
(1995) 03 CAL CK 0006
In the Calcutta High Court
Case No : Matter No. 643 of 1993

G. Kalyan Sundaram

APPELLANT

Vs

UCO Bank and Another

RESPONDENT

Date of Decision : 15-03-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (1995) 2 CALLT 201 : (1995) 1 ILR (Cal) 540

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Satyabrata Sinha, J.—The petitioner, in this application, has inter alia, prayed for the following reliefs :-

"(a) A writ in the nature of Mandamus commanding the respondent to give your petitioner notional promotion declaring your petitioner as a member of the officer"s cadre since October 1977 without break and to give him fixation of pay from the same date.

(b) A writ in the nature of certiorari calling upon the respondents to transmit the records and all decisions relating to the instant writ petition to the Registrar, Original Side of this Hon"ble High Court so that conscionable justice may be rendered to your petitioner.

(c) A writ in the nature of prohibition prohibiting the respondents not to insist for any undertaking from the petitioner and to act according to law ;

2. The facts of this case, shortly stated, are as follows :-

The petitioner was appointed as a Clerk by the respondent bank in 1966 and in the year 1977 he was promoted to the Officers" Cadre. The petitioner became a cardiac patient in 1984 when he was posted at Madras. His 9 years old daughter also became a patient of Authorities and both of them had to undergo a long

treatment at Appollo Hospital, Madras. At that time the petitioner was directed by the bank to perform rural service. The petitioner, in order to carry on his treatment and the treatment of his daughter requested the bank to keep him at Madras city, which was turned down by the bank. Thereafter, the petitioner requested the bank to revert him as a Clerk. On 9.12.87 the Zonal Officer, Madras, of the respondent-bank reverted the petitioner to clerical job under certain terms, which will appear from; Annexure "A" to the writ petition. The petitioner, thereafter, filed a writ petition before the Madras High Court praying for issuance of a writ quashing the said reversion order. On 22.8.91 the said writ petition was disposed of by directing the bank to promote the petitioner to Officers' Cadre prospectively. Being aggrieved by the said order, the petitioner preferred an appeal, which was disposed of on 16.9.91 by directing the respondent bank to consider his representation relating to extend protection of seniority to the petitioner. However, the respondent bank promoted the petitioner as Assistant Manager without giving seniority or pay protection and posted him at Jamshedpur, Bihar. Thereafter, the petitioner made repeated representations, which were of no avail and on 2.1.93 the respondent No. 2 issued the impugned order from Calcutta offering notional seniority from 1.10.1977 without any right to protection of pay and any consequential benefit.

3. The respondent's contention, however, is that keeping in view the decision of the Madras High Court this application is barred under the principles of res judicata. The learned Counsel in support of his aforementioned contention has relied on Pujari Bai Vs. Madan Gopal, . It was further submitted that the petitioner took his chance before the Madras High Court whereafter he was transferred to Bihar. The petitioner thereafter filed a representation which has been rejected by the Calcutta Office of the respondent bank. It is submitted, in this situation, such practice should not be allowed by this Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India.

4. The learned Counsel for the petitioner submitted that in view of the peculiar situation of this case, it must be held that the petitioner was compelled to enter into an unequal contract which is hit by Section 23 of the Contract Act as also Article 14 of the Constitution of India. Reliance in this connection has been placed upon Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and Md. Abdur Rahim v. The Sub-Divisional Officer, Alipur and Ors., reported in 1993 Lab. I.C. 1400.

5. Before considering the rival contentions of the parties as referred to hereinbefore, Clause 3 (8) (3) (b) of the Promotion policy of the respondent bank may be noticed which reads thus :

"Employee who seeks reversion after the expiry of probation period may be allowed reversion at the discretion of the Bank. In such case the concerned employee shall forfeit permanently his chance for promotion to officers' cadre, and shall be posted in the capacity of a clerk, notwithstanding his occupying any functional special allowance post prior to his promotion. His name will included in

the common seniority list of eligible employees in the clerical cadre for selection to functional special allowance posts under Bipartite Settlements after five years from the date of such reversion".

6. It is not disputed that the petitioner himself voluntarily requested the bank to revert him as a clerk whereupon he was reverted to perform clerical job under certain terms which are as follows :-

"1. You will be deemed to have permanently forfeited your claim for promotion and will have no claim nor be eligible for promotion as an Officer in the Bank at any time in future notwithstanding anything to the contrary contained in the Agreement entered/to be entered into by Bank with its employees unions regarding policy and procedure concerning promotion to Officers" cadre and selection of posts carrying any functional allowance.

2. You will not be eligible for selection to posts carrying any functional allowance for all time to come and as such, you will not be included in the seniority list of clerical cadre prepared for the purpose of selection of posts carrying functional allowance.

3. Your reversion to clerical cadre will take effect from the date of receipt of this letter.

4. Consequent upon your reversion you are posted to Madras Main as Clerk and fixed at the Basic pay of Rs. 1660/- and other eligible allowances in the clerical cadre.

5. You will not be entitled for any stagnation increment in future.

On receipt of this letter please handover charge of the Branch to the Assistant Manager and report for duty at our Madras Main Branch immediately".

7. The petitioner admittedly filed a writ application in the Madras High Court. The said High Court upon consideration of the cases of the parties therein held :

"The petitioner may have a grievance against that portion of the order of reversion which stated that he would be permanently debarred from promotion. But, in view of the offer made in the letter of the Bank dated 14.2.1989 and in view of the submission now made before this Court on behalf of the Bank offering prospective promotion to the petitioner, it should be deemed that portion of the order of reversion permanently debarring the petitioner from promotion is not being implemented in so far the petitioner is concerned. Hence, there will be an order in this writ petition directing that the petitioner be promoted to the Officer's Cadre prospectively by orders to be made by the first respondent Bank on or before 30.9.1991 and the petitioner, if given posting in Bihar, shall, without demur, join in service pursuant to that posting order and work there for a period of three years before seeking a transfer. It is also made clear that the promotion given to the petitioner shall be only prospective and shall not give him any right to claim back-wages in the scale of pay of Officers for the period during Which he

was working in the clerical cadre. The writ petition is ordered on the above terms. No. costs".

The petitioner preferred an appeal as against the said judgment.

8. A Division Bench of the Madras High Court without issuing any notice to the respondent bank merely directed-

"We do not think that any notice to the respondents is necessary at this stage. The appeal can be disposed of with the observation that the appellant shall make a representation to the competent authority (respondents). In case any such representation is made the respondents would consider the same in accordance with law, and extend to the petitioner protection of his seniority vis-a-vis his next junior.

With the observation as above, this appeal is disposed of."

It is, thus, clear that no direction had been issued by the appeal Court and merely an observation was made therein.

9. It is only pursuant to the said observation the petitioner preferred an appeal before the Chairman and Managing Director of the respondent bank in terms of his letter dated 25.9.91 which is contained: in Annexure "D" to the writ application. It is also admitted that the petitioner was transferred to Bihar in the meanwhile. Pursuant to the said representation/appeal of the petitioner, the impugned order dated 2.1.93 has been passed wherein it was stated-

"After considering the facts and circumstances of the case and your representation, it has been decided to give you notional seniority from 1.10.77 without any

(i) salary of any refitment thereon ; or

(ii) any right to protection of pay and any consequential benefit(s) arising howsoever therefrom including any right to considerations for past promotions based on such notional seniority.

If you are agreeable to the above, you should furnish an undertaking in writing that you are foregoing any claim based on the said notional seniority regarding any salary or any refitment thereof and any right to protection of pay and any consequential benefits including promotions as set out hereinabove and further that you undertake not to raise any claim in any manner for salary etc. as set out hereinabove based on such notional seniority.

On receipt of the said undertaking the effect to such notional seniority as stated above may be given by us".

Thus, there cannot be any doubt that the petitioner was reverted on his own asking. There was no compulsion on his part to do so. If the petitioner was aggrieved by any order of transfer/rural posting, he could have questioned the same, but chose not to do so. Only after the order of reversion was passed on

the conditions mentioned in the order dated 9.12.87 as contained in Annexure "A" to the writ application, the petitioner filed the abovementioned writ application before the Madras High Court. It, therefore, in my opinion, does not lie in the mouth of the petitioner now to question the said order of reversion. The aforementioned decision of the Madras High Court, in my considered view operates as res judicata. In Pujari Bai Vs. Madan Gopal, the Supreme Court observed :

"It thus becomes clear that when a writ petition after contest is disposed of on merits by a speaking order, the question decided in that petition would operate as res judicata, but not a dismissal in limini or dismissal on the ground of laches or availability of alternative remedy".

This aspect of the matter has also been considered by a Division Bench of this Court in Krishna Mohan Mukherjee v. The Chief General Manager, State Bank of India, disposed of on 22.11.94 wherein the Division Bench of this Court upon taking into consideration a large number of decisions has held that the principles of res judicata/constructive res judicata apply in a writ proceedings also.

"Although, in view of the provisions contained Section 141 of the Code of Civil Procedure, the principles of res judicata as contained in Section 11 thereof may not strict sense apply in the writ proceedings, the general principles of res judicata/constructive res judicata are applicable. Reference in this connection may be made to Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), and Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, as also Sashibhuson Kumar v. State of Bihar reported in 1994(2) PLJR 55".

The Division Bench further took into consideration decisions in the case of State of U.P. Vs. Nawab Hussain, , The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, , G.K. Dudani and Others Vs. S.D. Sharma and Others, as also Spencer-Bower and Turner in The Doctrine of Res Judicata.

The House of Lords in the Indian Endurance Republic of India and Ors. v. India Steamship Co. Ltd. reported in (1993) 1 All ER 998 observed as follows :-

"Central to the consideration of these issues is the impact of Section 34 of the 1982 Act, upon which Sheen, J. and the Court of Appeal based their conclusion that the appellants" claim should be struck out. Indeed Sheen, J. expressed the view that if S-34 did not apply, and the case was to be decided upon the basis of the common law principle of issue estoppel, further investigation of the facts would be necessary. I propose therefore to turn first to consider the legislative purpose underlying Section 34 and the effect of the section in the light of that legislative purpose and in order to carry out that task it will, in my opinion, be necessary to set the section against the back-ground of the common law principle of res judicata".

"The House of Lords upon taking into consideration its earlier decision in Thoday v. Thoday (1964) All ER 341 and Yat Tung Investment Company Ltd. v. Dao Heng Bank Ltd. (1975) Appeal Cas 581 and other decision, inter alia, held that the cause of action also merges, with the judgment. It also emphasised the principles of constructive res judicata".

In Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others, and State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others, , it has been held that even an erroneous order would also operate as res judicata. The Apex Court held "A wrong decision by a Court having jurisdiction inasmuch binding between the parties as a right one and may be superceded only by appeals to higher tribunals or other procedure like review which the law provides".

This aspect of the matter has also recently been considered by the Apex Court in P.K. Vijayan Vs. Kamalakshi Amma and Others, in the following terms :

"We have already seen that the Land Reforms Act is a beneficial legislation and has conferred certain benefits on the tenants. The tenant is expected to raise all the pleas available under the statute at the relevant time. It is a sheer abuse of the process of the Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just that the parties to raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive res judicata to prevent raising of the same at a later point of time. Thereby it must be deemed that they are waived".

Reference in this connection may also be made to paragraph 197 of Spencer Bower and Turner on Res Judicata wherein it has been stated :-

"Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence or otherwise some questions or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings, and which, therefore, it was his duty (in a sense) to have them raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue or point so omitted to be raised, just as much as if it had been expressly raised by" the party and expressly determined against him. And this is so whether the question or issue is simply passed over through inadvertence, or is made the subject of expresser implied assumption or admission."

10. It is now well settled that the doctrine of constructive res judicata is applicable in writ proceedings. Thus, in the event the petitioner was of the view that he had been compelled to enter into the contract which according to him was wholly unjust and against the public policy, he should have raised the said contention before the Madras High Court. He having not done so, in my opinion is estopped and precluded from raising the self same issue by filing this application.

He, in my opinion, is estopped by records from maintaining this application.

The decisions of the Supreme Court of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and of this Court in Md. Abdur Rahim v. The Sub-Divisional Officer, Alipur and Ors. reported in 1993 Lab. I.C. 1400, have no application to the facts and circumstances of the case. In the case of Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly the Supreme Court was considering the Rule of the Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules in terms whereof the service of an employee could be terminated only upon giving three months' notice. The Supreme Court held that such a provision is ultra vires Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act. In Md. Abdur Rahim (1993 Lab. I.C..) this Court followed Ganguly's case (supra). It was held :-

"In our considered opinion, Appendix IV containing the Agreement with a Tahsildar upon which the appellant was a signatory is directly hit by the Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, It was an Agreement between the two unequals, the State with all its might and a poor man seeking job of a petty Tahsildar who has no right to utter a single word but to sign on the form given to him containing the Agreement. We hold that Clause II of the said Agreement is contrary to Section 23 of the Contract Act as well as ultra vires Article 14 of the Constitution".

Such is not the position here.

11. A provision in the contract including a contract of service can be questioned only if the same is contrary to public policy and/or offends the equality clause as enshrined under Article 14 of the Constitution.

12. The petitioner did not question before the Madras High Court the vires of the aforementioned provision relating to reversion. He, therefore, in my opinion, cannot do so now by filing a separate writ application. In any view of the matter, the petitioner had taken a chance by submitting himself to the jurisdiction of the Chairman cum Managing Director of the respondent bank pursuant to an observation made by the Division Bench of the Madras High Court. Although the said judgment and order of the Division Bench of the Madras High Court was not binding on the respondent bank as no notice was issued to it in the said appeal, its Chairman and Managing Director considered the appeal of the petitioner and passed an order which to a large extent is in favour of the petitioner. It is, therefore, open to the petitioner to accept or reject the offer made by the respondent bank.

13. The petitioner obtained the order of reversion on his own accord. He, in fact, thanked the authorities of the Bank for the same. o

14. The Madras High Court clearly held upon consideration of the issues which have been raised herein that the promotion of the petitioner shall be prospective

and he would not get any monetary benefit therefore. The petitioner himself waived his claim for back wages at one stage.

15. In view of the judgment of the Madras High Court the petitioner does not have any existing legal right in his favour to obtain back wages. He cannot claim a writ/direction in the nature of mandamus in discretionary matter as a matter of right.

In K.V. Rajalakshmiah Setty and Anr. v. State of Mysore reported in AIR 1967 SC 993, the Apex Court held :-

"There is some force in some of the contentions put forward on behalf of the State of Mysore. It is not necessary to test them as we find ourselves unable to uphold the contention of the appellants. No doubt, some concession had been shown to the first batch of 41 persons and the batches of persons who had come in after the batch of 63 persons also received some concession, but after all these were concessions and not something which they could claim as of right. The State of Mysore might have shown some indulgence to this batch of 63 persons but we cannot issue a writ of mandamus commanding it to do so. There was no service rule which the State had transgressed nor has the State evolved any principle to be followed in respect of persons who were promoted to the rank of Assistant Engineers from surveyors. The indulgence shown to the different batches of persons were really ad hoc and we are not in a position to say what, if any, ad hoc indulgence should be meted out to the appellants before us."

16. The submission of the learned Counsel of the petitioner relying on the decision of Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, is misplaced.

It was held :-

"Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, professor De Smith states : "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial" Review of Administrative Act 4th Ed. p. 540). We share this view. The judicial control over the fact expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances."

17. In the case of Respondent Bank has no public duty to perform. The service rules of the Bank have not been violated.

In the aforementioned case, the Supreme Court itself held that writ can be issued as against any person performing public duty.

18. This case does not involve exercise of any power on the part of the Bank which can be said to be of public law character. No element of public duty existed in the matter of disposal of representation of the petitioner pursuant to the observations made by the Division Bench of the Madras High Court.

19. In terms of the judgment of the Madras High Court the petitioner's fate was sealed. By reason of the impugned order the petitioner has been granted the benefit of notional seniority without the back-wages.

20. In view of the judgment of the Madras High Court, the petitioner was not entitled to any back wages.

The learned counsel for the petitioner would submit that the impugned order is harsh and the petitioner has suffered a lot and thus this Court shall grant this reliefs prayed for in this application. The said contention cannot be accepted as in this case, in my opinion, there is no scope for exercise of equitable jurisdiction of this Court. It is not a case where the reliefs to the petitioner are being refused on mere technicalities. Even sympathy has no role to play in such case.

21. In *Latham v. Richard Johnson & Nephew, Ltd.* reported in 1911 AER117, Farwell L.J. observed :-

"We must be very careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will of the wisp to take as a guide in the search for legal principles."

22. In *State of Tamil Nadu and Others Vs. St. Joseph Teachers Training Institute and Another*, the Apex Court observed that court cannot grant relief on humanitarian ground contrary to law.

23. For the reasons aforementioned this application, being devoid of any merit, is dismissed. But in the facts and circumstances of this case, there will be no order as to costs.