

(2016) 01 AHC CK 0103

In the Allahabad High Court

Case No : Special Appeal Defective No. 715 of 2012

State of U.P. and Others

APPELLANT

Vs

Hc Kalika Singh and Others

RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Limitation Act, 1963 — Section 5

Citation : (2016) 01 AHC CK 0103

Hon'ble Judges : Rakesh Tiwari and Pratyush Kumar, JJ.

Bench : Division Bench

Advocate : Shiv Shanker Sen, for the Respondent

Final Decision : Dismissed

Judgement

Pratyush Kumar, J.—1. Heard Additional Chief Standing Counsel for the applicants/appellants and Sri Rajesh Singh Chauhan, Advocate appearing for the respondents/opposite parties. By the instant application the applicants seek condonation of the delay in filing the special appeal. In the supporting affidavit reason for the delay has been given as protracted correspondence between various authorities in reference to filing of the said appeal.

2. After receiving the notice on behalf of the opposite parties objection has been filed supported by counter affidavit whereby averments made in the supporting affidavit have been denied and it has been further stated that the judgment impugned in the intra court appeal has already been implemented by some authorities.

3. On behalf of the applicants rejoinder affidavit has been filed reiterating their earlier assertions and in reply to the additional facts stated in the counter affidavit it has been averred that implementation of the impugned judgment in the form of giving financial benefits has been made under the duress and with protest.

4. According to office report the impugned judgment was delivered on 23.3.2012. Appeal could have been preferred upto 23rd April, 2012, it has been filed on 9th October, 2012 beyond 5 months 16 days" time.

5. We have given our anxious consideration to the facts stated in the supporting affidavit and their denial by the opposite parties. While disposing of application moved under section 5 of the Limitation Act the Court always leans in favour of providing opportunity of hearing instead of shutting it up. It is also a ground reality that in the government offices correspondence takes long time to arrive at its logical end. In the supporting affidavit details of correspondence have been given meticulously. Their denial appears to be a bald denial as the opposite parties could not have opportunity to check the dates on which various developments in the correspondence took place. Keeping in view the peculiar facts and circumstances of the case we hold that delay has been sufficiently explained and in the interest of justice we allow the application and condone the delay.

6. Since the judgment impugned before us is of the year 2012 and the matter is pending since then and on the request of counsel for both the parties, we think it proper to hear them on the point of admission of the special appeal at the same time.

7. The reasons disclosed in the affidavit filed in support of the application for condonation for delay in moving the special appeal, are sufficient to condone the delay.

8. Accordingly the delay is condoned.

9. After condoning the delay we have heard the learned Additional Chief Standing Counsel for the appellants, Sri Rajesh Singh Chauhan, learned counsel for the respondents and proceed to dispose of the appeal at the admission stage.

10. On behalf of the appellants learned Additional Chief Standing Counsel has submitted that the appellants were not provided an opportunity to file the counter affidavit and at the stage of admission itself writ of respondents was allowed by the learned Single Judge, erroneously placing reliance on an earlier judgment of this Court, whereby relief was granted in Writ Petition No. 24910 of 2006. According to him that writ petition was filed by constables claiming similar relief which the present respondents holding the post of Head Constable had claimed and granted to them by the impugned judgment.

11. On behalf of the respondents Sri Rajesh Singh Chauhan has submitted that the impugned judgment has been passed following the judgment and order dated 8th April, 2009 in Writ Petition No. 24910 of 2006 and that judgment had attained finality. In the memo of appeal nowhere the appellants have indicated that they have challenged the earlier judgment. In this regard the learned counsel has drawn the attention of this Court to para 5 of the rejoinder affidavit wherein averments contained in para 3 of the counter affidavit relating to

previous judgment have been replied. He has further submitted that finality of judgment dated 8th April, 2009 has not been disputed, only distinction was made between the status of constable and head constable.

12. We are hearing the parties on the point of admission of the present intra court appeal. The yardstick for admission is that an appeal raising a triable issue should not be summarily dismissed (*Uma Kant v. Parashuram* , AIR 1973 SC 218; *Mahadev v. Sugandha* , AIR 1972 SC 1932).

13. Keeping in view the above settled legal position, we propose to consider the merits of the respective arguments.

14. Before doing that it is also necessary for us to have a glance at the facts giving rise to the present controversy. The writ petition was filed by the respondents, who had worked as constables and after completing qualifying service appeared in the examination for promotion as head constable and were declared successful and sent to training in Police Training School, Moradabad. Government vide order dated 2nd December, 2000 granted selection grade pay scale to an employee, who had completed eight years of satisfactory service and further, on completion of 14 years" of satisfactory service including six years in selection grade, grant of first promotional pay scale was made admissible to them and further after completion of 24 years of satisfactory service grant of second promotional pay scale was also made admissible.

15. Grievance of the respondents is that counting length of their service for grant of assured career progression scheme, period spent by them while undergoing training as head constable was excluded. When the writ petition of the respondents came before the learned Single Judge, the Hon'ble Mr. Justice R.K. Agarwal (as his Lordship then was) has passed the following order:

"The sole grievance raised in the present petition is as to whether the period spent on training prior to appointment as a Constable in the Police Department can be counted for granting them promotional pay scale.

I have heard learned counsel for the parties.

This issue was examined by this Court in Writ Petition No. 24910 of 2006 and the petition was allowed with the following observations:--

"Thus, for the reasons stated above, the respondents are not justified in not counting the period spent in training for the purposes of calculating 24 years of service for grant of promotional pay scale to the petitioners. The writ petition is allowed with a direction to the respondents to count the training period of the petitioners for the purposes of granting second promotional pay scale."

Thus, for the reasons stated in the judgment and order dated 8th April, 2009 passed in the aforesaid Writ Petition No. 24910 of 2006, this petition deserves to be allowed and is allowed. The respondents shall count the training period of the petitioners for the purposes of granting second promotional pay scale."

16. The perusal of the impugned order reveals that counsel for both the parties were heard. On behalf of the present appellants before the learned Single Judge no prayer was made for grant of time to file the counter affidavit. Further, on behalf of the present appellant ground taken to distinguish the decision of the Court expressed in judgment dated 8th April, 2009 was not argued. The silence of the appellants on both the counts is conspicuous and in the memo of appeal no where it has been stated that these pleas were submitted before the learned Single Judge and they were not taken into consideration. Only on this score we are inclined not to admit the appeal. However, considering the lengthy arguments advanced in support of the appeal we have given our serious consideration to them and we find that even if we ignore the above, still the appeal does not have any merit i.e. triable issue.

17. To explain that we would like to place on record that constable and head constable are species of the same genus. Both are government servants. Conditions of service of the government servant are regulated by Rules, Regulations and Government Orders. Out of these, one is Financial Hand Book Vol. II (Parts 2 to 4). Its subsidiary Rule 2 framed under fundamental rule 9 (6) (b) provides that government servant will be treated on duty during the time they spent on training. Constables and Head Constables both have been treated alike in the above quoted subsidiary rule and the government order dated 2nd December, 2000. Though feebly it has been argued there are different conditions of service of constables and head constables in reference to the status of training imparted to them but as observed earlier the Financial Hand Book does not make any distinction. Therefore, the effort to distinguish between the previous judgment and the impugned one are without substance and the impugned judgment suffers with no legal infirmity.

18. Now question remains what is the binding effect of judgment and order dated 8th April, 2009 on the judgment impugned before us. The first answer which comes to our mind is that at least it would have effect of estoppel by record. In this regard there is no doubt that being of the same department the respondents on account of non filing of appeal against the previous judgment led to believe that the present appellants accepted the decision rendered in the previous judgment to be a correct one and this belief persuaded them to file the writ petition, which stands allowed before us.

19. However, when we gave our serious thought to this question we find that there is roman doctrine "Exceptio rei judicatae" which means previous judgment. This doctrine was respected by the courts and the Privy Council in the case of Sheoparsana Singh v. Ram Nandan Singh AIR 1916, PC 78 has applied it. This doctrine has also been statutory engrafted in the Code of Civil Procedure in the form of section 11, known as res judicata. "Res judicata" and "estoppel by record" are almost of same import, however, Justice Mahmud has outlined the difference between these two in the celebrated case of Sita Ram v. Ameer Begum 1986 ILR 8 All 324. The observation made by justice Mahmud in this regard is

benefitingly quoted as under:

"Perhaps the shortest way to describe the difference between the plea of res judicata and an estoppel, is to say that whilst the former prohibits the court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declarations or acts, to the prejudice of another party who, relying upon those declarations or acts, has altered his position. In other words, res judicata prohibits an inquiry in limine whilst an estoppel is only a piece of evidence.

When examined in this perspective filing of counter affidavit could not been prohibited on the basis of estoppel by record but if the principle of res judicata is applicable, the appellants would have no occasion to file the counter affidavit because it prohibits an inquiry in limine.

It is trite to say that principle of res judicata would be applicable in reference to writ petitions also. So far as subject matter of controversy, it is the same, competence of this Court is not in dispute and it is also not disputed that judgment and order dated 8th April, 2009 had been finally decided by the Court after both parties were heard at length. The crucial point is whether the petitioners to the earlier writ petition could be treated as predecessors-in-interest of the present respondents (petitioners in the subsequently decided writ petition). Answer to this lies in the fact that both are of the same department, both were trainees at the relevant time, both were denied financial benefits on the ground of non inclusion of training period from counting their length of service. Being of the same department having the same status and same rights both are privy to each other and enjoy same status and the present respondents are litigating under the same title. Thus all the conditions required for applying principle of res judicata are present and on the basis of this finding we hold that the appellants were not entitled to reagitate the matter in controversy again. Hence they will not be permitted to say that they were not provided opportunity of filing counter affidavit."

20. The arguments advanced in the intra court appeal are without substance. Appeal has no trial issue and it deserves to be dismissed in limine.

21. However, before parting we would like to mention that frivolous litigation is encumbering the law courts increasingly. The Hon"ble Apex Court in the case of Subrata Roy Sahara v. Union of India and others , (2014) 8 SCC 470 in paras 191 to 193 has expressed its anxiety on this score. We experience the same anxiety, which necessitates us to reproduce the observations of the Hon"ble Apex Court for the benefit of the litigants, they read as under:

"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every

irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs".

192. We should not be taken to have suggested that the cost of litigation should be enhanced. It is not our suggestion that court fee or other litigation related costs should be raised. Access to justice and related costs should be as free and as low as possible. What is sought to be redressed is a habituation to press illegitimate claims. This practice and pattern is so rampant that in most cases disputes which ought to have been settled in no time at all before the first Court of incidence are prolonged endlessly for years and years and from Court to Court upto the highest Court.

193. This abuse of the judicial process is not limited to any particular class of litigants. The State and its agencies litigate endlessly upto the highest Court just because of the lack of responsibility to take decisions. So much so that we have started to entertain the impression that all administrative and executive decision making are being left to Courts just for that reason. In private litigation as well, the litigant concerned would continue to approach the higher Court, despite the fact that he had lost in every Court hitherto before. The effort is not to discourage a litigant in whose perception his cause is fair and legitimate. The effort is only to introduce consequences if the litigant's perception was incorrect and if his cause is found to be not fair and legitimate, he must pay for the same. In the present setting of the adjudicatory process, a litigant no matter how irresponsible he suffers no consequences. Every litigant, therefore, likes to take a chance even when counsel's advice is otherwise."

22. Accordingly intra court appeal is dismissed in limine.