

Deepak Vs. Dy. Director (R) and Member-Secretary, Scheduled Tribe Caste Certificate Scrutiny Committee and Another

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Court : Mumbai Nagpur

Decided On : Dec-04-2015

Judge : B.R. Gavai & P.N. Deshmukh

Appeal No. : Writ Petition No. 29 of 2014

Appellant : Deepak

Respondent : Dy. Director (R) and Member-Secretary, Scheduled Tribe Caste Certificate Scrutiny Committee and Another

Advocate for Pet/Ap. : Shri. S.R. Narnaware

Judgement :

Oral Judgment: (B.R. Gavai, J.)

1. Rule returnable forthwith. Heard the learned Counsel for the parties finally by consent.
2. The petitioner has approached this Court mainly praying for the following reliefs:
 - i. protect the services of the petitioner in view of Office Memorandum dated 10.8.2010 issued by Government of India (Annexure-10) and Kavita Solunke's case by quashing and setting aside the termination dated 25.8.2004 issued by the

respondent No.2, i.e. The Commissioner of Customs (General), New Custom House, Ballard Estate, Mumbai (Annexure-4) and reinstating the petitioner in the services as Lower Division Clerk, in the interest of justice,

ii. quash and set aside the impugned order dated 03.10.2013 passed by the respondent No.2, i.e. The Commissioner of Customs (General), New Custom House, Ballard Estate, Mumbai (Annexure No.9) in the interest of justice.?

3. The petition has a chequered history. The petitioner came to be appointed as Lower Division Clerk on 6.6.1995 on the establishment of the respondent no.2 against a post reserved for Scheduled Tribe, since the petitioner claimed to be belonging to Halba Scheduled Tribe. The petitioner's claim was based on the certificate issued to him on 23.8.1998 by the Executive Magistrate, Bhandara. Since the petitioner was appointed against the post reserved for Scheduled Tribe, his claim came to be forwarded to the respondent Scrutiny Committee for scrutinizing the validity of the same. Vide the order dated 24.6.2004 the respondent No.1 Scrutiny Committee invalidated the claim of the petitioner. Since the petitioner's claim was invalidated, his services came to be terminated vide order dated 25.8.2004.

4. The petitioner filed Original Application being O.A. No. 612/04. The said O.A. was allowed vide judgment and order of the learned Tribunal dated 20.4.2006. The learned Tribunal held that the petitioner was entitled to protection in view of the judgment of the Apex Court in the case of **Milind Katware .vs. State of Maharashtra reported in 2001(1) Mh.L.J. 1.**

5. Being aggrieved thereby, the respondent no.2 filed a petition at the Principal Seat. The Division Bench of this Court allowed the said petition, being Writ Petition No. 853/07, vide judgment and order dated 21.8.2007 and set aside the judgment and order passed by the learned Tribunal. The petitioner had also filed an application for review of the said order. The same was also dismissed.

6. It appears that thereafter in view of the judgment of the Apex Court in the case of **Milind Katware .vs. State of Maharashtra (cited supra)** the petitioner filed a Writ Petition being Writ Petition No. 5305/10. In the said petition, the petitioner had

sought prayer for protection in view of the Office Memorandum dated 10.8.2010 and had also challenged the order passed by the Scrutiny Committee. The said petition was dismissed by Division Bench of this Court vide judgment and order dated 19.3.2012. The petitioner again filed a Review Application seeking review of the said judgment. However, when they were listed before this Court the petitioner sought liberty to withdraw the said M.C.As. with further liberty to file substantive petition. The said liberty was granted vide judgment and order dated 17.10.2012.

7. The petitioner thereafter filed another petition before this Court, i.e. Writ Petition No. 5733/12. In the said petition also, the petitioner had sought relief of protection as well as for quashing of the termination order. However, in the said petition also, the learned Counsel for the petitioner sought liberty to withdraw the petition with liberty to make a representation to the respondent no. 2. As such, the petition was disposed of by granting liberty to the petitioner, vide order dated 21.8.2013. Accordingly, the petitioner made a representation to respondent no.2. The representation made by the petitioner was also rejected. Hence, the petitioner has filed this fourth petition.

8. Shri S.R. Narnaware, learned Counsel for the petitioner, submits that in view of the law laid down by the Apex Court in the case of **Kavita Solunke .vs. State of Maharashtra and others (AIR 2012 SC 3016)** submits that in view of the judgment of the Apex Court in the case of Kavita Solunke, the controversy as to whether the powers exercised by the Apex Court in the case of Milind Katware were exercised under Article 142 or Article 141 of the Constitution of India came to be settled wherein it was held that the powers exercised were under Article 141. The learned Counsel, therefore, submits that since the law was settled in case of Kavita Solunke, the petitioner approached this Court by way of present petition.

9. The learned Counsel relying on the judgment of the Apex Court and the Division Bench of this Court in **Vijaya Deorao Nandanwar (Ku.) Vs. Chief Officer, Municipal Council, Wardha “ 2013 (5) Mh.L.J. 153** submits that in the similar facts and circumstances, i.e. dismissal of earlier petitions, this Court has granted the protection on the ground of parity and on the ground of equality. The learned Counsel submits that the Division Bench has clearly held that the issue regarding

resjudicata is only procedural issue and cannot come in the way of constitutional Courts protecting the rights of the citizens.

10. The learned Counsel further submits that even the Larger Bench of this Court in **Arun s/o Vishwanath Sonone .vs. State of Maharashtra and others reported in 2015(I) Mh. L.J. 457** has held that there cannot be a straightjacket formula and as to whether the decision in the earlier proceedings would operate as resjudicata or not, would depend upon the facts of each case. The learned Counsel submits that since in the present case there is no finding that the petitioner had played fraud, he would be entitled to get the protection. He submits that in the similar facts the Division Bench of this Court vide order dated 11.8.2015 in Writ Petition No. 1793/15 has permitted the said Writ Petition to be converted into Review Application in Writ Petition No. 5430/11 which review application has been finally allowed, thereby granting protection to the petitioner therein.

11. Shri Rohit Deo, learned Assistant Solicitor General of India for respondent No.2, on the contrary submits that the present petition is totally hit by the principles of resjudicata. He submits that when a lis between the same parties has reached finality, it is not permissible to reopen the same. The learned Assistant Solicitor General of India relies on the judgment of the Constitutional Bench of the Apex Court in the case of **Daryao and others .vs. State of U.P. and others reported in AIR 1961 SC 1457**. The learned Assistant Solicitor General of India also relies on the judgment of the Apex Court in the case of **Forward Construction Co. and others .vs. Prabhat Mandal (Regd.), Andheri and others reported in (1986) 1 SCC 100** in support of the proposition, that where the parties have the opportunity of controverting the matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The learned Counsel submits that the petitioner in the first round of litigation had approached the learned Central Administrative Tribunal and the Division Bench at the Principal Seat and issue with regard to grant of protection was directly and substantially in issue in the said proceedings and there has been adjudication thereof. It is submitted that in the second round of litigation, i.e. Writ Petition No. 5305/10 also the prayer for grant of protection in view of Office Memorandum dated 10.6.2010 and with regard to setting aside the termination was raised by the petitioner. He submits that it will

have, therefore, to be deemed that the issue was heard and decided by this Court in the said proceedings. He submits that a Review Application seeking review of the said order has also been withdrawn with liberty to file a substantive petition. He submits that taking umbrella of the order passed in Review Application, a third petition is filed which is also sought to be withdrawn with liberty to make a representation. It is submitted that now after rejection of that representation, the fourth petition is filed seeking the same reliefs which have been finally denied to the petitioner.

12. No doubt that the Larger Bench of this Court in the case of **Arun s/o Vishwanath Sonone .vs. State of Maharashtra (cited supra)** in paragraph 76 has observed thus:

76. On the question No.2 framed for the decision by the Full Bench, we must express that the question of res judicata, including the constructive res judicata, may involve adjudication of facts and law both. Merely because a petition was filed claiming the relief of protection and that was either withdrawn or dismissed by the Court, that by itself would not follow that the subsequent petition claiming the same relief would be barred by the principle of res judicata. Similarly, in spite of invalidation of the caste claim by the Scrutiny Committee, there may not be occasion to claim protection in employment in a petition challenging the order of the Scrutiny Committee, if by the time the petition is decided, no action is taken by the employer to terminate the services on the basis of the order of the Scrutiny Committee. In such a situation, claiming the relief of setting aside the termination would be premature and the bar of constructive res judicata may not come in the way. It, therefore, depends upon several factors, like the fresh cause of action arising because of intervening events requiring either to review the earlier decision rendered or to adjudicate the controversy or prematurely claiming the relief of protection, etc. We do not think that any further opinion need to be expressed by the Full Bench on this aspect. We leave this point to be open and decided by the appropriate Division Bench, keeping in view the facts and circumstances of each case. The question No.2 is, therefore, answered accordingly.?

The Larger Bench has held that merely because a petition was filed claiming the relief of protection and that was either withdrawn or dismissed by the Court, that itself would not follow that subsequent petition claiming the same relief would be barred by the principle of resjudicata. The Larger Bench further observes that as to whether the earlier dismissal or withdrawal of the petition operates as a constructive resjudicata or not, would depend on several factors like fresh cause of action arising because of intervening events, requiring either to review the earlier decision rendered or to adjudicate the controversy or prematurely claiming the relief of protection, etc. The Larger bench had kept the issue open to be decided by the appropriate Division Benches keeping in view the facts and circumstances of each case.

13. It will be relevant to refer to the judgment of the Constitutional Bench of the Apex Court in the case of **Daryao and others .vs. State of U.P (cited supra)**. Their Lordships of the Apex Court were considering the issue as to whether rejection of earlier petition by the High Court under Article 226 would operate as res-judicata for filing another petition under Article 32 before the Apex Court. Their Lordships have observed thus in paragraph No. 19 :

19. 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 Art. 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 Art. 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 Art. 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 Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 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 The petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent Gaj petition under Art. 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.?

It could thus be seen that the Apex Court in clear terms has held that, if the Writ Petition filed by a party under Article 226 is considered on 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 appellate or other appropriate proceedings permissible under the Constitution. It has been held that it would not be open to a party to ignore the said judgment and move under Article 32 by a original petition on the same facts and for obtaining the same or similar order or writs. It has further been held that if the petition filed in the High Court under Article 226 is dismissed not on merits but because of laches of the party applying for the writ, or on the ground of availability of alternate remedy, then the dismissal of the Writ Petition would not constitute a bar to the subsequent petition under Article 32. It has further been held that if the Writ Petition is dismissed in limine and where an order is pronounced in that behalf, whether that would operate as resjudicata or not would depend upon the nature of the order passed. If the order is on the merits, it would be a bar, otherwise it would not be. It has

further been held that if the petition has been dismissed as withdrawn, it would not operate as a bar to subsequent petition under Article 32.

14. It could thus be seen that Their Lordships of the Apex Court, have culled out following categories for consideration as to whether the earlier proceedings before the High Court under Article 226 would operate as bar for subsequent original proceedings under Article 32 before the Apex Court:

I. Where the matter is contested between the parties and the Court has decided the petition under Article 226 on merits, the same would bind the parties, unless modified or reversed by the Appellate Court. In such a case, it would not be open to parties to ignore the said judgment and move the Apex Court under Article 32 by a original petition.

II. Where the petition is dismissed merely on the ground of laches or availability of alternate remedy, the same would not operate as a bar for subsequent proceedings.

III. When the petition is dismissed in limine and the order is passed in that behalf, whether such a dismissal would constitute a bar or not would depend upon the nature of the order passed by the High Court,

IV. When the petition is withdrawn, the same would not operate as a bar.

15. We find that when the aforesaid guidelines are laid by Their Lordships for entertaining subsequent original petition under Article 32, the same would also apply to the subsequent petition under Article 226 before this Court.

16. The question as to whether the subsequent interpretation of a provision of law would have the effect of reopening the matter which was concluded between the parties, fell for consideration before Their lordships in the case of **Kalinga Mining Corporation .vs. Union of India and others reported in (2013) 5 SCC 252**. It will be relevant to refer to the following observations of the Apex Court in paragraph no. 44, which read as under:

44. Even though, strictly speaking, *res judicata* may not be applicable to the proceedings before the Central Government, the High Court in exercise of its power under Article 226 was certainly entitled to take into consideration the previous history of the litigation *inter partes* to decline the relief to the appellant. Merely because the High Court has used the expression that the claim of the appellant is barred by *res-judicata* would not necessarily result in nullifying the conclusion which in fact is based on considerations of equity and justice. Given the history of litigation between the parties, which commenced in 1950s, the High Court was justified in finally giving a *quietus* to the same. The subsequent interpretation of Rule 25A by this Court, that it would have only prospective operation, in the case of *Saligram (supra)*, would not have the effect of reopening the matter which was concluded between the parties. In our opinion, if the parties are allowed to reagitate issues which have been decided by a Court of competent jurisdiction on a subsequent change in the law then all earlier litigation relevant thereto would always remain in a state of flux. In such circumstances, every time either a statute or a provision thereof is declared *ultra vires*, it would have the result of reopening of the decided matters within the period of limitation following the date of such decision. In this case not only the High Court had rejected the objection of the appellant to the substitution of the legal heirs of Dr. Sarojini Pradhan in her place but the SLP from the said judgment has also been dismissed. Even though, strictly speaking, the dismissal of the SLP would not result in the merger of the judgment of the High Court in the order of this Court, the same cannot be said to be wholly irrelevant. The High Court, in our opinion, committed no error in taking the same into consideration in the peculiar facts of this case. Ultimately, the decision of the High Court was clearly based on the facts and circumstances of this case. The High Court clearly came to the conclusion that the appellant had accepted the *locus standi* of the LRs of Dr. Sarojini Pradhan to pursue the application for the mining lease before the Central Government, as well as in the High Court.? (emphasis supplied).

17. It could thus be seen that Their Lordships of the Apex Court, have held that subsequent interpretation of statutory provision would not have the effect of reopening the matters which was concluded between the parties. It has been held that if this is allowed, then all earlier litigations would always remain in a state of

flux. It has been held that every time either a statute or provision thereof is declared ultra vires, it would have the result of reopening the decided matters within the period of limitation following the date of such decision.

18. Their Lordships of the Apex Court in the case of **Forward Construction Co. and others .vs. Prabhat Mandal (Regd.), Andheri** (cited supra) have observed thus in paragraph no. 20:

20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to s.11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.?

It could thus be seen that the Hon'ble Apex Court has clearly held that any matter which might or ought to have been made a ground of defence or attack in the earlier proceedings will be deemed to have been matter directly and substantially in issue in such proceedings. It has further been held that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided.

19. In the present case, it will be relevant to refer to the following observations of the learned Central Administrative Tribunal in its judgment dated 20.4.2006:

10.The case of present applicant is squarely covered by the observations made by the Apex court in the case of Milind Katware (supra). The same has been followed in the matter of Ku. Sanjivini (supra) in protecting her appointment.

11. In the facts and circumstances of the case and following the law laid down by the Hon'ble Apex Court as followed in the case of Sanjivini (supra), we quash and set aside the impugned order Ex. A dated 25.8.2004 and declare that applicant's appointment to the post of LDC under the respondents is legal and valid and stands protected by the observations made by the Hon'ble Apex Court in Milind Katware's case (supra).....?

It could thus be seen that the learned Tribunal held that in view of the judgment of the Apex Court in the case of Milind Katware, the petitioner's appointment as LDC was legal and valid and it stood protected.

20. The respondent no.2 being aggrieved thereby, approached the Principal Seat of this Court at Mumbai. The Division Bench presided over by the then Chief Justice vide judgment and order dated 21.8.2007 allowed the petition and set aside the order passed by the School Tribunal. It will be relevant to refer to para no.5 of the judgment of the Division Bench of this Court in the said petition:

5. In view of the above reasoning, we are of the considered view that the respondent obtained appointment by annexing an incorrect certificate and his subsequent conduct disentitles him from claiming any equitable relief. The respondent has deprived a genuine person belonging to Halba Scheduled Tribe, from getting appointment and thus cannot be protected to take advantage of his own wrong. There is no reason for the Court to disturb the finding of facts arrived at by the Scrutiny Committee and no reason whatsoever has been given in the impugned judgment for not accepting the view of the Committee. The Court or the Tribunal would not embark upon the jurisdiction which is vested in the Scrutiny Committee. The view taken by the Committee calls for no interference. Resultantly, this writ petition is allowed. The impugned judgment of the Tribunal

dated 20th April, 2006 is set aside. The petitioners are at liberty to take action against the respondent in accordance with law.?

It could thus be seen that the Division Bench in unequivocal terms has held that the conduct of the petitioner disentitled him from claiming any equitable relief. It could thus be seen that the issue as to whether the petitioner was entitled to protection or not was an issue directly in contest between the parties which was held in favour of the petitioner herein by the learned Tribunal but reversed by a Division Bench of this Court. Undisputedly, the petitioner has not challenged the said findings and as such, the said findings have reached finality.

21. We find that the petitioner's case would fall in category (I) of the cases which have been carved out by Their Lordships of the Apex Court in the case of **Daryao** (cited supra). In view of the orders passed in Writ Petition No. 853/07, we find that the subsequent petition, i.e. Writ Petition No. 5305/10 itself was not tenable. Be that as it may, the prayer for grant of protection to the petitioner's service and for setting aside the termination were specifically made by the petitioner. Though there are no findings with regard to that in the said judgment by the Division Bench dated 19.3.2012, in view of the judgment of the Apex Court in the case of *Forward Constructions* (cited supra), it will have to be held that the said issue was considered and decided by the Court. The matter does not stop at that. The petitioner thereafter files a Review Application seeking review of the said judgment and order dated 19.3.2012; however, seeks liberty from this Court on 17.10.2012 to withdraw the Miscellaneous Civil Application for review with liberty to file substantive petition. Taking umbrella of the said liberty, the petitioner files the third petition wherein again an issue regarding protection and termination of the services is brought in issue. The petitioner does not press that petition also and seeks liberty to withdraw the petition with liberty to make a representation. After the representation having been rejected and after the judgment is delivered in the case of *Kavita Solunke*, the petitioner has now filed this fourth petition. It is pertinent to note that the judgment in the case of *Kavita Solunke* was delivered by Their Lordships of the Supreme Court on 9.8.2012. It could thus be seen that the date on which the Review Application was withdrawn, i.e. 17.10.2012 as well as the date on which the Writ Petition No. 5733/12 was withdrawn, i.e. 21.8.2013 the

judgment in the case of Kavita Solunke was very much available to the petitioner. However, the petitioner for the reasons best known has neither pressed into service the Review in Writ Petition No. 5305/10 nor the Writ Petition No. 5733/12.

22. In any case, we find that after the issue between the petitioner and the respondent with respect to protection of his services was contested and had attained finality by the judgment and order passed by Division Bench of this Court at Principal Seat in Writ Petition No. 853/07 dated 21.8.2007, no further petitions could have been entertained by this Court in view of the law laid down by the Apex Court in the case of Daryao (cited supra). As already discussed hereinabove, where a matter is contested between the parties and issue is decided on merits by the Court, it is binding on the parties and operates as a bar to the subsequent proceedings.

23. In that view of the matter, we are of the considered view that the present proceedings are not tenable in law, inasmuch as the judgment of the Division Bench of this Court at Principal Seat in Writ Petition No. 853/07 dated 21.8.2007 shall operate as a bar to subsequent original proceedings before this Court.

24. The petition is, therefore, found to be without merit and as such, rejected.

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