A T.P. MOIDEEN KOYA

v.

GOVERNMENT OF KERALA AND ORS.

SEPTEMBER 30, 2004

B [R.C. LAHOTI, C.J., G.P. MATHUR AND P.K. BALASUBRAMANYAN, JJ.]

Constitution of India, 1950.

C *Articles 22(5), 32, 136 and 226*—**Habeas corpus**—*Writ of*—**Res judicata**—*Bar of—Applicability of*—**Habeas corpus** *petition under Art. 226 dismissed by High Court—SLP also dismissed—Writ petition under Art. 32 questioning the detention order of the petitioner filed—Maintainability of—Held: If a writ of* **habeas corpus** *under Art. 226 is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking* D *order) and the said decision becomes final due to non-filing of appeal under Art. 136, it would still be open for a petitioner to file an independent petition under Art. 32 seeking a writ of* **habeas corpus**—*But if the said decision on being challenged under Art. 136 attains finality, the same issue cannot be re-agitated in a subsequent petition under Art. 32—However, a subsequent* E *petition under Art. 32 is maintainable if the circumstances have changed or on the grounds which were not available when the earlier petition was decided—The only plea raised in the present petition under Art. 32 had also been raised in the writ petition under Art. 226 and also in the SLP—It is neither a subsequent development nor a new plea which may not have been available at the earlier stage—Further, even if the plea raised by the* F *petitioner had not been considered in the SLP it cannot be a ground to entertain a fresh petition under Art. 32—Hence, the present petition under Art. 32 is not maintainable.*

Articles 32 and 136—Writ petition—**Res judicata**—*Principle—* G *Applicability of—Held: While hearing a petition under Art. 32, it is not permissible for the Supreme Court either to exercise a power of review or some kind of an appellate jurisdiction over a decision rendered under Art. 136.*

Articles 32 and 226—Writ petition—**Res judicata**—*Principle—* H *Applicability of—Petitioner filed a petition under Art. 226, which was*

dismissed—The decision attained finality since appeal not preferred—Subsequent petition filed under Art. 32 seeking same relief—Maintainability of—Held: The bar of **res judicata** *or constructive* **res judicata** *would apply to such a petition under Art. 32—Hence, such subsequent petition under Art. 32 not maintainable.*

Articles 22(5)—Detention order—Against a person under custody—Permissibility of—Held: In law there is no bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the cogent material placed before him that the detenu is likely to be released on bail—However, if there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised—Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, S. 3(i)(iv).

After the *habeas corpus* petition seeking quashing of the detention order passed against the petitioner and for setting him at liberty had been dismissed by the High Court, the matter was carried in appeal to this Court by filing a petition under Article 136 of the Constitution. After leave was granted, the appeal was dismissed by a detailed judgment wherein all the contentions raised laying challenge to the detention order and also to the continued detention of the petitioner had been considered. Thereafter the present petition was filed under Article 32 of the constitution for quashing of the detention order.

The only ground urged by the petitioner was that at the time of service of the detention order, the petitioner was already in custody, but the detaining authority had not applied his mind to the aforesaid fact whether still there was any necessity to detain the petitioner. It was also urged that the said fact, namely, that the petitioner was already in custody having not been mentioned in the detention order, the order of detention passed against the petitioner was wholly illegal.

The following question arose before the Court:

Whether the dismissal by this Court of the Special Leave Petition preferred against the judgment and order of the High Court whereby the *habeas corpus* petition filed by the wife of the petitioner seeking quashing of the detention order and also his release had been dismissed, would act as a bar to the maintainability of the present petition which

A had been tiled under Article 32 of the Constitution?

Dismissing the petition, the Court

HELD : 1. The bar of *res judicata* or constructive *res judicata* would apply even to a petition under Article 32 of the Constitution where a B 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 C 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 D 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*. [916-D-E-F-G]

Ghulam Sarwar v. *Union of India,* AIR (1967) SC 1335, followed.

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Nazul Ali Molla v. *State of West Bengal,* [1969] 3 SCC 69 and *Niranjan Singh* v. *State of M.P.,* AIR (1972) SC 2215, relied on.

Daryao v. *State of U.P.,* AIR (1961) SC 1457; *Virudhunagar Steel Rolling Mills Ltd.* v. *The Government of Madras,* AIR (1968) SC 1196 and F *M/s. Trilokchand Motichand* v. *Commissioner Sales Tax,* AIR SC 898, held not applicable.

In Re: Hastings (2) [1958] 3 All ER 625 and *In Re: Hastings* (3) [1959] 1 All ER 698, referred to.

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2. 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 H 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. [917-B-C-D]

3. While hearing a special leave petition against the judgment of the High Court dismissing a *habeas corpus* petition wherein a prayer has been made to set a detenu at liberty, the Court would normally examine the same grounds, namely, whether the detention order is in conformity with Article 22(5) of the Constitution and the provisions of the enactment under which the detention order has been passed, whether the procedural safeguards have been observed and also whether the continued detention of the detenu has not been rendered invalid on account of any breach of the duty cast upon the authorities. A decision rendered by this Court in proceedings under Article 136 of the Constitution which has attained finality, would bind the parties and the same issue cannot be re-agitated or reopened in a subsequent petition under Article 32 of the Constitution. [917-D-E-F-G]

Daryao v. *State of U.P.*, AIR (1961) SC 1457, followed.

Bhagubhai Dullabhbhai Bhandari v. *District Magistrate,* AIR (1956) SC 585, relied on.

4. It is clarified that the subsequent petition under Article 32 of the Constitution seeking a writ of *habeas corpus* for setting at liberty a person who has been detained under any of the detention laws would be maintainable if the circumstances have changed. It would also be maintainable on the grounds, which were not available when the earlier petition was decided. To illustrate, a detenu soon after his detention may file a *habeas corpus* petition on the ground that the concerned officer of the Government passing the detention order had no authority to do so or the grounds of detention relate to "law and order" and not to "public order" (in a case where detention order has been passed under National Security Act). If such a petition is dismissed by the High Court and the judgment is affirmed by this Court in a special leave petition under Article 136 of the Constitution, it would always be open to him to file a petition under Article 32 assailing his continued detention on the ground of inordinate and unexplained delay in consideration of his representation

A or some procedural infirmity which may have occurred subsequent to the decision of this Court. [917-G-H; 918-A-B-C]

5. The only plea raised in the present petition had also been raised in the Special Leave Petition, which had been filed earlier seeking quashing of the detention order and the release of the petitioner. It is B neither a subsequent development nor a new plea, which may not have been available at the earlier stage. If the plea raised has not been considered in the judgment rendered by this Court, as submitted by the petitioner, it cannot be a ground to entertain a fresh petition under Article 32 of the Constitution. In the course of a judgment, Courts C normally deal with only such points, which are pressed and argued. If a fresh petition under Article 32 is permitted on the ground that a certain point has not been dealt with in the judgment, a party can file as many petitions as he likes and take one or two new points every time. Besides, if such a course was allowed to be adopted, the doctrine of D finality of judgments pronounced by the Supreme Court would also be materially affected. Therefore, having regard to the facts pleaded and the grounds raised, the present petition is not maintainable.

[918-G-H; 919-A-B-C-D]

6. The very object of passing a detention order being to prevent the E person from acting in any manner prejudicial to maintenance of public order or from smuggling goods or dealing in smuggled goods etc., normally there would be no requirement or necessity of passing such an order against a person who is already in custody in respect of a criminal offence where there is no immediate possibility of his being released. But in law there is no bar in passing a detention order even against such a person if the detaining F authority is subjectively satisfied from the material placed before him that a detention order should be passed. [919-G-H; 920-A-B]

7.1. The principle is that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent G material before the authority passing the detention order for inferring that the detenu was likely to be released on bail. [920-G-H; 921-A-B]

Rameshwar Shaw v. *District Magistrate,* AIR (1964) SC 334, followed.

Binod Singh v. *District Magistrate,* AIR (1986) SC 2090; *Vijay Kumar* H v. *State of J & K,* [1982] 2 SCC 43, *Ramesh Yadav* v. *District Magistrate,*

[1985] 4 SCC 232 and *Kamarunnissa* v. *Union of India,* AIR [1991] SC 1640, relied on. A

7.2. However, the above principle can have no application here for several reasons. The petitioner had already been released on bail by the order of ACJM and the detention order was passed more than two months thereafter when he was not in custody. As the petitioner absconded, the detention order could not be served immediately and proceedings under Section 7 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 were initiated and publication in the gazette was made. A device for surrendering was adopted and the petitioner along with a surety appeared in the Court of ACJM where the surety withdrew his consent and the petitioner was remanded in custody till a certain date. The authorities after coming to know of the said fact served the detention order in jail. A detention order, which has been validly passed, cannot be rendered invalid on account of the own conduct of the detenu of absconding and evading service. That apart, the ACJM had passed the order of remand only till a certain date and thereafter there was the possibility of his being released or at any rate the petitioner could furnish another surety in place of the one who had withdrawn his consent and thereafter he would have been released from custody. The bail granted to the petitioner in the case under the Customs Act had not been cancelled. This is not a case where the petitioner may have been taken into custody in connection with some serious criminal case where there may be no immediate possibility of his getting bail. Therefore, even on merits, the ground urged in support of the writ petition has no substance. [921-E, F, G, H; 922-A-B-C] B C D E F

CRIMINAL ORIGINAL JURISDICTION : Writ petition (Criminal) No. 69 of 2004.

Under Article 32 of the Constitution of India.

P.K. Manohar for the Appellant. G

A. Sharan, Additional Solicitor General, P.P. Khurana, T.L.V. Iyer, Hemant Sharma, P. Parmeswaran (NP), B. Krishna Prasad (NP), John Mathew and K.R. Sasiprabhu (NP) for the Respondents.

The Judgment of the Court was delivered by H

A **G.P. MATHUR, J.** : 1. This petition under Article 32 of the Constitution has been filed for quashing and setting aside the detention order dated 21.1.2002 issued by Government of Kerala for detaining the petitioner T.P. Moideen Koya under Section 3(i)(iv) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short
B 'COFEPOSA')

2. The residence of one Pulikuth Hamzath Abdussalam@Kunjumon was searched on 18.8.2001 and gold biscuit of foreign origin weighing 4430.8 grams valued at Rs. 19,80,567, Indian currency worth Rs. 15,24,500 and foreign currencies worth Rs. 1,39,360 were recovered and some
C incriminating documents and a computer with accessories were also seized. The statement of M. Mohammed Mustafa, a distant relative and employee of Kunjumon which was recorded on 19.8.2001 and the seized documents showed that petitioner Moideen Koya had dealt with 290 smuggled gold biscuits valued at Rs. 1.5. crores. He had transaction worth Rs. 18 crores with
D Kunjumon during the period 1.8.2001 to 15.8.2001. The Government of Kerala thereafter passed a detention order on 21.1.2001 for detaining the petitioner under Section 3(i)(iv) of the COFEPOSA. The petitioner absconded and proceedings under Section 7(1) of the Act had to be initiated. He surrendered before the court of Additional Chief Judicial Magistrate (Economic Offences), Ernakulam on 4.9.2002 and was taken into custody. The detention
E order was then served upon him in jail on 12.9.2002. The wife of the petitioner, namely, Safiya filed a *habeas corpus* petition being O.P. No. 2956 of 2002 in the Kerala High Court seeking quashing of the detention order and for setting him at liberty. The High Court dismissed the *habeas corpus* petition on 11.2.2003. Safia then preferred Special Leave Petition (Criminal)
F No. 1215 of 2003 (re-numbered as Criminal Appeal No. 913 of 2003 after grant of leave) in this Court which was also dismissed by a detailed order on 28.7.2003. The judgment is reported in [2003] 7 SCC 46. Thereafter, the present writ petition has been filed under Article 32 of the Constitution for quashing of the detention order. The petition has, presumably, been filed to
G get out of the clutches of Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, as even before filing of the petition, the petitioner had served out the period of detention and had been released.

3. Shri A Sharan, learned senior counsel for Union of India has raised a preliminary objection regarding the maintainability of the present petition.
H Learned counsel has submitted that the exact issue raised before this Court

in the Special Leave Petition filed against the judgment of the Kerala High Court was whether the detention order passed against the petitioner was valid and proper having regard to the provisions of COFEPOSA and Article 22(5) of the Constitution and this Court having upheld the validity of the detention order and also the continued detention of the petitioner, the present petition under Article 32 of the Constitution filed by him is not maintainable. Learned counsel for the petitioner has, on the other hand, submitted that as the detention order passed against the petitioner violated his fundamental right, his right to approach this Court by way of a petition under Article 32 is guaranteed under the Constitution and can not be taken away by any technical consideration.

4. The question which requires consideration is whether the dismissal by this Court of the Special Leave Petition preferred against the judgment and order dated 11.2.2003 of Kerala High Court whereby the *habeas corpus* petition filed by the wife of the petitioner seeking quashing of the detention order and also his release had been dismissed would act as a bar to the maintainability of the present petition which has been filed under Article 32 of the Constitution. Part III of the Constitution guarantees a set of fundamental right to all its citizens and some of these rights are available to even non-citizens. Clause (1) of Article 32 provides that the right to move the Supreme Court by appropriate proceeds for the enforcement of the rights conferred by Part III is guaranteed and clause (2) provides that the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. The bar of *res judicata* against a petition filed under Article 32 of the Constitution on the same facts and praying for the same or similar relief where a petition filed under Article 226 of the Constitution had been dismissed by the High Court and the order had become final has been considered in several decisions of this Court. This question was examined in considerable detail by a Constitution Bench in *Daryao and Others* v. *State of U.P. and Others,* AIR (1961) SC 1457. Here, the petitioners had filed suit for ejectment under Section 180 of the U.P. Tenancy Act, 1939 which was decreed by the trial court and the decree was affirmed by the Additional Commissioner in appeal, but the Second Appeal preferred by the contesting respondent was allowed by the Board of Revenue and the suit was dismissed. The petitioners then filed a writ petition under Article 226 of the Constitution before the Allahabad High Court, which was dismissed on 29.3.1955 as not

A pressed as the relevant provisions of law, namely, Section 20 of the U.P. Zamindari Abolition and Land Reforms (Amendment) Act had been earlier interpreted and decided by a Full Bench against the contentions advanced on behalf of the petitioners. Section 20 was later on amended by Act XX of 1954 and thereafter the writ petition under Article 32 of the Constitution was filed B on 14.3.1956. Gajendragadkar, J. who spoke for the Court highlighted the importance of Article 32 of the Constitution by observing that there can be no doubt that fundamental right guaranteed by Article 32(1) is a very important safeguard for the protection of the fundamental rights of the citizens, and as a result of the said guarantee Supreme Court has been entrusted with the solemn task of upholding the fundamental rights of the C citizens of this country. As to what should be the approach of the Court in entertaining the plea of *res judicata* against a petition under Article 32 of the Constitution was summarized in the following manner in paragraph 8 of the report :

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> "..... Thus the right given to the citizen to move this Court by a petition under Art. 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the application of the rule of *res judicata* this aspect of the matter has no doubt to be borne in mind."

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After a detailed consideration of the matter, the following principle was enunciated in paragraph 19 of the report and the relevant part thereof reads as under :

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> "....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 G Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar order 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 H 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. It 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 petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32, because in such a case there was been no decision on the merits by the Court....."

5. In another decision by a Constitution Bench in *Devilal Modi* v. *Sales Tax Officer, Ratlam and Others,* AIR (1965) SC 1150 the petitioner challenged the validity of sale tax imposed upon him for a particular year by filing a petition under Article 226 of the Constitution which was rejected on merits. In the appeal preferred against the said decision in the Supreme Court the assessee sought to raise two additional grounds which was not permitted and the appeal was dismissed on merits. Thereafter the assessee filed a second writ petition in the High Court challenging the same assessment order and also raising the grounds which had not been earlier permitted by the Supreme Court. The High Court dismissed the writ petition and thereafter the matter was taken in appeal to the Supreme Court. Gajendragadkar, C.J., after referring to the case of the *Daryao* v. *State of U.P.* (supra) held as under, in paragraph 10 of the report :

"As we have already mentioned, though the Courts dealing with the questions of the infringement of fundamental rights must

A consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of *res judicata* altogether in dealing with writ petitioners filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such B cases, and the basic doctrine that judgments pronounced by this Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration."

6. In *Virudhunagar Steel Rolling Mills Ltd.* v. *The Government of Madras;* AIR (1968) SC 1196, which is also a decision by a Constitution C Bench, it was held that where a writ petition under Article 226 of the Constitution is disposed of on merits and the order of dismissal of the petition is a speaking order that would amount to *res judicata* and would bar a petition under Article 32 on the same facts irrespective of whether notice was issued to the other side or not before such a decision was given.

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7. Examining a similar contention Hidayatullah C.J. in his separate opinion in *M/s. Tilokchand Motichand and Others* v. *H.B. Munshi, Commissioner of Sales Tax, Bombay and Another,* AIR (1970) SC 898 (a decision rendered by a Constitution Bench) observed that Article 32 gives the right to move the Supreme Court by appropriate proceedings for E enforcement of the rights conferred by Part III of the Constitution. The provision merely keeps open the doors or this Court, in much the same way, as it used to be said, the doors of the Chancery Court were always open. The State cannot place any hindrance in the way of an aggrieved person seeking to approach this Court. But the guarantee goes no further at least on the terms F of Article 32. Having reached this Court, the extent or manner of interference is for the Court to decide. In paragraph 6 of the report, it was observed as under :

"Then again this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226. This G constitutes a comity between the Supreme Court and the High Court. Similarly, when a party had already moved the High Court with a similar complaint and for the same relief and failed, this Court insists on an appeal to be brought before it and does not allow fresh proceedings to be stated. In this connection, the principle of *res* H *judicata* has been applied, although the expression is somewhat

inapt and unfortunate. The reason of the rule no doubt is public policy which Coke summarized as "interest *reipublicae res judicatas non rescindi"* but the motivating factor is the existence of another parallel jurisdiction in another Court and that Court having been moved, this Court insists on bringing its decision before this Court for review." A B

8. But, the bar of *res judicata* has not been applied in petitions for *habeas corpus*, as for historical reasons, the writ for *habeas corpus* has been treated as standing in a category by itself. In *Daryao* v. *State of U.P.* (supra), the legal position in England as of now has been considered in paragraph 17 of the report, and after referring to *Re Hastings* (No. 2), [1958] 2 All E.R.625 and *Re Hastings* (No. 3), [1959] 1 All. E.R. 698, it was observed that even in regard to *habeas corpus* petition it is now settled in England that an applicant cannot move one Divisional Court of the Queen's Bench Division after another. C D

9. This question was examined in considerable detail by a Constitution Bench in *Ghulam Sarwar* v. *Union of India and Others,* AIR (1967) SC 1335. In this case the petitioner who was detained under Section 3(2)(g) of the Foreigners Act, 1946 filed 9 petition for issuing a writ *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 E.R. 625, in *Re Hastings 3,* [1959] 1 All E.R. 698 and some other English and American cases held, as under : E F

"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 England and the American Courts because it is either not a judgment or because the principle of *res judicata* is not G H

A applicable to a fundamentally lawless order."

10. 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 B 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 C of the Constitution before the 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,* AIR (1972) SC 2215.

D 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 E 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 detentiion 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 F 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.*

G 12. However, the position here is quite different. After the *habeas corpus* petition seeking quashing of the detention order passed against the petitioner and for setting him at liberty had been dismissed by the Kerala High Court, the matter was carried in appeal to this Court by filing a petition under Article 136 of the Constitution. After leave was granted, the appeal H was dismissed by a detailed judgment wherein all the contentions raised

laying challenge to the detention order and also to the continued detention of the petitioner had been considered. The question is whether, even in such circumstances, a subsequent petition under Article 32 of the Constitution seeking to challenge the same detention order would be maintainable.

13. 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 is *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*).

14. While hearing a special leave petition against the judgment of the High Court dismissing a *habeas corpus* petition wherein a prayer has been made to set a detenu at liberty, the Court would normally examine the same grounds, namely, whether the detention order is in conformity with Article 22(5) of the Constitution and the provisions of the enactment under which the detention order has been passed, the procedural safeguards have been observed and also whether the continued detention of the detenu has not been rendered invalid on account of any breach of the duty cast upon the authorities. A decision rendered by this Court in proceedings under Article 136 of the Constitution which has attained finality, would bind the parties and the same issue cannot be re-agitated or re-opened in a subsequent petition under Article 32 of the Constitution.

15. We would like to clarify here that the subsequent petition under Article 32 of the Constitution seeking a writ of *habeas corpus* for setting at liberty a person who has been detained under any of the detention laws would be maintainable if the circumstances have changed. It would also be maintainable on the grounds which were not available when the earlier

petition was decided. To illustrate, a detenu soon after his detention may file a *habeas corpus* petition on the ground that the concerned officer of the Government passing the detention order had no authority to do so or the grounds of detention relate to "law and order" and not to "public order" (in a case where detention order has been passed under National Security Act). If such a petition is dismissed by the High Court and the judgment is affirmed by this Court in a special leave petition under Article 136 of the Constitution, it would always be open to him to file a petition under Article 32 assailing his continued detention on the ground of inordinate and unexplained delay in consideration of his representation or some procedural infirmity which may have occurred subsequent to the decision of this Court.

16. In the light to the principle discussed above the contention of the petitioner may be examined. The only ground urged by learned counsel for the petitioner is that at the time of service of the detention order, the petitioner was already in custody, but the detaining authority had not applied his mind to the aforesaid fact whether still there was any necessity to detain the petitioner. It is also urged that the said fact, namely, that the petitioner was already in custody having not been mentioned in the detention order, the order of detention passed against the petitioner is wholly illegal. In support of this submission reliance has been placed upon *Binod Singh* v. *District Magistrate,* AIR (1986) SC 2090, wherein it has been held that if at the time of the passing of the detention order, there is no proper consideration of the fact that the detenu was already in custody or that there was any real possibility of his release, the power of pre-emptive detention should not be exercised. This plea was raised in the *habeas corpus* petition which was filed in the Kerala High Court. The High Court examined the plea in considerable detail and rejected the same by the judgment and order dated 11.2.2003. Similar plea was also taken in Special Leave Petition (Criminal) No. 1215 of 2003 (vide para Nos. 2.3 and 2.4 and ground Nos. H to L). In fact, in para 7 of the present Writ Petition it is stated that a contention was raised and was specifically argued before this Court in the Special Leave Petition that the order of detention has been vitiated on account of the fact that the same was served upon the detenue while he was in jail, but the fact of his being in custody was not reflected in the detention order. However, a grievance is raised that the said contention has not been dealt with or decided in the judgment of this Court. It is, therefore, apparent that the only plea raised in the present petition had also been raised in the Special Leave Petition which had been filed earlier seeking quashing of the detention order and the release

of the petitioner. It is neither a subsequent development nor a new plea which may not have been available at the earlier stage. If the plea raised has not been considered in the judgment rendered by this Court on 28.7.2003 in Special Leave Petition (Criminal) No. 1215 of 2003, as submitted by the petitioner, it cannot be a ground to entertain a fresh petition under Article 32 of the Constitution on the principles discussed above. In the course of judgment, Courts normally deal with only such points which are pressed and argued. If fresh petition under Article 32 is permitted on the ground that certain point has not been dealt with in the judgment, a party can file as many petitions as he likes and take one or two new points every time. Besides, if such a course was allowed to be adopted, the doctrine of finality of judgments pronounced by the Supreme Court would also be materially affected. Therefore, having regard to the facts pleaded and the grounds raised, the present petition is not maintainable.

17. Even though we have held above that looking to the nature of the plea raised, the present writ petition under Article 32 of the Constitution is not maintainable, still the contentions raised may be examined on merits.

18. The petitioner was granted bail in the case under Customs Act by the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam (for short 'ACJM') in O.R. No. 3 of 2001 vide order dated 17.11.2001. The detention order was thereafter passed by the Government of Kerala on 21.1.2002 and at that time the petitioner was a free person and was not in custody. The detention order could not be served on the petitioner as he absconded. Thereafter, proceedings under Section 7 of COFEPOSA were initiated and notification was published in the official gazette on 1.4.2002 directing the petitioner to surrender. Coercive steps were also taken to secure his arrest. The petitioner than appeared before the Court of ACJM on 4.9.2002 along with one of his sureties who submitted an application that he was no longer willing to be a surety. The ACJM remanded the petitioner to judicial custody till 17.9.2002. The detention order was then served upon the petitioner in jail on 12.9.2002.

19. The very object of passing a detention order being to prevent the person from acting in any manner prejudicial to maintenance of public order or from smuggling goods or dealing in smuggled goods etc., normally there would be no requirement or necessity of passing such an order against a person who is already in custody in respect of a criminal offence where there

A is no immediate possibility of his being released. But in law there is no bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the material placed before him that a detention order should be placed. A Constitution Bench in *Rameshwar Shaw* v. *District Magistrate,* AIR (1964) SC 334 held as under :

B

> "As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail, but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the
> C principle that a detention order can be passed against a person in jail."

20. In *Vijay Kumar* v. *State of J&K,* [1982] 2 SCC 43, it was held :

D

> "If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness
> E of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made."

21. In *Binod Singh* v. *District Magistrate* (supra) there were several
F criminal cases against the detenue including a murder case in which investigation was in progress. At the time when the detention order was passed, the detenue had not surrendered in respect of the criminal charge. The detention order was served soon after he surrendered in the murder case. The Court then held that from the affidavit of the District Magistrate it did not
G appear that either the prospect of the immediate release of the detenu or other factors which could justify the detention of a person already in custody, were properly considered in the light of the principles laid down in *Rameshwar Shaw* v. *District Magistrate,* AIR (1964) SC 334 and *Ramesh Yadav* v. *District Magistrate,* [1985] 4 SCC 232. The principle is that if a person is in custody and there is no imminent possibility of his being released
H therefrom, the power of detention should not ordinarily be exercised. There

must be cogent material before the authority passing the detention order for inferring that the detenu was likely to be released on bail. In *Kamarunnissa* v. *Union of India,* AIR (1991) SC 1640, after review of all the earlier decisions, the law on the point was enunciated as under in para 13 of the report :

> "13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court. What this court stated in the case of *Ramesh Yadav,* AIR (1986) SC 315 (supra) was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention....."

22. However, the above principle can have no application here for several reasons. The petitioner had already been released on bail by the order of ACJM on 17.11.2001 and the detention order was passed more than two months thereafter on 21.11.2002 when he was not in custody. As the petitioner absconded, the detention order could not be served immediately and proceedings under Section 7 of COFEPOSA were initiated and publication in gazette was made on 1.4.2002. A device for surrendering was adopted and the petitioner along with a surety appeared in the Court of ACJM where the surety withdrew his consent and the petitioner was remanded in custody till 17.9.2002. The authorities after coming to know of the said fact served the detention order in jail on 12.9.2002. A detention order which has been validly passed cannot be rendered invalid on account of the own conduct of the detenu of absconding and evading service. That apart, the ACJM had passed the order of remand only till 17.9.2002 and thereafter there was possibility

A of his being released or at any rate the petitioner could furnish another surety in place of one who had withdrawn his consent and thereafter he would have been released from custody. The bail granted to the petitioner in the case under Customs Act had not been cancelled. This is not a case where the petitioner may have been taken into custody in connection with some serious
B criminal case where there may be no immediate possibility of his getting bail. Therefore, even on merits, the ground urged in support of the writ petition has no substance.

23. For the reasons discussed above, the writ petition lacks merit and is hereby dismissed.

C

V.S.S. Petition dismissed.