

(1995) 02 CAL CK 0007
In the Calcutta High Court

Birendra Nath Sankhari

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 21-02-1995

Acts Referred:

Bengal Municipal Act, 1932 — Section 322, 326, 329, 34, 3A
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 11, 141
Constitution of India, 1950 — Article 114, 12, 226, 32
West Bengal Co-operative Societies Act, 1983 — Section 5(2), 7(3), 95, 97

Citation : (1995) 2 ILR (Cal) 53

Hon'ble Judges : Stayabrata Sinha, J

Bench : Single Bench

Advocate : Biswaranjan Ghosal, Sukumar Ghosh and Hirendra Mohan Sengupta, for the Appellant; P.K. Das, Arijit Banerjee, Partha Sarathi Biswas for Private Respondents, Amal Baran Chatterjee, Anadi Banerjee for Respondent Housing Board, Milan Bhattacharjee and Keshab Bhattacharjee for State, for the Respondent

Final Decision : Dismissed

Judgement

Satyabrata Sinha, J.—The Petitioners in this writ application have, inter alia, prayed for the following relief?s:

(a) Issue a writ or in the nature of a writ of Mandamus directing the Respondents and each one of them to withdraw and/or to cancel and/or to set aside the Order of Sanction passed by the Bidhan Nagore Notified Area Authority and also the Circular dated 4th January, 1994, being Annexure "F" to this writ application issued by the Chairman, Purbachal Nabarun Housing Co-operative Society Ltd. on the basis of the Order of Sanction for the extension of the flats of DCH-I, Cluster-1, Purbachal," Salt Lake City, Calcutta-91 (Sanction Order) of which has not been served upon the writ Petitioner;

(b) Issue a Writ of Mandamus directing the Respondents and each one of them and/or their Agents to act in accordance with law and further direct them to

demolish any structure and/or extension of any flats or apartments at DCH-1, Cluster I, Purbachal. Salt Lake City, Calcutta-91, if any made and/or constructed by any of the apartment owners on view of such illegal Order of Sanction passed by the Bidhan Nagar Notified Area Authority with immediate effect.

(c) Grant of an order of Injunction restraining the Respondents and each one of them and/or their Officers and/or their Subordinates from giving any effect or any further effect to the Order of Sanction passed by the Bidhan Nagore Notified Area Authority, for the extension of DCH-I Flats Cluster-I, Purbachal, Salt Lake City, Calcutta-91, and also the Circular dated 4th January, 1994; issued by the Chairman, Purbachal Nabarun Co-operative Housing Society Ltd., being Annexure "F" to this writ application.

2. The fact of the matter is as follows: In December 1980 an advertisement was issued by the West Bengal Housing Board inviting applications from public for registration of flat/houses at Salt Lake, Sector-III, GA Block (now Purbachal Housing Estate). Pursuant thereto the Petitioners applied for registration of flats. Brochure of the Housing Scheme was published by the West Bengal Housing Board containing the details of the terms and conditions in May 1982. The Petitioners applied for allotment of apartments. The Petitioners were allotted apartments upon drawing a lottery by the West Bengal Housing Board for 999 years. The Petitioner No. 1 allegedly obtained loan from the Central Government in September 1984. According to the Petitioners, West Bengal Housing Board had laid down two different types of payment/considerations, namely, (a) Full payment at a time and (b) payment by instalment. On or about December 14, 1983, a deed of lease was executed by West Bengal Housing Board. There appears to be some controversy whether the said deeds were executed in favour of the allottees or in favour of the Purbachal Nabarun Co-operative Housing Society Ltd. It is not disputed that the Petitioners are the members of the said Co-operative Society. It also appears that the Petitioners and the Co-operative Society requested West Bengal Housing Board that said apartment be conveyed in favour of the Society. The possession of the said flat was given in favour of the Petitioners upon execution of a Deed. It is also not in dispute that declarations have been made by the Petitioners in terms of the provision of West Bengal Apartment Ownership Act, 1972. It is stated that the apartment has been mortgaged with the West Bengal Housing Board on December 14, 1983, for the balance premium with interest thereon. On January 27, 1989, a deed of re-conveyance (Release) by the Purbachal Nabarun Co-operative Housing Society Ltd. was executed in favour of the Petitioners. It appears that several meetings were held by the members of the concerned Co-operative Society with regard to the question as to whether the allottee should make extension or not. Majority of the members, however, it is admitted, agreed to such extension pursuant to the resolution adopted in the meeting of the said Co-operative Society, and the Respondent Co-operative Society applied for and sanction was granted for extension of the apartment to the extent of 270 sq.ft. by the Bidhan Nagar Notified Area Authority. The said sanction was granted on November 22, 1993.

The Respondent Co-operative Housing Society issued a Circular letter dated January 4, 1994, to each member stating that the Bidhan Nagar Notified Area Authority had accorded sanction for the proposed extension of the flats in Cluster-I. The Petitioner filed a writ application in this Court on January 20, 1994, praying, inter alia, for the following relief?s:

(a) Issue a writ or in the nature of a writ of mandamus directing the Respondents and each one of them to withdraw and/or cancel and/or to rescind the Circular dated 4th January, 1994, issued by the Chairman, Purbachal Nabarun Co-operative Housing Society Ltd., being Annexure "F" to this application, being bad and illegal since ultra vires.

It is stated that in the said writ application, Ruma Pal J. passed some interim order which being for a limited period expired. According to the Petitioner, as despite several attempts the said matter could not be listed, a second writ application was filled praying for identical relief?s. On May 20, 1994, the second writ application was dismissed by Tarun Chatterjee J. On July 11, 1994;

Tarun Chatterjee J. dismissed the first writ application holding as follows:

Therefore, from the same it is evident that the Chairman of the Society gives permission to the flat owners to extend their flats. In my view, even if a dispute arises as to whether such permission can be granted by the Chairman of the Society to its members, such dispute being purely a private dispute is not amenable to the writ jurisdiction of this Court. Therefore, without deciding the said dispute. I dismiss this writ application on the ground that such dispute is not amenable to the writ jurisdiction of this Court.

3. The statement made in that writ application to the effect that the writ application has maintainable as an order of sanction was passed by the Bidhan Nagore Notified Area Authority directing the Respondent Cooperative Housing Society to extend respective flats in question. However, the learned Judge found that no challenge has been thrown against the said order of sanction. The learned Judge therefore observed as follows:

That being the position, in this writ application, I am not called upon such question to be decided by the appropriate forum. I make it clear that I have not gone into the merits of the disputes raised against the said circular, nor I have gone into the merits as to whether the Bibhan Nagore Notified Area Authority has any authority to grant sanction to the cooperative Society or its members to extend their flats in question. All questions are left open to be decided by any other appropriate forum. However, it appears that leave was sought for, for filing an amendment application to the said writ application which was also dismissed stating that the same cannot be permitted now because the subject-matter of the dispute in the writ petition and the nature of amendment sought for at this stage are totally different. The learned Judge observed as follows:

However, the writ Petitioner may take appropriate steps against the order of

sanction issued by the Bidhan Nagore Notified Area Authority permitting the Co-operative Society and its members to extend their respective flats in question, in any appropriate forum.

4. Thereafter the instant writ application has been filed praying for relief? as indicated hereinbefore. As noticed the relief? sought for in the two earlier writ applications were identical. In this writ application only an additional prayer has been made for issuance of a Writ of Mandamus directing the Respondents to set aside the order of sanction passed by Bidhan Nagore Notified Area Authority. The said Circular letter dated January 4, 1994, is contained in Annex. "F" to the writ petition which was contained in Annex. "F" to the earlier writ applications also.

5. Mr. Sukumar Ghosh, learned Counsel appearing on behalf of the Petitioner, has raised a number of contentions in this application. The learned Counsel has submitted keeping that in view the fact that the provision of West Bengal Apartment Ownership Act, 1972, is attracted in the instant writ application, the Respondent Co-operative Housing Society and the Bidhan Nagore Notified Area Authority have no jurisdictions to take any steps for extension of the flats in question. According to the learned Counsel, in the event it be held that the Petitioner being a member of the Co-operative Society is bound in terms of the provision of Sub-rule (20) of Rule 65 of the Bye-laws it not being in consonance with the provision of the said Act must be declared to be ultra vires. It is submitted that by reason of last sanction the right of the Petitioner to enjoy the common area and common facilities have been diminished which is not permissible in law. The majority of the members of the said Society, the learned Counsel submits, cannot take away the legal right of the Petitioner. In this connection my attention has been drawn to Sub-sections (3), to (5) of Section 97 of the West Bengal Co-operative Housing Society Act and Clause (20) of Rule 65 of the Bye-laws. The learned Counsel for the Petitioner further submits that this writ application is maintainable keeping in view the fact that the order sanctioning a plan by the Bidhan Nagore Notified Area Authority is in question. It is submitted that keeping in view the fact all the questions which have been raised in this writ application in fact were also raised in the earlier writ application, the principles of res judicata and/or constructive res judicata are not attracted.

6. Mr. P. K. Das, learned Counsel appearing on behalf of the Respondents Nos. 11, 13, 14 and 15 submits that various Co-operative Housing Societies applied for and were granted sanction by the Bidhan Nagore Notified Area Committee. It is stated that if any order is passed in favour of the Petitioners, the same would affect 10,000 flats owners. According to Mr. Das, there are total number of 168 flat owners on Cluster-I of Purbachal, but only three flat owners have raised grievance before this Court. It is submitted that even in terms of the provision of Bye-laws, the apartment owners are entitled to obtain an extension of 470 sq. ft. But in fact permission has been granted for extension only to the extent of 270 sq.ft. per flat. In this connection my attention has been drawn to the statement

made in sub-para. (D) of para. 4 of the affidavit-in-opposition which reads thus:

In fact the concerned flat owners were entitled to ask for permission to build additional covered area of approximately 470 sq.ft. as per calculation shown hereinbelow:

- (a) Land area allotted to Cluster-I, Purbachal ?11938.226 sqm.
- (b) Plinth area occupied by DCH?I Flats - 1816.21 sq.m.
- (c) Plinth area occupied by DCH? 2 Flats - 1323.92 sq.m.
- (d) Total Plinth area occupied by DCH?I and DCH?2 Flat - 3140.13 sq.m.
- (e) Open area (a) - (b) - 8798.096 sq.m,
- (f) Max. covered area allowed (40 % of (a) - 4775.2904 sqm.
- (g) Area available for extension (f) - (d) - 1635.1604 sq.m.
- (h) Probata area available for DCH?I Flats ext- (b)/ (d) x (g)/22 per DCH?I fiat - 42.9889 sq.m.

However, the flat owners through "he said cooperative society applied for sanction of an additional floor space of about 270 sq.ft., and such sanction has duly been granted by the Bidhan Nagore Notified Area Authority by its letter dated 22.11.1993.

7. It is stated that by reason of such sanction for extension as well as by reason of the Circular letter dated January 4, 1994, the percentage share in the undivided common area of each flat owner shall remain the same even after extension. It is further stated that there will be no diminution of the common area as the total land of Cluster-I constitutes the common area. The learned Counsel for the Respondents has submitted that in view of the fact that the Petitioners are members of the Co-operative Housing Society and as the resolution was adopted by the members of the majority, this Court may not exercise its writ jurisdiction in this matter. It has been further stated that in terms of the impugned Circular letter dated January 4, 1994, the rights of the persons who intended to avail the benefits of such extension?s also protected in view of the fact that it has been provided therein that:

Members not participating immediately along with others, may, however, indicate their willingness to join later on the express undertaking that they would-pay their due share of expenditure to the starting members along with 1" interest per month calculated from the 7th month after the start of the work by other members of the Construction Unit concerned.

8. It is stated that thus the Petitioners may preserve their rights to avail of the benefit of the said scheme in future.

9. Mr. Das, learned Counsel, has also drawn my attention to the said Circular

which reads thus:

(i) Shifting and relaying of sewerage system, storm water drainage system, water supply line etc. as much as it concerns the Construction Unit adjacent and closest to the elements in question. The total process must be undertaken with least possible inconvenience to the neighbors.

(ii). Foundation upto plinth level including ground" floor slabs roof slabs, including water proofing (as required), parapet, down pipes etc.

(iii) Columns, beams:

The members joining the project later will pay in addition to his/her share as described above, for all structural works connected with executed at his/her instance. (Sanctioned drawings must be followed).

10. According to the Mr. Das, learned Counsel, this writ application involves a serious disputed question of fact as in the matter of granting sanction for extension of flats and the due implementation thereof various technical details relating to measurements, strength of foundation, number of columns, beams etc. are required to be considered and involves detailed consideration and examination of evidence and on that ground this Court may not exercise of its discretionary writ jurisdiction under Article 226 of the Constitution of India.

11. It has been stated that after grant of lease for a period of 999 years, Co-operative Society as lessee on relation of individual flats, the Board had virtually gone out of picture and the questions have to be determined by the Respondent Notified Area Committee. The learned Counsel submits that the Petitioners have adopted an attitude of spanner in the wheel which is wholly unreasonable.- The learned Counsel further submitted that dispute in question is a private dispute. It was further submitted that this application is barred under the principles of res judicata and/or constructive res judicata. Reliance in this connection has been placed on State of U.P. Vs. Nawab Hussain, ; G.K. Dudani and Others Vs. S.D. Sharma and Others, ; Direct Recruit Class II Engineering Officers" Association v. State of Maharastra AIR 1990 S.C. and D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, It was further submitted that a writ application is not maintainable for nullifying a sanction plan. Reliance, in this connection, has been placed on the case of D.L.F. Housing Construction¹. He further submitted that the right to grant sanction in terms of Section 322, read with Section 326 of the Bengal Municipal Act, 1932, is conferred upon the Respondent Notified Area Committee, and an application for addition or alteration may be refused only on any of the grounds contained in Clause (a) to (j) of Section 329 and as none of the said grounds applied in the instant case, this writ application is not maintainable. It was further submitted that in view of Section 3A of the said Act, the Cooperative Society is lessee, and thus no violation of the provisions of the said Act has occurred in the instant case.

12. This writ application, thus, involves many interesting and complicated

questions of facts and law.

13. It is not in dispute that the West Bengal Apartment Ownership Act, 1972, is attracted in the instant case. The said Act was enacted to provide for the ownership of an individual apartment and to make such apartment heritable and transferable property. . Section 3A of the said Act reads thus:

A lessee of such property or a part of such apartment where the lease is for a period of 30 years or more is also the owner within the meaning of the provisions of the said Act.

14. There, thus, exists a disputed question as to whether the owner of the apartments would be the Cooperative Society or the individual allottees. Before proceeding further it may be noticed that it is not disputed that construction works for extension of the apartments in question have been going on. This writ application was moved on August 1, 1994. A submission (4) Supra was made that the plan sanctioned by Bidhan Nagar. Notified Area Committee was not available Whereupon it was directed within one week from date the Respondent Bidhan Nagar Notified Area Authority shall hand over a copy of the order in question to the Petitioners, whereafter it would be open to the Petitioners to affirm supplementary affidavit questioning the validity of the same. The Petitioners had not filed any supplementary affidavit questioning the validity of the said plan. A copy of the said plan has not been brought on records.

15. From the facts, as noticed hereinbefore, it is admitted that the Petitioners filed two writ applications on the selfsame issue. It also stands admitted that both the writ applications have been dismissed.

16. It is pertinent to note that Mr. Ghosh, appearing on behalf of the Petitioners, himself in his written arguments submitted:

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

So, if a party might and ought to have raised matters-in the previous suit, but did not, he shall be debarred from raising those matters again in a subsequent suit in view of the principle of constructive res judicata of other conditions of the applicability of the section are present: Manilal Harjivandas Vs. Gangaben Ganeshbhai, . The doctrine of constructive res judicata is based on the principle that where the parties have had an opportunity of controvert a matter, but did not avail himself of that opportunity, it should be deemed that the matter had actually been controverted and decided: State of U.P. Vs. Nawab Hussain, .

And, therefore, (I) since the Court has not decided any of the issues directly or substantially in question of law or the fact, then the question of opportunity of controvert a matter or attacking in any form does not also arise.

(II) And, moreover, there has not been any matter either brought in or agitated

in the present writ application which might and ought to have been made " the grounds of defence or attack in the earlier writ application does not arise, which could have been to have been a matter directly or substantially in issues in such previous writ application, as-

(a) Circular dated January 4, 1994 issued by the Chairman, Purbachal Nabarun Co-operative Housing Society Ltd. has been under challenged.

(b) Sub-rule (20) of Rule 65 of the Bye-laws of the Society was under challenged and prayed for a declaration as ultra vires.

(c) Such other or further order or orders and/or direction or directions as could be deemed fit and proper also was prayed for.

(d) Apart from the prayers as above.

(i) The Chairman, Bidhan Nagar Notified Area Authority was made as a part to the Respondents.

(ii) Actions of Respondents for the extension of the apartments were also under challenged, since bad, mala fide and illegal.

(iii) The actions of the Respondents were not meant,, leaving the Chairman, B.N.A.A.

(iv) The sanction of the plan of extension itself was challenged, since illegal and abrogated and/or abridged the fundamental rights of the writ Petitioners and obviously that was the action of the Chairman of the B.N.A.A.

(v) The Chairman, B.N.A.A., was requested not to permit/approve any extension to any flat in Cluster-1 of Purbachal Housing Estate, Bidhannagar, by representations dated March 19 and April 21, 1993, by the writ Petitioners. The said representations were ones amongst other Annexures in the previous writ applications too and wherein it has been stated in the previous writ application in para. No. 7, which runs as follows:

That, your Petitioners with many others made their objections for extension of the apartments during the General Meetings, which were takeri up in the General Meetings and that apart the writ Petitioners and other members of the Cluster-1 of the Apartments Owners" Association made the written com- plaints before the Chairman of the Bidhan Nagar Notified Aera Authority with a copy to other appropriate authorities, who have been impleaded as a party to the Respondents hereto this writ application..." and it is also submitted that in the previous writ applications it was also stated that", the Purbachal Nabarun Housing Society Limited has got accorded and obtained the sanctioned order for the proposed extension of the DCHI Flats in Cluster-1, Purbachal, Salt Lake City, Calcutta-700091, from the Bidhan Nagar Notified Area Authority...." and further "...whatsoever it is such sanction has been obtained illegally with a very ulterior motive and vested interest, which cannot be allowed to perform at the interference by this Hon"ble High Court at Calcutta.

And, therefore, it is crystal clear that all these grounds and/or points have been taken in the earlier writ applications and no new material law points or facts have been incorporated in the instant writ application, which could be described as "any matter", which might or ought to have been made ground of defence or attack in such previous applications, which shall be deemed to have been a matter directly or substantially in issue in such writ applications; the points of which were not taken up in the previous writ application.

17. It is also not in dispute that all the parties in the present writ application were substantially represented in the earlier writ petition also inasmuch as the Chairman of the Respondent Notified Area Committee as also Calcutta Metropolitan Development Authority had been impleaded as parties therein.

18. It would not be correct to contend that Tarun Chatterjee J. in his order dated July 11, 1994. which is contained in Annex. A to the affidavit-in-opposition did not decide any question whatsoever. A bare perusal of the said order would in no unmistakable term point out that it was held therein that the dispute between the Petitioners and Respondents Cooperative Society was a private dispute and, thus, the same was not amenable to the writ jurisdiction of the Court. It is interesting to note that in the earlier writ application the Petitioner also questioned the vires of Sub- rule (2) of Rule 65 of the Bye-laws of Purbachal Nabarun Cooperative Societies Ltd.. The true copies of the earlier two writ applications have been placed before me. They contain same facts and same questions of law. In fact, as noticed hereinbefore, Mr. Ghosh, in his written arguments, while answering the question of constructive res judicata has categorically stated that all the questions which have been raised in this application had also been raised in the earlier writ applications. It is also interesting to note that Mr. Ghosh himself submitted that the Court in the earlier writ petition had jurisdiction to grant the prayers sought for in this writ application, although no specific prayer made for quashing the order of sanction passed by the Respondent Notified Area Committee dated November 2, 1993, inter alia, on the ground that the High Court had jurisdiction to mould prayers in a writ application and to grant relief to the aggrieved party to which he is entitled in law, although the said relief has not been specifically asked for. The learned Counsel himself in that regard has relied upon a decision of this Court in, Ali Ahmed Vs. State of West Bengal and Others,

19. It is not and cannot be disputed that the writ petition is not maintainable as against a private Cooperative Society as such the Society is not a State within the meaning of Article 12 of the Constitution of India unless it is shown that the said Society while discharging its statutory functions have either acted in violation of provisions of the Statute or failed and/or neglected to do any act which it was bound to do under the law. Reference in this connection may be made to Arjed Ali v. State of West Bengal 1991 C.L.T. 211. Such Co-operative Society is not a State within the Teaming of Article 12 of the Constitution of India has also been held by a Division Bench of the Patna High Court in the case of

Harendra Narayan Bauker v. State of Bihar 1985 B.L.J.R. 1078 wherein it was held that Biscomaun was not a State within the meaning of Article 12 of the Constitution. Such a view has also been taken by another Division Bench of Patna High Court in Bihar State Cooperative Marketing Corporation v. State of Bihar 1993 (1) B.L.J.R. 29. The said decision has been referred to by me in Northern India Seeds Corporation v. State of Bihar 1994 (1) B.L.J.R. 559. Reference in this connection may also be made to Sarjug Singh v. State of Bihar 1994 (1) B.L.J.R. 201 and Smt. Lilawati Kumari v. National Cooperative Union of India 1994 (1) B.L.J.R. 753. Recently In J.S. Janeja v. National Co-operative Consumers Federations of India Ltd. AIR 1995 Del. 44, a similar view has been taken by the Delhi High Court.

20. The Petitioner's earlier writ application was dismissed by Tarun Chatterjee J. who held that the writ petition was not maintainable as the disputes raised therein were private disputes. The said decision, Mr. Ghosh now contends, was wrong, but thereby the case cannot be brought outside the purview of the principles of res judicata and/or constructive res judicata.

21. In view of the judgment passed by Tarun Chatterjee J. there cannot be any doubt that the prayer of the Petitioner questioning the validity or otherwise of the Circular letter issued by the Respondent Cooperative Society dated January 4, 1994, as contained in Annex. "F" to the writ application, would be barred? by principles of res judicata. It is true that in the aforementioned judgment the order of sanction passed by the Respondent Notified Area Committee although was specifically raised, but the said question was kept open to be agitated before an appropriate forum. In view of the said judgment, there cannot be any doubt that the Petitioner could question the aforementioned Circular letter dated January 4, 1994, as also the order of sanction passed by the Bidhan Nagar Notified Area Committee dated November 2, 1993.

22. By reason of the said order, however, no relief has been granted to the Petitioners to file a separate writ application. It was merely stated that the Petitioners may raise the said question before the appropriate forum, undoubtedly, comes within the purview of Section 95 of West Bengal Cooperative Societies Act. In absence of express liberty having been granted to the Petitioner to file a writ application, and moreover, in view of the fact that this Court rightly or wrongly having held that such a point cannot be allowed to be adjudicated upon in writ jurisdiction, not only the principles of res judicata would be applicable but public policy also demands that the Petitioner should not be permitted to raise such a question once over again. It is now well-settled that a judgment of a Court cannot be read as a Statute, In the case of State Bank of India Staff Association and Ors. v. Election Commission of India and Ors. 1994 (42) (1) B.L.J.R. 128 I have held: It is also well-known that a judgment of the Supreme Court has to be read in a reasonable manner and like any other documents in its entirety.

23. In Central Coalfields Ltd. v. State of Bihar 1993 P.L.J.R. 617 a Division Bench

of this Court (of which I was a member) observed as follows:

It is also well-known that judgment of a Court is not to be read as a statute.

In *General Electric Co. Vs. Renusagar Power Co.*, it was held:

As often enough pointed by us, words and expressions used in a judgment are not to be construed in the same manner as statutes or as word and expressions defined in statutes. We do not have any doubt that when the words, "adjudication of the merits of the controversy in the suit" were used by this Court in *State of U.P. v. Janki Saran Kailash Chandra* the words were not used to take in every adjudication which brought to an end the proceeding before the Court in whatever manner but were meant to over only such adjudication as touched upon the real dispute between the parties which gave rise to the action. Objections to adjudication of the disputes between the parties, on whatever ground, are in truth not aids to the progress of the suit but hurdles to such progress. Adjudication of such objections cannot be termed as adjudication of the merits of the controversy in the suit. As we said earlier a broad view has to be taken of the principles involved and narrow had technical interpretation which tends to defeat the object of the legislation must be avoided.

24. The principles of *res judicata* and/or constructive *res judicata* have application in a writ petition is no longer in doubt or dispute. Recently a Division Bench of this Court in *Krishna Mohan Mukherjee v. The Chief General Manager, State Bank of India F.M.A.T. No. 1204 of 1990* held:

Although, in view of the provisions contained in Section 141 of the Code of Civil Procedure, the principles of *res judicata* as contained in Section 11 thereof may not *stricto sensu* apply in the writ proceedings, the general principles of *res judicata*/ constructive *res judicata*, are applicable. Reference in this connection may be made to *Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat)*, and *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*, as also *Shashi Bhushan Kumar Vs. The State of Bihar and Others*,

25. It also appears in *State of Uttar Pradesh v. Nawab Hussain*, the Supreme Court has clearly held that if a prayer was not made at the time when cause of action arose, the subsequent writ application praying for an additional relief will be barred under constructive *res judicata*. In *Direct Recruit Class-II Engineering Officers" Association v. State of Maharashtra {Supra}*, the Supreme Court upon consideration of its earlier decision in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, held:

It is well-established that the principles of *res judicata* are applicable to writ petitions. The relief prayed for on behalf of the Petitioner in the present case is same as he would have, in the event of his success, obtained in the earlier petition before the High Court. The Petitioner in reply contended since the SLP before this Court was dismissed in limine without giving any reason, the order

cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the SLP which is being relied upon, the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation, a Constitution Bench of this Court in *Daryao and Others Vs. The State of U.P. and Others*, held that where High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter in the merits, a subsequent petition in the Supreme Court under Article 32 of the same facts and for the same relief filed by the same parties will be barred by the general principle or res judicata. The binding character of judgments of Court of competent jurisdiction is in essence a part of the rule emphasised by the Constitution of justice, so much emphasised by the Constitution, is founded and a judgment of High Court under Article 226 passed after hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at page 595 S.C.R. 1467 of AIR of the reported judgment, thus:

We are satisfied that a change in the form of attack against the impugned statute would make No. difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the Petitioner in that behalf are subsequently the same.

26. The decision in *Forward Construction Co. v. Prabhat Mandal (Supra)*, further clarified the position by holding that an adjudication was conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Expl. IV of Section 11 of the CPC was applied to writ case. We accordingly, hold that the writ case is fit to be dismissed on the ground of res judicata.

27. Similar view has been taken by the Supreme Court in *G. K. Dudani v. S. D. Sharma (Supra)*.

28. *Spenser-Bower and Turner in The Doctrine of Res judicata* stated the law in Article 114 thereof thus ?

A Tribunal may exceed its jurisdiction either by embarking upon an enquiry outside its province, or, while confining its enquiry within the proper limits, by making an order in excess of its powers. In either case the result will be to nullify the decision as a res judicata in the former case, by the effect of the events, we have mentioned upon the declaratory part of the decision, and, in the second, by their effect upon its jussive or prohibitory provisions.

29. The Division Bench also noticed a decision of the Division Bench of the Patna High Court in *Dr. S.M. Naqui Imam, Dental College and Hospital Vs. Dental Council of India and Others* wherein the law was stated in the following terms:

In the case of the Petitioner itself (reported in *Shashi Kumar Sinha and Others Vs. State of Bihar and Others*, a Division Bench of this Court, *inter alia*, observed that appropriate decision in the matter of grant of recognition would be taken in the light of the amended provision as early as possible preferably within six months from the date of receipt of a copy of the order.

In this view of the matter, in our opinion, the submission of Mr. Prasad to the effect that this application is barred by the principle of *res judicata* must be held to have substance.

The House of Lords in the *Indian Endurance Republic of India and Ors. v. India Steamship Co. Ltd.*, reported in 1993(1) All E.R.1998, observed as follows:

Central to the consideration of these issues is the impact of Section 34 of 1982 Act, upon which Sheen J. and the Court of Appeal based their conclusion that the Appellants' claim should be struck out. Indeed Sheen J. expressed the view that if Section 34 did not apply, and the case was to be decided upon the basis of common law principle of issue estoppel, further investigation of the facts would be necessary. I propose therefore to turn first to consider the legislative purpose underlying Section 34 and the effect of the section in the light of that legislative purpose; and in order to carry out that task, it will, in my opinion, be necessary to set the section against the background of the common law principle of *res judicata*.

The House of Lords upon taking into consideration its earlier decision in *Thoday v. Tho'day* (1964) All E.R. 341 at page 352, and *Yat Tung Investment Company Ltd. v. Dao Heng Bank Ltd.* (1975) AC 581 at page 590, and other decision, *inter alia*, held that the cause of action also merges, with judgment. It also emphasised the principle of constructive *res judicata* which in India is laid down in Explanation 4 appended to Section 11 of the Code of Civil Procedure.

30. It also took in to consideration a decision of the Supreme Court in *P.K. Vijayan Vs. Kamalakshi Amma and Others*, wherein the Apex Court held:

We have already seen that the Land Reforms Act is a beneficial legislation and has conferred certain benefits on the tenants. The tenant is expected to raise all the pleas available under the statute at the relevant time. It is a sheer abuse of the process of Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just that the parties would raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive *res judicata* to prevent raising of the same at a later point of time. Thereby it must be deemed that they are waived.

31. Reference in this connection may be made to para. 197 of *Spencer Power*.

and Turner on Res judicata, wherein it has been stated:

Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence or otherwise some questions or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future proceedings, and which, therefore, it was his duty (in a sense) to have then raised, the adverse, general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question or issue is simply passed over through inadvertence, or is made the subject of express or implied assumption or admission.

32. The submission of Mr. Ghosh, therefore, if accepted would lead to only one conclusion that the judgment of this Court in the earlier writ application was wrong and although the Petitioners were entitled to the relief?s, sought for hereinbefore the same had not been granted. The argument of Mr. Ghosh in absence therefore appears to be that the decision of Chatterjee J. was wrong. I am not called upon to answer to the said question inasmuch as in *Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others*, and *State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others*, the Apex Court has held that even an erroneous order would also operate as res judicata by stating?

a wrong decision by a Court having jurisdiction binding between the parties is a right one and may be superseded only by appeals to higher Tribunals or other procedure like review which the law provides. The Petitioner has not preferred any appeal against the said order nor filed any application for review.

33. It may be true that in the afore-mentioned judgment, the questions raised therein had not been decided merits, but there cannot be any doubt that this Court in the said application categorically held that no writ petition is maintainable. Mr. Ghosh submitted on the basis of judgment of the Supreme Court in *Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others*, that the pleadings of the previous suit should be considered for the purpose of finding out as to what had been decided in the former judgment which is to operate as res judicata, but in this case the copies of previous writ applications have been filed and indeed Mr. Ghosh himself has conceded that all the points raised in this application had been raised in the previous application. Moreover, a "cause of action" means a bundle of facts which are necessary for the purpose of determination of such question as the factum of the ground of action by the Respondent Notified Area Committee was known to the Petitioner which, in fact, constituted a cause of action for filing the earlier writ application, the disposal thereof would tantamount to merger of such causes of action. Thus, on the ground of public policy also, this writ application is not maintainable, particularly in view of the judgment of the Supreme Court in *Ft. K. Vijayan's case (Supra)*.

34. However, keeping in view the observation made in the earlier judgment there cannot be any doubt that the Petitioner was entitled to question the order of sanction dated November 2, 1993, by filing a writ application. But the question which arises for consideration is as to whether it will be proper for this Court to exercise its jurisdiction in favour of the Petitioner. The answer should be rendered in negative for the following reasons:

(1) The Petitioner has not impleaded the members of the Cooperative Society who would be adversely affected if the order of sanction is quashed.

(2) The Petitioner on his own showing filed two applications previously, but both of them have been dismissed.

(3) The Petitioner on his own showing! in sum and substance raised the self-same questions in the earlier writ application, but despite their knowledge that the Respondent Notified Area Committee had passed an order sanctioning the building plan submitted by the Respondent Cooperative Society, did not question the legality and/or validity thereof. However, it may be noticed that in the body of the writ application such question had been raised which had been stated by Mr. Ghosh himself.

(4) Even in this writ application, the Petitioner has not filed the sanction plan despite an opportunity having been given nor filed any supplementary affidavit questioning the validity thereof.

(5) Many persons have already raised their construction pursuant to such sanction as also the Memorandum dated January 4, 1995, issued by the Respondent Cooperative Society. The Petitioner had not sought for any relief from this Court under Order 1 Rule 8 of the CPC in the light of Rule 12 of the Writ Rules framed by this Court.

(6) A serious and disputed question arises for consideration as to whether the owner of the apartment would be the Co-operative Society or the Petitioner.

(7) A serious disputed question of fact also arises for consideration as to whether keeping in view the area available for consideration of the people, the Respondent Notified Area Committee was within its jurisdiction to grant such sanction or not, particularly in view of the assertions of the Respondents to the effect that they were entitled to ask for an extension of their apartment to the extent of 470 sq.ft. but extension had been sought for only to the extent of 270 sq.ft.

(8) A disputed question has also been raised as to whether by raising of such construction the Petitioner's right as an owner of the apartment, if any, particularly in terms of Sub-section (2) and (3) of Sections 5 and 7 thereof would be affected or not. Reliance in this connection has been placed on the case D.L.F. Housing Construction Pvt. Ltd. v. Delhi Municipal Corporation (Supra). As indicated hereinbefore, the members of the Respondent Cooperative Society have already raised the structures substantially after the limited order of stay

granted by a learned Single Judge of this Court, in the first writ application of the Petitioner expired. Recently, the Supreme Court in Calcutta Municipal Corporation and Another Vs. Anil Ratan Banerjee and Others, after holding that the Respondents therein could not have raised any structure after the expiry of the period of sanction and in view of the New Building Rules, issued under the Calcutta Municipal Act, 1980, allowed the Petitioners thereof to raise the building upto the height of 9 meters from the ground floor.

(9) It is also well-settled that this Court does exercise its jurisdiction only because it is lawful to do so. This Court in a given case may refuse to exercise its jurisdiction keeping in view the interest of the Petitioner vis-a-vis the Respondents and the other parties who would be affected by such orders, if any.

(10) After the judgment and order was passed in the earlier writ application of the Petitioner, the Petitioner could have raised a dispute before the Registrar, of Cooperative Societies in terms of Section 95 of the Cooperative Societies Act. Had such an application been filed, the Petitioner also could have prayed therein that the Respondent Society be restrained from giving effect to or in furtherance of the impugned Memorandum dated February 4, 1994, The Petitioners also could have approached the Respondent Notified Area Committee to review and/or recall its decision. They however did not choose to do so.

35. For the reasons aforementioned, in my opinion, it is not a fit case in which this Court should exercise its extra-ordinary constitutional writ jurisdiction in favour of the Petitioner. The Petitioner is given liberty to avail of such other remedies if available in law in terms of the judgment of Tarun Chatterjee J. This application is, therefore, dismissed. However, keeping in view the facts and circumstances of this case there will be no order as to costs.