
(1988) 05 GAU CK 0018
In the Gauhati High Court
Case No : Civil Rule No. 950 of 1983

Arun Bhattacharjee

APPELLANT

Vs

Executive Council of Gauhati University

RESPONDENT

Date of Decision : 11-05-1988

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1988) 2 GLJ 140 : (1989) 1 GLR 347

Hon'ble Judges : B.L.Hansaria, J and J.Sangma, J

Bench : Division Bench

Advocate : Y.K.Phukan, S.K.H.Choudhary, S.Dutta, S.Das Gupta,
G.Bhattacharjee, A.C.Sharma, Advocates appearing for Parties

Judgement

Hansaria, J.—By this application under Article 226 of the Constitution the petitioner has challenged two orders (1) order passed by the Executive Council of Gauhati University on 24.11.73 with regard to the use of unfair means in the Intermediate Law Examination held in March, 1973. By this order the concerned examination of the petitioner was cancelled and he was debarred from appearing at any University examination until 1975; and (2) resolution of the Governing Body of B. Barooah College, Guwahati, by which the petitioner was removed from service w.e.f. 30.3.75.

2. It is not in dispute that the aforesaid two orders had come to be challenged before this Court on two earlier occasions by the petitioner. The one relating to debarring from appearing at any University examination was the subject matter of Civil Rule No. 536/74 and the other was the subject matter of Civil Rule No. 519/75. Both these applications were dismissed by this Court. The office noting on the body of these two judgments shows that against both the judgments of this Court the petitioner had filed Special Leave Petitions and both were dismissed. As per the office noting the Special Leave Petition relating to Civil Rule 536/74 was the subject matter of Special Leave to Appeal (Civil) No. 3050/75 which was dismissed by the Hon'ble Supreme Court on 18.12.75. The other

Special Leave Petition Was the subject matter of Special Leave to Appeal (Civil) No. 3911/77 which was dismissed by the Hon"ble Supreme Court on 26.10.77.

3. This being the position, a preliminary objection has been raised by Shri A.C. Sarma relating to maintainability of the present writ petition on the ground that the same is barred by doctrine of constructive res judicata. The aid of constructive res judicata is being take a because the petitioner has urged some new grounds to assail the aforesaid two orders. The question is whether constructive res judicata has application in the proceeding of the present nature or not.

4. Shri Homchoudhury has contended that technical rule of res judicata has no application to the case at hand. To support him in this submission he has referred to Amalgamated Coalfields vs. Janapada Sabda AIR 1964 SC 1013 That case had dealt with a taxation matter relating to a different assessment year because of which it was held that constructive res judicata would not apply. This decision was explained and distinguished in Devilal Modi vs. Sales Tax Officer AIR 1965 SC 1150 which is also a decision by the Constitution Bench as was the decision in the Amalgamated Coalfield. The decision rendered in Amalgamated Coalfield was distinguished in this case in para 9 of the judgment by stating the general observations made in Amalgamated Coalfield's case must be read in the light of the important fact that the order which was challenged in the second writ petition was in relation to a different period and not for the same period as was covered by the earlier petition. In Devilal however the challenge in the subsequent petition under Article 226 was to the order passed in the same assessment year but on grounds which the Hon"ble Supreme Court had not permitted to be raised by the assessee in the appeal before them in the previous writ petition. After distinguishing the Amalgamated Coalfield's case the Supreme Court observed as below :

"(1) If constructive res judicata is not applied to such proceedings, a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed on considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by the Supreme Court would also be materially affected."

4. Shri Homchoudhury has contended that the aforesaid decision should be confined to cases under taxation law because of certain observations made in para 12 wherein the above quoted portion finds place. What has been observed in the opening part of para 12 is that the proceedings had illustrated how a citizen who has been ordered to pay a tax can postpone the payment of tax by prolonging legal proceeding interminably, We do not think that just because of this observation the enunciation noted above by us can really confined to tax proceeding alone.

5. A perusal of the present application shows that the petitioner has approached

this Court again keeping in view two "epoch making decisions." namely, *Lalubhai v. Union of India*, AIR 1981 SC 728 and *Kirit Kumar v. Union of India*, AIR 1981 SC 1621,. Both these decisions are however concerned with actions taken under preventive detention law. As to the action under preventive detention law, which given rise to habeas corpus application, the view of the Hon"ble Supreme Court has been right from *Ghulam Sarwar vs. Union of India*, AIR 1967 SC 1335 wherein the Hon"ble Supreme Court traced the history of habeas corpus writs, that so far as petitions for habeas corpus are concerned the doctrine of constructive res judicata would not apply. In this connection in *Ghulam Sarwar* (supra), Subba Rao, C J. observed as follows at page 1337 :

?If the doctrine of res judicata is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive res judicata cannot also govern the said application, for the rule of constructive res judicata is only a part of the general principles of the law of res judicata, and if that be applied, the scope of the liberty of an individual will be considerably narrowed..... If the doctrine of constructive res judicata be applied, this Court, though it is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. This would be whittling down the wide sweep of the constitutional protection.?

Reference was thereafter made in *Kirit Kumar* to *Lallubhai* (supra) case where also the Hon"ble Supreme Court held that even successive petitions for habeas corpus under Article 32 would be maintainable provided the points raised in the subsequent petition were not taken in the previous petition. In this connection Sarkaria, J. speaking for the Court observed as follows in *Lallubhai*:

?The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. The principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief.?

There is no manner of doubt that constructive res judicata even though the same principle is not applicable to habeas corpus petition does not apply to civil proceedings. It is apparent that the present proceeding before this Court is in the nature of a civil proceeding. Though in this connection Shri Homchoudhury has referred to *Himansu Kumar v. Jyoti Prokash*, AIR 1964 SC 1636 a perusal of that judgment shows that the question of constructive res judicata or for that matter res judicata was not raised in that case. This decision has therefore no relevance so far as this case is concerned.

6. Shri A. C. Sarma appearing for the University has brought to our notice a large number of decisions of the Apex Court in which principles of res judicata was applied. In this connection Shri Sarma has referred to *Daryao v. State of U. P.*, AIR 1961 SC 1457 wherein it has been pointed out that rule of res judicata is

not a mere technical rule but is based on public policy and can be invoked against a petition under Article 226 of the Constitution as well. It has been observed in this decision that it is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction and it is also in the public interest that the individuals should not be vexed twice over with the same kind of litigation. It was further pointed out that the binding character of judgments pronounced by Courts of competent jurisdiction is itself an essential part of the rule of law and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. Our attention was thereafter drawn to *The Workmen of Cochin Port Trust vs. The Board of Trustees*, AIR 1978 SC 1283 in which it was pointed out that it is well known that the doctrine of *res judicata* is codified in section 11 CPC but is not exhaustive. Apart from the codified law, the doctrine of *res judicata* has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive *res judicata* is engrafted in Explanation IV of section 11 and in many other situations principles not only of direct *res judicata* but of constructive *res judicata* are also applied. It was further observed that when any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore is taken as decided. We were then referred to *Gulabchand vs. State of Gujrat*, AIR 1965 SC 1153 *Union of India vs. Nanak Singh*, AIR 1968 SC 1370 and *State of Punjab vs. B. D Kaushal*, AIR 1971 SC 1676 in which decisions it was held that if the matter has been decided, by a High Court under Article 226 of the Constitution, principle of *res judicata* would apply in a subsequent suit relating to the same subject matter.

7. Shri S. Sarma, learned Government Advocate, appearing for the State of Assam also brought to our notice two recent decisions, namely, *Forward Construction Co. vs. Prabhat Mandal*, AIR 1986 SC 391 and *K.N. Oil Industries vs. State of M.P.*, AIR 1986 SC 1929 wherein top principle of *res judicata* and constructive *res judicata* were applied to proceedings under Article 32 and 226 of the Constitution. . ,

8. Shri Homchoudhury has, however, referred us to an order passed by the Hon"ble Supreme Court on 29.7.83 in Writ Petition No. 8377 in which the petitioner herein was also a writ petitioner before the Hon"ble Supreme Court. The order of the Hon"ble Supreme Court reads as below :

?Writ petition is allowed to be withdrawn. If the petitioner has any grievance either in regard to the order which was passed on November 24,1973, cancelling his examination held in March, 1973 and debarring him from appearing at any University examination until 1975 or if he has any grievance in regard to the nondeclaration of his result for the D. Litt. examination he may, if so advised approach the High Court of Gauhati?

9. We do not think if the observation made by the Hon"ble Supreme Court that if the petitioner had any grievance with regard to the order passed on November 24, 1973 cancelling his examination held in March, 1973 or any grievance in regard to the nondeclaration of his results of the D. Litt, he may, if so advised, approach the High Court of Gauhati, is a direction to this Court to entertain the present petition even the same were to be barred by principle of res judicata. From the order as passed by the Hon"ble Supreme Court it does not appear if the petitioner had brought to the specific notice of the Court that for the selfsame matter he had earlier approached this Court which had dismissed his petitions against which special leave petitions were also dismissed. "

10. In view of what has been stated above, we are constrained to hold that the petition is barred by constructive res judicata and the same cannot be entertained by us. The petition is therefore dismissed.