

Dr. E. Muralidharan Vs. Union of India (Uoi) Rep. by Secretary, Higher Education, Ministry of Human Resources Development, Government of India,

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SooperKanoon Citation : sooperkanoon.com/830258

Court : Chennai

Decided On : Nov-28-2008

Reported in : (2009)2MLJ417

Judge : A.K. Ganguly, C.J. and ;F.M. Ibrahim Kalifulla, J.

Acts : Code of Civil Procedure (CPC) - Sections 11; [Constitution of India](#) - Articles 32, 226, 226(2) and 329

Appeal No. : Writ Appeal No. 1242 of 2008

Appellant : Dr. E. Muralidharan

Respondent : Union of India (Uoi) Rep. by Secretary, Higher Education, Ministry of Human Resources Development, G

Advocate for Def. : P. Chandrasekaran, S.C.G.S.C. for Respondent 1 and ;R. Vijay Narayan, Sr. Counsel for Kartik Mukundan, Adv. for Respondents 2 to 4

Advocate for Pet/Ap. : Party-in-Person

Disposition : Appeal allowed

Judgement :

A.K. Ganguly, C.J.

1. Heard Dr. E. Muralidharan in person, Mr. R. Vijay Narayan, learned senior Counsel appearing for respondents 2 to 4 and Mr. P. Chandrasekaran, learned Senior Central Government Standing Counsel appearing for the first respondent. This appeal is directed against a judgment and order dated 22.9.2008 passed by a learned Judge of the writ court, whereby the writ petition filed by the petitioner-in-person was dismissed not on merit, but on the ground of maintainability. The ground of maintainability arises under the following facts.

2. The appellant moved the Honourable Supreme Court under Article 32 of the [Constitution of India](#) with the following prayer:

(i) To injunct the 2nd respondent from continuing in the post of Director of the Institute during the pendency of the above writ petition;

(ii) For ad-interim orders in terms of prayer (i) above and confirm the same after notice of motion; and

(iii) To pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and render justice.

3. It appears from the order of the Honourable Supreme Court dated 29.10.2007 that the learned Counsel for the appellant sought the Court's permission to withdraw the writ petition. The permission was granted and the writ petition was dismissed as withdrawn. The exact order of the Supreme Court is as follows:

Learned Counsel for the petitioner seeks permission to withdraw the petition. Permission granted. The writ petition is dismissed as withdrawn.

4. The appellant, who is appearing in person before us, submits that while the Supreme Court passed the order as set out hereinabove, the Supreme Court also gave him leave to move the High Court under Article 226.

5. The order which was passed by the Supreme Court was passed only in the presence of the learned Counsel for the appellant and nobody appears to have entered appearance on behalf of the respondents. Therefore, there is no question of the learned Counsel for the respondents accepting the aforesaid contention. We, therefore, cannot proceed on the basis that the Supreme Court granted the appellant leave since the leave has not been recorded in the body of the order. But one thing is clear from the text of the order set out above that the Supreme Court did not consider the matter on merits, nor did it hear the matter, as obviously it was not called upon to do so, since the appellant wanted to withdraw the writ petition. Therefore, none of the points raised by the appellant was decided. Now, the appellant has filed the present writ petition under Article 226 with the following prayer:

For the reasons stated above, the petitioner herein respectfully prays that this Hon'ble Court may be pleased to injunct the 2nd respondent from holding the post as the Director of IIT, Madras pending disposal of the aforesaid writ petition and pass such further or orders as this Hon'ble Court may deem fit and render justice.

The Honourable Court may be pleased to issue a writ in the nature of a writ of Quo Warranto or any other appropriate writ or order or direction to the 1st respondent to show on what authority the 2nd respondent can hold the post of the Director of the Indian Institute of Technology, Madras and pass such other order or orders as this Honourable Court may deem fit in the facts and circumstances of this case and render justice.

6. The prayers are almost the same. The learned Judge of the writ court held that since the appellant's previous petition under Article 32 was dismissed as withdrawn by the Supreme Court, the subsequent writ petition under Article 226 is barred. In coming to the said conclusion, the learned Judge of the writ court relied on a judgment of this Bench dated 10.9.2008 rendered in W.P. No. 33935 of 2007 and has quoted the same in paragraph 15 of his lordship's judgment.

7. We have seen the said judgment. In that case, the petition under Article 32 was moved before the Supreme Court and the Supreme Court was pleased to pass the following order:

Heard. The writ petition is dismissed.

Since the Supreme Court heard the matter and dismissed the writ petition under Article 32, this Bench held that a further writ petition under Article 226 on the same cause of action was not maintainable since on the same cause of action, the Supreme Court has given its verdict after hearing the appellant. Of course, the reasoning for dismissal is not indicated, but since the Supreme Court passed an order of dismissal after hearing the parties, even without disclosing the reason therefor, that is a final judgment on the matter since the Supreme Court is a Superior Court of Record with plenary powers and has the authority to say the last word on the subject. In other words, it is the highest court of the land. When the highest court of the land hears a matter and then dismisses it, with reason or without reason, that decision becomes final. That is why in the case referred to herein above, this Bench held that a subsequent writ petition on the same cause of action was not maintainable. But here, the Supreme Court has not heard the matter as it was not called upon to do so, as the appellant withdrew the writ petition and it was dismissed as withdrawn. Therefore, there is a fundamental difference between the two orders passed by the Hon'ble Supreme Court under Article 32 of the Constitution. The present case is not covered by the Bench decision of this Court dated 10.9.2008.

8. It is well known and cannot be disputed and has not been disputed before us that the scope of Article 226 is wider than Article 32. However on territorial limits an order under Article 32 can operate in any part of India, whereas an order under Article 226 has necessarily to operate within the State where the High Court is situate, subject to the exceptions under Article 226(2). Article 32 confers a fundamental right on a litigant to move the Supreme Court for enforcement of Fundamental Rights. The grievances which can be raised under Article 32 are to be limited to an examination of the question whether the Fundamental Right of the petitioner has been infringed or not. Article 226, on the other hand, has conferred a power on the High Court to entertain a proceeding for enforcement of a Fundamental Right covered by Part-III and 'for any other purpose'. This expression 'for any other purpose' has been judicially construed by the Honourable Apex Court to include enforcement of any other right, viz., statutory right or constitutional

right or may be even a common law right.

9. Article 226 of the Constitution has been designedly couched in a very comprehensive phraseology and it ex-facie confers very wide powers on the High Court to reach injustice wherever it is found. The Hon'ble Supreme Court has held that the powers of the High Court under Article 226 are wider than the powers of the English Courts to issue prerogative writs under English Law See *Dwarka Nath v. I.T. Officer* : [1965]57ITR349(SC) . That being the accepted position, this Court is of the opinion that the writ petition filed under Article 226 in this case cannot be held to be barred. Before a person's right to move a writ Court can be held to be barred, such bar must flow from some constitutional provision like Article 329(b) of the Constitution, either expressly or by necessary implication or from some firmly established practice on exercise of discretion by a writ court.

10. Here, the learned senior Counsel appearing for respondents 2 to 4 submits that such a bar is inherent in public policy. Learned senior Counsel has not been able to refer to any direct judgment on the point nor any provision of the Constitution which can be said to have barred the appellant's remedy under Article 226. We, therefore, are of the opinion that on vague grounds of public policy, we cannot say that the appellant's rights are barred under Article 226. It cannot be barred on public policy inherent in the doctrine of Res Judicata which is codified in Section 11 of the Civil Procedure Code. In the case of *Daryao v. State of U.P.* : [1962]1SCR574 , decided by the Constitution Bench of the Supreme Court, it has been held by Justice Gajendragadkar (as His Lordship then was) that if a writ petition is considered on merits and is dismissed, the decision pronounced in that case will bind the parties unless it is modified or reversed in appeal. In such a case, it will not be open to the parties to ignore the said judgment and move the Supreme Court under Article 32 by an original petition on the same facts. But the learned Judge hastened to add that if a writ petition in the High Court is dismissed not on the merits, but because of laches of the parties or if 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, unless the facts found by the High Court are relevant for consideration by the Supreme Court under Article 32. The learned Judges specifically held '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'. The learned Judge made it clear that those principles were laid down in the context of the Doctrine of Res Judicata (See paragraph-19 at page-1466 of the report)

11. However, in *Virudhunagar S.R. Mills v. Madras Government* reported in : [1968]70ITR726(SC) , Chief Justice Wanchoo, speaking for the Constitution Bench, said that if the writ petition is dismissed on merits by a speaking order that bars a petition under Article 32 even if no notice is issued to other side before such dismissal (See paragraphs 6 & 7). In coming to the said conclusion, the learned Judges relied on the principles laid down in *Daryao's case*.

12. In *Ahmedabad Mfg. & Calico Printing Co. v. Workmen* : (1981)ILLJ489SC , the Hon'ble Supreme Court held that the High Court did not exercise its discretion on a proper and sound basis by dismissing the writ petition in limine on the sole ground that the application for special leave on the same facts and grounds had been withdrawn unconditionally. (See paragraph-20 at page-964 of the report). The Supreme Court has specifically held in the aforesaid case that a non-speaking order of dismissal cannot operate as res judicata. An order permitting the withdrawal of the leave petition for the same reason cannot operate as res judicata.

13. Following the principles laid down by the Supreme Court, this Court is of the opinion that the bar of res judicata does not operate in this case. The reasoning discussed in the aforesaid cases should apply here in a reverse situation namely, where a petition under Article 32, dismissed as withdrawn without any discussion on the merits of the case, that cannot bar the petitioner's access to a writ court under Article 226.

14. Therefore, the writ petition is maintainable and the impugned judgment of the learned single Judge is accordingly set aside. The matter is remanded for fresh consideration on merits before K. Chandru, J. Since the matter is pending in this Court for some time, we hope and expect that the matter is disposed of by the learned Judge as early as possible, but preferably within a period of two months from date. We make it clear that we have not made any pronouncements on the

merits of the case. The writ appeal is accordingly allowed. The interim order which was granted during the pendency of the writ petition, that the holding of office by the Director of I.I.T., viz., the fourth respondent herein, will abide by the result of the writ petition continues. There shall be no order as to costs. Consequently, M.P. No. 1 of 2008 is closed.

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