

(2013) 01 P&H CK 0073

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 1761 of 2009 (O and M)

Mohinder Singh Gulia

APPELLANT

Vs

The Sonapat Co-operative Bank Limited and Another

RESPONDENT

Date of Decision : 14-01-2013

Acts Referred:

Citation : (2013) 170 PLR 130

Hon'ble Judges : Rajesh Bindal, J

Bench : Single Bench

Advocate : Rajender Singh Malik, for the Appellant; Subhash Ahuja, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Bindal, J.—The petitioner has approached this court impugning the order dated 11.4.1991 passed by the Managing Director of the respondent-Bank whereby the pay of the petitioner was re-fixed after correcting error made in terms of clarification given by the Registrar, Co-operative Societies. Learned counsel for the petitioner submitted that the petitioner joined service of the respondent-Bank on 18.12.1975 as Bank Supervisor. He was deputed to work as Clerk-cum-Cashier from 14.12.1981 and on account of the duties discharged by him, he was paid Rs. 100/- as special pay, which he continuously got till 30.12.1988. Thereafter, he was promoted as Junior Accountant on 11.1.1989. Initially at that time, the pay of the petitioner was correctly fixed on the promoted post after taking into account the special pay of Rs. 100/- being received by him, however, later on without there being any reason given in the impugned order, the pay of the petitioner was re-fixed after reducing the benefit of Rs. 100/- as special pay which the petitioner was getting. The same is in contravention to Rule 4.14(ii) of the Punjab Civil Service Rules (as applicable to the Haryana).

2. Learned counsel for the petitioner further submitted that under similar circumstances the pay of an employee junior to the petitioner namely Hawa

Singh Sheoran was fixed. He challenged the order by filing CWP No. 7601 of 2006. The writ petition was allowed by a Division Bench of this court on 11.2.2008 setting aside the order passed against the petitioner therein. The petitioner being similarly situated also deserves to be granted the same relief.

3. On the other hand, learned counsel for respondent No. 1 submitted that the petitioner has concealed material facts from this court. He had earlier filed a civil suit claiming the same relief, which was dismissed on merits as well as on the ground of jurisdiction by the Additional Civil Judge (Senior Division), Sonapat, on 16.5.2007. The petitioner being not aggrieved against the aforesaid judgment and decree of the trial court, did not file any appeal. The writ petition has been filed in this court raising a plea that in the case of some other employee this court had granted the relief. Once the petitioner had filed civil suit, he should have challenged the judgment and decree of the trial court passed against him by filing appeal and cannot leave the same in between and file the writ petition. The writ petition filed under these circumstances will be barred by principles of *res judicata*. In support of his arguments, reliance was placed upon judgment of this court in *Piara Singh v. Union of India and others*, 2003 (3) R.S.J. 175.

4. Learned counsel for respondent No. 1 further submitted that the writ petition is liable to be dismissed on the ground of delay and laches as well. The order passed against the petitioner on 11.4.1991 is sought to be challenged by filing the writ petition more than 18 years thereafter. In support of his arguments, reliance was placed upon judgment of Hon'ble the Supreme Court in *State of Orissa and Another Vs. Mamata Mohanty*, Even on merits, the submission is that when the case of other employee was considered by this court, all the relevant rules and regulations applicable were not brought to its notice. Clerk-cum-Cashier was granted Rs. 100/- as special allowance and not as special pay. As per Rule 2.44 of the Punjab Civil Services Rules, Volume-I, Part-I (as applicable to the State of Haryana), pay means the basic pay and as per Rule 2.52 of Punjab Civil Service Rules, special pay means payment in addition to the pay on account of some arduous nature of duties performed by an employee.

5. In the present case, the petitioner was not paid any special pay. It was merely an allowance. It could not be added in the basic pay for the purpose of fixation of pay in higher scale on promotion. In support of his plea, reliance was placed upon judgment of Hon'ble the Supreme Court in *Government of Andhra Pradesh and others Vs. Syed Yousuddin Ahmed*, , and judgment of this court in *J.S. Yadav v. State of Haryana*, 1992 (2) S.C.T. 262 where similar Rule for the Central Government employees was under consideration.

6. Further contention of learned counsel for respondent No. 1 is that as the relevant rules applicable in the case of the petitioner were not referred to in the judgment of Division Bench of this court, the same cannot be cited as a precedent and similar relief cannot be claimed by other employees as a direction cannot be issued which is a contrary to the Act or the rules applicable. In support of his arguments, reliance was placed upon judgments of Hon'ble the Supreme

Court in Union of India (UOI) and Another Vs. Manik Lal Banerjee, and Union of India (UOI) and Others Vs. S.K. Saigal and Others,

7. In response to the contention raised by learned counsel for respondent No. 1, learned counsel for the petitioner submitted that factum of filing civil suit and dismissal thereof on the issue of jurisdiction has been mentioned in para 11 of the writ petition. Hence, the stand of learned counsel for respondent No. 1 that the petitioner had concealed the material facts from this court is not tenable. He further submitted that once the person junior to the petitioner is getting higher pay, the petitioner also deserves the same relief.

8. Heard learned counsel for the parties and perused the paper book.

9. The undisputed fact in the present case is that prior to filing of the present writ petition before this court, the petitioner had filed civil suit No. 266 of 2001/2003, for the same relief which was dismissed by the Additional Civil Judge (Senior Division), Sonipat vide judgment and decree dated 16.5.2007. One of the issue framed in the suit was, whether the plaintiffs are entitled for fixation of pay including special pay from the date of their promotion as Junior Accountants and defendants are also liable to rectify the anomalies in fixation of pay? In addition, the issue regarding jurisdiction of the court was also framed. While recording finding on the merits of the controversy against the petitioner, the court also held that it did not have jurisdiction to entertain the suit. The petitioner did not challenge the judgment and decree of the trial court against him any further and was satisfied. After keeping quiet for more than two years, the present writ petition was filed impugning the order dated 11.4.1991 passed by the authority withdrawing the benefit erroneously granted to the petitioner earlier, while referring to the case of other employee, who had approached this court immediately after the order was passed against him. The issue as to whether under such circumstances a litigant can be heard on the merits of the controversy was considered by this court in Piara Singh's case (supra), wherein it has been held that in case a finding has been recorded against a litigant by the court on merits even if the case is ultimately dismissed on account of lack of jurisdiction, in the absence of challenge to that finding in further proceedings, the same operates as res judicata. Relevant para thereof is extracted below:-

After hearing learned counsel for the parties, I am of the considered view that the petitioner has a primary hurdle in his way because Civil Suit No. 337 of 1088, decided on 28.11.1987 has not only been decided on the question of jurisdiction but it has been decided on merits. A perusal of issues No. 1 and 2 framed by the Civil Judge would show that these issues were framed on merits and the decision had also been rendered on merits. The petitioner failed to file any appeal for getting the findings set aside on merits. It is a different matter that a Civil Court cannot while deciding the case of a plaintiff on a preliminary objection express opinion on merits but in a case, where it has been done and the judgment and decree has been accepted, then the judgment and decree is binding. If such a judgment and decree is set aside in another proceedings, it would be absolutely

unwarranted because such a course, would be impermissible in law. Therefore, on the principle of res judicata, the writ petition is barred and cannot be heard on merits.

10. Considering the aforesaid enunciation of law, in my opinion, once the petitioner had filed civil suit claiming the same relief and failed therein even if the same was dismissed by the court on account of lack of jurisdiction and the finding has been recorded on the merits of the controversy as well, the petitioner cannot be permitted to raise the same issue in the writ petition while accepting the judgment and decree of the civil court as such by not filing the appeal. For the reasons mentioned above, the present writ petition is dismissed.