

(2006) 09 BOM CK 0023

In the Bombay High Court

Case No : Criminal Writ Petition No. 1458 of 2006

Manjit Singh Sethi

APPELLANT

Vs

Maharashtra Assembly, Maharashtra State Legislative
Assembly, The Hon"ble Speaker, Maharashtra State
Legislative Assembly and The Superintendent, Byculla Jail

RESPONDENT

Date of Decision : 22-09-2006

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 32

Citation : (2007) 1 CTC 42 : (2006) 6 MhLj 849

Hon'ble Judges : V.M. Kanade, J;S.B. Deshmukh, J;S. Radhakrishnan, J

Bench : Full Bench

Advocate : Mahesh Jethmalani and S.N. Raj, R.A. Dada, Amicus Curiae, for the Appellant; A.A. Kumbhakoni, Associate A.G. and N.P. Deshpande, for the Respondent

Judgement

S. Radhakrishnan, J.—The present petition has been filed seeking a Writ of Habeas Corpus, challenging the detention arising out of an order dated 11th /12th April 2006, passed by the State Legislative Assembly, Maharashtra State, Mumbai, awarding a punishment of detention for 90 days to the Petitioner for the breach of privilege of the State Legislative Assembly.

2. The facts which are relevant to decide this petition are as follows:

The Petitioner, the President of Fight for Right Bar Owners" Association, Mumbai had attended a meeting organized by the Dance Bar Girls" Association. Thereafter a new item appeared in the daily "Sakal" under a caption "Wives of the Ministers" shall not be allowed to move on the streets", which claimed that the Petitioner had made the above statement and had abused the Deputy Chief Minister of State, Shri R.R. Patil. The Petitioner was thereafter sentenced to undergo 90 days imprisonment on account of Breach of Privilege of the House after an enquiry by an order dated 11th /12th April, 2006. The Petitioner had filed an earlier Writ Petition against this impugned order, being Criminal Writ

Petition No. 873 of 2006 in this Court on 15.4.2006. On 21.6.2006, the Learned Division Bench of Shri D.G. Deshpande, J. and Shri S.A. Bobde, J. had directed that this matter be placed before the Chief Justice for constituting a larger bench. The matter was finally heard by a Full Bench on 28.6.2006. By an order dated 4.7.2006, the Full Bench had dismissed the said Writ Petition on the grounds that the court can't interfere with the order passed by the House, while exercising its jurisdiction under Article 226 of the Constitution of India, as the House had given a fair opportunity of hearing through its Privilege Committee, and that as there was a privilege, with regard to which the House was competent to take action.

3. Being aggrieved by the very same order dated 11th /12 th April, 2006, the Petitioner has again preferred this Writ Petition under Article 226 of the Constitution of India for a Writ of Habeas Corpus on grounds which were not urged in the earlier petition. A preliminary objection was raised, as to the maintainability of a second petition for a Writ of Habeas Corpus.

4. The Senior Counsel appearing on behalf of the Petitioner, Mr. Jethmalani, contended that the instant Writ Petition was not a second Petition for a Writ of Habeas Corpus. Mr. Jethmalani submitted that this was because the earlier petition was seeking to quash the entire order dated 11th /12 th April, 2006 based on grounds pertaining to the liability of the Petitioner for breach of privilege alone and did not challenge the illegality of the sentence part of the order. The earlier petition thus was for striking down the entire order based on the grounds of illegal conviction of the Petitioner. The learned Counsel submitted that the present Writ Petition on the other hand challenged the illegality of the sentence and hence the causes of action in the two Writ Petitions were accordingly quite distinct. It was further contended that the cause of action in the present Writ Petition arose only on the 3rd of July 2006. This was because, proceeding on the assumption that the conviction and sentence of the Petitioner until 21.4.2006 when the session of the House was prorogued, was legal, it is only the subsequent detention of the Petitioner on 3.7.2006 that made the sentence part of the impugned order illegal. It was argued by the learned Counsel that on prorogation of the House on 21.4.2006 the remaining part of the sentence lapsed and therefore the imprisonment pursuant to 3.7.2006 was illegal giving rise to a new cause of action from 3.7.2006, the remedy to which was a Writ of Habeas Corpus under Article 226 of the Constitution of India. Although the Petitioner was released from custody on prorogation of the second session on 21.7.2006, his petition was to be treated as if the Petitioner was in custody, as was clear from the Full Bench order dated 19.7.2006 in the above Petition.

5. The learned Senior Counsel Mr. Jethmalani for the Petitioner also argued that although the Petitioner had also prayed for a Writ of Habeas Corpus in the first petition, it ceased to be a Habeas Corpus petition from 21.4.2006, on which date the Petitioner was released from his first detention. Since that date the earlier petition was only concerned with the surviving prayer for a Writ of Certiorari.

Hence it was argued that the first petition did not and could not have dealt with the Petitioner's prayer for Habeas Corpus on the date on which it was disposed off by the Full Bench on 4.7.2006. Hence this prayer for Writ of Habeas Corpus in the petition was being considered for the first time and therefore the present Writ Petition was not a second Writ Petition for Habeas Corpus. Reliance was also strongly placed by Mr. Jethmalani, the Learned Senior Counsel for the Petitioner on the judgment of Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, stating that the above contention was clear from paragraph 13 of the said judgment as follows:

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. This 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 of India on fresh grounds which were not taken in the earlier petition for the same relief.

This principle was also reiterated in the judgments of Supreme Court in Sunil Dutt Vs. Union of India (UOI) and Others, and Kirit Kumar Chamanlal v. State of Gujarat 1981 2 SCC 437.

6. It was contended by Mr. Jethmalani that since 1982 up to 1998, a plethora of decisions of successive Division Benches of the Bombay High Court followed the principle laid down in paragraph 13 of Lallu Jogi's case. He also contended that Lallu Jogi's case was not contrary to but fully consistent with, and in fact a natural corollary to Ghulam Sarwar Vs. Union of India (UOI) and Others, , which laid down that the principle of res judicata and constructive res judicata, were applicable to Habeas Corpus proceedings also.

7. Further it was vehemently contended that the Bombay High Court Division Bench Judgment of Deepesh Mahesh Zaveri Vs. The Union of India and others, which purportedly overruled decisions of Division Benches of this High Court, it ought not to have done so for the following reasons:

a) The earlier Division Benches of the Bombay High Court had upheld the principle that a second Writ Petition under Article 226 of the Constitution of India to challenge illegal detention by a writ of Habeas Corpus would be allowed.

b) Judicial propriety demanded that they follow the decision of the Supreme Court in Lallu Jogi's (supra) case, which constituted a binding precedent, particularly when Lallu Jogi itself asserted that it followed earlier Supreme Court decisions of larger benches.

c) Deepesh Mahesh's (supra) case distinguished earlier decisions on the grounds that petitioners in those cases were in custody and hence those earlier Writ Petitions were maintainable while the Petitioner in Deepesh Mahesh's case was not and so the second writ petition did not lie. It was contended that in the instant case by an express order of the Full Bench the Petitioner was to be

treated as if he is in custody. And hence even if this Court adopted the view in Deepesh Mahesh's case, the petitioner herein being in deemed custody, the Writ Petition would still be maintainable.

8. It was further argued by the learned Senior Counsel Mr. Jethmalani that the case of T.P. Moideen Koya Vs. Government of Kerala and Others, reaffirmed the principle laid down in Lallu Jogi's case without referring to the case. Quoting paragraph 11 of the same, " This principle namely the bar of Res Judicata or principles analogous thereto would not apply for a writ of Habeas Corpus where the Petitioner prays to set him at liberty." It was contended by the learned Senior Counsel that the rest of the Judgment had no relevance or applicability whatsoever even to the preliminary issue. The rest of the Koya (supra) judgment was refuted by Mr. Jethmalani on the basis of the following points:

a) In the Koya case, the SLP before the Supreme Court under Article 136 of the Constitution of India was entertained and the Appeal was dismissed by a detailed judgment wherein all the contentions raised challenging the detention order and also the continued detentions of the petitioner were challenged. In these circumstances the Supreme Court had held that it would not be permissible for it to exercise an appellate power or sit in review over a decision rendered by the court under Article 136 of the Constitution of India, by entertaining a Writ Petition under Article 32 of the Constitution of India. It was contended that on the other hand in the instant case the Petitioner is challenging the illegality of the sentence.

b) It was contended that the bar of Res Judicata would only apply when the Supreme Court had earlier considered the matter in its entirety in a petition under Article 136 of the Constitution of India. For this purpose the learned Counsel placed reliance over paragraph 11, " If a person under detention files a writ of Habeas Corpus under Article 226 of the Constitution before the High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a nonspeaking order) and the said decision is not challenged by preferring a SLP under Article 136 of the Constitution and is allowed to become final it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of Habeas Corpus."

c) In the Koya (supra) case the plea had been raised by the petitioner both in the Kerala High Court and in the Supreme Court under Article 136 of the Constitution of India. Hence it was held that the Writ Petition under Article 32 would not be maintainable.

d) In paragraph 16 of the Koya case the Court observed, " Having regard to the facts pleaded and the grounds raised, the present petition is not maintainable." It was contended that in the present case a petition under Article 136 had not been filed before the Supreme Court challenging the Judgment and Order of 4/7/2006 (of this Court), hence Mr. Jethmalani, the Learned Senior Counsel submitted that the Koya Judgment both on facts and law would be inapplicable to

the present petition.

9. Appearing on behalf of Respondent No. 3, the Superintendent of Prisons, Learned Associate Advocate General Mr. Kumbhakoni had contended that the maintainability of a second Writ Petition is a pure question of law has to be considered under the following circumstances:

? Where there was an earlier petition filed under Article 226 and a subsequent petition was filed under Article 32, without filing an appeal against the order under Article 226.

? Where there was an earlier petition filed under Article 226 and a subsequent petition filed under 32, after filing an appeal against the order under Article 226.

? Where all petitions were under Article 226 but:

1. Points urged in the earlier petition were not not considered or decided.

2. Points urged in the subsequent petition were not raised deliberately or advisedly, though available in the earlier petition.

10. The Learned Associate Advocate General submitted then the subsequent petition would not be maintainable:

a. As the points urged were not raised in the petition but were available at the hearing of the earlier petition.

b. As the successive petition under Article 226 would amount to an analogous provision of review of an order.

c. As under the doctrine of "finality of decisions of a competent court" would be beaten.

11. Mr. Kumbhakoni therefore submitted that the petitioner did not choose to challenge the order in the earlier petition or challenged it unsuccessfully and therefore the grounds should not be allowed to be raised when it was available to him at the hearing of the first petition.

12. Mr. Rafique Dada, learned Senior Counsel appeared as amicus curiae and addressed the issue of maintainability of the subsequent petition under Article 226 of the Constitution of India and cited several judicial decisions that have laid down the position of law as regards to the preliminary objection as to maintainability of this present petition, being a second Petition for a Writ of Habeas Corpus.

13. Referring to the petition, in paragraph 6, page 4, it was made clear that the present petition proceeded on grounds "which were not urged in the earlier writ petition" i.e. in effect, the petition proceeded on "additional" grounds. Paragraph 6 of the Petition also prays for direction for release. This implies that the petition is challenging the detention order, which has been challenged in the first petition and the additional grounds taken do not mean that grounds were not available

earlier.

14. Mr. Dada, the Learned Senior Counsel cited the case of Moideen Koya (supra), which has a specific reference to a Habeas Corpus petition, to reiterate the two circumstances under which a subsequent petition under Article 32 of the Constitution of India would be maintainable: change in circumstances, or existence of a new ground that was not available at the time of decision of the earlier writ petition. Hence, it would be open to a petitioner to approach the Supreme Court under Article 32, of the Constitution of India exercising his Fundamental Right, after his petition for liberty has been dismissed by the High Court.

15. Mr. Dada, the Learned Senior Counsel relied on paragraph 8 of the above case. The case of Ghulam Sarwar (supra) was discussed. The Sarwar case quoted Daryao v. State of UP, and Re: Hastings while stating the principle accepted by the English and American Courts that res judicata is inapplicable to habeas corpus petitions. The Learned amicus curiae mentioned that though res judicata, as a principle, is a principle applicable in civil proceedings and the CPC does not refer to writ petitions, however the said principle of res judicata is applicable to Writ Petitions also.

16. Mr. Dada made a reference to the Moideen Koya judgment, paragraph 13 at pg 116. It states the well settled principle that a decision pronounced by a court of competent jurisdiction is binding unless modified or reversed adopting a procedure established by law. Finality should attach the binding judgment and in public interest, individuals should not be vexed twice over the same kind of litigation.

17. The Learned amicus curiae cited the case of Deepesh Zaveri (supra) to submit that exceptions were carved out by the ratio regarding maintainability of a subsequent petition under Article 226 of the Constitution of India. It was held that a fresh petition of habeas corpus was maintainable:

(i) when a fresh and new ground of attack against order of detention/custody has arisen after decision of first petition

(ii) where for some exceptional reason though the ground was available, was omitted in the earlier Petition.

Mr. Dada hence put forth that the second petition of habeas corpus in the same court would not be maintainable except in circumstances laid down in the said judgment.

18. Mr. Dada submitted that the Bombay High Court judgment in Deepesh Mahesh case has relied upon the case of Lallubhai Jogibhai Patel (supra), which in turn has followed the Punjab High Court's ratio (infra). Paragraph 13 of the Supreme Court judgment in Lallubhai's case holds that constructive res judicata is confined to civil proceedings; inapplicable to illegal detention and it does bar a subsequent petition under Article 32 on fresh grounds that were not taken in the

earlier petition for the same relief.

19. Mr. Dada relied upon the ratio of *Sunil Dutt Vs. Union of India (UOI) and Others*, of which categorically stated that dismissal of an earlier writ petition of habeas corpus is not bar to maintainability of a subsequent writ petition however, subject to the above limitations. It was submitted that in the case of *Sunil Dutt Vs. Union of India (UOI) and Others, India (supra)*, the criminal matter in appeal and writ petition under Article 32 of the Constitution of India were heard together. Paragraph 9 of the judgment clearly said that if *res judicata* could not apply to subsequent writ petitions under Article 32, of the Constitution of India much less could they be attracted in cases where points not agitated before High Court, but raised for the first time in Supreme Court. Mr. Dada pointed out that *Ghulam Sarwar's* case was invoked to state that principle of "finality of judgment" cannot be allowed to whittle down or override the constitutional mandate under Article 32 of the Constitution of India.

20. It was submitted by Mr. Dada, that the Punjab High Court in *Ram Kumar Pearay Lal Vs. District Magistrate*, laid down the basis on which a ground could be raised in a subsequent petition- that the ground did not exist at the time of decision of first petition. Further, in cases where a satisfactory explanation was provided for omission of a ground before a petition under Article 226, the High Court would intervene and grant relief for the ends of justice. Clearly, Mr. Dada submitted that no such case is made out in the present petition. It was emphasized that the second petition would not be maintainable merely because an additional ground existed but missed earlier, unless some exceptional circumstance for omission of the same is made out.

21. Mr. Dada made it clear that in the light of the judgments cited, a subsequent habeas corpus petition would be maintainable in the Supreme Court, considering it itself is a Fundamental Right under Article 32 of the Constitution of India. Even adopting liberal interpretations of these decisions, it cannot be construed as a license to file fresh writ petitions under Article 226, of the Constitution of India except within the exceptions made out in the judgment of the Bombay High Court in *Deepesh Zaveri (supra)* and Punjab High Court in *Ram Kumar Pearay Lal's* case.

22. The learned amicus curiae addressed the issue raised by Mr. Jethmalani, who contended that a fresh cause of action arose on 3rd July, 2006. The first writ petition challenged the conviction and the detention order, i.e. the prospect of detention. The present case, going by the words of the petition, seeks to challenge the detention after the prorogation of the Legislative Assembly. The detention is, in fact a consequence of the detention order, and flows from it. It was strongly contended that execution of an order does not give rise to a fresh cause of action. Challenging the execution or consequence of an order would be in effect petitioning against the order itself, which has been challenged earlier. This would not, in any sense fit into the category of a "fresh" ground or cause of action for which a second writ petition could be filed.

23. After hearing all the Learned Counsels at length, we find as the learned Counsel for the Petitioner had contended, in the earlier petition, the prayer of Habeas Corpus did not survive due to the subsequent release of the detenu from custody. By maintaining this stand, the counsel would be prejudicing his subsequent petition on the same grounds, as the detenu has been released in the present scenario too. Applying the same argument to the present petition, we find that the prayer clause seeking a writ of Habeas Corpus would not survive, thus making the present petition infructuous and not maintainable.

24. Counsel for the Petitioner also claimed that in the earlier petition, the entire order of conviction of the House was being challenged, whereas in the subsequent petition it's only the sentence is being challenged. We do not accept this contention because as the counsel for respondent No. 3 had mentioned, the order finding the detenu guilty, the quantum of punishment and the deferred manner of punishment, all form part of the initial decision itself and cannot be challenged separately. Thus the petition can be challenged only in its entirety and in toto, but cannot be made a piecemeal thereof.

25. Although in the case of Deepesh Mahesh (Supra), the rationale applied, being that since the petitioner was not in prison at the time of filing of the petition, the doctrine of res judicata would apply, is not applicable to the instant case as the nature and manner of detention is unique, paragraph 20 at page 648 of Deepesh Mahesh is of relevance. To quote the same:

20. ... In our view, a second petition for the writ of habeas corpus at the instance of a detainee, who is in custody, would lie to the High Court under Article 226 when (i) fresh and new ground of attack against legality of detention or custody has arisen after decision on the first petition and (ii) where for some exceptional reason, the ground has been omitted in an earlier petition. In either of these circumstances, the High Court will hear the second petition on such a ground for ends of justice. It is also clear to us that in the second case mentioned above it is only the ground which existed at the time of earlier petition and which was omitted for some exceptional reason that will be considered in the second petition but the second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same.

26. In the case of Moideen Koya (supra) the Supreme Court has expressly laid down, under what circumstances a second petition for Habeas Corpus would be maintainable. The relevant portion of paragraphs 11, 13 and 14 read as under:

11. ... If a person under detention files a writ of Habeas Corpus under Article 226 of the constitution before the High Court and the Writ Petition is dismissed (whether by a detailed order after considering the case on merits or by a nonspeaking order) and the said decision is not challenged by preferring a SLP under Article 136 of the Constitution and is allowed to become final it would still be open to him to file an independent petition under Article 32 of the constitution

seeking a writ of Habeas Corpus.

13. It is well settled that a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure established by law. It is in the interest of public at large, that finality should attach to the binding decisions pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over the same kind of litigation. While hearing a petition under Article 32 it is not permissible for this Court either to exercise a power of review or some kind of an appellate jurisdiction over a decision rendered in a matter which has come to this Court or by way of a petition under Article 136 of the Constitution. The view taken in *Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Others*, that the binding nature of the conviction recorded by the High Court against which an SLP was filed and dismissed cannot be assailed in proceedings taken under Article 32 of the constitution was approved in *Daryao and Others Vs. The State of U.P. and Others*, .

14. ... A decision rendered by this Court in proceeding under Article 136 of the constitution which has attained finality, would bind the parties and the same issue cannot be re agitated or reopened in a subsequent petition under Article 32 of the constitution.

27. Drawing an analogy from the above ratio and applying the same logic to the instant case, once a habeas corpus petition has been decided on merits by the High Court under Article 226 of the Constitution of India it would attain finality within that court. Hence the High Court would not be able to sit in review or appeal by considering another petition under Article 226 of the Constitution of India. A recourse would be available however in a higher court of law that is the Supreme Court of India under Article 32 of the Constitution of India or alternatively under Article 136 of the Constitution of India by a Special Leave Petition. This is because a party to a proceeding is not allowed to go bench hopping within the same court.

28. To quote from the case of *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, :

It was held in England that a decision in a writ of habeas corpus was not a judgment and therefore would not operate as *res judicata*. On that basis it was thought at one time that a person detained could file successive application before different Judges of the same High Court. But subsequently the English Courts held that a person detained cannot file subsequent petitions for a writ of habeas corpus before different courts of the same division or before different Divisions of the same High Court on the ground that the Divisional Court speaks for the entire Division and that each division for the entire court and one division cannot set aside the order of another Division of the same Court.

An exception to this rule would be when the doctrine of constructive *res judicata*, which is a part of the larger doctrine of *res judicata*, would not apply to cases of

habeas corpus under two circumstances:

- 1) That a new ground has arisen, and which was not available at the time of first petition.
- 2) Due to some exceptional circumstances a ground could not be raised, though it was available at the time of first petition.

29. This position has been consistently followed in a large number of cases, as the Supreme Court has quoted with approval the Judgment of the Full Bench of Punjab High Court, in paragraph 7 of Lallubhai's case:

No second petition for a writ of habeas corpus to the High Court on a ground on which a similar petition had already been dismissed by a court. However, fresh and new ground of attack against the legality of detention or custody has arisen after the decision of the first petition and also where for some exceptional reason a ground has been omitted in an earlier petition, and in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. In the last case it is only a ground which existed at the time of earlier petition, and was omitted from it, that will be considered. Second petition will not be competent on the same ground merely because an additional argument is available to be urged with regard to the same,

30. In the present case the order of detention was passed on 11th /12th April 2006. It specified clearly the quantum of punishment, which is 90 days, as also the manner in which this punishment was to be undergone. Hence the cause of action arose from the very detention order and all grounds ought to have been raised in the first petition. The ground raised in this Petition is not a new/fresh ground subsequent to the judgment in the first Petition. At the same time, the counsel for the petitioner has failed to show any exceptional circumstance due to which the ground was not urged, in fact there is no such plea in the Petition. When the detention order has expressly mentioned that the petitioner would be imprisoned for 90 days, the remaining portion of detention being executed in each and every subsequent session of the House, it was very much clear that the ground of challenging the legality of deferred sentence was very much available during the earlier petition also. Hence the argument that the cause of action arose only on 3rd July, 2006 cannot be countenanced at all.

31. We uphold the preliminary objection, that the present second Petition is not maintainable. Hence Rule stands discharged.

32. The learned Counsel for both the parties had also argued with regard to legality or otherwise of the deferred detention, even after prorogation of the House. We are not going into the same, as we are clearly of the view no second Writ Petition would lie. Before we part, we must record our deep appreciation for the able assistance rendered by Mr. R. A. Dada, as an amicus curiae.

Issuance of certified copy expedited.