

(2011) 12 AHC CK 0222

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 73786 of 2011

Atul Kumar Singh and Others

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 19-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226

Citation : (2011) 12 AHC CK 0222

Hon'ble Judges : Dilip Gupta, J

Final Decision : Dismissed

Judgement

Dilip Gupta, J.—The petitioners, who had completed the B.T.C. Training Course2004 in September, 2011, have filed this petition for quashing the order dated 15th July, 2011 by which certain persons, who had completed the B.T.C. Training Course2004 in March 2011, were granted appointment as Assistant Teachers in Elementary Schools run by the Board of Basic Education U.P. Allahabad (hereinafter referred to as the "Basic Education Board") without requiring them to pass the U.P. Teachers Eligibility Test (hereinafter referred to as the "U.P.TET"). The petitioners have also sought a mandamus for treating them at par with such persons who had completed the B.T.C. Training2004 in March, 2011 and to provide all benefits to the petitioners accordingly.

Though it is stated in paragraph 1 of the writ petition that this is the first writ petition filed by the petitioners for the reliefs claimed and no other writ petition had been filed for the same reliefs on the same material facts, but on a query being put by the Court, Sri Shailendra, learned counsel for the petitioners stated that earlier, Writ Petition No.62219 of 2011 (Atul Kumar Singh & Ors. Vs. State of U.P. & Ors.) was filed by the petitioners, which petition was dismissed by the Court on 11th November, 2011.

It is seen from the copy of Writ Petition No.62219 of 2011 supplied by the learned counsel for the petitioners that the present petitioners are petitioner nos.

1, 2, 3, 4 and 44 of the earlier Writ Petition and the reliefs claimed in the earlier Writ Petition are as follows:

"1. a writ, order or direction of suitable nature commanding the respondents to forthwith grant appointment to the petitioners as assistant teacher in Prathmik Vidyalaya run by the Board of Basic Education, U.P. Allahabad for district Mau within a period to be specified by this Hon''ble Court.

2. a writ, order or direction of suitable nature commanding the respondents to permit the petitioners to function as assistant teacher in Prathmik Vidyalaya run by the Board of Basic Education, U.P. in district Mau and to pay the petitioners their regular monthly salary on such basis regularly every month.

3. a writ, order or direction of suitable nature commanding the respondents not to insist upon the petitioners to pass the U.P. Teacher Eligibility Test as a pre condition for grant of appointment to the petitioners as assistant teachers."

The relevant paragraphs of Writ Petition No.62219 of 2011 containing the material fact are as follows:

"3. That on 20.2.2004 the State Government issued a government order notifying admission to two year training course of Basic Teacher Certificate. A true copy of the government order dated 20.2.2004 is annexed and marked as Annexure No.1 to this writ petition.

4. That in pursuance to the aforesaid government order a notification was published on 8.9.2004 inviting applications from eligible candidates. Each of the petitioners being fully eligible also applied in pursuance to the aforesaid notification for consideration in the said selection.

8. That based upon the aforesaid altered modality the select list was finalised for each of the districts. In so far as the present petitioners are concerned their applications were considered for admission to District Institute of Education and Training, Mau. In the select list published the petitioners were shown as selected. It is further necessary to state that even though the selection was for B.T.C. 2004 the actual admission commenced only in January 2009.

9. That the training of the first batch commenced in January 2009 and after completion of two year training course their result were declared in April 2011. All the persons so declared successful have been granted appointment as assistant teachers in the month of July 2011, have joined, are working and are getting their regular monthly salary.

10. That the training of the second batch commenced in June 2009. All the petitioners were included in the second batch, they successfully pursued their course and have been declared successful therein. The petitioners have been awarded B.T.C. Training Course on 21.9.2011. True copies of the B.T.C. Training Certificate of the petitioners are collectively annexed and marked as Annexure No.3 to this writ petition.

11. That as already stated above all the persons whose result were declared in the month of April 2011 belonging to the 2004 batch itself have already been granted appointments as assistant teacher in July 2011. However, the petitioners have not been given granted any such appointment the declaration of the result on 21.9.2011 and the petitioners are still awaiting appointment.

12. That in terms of U.P. Basic Education Teachers Service Rules, 1981 appointment to a candidate who has successfully completed B.T.C. Training Certificate is automatically granted subject only to verification of his testimonials (sic).

17. There does not exist any rational jurisdiction for non grant of appointment to the petitioners when candidates selected along with the petitioners have already been granted appointment on 1.7.2011.

19. That the appointment of the petitioners has been withheld on account of a stipulation of the respondents to the effect that the petitioners are liable to pass a teacher eligibility test notified by the State Government.

24. That the respondents are insisting that the petitioners are required to appear in the U.P. Teacher Eligibility Test and to qualify the same as a pre condition for grant of appointment to them as assistant teacher. Aggrieved by such action the petitioners are filing the present petition under Article 226 of the Constitution.

26. That as a consequence of the impugned action candidates selected in the same batch i.e. B.T.C. 2004 have been classified in two category, namely, candidates of first batch whose final result stood declared in April 2011 and who have been granted appointment on 1.7.2011 without any requirement of such candidates to qualify U.P. Teacher Eligibility Test. The second group categorized by the respondents is of candidates belonging to the second batch whose result have been declared on 21.9.2011. With regard to this second category the respondents are insisting upon such candidates to qualify the U.P. Teacher Eligibility Test as a pre condition for grant of appointment to them.

27. That the aforesaid classification is not based upon any intelligible differentia.

29. That even otherwise all candidates selected in B.T.C. 2004 constitute a single category and different norms cannot be made applicable to candidates belonging to the 2004 batch itself."

Writ Petition No. 62219 of 2011 earlier filed by the petitioners was connected with number of Writ Petitions and was dismissed by a detailed judgment and order dated 11th November, 2011. The portion of the judgment relevant for the purposes of this petition is quoted below:

"It is for these reasons that Sri Ashok Khare, learned Senior Counsel appearing for the petitioners has submitted that it is not necessary for the petitioners to appear at the U.P.TET and they should be granted appointments as Assistant Teachers in Elementary Schools provided they satisfy the conditions stipulated in

the 2001 NCTE Regulations. In this connection he has also pointed out that the State of Uttarakhand has correctly appreciated this position and has, accordingly, exempted the candidates who have successfully completed the B.T.C./Special B.T.C. Training Course. In respect of petitions dealing with B.T.C.2004 which comprised of two batches he has submitted that candidates of the First Batch who completed the Training in April, 2011 were granted appointment as Assistant Teachers on 1st July, 2011 even though they had not cleared the U.P.TET but the candidates of Second Batch who completed their Training subsequently are being asked to clear the U.P.TET. It is his submission that there cannot be any discrimination between the candidates of 2004 Batch.

.....

Earlier, appointments of teachers may have been made without following the procedure prescribed under the 1981 Rules but that does not mean that the advertisement issued for the purpose of admission to B.T.C./Special B.T.C. course should be taken to be the advertisement issued for initiating the process of appointment of teachers. The 1981 Rules have to be strictly followed and any deviation made in the past will not confer a right upon the petitioners to claim that it should be continued by the Basic Education Board while appointing them on the post of Assistant Teachers. The plea of discrimination between the 2004 B.T.C. candidates cannot, therefore, be accepted.

In this connection reference needs to be made to the decision of the Supreme Court in Yogesh Kumar Vs. Government of NCT Delhi (2003) 3 SCC 548:

"This last argument advanced also does not impress us at all. Recruitment to Public Services should be held strictly in accordance with the terms of advertisement and the recruitment rules, if any. Deviation from the Rules allows entry to ineligible persons and deprives many others who could have competed for the post. Merely because in the past some deviation and departure was made in considering the B.Ed., candidates and we are told that was so done because of the paucity of TTC candidates, we cannot allow a patent illegality to continue.

(emphasis supplied)

The appointment of the petitioners as teachers in Elementary Schools will have to be considered on the basis of the minimum qualifications prescribed in the notification dated 23rd August, 2010 and not by the NCTE2001 Regulations and such being the position, the petitioners have necessarily to pass the U.P.TET before they are appointed as it is an essential requirement."

(emphasis supplied)

This petition has now been filed for not only quashing the appointments of such persons of the First Batch who had been completed B.T.C. Training Course2004 in March 2011 and had been appointed as Assistant Teachers by the order dated 15th July, 2011 without requiring them to clear the U.P.TET but also to treat the petitioners at par with such persons and provide all the benefits to the

petitioners as were provided to such persons as the petitioners are eligible for appointment as Assistant Teachers.

Learned counsel for the petitioners submitted that the earlier writ petition filed by the petitioners was only for a mandamus upon the respondents to grant appointments to the petitioners and the petitioners had not sought the quashing of the appointments of the persons who had completed the B.T.C. Training in March 2011 and, therefore, the cause of action in both the writ petitions is different. He, therefore, submits that this petition can be entertained by the Court and is not barred by the principles of res judicata.

As noticed hereinabove, the petitioners had filed Writ Petition No.62219 of 2011 claiming appointment on the post of Assistant Teachers in Elementary Schools run by the Basic Education Board without requiring them to appear at the U.P.TET and in this connection, the petitioners had raised a grievance before the Court that the first Batch of B.T.C. 2004 candidates, who had completed the training in April 2011, had been given appointment as Assistant Teachers in July 2011 without requiring them to clear the U.P.TET and so discrimination was practiced by the Basic Education Board when it insisted that the petitioners, who belong to the second Batch of B.T.C. 2004 and who had completed their training in September 2011, should appear at the U.P.TET. This plea of discrimination was repelled by the Court holding that appointment as Assistant Teachers was required to be made strictly in accordance with the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as the "1981 Rules") and any deviation made in the past will not confer a right on the petitioners to claim that such deviations should be continued in the case of petitioners also.

In this petition, the petitioners contend that if they cannot be appointed as Assistant Teachers till they clear the U.P.TET, then the appointment of those candidates, who had cleared B.T.C. 2004 in the first Batch and who had been appointed without clearing the U.P.TET, should be cancelled as it was not made in accordance with the 1981 Rules. The petitioners have also claimed parity with such candidates and desire the same benefit as was given to the candidates of first Batch of B.T.C. 2004 which means that the petitioners should be given appointment as Assistant Teachers without requiring them to appear at the U.P.TET.

The issue as to whether this plea raised by the petitioners can be entertained shall be examined later but what has first to be examined is whether it was necessary for the petitioners to mention the filing of the earlier Writ Petition No.62219 of 2011 and its dismissal in this petition.

In this connection, what needs to be noticed is that the material facts on the basis of which the reliefs have been claimed in the present petition, as has been noticed above, are basically the same as in the earlier Writ Petition No.62219 of 2011. It was, therefore, imperative for the petitioners to have disclosed the filing of the earlier writ petition but instead of doing that, the petitioners have taken

the liberty to state in paragraph 1 of the present petition that this is the first writ petition filed by the petitioners for the reliefs claimed and no other writ petition had been filed for the same reliefs and on the same material facts.

What also needs to be noticed is that instead of enclosing the judgment rendered by the Court in Writ Petition No.62219 of 2011 earlier filed by the petitioners, they have annexed as Annexure1 to the writ petition the judgment rendered by the Court in Writ Petition No.64709 of 2011 which was filed by Shailendra Kumar Yadav & Ors.

A person who approaches the High Court for invoking the equitable extraordinary jurisdiction under Article 226 of the Constitution must come with clean hands and must not conceal any material facts. This is what has been observed by the Supreme Court in *The Ramjas Foundation & Ors. Vs. Union of India & Ors.*, AIR 1993 SC 852.

A Full Bench of this Court in *Asiatic Engineering Co. Vs. Achhru Ram & Ors.*, AIR (38) 1951 Allahabad 746 also observed:

"In our opinion, the salutary principle laid down in the cases quoted above should appropriately be applied by Courts in our country when parties seek the aid of the extraordinary powers granted to the Court under Art. 226 of the Constitution. A person obtaining an ex parte order or a rule nisi by means of a petition for exercise of the extraordinary powers under Art. 226 of the Constitution must come with clean hands, must not suppress any relevant facts from the Court, must refrain from making misleading statements & from giving incorrect information to the Court. Courts, for their own protection, should insist that persons invoking these extraordinary powers should not attempt, in any manner, to misuse this valuable right by obtaining ex parte orders by suppression, misrepresentation or misstatement of facts."

In *M/s. S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.*, 2004 AIR SCW 2987 the Supreme Court observed:

"As a general rule, suppression of material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the Court, whatever view the Court may have taken."

In this connection reference also needs to be made to the decision of the Supreme Court in the case of *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors.*, JT 1993 (6) SC 331, wherein it has been observed:

"The court of law are meant for imparting justice between the parties. One who comes to the court, must come with cleanhands. We are constrained to say that

more often than not, process of the court is being abused. Propertygrabbers, taxevaders, bankloandodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation."

The Supreme Court in *Raj Kumar Soni & Anr. Vs. State of U.P. & Anr.* JT 2007 (5) SC 114 again observed:

"It is a fundamental principle of law that a person invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India must come with clean hands and must make a full and complete disclosure of facts to the Court. Parties are not entitled to choose their own facts to put forward before the Court. The foundational facts are required to be pleaded enabling the Court to scrutinize the nature and content of the right alleged to have been violated by the authority."

Even otherwise, no relief can be granted to the petitioners because such a relief could have been claimed by the petitioners in earlier Erit Petition No. 62219 of 2011 filed by them. This petition is, therefore, barred by the principles of constructive res judicata. In this connection, reference may be made to the provisions of Section 11 of the Code of Civil Procedure read with Explanation IV which is as follows :

"11. Res judicata. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

.....

Explanation IV. Any matter which might and ought to have been made ground defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and is incidental to or essentially connected with the subject matter of the litigation.

In *Devilal Modi Vs. Sales Tax Officer, Ratlam & Ors.* AIR 1965 SC 1150, the Supreme Court observed :

"7.But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Art. 226, cannot be answered merely in the light of the significance and importance of the

citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by Courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide : *Daryao and Others v. The State of U. P. & Others* 1962 1 SCR 574: (AIR 1961 SC 1457)..

8. It may be conceded in favour of Mr. Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred.

.....

10. As we have already mentioned, though the courts dealing with the questions of the infringement of fundamental rights must 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 petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such 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.

11. The result of the decision of this Court in the earlier appeal brought by the appellant before it is clear and unambiguous, and that is that the appellant had failed to challenge the validity of the impugned order which had been passed by the Assistant Commissioner against him. In other words, the effect of the earlier decision of this Court is that the appellant is liable to pay the tax and penalty imposed on him by the impugned order. It would, we think, be unreasonable to suggest that after this judgment was pronounced by this Court, it should still be open to the appellant to file a subsequent writ petition before the Madhya Pradesh High Court and urge that the said impugned order was invalid for some additional grounds."

(emphasis supplied)

In *State of Karnataka and Anr. Vs. All India Manufacturers Organisation and Ors.* (2006) 4 SCC 683, the Supreme Court also examined Explanation IV of CPC and

observed :

38. The spirit behind Explanation IV is brought out in the pithy words of Wigram, V.C. in *Henderson v. Henderson* as follows (All ER pp. 378 I382 A):

The plea of *res judicata* applies, except in special case (sic), not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. (Ibid. at pp. 381382)

39. In *Greenhalgh v. Mallard* (1947) 2 All ER 255 (hereinafter "Greenhalgh"), Somervell L.J. observed thus:

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

40. The judgment in *Greenhalgh* (supra) was approvingly referred to by this Court in *State of U.P. v. Nawab Hussain* (1977) 2 SCC 806 . Combining all these principles, a Constitution Bench of this Court in *Direct Recruit, Class II Engineering Officers" Association v. State of Maharashtra* (1990) 2 SCC 715 expounded on the principle laid down in *Forward Construction Co.* (supra) by holding that:

"An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had (sic) decided as incidental to or essentially connected with (sic) subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive *res judicata* underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of *res judicata*."

.....

49. In the face of such a finding by the High Court, Explanation IV to Section 11 squarely applies as, admittedly, the litigation in *Somashekar Reddy* (supra) exhausted all possible challenges to the validity of the FWA, including the issue of excess land. Merely because the present petitioners draw semantic distinctions and claim that the excess land not having been identified at the stage of the litigation in *Somashekar Reddy* (supra), the Project should be reviewed, the issue does not cease to be *res judicata* or covered by principles analogous thereto. If we were to reexamine the issues that had been raised/ought to have been raised in *Somashekar Reddy* (supra) it would simply be an abuse of the process of the

court, which we cannot allow."

It is, therefore, not possible to accept the contention of learned counsel for the petitioners that the principles of constructive res judicata will not apply because the relief claimed in this petition and the cause of action is different. Such a plea could have been taken by the petitioners in the earlier writ petition but it has not been taken.

Thus, for all the reasons stated above, the Court declines to entertain this petition.

The writ petition is, accordingly, dismissed.