
(2003) 11 BOM CK 0022
In the Bombay High Court
Case No : Writ Petition No. 2418 of 2000

R.S. Sharma

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 11-11-2003

Acts Referred:

Administrative Tribunals Act, 1985 — Section 14
Central Civil Services (Pension) Rules, 1972 — Rule 41
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2004) 101 FLR 651 : (2004) 3 LLJ 191 : (2004) 1 MhLj 1005

Hon'ble Judges : V.C. Daga, J; S.B. Deshmukh, J

Bench : Division Bench

Advocate : R.P. Joshi, for the Appellant; Govind Mishra, for the Respondent

Final Decision : Allowed

Judgement

S.B. Deshmukh, J.—This Writ Petition seems to have been filed on 3-7-2000, which is admitted by this Court by the order dated 25-2-2003. This Court considering the request of the petitioner that he is 75 years old, listed the petition for early hearing on November 10th, 2003.

2. The challenge in this petition is made to the Judgment and order of the learned Central Administrative Tribunal, Nagpur Bench, in Original Application No. 207/99 dated February 11th, 2000 and the communication dated July 9th, 1998, rejecting the case of the petitioner for compassionate allowance.

We have heard the parties through their Counsel

The Facts:

3. The facts in brief leading to the controversy between the parties may be summarized as below:

4. The petitioner was initially appointed as a Telephone Operator in the Telecom Department at Telephone Exchange, Nagpur with effect from 19-3-1949. The

petitioner from time to time was promoted and, ultimately, held the post Group "A" cadre as Divisional Engineer, in the year 1982. The petitioner was indicted with certain allegation of misconduct, and charge sheeted before his retirement. The petitioner ultimately, was dismissed from service as per the Order dated 18/19-6-1986.

5. The petitioner challenged the above order of dismissal before the Central Administrative Tribunal ("the Tribunal" for short) by filing Original Application No. 471/1986 ("the O. A." for short). This O. A. came to be allowed by the order dated 19-4-1991 and remitted to the department for consideration afresh after supplying copy of the Enquiry Officer's report to the petitioner. Even after fresh consideration, the petitioner came to be punished with the punishment of withdrawal of pension permanently by an order dated 4-8-1993; which again came to be challenged before the Tribunal by another fresh Original Application No. 1082/1993; which came to be dismissed on 19-2-1997.

6. The petitioner, after dismissal of the above O.A., addressed one representation to the Hon"ble President of India for grant of compassionate allowance/compassionate pension as per Rule No. 41 of the Central Civil Services Pension Rules, 1972 ("the Rules" for short). This representation came to be rejected as per the communication dated 9-7-1998. The petitioner again challenged the said communication dated 9-7-1998 in the Original Application No. 207/1999 filed before the Central Administrative Tribunal, Bench Mumbai, whereby compassionate allowance/compassionate pension to the petitioner was disallowed. The said Original Application was also rejected by the Tribunal, by the Judgment and order dated 11-2-2000.

7. The Tribunal has rejected the claim of the petitioner for compassionate allowance/compassionate pension set up in A. O. No. 207/1999, holding that in the earlier round of litigation arising out of Original Application No. 1082/1993 filed by the petitioner having been rejected after hearing the parties by the Division Bench of the Tribunal by the order dated 12-2-1997, the said order would operate or "res judicata" between the parties. This order of the Tribunal is a subject matter of challenge in this petition.

8. The petitioner has placed on record copy of the Judgment of learned Tribunal which was passed in O. A. No. 1082/1993. From the copy of the same, it appears that Original Application No. 1082/1993, was filed to challenge the order of dismissal dated August 4th, 1993. The facts emerging at that point of time were that the petitioner was serving as a Divisional Engineer with the respondent No. 1, more specifically, at its Office at Nagpur. The petitioner was dismissed by the order dated 19-6-1986. The said order of dismissal was served on the petitioner just 5 days before his date of superannuation. From the copy of the Judgment passed in O. A. No. 1082/1993, it is clear that the petitioner had filed the Original Application No. 471/1986 which came to be disposed of by the Tribunal vide its order dated 19-4-1991 whereby Tribunal had allowed the said Original Application and quashed the order of dismissal. It appears, thereafter, that the

petitioner made a representation dated 14-9-1992 to the respondents. The record also shows that the impugned Order passed in the name of the President of India, came to be passed on 4-8-1993 i.e. much after 9-4-1991 holding the petitioner guilty for the grave misconduct committed by the petitioner during the period of his service and, therefore, the pension admissible to the petitioner was withdrawn permanently. This order was the only order which was a subject matter of challenge in the Original Application No. 1082/1993 which was rejected by the learned Member of the Central Administrative Tribunal, Mumbai, Camp at Nagpur.

9. The Tribunal, as stated above by a perfunctory and cryptic order, held that the Original Application No. 207/1999 is hit by the principles of "constructive res judicata" and rejected the same. In the submission of the Learned Counsel for the petitioner the impugned order of the Tribunal is absolutely wrong, illegal and contrary to the provisions laid down under Rule 41 of Central Civil Services Pension Rules, 1972 as such the same is liable to be quashed and set-aside. He submits that in the facts of the present case by no stretch of imagination doctrine of res judicata can be applied especially, the issues involved in the earlier proceedings were altogether different.

Consideration :

10. We have heard and considered the submissions advanced by the learned Counsel for the respondents. We are of the firm view that the Original Application No. 207/99 is not hit by the principles of constructive res judicata. The Original Application No. 1082/1993, was filed to challenge the order of dismissal dated 4-8-1993. The question of entitlement of the petitioner for compassionate pension/allowance under Rule 41 of Central Civil Services (Pension) Rules, 1972, was not the subject matter of the consideration before the Learned Central Administrative Tribunal in that petition. Therefore, it cannot be said that the contentions raised in O. A. No. 207/1999 were hit by the principles of "constructive res judicata". The learned Member of the Tribunal without adverting to the challenges set out in O. A. No. 1082/1993, wrongly recorded a finding that the Original Application No. 207/1999 was hit by the principles of res judicata.

11. We have also examined Rule 41 of Central Civil Services Pension Rules, 1972, which reads thus :

"41. Compassionate allowance. -- (1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity : Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on [compassionate pension].

(2) A compassionate allowance sanctioned under proviso to Sub-rule (1) shall not be less than the [amount of Rupees sixty per mensem].

12. The concept of "constructive res judicata" has been explained by the Apex Court in the case of Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, in the following words :

"Para 8 :

It is well-known that the doctrine of res judicata is codified in Section 11 of the CPC but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the CPC and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided."

13. Applying the above principles by no stretch of imagination, it can be said that refusal to consider the Compassionate pension or allowance could have been the subject matter of challenge in the earlier round of litigation. If that be so, the principles of constructive res judicata could not have been invoked and applied by the Tribunal. The finding recorded in this behalf is unsustainable and liable to be quashed and set aside. The communication dated 9-7-1998 records that the penalty imposed on the petitioner is neither removal, nor dismissal in nature from the service, hence, Rule 41 is not applicable.

14. Having examined the facts of the case and the above reason recorded by the Tribunal, we are of the view that the respondents, by the above impugned communication illegally, have rejected claim of the petitioner. The petitioner was never removed or dismissed by way of penalty from the service. The punishment imposed on petitioner was of withdrawing pension permanently. We fail to understand, if the case of a person, who is dismissed or removed from service who forfeits his pension and gratuity if found to be deserving of special consideration can get compassionate allowance, then, why a person who suffered lower punishment than that of removal or dismissal should not be considered for the same benefit if he makes out a case deserving special consideration. We are of the view that the case of the petitioner needs to be considered from the stand point of view as to whether or not it is a case deserving special consideration. If

on examination authorities find that it is a deserving case of special consideration, then certainly in such deserving cases compassionate allowance can very well be granted. The learned Tribunal also did not consider the provisions under Rule 41 of the CCS (Pension) Rules, 1972 in its proper perspective, wrongly applied concept of constructive res judicata and erroneously rejected case of the petitioner.

In the above view of the matter, Writ Petition is allowed.

The matter is remanded to the respondents with direction to consider the case of the petitioner under Rule 41 of the above Rules in the light of the observations made hereinabove and for deciding the quantum of compassionate allowance/ compassionate pension to the petitioner in accordance with Rule 41 of the CCS (Pension) Rules, 1972, if found to be deserving of special consideration.

The respondent No. 1 shall take steps to get the case decided within a period of three months from the date of receipt of Writ of this order from this Court.

Accordingly, rule is made absolute in terms of this order with no order as to costs.