# Arunima Baruah vs Union Of India & Ors on 27 April, 2007

## Author: S.B. Sinha

## Bench: S.B. Sinha, Markandey Katju

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           CASE NO.:
Appeal (civil)  2205 of 2007

PETITIONER:
Arunima Baruah

RESPONDENT:
Union of India & Ors

DATE OF JUDGMENT: 27/04/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
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J U D G M E N T CIVIL APPEAL NO. 2205 OF 2007 [Arising out of SLP (Civil) No. 9283 of 2006] S.B. SINHA, J :

Leave granted.

How far and to what extent suppression of fact by way of non- disclosure would affect a person's right of access to justice is the question involved in this appeal which arises out of a judgment and order dated 23.07.2003 passed by the High Court of Delhi in LPA No. 68 of 2003.

With a view to advert to the said question, we may notice the admitted facts.

Indian Council for Child Welfare is a Society registered under the Societies Registration Act and is governed by its Memorandum of Association as well as Rules and Regulations framed thereunder. Appellant herein was an employee of the said Society which is a 'State' within the meaning of Article 12 of the Constitution of India. She was offered an appointment. Her services, however, were terminated allegedly without complying with the principles of natural justice despite the fact that she was confirmed in her service.

Appellant filed a suit in the District Court on 28.03.2001. An application was filed for grant of injunction. On or about 9.04.2001, only a notice to the defendant was issued but no order of ad-interim injunction was passed. She filed a writ petition before the Delhi High Court on 10.04.2001. Admittedly, in the said writ petition, the fact in regard to pendency of the said suit was not disclosed. However, before the writ petition came up for preliminary hearing, she filed an

application for withdrawal of the suit on 12.04.2001. The said application allegedly could not be moved because of the strike resorted to by the lawyers. The writ petition came up for preliminary hearing on 18.04.2001. A notice was issued therein. Her application to withdraw the suit dated 12.04.2001 came up for consideration before the Civil Court and upon a statement made by her, the same was permitted to be withdrawn by an order dated 30.04.2001. The writ petition, however, was dismissed by a learned Single Judge of the Delhi High Court by an order dated 29.11.2002, opining:

> "The petitioner has filed the present writ petition for issuance of a writ of mandamus for quashing the order dated 19th March, 2001 terminating the services of the petitioner.
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> Notice was issued in the writ petition.
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> In the counter affidavit filed by Respondent No. 3, it has been disclosed that the petitioner had filed a civil suit in the District Court on 28th March, 2001. A photocopy of the civil suit filed by petitioner for a declaration and permanent injunction is filed with the counter affidavit as Annexure R3/A. The prayer made in the suit is for a declaration that the order dated 19th March, 2001 is illegal, null and void. An application was also filed for the grant of an ex-parte ad interim injunction. It appears that no ex-parte ad interim injunction was granted to the petitioner.
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> However, without disclosing all these facts, the present writ petition was filed on 10th April, 2001. There is not even a whisper in the writ petition about the civil suit. Learned Counsel for the petitioner does not dispute that such a civil suit was filed. It is stated in the rejoinder affidavit that a civil suit was subsequently withdrawn but the relevant orders have not been filed along with the rejoinder affidavit.
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> In view of gross concealment of fact by the petitioner, it appears that the petitioner is doing nothing more than forum hunting. Having failed to obtain any injunction in the civil suit, the Petitioner has resorted to filing the present writ petition.
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> In view of the conduct of the petitioner and a material concealment of fact, I am not inclined to entertain the writ petition. The same is, accordingly, dismissed."

An intra-court appeal preferred thereagainst has been dismissed by the impugned judgment stating:

> " When the writ petition was filed, in the writ petition the factum of filing the suit and non-grant of ex-parte injunction was not mentioned, therefore, there appears to be concealment of facts. The ld. Single Judge rightly came to the conclusion that since the appellant concealed the facts in the writ petition, therefore, did not deserve any relief and dismissed the same as if was found abuse of the process of court. It is well settled law that a party who comes to the court by concealing facts is not entitled to relief under Article 226 of the Constitution of India."

Ms. Lata Krishnamurthy, learned counsel appearing on behalf of the appellant, would submit that the learned Single Judge as well as the Division Bench of the High Court failed to take into consideration that in the rejoinder filed by the appellant to the counter affidavit of the respondents, the circumstances in which the writ petition was moved as also the legal advice on which the appellant had acted were disclosed.

The learned counsel would submit that as on the date of hearing of the writ petition, the suit already stood withdrawn, the question of dismissal of the writ petition on the ground of availability of alternative remedy would not arise and, thus, the writ petition could not have been dismissed on that premise. Strong reliance in this behalf has been placed on S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Others [(2004) 7 SCC 166] The learned counsel appearing on behalf of the respondents, however, would submit that as a writ court exercises a discretionary jurisdiction, it can refuse to do so when material facts have been suppressed.

On the one hand, judicial review is a basic feature of the Constitution, on the other, it provides for a discretionary remedy. Access to justice is a human right. [See Dwarka Prasad Agarwal (D) by Lrs. and Another v B.D. Agarwal and Others (2003) 6 SCC 230 and Bhagubhai Dhanabhai Khalasi & Anr. v. The State of Gujarat & Ors., 2007 (5) SCALE 357] A person who has a grievance against a State, a forum must be provided for redressal thereof. [See Hatton and Others Vs. United Kingdom 15 BHRC 259. For reference see also Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649] The court's jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands but to what extent such relief should be denied is the question.

It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

In Moody v. Cox [1917 (2) Ch 71], it was held:

> "It is contended that the fact that Moody has given those bribes prevents him from getting any relief in a Court of Equity. The first consequence of his having offered the bribes is that the vendors could have rescinded the contract. But they were not bound to do so. They had the right to say "No, we are well satisfied with the contract; it is a very good one for us; we affirm it". The proposition put forward by counsel for the defendants is: "It does not matter that the contract has been affirmed; you still can

> claim no relief of any equitable character in regard to that contract because you gave a bribe in respect of it. If there is a mistake in the contract, you cannot rectify it, if you desire to rescind the contract, you cannot rescind it, for that is equitable relief. With some doubt they said: "We do not think you can get an injunction to have the contract performed, though the other side have affirmed it, because an injunction may be equitable remedy." When one asks on what principle this is supposed to be based one receives in answer the maxim that any one coming to equity must come with clean hands. It think the expression" clean hands" is used more often in the text books than it is in the judgments, though it is occasionally used in the judgments, but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the courts of Equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in Dering v. Earl of Winchelsea 1 Cox, 318 which has been referred to shows that equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bribe has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bribe. Therefore that point, which was argued with great strenuousness by counsel for the defendant Hatt, appears to me to fail, and we have to consider the merits of the case."

In Halsbury's Laws of England, Fourth Edition, Vol. 16, pages 874- 876, the law is stated in the following terms:

> "1303. He who seeks equity must do equity. In granting relief peculiar to its own jurisdiction a court of equity acts upon the rule that he who seeks equity must do equity. By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record. The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked. In a court of law it is otherwise: when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed.
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> *** *** *** 1305. He who comes into equity must come with clean hands. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim "he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or

> with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.
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> The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff's demerits."

[See also Snell's Equity, Thirtieth Edition, Pages 30-32 and Jai Narain Parasrampuria (Dead) and Others v. Pushpa Devi Saraf and Others, (2006) 7 SCC 756] In Spry on Equitable Remedies, Fourth Edition, page 5, referring to Moody v. Cox (supra) and Meyers v. Casey [(1913) 17 C.L.R. 90], it is stated :

> " that the absence of clean hands is of no account "unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for". When such exceptions or qualifications are examined it becomes clear that the maxim that predicates a requirement of clean hands cannot properly be regarded as setting out a rule that is either precise or capable of satisfactory operation "

Although the aforementioned statement of law was made in connection with a suit for specific performance of contract, the same may have a bearing in determining a case of this nature also.

In the said treatise, it was also stated at pages 170-171:

> " In these cases, however, it is necessary that the failure to disclose the matters in question, and the consequent error or misapprehension of the defendant, should be such that performance of his obligations would bring about substantial hardship or unfairness that outweighs matters tending in favour of specific performance. Thus the failure of the plaintiff to explain a matter of fact, or even, in some circumstances, to correct a misunderstanding of law, may incline the court to take a somewhat altered view of considerations of hardship, and this will be the case especially where it appears that at the relevant times the plaintiff knew of the ignorance or misapprehension of the defendant but nonetheless did not take steps to provide information or to correct the material error, or a fortiori, where he put the defendant off his guard or hurried him into making a decision without proper enquiry "

In S.J.S. Business Enterprises (P) Ltd. (supra), it was stated:

> "14. Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable ( sic ), the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226 5 . But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If, however, a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. The rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another court. But this Court has also held in Chandra Bhan Gosain v. State of Orissa 6 that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32 7 . Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226 8 . Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits."

There is another doctrine which cannot also be lost sight of. The court would not ordinarily permit a party to pursue two parallel remedies in respect of the same subject matter. [See Jai Singh v. Union of India and Others, (1977) 1 SCC 1] But, where one proceeding has been terminated without determination of the lis, can it be said that the disputant shall be without a remedy?

It will be in the fitness of context to notice M/s. Tilokchand and Motichand & Others v. H.B. Munshi and Another [(1969) 1 SCC 110] wherein it is stated:

> "6. Then again this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226. This 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 started. In this connection the principle of res judicata has been applied, although the expr ession is some what inapt and unfortunate. The reason of the rule no doubt is

> public policy which Coke summarised 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. Again this Court distinguishes between cases in which a speaking order on merits has been passed. Where the order is not speaking or the matter has been disposed of on some other ground at the threshold, this Court in a suitable case entertains the application before itself. Another restraint which this Court puts on itself is that it does not allow a new ground to be taken in appeal. In the same way, this Court 'has refrained from taking action when a better remedy is to move the High Court under Article 226 which can go into the controversy more comprehensively than this Court can under Article 32."

[Emphasis supplied] Existence of an alternative remedy by itself, as was propounded in S.J.S. Business Enterprises (P) Ltd. (supra) may not be a relevant factor as it is one thing to say that there exists an alternative remedy and, therefore, the court would not exercise its discretionary jurisdiction but it is another thing to say that the court refuses to do so on the ground of suppression of facts.

Ubi jus ibi remedium is a well known concept. The court while refusing to grant a relief to a person who comes with a genuine grievance in an arguable case should be given a hearing. [See Bhagubhai Dhanabhai Khalasi (supra)] In this case, however, the appellant had suppressed a material fact. It is evident that the writ petition was filed only when no order of interim injunction was passed. It was obligatory on the part of the appellant to disclose the said fact.

In this case, however, suppression of filing of the suit is no longer a material fact. The learned Single Judge and the Division Bench of the High Court may be correct that, in a case of this nature, the court's jurisdiction may not be invoked but that would not mean that another writ petition would not lie. When another writ petition is filed disclosing all the facts, the appellant would be approaching the writ court with a pair of clean hands, the court at that point of time will be entitled to determine the case on merits having regard to the human right of the appellant to access to justice and keeping in view the fact that judicial review is a basic feature of the Constitution of India.

The judgment of the High Court, in a case of this nature, shall not operate as a res judicata.

For the reasons aforementioned, while we uphold the judgment of the High Court, are of the opinion that in the event the appellant files a fresh writ application, the same may be considered on its own merits. The appeal is dismissed with the aforementioned observations. No costs.