

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Original Application No. 1154/97

Date of Decision 19/10

R.K. Srivastava & Ors.

Applicant(s)

Sri R. Tavedi

Counsel for the
Applicant(s)

V E R S U S

Union of India & Ors.

Respondents(s)

Sri G.P. Agarwal

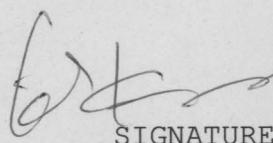
Counsel for the
Respondents(s)

CORAM :

Hon'ble Mr. DR Tiwari Member (A)

Hon'ble Mr. KBS Rayam Member (J)

1. Whether Reporters of local News Papers may be allowed to seen the Judgment?
2. To be referred to the Reporters or not?
3. Whether their Lordship wish to see the fair copy of the judgment.
4. Whether to be circulated to all the Benches.


SIGNATURE

RESERVED

**CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH ALLAHABAD.**

Original Application No.1154 of 1997.

ALLAHABAD THIS THE 19/10 DAY OF OCTOBER. 2005.

**Hon'ble Mr. D.R. Tiwari, Member-A
Hon'ble Mr. K. B.S. Rajan, Member-J.**

1. Rakesh Kumar Srivastava Outstanding Inspector, DQMS, Office, Allahabad.
2. Rajesh Kumar Srivastava, Chief Booking Supervisor, Allahabad.
3. Deo Narain Dubey, Chief Booking Supervisor, Allahabad.
4. V.K. Verma, Chief Parcel Supervisor, Allahabad.
5. Chandrika Prasad, CMI/LR under the Sr. D.C.M., Allahabad.
6. Hari Shanker Pandey, Chief Parcel Supervisor, Northern Railway, Kanpur.
7. Brij Kishore, Chief Booking Supervisor, Northern Railway, Etawah.
8. Ram Autar, Chief Parcel Supervisor, Northern Railway Etawah.
9. Udaibir Singh Prabhakar, Chief Booking Supervisor, Northern Railway, Tundla.
10. A.K. Gupta, Chief Booking Supervisor, Northern Railway, Kanpur.
11. Jitendra Varshney, Chief Booking Supervisor, Aligarh
12. Sant Ram Verma, CPS/CNB now ACM/NR/Lucknow (Group 'B' Post).
13. L.B. Chauhan, Chief Goods Supervisor working as CMI/Planning/Alld. Under Sr. DCM/Allahabad.
14. Vinod Kumar Chief Goods Supervisor, now working as CMT Tundla,

All C/o Rakesh Kumar Srivastava Outstanding Inspector, DRM's Office, N.R., Allahabad.

.....Applicants.

(By Advocate : Sri R. Trivedi)

Versus.

1. Union of India through the General Manager, N.R., Baroda House, New Delhi.
2. D.R.M., N.R., Allahabad.

.....Respondents.



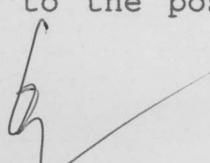
(By Advocate : Mr. G.P. Agarwal.)

ORDER

BY K.B.S. RAJAN, MEMBER-J

The applicants in this O.A. have prayed for arrears of pay and allowances from 1.1.1984/22.12.84 to 1.3.93 in the Grade of Rs. 2000-3200/- on the ground that this Tribunal while deciding O.A. no. 1376/88 and 1132 of 1998 allowed the O.As vide order dated 25.11.92 in respect of grant of seniority to the applicants and also on the basis of an observation in order dated 31.10.96 whereby liberty was given to the applicants to seek appropriate remedy if they were aggrieved due to non-payment of arrears.

2. The brief facts of the case are that the applicants were initially appointed as Assistant Goods Clerks. They were promoted as Senior Goods Clerk and later on under the 10% quota for the post of supervisors, a panel was set up to select the qualifying candidates. The applicants were empanelled on 16.6.83 and the applicants were sent for training in July, 1984. It was at the same time that restructuring of panel took place w.e.f. 1.1.1984 and the panel list was published as on 16.6.1983 and thereafter on 10.2.1987 a seniority list was also published. The applicants found their names below some Goods Supervisors who were brought to the position on account of restructuring of the



panel in accordance with the order dated 1.1.1984.

Admittedly, these individuals were shown to the applicants were appointed later than the applicants as Goods Clerks, hence the applicants prayed for their proper seniority.

3. This Tribunal by order dated 25.11.1992 allowed the O.As and directed the respondents to re-fix the seniority of the applicants as published on 23.11.1987.

4. As the directions of the Tribunal were not complied with, the applicants moved CCA 1228 of 1993 which was decided on 31.10.1996. By that time, the order having been complied with, the CCA became infructuous, but the applicants claimed that they should be given the benefit of pay and allowances on account of the anti dating of their seniority. In regard to the said claim, this Tribunal has held as under:

“3. The learned counsel for the applicant now has submitted that although the applicants have been given notional seniority and also certain arrears of salary, such arrears have been granted w.e.f. 1.3.93 instead of 1.1.1984 from which date arrears of wages ought to have been given.

4. The operative portion of the order very clearly states that the applicant should be given notional seniority from the date of empanelment. There is nothing in the order which obligates the respondents to grant any arrears of wages. Whether or not such arrears of wages are due to the applicants, cannot be adjudicated within the compass of contempt application.”

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5. It is under the above circumstances that this O.A. has been filed.

6. The respondents have contested the O.A certain preliminary objections have been raised by them. They have even challenged by filing of single application. Limitation is the next objection and further the respondents have contended that the application is barred by the principle of order 2 Rule 2 CPC, principle of estoppels etc.

7. Arguments were heard and the documents perused. The counsel for the applicants had also filed Written Submission, which has also been gone through. The following are the decision cited by the counsel for the applicants.

- (a) 1992 19 ATC 839
- (b) 1996(2) ATJ 434
- (c) 1998 (1) SLJ 88
- (d) 2002-03 A.T.F.B. 143
- (e) 2001 ATJ 485
- (f) Order dated 29.1.2003 in O.A. no. 170 of 2001 of P.B.
- (g) 1993 SCC (L&S) 387
- (h) Order 24.11.2003 in O.A. no. 519 of 1996 of this Bench
- (i) 1993 SCC (L&S) 590
- (j) 2002 SCC (L&S) 312.
- (k) 2004 11 SCC 210.
- (l) 2004 (3) ATJ 36.
- (m) 2004 (3) SLJ 84.
- (n) Order dated 13.1.2005 in O.A. no. 489 of 2002 of this Bench

8. The applicants contended that para 228 (1) of IREM 1989 which is para-meteria with circular dated 15/17th September, 1964 had been struck down by various judgments of the Courts and hence there is no question of "no work no pay".

9. The question involved is not mere claim for the salary for the period from 1984, in respect of which it has to be seen whether the limitation permits entertainment of the O.A. More than that is that the counsel for the ^{the respondents} applicant has contended that the OA is barred by the principles of resjudicata. He has invited our attention to paragraph III, to VI of the Counter reply filed by the respondents. It is, therefore, essential to deal with the preliminary objection before entering into the merits of the matter.

10. Admittedly, the applicants in their earlier O.As have not claimed any arrears of salary. Their claim before the Contempt jurisdiction was rejected with liberty to agitate the matter through an appropriate forum. Such a liberty though granted, it is axiomatic that the liberty is subject to entitlement of the applicants to stake their claim in accordance with law. Now the question is whether law permits entertainment of the such O.A with such a claim which ought to have been raised before the Tribunal when the seniority was claimed. In other words, whether the res-judicata or constructive res-judicata comes in the way of the applicants is to be seen.

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11. First the law on res-judicata or constructive res-judicata may be considered whereafter the facts of the case would be telescope upon the said law.

The law on Constructive Res judicata is dealt with by the Apex Court in the following decisions:-

(a) *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai, (1976) 3 SCC 832:*

"40. The plea of constructive res judicata is based on the "might and ought" doctrine."

State of Haryana v. State of Punjab, (2004) 12 SCC 673, at page 701 :

Now, the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32."

(b) *Workmen v. Board of Trustees, Cochin Port Trust, (1978) 3 SCC 119, at page 124 :*

The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure 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.** (underlining supplied)



(c) A Constitution Bench, presided over by the then Chief Justice of India, in the *Devilal Modi v. STO*, (1965) 1 SCR 686 held as under:-

This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding **which is based on the same cause of action**; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred

(underlining and emphasis supplied)

(d) In *Nand Kishore v. State of Punjab*, (1995) 6 SCC 614 the Apex Court has held as under:-

16. Gajendragadkar, C.J. who authored the judgment in the above-quoted case of *Amalgamated Coalfields Ltd.* case, later in *Devilal Modi v. STO*, yet applied the principles of res judicata holding that if the doctrine of constructive res judicata was not applied to writ proceedings, it would be open to a party to take one proceeding after another and urge new grounds every time, which was plainly inconsistent with the considerations of public policy. This decision was followed in *State of U.P. v. Nawab Hussain*.

(e) Vide *Maharashtra Vikrikar Karamchari Sangathan v. State of Maharashtra*, (2000) 2 SCC 552, the Apex Court has held:

This contention need not detain us any longer because such a contention was available to the appellants in the earlier proceedings, namely, Transfer Application No. 822 of 1991 and the same was not put in issue. That not having been done, it must follow that such a contention is barred by the principles of constructive res judicata.

12. The above law laid down by the Apex Court clearly goes to show that when a particular issue ought to have been raised in an earlier proceedings, failure to so raise would incapacitate the litigant from raising the said issue in a subsequent proceedings. Again, when two issues emanate from the same cause of action, as of another, raising only one issue in a litigation and failure to initiate action in the same proceedings in respect of the second would act as a bar under constructive res-judicata. In the instant case, the cause of action was one and the same and the issues emanated

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from the same cause of action are two (a) the seniority aspect and (b) the salary aspect. Consciously the applicants had not claimed the arrears of salary when they agitated against seniority in the earlier O.A. Thus, they are now precluded from claiming the same under the fresh O.A. It is to circumvent the same that a feeble attempt was made by the counsel for the applicants that the Tribunal has provided for a lever by grant of liberty. That liberty in our view cannot enlarge the scope of the applicants' right which has been hampered by the doctrine of constructive res-judicata. Hence on the ground of this principle, the applicant cannot be permitted to raise this claim of arrears for the period prior to their unsoldering the higher responsibility.

13. Let us view from the other angle, whether the applicants would have become entitled to even had they raised the issue in the earlier applications. The answer is No. The following cases of the Apex Court would support this view.

In the case of *State of Haryana v. O.P. Gupta, (1996) 7 SCC 533* the Apex Court has held as under:-

3. Admittedly, the respondents were working in Haryana Service Engineers, Class II, Public Works Department (Irrigation Branch). They are governed by the Haryana Service Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970. There was inter se dispute regarding the promotion to the higher echelons of service which ultimately resulted in the order passed by this Court on 7-8-1990 in *Sushil K. Arora v. State of Haryana*¹. Therein, this Court had directed the Government to prepare the seniority list in accordance with Rule 9 of the Rules ignoring the instructions contained in para 11.4 of the Manual and any other inconsistent instruction running counter to the Rules and to prepare a fresh list strictly in accordance with the rules untrammelled by inconsistent observations made

by the High Court. It was also mentioned that if any promotions had already been made, those promotions were directed not to be disturbed. Following the directions, seniority list has been prepared and promotions accordingly were given to all the eligible persons. We are informed that about 90 persons have been promoted. They have also been given the scale of pay to which they are eligible in the promoted posts. The respondents in these appeals have approached the High Court by filing writ petitions claiming payment of arrears. The High Court in the impugned order dated 29-9-1993 made in CWP No. 6760 of 1993 and batch directed payment of arrears from the deemed date given in the seniority list to the date of their posting in the promotional posts. Thus, these appeals by special leave.

4. The only controversy in these cases is whether the respondents are entitled to arrears of salary for the period during which admittedly they had not worked but they had been given notional promotion from the deemed date. We have computed the deemed date as 1-1-1983. They have joined the duty on 1-12-1992. Therefore, the period for which they claimed arrears would be from 1-1-1983 to 30-11-1992. We are informed that some of them had retired even before that date and, therefore, they have been given notional promotion till the date of their retirement.

5. Shri Gupta, learned counsel appearing for the State, contended that the State was prepared to comply with the direction issued by the High Court in the first instance for the preparation of the seniority list but the rival candidates who claimed inter se seniority over the others approached the Division Bench and also this Court for relief; since, ultimately, this Court has decided that seniority has to be prepared strictly in accordance with Rule 9 of the Rules, on receipt thereof, the Government has complied with the conditions of the preparation of the seniority list. Accordingly, they have been given the promotion with the deemed dates, though there was no specific direction in that behalf. Others who had joined the service have not claimed, except the respondents, but some of them were not even parties to the earlier writ proceedings or to the appeal in this Court and consequently, they are not entitled to the arrears. It is contended by Shri S.M. Hooda, learned counsel appearing for the respondents that the respondents were willing to work in the respective posts but they were not given the same. To avoid their entitlement, a seniority list was wrongly prepared denying them their entitlement to work in the promotional post; consequently, the respondents are entitled to the arrears of salary and the High Court was right in granting the same.

6. Having regard to the above contentions, the question arises whether the respondents are entitled to the arrears of salary? It is seen that their entitlement to work arises only when they are promoted in accordance with the Rules. Preparation of the seniority list under Rule 9 is a condition precedent for consideration and then to pass an order of promotion and posting to follow. Until that exercise is done, the respondents cannot be posted in the promotional posts. Therefore, their contention that though they were willing to work, they were not given the work after posting them in promotional posts has no legal foundation. The rival parties had agitated their right to seniority. Ultimately, this Court had directed the appellant to prepare the seniority list strictly in accordance with Rule 9 untrammelled by any other inconsistent observation of the Court or the instructions issued in contravention



thereof. Since the order had become final in 1990, when the appeal had been disposed of by the Court by the above directions, the State in compliance thereof prepared the seniority list in accordance with the Rules and those directions and promotions were given to all eligible persons and postings were made accordingly on 1-12-1992. In the interregnum some had retired. As stated earlier, though the deemed date has been given as 1-1-1983, the respondents cannot legitimately claim to have worked in those posts for claiming arrears and, as a fact, they did not work even on ad hoc basis.

7. This Court in *Paluru Ramkrishnaiah v. Union of India*² (SCR at p. 109: SCC p. 556, para 19) considered the direction issued by the High Court and upheld that there has to be "no pay for no work", i.e., a person will not be entitled to any pay and allowance during the period for which he did not perform the duties of higher post, although after due consideration, he was given a proper place in the gradation list having been deemed to be promoted to the higher post with effect from the date his junior was promoted. He will be entitled only to step up the scale of pay retrospectively from the deemed date but is not entitled to the payment of arrears of the salary. The same ratio was reiterated in *Virender Kumar, G.M., N. Rlys. v. Avinash Chandra Chadha*³ (SCC p. 482, para 16).

8. It is true, as pointed out by Shri Hooda, that in *Union of India v. K.V. Jankiraman*⁴ this Court had held that where the incumbent was willing to work but was denied the opportunity to work for no fault of his, he is entitled to the payment of arrears of salary. That is a case where the respondent was kept under suspension during departmental enquiry and sealed cover procedure was adopted because of the pendency of the criminal case. When the criminal case ended in his favour and departmental proceedings were held to be invalid, this Court held that he was entitled to the arrears of salary. That ratio has no application to the cases where the claims for promotion are to be considered in accordance with the rules and the promotions are to be made pursuant thereto.

9. In these appeals unless the seniority list is prepared and finalised and promotions are made in accordance with the Rules on the basis of the above seniority list, the question of entitlement to work in the promotional posts does not arise. Consequently, the payment of arrears of salary does not arise since, admittedly the respondents had not worked during that period. The High Court was, therefore, wholly illegal in directing payment of arrears of salary. The order of the High Court accordingly is quashed.

14. In the case of *Krishnamurthy v. G.M., Southern Rly.*, (1976) 4 SCC 825 the verdict of the Apex Court is as under:-

4. The next question that arises is regarding his fitment for the purpose of salary. Undoubtedly, he would have been a traffic inspector much earlier had the Railway not committed the mistake which it discovered subsequently. It is, therefore, reasonable that the appellant should be fitted into the scale of pay at a point where full notional seniority which he would have been entitled to, had the

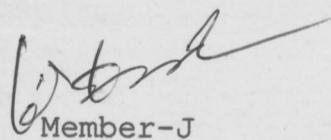
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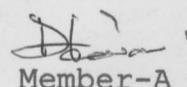
right thing been done at the right time, is recognised. Plainly put, he will be drawing a salary on December 20, 1967 on the basis of a notional appointment as traffic inspector as on January 1, 1959. This will govern the salary part of his service from December 20, 1967.

5. Yet another point that arises is as to what is to happen regarding his arrears of salary from December 20, 1967 and for the post-writ petition period. We make it clear that while seniority is being notionally extended to him from January 1, 1959, the appellant will not be entitled to any salary qua traffic inspector prior to December 20, 1967. However, he will be entitled to salary on the terms indicated above from December 20, 1967 as traffic inspector; that is to say, he will be eligible to draw the difference between what he has drawn and what he will be entitled to on the basis we have earlier indicated in this judgment.

15. The above decisions go to show that a mere fixation of notional seniority would not automatically entitle the applicants to the arrears of pay and allowances. Thus, even on merits, the applicants cannot make out a case. Hence, the O.A. being devoid of merits, merits dismissal. We accordingly order so.

16. Under the circumstances, there would be no orders as to costs.


Member-J


Member-A

Girish/-