
(1996) 03 DEL CK 0048

In the Delhi High Court

Case No : Civil Writ Petition No's. 271 and 1169 of 1995

Subhash Juneja

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1996) 2 AD 636 : (1996) 62 DLT 167 : (1996) 37 DRJ 253

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Ashok Gumani, Rakesh Tikku and Jyoti Singh, for the Respondent

Judgement

M.K. Sharma, J.

(1) As the facts involved in both the writ petitions are similar and the issues raised before us are identical in nature, we propose to dispose of both these writ petitions by this common judgment and order.

(2) In this writ petition, the petitioner has challenged the order of termination passed against him on 3.3.1980 by the Government of India terminating his services in exercise of the powers vested under the provisions of Section 18 of the Army Act. In this writ petition, substantially two reliefs are sought for by the petitioner - the first relief being for quashing of the order dated 3.3.1980 by which the services of the petitioner was terminated and the other being that he be declared to be entitled for all benefits with respect to payment of salary, pension and all other benefits as if he continued to be in service up to the date of his superannuation. Apparently, Therefore, the second relief sought for by the petitioner in this writ petition is dependent and consequent upon the view taken by this court on the first relief sought for by the petitioner in the present writ petition.

(3) Incidentally it may be mentioned that the present petitioner also filed a writ petition earlier challenging the said impugned order which was registered and

numbered as writ petition No. 422/1980. On perusal of the contents of the aforesaid writ petition, it appears that in the said writ petition also the petitioner challenged and sought for quashing of the order dated 3.3.1980 whereby his service was terminated invoking the provisions of Section 18 of the Army Act. On a comparison of the contents of both the writ petitions, it is found that in the earlier writ petition also the petitioner challenged the validity of the order dated 3.3.1980 on the ground of the same being not in conformity with the provisions of the Army Act including the provisions of Section 18 of the Army Act read with Army Rules 14 and 15. The further grounds of challenge were in respect of violation of the principles of natural justice in passing the aforesaid order and also on the ground that the said order was passed mala fide. The Division Bench of this Court on 21.4.1980 dismissed the aforesaid writ petition by recording the following order:

"DISMISSAL from service is u/s 18 of the Army Act which is complimentary to Article 310 of the constitution. This means that the officer held the tenure during the pleasure of the President. It has been contended that it was not in accordance with the provision of the Act and that due process for dismissal for misconduct has not been followed. The impugned order does not say whether the dismissal is for misconduct or otherwise. It only sets out the pleasure doctrine. In this view of the matter, no case made out for interference. Dismissed."

(4) Being aggrieved by the aforesaid dismissal of the writ petition, the petitioner preferred a SLP before the Supreme Court of India, which was registered as SLP (C) No. 7225-33/1980. By an order dated 4.9.1980, the Supreme Court dismissed the SLP preferred by the petitioner.

(5) The petitioner has now preferred the present writ petition seeking to challenge once again the said impugned order dated 3.3.1980 by which his services were terminated on the ground of existence of a fresh cause of action in his favor for challenging the order dated 3.3.1980 in view of a Full Bench decision of this court in Union of India & Ors. Vs. Ex-Major N.R. Ajwani & Ors. reported in 55 (1994) DLT 219 holding that an order passed by the competent authority invoking the provisions of Section 18 of the Army Act could be the subject matter of judicial review and that the court could lift the veil where it appears that power was used for a collateral purpose under the cloak or garb of innocuous form of an order and determine the true character of the order under challenge.

(6) In this writ petition, the petitioner has challenged his order of dismissal dated 11.1.1980 passed by the Government of India invoking the provisions of Section 18 of the Army Act. The petitioner filed a writ petition challenging the validity of the aforesaid order of dismissal dated 21.1.1980 which was registered and numbered as C.W.P. 420/1980. The aforesaid writ petition was also dismissed by this Court against which the petitioner preferred a SLP which also came to be dismissed as in the other writ petition. However, subsequent to the pronouncement of the aforesaid judgment by the Full Bench of this Court in N.R.

Ajwani's case (supra), the petitioner has preferred the present writ petition challenging once again his order of dismissal passed on 11.1.1980 on almost similar grounds as that of the other writ petition.

(7) The respondents have raised a preliminary objection in both these writ petitions regarding the maintainability of the writ petitions contending, inter alia, that since the matter between the parties as regards the legality of the impugned orders stand affirmed by the Supreme Court, this Court cannot adjudicate on the legality or otherwise of the impugned termination order and dismissal order dated 3.3.1980 and 11.1.1980 respectively in exercise of its writ jurisdiction. In other words, the preliminary objection of the respondents with regard to the maintainability of the writ petition relates to the writ petitions being barred by the principles of constructive res judicata.

(8) We accordingly decided to hear both the writ petitions initially on the question of maintainability of the writ petition and consequently we have heard the learned counsel for the parties.

(9) Mr. Ashok Gurnani appearing for the petitioner in C.W.P. 271/1995 forcefully contended that in the earlier writ petition, rights of the parties were not determined and that there has been a misapplication of law by this court in deciding the earlier writ petition. According to him, subsequent to the aforesaid decision of this court in the earlier writ petition there has been a change of law as the Full Bench of this court has conclusively held that such an order of termination passed by the President of India invoking the provisions of Section 18 of the Army Act is open to judicial review and the court could examine the validity and legality of such an order inspired by the respondent having exercised the Pleasure Doctrine. In support of his submission, the learned counsel relied upon the decisions of the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, and also in Nand Kishore Vs. State of Punjab, .

(10) Mr. Arvind Shah appearing for the petitioner in C.W.P. 1169/1995 adopted the arguments of Mr. Ashok Gurnani and in his submission also, the present writ petitions are not barred by the principles of constructive res judicata.

(11) Mr. Rakesh Tikku appearing for the respondents submitted that apparently the petitioners herein had assumed the existence of a fresh cause of action in their favor for challenging the orders dated 3.3.1980 and 11.1.1980 on the ground that a Full Bench decision of this Court as affirmed by the Supreme Court has taken a view that an order of termination of service u/s 18 of the Army Act can be challenged on the ground of malafide. In his submission, the same does not give any fresh cause of action to the petitioner for assailing the legality of the impugned order of termination which has already attained finality, the validity of the same having been upheld by this court and affirmed by the Supreme Court. According to him, the petitioners having earlier filed a writ petition challenging the same impugned orders which came to be dismissed by the Division Bench of

this Court and affirmed by the Supreme Court, the present writ petitions are barred by the principle of constructive res judicata. He also drew our attention to the averments in paragraph 28 of the Civil writ petition No. 271/1995, wherein, the petitioner had stated that the subject matter of the present writ petition had been a subject matter of a previous writ petition filed by the petitioner. In support of his submission, the learned counsel for the respondents also relied upon the decision in Abdul Salam Vs. State of Jammu and Kashmir and Others, .

(12) The records available before us do reveal that the petitioners of both the writ petitions had earlier challenged the impugned orders of termination and dismissal respectively passed against them in earlier writ petitions which were dismissed by this Court and on SLP being filed against the same, the same were also dismissed by the Supreme Court. The subject matters and issues raised in the present writ petitions appear to be same as that of the previous writ petitions filed by the petitioners. The earlier writ petitions filed by the petitioners came to be dismissed by this Court holding that no case has been made out by the petitioners for interference. The contentions that were raised in the said writ petitions were that the impugned orders were not in accordance with the provisions of the Act and that due process of law was not followed for termination and dismissal of the petitioners from service on the ground of misconduct. This court dismissed the writ petitions holding that the impugned orders did not say whether the dismissal was for misconduct or otherwise and that the same only recorded the Pleasure Doctrine and accordingly in that view of the matter, this court held that no case was made out for interference. Both the petitioners being aggrieved by the aforesaid orders of dismissal of their writ petitions preferred SLP before the Supreme Court which also came to be dismissed.

(13) Consequently, the said impugned orders appear to have reached a finality for all intents and purposes. However, in view of the submissions now raised by the counsel for the petitioners that in view of the subsequent Full Bench decision of this Court and upheld by the Supreme Court, there is a fresh cause of action and that the writ petitions preferred now are maintainable and it falls for our consideration and decision as to whether this court could reopen the same matter and decide the subject and issues raised afresh in the light of the ratio of the aforesaid Full Bench decision of this court and whether the present writ-petitions are not barred by the principles of constructive res judicata.

(14) It is settled law that a judgment inter parte of the competent court in a previous writ petition would operate as res judicata in a subsequent writ petition between the same parties where the issues directly involved in the two proceedings are the same, irrespective of the fact whether or not the decision in the earlier writ petition was founded on a view contrary to the one, subsequently expressed in a different case. Correctness or otherwise of the earlier decision is wholly irrelevant where the conditions for the application of the Rule of res judicata are satisfied in the latter case. It is well settled that the matter in issue,

if it is one purely of fact, decided in the earlier proceeding by the competent court, must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties, for the same reason cannot be questioned in a subsequent proceeding between the same parties and also even if the decision is on a question of law, the same principle would apply except in cases where the question raised is a question of law and relates to the jurisdiction of the Court or the lack of it or the law has been subsequently changed.

(15) The various decisions relied upon by the counsel for the parties clearly lay down that only when there is a change of cause of action or when the question of law relates to the jurisdiction of the court or the lack of it or the law has come to be obliterated from the statute or the law has been changed by the Legislature, in such cases the principles of constructive *res judicata* would not be applicable and that a fresh writ petition shall be maintainable. In the light of the aforesaid settled law, we have to examine whether in the present case there has been such a change in the cause of action or that there has been a change of law in respect of the jurisdiction of the court or that there is a change of law obliterating the provisions from the statute either through pronouncement of the court or through a legislation.

(16) On careful consideration of the contentions raised by the parties and on proper appreciation of the records, we find that in the present cases there has been no change of cause of action or change of law on any of the aforesaid circumstances enabling the petitioner to file a fresh writ petition. So far the question of change of law in respect of jurisdiction of the court or in respect of the provisions under which action was taken being obliterated from the statute either on the order of the court or by the decision of the Legislature, we find that no such change also has in fact been brought in so far the facts of the present cases are concerned. The provisions of Section 18 of the Army Act has not been declared to be *ultra virus* by any court till today, nor there is any change in respect of jurisdiction or lack of it.

(17) The decisions of the Supreme Court in *Mathura Prasad Sarjoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy* (supra) and also in *Nand Kishore Vs. State of Punjab* (supra), heavily relied upon by the learned counsel for the petitioners appear to be distinguishable on facts. In *Mathura Prasad Sarjoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy* (supra), the Supreme Court declared the law on the point as follows:

"A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot operate as *res judicata* between the same

parties, whether the cause of action in the subsequent litigation is the same or otherwise.

IT is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined, in the earlier proceeding between the same parties may, for the same reason, be questioned in a subsequent proceeding between the Parties. But, where the decision is on a question of law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in S.11, Code of Civil Procedure, means the right litigated between the parties, claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

(18) The aforesaid observations of the Supreme Court came to be recorded in view of the facts of the said case wherefrom it is found that there was a change in the law in respect of jurisdiction subsequent to the decision rendered by the Court in the earlier proceeding filed by the petitioner therein. In the said judgment it is specifically recorded that fresh application was filed in the court of small cases because the area in which the land was situated had since been included within the limits of the Greater Bombay Area. In the said conduct, the Supreme Court held as follows:

"IN the present case the decision of the Civil Judge, Junior Division, Borivli, that he had no jurisdiction to entertain the application for determination of standard rent, is, in view of the judgment of this Court, plainly erroneous, see Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, . If the decision in the previous proceeding be regarded as conclusive it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature".

(19) Similarly in Nand Kishore's case (supra), the petitioner in the said case challenged the order of his compulsory retirement from service passed by invoking the provisions of Rule 5.32 of the Punjab Civil Service Rules in a writ petition, which was dismissed on 2.2.1962. Incidentally Rule 5.32 of the Punjab Civil Service Rules was identical to Article 9.1 of the Pepsu Service Regulations, which was struck down by the Supreme Court in Gurdev Singh Sidhu Vs. State of Punjab and Another, following and applying the ratio in Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., . It is, Therefore, in the context of striking down a statutory provision holding it to be unconstitutional,

the Supreme Court in NandKishore's case (supra) held:

"IT would then have to be seen the twin play of the notion of deemed constitutionality and bar of constructive res judicata. Raising the constitutionality of a provision of law, as it appears to us, stands on a different footing than raising a matter on a bare question of law, or mixed question of law and fact, or on fact. There is a presumption always in favor of constitutionality of the law. The onus is heavy on the person challenging it. It is by the discharge of onus that the presumption of constitutionality can be crossed over. When a person enters a Court for relief and does not challenge the constitutionality of the law governing the matters directly and substantially in issue, it only means and implies that he goes by the presumption of constitutionality. He cannot on this stand be deemed to have raised the question of constitutionality and the question of constitutionality to have been decided against him and such matter to have been directly and substantially in issue. The constitutionality of the Rule relating to compulsory retirement cannot be deemed to have been questioned and decided against the appellant on the principles of "might and ought" or it being "directly and substantially in issue". It cannot be taken as a rule that one of the pleas, either by the plaintiff or the defendant, in every suit or proceeding, must of necessity relate to the constitutionality of the law on which the cause is founded or defended in order to obviate the plea of constructive res judicata being raised in an eventuality. It cannot also be taken as a rule that constitutionality of the law involved is a matter directly and substantially in issue, and if not raised renders a mute decision in favor of its constitutionality barring the plea being raised in a subsequent suit. If there be read such a rule in all civil litigation, it would, to our mind, be against public policy vexing and burdening the courts to go into the constitutionality of provisions of law in every case. When under the impugned rule, the Government assumed to itself the power to compulsorily retire a permanent government servant after ten years of qualifying service, the court's act of striking- that Rule as unconstitutional is the law which appeared on the scene, not only to break the presumption of constitutionality but to declare it void. In a sense the offending provision was never there and in the other it was henceforth not there. In either event, it would be within the ambit of the emphasised words in Mathura Prasad's case".

(20) The aforesaid decisions, Therefore, on facts are distinguishable from the facts of the present writ petitions. Here it may be noted that the earlier writ petition was not dismissed on the ground of want of jurisdiction. The High Court had jurisdiction to entertain the writ petition but it said that it was not a "fit case for interference". The High Courts had imposed upon them certain limitations for interference under Article 226 of the Constitution of India. Therefore, the earlier writ was never disposed of on the ground of want of jurisdiction.

(21) Further the issues raised in the present writ petitions are similar to that of the earlier writ petition and the said fact is apparently admitted by the statement of the writ petitioner wherein, it is stated that the subject matter of the present

writ petition had been the subject matter of the previous writ petition filed by the petitioner. Besides the petitioners have sought to invoke the extraordinary jurisdiction of this court once again after a period of 15 years on the ground that in view of the Full Bench decision of this court, the court can lift the veil in order to examine as to whether the order of termination was innocuous or was passed mala fide. The aforesaid effort on the part of the petitioner through the present writ petition appears to be based on question of fact or at the most mixed questions of law and fact.

(22) The conclusion that could be deduced from the aforesaid discussion is that the petitioners herein through the present writ petitions are trying to reopen the decisions on the aforesaid impugned orders which was earlier given by this court and subsequently affirmed by the Supreme Court, which, in our opinion, reached a finality.

(23) Since there is no change in law either in respect of jurisdiction conferring or taking away the same nor there being any obliteration of statutory provision in view of decision of court or legislature nor there being change in the cause of action, we feel that we are not competent to reopen the issues raised in these two writ petitions which have already reached a finality. We also respectfully agree with the law laid down in Abdul Salam's case (supra), holding that the principles of res judicata and the general principles emanating there from must be resorted to, to secure and freeze the issue once adopted and finally decided and the principles of res judicata can not be ignored merely on the plea that the earlier judgment was wrong or erroneous. Through the present writ petitions, the petitioners seek to reopen the decision of this court and affirmed by the Supreme Court on the same subject matter without fulfilling any of the conditions laid down by the Supreme Court in that regard for reopening a case and, Therefore, in our considered opinion, the present writ petition are barred by the principles of constructive res judicata.

(24) In the result, the writ petitions are held to be not maintainable being barred by the principles of constructive res judicata and are accordingly dismissed, but) without any costs.