

(2003) 05 AHC CK 0065
In the Allahabad High Court
Case No : C.M.W.P. No. 22808 of 2003

Union of India (UOI)

APPELLANT

Vs

Praveen Kumar and Others

RESPONDENT

Date of Decision : 22-05-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 10, 11

Citation : (2003) 6 AWC 5586

Hon'ble Judges : Ghanshyam Das, J; B.S. Chauhan, J

Bench : Division Bench

Advocate : B.N. Singh and C.S.C, for the Appellant; Sudhir Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This writ petition has been filed against the judgment and order dated 31.3.2003, passed by the Central Administrative Tribunal, Allahabad Bench, allowing the application of Respondent No. 1 quashing the order dated 7.5.2003, passed by the Petitioner Union of India, allotting the Respondent No. 1- an I.P.S. Officer, Uttaranchal cadre.

2. The facts and circumstances giving rise to this case are that the Respondent Nos. 1 and 3, in this case appeared in Civil Service Examination, 2000, conducted by the Union Public Service Commission and both of them were declared successful in merit list prepared by the said Commission. The name of the Respondent No. 1 was placed at Sl. No. 62 and the Respondent No. 3 was placed at Sl. No. 16. The said Respondent No. 3 belonged to reserved category of O.B.C. In the State of U.P. there were only two vacancies. The Respondent Nos. 1 and 3 were insider candidates. Out of the two vacancies one had already been filled up by one Tarun Gauba as an outsider candidate. Thus, only one vacancy remained available for insider candidate and it was allocated to the Respondent No. 3. Being aggrieved and dissatisfied Respondent No. 1 filed Original Application No. 1341 of 2001 before the Respondent No. 2 Central Administrative

Tribunal, Allahabad Bench, on the ground that the said vacancy was meant for general category candidate, and Respondent No. 3 had wrongly been allocated. The Tribunal adjudicated upon the issue and allowed the said application vide judgment and order dated 2nd April, 2002, (Annexure-10) holding that the said vacancy was meant to be filled up from general category candidates and not from reserved category of O.B.C., and thus was wrongly allocated to the Respondent No. 3. Respondent No. 1-applicant being better in ranking, was entitled for allocation of U.P. Cadre. Thus, it quashed the impugned order dated 25.9.2001 of allocation and notification dated 24.9.2001, only to that extent and the Petitioner-Union of India was directed to pass a fresh order in the light of observation made therein.

3. In pursuance of the said judgment and order, Respondent No. 1 filed a representation, and vide order dated 7.5.2002, it stood rejected. Being aggrieved and dissatisfied, Respondent No. 1 again approached the Tribunal by filing O.A. 706 of 2003, which has been allowed vide judgment and order dated 31.3.2002. Hence, this petition.

4. Shri Bhopendra Nath Singh, learned Counsel for the Petitioner has submitted that the order of allocation made by the learned Tribunal runs counter to the law laid down by the Hon'ble Supreme Court in Union of India (UOI) and Others Vs. Rajiv Yadav, IAS and Others, , wherein, it has been held that the selected candidate has a right to be considered for appointment, but has no right to be allocated to the cadre of his choice or to his home State. The allotment of cadre is an incident of service and a member of an All India Service bears liability to serve in any part of India. Thus, in view of the above, the Central Government is the sole authority to allocate the cadre. Thus, the judgment and order of the Tribunal is liable to be set aside.

5. On the contrary, Shri Sudhir Agarwal, learned Counsel appearing for Respondent No. 1 caveator, has submitted that the applicant has a legitimate expectation that allocation of cadre shall be in accordance with rules and as the Tribunal has decided in his favour vide judgment and order dated 2.4.2002 and the same has attained the finality as it has not been challenged either by Union of India or Respondent No. 3 before any forum, the order dated 7.5.2002, was nullity being in contravention of the order of the Tribunal. The findings of fact recorded by the Tribunal earlier vide its judgment and order dated 2.4.2002, on factual issues, were binding and would operate as res judicata and the order dated 7.5.2002, passed by the Union of India being contrary to the judgment and order of the Tribunal dated 2.4.2002, has rightly been set aside by the Tribunal. Thus, no interference is called for and petition is liable to be dismissed.

6. We have considered the rival submissions made by the learned Counsel for the parties. Admittedly, the matter had been adjudicated upon earlier. The learned Tribunal by a speaking and reasoned order giving cogent reasons and considering matter at length recorded the findings of fact that the only one vacancy available in U.P. Cadre had to be filled up by insider candidate belonging to general

category and was not meant for reserved category of O.B.C. The Tribunal has concluded the said judgment and order as under:

"But in the circumstances, we have already noticed above that the vacancy against which Respondent No. 2 has been appointed was not meant for reserved category of OBC. Contrary to it, it was unreserved and applicant being better in ranking could be legally entitled for U.P. Cadre. In the circumstances, relief cannot be refused to him on the grounds suggested by counsel for the Respondents. As the applicant is found entitled for relief on the basis of the second question, we do not think it necessary to enter into the question whether the policy of reservation could be applied to the single vacancy meant for insider candidate.

For the reasons stated above, this O.A. is allowed. The impugned order dated 25.9.2001 (Annexure 1 to the O.A.) and notification dated 24.9.2001, so far as they allocate Uttaranchal Cadre of I.P.S. to the applicant and U.P. Cadre to the Respondent No. 2 are quashed. The Respondent No. 1 is directed to pass a fresh order in accordance with law and in the light of the observations made above within a period of one month from the date a copy of this order is filed."

7. The learned Tribunal had given the direction only to implement the said judgment and order and thus it was not open to the Union of India to sit in appeal against the said findings of fact recorded by it. Admittedly, neither the Petitioner Union of India nor Respondent No. 3 challenged the said order before any forum and it attained the finality. Thus, we fail to understand as under the garb of implementation of the order how the Union of India could review it and record its own finding of fact contrary to those given by the Tribunal. Any order passed by any authority in contravention of the order of the Court is nullity, and thus, remains inexecutable and unenforceable (vide *Mulraj Vs. Murti Raghonathji Maharaj, Surjit and others Vs. Harbans Singh and others etc. etc.*, *Govt. of Andhra Pradesh and Others Vs. Gudepu Sailco and Others*, *Kannambath Narayanan Nair Vs. Kannambath Sankaran Nair and Others*, and *Satyendra Pal v. Regional Transport Authority, Agra and Anr.* 1982 ALJ 310).

8. There is another aspect of the matter and the case requires to be examined from that angle. Even if the Court passed an interim order, it is not permissible for a party to disobey even if ultimately it is found that the Court granting the interim relief had no jurisdiction to entertain the case and if a party does so, it runs the risk of being exposed to contempt of Court proceedings. In *Tayabbhai M. Bagasarwalla and another Vs. Hind Rubber Industries Pvt. Ltd. etc.*, , the Hon"ble Supreme Court held that if the case has been instituted bona fide and an order is passed and is disobeyed, the Defendant cannot escape the consequences of their disobedience and they have no choice but to obey the said order. Even if the Defendants are of the view that the Court passing such an order has no jurisdiction, they are bound to follow the order passed by the Court. However, if they are aggrieved of the said order, either they should file an application to modify or recall the order before the same Court or approach the higher Court in

appeal or revision setting aside the said order. In the instant case, as the issue had been adjudicated fully and attained finality, it is shocking to judicial conscious that the Union of India had the audacity to re-examine the issue sitting in appeal over the said judgment and order rendered by the learned Tribunal. The finding of fact recorded by the Tribunal for the entitlement of the Respondent No. 1, and particularly, on the issue that the one vacancy available in U.P. Cadre was meant for general category candidate attained finality and the said judgment and order has not been challenged, and thus, the doctrine of res judicata was attracted.

9. So far as the issue of res judicata is concerned, it is a doctrine of law based on equity and public policy that a party may not be permitted to harass the other party and waste Court's time by reagitating the same issue. A Constitution Bench of the Hon"ble Supreme Court, in *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, , observed that "What becomes res judicata is a "matter" which is actually decided and not the reason which leads the Court to decide the "matter"." Therefore, it is the decision which may not legally be correct but it become binding and the party cannot be allowed to re-agitate the same issue.

10. It is settled legal proposition that even an erroneous decision on a question of law is res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (Vide *Arjun Singh Vs. Mohindra Kumar and Others*, L.R. Ganapathi Thevar (dead) by his legal representatives Vs. Sri Navaneethaswaraswami Devasthanam, and *Satyadhyan Ghosal and Ors. v. Smt. Deorajin Debi and another* AIR 1969 SC 941).

11. In *Har Pyari Devi v Ghansham Singh*, (1982) 2 SCC 109 *Mahabir Prasad Verma Vs. Dr. Surinder Kaur*, and *P. Lal Vs. Union of India (UOI) and Others*, , the Apex Court held that it is not permissible for an authority, Tribunal or a Court to reopen the finding of fact which has attained finality in earlier proceedings.

12. In *Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy*, , the Apex Court held that while considering the issue of res judicata, it is not open to the Court to examine as to whether the findings recorded earlier were correct or not. As it becomes binding on attaining finality, the purpose of applying this doctrine is that the rights which had already been determined should not become nugatory by precluding the parties from reopening or re-contesting the issues which had become finally decided. The Court observed as under:

"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 not, for

the same reason, be questioned in a subsequent proceeding between the same 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 proceedings between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure, means the right litigated between the parties, i.e., the facts on which the right is 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 or a decision 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."

13. In *N.V. Panchapagasan v. K. Swaminathan* AIR 1985 Mad 154, it has been held by the Madras High Court that if a decision has been given by a competent Court having jurisdiction over the matter and the principles laid down therein are not accepted by another Bench or a larger Bench, even then such decision would operate as res judicata inter-parties for the reason that it cannot be said that an erroneous decision had been arrived at by the earlier decision by an assessment of jurisdiction which the Court did not have. The Court further observed as under:

"If the binding character of a decision is made to fluctuate with every change in the current of authority, the Court machinery would be reduced to one for unsettling the rights rather than giving effect to rights already ascertained."

14. In the case of *State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others*, , the Apex Court clearly held "a wrong decision by a Court having jurisdiction is as much binding between the parties as right one and may be superseded by other procedure like review, which the law provides."

15. Again in the case of *Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another*, , the Apex Court observed as under:

"...if a question of law is related to the fact in issue, the erroneous decision on such question of law may operate as res judicata between the parties in subsequently that suit or proceeding if the cause of action is the same. The Delhi High Court judgment does not decide any abstract question of law and there is also no question of jurisdiction involved. Assuming that judgment of Delhi High Court are erroneous, such judgment being on the question of fact would still operate as res judicata between the same parties in the subsequent suit or proceeding over the same cause of action."

16. The Constitution Bench of Hon"ble Supreme Court in the case of *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, , has observed as under:

"...an adjudication is conclusive and final not only as to the actual matter

determined but as on over other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject-matter of litigation and every matter coming into legitimate purview of the original action both in respect of the matter of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of CPC was applied to writ case".

17. In the case of Commissioner of Income Tax v. T. E. Kumaran 1990 (10) SCC 567, the Hon"ble Supreme Court applying the principle of res-judicata clearly held:

"The claim is barred by constructive res judicata u/s 11 Explanation IV of the Code of CPC which envisages that any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been matter directly substantially in issue in a subsequent suit. Hence, when the claim was made on earlier occasion, he could have or might have sought and secured decree for interest. He did not seek so and, therefore, it operates as res judicata. Even otherwise when he filed a suit and specifically did not claim the same. Order II, Rule 2 of the Code of CPC prohibits the Petitioner to seek remedy separately. In either event the Original Application is not sustainable."

18. Thus, in view of the above, whatever may be the merits and correctness of the findings of fact recorded by the Tribunal earlier in its judgment and order dated 2.4.2002, it was not open to the Petitioner Union of India to reopen the issue sitting as an appellate authority over and above the Tribunal. It had been assigned a limited role of execution/ implementation of the order passed by the Tribunal and by no stretch of imagination, it could have the competence to sit in appeal against the said judgment, and thus, the order dated 7.5.2002, passed by the Petitioner Union of India has rightly been set aside by the judgment and order dated 31.3.2003. We find no force in the submissions made by Shri B. N. Singh placing reliance upon the judgment in Rajiv Yadav (supra) as the facts of the said case are quite distinguishable and the ratio of the said judgment has no application in the instant case. Once it is held that one vacancy available for insider candidate in U.P. was meant for the candidate of the general category that could not be filled up by the reserved category candidate. The Respondent No. 1 had legitimate expectation for allocation against the said vacancy.

19. Thus, in view of the above, we are of the considered opinion that the Petitioner Union of India, while passing the order dated 7.5.2002, had acted without competence/ jurisdiction as it had never been assigned the role to function as an appellate authority over the judgment and order of the Tribunal. It has been assigned a limited role of the execution of the judgment and order dated 2.4.2002. The order has rightly been set aside by the Tribunal vide judgment and order dated 31.3.2002. The case does not present any special feature warranting interference by this Court in a limited jurisdiction of judicial review.

20. The petition is, therefore, dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.