
(1981) 06 CAL CK 0007
In the Calcutta High Court

Satya Ranjan Ghosh and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 01-06-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 12, 136, 226, 32

Citation : 85 CWN 992

Hon'ble Judges : M.N. Roy, J

Bench : Single Bench

Advocate : Ranjit Kumar Banerjee and Prasanta Kumar Bandopadhyaya, for the Appellant; Pabitra Kumar Basu, for the Respondent

Final Decision : Dismissed

Judgement

M.N. Roy, J.—The facts and points involved in this application for a Rule which was affirmed on 20th April 1981 by Satya Ranjan Ghosh, petitioner No. 1 were the same as in or similar to the facts and points involved in the application dated 14th March 1974, affirmed by Shri Balaram Ghosh, petitioner No. 11, in that Rule which was numbered as Civil Rule No. 1433: (W) of 1974 and which had to be discharged on 5th October 1977, as none appeared in support of the same even of the second call. In fact, Mr. Banerjee, appearing in support of the present application for a Rule, without placing the application on merits initially contended that earlier discharge of the Rule, with out going into the merits of the case, would not be a bar in entertaining the present application. If Mr. Banerjee is right and justified in such submissions in the facts of this case, then a Rule will certainly have to be issued as there was a prima facie case established, on the self same facts, at the time of the issue of the first Rule as mentioned above and which facts have not admittedly been dealt with or considered on merits while making the order. It should also be noted that the petitions in the two applications, excepting the additional statement made in the present one regarding the exparte rejection of the earlier Rule and the circumstances relating to the same or the fact of such rejection, would not be a bar were the same.

2. Mr. Banerjee, appearing in support of the present application, relied firstly on the determinations in the case of *Shedun Singh v. Duriyao* AIR 1965 S.C. 1332. There the Supreme Court while determining on section 11 of the CPC have observed that it is the Court which decides the former suit whose jurisdiction to try the subsequent suit has to be considered and not the Court in which the former suit may have been filed. In order that a matter may be said to have been heard and finally decided, the decision of the former suit must have been on the merits. Where, for example, the former suit was dismissed by the Trial Court for want of jurisdiction, as for default of the plaintiff's appearance or on the ground of non joinder of parties or misjoinder of parties or multifariousness or on the ground that the suit was badly framed or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificates when the same was required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was under valued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal, if any, the decision not being on the merits would not be res judicata in a subsequent suit. It has also been observed in that case that where the trial court has decided two suits having common issues on merits and there are two appeals therefrom on any one of them is dismissed on some preliminary ground like limitation or default in printing, with the result that the trial court's decision stands confined the decision of the Appeal Court will be res judicata and the Appeal Court must be deemed to have heard and finally decided the matter and in such a case the result of the decision of the Appeal Court is to confirm the decision of the Trial Court given on merits, and if that is the decision of the Appeal Court will be res judicata.

3. Secondly, Mr. Banerjee referred to the determinations in the case of *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another*, . This was also a case amongst others u/s 11 of the CPC and it has been observed that it is wellknown that the doctrine of the res judicata is codified in section 11 but the same is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res judicata has been applied since long in various other kinds of proceedings and situations, by courts in England, India and other countries. The Rule of constructive res judicata is engrafted in explanation IV of section 11 and in any other situations also, principles not only of direct res judicata but constructive res judicata are also applied. If by any judgement or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties. It has also been observed that the principles of res judicata comes into play whereby the judgement and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication : that also the principles of res judicata on that issue is directly applicable. The Supreme Court

has further observed that when any matter which might and have been made a, ground of defence or attack in a former proceedings but was not so made, then such a matter in the eye of law, to avoid implicit of litigation to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided. It has also been observed that disposal of a SLP under Article 136 need not necessarily bar the entertainment of a writ petition under Article 226 on the same grounds and, from the order dismissing the SLP in liminri it cannot be inferred that all the matters agitated in the concerned writ petition whether explicitly or implicitly decided. It has also been observed that the technical Rule of Res judicata, although a wholesome Rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issues must have been decided and it is not safe to extend the principles of res judicata to such an extent so as to found a on mere guess work.

4. The third case on which reference was made was that of Hoshnak Singh Vs. Union of India (UOI) and Others, which has dealt with the application of res judicata in writ proceedings and it has been observed that if after preferring an appeal or rivation in the statute, under which the right is claimed by the petitioner, a petition under Article 226 is filed, the irrespective of the fact that 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 judicate, because the cause of action is entirely different and the merits cannot stand in the way of the petitioner, invoking the jurisdiction of the High Court under Article 226. It has also been observed that is incontrovertible that where a petition under Article 226 is dismissed limini and without a speaking order such a dismissal would not constitute a bar of res judicata to a subsequent petition On the same cause or action.

5. When reference was made by Mr. Banerjee to the determination in the case of Daryao and Others Vs. The State of U.P. and Others, . In that case, it has been observed that the Rule of res judicata is not merely a technical rule but is based on public policy and can be invoked against a petition under Article 12 of the Constitution of India. In fact, it has been observed by the Supreme Court that the argument that res judicata is a technical Rule and as such is irrelevant in dealing with petitions under Article 32, cannot be accepted. It has been observed that the rule of res judicata as indicated in section 11, has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy, and it is the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, it is also in the public interest that individuals should not be vexed twice over the same kind of litigation. It has further been stated that if these two principles form the foundation of the general rule of res judicata, they cannot be treated as irrelevant or inadmissible even in dealing with fundamental

rights in petitions filed under Article 32.

6. In that case it has also been observed that the binding character of judgements pronounced by courts of competent jurisdiction is itself in essential part of the rule of law, and no rule of law obviously is the basis of the administration of justice on which the Constitution lays, on much emphasis. On general considerations of public policy there seems to be no reason why the rule of resjudicata should be treated as inadmissible or irrelevant in dealing with petitions filed under Article 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgement of decision. Such a decision, pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution, apart from holding, that it makes no difference to the application of the rule of res judicata that the decision on which the plea of res judicata is raised is a decision not of Supreme Court but of a High Court, exercising its jurisdiction under Article 226. It is doubtful if the technical requirement prescribed by section 11, as to the competence of the first Court to try the subsequent suit is an essential part of the general rule of res judicata ; but assuming that it is in substance even the said test is satisfied, because the jurisdiction of the High Court in dealing with a writ petition filed under Article 226 is substantially the same as the jurisdiction of this Court in entertaining an application under Article 32. Article 226 confers jurisdiction on the High Court to entertain a suitable writ petition whereas Article 32 provides for moving the Supreme Court for a similiar writ petition for the same purpose. Therefore, the argument that a petition under Article 32 cannot be entertained by a High Court under Article 226, is without any substance ; and so the plea that the judgement of the High Court cannot be treated as res judicata on the ground that it cannot entertain a petition under Article 32 must be rejected. This apart, the Supreme Court has further observed that 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, then 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 on 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.

Mr. Banerjee, thereafter, relied on the determinations in the case of P.D. Sharma Vs. State Bank of India, . In the facts of the case it was observed that as the order summary dismissing the writ petition was not a speaking order, no question of rejudicata could arise and the case did not fall within the rule laid down in the case of Daryao -vs- State of U.P. (supra). It has also been observed that the scope of an appeal under Article 136 is much wider than a petition under Article 226 of the Constitution of India.

7. The last case, to which reference was made by Mr. Banerjee, was that of Tilakchand Motichand -vs- H.B. Munshi AIR 1970 SC 1898, wherein, it has been observed that Article 32 gives a right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part-III of the Constitution. The state cannot place any hindrance in the way of an aggrieved persons seeking to approach the Supreme Court. But the guarantee goes no further on the terms of Article 32. It has been observed that where the matter has reached the Supreme Court, the extent or manner of interference is for the Court to decide and interference must always depend upon the facts of each case. The Court does not convert Civil and Criminal actions into proceedings for the obtainment of writs and it is in rare cases, where the ordinary process of law appears inefficacious, that the Supreme Court interferes even where other remedies are available. Furthermore, the Supreme Court refrains from acting under Article 32, if the party has already moved the High Court under Article 226, with a similar complaint and for the said relief and failed. There is no doubt that earlier Civil Rule No. 1433(W) of 1974, was discharged for default on the second call on 5th October 1977, when admittedly no one was present in support of the Rule. In the present application, only in paragraph 14, it has been stated that after such discharge of the said Rule for the failure of the learned Advocate concerned to appear it transpired upon enquiry on 15th April 1981 that the said Rule was discharged. The present application was affirmed as mentioned above, on 28th April 1981. As such, there was delay about three years and six months,

which has not been appropriately explained. The petitioners have only stated that only upon enquiry on 15th April 1981, it transpired to them, that the writ petition was discharged on 5th October 1977. They have not mentioned as to what made them to make such enquiry or what steps they took to find out, whether the proceeding was still alive or not. In fact, in my view, on such explanation, which do not go to establish any diligence on the part of a litigant, the litigant should not be allowed to move a fresh application for the issue of a further and fresh Rule on the same cause of action or on same facts, which were in issue in on earlier Rule, which, as in this case, was rejected *exparte* and without going into merits. Such would not certainly be in keeping with the public policy as involved or the finality of the proceedings, which is required to be achieved. If such applications, without necessary explanations, are accepted, then not only the Respondents, who have received some benefits out of such order of *exparte* discharge of the Rule, but so also the Court making such *exparte* orders, would not be safe. It should also be noted that the deponent of the application has affirmed those statements as mentioned above and as mentioned in paragraph 14 of the petition, as true to his knowledge, without disclosing the source of such knowledge or from whom and now he came to know of the relevant facts. It should further be noted that the petitioner, from *exparte* order of discharge of the concerned Civil Rule No. 1433(w) of 1974 could have either preferred an appeal or move an application for recalling such order, but none of those steps have been taken and Mr. Banerjee, appearing in support of this application, on being asked, informed that in the facts and circumstances of the case, even without taking recourse to the remedies as mentioned above, this application would be maintainable. Article 226 is a discretionary remedy and nobody can claim the use and exercise of such discretion, as a matter of right or of course. Such discretionary remedy or relief, amongst other, in my view, should be refused, if the person claiming the same, is guilty of wilful laches or is not diligent. Diligence, in my view, goes a long way or plays an important part in the matter of interference in a writ proceedings, and for the use and exercise of the discretion. If this Court finds or is satisfied that the person claiming interference, was not at all diligent, as in this case or in prosecuting the proceeding as initiated or taken, the use of discretion in his favour, may be refused. In this case, admittedly, the earlier Rule had to be discharged in the manner as indicated, long ago and more particularly on 5th October 1977 and save and except a bare statement or a statement without any material particulars, that on enquiry, the fact of the said order was learnt on 15th April 1981, there has been no explanation. Such explanation as given, in my view, has not only established lack of diligence but has not also brought the case within the purview of the determinations as cited at the Bar. In fact, this was also the submissions of Mr. Basu, who appeared for the answering Respondents and opposed the application. I am also of the view, in agreement with the submissions of Mr. Basu that the determinations as cited, are not appropriately applicable in the facts of this case and on facts and considering the conduct of the petitioners, and more particularly the lack of diligence, I also feel, that the present application was not

a bonafide one and the same was intended, in particular, by circumvent the effect of the earlier order of discharge or to frustrate the same, without challenging the order as made, duly and before the appropriate forum. It should be noted that the question of diligence or the lack of the same was not considered or was in issue in any of the cases as cited at the Bar.

The above being the position, I reject the application. There will be no order for costs.