

(2013) 06 JH CK 0064
In the Jharkhand High Court
Case No : Writ Petition (S) No. 5445 of 2001

Vijay Kumar

APPELLANT

Vs

Bank of India and Bhupendra Lal Das Raman

RESPONDENT

Date of Decision : 14-06-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2013) 3 JLJR 295

Hon'ble Judges : Shree Chandrashekhar, J

Bench : Single Bench

Advocate : Sumantra Sinha and Shresth Gautam, for the Appellant; Rajesh Kumar, Amit Kumar and Manindra Kr. Singh, Advocates for Bank of India for Respondent Nos. 1 and 2 and Mrs. Indrani Sen Choudhary, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Shree Chandrashekhar, J.—The petitioner has approached this Court seeking issuance of a writ of certiorari for quashing the order of appointment of respondent No. 3 against the general vacancy for subordinate staff members and for a direction upon the respondents for appointment of the petitioner. The brief facts of the case are that, sometime in August, 1993 several names were forwarded by the employment exchange for the appointment of subordinate staff members (Peon) in the Bank of India, Bokaro Steel City. A written examination was conducted and thereafter, the petitioner was called for interview by letter dated 6.8.1994. This is stated in the writ petition that there were 7 vacancies. The petitioner was placed at serial No. 4 in the merit list, however, he was not offered appointment. Subsequently, the petitioner came to know that the respondent No. 3 was given appointment from the said merit list though his name appeared below the petitioner in the merit list. The petitioner made representations before the authorities, however, his grievance was not redressed and therefore, he has approached this Court by filing the present writ petition.

2. A counter affidavit has been filed on behalf of respondent Nos. 1 and 2 in which it has been admitted that the respondent No. 3 namely, Sri Bhupendra Lal Das Raman had also participated in the written examination and interview, which were conducted for selecting the eligible candidates for appointment on the post of subordinate staff (peon), and he was below the petitioner in the merit list. It has also been admitted in the counter affidavit that though the respondent No. 3 was not absorbed in the service of the bank, however, as Assistant Labour Commissioner suggested to absorb him, the bank decided to accept the recommendation of the Assistant Labour Commissioner and respondent No. 3 was given appointment. It has been disputed that the name of the petitioner appeared at serial No. 4 in the merit list, rather his name appeared at serial No. 6 in the said merit list. It has also been contended that the present writ petition is barred by constructive res-judicata. After the dismissal of the writ petition, no application seeking restoration of the writ petition was filed and therefore, the second writ petition seeking a similar relief cannot be maintained by the petitioner.

3. Heard learned counsel for the petitioner and learned counsel for the respondents.

4. The learned counsel appearing for the petitioner has submitted that the name of the petitioner appeared in the merit list above the respondent No. 3 and it has also been admitted by the respondents that respondent No. 3 was offered appointment on the post for which the merit list was prepared and only in view of the suggestion made by the Assistant Labour Commissioner, the respondent No. 3 was appointed on the post on which the petitioner should have been appointed. The learned counsel appearing for the petitioner further submitted that in this case restoration petition could not be filed for the reason that the Clerk of the Advocate left the job and he did not inform either the counsel or the petitioner. He has also been submitted that the dismissal of the earlier writ petition bearing no. W.P. (S) No. 2758 of 1999 (R) would not come in way of the petitioner for seeking the relief which has been prayed in the present writ petition, as the earlier dismissal would not bar the presentation of the present writ petition. The claim of the petitioner was not decided on merits and since it has not been adjudicated by the Court, the present writ petition is maintainable.

5. On the other hand, learned counsel appearing for the respondent Nos. 1 and 2 has submitted that the appointment given to the respondent No. 3 cannot be challenged by the petitioner in view of the dismissal of the earlier writ petition.

6. The respondent No. 3 has also appeared and submitted that the respondent No. 3 was appointed on 3.4.1997 and he has continued since then and his letter of appointment has not been challenged specifically by the petitioner and therefore, the appointment of the respondent No. 3 cannot be interfered with by this Court. The learned counsel appearing for respondent No. 3 has further submitted that she has no objection, if any positive order is passed in favour of the petitioner.

7. Adverting to the contention raised by the counsel for the respondent Nos. 1 and 2 that the present writ petition is barred by the principle of constructive res-judicata, I am of the opinion that in the facts of this case such plea is not tenable. The rule of res-judicata is based upon public policy. For attracting res-judicata, statutory or constructive, there must be a final decision by the Court. If nothing has been decided and if the issue before the Court was not heard and finally decided, it would not bar institution of a second suit/petition. Dismissal of a writ petition in default cannot be said to be a decision on the merits of the case, and therefore, it would not constitute res-judicata.

8. In " Sheodan Singh Vs. Smt. Daryao Kunwar, the Hon"ble Supreme Court held as under:

13. Re. (iv): "this brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiffs appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res-judicata in a subsequent suit.

9. In Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others, , where the principle of res-judicata were sought to be invoked on the ground of the earlier decision which was a compromise judgment and decree, the Hon"ble Supreme Court held as under:

10. The appellants then seek to reach the same result by invoking the principle of res-judicata. It is contended that the earlier decision amounts to res-judicata and the respondents were not entitled to raise the same issue which by implication must be held to be decided against them by the compromise judgment and decree. In the alternative, it is contended that the earlier compromise decree creates an estoppel against the respondents, because the

appellants at that time had shown some concession in the amount which they were claiming and a decree for a lesser amount was passed. This estoppel was said to be an estoppel by judgment. In our opinion, these contentions cannot be accepted. The Act as amended confers this right upon petty agriculturists to save them from the operation of loans taken at usurious rates of interest. No doubt the conduct of the respondents in omitting to press the claim for reduction of the amount of the claim on the first occasion is significant, but this did not constitute res-judicata, either statutory or constructive. The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court was implicit in it. Only a decision by the court could be res-judicata, whether statutory under S. 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. The respondents claim to raise the issue over again because of the new rights conferred by the Amending Act, which rights include, according to them, the re-opening of all decrees which had not become final or which had not been fully executed. The respondents are entitled to take advantage of the amendment of the law unless the law itself barred them, or the earlier decision stood in their way. The earlier decision cannot strictly be regarded as on a matter which was "heard and finally decided."

10. In "The Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, , the issue before the Court was whether dismissal of the SLP "in limine", would bar institution of a writ petition. The Hon"ble Supreme Court has held as under:

9. In the instant case the award of the Tribunal no doubt, was challenged in the SLP filed in this Court, on almost all grounds which were in the subsequent writ proceeding agitated in the High Court. There is no question, therefore, of applying the principles of constructive res-judicata in this case. What is, however, to be seen is whether from the order dismissing the SLP in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award. A writ proceeding is a different proceeding. Whatever can be held to have been decided expressly, implicitly or even constructively while dismissing the SLP cannot be reopened. But the technical rule of res-judicata, although a wholesome rule based upon public

policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issues must have been decided. It is not safe to extend the principle of res-judicata to such an extent so as to found it on mere guesswork. To illustrate our view point, we may take an example. Suppose a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the Writ Petition is dismissed after contest by a speaking order obviously it will operate as res-judicata in any other proceeding, such as, of suit, Art. 32 or Art. 136 directed from the same order or decision. If the Writ Petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an alternative remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of res-judicata. Of course, a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly even if one writ petition is dismissed in limine by a non-speaking one word order "dismissed", another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter, then no merit can be deemed to have been necessarily and impliedly decided and any other remedy of suit or other proceeding will not be barred on the principle of res-judicata.

11. The Hon^{ble} Supreme Court in Ram Gobinda Dawan and Others Vs. Smt. Bhaktabala, has observed as follows:

23. For an earlier decision to operate as res-judicata it has been held by this Court in Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others, that the same must have been on a matter which was "heard and finally decided".

24. In Sheodan Singh Vs. Smt. Daryao Kunwar, the question whether a decision given by the High Court dismissing certain appeal on the ground of limitation or on the ground that the party had not taken steps to prosecute the appeal operates as res-judicata, was considered by this Court.

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This Court referred to instances where a former suit was dismissed by a trial Court for want of jurisdiction or for default of plaintiffs appearance etc., and pointed out that in respect of such class of cases, the decision not being on

merits would not be res-judicata in a subsequent suit. It was further pointed out that none of those considerations apply to a case where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing. It was held that such dismissal by an appellate Court has the effect of confirming the decision of the trial Court on merits, and that it "amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal".

25. It will be seen from the above reasoning that in order to operate as res-judicata, the previous decision must have been given after the matter was heard and finally decided on merits.

12. In " Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen and Another, a case in which a SLP was withdrawn and thereafter, a writ petition was filed in the High Court which was dismissed "in limine", the Hon'ble Supreme Court has held as under:

20. After having analysed the various cases cited, we are of the view that permission to withdraw a leave petition cannot be equated with an order of its dismissal. We also come to the conclusion that in the circumstances of the case the High Court has not exercised a proper and sound discretion in dismissing the writ petition in limine on the sole ground that the application for special leave on the same facts and grounds had been withdrawn unconditionally.

13. In view of the settled law as noticed above and the fact that for the fault of the Clerk of the Advocate who had already left the job, the petitioner cannot be made to suffer, I am inclined to dispose of the matter on merits.

14. Now coming to the facts of the case, a perusal of the documents on record would disclose that the respondents have admitted that the petitioner's name appeared in the merit list above the respondent No. 3. Paragraph 8 of the counter affidavit filed on behalf of respondent Nos. 1 and 2 are as under:

8. That in respect of the statements made in paras 5 to 7 of the writ application, it is stated and submitted that the statements made in these paras are partly correct. The petitioner has not submitted the full facts. The full facts involved in the instant case is that after the test and interview the selection committee comprising of 3 members allotted marks to each candidate. They submitted the result in sealed cover to the then Regional Manager. The candidates were placed in the merit list as per the marks obtained by them in the selection test. The petitioner's name was appearing at serial No. 6 as stated by him and not at serial No. 4 of the list of general candidates. No appointment was made till 1997 from the said panel. In the meanwhile Shri Bhupendra Lal Das Raman, Respondent No. 3, raised an Industrial Dispute before the Assistant Labour Commissioner, Dhanbad claiming that he has worked for more than 240 days (total 484 days) at Bank's Phusro Bazar and Jaridih Bazar Branch and therefore entitled for regularisation in Bank's service on Class IV post. In the said selection

process Shri Bhupendra Lal Das had also participated, however, he was below in the said merit list. He had submitted his petition on 28.7.1995 to the Asstt. Labour Commissioner. The Respondents called for information from the respective Branches. Then it transpired that he worked for 200 days during 3.10.1989 to 26.6.1990 at Phusro Bazar Branch and 284 days during 14.9.1990 to 31.7.1991 at Jaridih Bazar Branch in the absence of regular Sub-Staff (Peon). At Phusro Bazar Branch he was paid wages of Casual Labour but at Jaridih Bazar Branch he was paid pro-rata wages of salary scale applicable to Subordinate Staff. The Respondents submitted their reply to the Asstt. Labour Commissioner wherein they made it clear that he cannot be absorbed in the Bank. However, the Asstt. Labour Commissioner suggested to absorb him in the interest of justice to the candidate. Considering the overall circumstances of the case, the Bank decided to accept the recommendation of the Assistant Labour Commissioner and thus the Bank absorbed Shri Bhupendra Lal Das Raman on the Subordinate Post at Ghorthamba Branch of the Bank without the benefit of back wages. Alongwith him 6 (six) other candidates from the panel were also appointed in six Branches out of these, three were from General Category and three from Reserved Category.

15. No reason whatsoever has been offered by the respondents for ignoring the claim of the petitioner except that the respondent No. 3 was offered appointment on the suggestion of Assistant Labour Commissioner. No fault has been found by the respondents with the candidature of the petitioner and therefore, in my view, the petitioner could not have been denied the appointment on the post for which he had undergone a complete selection process.

16. In view of the aforesaid, I am of the view that the petitioner is entitled for an order of appointment on the post for which he was selected and his name was placed in the merit list above the respondent No. 3. However, in view of the peculiar facts of the case and the fact that the respondent No. 3 was appointed on 3.4.1997, it would not be proper to pass any order interfering with the appointment of the respondent No. 3. In view of the aforesaid discussion, this writ petition is allowed with a direction to the respondent Nos. 1 and 2 to appoint the petitioner w.e.f. 3.4.1997, that is, the date of appointment of respondent No. 3 on the post of subordinate staff (peon) forthwith. The Writ petition is disposed of in the aforesaid terms.