
(2000) 02 J&K CK 0009
In the Jammu And Kashmir High Court
Case No : C. 2. A. No. 41/88

Mani Ram; Ram Saran

APPELLANT

Vs

Ram Kaur; Behari Lal

RESPONDENT

Date of Decision : 10-02-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Jammu and Kashmir Civil Procedure Code, 1977 — Section 11

Citation : (2000) SriLJ 228 : (2000) 1 SriLJ 228

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Judgement

1. The only question involved in this Civil 2nd Appeal is whether the dismissal of a writ petition after considering the objections filed by theirs

ojidenjtjLanj d hea/ing the parties operates asj resjudicata in a subsequent proceeding involving the same question. The facts giving rise to the question are these.

2. The appellant was a tenant of shop No. 1C situate Warehouse. Jammu belonging to the State Government the official respondent herein.

Sometime in April, 1974 the appellant handed over the possession of this shop to respondent 2 purportedly as a licensee. Since the licensee did

not surrender possession, a suit for mandatory injunction was filed by the appellant in the year 1976. During the pendency of this suit the

government vide order No: 297O&N of 1976 dated 064)81976 allotted the shop to respondent 3. The suit was dismissed by the court of City

Judge, Jammu on 19081978, holding that it is not maintainable in view of the Government Order No. 297 O&N of 1976 (supra). Decree was

upheld by the District Judge, Jammu while dismissing the appeal on 10051980.

The appellant challenged the dismissal of the suit in civil 2nd appeal which was allowed by this court on 0406198,6. While allowing the civil 2nd appeal this court permitted the appellant to amend the suit in order to challenge the government order impugned by impleading the State and other's as defendants. Accordingly appellant filed amended suit in August, 1986. The suit was resisted by the respondents on various grounds including the one that it is barred by the principle of resjudicata. Both the trial court as well the 1st Appellate Court found the suit is barred by the principle of resjudicata because the appellant having unsuccessfully challenged the government order (supra) allotting the shop to respondent 3 is prevented from questioning the same order in the suit.

3. Mr. R.K. Kotwal appearing for the appellant has vehemently argued that since the writ petition was not decided on merits, therefore, the doctrine of resjudicata is not even distantly attracted. He further argued that even though the respondent had filed the objections against the maintainability of the petition yet no finding was returned by the writ court, in the absence of which the principle of resjudicata cannot be invoked.

4. Mr. P. Kohli learned counsel for the respondents, however, argued that State having resisted the petition by filing detailed objections which the writ court considered while dismissing the petition, it cannot be successfully argued that the petition was dismissed in limine or by a nonspeaking order.

5. The question involved is whether the writ petition filed by the appellant was considered on merits as a contested matter before being dismissed.

In order to answer this, reference to the order of dismissal of the petition becomes necessary. It is not disputed that the appellant had challenged the vires of the government order no. 2970&M of 1976 dated 06081976 in writ petition no.061976. It' is also admitted that State Government respondent herein had filed detailed objections. By order dated 25041979 the writ petition was dismissed by a Division Bench of this Court holding that:

We have heard the counsel for petitioners and also perused the objections already filed by the respondent. In our opinion no good ground is made out for the admission of the writ petition which is accordingly hereby dismissed.

6. So the Bench considered the objections challenging the right of the appellant

to seek relief and dismissed the petition after hearing the arguments of the counsel for the parties. The petition was thus dismissed after a contest as is evident from the reading of paras 6 and 7 of the objections filed

on behalf of the State Government which reads as follows:

6. That para 6 is irrelevant so far as respondents 1 and 2 are concerned. However, it is added that the allottee M/s Mani Ram Ram Saran could

not part with possession as licensee of the shop No; 1C. as it was specifically prohibited as per terms of the allotment agreement.

7. That in answer to para 7 of the petition it is submitted that on 28/7/76 respondent no. 4 submitted an application on behalf of the respondent no.

3 wherein it was stated that respondents no. 4 and 5 were partners along with petitioner and Ram Saran. It was also stated that the said partnership

stood dissolved and respondents No.4 and 5 had taken over all the liabilities of the partnership business along with the possession of the shop no.

1C Warehouse, Jammu where the partnership business was being carried on. It was further averred in the said application that since July 1974 the

rent was also being paid by them and they had also cleared the payment upto 31.3.76. Along with this application an attested true copy of a deed

of dissolution of partnership evidencing dissolution as also the factum of the possession of the shop having gone over to them exclusively was

attached. The said application was also supported by an affidavit. On the basis of the above said application supported by an affidavit and copy of

the deed of dissolution of the partnership. Government order No: 297 (O&M) of 1976 dated 6.8.76 was passed and the possession of

respondent No. 3 was regularised. Copies of application affidavit and deed of dissolution are attached herewith as annexure R1, R2 and R3

respectively.

7. These facts were considered by the Courts below while dismissing the suit. In support of its finding the First Appellate Court relied on the

judgment of Division Bench of this Court in 'Mst. Jan Bibi & anr Vs. State of J&K and anr 1986 KLJ 334 in which it has been held that:

6 In *Daryee and others Vs. State of U. P. and others*, AIR 1961 SC 1457, their Lordships of the Supreme Court opined that the general rule of

res judicata can be invoked where there has been a contest between the parties in a court of competent jurisdiction after both sides have been

granted a fair opportunity of proving their respective cases and at the end the court had pronounced its judgment or decision, such a judgment or

decision is binding on the party. This principle applied with full force to the facts of the present case. 7. A division bench of Orissa High Court in

Bishu Charan Mohanty Vs. State of Orissa and others. AIR 1973 Orissa 199, found that where a petitioner had withdrawn his earlier writ petition

with full knowledge of the Govt's stand, as reflected in the counter affidavit, a second writ petition on the same cause of action would be barred by

the principles of resjudicata. We cannot agree with Mr. M. S. Malik that since, the order dated 18121985 is not a detailed order and to use his

expression is not ""a speaking order"" it cannot be treated to be any adjudication on the merits. Whether or not there has been any adjudication

would depend upon the facts of each case and the test is not whether the order is detailed one or not a detailed one. Undoubtedly, in writ petition

No. 249 of 1984, the Union of India had disclosed its stand and had resisted the grant of the writ petition. There was a contest between the parties

in the court. Both sides were present through their counsel who had a fair opportunity of proving their respective cases. It was at that stage that the

counsel for the petitioners withdrew the writ petition and it was dismissed as withdrawn. In our opinion, such a pronouncement is binding on the

parties and attracts the General principles of resjudicata. particularly, when no liberty to file a fresh writ petition had been sought by the learned

counsel for the petitioners.

8. Since the petition has been dismissed after considering the objections and hearing the counsel for the parties, the ratio of the judgment is

squarely applicable and therefore the suit has been rightly dismissed. However, according to Mr. Kotwal this judgment requires reconsideration

because the decision of the Apex Court in case 'Daryao & Ors Vs. State of U. P. (supra) does not lay down such a proposition. In support of this

contention he placed reliance on the following judgments:

1 union of India and another Vs. Sher Singh and others. AIR 1997 SC 1796. 2. M/ s Sun Export Corporation. Bombay V. Collector of Customs.

Bombay and another. AIR 1997 SC 2658.

3. Ferro Alloys Corpn. Ltd. and another V. Union of India and others; AIR 1999 SC 1236.

4. Indian Oil Corporation Ltd. V. State of Bihar, AIR 1986 Sc 1780.

9. However, sitting singly, I am bound by the decision of the Division Bench. But the question whether the decision requires reconsideration has to

be examined with reference to the law laid down by the Constitution Bench in 'Daryao & Ors Vs. State of UP. (supra) in which following

proposition has been laid down:

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 Art. 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 Art. 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 Art. 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 Art. 32 except in cases where and if the facts thus found by the High Court may themselves be

relevant even under Art. 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 then such dismissal cannot be treated as creating a bar of

resjudicata. 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 resjudicata against a similar petition filed under Art. 32. If

the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 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 resjudicata 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.

10. By applying the above, principle it can be safely held that the writ petition has been dismissed by the court on merits after a contest because the order was passed after considering the objections and hearing the parties. The judgments referred by Mr. Kotwal do not lay down a contrary

proposition. In the case of Ferro Alleys Corporation Limited (supra) this principle has been reiterated by observing as under""29. It is no doubt true

that principle of constructive resjudicata can be invoked even inter se Respondents, but it is well settled that before any plea contesting Respondent

could be said to be barred by constructive resjudicata in future proceedings inter sc such contesting Respondent, it must be shown that such a plea

was required to be raised by the contesting Respondent to meet the claim of the appellant in such proceedings. If such a plea is not required to be

raised by the contesting Respondents with a view to successfully meet the case of the appellant then such a plea inter se contesting Respondents

would remain in the domain of an independent proceedings giving an entirely different cause of action inter se the contesting Respondents with

which the appellants would not be concerned. Such pleas based on independent causes of action inter as respondents cannot be said to be barred

by constructive resjudicata in the earlier proceedings where the Us is between the appellants on the one hand and all the contesting respondents on

the other. In other words, when the appellants are not concerned with the inter so disputes between the contesting Respondents such inter so

disputes amongst Respondents would not give rise to a situation wherein it can be said that such contesting Respondents might and ought to have

raised such a ground of defence or attack for decision of the court.

11. Since the respondents had a right to support the Government order and they successfully met the challenge thrown by the appellant, this

constitutes resjudicata. The judgment in Union of India Vs. Slier Singh & Ors:

AIR 1997 SC 1796 pertains to a Special Leave Petition under Article 136 of the Constitution of India. A writ proceeding according to the Apex Court is a different and distinct proceeding as compared to the Special Leave Petition as has been laid down in ""Indian Oil Corporation Limited Vs. State of Bihar"". AIR 1986 SC 1780. holding as under

We are clearly of opinion that the view taken by the High Court was not right and that the High Court should have gone into the merits of writ petition without dismissing it on the preliminary grounds. As observed by this court in workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust (1978) 3 SCC 119; (AIR 1978 SC 1283: (1978 Lab 1C 1111). the effect of a nonspeaking order of dismissal of a Special Leave Petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this court due to several reasons. When the order passed by this court was not a speaking one, it is not correct to assume that this court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this court in the special leave petition. A writ proceedings is a wholly different and distinct proceeding. Questions which can be said to have been decided by this court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of resjudicata nor on any principle of public policy analogous thereto, would the order of this court dismissing the special leave petition operates to bar the trial of identical issues in a separate proceeding, namely the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this court at least by implication. It is not correct or safe to extend the principle of resjudicata or constructive resjudicata to such an extent so as to found it on mere guesswork. This enunciation of the legal position has been reiterated by this court in Ahmadabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen, (1981) 3 SCR 213: (AIR 1981 SC 960). The principles laid down in the two decisions cited above fully govern the present case. It is not the policy of this court to entertain

special leave petition and grant leave under Art. 136 of the Constitution save in these cases where some substantial question of law of general or public importance is involving or there is manifest injustice resulting from the impugned order or judgment. The dismissal of a special leave petition in limine by a nonspeaking order does not therefore, justify any interference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by this court. It may also be observed that having regard to the very heavy backlog of work in this court and the necessity to restrict the intake of fresh cases by strictly following the criteria aforementioned, it has very often been the practice of this court to grant special leave in cases where the party cannot claim effective relief by approaching the concerned High Court under Art. 226 of the Constitution. In such cases also the special leave petitions are quite often dismissed only by passing a nonspeaking order especially in view of the rulings already given by this court in the two decisions aforecited, that such dismissal of the special leave petition will not preclude the party from moving the High Court for seeking relief under Article 226 of the Constitution. In such cases it would work extreme hardship and injustice if the High Court were to close its doors to the petitioner and refuse him relief under Art. 226 of the Constitution on the sole ground of dismissal of the special leave petition.

So the observation of their Lordship that "a writ proceedings is a wholly different and distinct proceeding. Questions which can be said to have been decided by this court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of resjudicata nor on any principle of public policy analogous thereto, would the order of this court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceedings, namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this court at least by implication", have set at rest the controversy sought to be reopened by Mr. Kotwal. Moreover it is neither a case of dismissal in limine nor without a contest. The writ petition was contested by filing objections and it was dismissed after hearing as noticed above. It is also not

correct that the petition was dismissed by a nonspeaking order. What is missing in the order is reasons for its dismissal But since objections were considered and parties heard applying the ratio of the decisions in Daryao case (supra) the writ petition has been dismissed on merits after contest. Hence there is no merit in this appeal which is dismissed with costs.