State Of U. P.

Vs

Nawab Hussain

Civil Appeal No. 2339 of 1968

(Y. V. Chandrachud, P. K. Goswami, P. N. Shinghal JJ)

04.04.1977

JUDGMENT

SHINGHAL, J. –

1. Respondent Nawab Hussain was a confirmed Sub-Inspector of Police in Uttar Pradesh. An anonymous complaint was made against him and was investigated by Inspector Suraj Singh who submitted his report to the Superintendent of Police on February 25, 1954. Two cases were registered against him under the Prevention of Corruption Act and the Penal Code. They were also investigated by Inspector Suraj Singh, and the respondent was dismissed from service by an order of the Deputy Inspector General of Police dated December 20, 1954. He filed an appeal, but it was dismissed on April 17, 1956. He then filed a writ petition in the Allahabad High Court for quashing the disciplinary proceedings on the ground that he was not afforded a reasonable opportunity to meet the allegations against him and the action taken against him was mala fide. It was dismissed on October 30, 1959. The respondent then filed a suit in the Court of Civil Judge, Etah, on January 7, 1960, in which he challenged the order of his dismissal on the ground, inter alia, that he had been appointed by the Inspector General of Police and that the Deputy Inspector General of Police was not competent to dismiss him by virtue of the provisions of Article 311(1) of the Constitution. The State of Uttar Pradesh traversed the claim in the suit on several grounds, including the plea that the suit was barred by res judicata as "all the matters in issue in this case had been raised or ought to have been raised both in the writ petition and special appeal". The trial Court dismissed the suit on July 21, 1960, mainly on the ground that the Deputy Inspector General of Police would be deemed to be the plaintiff's appointing authority. It however held that the suit was not barred by the principle of res judicata. The District Judge upheld the trial Court's judgment and dismissed the appeal on February 15, 1963. The respondent preferred a second appeal which has been allowed by the impugned judgment of the High Court dated March 27, 1968, and the suit has been decreed. The appellant State of Uttar Pradesh has therefore come up in appeal to this Court by special leave.

2. The High Court has taken the view that the suit was not barred by the principle of constructive res judicata and that the respondent could not be dismissed by an order of the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. As we have reached the conclusion that the High Court committed an error of law in deciding the objection regarding the bar of res judicata, it will not be necessary for us to examine the other point.

3. The principle of estoppel per rem judicatam is a rule of evidence. As has been stated in Marginson v. Blackburn Borough Council ((1939) 2 KB 426 at p. 437), it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories : (i) the finality and conclusiveness of judicial decisions for the final termination of

disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata.

4. But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell, L.J., has answered it as follows in Greenhalgh v. Mallard ((1947) All ER 255 at p. 257) :

I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has some times been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle.

5. These simple but efficacious rules of evidence have been recognised for long, and it will be enough to refer to this Court's decision in Gulabchand Chhotalal Parikh v. State of Bombay ((1965) 2 SCR 547 : AIR 1965 SC 1153) for the genesis of the doctrine and its development over the years culminating in the present Section 11 of the Code of Civil Procedure, 1908. The section, with its six explanations, covers almost the whole filed, and has admirably served the purpose of the doctrine. But it relates to suits and former suits, and has, in terms, no direct application to a petition for the issue of a high prerogative writ. The general principles of res judicata and constructive res judicata have however been acted upon in cases of renewed applications for a writ. Reference in this connection may be made to ex parte Thompson (6 QB 720). There A. J. Stephens moved for a rule calling upon the authorities concerned to show cause why a mandamus should not issue. He obtained a rule nisi, but it was discharged as it did not appear that there had been a demand and a refusal. He applied again saying that there had been a demand and a refusal since then. Lord Denman, C.J., observed that as Stephens was making an application which had already been refused, on fresh materials, he could not have "the same application repeated from time to time" as they had "often refused rules" on that ground. The same view has been taken in England in respect of renewed petitions for certiorari, quo warranto and prohibition, and, as we shall show, that is also the position in this country.

6. We find that the High Court in this case took note of the decisions of this Court in L. Janakirama Iyer v. P. M. Nilakanta Iyer ((1962) Supp 1 SCR 206 : AIR 1962 SC 633); Devilal Modi v. Sales

Tax Officer, Ratlam ((1965) 1 SCR 686 : AIR 1965 SC 1150 : (1965) 1 SCJ 579) and Gulabchand Chhotalal Parikh v. State of Bombay (supra) and reached the following conclusion :

On a consideration of the law as laid down by the Supreme Court in the above three cases I am inclined to agree with the alternative argument of Sri K. C. Saxena, learned Counsel for the plaintiff-appellant, that the law as declared by the Supreme Court in regard to the plea of res judicata barring a subsequent suit on the ground of dismissal of a prior writ petition under Article 226 of the Constitution is that only that issue between the parties will be res judicata which was raised in the earlier writ petition and was decided by the High Court after contest. Since no plea questioning the validity of the dismissal order based on the incompetence of the Deputy Inspector General of Police was raised in the earlier writ petition filed by the plaintiff in the High Court under Article 226 of the Constitution and the parties were never at issue on it and the High Court never considered or decided it, I think it is competent for the plaintiff to raise such a plea in the subsequent suit and bar of res judicata will not apply.

We have gone through these cases. Janakirama Iyer's was a case where the suit which was brought by defendants 1 to 6 was withdrawn during the pendency of the appeal in the High Court and was dismissed. In the mean time a suit was filed in a representative capacity under Order 1 Rule 8 C.P.C. One of the defences there was the plea of res judicata. The suit was decreed. Appeals were filed against the decree, but the High Court dismissed them on the ground that there was no bar of res judicata. When the matter came to this Court it was "fairly conceded" that in terms Section 11 of the Code of Civil Procedure could not apply because the suit was filed by the creditors defendants 1 to 6 in their representative character and was conducted as a representative suit, and it could not be said that defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who had brought the subsequent suit were the same parties or parties who claimed through each other. It was accordingly held that where Section 11 was thus inapplicable, it would not be permissible to rely upon the general doctrine of res judicata, as the only ground on which res judicata could be urged in a suit could be the provisions of Section 11 and no other. That was therefore quite a different case and the High Court failed to appreciate that it had no bearing on the present controversy.

7. The High Court then proceeded to consider this Court's decisions in Devilal Modi's case (supra) and Gulabchand's case (supra). Gulabchand's was the later of these two cases. The High Court has interpreted it to mean as follows :

> It was held that the decision of the High Court on a writ petition under Article 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter. As appears from the report the above was the majority view of the Court and the question whether the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceedings was left open. The learned Judges took care to observe that they made it clear that it was not necessary and they had not considered that the principles of constructive res judicata could be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

As we shall show, that was quite an erroneous view of the decision of this Court on the question of constructive res judicata. It will help in appreciating the view of this Court correctly if we make a brief reference to the earlier decisions in Amalgamated Coalfields Ltd. v. Janapada Sabha,

Chhindwara ((1962) 1 SCR 1 : AIR 1961 SC 964 : (1962) 1 SCJ 445) and Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara ((1963) Supp 1 SCR 172 : AIR 1964 SC 1013), which was also a case between the same parties. In the first of these cases a writ petition was filed to challenge the coal tax on some grounds. An effort was made to canvass an additional ground, but that was not allowed by this Court and the writ petition was dismissed. Another writ petition was filed to challenge the levy of the tax for the subsequent periods on grounds distinct and separate from those which were rejected by this Court. The High Court held that the writ petition was barred by res judicata because of the earlier decision of this Court. The matter came up in appeal to this Court in the second case. The question which directly arose for decision was whether the principle of constructive res judicata was applicable to petitions under Articles 32 and 226 of the Constitution and it was answered as follows :

> It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the Court in another form. The grounds now urged are entirely distinct, and so, the decision of the High Court can be upheld only if the principle of constructive res judicata can be said to apply to writ petitions filed under Article 32 or Article 226. In our opinion, constructive res judicata which is a special and artificial from of res judicata enacted by Section 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Article 32 or Article 226. We would be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impugned tax liability is for different years.

It may thus appear that this Court rejected the application of the principle of constructive res judicata on the ground that it was a "special and artificial form of res judicata" and should not generally be applied to writ petitions, but the matter did not rest there. It again arose for consideration in Devilal Modi's case (supra). Gajandragadkar, J., who had spoken for the Court in the second case of the Amalgamated Coalfields Ltd. spoke for the Court in that case also. The petitioner in that case was assessed to sales tax and filed a writ petition to challenge the assessment. The petition was dismissed by the High Court and he came in appeal to this Court. He sought to make some additional contentions in this Court, but was not permitted to do so. He therefore filed another writ petition in the High Court raising those additional contentions and challenged the order of assessment for the same year. The High Court dismissed the petition on merits, and the case came up again to this Court in appeal. The question which specifically arose for consideration was whether the principle of constructive res judicata was applicable to writ petitions of that kind. While observing that the rule of constructive res judicata was "in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure", this Court declared the law in the following terms :

> This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred.

While taking that view, Gajendragadkar, C.J., tried to explain the earlier decision in Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara (supra) and categorically held that the principle of constructive res judicata was applicable to writ petitions also. As has been stated, that case was brought to the notice of the High Court, but its significance appears to have been lost because of the decisions in Janakirama Iyer v. P. M. Nilakanta Iyer (supra) and Gulabchand's case. We have made a reference to the decision in Janakirama Iyer's case which has no bearing on the present controversy, and we may refer to the decision in Gulabchand's case as well. That was a case where the question which specifically arose for consideration was whether a decision of the High Court on merits on a certain matter after contest, in a writ petition under Article 226 of the Constitution, operates as res judicata in a regular suit with respect to the same matter between the same parties. After a consideration of the earlier decisions in England and in this country, Raghubar Dayal, J., who spoke for the majority of this Court, observed as follows :

> These decisions of the Privy Council well lay down that the provisions of Section 11, C.P.C. are not exhaustive with respect to an earlier decision in a proceeding operating as res judicata in a subsequent suit with respect to the same matter inter parties, and do not preclude the application to regular suits of the general principles of res judicata based on public policy and applied from ancient times.

He made a reference to the decision in Daryao v. The State of U.P. ((1962) 1 SCR 574 : AIR 1961 SC 1457 : (1962) 1 SCJ 702) on the question of res judicata and the decisions in Amalgamated Coalfields Ltd. v. Janapada Sabha Chhindwara and Devilal Modi's case (supra) and summarised the decision of the Court as follows :

> As a result of the above discussion, we are of opinion that the provisions of Section 11, C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial.

He however went on to make the following further observation :

> We may make it clear that it was not necessary, and we have not considered, whether the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

It was this other observation which led the High Court to take the view that the question whether the principle of constructive res judicata could be invoked by a party to a subsequent suit on the ground that a plea which might or ought to have been raised in the earlier proceeding but was not so raised therein, was left open. That, in turn, led the High Court to the conclusion that the principle of constructive res judicata could not be made applicable to a writ petition, and that was why it took the view that it was competent for the plaintiff in this case to raise an additional plea in the suit even though it was available to him in the writ petition which was filed by him earlier but was not taken.

As is obvious, the High Court went wrong in taking that view because the law in regard to the applicability of the principle of constructive res judicata having been clearly laid down in the decision in Devilal Modi's case, it was not necessary to reiterate it in Gulabchand's case as it did not arise for consideration there. The clarificatory observation of this Court in Gulabchand's case was thus misunderstood by the High Court in observing that the matter had been "left open" by this Court.

8. It is not in controversy before us that the respondent did not raise the plea, in the writ petition which had been filed in the High Court, that by virtue of clause (1) of Article 311 of the Constitution he could not be dismissed by the Deputy Inspector General of Police as he had been appointed by the Inspector General of Police. It is also not in controversy that was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition, but he contended himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide. It was therefore not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principle of constructive res judicata, and the High Court erred in taking a contrary view.

9. The appeal is allowed, the impugned judgment of the High Court dated March 27, 1968, is set aside and the respondent's suit is dismissed. In the circumstances of the case, we direct that the parties shall pay and bear their own costs.

</html