CASE NO.:
Appeal (crl.) 1201 of 2006

PETITIONER:
Srikant

RESPONDENT:
District Magistrate, Bijapur & Ors

DATE OF JUDGMENT: 22/11/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (CRL.) No.666 of 2006)

ARIJIT PASAYAT, J.

Leave granted.

Appellant calls in question legality of the judgment of the Division Bench of the Karnataka High Court dismissing the Habeas Corpus Petition filed questioning detention of his brother Shri Shivalingappa (hereinafter referred to as the 'detenu') under the provisions of the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985 (in short the 'Act'). The detention order was passed on 26.5.2005 by the District Magistrate holding that the detenu was indulging in such activities which amounted to immoral activities as detailed in the Act. The order of detention was approved by the State Government and the Advisory Board. The main ground of challenge in the writ petition was alleged non-compliance with the procedure contemplated under Article 22(5) of the Constitution of India, 1950 (in short the 'Constitution'). It was specifically averred that detaining authority has not provided the opportunity of making representation and the right of the detenu to make such representation was not made known to the detenu. The detaining authority and other respondents resisted the petition on the ground that the appellant had already moved the High Court by filing a writ petition i.e. W.P. (HC) No. 56 of 2005 and the same had been dismissed by order dated 6.10.2005 and there was no challenge to the same. It was pointed out that the grounds taken in the Second Writ Petition were identical to those taken in the earlier writ petition and/or were available to be raised when the earlier writ petition was filed. It was contended by the appellant before the High Court that in view of the decision of this Court in Ghulam Sarwar v. Union of India and Ors. (AIR 1967 SC 1335) the Principle of res judicata or constructive res judicata would apply only in the case of civil actions and proceedings and do not bar subsequent writ petition in the matter of habeas corpus petition where personal liberty of citizen is involved. The High Court found that though the successive writ petition can be filed challenging the detention, yet it has to be shown that fresh grounds were involved and not the grounds which were already raised or were available to be raised. Accordingly the writ petition was dismissed.

Learned counsel for the appellant submitted that though the petition had become infructuous by passage of time, the issues of great importance were involved and the matter should be decided on merits. It was submitted that by a series of decisions it has been held that successive habeas corpus petitions can be filed and the principle of res judicata or constructive res judicata has no role to play.

Learned counsel for the respondents submitted that in the second writ petition no new ground was taken and since points were already raised or were available to be raised maintainability of the subsequent writ petition was ruled out.

The question relating to res judicata in habeas corpus petition was considered by this Court in several cases. In T.P. Moideen Koya v. Govt. of Kerala and Ors. (2004 (8) SCC 106) after reference to Gulam Sarwar's case (supra) this Court held as under :

"This question was examined in considerable detail by a Constitution Bench in Ghulam Sarwar v. Union of India and Ors. (AIR 1967 SC 1335). In this case the petitioner who was detained under Section 3 (2) (g) of the Foreigners Act 1946 filed a petition for issuing a writ of habeas corpus which was dismissed by a learned Single Judge of the High Court and the said judgment was allowed to become final. Thereafter the petitioner filed a writ petition under Article 32 of the Constitution in the Supreme Court praying that he may be set at liberty. Subba Rao, CJ, after referring to the Daryao v. State of U.P. (supra), in Re Hastings (2), 1958 3 All ER 625, in Re Hastings (3), 1959 1 All ER 698 and some other English and American cases held, as under:

"The principle of application of res judicata is not applicable in Writ of Habeas Corpus, so far as High Courts are concerned. The principles accepted by the English and American Courts, viz., that res judicata is not applicable in Writ of Habeas Corpus holds good. But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a Court other than the High Court, viz., the Supreme Court. The order of the High Court in such a case will not be res judicata as held by the English and the American Courts because it is either not a judgment or because the principle of res judicata is not applicable to a fundamentally lawless order."

In Nazul Ali Molla etc. v. State of West Bengal (1969 (3) SCC 698) the petitioners had challenged their detention under Section 3 (2) of the Preventive Detention Act by filing a writ petition under Article 226 of the Constitution before the Calcutta High Court, but the petition was dismissed. Thereafter they filed a writ petition under Article 32 of the Constitution in this Court. The objections

raised by the State regarding maintainability of the petition was repelled and it was held that a petition under Article 32 of the Constitution for the issue of writ of habeas corpus would not be barred on the principle of res judicata if a petition for a similar writ under Article 226 of the Constitution before a High Court has been decided and no appeal is brought up to the Supreme Court against that decision. Similar view has been taken in Niranjan Singh v. State of Madhya Pradesh (1972 (2) SCC 542).

11. The principle which can be culled out from this authorities is that the bar of res judicata or constructive res judicata would apply even to a petition under Article 32 of the Constitution where a similar petition seeking the same relief has been filed under Article 226 of the Constitution before the High Court and the decision rendered against the petitioner therein has not been challenged by filing an appeal in the Supreme Court and has been allowed to become final. However, this principle, namely, the bar of res judicata or principles analogous thereto would not apply to a writ of habeas corpus where the petitioner prays for setting him at liberty. If a person under detention files a writ of habeas corpus under Article 226 of the Constitution before the High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking order) and the said decision is not challenged by preferring a Special Leave Petition under Article 136 of the Constitution and is allowed to become final, it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of habeas corpus.

It is well settled that a decision pronounced by a Court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by law. It is in the interest of public at large that finality should attach to the binding decisions pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. While hearing a petition under Article 32 it is not permissible for this Court either to exercise a power of review or some kind of an appellate jurisdiction over a decision rendered in a matter which has come to this Court by way of a petition under Article 136 of the Constitution. The view taken in Bhagubhai Dullabhbhai Bhandari v. District Magistrate (AIR 1956 SC 585) that the binding nature of the conviction recorded by the High Court against which a Special Leave Petition was filed and was dismissed can not be assailed in proceedings taken under Article 32 of the Constitution was approved in Daryao v. State of U.P. (supra) (see para 14 of the report)."

In Lallubhai Jogibhai Patel v. Union of India and Ors. (AIR 1981 SC 728) it was noted as follows:

"The preliminary question, therefore, to be considered is, whether the doctrine of constructive res judicata applies to a subsequent petition for a writ of habeas corpus on a ground which he "might and ought" to have taken in his earlier petition for the same relief. In England, before the Judicature Act, 1873, an applicant for habeas corpus had a right to go from court to court, but not from one Bench of a court to another Bench of the same Court. After the Judicature Act, 1873, this right was lost, and no second application for habeas corpus can be brought in the same court, except on fresh evidence. In re Hastings (No. 3) [1958] 3 All E.R. 625 Lord Parker, C.J., after surveying the history of the right of habeas corpus, arrived at the conclusion that it was never the law that in term time, successive writs of habeas corpus lay from Judge to Judge. In re Hastings (No. 4) [1959] 1 All E.R. 698. Harman, J. pointed out that since the Judicature Act had abolished the three independent courts, namely, the Court of Exchequer, the King's Bench Division, and the Common Pleas, and had constituted one High Court, when an application for writ of habeas corpus has been disposed of by one Divisional Court, no second application on the same ground lies to another Divisional Court of the High Court. This position was given statutory recognition in the Administration of Justice Act, 1960."

In the said case reference was also made to the earlier decision in Gulam Sarwar's case (supra). The position was finally summed up as follows:

"13. The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same relief."

Whether any new ground has been taken, has to be decided by the Court dealing with the application and no hard and fast rule can be laid down in that regard. But one thing is clear, it is the substance and not the form which is relevant. If some surgical changes are made with the context, substance and essence remaining the same, it cannot be said that challenge is on new or fresh grounds.

The appeal is accordingly disposed of.