

(2007) 03 BOM CK 0019

In the Bombay High Court

Case No : Civil Revision Application No. 223 of 2003

Sham Rajendra Agrawal

APPELLANT

Vs

Ghanshyam Hajarilal Sharma and Another

RESPONDENT

Date of Decision : 09-03-2007

Acts Referred:

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

Citation : (2007) 3 ALLMR 545 : (2007) 4 BomCR 330 : (2007) 4 MhLj 691

Hon'ble Judges : Pangarkar C.L., J

Bench : Single Bench

Advocate : V.S. Kukday, for the Appellant; M.G. Bhangade and G. Agrawal, for N.A. No. 1 and V.G. Bhangade and V.V. Bhangade for Non-Applicant No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Pangarkar C.L., J.—This revision is directed against the order passed by the 8th Joint Civil Judge (Jr. Dn.), Nagpur, on an application u/s 11 of the Code of Civil Procedure, whereby he rejected the application filed by the applicant.

2. The facts giving rise to this revision are as follows-

Non-applicant No. 1 Ghanshyam instituted a civil suit against the applicant/defendant, Hindustan Petroleum Corporation as well as Dealers Selection Board. The Hindustan Petroleum Corporation had issued an advertisement inviting applications from eligible candidates for dealership of kerosene at 20 different places in Vidarbha region. Katol was one of the places where the dealership was to be assigned and it was not in the reserved category. The non-applicant/plaintiff submitted an application complete in all respect with the defendant No. 1. It is the job of defendant No. 2. Board to select the candidates on consideration of various aspects. One of the members of such Board is a retired Judge of the High Court. In this case, the Board was headed by District Judge instead of High Court Judge and only two members acted as members of the Board instead of three. It

is contended that, therefore, the selection is vitiated. After the interviews, the list of candidates in order of merits was published and it was found that the name of applicant/defendant No. 3 was at Sr. No. 1. In fact, defendant No. 3 was not eligible for allotment of the said dealership. The selection of defendant No. 3 was challenged by the non-applicant/plaintiff on various other grounds. Being aggrieved by the selection of defendant No. 3, the plaintiff had instituted writ petition No. 1155 of 2002. The said writ petition came to be dismissed in limine. A SLP was preferred before the Supreme Court. That also came to be dismissed in limine. It is after dismissal of these petitions that this suit came to be filed by the plaintiff for declaration that the allotment of dealership to defendant No. 3 was illegal.

3. The defendant No. 3 in that suit filed an application u/s 11 of the Code of Civil Procedure, alleging that since writ petition was dismissed by the High Court and the SLP was dismissed by the Supreme Court, those decisions operated as res judicata and the present suit was, therefore, liable to be dismissed. The learned judge of the lower Court did not find favour with what was alleged by the defendant and he rejected the application u/s 11 of the Code of Civil Procedure. Being aggrieved by that, this Civil Revision Application is preferred.

4. The only question, therefore, that needs to be determined is whether the dismissal of the writ petition and the SLP operates as res judicata or not. While dismissing the writ petition, this Court had passed the order to the following effect.

Heard the learned Counsel appearing for the petitioner.

Considering the disputed question of fact involved in the petition, we are not inclined to entertain this petition. Even otherwise, there is no merit in the contentions raised in the petition. The petition is dismissed in limine.

The plaintiff had preferred SLP before the Supreme Court being SLP No. 5514 of 2003, the same was also dismissed by the Supreme Court by a single-line order as follows-

The SLP is dismissed.

This suit is filed after this writ petition and the SLP are dismissed.

5. Shri Kukadey, the learned Counsel for the applicant/defendant No. 3 contended that suit is based on the same cause of action on the basis of which reliefs were claimed in writ petition. He submitted that the reliefs in the writ petition as well as the suit are identical. He contended that, therefore, the writ petition and SLP having been dismissed, the present suit is liable to be dismissed on principle of res judicata. The relevant part of Section 11 of the C.P.C. reads thus -

11. Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former

suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

6. Following ingredients must be fulfilled before Section 11 of C.P.C. can be applied.

(i) Matter in issue must be directly and substantially in issue in the former suit.

(ii) Parties must be same or they must be litigating under the same title.

(iii) The Court must be competent to try such subsequent suit, and

(iv) The suit must be heard and finally decided. There cannot be any quarrel on the point that the first three ingredients can be said to be fulfilled.

7. The only question is as to whether the lis could be said to be finally heard and decided. The words "heard and finally decided" would mean that the parties were heard and decision was rendered on merits i.e. there must be decision after contest. It is, therefore, only if a suit is decided on merit and contested, it could be said to be heard and finally decided. Therefore, to my mind, when writ petition is dismissed in limine that would not operate as res judicata. The learned Counsel for the applicant has relied on a decision of the Supreme Court in 1997 DGLS 646 : 1997(3) S.C.C. 78 (Sree Narayan Dharmasanghom Trust v. Swami Prakasananda and Ors.). The facts of the case are totally different. In reported case, the trial Court had granted an injunction. Appeal to district Court was preferred and against the order of appellate Court, revision was filed before the High Court. The High Court set aside the order and sent the matter back to the first appellate Court. A SLP against the order of High Court was preferred. The SLP was dismissed by the Supreme Court in limine. Thereafter, an application for review of order of High Court was filed. The Supreme Court held that the order of the High Court had merged into that of Supreme Court and High Court could not review its own order. The other decision cited is reported in Ishwar Dutt Vs. Land Acquisition Collector and Another, . This decision too has no bearing on the case at hand. The Counsel for the applicant then relied on the decision of this Court in 2000(3) B C R 1071 (Dr. Bharat Dhokane v. Yeshwantrao Gadakh). This decision also has no bearing on the case at hand. In this case, the Supreme Court had refused to interfere with the reasoned order of the High Court. It is held that the Supreme Court is deemed to have taken into consideration the merits of the case. The difference is that the High Court had passed a reasoned order and those reasons weighed with the Supreme Court. Therefore, the matter could not be reopened. In the case at hand, the writ petition was dismissed in limine so too the Special Leave petition. Virtually, therefore, there is no decision on merit in this case either by the High Court or by the Supreme Court. The Apex Court observes as follows in Yogendra Naryana Chowdhury and other Vs. Union of India and other, .

5. It is settled law that even the dismissal of SLP in limine without assigning reasons does not operate as res judicata. Under these circumstances, we are of the view that the view of the latter Bench of the CAT, Calcutta and of the Cuttack Bench are clearly consistent with the above reasoning. Therefore, we do not find that these are fit case warranting interference. The appeals are accordingly dismissed. No costs.

8. In another decision reported in Scientific Adviser to the Ministry of Defence and Others Vs. S. Daniel and Others, the Court observed as follows -

9. This, in crux, is the argument for the respondents. Before dealing with this argument, it will perhaps be helpful to steer clear of certain minor arguments addressed by either side:

(a) Shri Kanta Rao submitted that the same view as in Gafoor Mia had been taken by the CAT in Supriya Roy case and that this Court has already, on September, 21, 1988, dismissed SLP Nos. 9956-57 of 1988 filed against the said order. This appears to be correct but the dismissal in limine of that SLP cannot preclude us from considering the issue in these appeals on merits. It is seen that, in C.A. No. 3963 of 1988, an application has been filed for revocation, on this ground, of the leave granted by this Court. We dismiss this application.

9. In yet another decision reported in : [1979]3SCR399 (Hoshnak Singh v. Union of India and Ors.), the Court observed as follows -

10. In Virudhunagar Steel Rolling Mills Limited Vs. The Government of Madras, , rejecting the contention that if the petition under Article 226 is dismissed without issuing a notice to the other side though by a speaking order such a dismissal would not bar the subsequent petition for same cause of action or for the same relief, it was observed that this Court in Daryao's case did not mean to lay down that if the petition is dismissed in limine without notice to the opposite side it would not bar a subsequent petition. This Court only ruled that if the petition is dismissed in limine but with a speaking order which order itself indicates that the petition was dismissed on merits, the absence of notice to other side by itself would not be sufficient to negative the plea of res judicata in a subsequent petition in respect of the same cause of action. However, while negating the contention on the facts of the case this Court reaffirmed that if the petition is dismissed in limine without passing a speaking order then such a dismissal cannot be treated as creating a bar of res judicata. Similarly, in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, a majority of the Judges affirmed the ratio in Daryao's case that if a petition under Article 226 is dismissed not on merits but because an alternative remedy was available to the petitioner or that the petition was dismissed in limine without a speaking order such dismissal is not a bar to the subsequent petition under Article 32. It must follow as a petition under Article 226 would not be barred by the principles analogous to res judicata. Reaffirming the view taken on this point in Daryao v. Union of India AIR (S.C.) 1457, P.D. Sharma Vs. State Bank of India, , the

preliminary objection about the bar of res judicata was negated. It is, therefore, incontrovertible that where a petition under Article 226 is dismissed in limine without a speaking order such a dismissal would not constitute a bar of res judicata to a subsequent petition on the same cause of action, more so, when on the facts in this case it appears that the petition was dismissed presumably because the petitioner had an alternative remedy by way of a revision petition u/s 33 of the 1954 Act which remedy he availed of and after failure to get the relief he moved the High Court again for the relief. It would be incorrect in such a situation to dismiss the petition on the ground that the order made by the revisional authority dismissing the revision petition had the effect of merging the original order against which the revision has preferred with the order made by the revisional authority and, therefore, the challenge on the fresh cause of action to the order made by the revisional authority would of necessity be a challenge to the original order also and the petition would be barred by the principles analogous to res judicata as the first order had become final. The High Court was clearly in error in dismissing the petition on this short ground.

These decisions lay down the principle that when writ petition is dismissed in limine, it would not bar the subsequent petition on the same cause of action. Thus, I find that the learned Judge of the lower Court did not commit any error in rejecting the application u/s 11 of the Civil Procedure Code. The revision, is therefore, dismissed and the order of the lower Court is confirmed.