FULL BENCH

Before S. B. Capoor, Daya Krishan Mahajan and P. D. Sharma, JJ.

BANSI AND ANOTHER,—*Appellants*

versus

ADDITIONAL DIRECTOR, CONSOLIDATION OF HOLDINGS, ROHTAK, AND OTHERS,—*Respondents*

Letters Patent Appeal No. 86 of 1966

1966

May 3rd.

Constitution of India (1950)—*Art.* 226—*Dismissal* in limine *of a writ petition by a Bench of the High Court—Whether would bar a second petition by the same petitioners to the same High Court and based on similar facts.*

Held, that the dismissal *in limine* of a writ petition under Article 226 of the Constitution by a Bench of the High Court would bar a second petition by the same petitioners to the same High Court and based on similar facts. To entertain the second petition on the same grounds would amount to by-passing the remedies by way of a review petition or taking steps to file an appeal to the Supreme Court apart from recourse to the petition to the Supreme Court under Article 32 of the Constitution. Such a course would also be wrong not only on principle but also on grounds of propriety and public policy which, subject to the well-recognised exceptions require finality of judicial proceedings so far as the same Court is concerned.

Letters Patent Appeal under Clause X of the Letters Patent of the High Court against the order of the Hon'ble Mr. Justice Shamsher Bahadur in C. W. 3005 of 1965, decided on 3rd March, 1966.

G. C. MITTAL AND T. N. DUTTA, ADVOCATES, for the Appellants.

H. L. SARIN, SENIOR ADVOCATE, ASSISTED BY BALRAJ BAHL, AMRIT LAL BAHL AND MISS ASHA KOHLI, ADVOCATES, for the Respondents.

JUDGMENT.

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CAPOOR, J.—Letters Patent Appeal No. 86 of 1966 is directed against the judgment of the learned Single Judge, dated the 3rd March, 1966, dismissing Civil Writ No. 3005 of 1965 in which the petitioners were Bansi and Jai Dyal, sons of Ram Narain, of village Patikra, district Mohindergarh, and it was admitted by the Motion Bench to the Full Bench.

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The petitioners in this writ petition under Article 226 of the Constitution of India prayed for quashing the order made by the Assistant Director, Consolidation of Holdings, Rohtak (respondent No. 2 to the petition) allowing the appeal of respondents Nos. 3 to 7 in a consolidation matter and further the order of the Additional Director, Consolidation of Holdings, Rohtak, rejecting the petitioners' application under section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (Act No. 50 of 1948) against the order of the Assistant Director, Consolidation of Holdings. A similar application (Civil Writ No. 2946 of 1965) was filed by the petitioners and was dismissed *in limine* on the 3rd December, 1965, by the Motion Bench comprising of Falshaw, C.J., and Khanna, J. It was submitted in sub-paragraph (i) of paragraph 12 of Civil Writ No. 3005 of 1965 that the dismissal *in limine* of the previous writ petition did not bar the filing of the second petition. Civil Writ No. 3005 of 1965 was admitted by the Bench consisting of Mehar Singh and Pandit, JJ., and when it came up for hearing before Shamsher Bahadur, J., he on the basis of the Bench judgment in *Kirpal Singh* v. *Union of India* (1), held that when a petition under Article 226 of the Constitution had been dismissed *in limine* by a Bench of this Court, it cannot again be revived by another petition in which substantially the same allegations are made again. It was submitted before him that certain authorities of this Court were not considered in the Bench decision but the learned Single Judge quite properly held that sitting singly he could not reopen it once again and he observed that if so advised, the petitioners could go in appeal and agitate this matter again for reference of the question to a Full Bench. That is how this Letters Patent Appeal is before the Full Bench.

Mr. G. C. Mital, learned counsel for the appellants, has placed his main reliance on certain observations contained in *Daryao and others* v. *State of U.P. and others* (2). Their Lordships of the Supreme Court were dealing with six writ petitions under Article 226 of the Constitution in which the respondents had raised a common preliminary objection that the writ petitions were not maintainable on

(1) I.L.R. (1961)1 Punj. 218=1965 P.L.R. 862.

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

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the ground that in each case the petitioners had moved the High Court for a similar writ under Article 226 of the Constitution and the High Court had rejected those petitions. It was contended that the dismissal of a writ petition filed by a party for obtaining an appropriate writ creates a bar of *res judicata* against a similar petition filed in the Supreme Court under Article 32 on the same or similar facts and praying for the same or similar writ. The conclusion reached on the preliminary objection was as stated in paragraph 19 of the judgment, which it would be desirable to reproduce in full as it forms the main plank of the submissions made by the learned counsel for the appellants before us—

> "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 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 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 case 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. 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 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 *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. 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 in the light of this decision that we will now proceed to examine the position in the six petitions before us."

The learned counsel for the appellants laid particular emphasis on the following sentence : "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, however, necessary to keep in mind the context in which that particular observation was made. The question of bar of *res judicata* was being considered in respect of the petitions made to the High Court under Article 226 of the Constitution *vis-a-vis* the petitions based on similar facts made to the Supreme Court under Article 32 of the Constitution and their Lordships of the Supreme Court did not have before them the precise question which is agitated in this Letters Patent Appeal, viz., whether the dismissal *in limine* of a writ petition under Article 226 of the Constitution by a Bench of the High Court would bar a second petition by the same petitioners to the same High Court and based on similar facts. It was submitted by the

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learned counsel for the appellants that the principles laid down by the Supreme Court in paragraph 19 of the judgment should be extended by analogy to the case of a second or subsequent writ petition filed in the High Court after the dismissal *in limine* of the previous writ petition under Article 226 containing the same allegations. It was pointed out that as observed by the Supreme Court in paragraph 15 of *Daryao's case* (supra), "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. The scope of the writs, orders or directions which the High Court can issue in appropriate cases under Articles 226 is concurrent with scope of similar writs, orders or directions which may be issued by this Court under Article 32. The cause of action for the two applications would be the same. It is the assertion of the existence of a fundamental right and its illegal contravention in both cases." These observations were made by the Supreme Court while repelling the arguments that the judgment of the High Court could not be treated as *res judicate* on the ground that it could not entertain a petition under Article 32 of the Constitution. Clause (2) of Article 226 of the Constitution of India expressly provides that the power conferred on a High Court by clause (1) to issue certain writs shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32. Thus, the order made by the High Court while disposing of the writ petition under Article 226 is not final so far as the Supreme Court is concerned. It is not only appealable to the Supreme Court but the aggrieved party may in proper cases, after failing in the High Court, approach the Supreme Court under Article 32 of the Constitution. As held by the Supreme Court in *Daryao's case* (Supra) if the High Court has disposed of the matter on the merits under Article 226 of the Constitution of India and has thus passed a "speaking order", a similar writ petition to the Supreme Court under Article 32 of the Constitution will be barred by the principle of *res judicata.*

However, in the judgment of the Supreme Court in *Daryao's case* (supra) as mentioned above, it was made clear that the conclusion reached was confined only to *res judicata* and to no other. But so far as the maintainability of the second writ petition in the High Court after the

dismissal *in limine* of the earlier writ petition in the same facts is concerned, there is apart from *res judicata* another important aspect, which is the finality attaching to the judgment and order made by a Court vis-a-vis the maintainability of a subsequent petition containing the same allegations as were made in the earlier petition. The learned counsel for the appellants did not of course, go to the length of saying that when a writ petition under Article 226 of the Constitution has been decided on the merits in the presence of both the parties and the writ petition dismissed, it would be open to the petitioner to file a subsequent writ petition containing the same allegations. His submission was restricted to the case of a writ petition dismissed *in limine*, but on principle it is difficult to see what difference from the point of view of finality of the order would be made whether the dismissal *in limine* or on merits. Under rule 3 in Chapter 4 (F)(b), Volume V of the Rules and Orders of the High Court, the Court may, when dealing with application under Article 226 of the Constitution of India, either summarily dismiss it or order a rule *nisi* to be issued against the opponent against whom it is sought, as it thinks fit. According to the practice of the Court in England (*vide* page 83 of Volume 11 of Halsbury's Laws of England, Third Edition) 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. 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, though if there was a mere formal defect in the first application, such as that the affidavits were wrongly entitled in the first place, there may be a second application upon affidavits amended in this respect. The principle laid down will not probably apply to petitions in *habeas corpus* made on the grounds which have arisen after the rejection of the previous application but so far as the writ petition for *certiorari* giving rise to this Letters Patent Appeal is concerned, it would fully apply.

In a recent judgment of the Supreme Court *Ramesh and another* v. *Seth Gendalal Motilal Patni and others* (3),

(3) 1966 Current Law Journal 152 (S.C.).

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it was held (at page 157) that the controversy in the High Court, in proceedings arising under Article 226 ordinarily is whether a decision of a proceeding before a Court or tribunal or authority should be allowed to stand or should be quashed, for want of jurisdiction or on account of errors of law apprarent on the face of the record. A decision in the exercise of this jurisdiction, whether interfering with the proceeding impugned or declining to do so, is a final decision in so far as the High Court is concerned because it terminates finally the special proceeding before it. But it is not to be taken that any order will be a final order. There are orders and orders. A question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the Article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either upholds it or does not. In either case the controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correlate the decision in every case with the facts in controversy especially where the question is one of the jurisdiction of the Court or tribunal. The answer to the question whether the order is final or not will not depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable provided the other conditions are satisfied, otherwise not.

In the case before the Supreme Court (*Ramesh's case*) (supra) the question raised was whether the Commissioner, Nagpur Division, had jurisdiction to set aside the discharge of the debt ordered by the Claims Officer. This decision was challenged by a proceeding under Article 226. The High Court summarily dismissed the petition, that is, it upheld the jurisdiction and the Supreme Court held that in the circumstances it makes no difference whether the High Court makes a speaking order or not, for by this order this High Court has finally decided the question of jurisdiction. Since the order which was passed was final for the purpose of appeal to the Supreme Court, it was decided that the High Court was in error in refusing the

certificate under Article 133(1)(a) and (b) of the Constitution. This judgment is very helpful for deciding the point under consideration before us. In the earlier writ petition (Civil Writ No. 2946 of 1965) as well as in the writ petiton (Civil Writ No. 3005 of 1965) giving rise to this Letters Patent Appeal, what was challenged was the jurisdiction of respondents Nos. 1 and 2 to make the impugned orders. The previous writ petition was dismissed *in limine* on the 3rd December, 1965, and the dismissal *in limine* of the previous writ petition amounted to affirming the jurisdiction. That order, on the principle laid down in *Ramesh's case* (supra), was final so far as this Court was concerned and it could be challenged either by way of a review petition or by taking steps to file an appeal to the Supreme Court apart, of course, from recourse to the petition to the Supreme Court under Article 32 of the Constitution. To entertain the second petition on the same grounds would amount to by-passing these recognised legal procedures.

Such a course would also be wrong not only on principle but also on grounds of propriety and public policy which, subject to the well-recognised exception, require finality of judicial proceedings so far as the same Court is concerned. These rules of practice and propriety were enunicated as far back as 1892 in *The Queen* v. *Mayor and Justices of Bodmin* (1892) 2 Q.B. 21 and have been endorsed by the Bench of this Court in *Kirpal Singh* v. *Union of India and others* (1) (at page 866 of P.L.R.).

Apart from the judgment of the Supreme Court in *Daryao's case* (supra), learned counsel for the appellants has also relied upon certain observations in *Piara Singh* v. *The Punjab State and others* (4). This was a Letters Patent appeal against the order of a Single Judge whereby the writ petition of Piara Singh under Article 226 of the Constitution was dismissed on the sole ground that a writ petition filed by another person named Sikander Singh on the same facts and on the same grounds had been dismissed earlier by the Division Bench. The Letters Patent Bench *inter alia* referred to some observations in *Daryao's case* (supra) and remarked that it could be plausibly argued that since Sikander Singh's petition was dismissed by this Court *in limine* without making a

(4) I.L.R.(1962)2 Punj. 583=1962 P.L.R. 547.

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speaking order; the bar of *res judicata* would not be attracted at all; but the ground on which the Letters Patent Appeal was allowed was that Piara Singh was not a party to Sikander Singh's petition and by no stretch of reasoning his petition could be dismissed because Sikander Singh's petition containing similar allegations and facts had been previously dismissed *in limine*. Obviously; dismissal *in limine* does not give rise to any decision involving any principle and so it cannot be a precedent for a case in which the petitioner is a different person. So far as *Daryao's case* is concerned, reasons have already been given earlier in this judgment for distinguishing it.

We are, therefore, of the view that the judgment of the learned Single Judge in the order under appeal was correct and the Letters Patent Appeal is dismissed with costs. Council's fee Rs. 100.

Mahajan, J.

D. K. MAHAJAN, J.—I entirely agree, and have nothing to add.

Sharma, J.

P. D. SHARMA, J.—I agree.

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