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v.
Ajaib Singh
and another

Dua, J.

In so far as F.A.O. No. 126 of 1963, by Nagahia Singh, is concerned, it is not understood as to how he is entitled to challenge the impugned order, but since the impugned order has been set aside on the appeal filed by Smt. Raj Kaur, Nagahia Singh's appeal becomes almost infructuous and it is unnecessary to pass any formal order allowing this appeal. There would be no order as to costs in this appeal.

R. S. NARULA, J.—I agree.

R.S.

CIVIL MISCELLANEOUS

Before Shamsher Bahadur and Gurdev Singh, JJ.

KIRPAL SINGH,—*Petitioner.*

versus

THE UNION OF INDIA AND OTHERS,—*Respondents.*

Civil Writ No. 999 of 1963.

1965

May, 28th

Constitution of India (1950)—*Articles* 226 *and* 227—*Petition under, dismissed by a Division Bench with the single word "dismissed"—Second petition on same facts and for same relief—Whether competent.*

Held, that a second petition under Articles 226 and 227 of the Constitution on the same facts and for the same reliefs is not competent when the first petition has been dismissed by a Bench of the High Court *in limine* with the single word "dismissed". Such an order, being final, can be challenged either by way of appeal or review and not by means of a second petition. There is neither any principle nor authority to invoke the proposition that the petitioner has a continuous right of making applications to the High Court under Article 226 or Article 227 of the Constitution of India till a judgment amounting to a 'speaking order' has been delivered. The Motion Bench is not enjoined either by statute or otherwise to support its decision by what is called a 'speaking order' in every petition in which the High Court is moved for enforcement of fundamental rights in the exercise of writ jurisdiction. In appropriate cases, the Bench may consider it necessary to write such an order but this is not a duty which can be enforced by the resort adopted by the petitioner in the present instance. A Court of concurrent jurisdiction must resolutely decline to make any comment on the qualitative aspect of the order passed by another Court and the Benches of the High Court

exercise concurrent jurisdiction, and one Bench does not act as a Court of review or as a Court of appeal in respect of another Bench. If the first order of dismissal is to be attacked on the ground that it is not a 'speaking order' or that it has failed to observe the principles enunciated by their Lordships of the Supreme Court, the remedy lies by way of appeal and not by presentation of another similar petition.

Case referred by the Hon'ble Mr. Justice Shamsher Bahadur, on 26th February, 1965, for the decision of an important point of law raised in the case. The case was finally decided by the Hon'ble Mr. Justice Shamsher Bahadur and the Hon'ble Mr. Justice Gurdev Singh on the 28th May, 1965.

Petition under Articles 226 and 227 of the Constitution of India, praying that an appropriate writ order or direction be issued quashing the orders dated the 9th August, 1962, 16th October, 1961, 23rd June, 1961 and 22nd March, 1961, passed by the respondents Nos. 1 to 4 respectively.

H. S. GUJRAL AND SUSHIL MALHOTRA, ADVOCATES, for the petitioner.

ANAND SARUP AND R. S. MITTAL, ADVOCATES, for the Respondents.

ORDER OF THE DIVISION BENCH.

Shamsher Bahadur, J.

SHAMSHER BAHADUR, J.—Does a single worded order "dismissed" passed *in limine* by a Division Bench in a writ petition preclude the petitioner from presenting another application for the same relief on similar grounds before another Bench of concurrent jurisdiction? This broadly is the question which we are called upon to answer in this reference which has arisen in circumstances which may briefly be set out.

Kirpal Singh petitioner made a petition to this Court under Articles 226 and 227 of the Constitution of India for quashing the orders of the Settlement authorities regarding allotment of a house to him in Panipat. This petition (Civil Writ No. 362 of 1963) filed on 9th of March, 1963, was "dismissed" *in limine* by a Bench of Mahajan and Pandit JJ. on 14th of March, 1963. Undeterred by this order, the petitioner moved this Court again on identical facts and for identical relief in another petition under Articles 226 and 227 of the Constitution of India, this being Civil Writ No. 999 of 1963. In fairness to the petitioner

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and his counsel, it may be pointed out that in paragraph 9 of petition No. 999 of 1963, it is mentioned that the previous petition was dismissed *in limine* by the Bench on 14th of March, 1963, though it is asserted that the order of dismissal not being a 'speaking order' is not a dismissal on the merits of the case. In the petition which was moved during the vacation, a stay order was obtained from a learned Single Judge of this Court on 5th of June, 1963. On the re-opening of the Court, the petition was admitted by the Motion Bench of Capoor and Bedi JJ. on 9th of August, 1963, and the order of stay of dispossession was continued. In accordance with the rules framed by this Court, the petition was placed before me sitting in single Bench for disposal on 26th of February, 1965. Being of the view that an important issue had been raised regarding the competence of this Court to give a re-hearing in a petition which was dismissed by a summary order of dismissal *in limine* the papers were submitted to the Hon'ble the Chief Justice for the petition being placed before a Division Bench for disposal.

It has not been disputed before us that the order passed by the Bench of Mahajan and Pandit, JJ. (hereinafter called the 'first order') has all the attributes of a judgment or final order and the matter cannot be re-opened by a Bench of concurrent jurisdiction. This obvious conclusion is sought to be evaded by the argument that the order of 'dismissal' not being a 'speaking order' is not binding on the parties on the principle of *res judicata.* The consequences which naturally flow from this argument are that the High Court is bound to render a judgment even when an order is passed *in limine* in writ petitions setting out the points for determination, the findings and the reasons to form part of the record. In support of this proposition assailing the integrity of the first order, Mr. Harbans Singh Gujral, the learned counsel for the petitioner, has invited our attention to the judgment of their Lordships of the Supreme Court in *Daryao and others* v. *State of U.P. and others* (1), where it was held by the learned Chief Justice, speaking for the Court, that the general rule with regard to the binding character of a judgment can be "invoked only in cases where a dispute between the parties has been referred to a Court of competent jurisdiction.

(1) A.I.R. 1961 S.C. 1457.

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there has been a contest between the parties before the Court, a fair opportunity has been given to both of them to prove their cases, and at the end the court has pronounced its judgment or decision." It is to be observed, however, that the pronouncement of the Supreme Court was made *vis-a-vis* the question of entertainment of an application under Article 32 by it while the one under Article 226 on similar facts had already been disposed of by the High Court. The conclusion which is summarised in paragraph 19 at page 1465 and is strongly relied upon by Mr. Gujral is thus worded :—

> "We hold 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 this Court under Article 32 by an original petition made on the same 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.............. It is true that *prima facie,* dismissal *in limine* even without passing a speaking order in that behalf may strongly

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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 summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata* against a similar petition filed under Article 32 .... 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 plain that the observations of the learned Chief Justice on which reliance is placed by Mr. Gujral relate only to a question of *res judicata* being raised in a petition made on similar and identical facts before the Supreme Court under Article 32. The petitioner, on this reasoning, is entitled to present another petition under Article 32 of the Constitution before the Supreme Court, as the first order of dismissal would not be sufficient to attract the bar of *res judicata.* The authority, in our opinion, cannot be held to justify the entertainment of the same petition by a Bench of concurrent jurisdiction.

A final order or judgment can be challenged either by way of appeal or review. No further appeal lies so far as this Court is concerned from any order passed by a Division Bench of this Court either *in limine* or on merits. The petitioner could also move the High Court for a review of the order under its inherent powers. This is plainly not a petition for review and we have not been asked to treat it as such. There is neither any principle nor authority to invoke the proposition that the petitioner has a continuous right of making applications to this Court under Article 226 or Article 227 of the Constitution of India till a judgment amounting to a 'speaking order' has been delivered. It has not been suggested that the Motion Bench is enjoined either by statute or otherwise to support its decision by what is called a 'speaking order' in every petition in which this Court is moved for enforcement of fundamental rights in the exercise of writ jurisdiction. In appropriate cases, the Bench may consider it necessary to write such an order but this

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is not a duty which can be enforced by the resort adopted by the petitioner in the present instance. We are not oblivious of the occasions when the Supreme Court as an appellate authority has considered it necessary to remand for further determination cases where summary orders of dismissal have been passed in writ proceedings. In *Ram Saran Das* v. *State of Punjab* (Civil Appeal No. 36 of 1963) decided by the Supreme Court on 16th of September, 1963, a dismissed officer of the Punjab Civil Service had impugned the order of punishment on grounds of *mala fide*. An order was passed *in limine* by a Bench of this Court dismissing this petition. It was observed by their Lordships of the Supreme Court that :—

> "When a responsible public servant holding a judicial office moves the High Court under Article 226 and contends that the termination of his service, though ostensibly made in exercise of the power conferred under rule 23 of the rules really amounts to his dismissal, or that its exercise is *mala fide*, the High Court should have called upon the respondent to make a return and then considered whether the allegations made by the appellant had been proved, and if they were what would be the result of the said finding on his argument that the impugned order amounts to dismissal, or has been pased *mala fide*."

It was also observed that :—

> In a case of this kind where serious allegations are made by the appellant against responsible officers of the respondent, it may be desirable not to rely merely on affidavits but to take evidence in court."

It is to be remembered that these were the observations made by an appellate Court and sitting as a Court of concurrent jurisdiction we must resolutely decline to make any comment on the qualitative aspect of the first order as this Bench does not purport to act either as a Court of review or as a Court of appeal. The petitioner, in our opinion, has clearly misconceived his remedy. If the first order of dismissal is to be attacked on the ground that it

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is not a 'speaking order' or that it has failed to observe the principles enunciated by their Lordships of the Supreme Court, the remedy lay by way of appeal and not by presentation of another similar petition.

Another case which was remanded on similar grounds is *British India Corporation Ltd.* v. *Industrial Tribunal; Punjab* (2). The writ of the petitioner had been dismissed *in limine* under Article 226 of the Constitution and it was observed by their Lordships of the Supreme Court in the appeal preferred against this order that :—

> "In view of the fact that there was an allegation of *mala fides* on the part of the (Punjab) Government......it was the duty of the High Court to accord a hearing to the parties after issuing notice to the respondents and record its decision after considering all the circumstances of the case which would have thus been brought to its notice."

The ruling of this decision again points out the remedy which lay before the petitioner and cannot be used to support the proposition that an order of dismissal which does not amount to a 'speaking order' becomes open for re-determination and that this process will continue till a 'speaking order' has been delivered.

As a matter of principle, it seems well settled that there can be no successive applications for writs of *certiorari* in the High Court. The rule as stated in Halsbury's Laws of England goes so far as to say that a second application on an amended affidavit containing fresh material is not maintainable. Reference may be made to Simon's edition, Volume II page 83 where it is thus stated :—

> "When an application for an order of *certiorari,* prohibition or mandamus has been made, argued, and refused on the ground of defects in the case as disclosed in the affidavits supporting the application, it is not competent for the applicant to make a second application for the same order on amended affidavits containing fresh materials.

(2) A.I.R. 1957 S.C. 364.

> The rule applies even in cases where the defects in the case which caused the refusal of the first application are remedied in the second."

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The same principle of law is stated in Corpus Juris Secundum, volume 14, at page 156 on the subject of successive writes under the heading of '*Certiorari.*" The statement of law is to this effect :—

> "Where a *certiorari* has been dismissed for want of prosecution, a second writ should not be allowed to the prosecutor. Similarly, where the writ is dismissed on the merits, that is, for the reason that the petitioner therefor was not entitled to it, the judgment of dismissal is a bar to the subsequent issuance of another writ."

Basu in his Commentary on the Constitution of India (fourth edition) Volume 3; at page 398 has this to say :—

> "As regards writs other than *habeas corpus* the view has all along been maintained that a second application does not lie except where a previous one has been rejected on the ground of a mere formal defect. Even discovery of fresh materials does not sustain a second application.
>
> As regards *habeas corpus,* the old common law rule justifying successive applications has been superseded by recent case-law as well as legislation."

Thus, with the possible exception which seems to have been whittled down now in the case of *habeas corpus* petitions, no writ of *certiorari* can lie in the same Court after it has once been dismissed. In the absence of statutory provisions to the contrary a Court's determination of *certiorari* may be reviewed by the tribunal possessing appellate jurisdiction over such Court and not otherwise. This is also embodied as a principle of law in Corpus Juris Secundum, Volume 14, page 186.

Reference may be made to a decision of Day and Charles, JJ in *The Queen* v. *Manyor and Justices of Bodmin* (3), in which a preliminary objection was that a similar

(3) (1892) 2 Q.B. 21.

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rule had been applied for and discharged for precisely the same purposes and in precisely the same terms. It was observed by Day J. thus :—

> "As I read the authorities, it has always been held, whenever this objection has been taken and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first application has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the Court in such matters. It is a view which has commended itself to many judges who have acted upon it, and it commends itself to me......I think we are bound to conform to that practice, and that we have no right to take on ourselves to vary or alter it."

With respect, we fully agree with the dictum of the learned Judge which was concurred by Charles J. It is in harmony and keeping with the practice of this Court as well, and the authority underlines a principle which cannot lightly be departed from.

If the contention raised by Mr. Gujral so earnestly before us is sustained, it would lead to consequences which would indeed be disconcerting. The petitions under Article 226 of the Constitution of India have increased and are still on the increase though a large number of them are refused on a variety of grounds. The petitioner may have failed to establish the existence of a right to justify him in making the application; there may be no legal error apparent on the face of the facts disclosed in the petition; the applicant may not have been denied substantial justice or the determination of which a grievance is made may not be an appropriate subject for interference in *certiorari* proceedings, or the subject-matter of determination may not be considered suitable for issuance of a writ. These are only illustrative cases and it would be manifest that if on a preliminary hearing the Court is called upon to give an elaborate answer to the submissions made by the counsel or the allegations made in the petition, it would involve

an unnecessary strain on the time and conscience of the Court. Whenever there is a matter involving fundamental right in which allegations of *mala fide* are made, it may be that the Court may find it useful to give an indication in making a summary order how its mind has been affected but to insist that in every case where a person chooses to invoke the jurisdiction of this Court a speaking order should be delivered is a proposition which is hardly tenable and finds no shred of support from authority. It has been suggested by Mr. Gujral, that it would be a sufficient compliance if the order merely mentions that the Court does not find any substance on merits before dismissing the application, but in our view this is no more than a device and does not commend itself to us because it would amount to passing a virtual order of dismissal with the addition of a few words to give it the cloak of a speaking order. It is a matter in each case to determine for the Court which chooses to pass an order of dismissal to advert to the reasons which actuated it in so doing or content itself by simply dismissing it.

We, would, therefore, answer the question posed in the beginning of this order in the negative and dismiss this petition with costs. In this view of the matter, we do not consider that it is within the province of this Court to embark afresh on the merits of the petition which has already been dismissed by a Bench of this Court.

GURDEV SINGH, J.—I agree.

B.R.T.

REVISIONAL CRIMINAL

Before S. K. Kapur, J.

ROOP K. SHOREY,—*Petitioner.*

versus

THE STATE,—*Respondent.*

Criminal Revision No. 134-D of 1964.

1965

May, 28th

Code of Criminal Procedure (Act V of 1898)—Ss. 493 and 495—Ambit and scope of—Private counsel of complainant—Whether can examine or cross-examine witnesses and address arguments—Permission of the Court—Whether necessary—Interpretation of Statues—Rule as to, stated.