

(2004) 10 KAR CK 0009
In the Karnataka High Court
Case No : Writ Petition No. 40556 of 2004

D. Sangya Naik

APPELLANT

Vs

Department of Telecom and Others

RESPONDENT

Date of Decision : 05-10-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9
Constitution of India, 1950 — Article 226, 32

Citation : (2005) ILR (Kar) 1874 : (2005) 1 KCCR 641

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : P.A. Kulkarni, for the Appellant;

Final Decision : Dismissed

Judgement

N. Kumar, J.—The petitioner has challenged in this writ petition the order at Annexure-F, dated 18-9-2001, by which he was reverted to the post of T.O.A(G).

2. The petitioner had challenged the very same order before this Court by filing a writ petition in WP. No. 12302/2002, where this Court after entertaining the Writ petition granted an interim order of stay. The said writ petition came to be dismissal for non-prosecution on 22.7.2003. Therefore, contending that the said writ petition and the issues involved therein are not decided by the Court and the said writ petition came to be dismissed only for non-prosecution, the present writ petition is filed challenging the very same order. When the Court called upon the learned Counsel for the petitioner to show how this writ petition is maintainable, the learned Counsel has relied on three judgments of the Supreme Court. The first judgment is of the Constitutional Bench of the Supreme Court in the case of Daryao and Others Vs. The State of U.P. and Others, second judgment in the case of Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, and third judgment in the case of HOSHNNAK SINGH - v. - UNION OF INDIA and ORS. and contends that in view of the law declared by the Supreme Court in the three decisions.

3. In the aforesaid Constitutional Bench decision, the Supreme Court was considering the question what circumstances an order passed in an earlier proceeding would operate as *res judicata* and the decision of the High Court under Article 226 of the Constitution if can be pleaded as a bar to the petitioner under Article 32 of the Constitution. It is in that context, it has been held as under:-

"If a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar except in cases which are already indicated. If the petition is dismissed in limine without passing a speaking order than such dismissal cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all, but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata* against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court.

We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Articles 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held

that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order than such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in mat behalf may strongly suggest that the Court took the view that there was no substance in the petition at all, but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us."

(underlying by me)

4. Relying on the aforesaid passage, the learned Counsel for the petitioner contends that when the order is not on merits and when the order shows that the dismissal order is for non-prosecution as held in the aforesaid judgment, it is open to maintain a fresh writ petition. The aforesaid observations of the Supreme Court have to be understood in the context that, when an order is not on merits and when the petition is dismissed for laches on the part of the petitioner, a petition filed before the Supreme Court under Article 32 is maintainable because the order passed by the High Court is not binding on the Supreme Court. In fact after laying down the said law, the Supreme Court has cautioned to the effect that the conclusions reached by them are confined only to the point of res judicata which has been argued as a preliminary issue in those writ petitions and no other and therefore it is clear that the question before the Supreme Court was only whether the dismissal order operates as res judicata in a subsequent proceeding. Here the objection is not on the ground that the earlier order passed by this court operates as res judicata in this case. In that view of the matter, this judgment has no application to the facts.

5. In Hoshnak Singh's case, the Supreme Court was considering a case where an earlier writ petition was dismissed probably on the ground that the petitioner has

an alternative remedy. After exhausting the alternative remedy when he preferred a writ petition before the High Court, it was contended that the order of dismissal passed in an earlier occasion would operate as *res judicata* and thus second writ petition challenging the very same order is not maintainable. It is in that context, the Supreme Court has said, if after preferring an appeal or revision under the statute under which the right is claimed by the petitioner, a petition under Article 226 is filed irrespective of the fact that the revision or appeal was dismissed and the original order which was challenged in the first petition had merged into the appellate or revisional order, nonetheless the second petition in the circumstances would not be barred by the principles analogous to *res judicata* because the cause of action is entirely different and the merger of the order cannot stand in the way of the petitioner invoking the jurisdiction of the High Court under Articles 226 of the Constitution. Admittedly, in this case after the first order of dismissal, the petitioner has not availed of any alternative remedy and against such orders passed by the appellate authority or revisional authority the second petition is not preferred. But against the very same order which has been dismissed earlier for non-prosecution, this petition is filed.

6. In Shivashankar Prasad Shah's case, the Supreme Court was dealing with a case of dismissal for non-prosecution and it was open to the party to file an application against such orders vis-a-vis under Order IX Rules 8 and 9 CPC in that context, the Supreme Court has held as under:-

"We shall first take up the contention that the objection taken by the judgment-debtors is barred by principles of *res judicata*. Though at one stage learned Counsel for the appellants-decree-holders attempted to bring the case within explanation 5, Section 11, Civil Procedure Code, he did not pursue that line or argument but tried to support his contention on the broader principles of *res judicata*. The real question for decision in this case is whether the dismissal or Misc. Cases Nos.94 and 110 of 1959 for default of the judgment-debtors can be said to be a final decision of the Court after hearing the parties. Before a plea can be held to be barred by the principles of *res judicata*, it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the Court. A dismissal of a suit for default of the plaintiff, we think, would not operate as *res judicata* against a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the legislature to enact Rule 9 Order IX, CPC which in specific terms says that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. The contention that the dismissal of a previous suit for default of the plaintiffs operates as *res judicata* in a subsequent suit in respect of the same claim was repelled by the Judicial Committee of the Privy Council in *Maharaja Radha Parshad Singh v. Lal Sahab Rai* (1890) 17 Ind App 150. Therein the Judicial Committee observed thus:

"None of the questions, either of fact or law, raised by the pleadings of the

parties, was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief."

7. Therefore, all that the Supreme Court has said is that when the writ petition is dismissed for default earlier, a subsequent writ petition for challenging the very same order is not maintainable and another proceeding cannot be initiated on the same cause of action challenging the very same order.

8. The bar for maintaining this writ petition is contained in order IX Rules 8 and 9 CPC, which reads as under:

"8. Procedure where defendant only appears:- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit: (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

9. These Rules provide for restoration of suits dismissed under Rule 8 for non-appearance. It also mandates that the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. It enables him to apply to the same Court which dismissed the suit for non-appearance for setting aside the order of dismissal on his showing sufficient cause for his non-appearance when the suit was called on for hearing. The dismissal of the suit under Rule 8 does not operate as *Respondent judicata*". It only imposes a disability on the plaintiff. This Rule is based on sound public policy. The principle underlying this provision is that a litigant who comes to Court with a cause should agitate the matter with due diligence and take a decision on merits, so that a finality is reached. Otherwise, there would not be any finality, and the opposite party could be harassed endlessly, by allowing the proceedings to be dismissed for non-prosecution and re-agitate the matter time and again at his convenience and leisure. Then this judicial process would become an instrument of oppression rather than a means to resolve disputes in a civilized way. Therefore, it is a rule

of estoppel, which finds a statutory recognition in order IX Rule 8 CPC, which prevents the party from filing a suit on the same cause of action, if the earlier suit is dismissed for non-appearance. These provisions would also equally apply to the writ proceedings. When the earlier writ petition was dismissed for non-appearance of the petitioner on the day the case was set down for hearing, the petitioner shall be precluded from bringing a fresh writ petition on the same cause of action challenging the very same order which was the subject matter of the said proceedings.

10. The argument was that the petitioner is innocent, he had entrusted his case to his counsel who has let him down and therefore he should not be penalized. Though technically the writ petition is dismissed for non-prosecution on the date the case was set down for hearing, it cannot be said that such an order is bad. When a party engages a counsel it is his duty to see that his counsel is present when the case is called for hearing. Order DC Rule 9 provides for a remedy to the petitioner to file an application to recall the said order by showing sufficient cause for his absence. When a legislature provides a remedy for getting the said order set aside, he has to follow the procedure prescribed under law. If he does not choose to follow the said procedure and if chooses to follow the procedure which is not recognised in law, he cannot have any grievance. Under these circumstances, the bar contained in Order IX Rule 9 CPC which is equally applicable to writ rules is absolute and no discretion is conferred on any Court to ignore the aforesaid statutory provision and entertain the second writ petition challenging the order which was the subject matter of earlier proceedings which came to be dismissed for non-prosecution.

11. Under these circumstances, I am of the view that the writ petition filed challenging the impugned order is barred by the principle enunciated under order IX Rule 9 CPC. Accordingly, the writ petition is rejected.