

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE PRASENJIT BISWAS

**MAT 204 of 2024
CAN 2 of 2024**

**Dipak Kumar Dutta
Vs.
Union of India & Ors.**

&

**MAT 2278 of 2023
CAN 1 of 2024
CAN 2 of 2024**

**Maulana Abdul Kalam Azad Institute
Vs.
Union of India & Anr.**

Appearance:

For the Appellant (MAT 204 of 2024)	:	Mr. Souvik Nandy, Adv.
&		Mr. Shanto Kumar Gangopadhyay, Adv.
For the Respondent (MAT 2278 of 2024)		Mr. Arun Kumar Chakraborty, Adv.
		Ms. Subhosree Banerjee, Adv.
For the Appellant (MAT 2278 of 2024)	:	Mr. Piyush Chaturvedi, Adv.
&		Mr. Santanu Singha, Adv.
For the Respondent (MAT 204 of 2024)		Mr. Amit Halder, Adv.
		Mr. Amit Kumar Roy, Adv.

Judgment On : 23.12.2024

Harish Tandon, J.:

Both the appeals are taken up together having assailed the common order by the respective appellants in order to avoid the repetition of facts and the point of law agitated by the respective parties.

By the impugned judgment and order dated 4th October, 2023, the Single Bench allowed the writ petition being WPA 9996 of 2019 by quashing and setting aside the disciplinary proceeding as well as the penalty imposed on the ground of malice and bias and directed the reinstatement of the writ petitioner therein to the post which he held prior to the initiation of the disciplinary proceeding. The respondent in the writ petition namely, Maulana Abdul Kalam Azad Institute of Asian Studies, filed MAT 2278 of 2023 challenging the aforementioned impugned judgment and order in its entirety; on the other hand, the writ petitioner filed MAT 204 of 2024 assailing the said aforementioned judgment and order on a limited ground that while directing the reinstatement of the writ petitioner to its post held prior to the initiation of the disciplinary proceeding upon having quashed and set aside the penalty imposed upon him, he is entitled to a monetary benefit for such interregnum period.

Before we proceed to decide the point urged before us it would be apposite and profitable to adumbrate the salient facts leading to the institution of the writ petition by the said Dipak Kr. Dutta (referred to as 'the appellant' for the sake of convenience herein). The said appellant joined as Administrative-cum-Finance Officer at Moulana Abdul Kalam Azad Institute of Asian Studies, Kolkata (referred to as 'the Institute') upon taking a lien from Birbal Sahni Institute of Palaeobotany, Lucknow for a period of 2 years which expired on 30th March, 2011. Since the Institute was not confirming the appointment of the appellant, the writ petition being WP 9327(W) of 2011 was filed before this Court which was eventually allowed by directing the authorities to confirm the appointment of the appellant. The Order of

the Single Bench was assailed before the Division Bench by the Institute but the said *intra* court appeal was ultimately dismissed. In course of his service, the petitioner allegedly registered several complaints against the director of the said institute relating to the financial irregularities. Ultimately an order of suspension from discharging the duties was issued upon the appellant in contemplation to initiation of the disciplinary proceeding. Subsequently, by virtue of the Memorandum dated 7th December, 2015 the charge-sheet was issued upon the appellant indicating the articles of charges and sought for a response from the appellant. The petitioner challenged the order of suspension by filing writ petition being WP 27725 (W) of 2015 before this Court prior to the service of the charge-sheet. Since the charge-sheet was submitted amidst the pendency of the said writ petition, the appellant filed an application being CAN 1 of 2016 in the said writ petition bringing the factum of issuance of the said charge-sheet and further representation was made by the appellant so that the same may be treated as a part of the writ petition. The said application was directed to be tagged with the main writ petition and to be disposed of at the time of final hearing. Further application being CAN 3065 of 2016 was filed by the appellant for stay of the departmental proceeding with categorical averment that the director of the said institute being a party-respondent in the said writ petition is exercising her authority beyond his jurisdiction in issuing the orders dated 30th December, 2015, 11th January, 2016 and 30th January, 2016. It would further transpire that another writ petition was filed being WP 26163 (W) of 2015 by the appellant claiming relief relating to an audit report in respect of which a summary inspection was forwarded to the

relevant higher authority of the institute. Both the writ petitions were tagged together and finally disposed of on 07.04.2017 by the Single Bench and were ultimately dismissed. The record does not reveal that the said judgment and order dated 7th April, 2017 is further assailed before the higher forum. However, after accepting the enquiry report submitted by the enquiry officer the disciplinary proceeding was initiated upon issuance of second show cause notice which culminated into an order of compulsory retirement being the subject matter of challenge in the writ petition being WP 9996 (W) of 2019 by the appellant.

The Single Bench after noticing the facts proceeded to set aside the penalty imposed upon the appellant on a premise that the director of the institute being a disciplinary authority should not decide the proceeding more particularly, when a serious allegation as to financial irregularities was projected against her by applying the principle that a person cannot decide his own cause. *Apropos* the setting aside of the punishment, further direction was passed upon the institute to reinstate the appellant to the post occupied by him before the order dated 09.05.2017.

As indicated above, both the appellant and institute have challenged the impugned order by filing a separate appeal which is analogously heard. The appellant has taken a plea that the moment the punishment imposed by the disciplinary authority is quashed and set aside having found the same to be blatantly illegal and directed the reinstatement of the petitioner to the post which he held prior to the order of suspension, the monetary benefit should have been extended to the appellant for the interregnum. On

the other hand, the institute contends that the order impugned in the appeal suffered from severe infirmities and illegalities as the core issue which was agitated before the Single Bench was not addressed in accordance with law.

Since the institute challenged the impugned order in its entirety, we invited the counsel representing the institute to address us first. Mr. Chaturvedi, the learned advocate appearing for the institute vociferously submits that in an earlier round of litigation challenge was not only restricted to the order of suspension but also the charge-sheet issued by the director of the institute which culminated into a final order upholding the competence and the authority of the director to be within the purview of the relevant rules and law, cannot be reopened in a subsequent proceeding. In other words, it is sought to be contended that the moment the Court in an earlier round of litigation upheld the issuance of order of suspension and competence to issue charge-sheet, the another Coordinate Bench cannot take a diametrically opposite decision. Mr. Chaturvedi thus contends that the principle of *res judicata* is attracted and the issue which had been directly and/or substantially an issue in an earlier round of litigation, having decided finally, cannot be reopened. Mr. Chaturvedi audaciously submits that the principle of *res judicata* is based upon a public policy to bring a quietus to the issue earlier decided to be not reopened again, and therefore, the Single Bench ought to have dismissed the writ petition. In support of the aforesaid contention, Mr. Chaturvedi relies upon a judgment of the Apex Court in ***M. Nagabhushana vs. State of Karnataka & Ors., reported in (2011) 3 SCC 408*** and ***K. K. Modi vs. K.N. Modi & Ors.,***

reported in (1998) 3 SCC 573. He thus concludes that the Single Bench did not take into consideration the aforesaid legal proposition of law universally applied in a legal parlance and therefore the impugned order is liable to be set aside.

Mr. Nandy, the learned advocate appearing for the appellant submits that ordinarily the principle of *res judicata* applies in relation to civil suits and mere dismissal of the writ petition does not create any embargo in filing the subsequent writ petition and relies upon a judgment of the Apex Court in case of **Workmen of Cochin Port Trust vs. Board of Trustees of the Cochin Port Trust & Anr., reported in (1978) 3 SCC 119.** Mr. Nandy further relies upon a Full Bench decision of this Court in **Ratanlal Nahata & etc. vs. Nandita Bose & etc., reported in (1998) 2 CHN 166** in support of the contention that Code of Civil Procedure is not applicable in a proceeding under Article 226 of the Constitution but only the procedural aspect thereof may *mutatis mutandis* apply. Lastly, Mr. Nandi relies upon another judgment of the Supreme Court in case of **Ferro Alloys Corpn. Ltd. & Anr. Vs. Union of India & Ors., reported in (1999) 4 SCC 149,** on the proposition that the principle of constructive *res judicata* ought not to have applied in a writ proceeding. He thus submits that the plea of *res judicata* as taken by the counsel for the institute have no manner of application. On the score of monetary benefits, Mr. Nandy submits that the moment the appellant is reinstated to the post upon having found the disciplinary proceeding to be violative of the principle of natural justice, the Court ought to have extended such benefit and therefore no fetter is imposed upon the

appellate Court to modify the impugned judgment by extending monetary benefits.

The principle or doctrine of *res judicata* is well-known; even recognised under the Indian jurisprudence before it shaped as a bar in a legal system finding place in a statute book. Aforesaid doctrine is founded upon a legal policy creating an embargo upon the litigant to approach the Court for a decision on the issues/controversies directly or substantially in an earlier round of litigation to be decided in a subsequent round of litigation. It aimed to bring quietus to an issue and is primarily founded partly on the maxim “*interest reipublicae ut sit finis litium*” meaning that there should be an end to a litigation and partly on “*nemo debet bis vexari pro una at eadem causa*” meaning no man should be vexed twice over the same cause. It also extended its horizon to a situation where the point of attack or defence was also available at the time of an earlier litigation, having not taken, it would also come within the ambit of the principle of *res judicata* and it is commonly known as constructive *res judicata*. The rule of doctrine of *res judicata* or constructive of *res judicata* is predominantly based upon a principle of equity, good conscience and justice and it would not be fair that the issue concluded earlier should be permitted to be raised at the later proceeding. It is to be borne in mind that the doctrine of *res judicata* is never intended to prevent the new decision but expanded to an arena of new investigation on the issues as a person cannot be vexed twice for the self-same issues. The *res judicata* is predominantly treated as an estoppel by judgment having remote nexus with the estoppel on issues.

Bearing in mind the broad concept of the *res judicata* as succinctly narrated hereinbefore the Apex Court in ***M. Nagabhushana (supra)*** held:

“11. We find that disregarding the aforesaid clear finding of this Court, the appellant, on identical issues, further filed a new writ petition out of which the present appeal arises. That writ petition, as noted above, was rejected both by the learned Single Judge and by the Division Bench in clear terms. It is obvious that such a litigative adventure by the present appellant is clearly against the principles of *res judicata* as well as principles of constructive *re judicata* and principles analogous thereto.

12. The principles of *res judicata* are of universal application as they are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. This doctrine of *res judicata* is common to all civilised system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.”

Before the aforementioned judgment rendered by the Apex Court, in ***K. K. Modi (supra)*** the Apex Court highlighted the aforesaid concept as an abuse of the process of the Court in the event, an *an quietus* is not brought to a litigation in the following:

“44. One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as *res judicata*. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of the court’s discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The court should also be satisfied that there is no change of the suit succeeding.”

We do not find any contrary view having expressed by the Apex Court in ***Workmen of Cochin Port Trust (supra)*** relied upon by the counsel for the appellant. Though it has been held that by incorporation of the specific provision relating to *res judicata* under Section 11 of the Code of Civil Procedure, it is generally applicable to the civil suits but has its equal applicability to other proceedings as a principle governing the field and even recognized the applicability of constructive *res judicata* in the writ proceedings in the following:

“9. It is well-known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then

also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.”

A distinguishing feature can be noticed from the said report that in the said case the writ petition was dismissed *in limine* without making any effective adjudication on the issues involved therein and in such perspective it was held that the moment no decision has been taken deciding an issue it may not invite such principle in the following:

“10. In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this Court, on almost all grounds which were in the subsequent writ proceeding agitated in the High Court. There is no question, therefore, of applying the principles of constructive res judicata in this case. What is, however, to be seen is whether from the order dismissing the special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken

to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award. A writ proceeding is a different proceeding. Whatever can be held to have been decided expressly, implicitly or even constructively while dismissing the special leave petition cannot be re-opened. But the technical rule of res judicata, although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issues must have been decided. It is not safe to extend the principle of res judicata to such an extent so as to found it on mere guesswork. To illustrate our view point, we may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the writ petition is dismissed after contest by a speaking order obviously it will operate as res judicata in any other proceeding, such as, of suit, Article 32 or Article 136 directed from the same order or decision. If the writ petition is dismissed by a speaking order either at the threshold or after

contest, say, only on the ground of laches or the availability of an alternative remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of res judicata. Of course, a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly even if one writ petition is dismissed in limine by a non-speaking one word order 'dismissed', another writ petition would not be maintainable because even the one-word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter; then no merit can be deemed to have been necessarily and impliedly decided and any other remedy of suit or other proceeding will not be barred on the principle of res judicata."

The reliance of a Full Bench decision of this Court in ***Ratanlal Nahata & etc. (supra)*** by the counsel for the appellant appears to be misplaced in the facts and circumstances of the instant case. By virtue of Article 53 of the writ rules framed by the High Court, the provision of the Code of Civil Procedure was applicable *mutatis mutandis* to the writ

proceeding. It was sought to be argued that by virtue thereof all the provisions of the Code of Civil Procedure would be applicable to writ proceeding which was repelled by the Full Bench. However, the Full Bench also did not rule out in certainty the applicability of the doctrine of *res judicata* as a principle based upon the public policy to apply in a writ proceeding in the following:

“1. Code of Civil Procedure does not apply to a writ proceeding under Article 226 of the Constitution of India, Courts, however, sometimes constructively apply certain basic principles enshrined therein to the writ proceedings, on grounds of public policy or dictates of reason or necessity whenever it is found to be essential for the effective administration of justice.”

The judgment rendered in *Ferro Alloys Corpn. Ltd. & Anr. (supra)* relied upon by the counsel for the appellant is relatable to the issue attracting the constructive *res judicata*. It is held that the care and caution should be taken in applying such principle whether the plea agitated in a subsequent proceeding was in fact available in an earlier round of litigation. It is thus imperative on the part of the court to find whether a plea was available to the litigant as a ground of attack or defence in an earlier round of litigation and if it is not so the constructive *res judicata* would not apply.

There is no quarrel to such proposition of law as the constructive *res judicata* would only be attracted in the event, a plea was available as a ground of attack or defence in the earlier round of litigation which would

further be fructified by explanation IV to Section 11 of the Code of Civil Procedure.

The law initiated in the aforementioned reports does not rule out the applicability of the doctrine of *res judicata* in a writ proceedings based upon a public policy; even the principle of constructive *res judicata* shall also be attracted provided a plea of defence or attack taken in a subsequent litigation was available in an earlier litigation. The reports as relied upon does not in explicit term exclude the applicability the doctrine of *res judicata* in a writ proceeding which is based upon a public policy.

Let us now, consider whether the aforesaid doctrine applies in the facts of the instant case. We have succinctly narrated the salient facts of the case and it is undisputed that an earlier writ petition being WP 27725 (W) of 2015 was filed by the appellant assailing the order of suspension imposed upon him. Amidst the pendency of the said writ petition the charge-sheet was also issued and the same was brought to the notice of the Court by filing CAN 1 of 2015 by the appellant. The said application was directed to be disposed of along with the writ petition which was already listed for final disposal. Subsequently, another application being CAN 3065 of 2016 was filed in the said writ petition challenging the power of the director in exercising its authority during the pendency of the said writ petition in the following:

“8. That amidst the aforesaid facts and circumstances, while the petitioner has been anxiously waiting for a final decision from this Hon’ble Court in the pending writ petition which has already

been fixed for hearing. The Director being a party-respondent under the relevant provisions of Article 226 of the Constitution of India, has been exercising her authority beyond jurisdiction, in issuing certain order viz. dated 30-12-2-15, 11-01-2016 and 30-01-2016 in respect of appointment of suspension”

The aforesaid writ petition along with the applications were disposed on 07.04.2017 by the Single Bench and it was categorically held that neither DP is without jurisdiction nor is carried out in violation of the principles of natural justice is following:

“The petitioner has not been able to demonstrate before this Court in the light of the judicial authorities as adumbrated above, that the DP is either without jurisdiction or, is being carried out in violation of the principles of natural justice.

On the contrary, this Court finds adequate material with the records to show that the petitioner has avoided the DPs which have reached their final stages and, even the second show cause issued to the petitioner awaits his reply”

It is thus manifest from the facts that though the earlier writ petition was initially restricted to an order of suspension but the initiation of the Departmental Proceedings on the plea that the director has no jurisdiction and authority in this regard was also subsequently brought as an issue to be decided in the said writ petition. The Single Bench conclusively held that the Departmental Proceeding is neither without jurisdiction nor violative of the natural justice obviously that the director is competent to act in such

capacity, it cannot be reopened in a subsequent writ petition on the ground that the director was incompetent or acted in violation of the rules or a principle of natural justice. The Single Bench ought not to have ventured into the aforesaid aspect but should restrict its consideration on the penalty so imposed upon the appellant being excessive or not in commensurate with gravity of the charges leading to a shock in the conscience of the Court and therefore, the same cannot be sustained. Since no argument is advanced on the above aspect before us, we treat it that the parties have abandoned such issue as they have restricted their argument on the legal point as decided hereinabove.

The order impugned is thus set aside.

The appeal is allowed as consequence whereof the writ petition filed by the appellant is dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Prasenjit Biswas, J.)