IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. No. 469 1990
~~T.A. No.~~

DATE OF DECISION 31.5.1991

T. Seethalakshmi Applicant (s)

Mr. M.R. Rajendran Nair Advocate for the Applicant (s)

Versus

Union of India rep. by the Secretary, Ministry of Communications, New Delhi and 2 others. Respondent (s)

T.P.M. Ibrahim Khan, ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. N.V. Krishnan, Member (Administrative)

The Hon'ble Mr. N. Dharmadan, Member (Judicial)

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

N. Dharmadan, M(J)

An important question as to the application of the principles of constructive resjudicata in a proceeding under Sec.19 of the Administrative Tribunals Act 1985 arises for consideration in this case.

2. The facts are not in dispute. The applicant was provisionally posted as Branch Post Master (BPM for short) on 17-5-85 at Kakazham Post Office

.....

in place of Smt. M. Manohari when she was relieved to take over the charge in another Post Office. Annexure-I order indicates that this appointment was for 89 days or till regular appointment to this post. She filed OA 234/86 on 24-2-86 apprehending termination with the prayer that the respondents 2 and 3 therein may be restrained from terminating the service of the applicant as EDBPM at Kakazham Post Office, and that they should be directed to regularise the services of the applicant as EDBPM, Kakazham Post Office. The applicant was terminated from service on 25-2-86, next day to appoint one Sri. T.K. Purushothaman. OA 234/86 was heard and dismissed on 10-11-87 holding that 'the applicant cannot be termed as 'retrenched employee' (ED Agent), she is not a person found qualified for the post'. Annexure-II is the judgment. The applicant, thereafter, submitted Annexure-III representation to the Post Master General, Trivandrum on 13-2-88 raising the same allegations against the selected candidates and requested to appoint her as EDBPM at Kakazham Post office. This was rejected

as per Annexure-IV order dated 15-6-88. The applicant filed Annexure-V representation dated 4-6-90 before the Superintendent of Post Offices, Alleppey praying that she may be reinstated in service and filed this application on 11-6-90 with the following main prayers:

> "..i) To declare that the termination of applicant's services from the post of EDBPM Kakazham is null and void and to direct the respondents to re-instate the applicant with back-wages.
>
> ii) Alternatively to direct the respondents to consider the applicant for future appointment by giving her preference under section 25 H of the I.D. Act"

3. The learned counsel for the respondents raised an objection that the application is barred by constructive resjudicata and hence it is to be dismissed without going into the merits. This was opposed by the learned counsel for the applicant on two grounds: (1) The respondents have not raised the plea of constructive resjudicata and sothe respondents should not be allowed to urge that plea in this case and (2) the constructive resjudicata does not apply to the facts of this case and more so in an application filed under section 19 of the Administrative Tribunals Act 1985.

4. The first objection of the applicant deserves to be rejected summarily for the respondents have given xxx basic facts necessary for building up a case of resjudicata in the reply statement. The relevant portions in the reply statement are extracted below:

> "...The applicant was also one among the candidates who had applied for the post. She was not selected for the post as she had no independent income at that time as required under the recruitment rules. Sri T.K. Purushothaman, Nedumprayil Veedu, Neerkunnam, Alapuzha 688 005 who was found eligible in all respects was selected and appointed as Branch Postmaster, Kakazham and the applicant was relieved on 25-2-86. Thereafter she approached the Central Administrative Tribunal and filed an application under OA 234/86 against the termination of services and her non-selection. It was dismissed by the Central Administrative Tribunal on 10-11-1987..."

xxxxx xxxxx xxxxx

> "...The applicant had in that Original Application prayed for stay against termination of her service and the Hon. Central Admive. Tribunal had turned down this prayer. This final order passed by the Central Admve. Tribunal in OA 234/86 clearly indicates that the question of termination of services of the applicant was considered in the Original Application. A representation was given in Annexure-V was received from the applicant and it was duly considered. As the matter was once settled through the Central Admve. Tribunal in OA 234/86 no further action was found to be necessary...."

It is true that the applicant had neither used the expression resjudicata nor made mention about the constructive resjudicata in the reply statement. But necessary facts for sustaining such a plea are given in the reply statement. The failure to state or mention the legal phraseology while giving the necessary basic materials or factual details leading to such phraseology and principle would not deprive a party from building up a case on the legal principle and urge it before the court or Tribunal if from the basic facts and meterials given in the reply statement it is easy to find the ingredient necessary to sustain the legal position based on such principle. The Supreme Court held that the plea is not waived if necessary facts are there in the written statements. Absence of specific mention of the plea in the written statement or framing of specific issue is immeterial(State of Punjab V. B.D. Kanshal, AIR 1971 SC 1676). In the instant case there are sufficient materials to sustain the plea of constructive resjudicata. So, we reject the first objection of the applicant.

...../

5. The second objection was raised by the applicant presumbly due to a misconception that resjudicata is only a technical rule of procedure based on Sec.11 of the CPC and it would xxx apply only to civil proceedings. "Resjudicata is a rule of universal law pervading every well regulated system of jurisprudence and is put upon two grounds embodied in various maxims of common law; the one; public policy and necessity, which makes it to the interest of the state that there should be an end to litigation -interest republicae ut sit finis litium; the other hardship on the individual that he should be vexed twice for the same cause- nemo debet vexari proeadem causa" Corpus juris, Vol. 34 page 743. In Daryao V. State of UP, AIR 1961 SC 1457, the Supreme Court quoted with approval the above passage and held that a petitioner could not maintain a petition under Art 32 if he had obtained a decision on merits on the same matter in a petition under Art 226, for he would be met by the bar of res judicata. This is affirmed in a number of subsequent decisions of the Supreme Court. The

...../

rule obtains in England (Halsbury's Vol. 15, 3rd Edn., Page 416) and in the United States (American Jurisprudence, Vol 30 A P.416) and is based on the same principle on which the general doctrine of resjudicata is based, namely, that public interest requires that there should be an end to litigation and that a person should not be vexed twice in respect of the same subject matter.

6. Sec.11 of the Civil Procedure Code embodies only a restricted form of resjudicata. It prohibits a court from trying "any suit or issue in which the matter directly and substantially in issue has been directly and and substantially in issue in a former suit between the same parties" Explanation IV says about the principle of Constructive resjudicata. A 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 a matter directly and substantially in issue. In other words, by virtue of this explanation a question, even if it is not raised must be deemed to have been "constructively in issue" in a suit for the purpose of the decision in that case.

7. It is well settled that the doctrine of

..../

resjudicata is very wide, much wider in scope than section 11 of CPC. It applies not only to suit but other proceedings as well. The Full Bench of Patna High Court in Baijath Prasad V, Ramphal, AIR 1982 Pat 697(FB) held "it may also apply in some cases when the former court was not competent to try the subsequent cause. If a party takes an objection at a certain stage of a proceeding and does not take another objection which it might and ought to have taken at the same stages it must be deemed that the court has adjudicated upon the other objection also and has held against it. This principle of constructive resjudicata has been extended further. If a part has knowledge of a proceeding and , having had an opportunity when it might and ought to have raised an objection, it does not do so, it cannot be allowed to raise that objection subsequently, if the court passes an order which it might not have passed in case that objection had been raised on time. Under these circumstances the said objection should be deemed to have been raised by the party and decided against it. In other words, when an order is passed by a competent c... court, which is inconsistant with the existence of fact or law on which the party could

have based its objection, it must be deemed that the court has decided those facts or law against it." The principle of constructive resjudicata is only an amplification of the general principle of resjudicata and it applies to all proceedings. The Supreme Court in Mohanlal Goenka V. Benoy Kishna, AIR 1953 SC 65 held "there is ample authority for the proposition that even an erroneous decision on a question of law operates as 'resjudicata' 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'. In Devilal's case, AIR 1965 SC 1150, the Supreme Court said '...if the doctrine of constructive resjudicata is not applied to writ proceedings it would be open to the party to take one proceedings after another and urge new grounds every time and that plainly is inconsistent with consideration of public policy on which res judicata is based and would mean harassement and hardship to the opponent ..." Again the Supreme Court, in Gulabchand V, State of Gujarath, AIR 1965 SC 1153, said that 'this court had to consider the applicability of the general

principles of res judicate in several cases and has repeatedly held that this principle is not based on a rule of technicality but is based on high public policy to bring about an end to litigation by giving finality to judgments inter parties and to save litigants from harassement a second time.."

8. The Supreme Court was reluctant to apply the principle of constructive resjudicate in fiscal matter as indicated in Amalgamated Coal Fields V. Janapada Sabha, AIR 1964 SC 1013. In this case, the appellants challenged the notices issued in connection with the levy of taxes for a period different from the period covered by the notices which were the subject matter of a decision (AIR 1961 SC 946). In that case the Supreme Court observed "constructive resjudicata', which is a special and artificial form of resjudicata enacted by Sec.11 of the CPC should not generally be applied to writ petitions filed under Article 32 or Article 226. WE would be reluctant to apply this principle to the present appeals all the more because we are dealing with case where the impugned tax liability is for

..../

different years." This case was explained by the Supreme Court in two later cases by stating "in our opinion, the said general observations must be read in the light of the important fact that an order which was challenged in the second writ petition was in relation to a different period and not for the same period as was covered by earlier petition.." Devilal's case, AIR 1965 SC 1150; "it would be reluctant to apply this principle to appeals under decision because they dealt with cases where the impugned tax liability were for different years." Gulabchand's case, AIR 1965 SC 1153, Again in State of UP V. Nawab Hussai, AIR 1977 SC 1680 the Supreme Court observed 'same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated sucha course of action as abuse of its process....This is therefore another and equally necessary and efficacious aspect of the same principle for it helps in raising the bar of

..../

of res judicata by suitably construing the general principles of subduing a cantankerous litigant. That is why this other rule has some times been referred to as constructive res judicata which in reality, is an aspect of amplification of the general principle." The court further made clear that in the light of the clarificatory observation in Devilal's case and Gulabchand's case, the principle of constructive res judicata would apply to writ proceedings.

9. The Kerala High Court in Padmanabhan V. State, AIR 1966 Ker.110, followed the above decisions, in a case of a Govt. servant, who filed a writ petition challenging disciplinary proceedings and got an order, and approached the Court when a suspension order was passed for the same acts, and held as follows:

> " ..There was a contest between the parties on the legality or validity of the disciplinary proceedings taken by the State. The parties did have a fair opportunity of placing their cases before the Court and a decision was taken on the basis of all the Rules placed before the Court by the petitioner as well as the State andif that is so, in my view the doctrine of constructive res judicata as laid down by the Supreme Court in AIR 1965 SC 1150 directly applied to the particular circumstances of this case..."

..../

10. The Calcutta High Court has taken the view, in Azizus Subhan V. Union of India, AIR 1966 Cal 570, that mere addition of new party or a new ground will not exclude the operation of the principles of constructive resjudicata. The courd held "in our opinion the mere addition of union of India as a party respondent would not exclude the operation of the principle of res judicata nor could the application of principles be avoided by addition of new ground which might and ought to have been raised in the earlier petition, but was not raised. In this case the principles of constructive res judicata must be held to apply with full force... ."

11. According to the Rajasthan High Court, Rita Mazumdar V. Rajasthan University, AIR 1964 Raj 64, when a prior petition was dismissed on merits a second one will not lie with additional facts which were already within the knowledge of the petitioner. The Full Bench of Patna held in Lalbihari V. Sheb Sankar Prasad, AIR 1964 Pat 174, held that where a party has filed a writ petition without incorporating certain valid points including the vires of certain

Acts, they cannot be raised in a subsequent petition. The Court observed "where a party has filed a writ application in the High Court, but has omitted to raise certain points including the vires of certain Acts, its subsequent suit for a declaration about the vires of that Act is barred by the principles of constructive res judicata.." (emphasis supplied)

12. The Supreme Court in Union of India V. Nanak Singh, AIR 1968 SC 1870, has observed "there is no good reason to preclude such decision on matters of controversy in writ proceedings under Art. 226 or Article 32 of the Constitution from operating as resjudicata in subsequent regular suits on the same matter in controversy between the same parties..... in order that the previous adjudication between the parties may operate as res judicata, the question must have been heard and decided or that the parties must have an opportunity of raising their contentions thereon..' (emphasis ours). The Supreme Court applied this principle in public interest litigation also. In Forward Construction Co. and others V. Municipal Copporation of Greater Bombay, AIR 1986 SC 391, the

court held "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the ligitimate perview by the original action both in respect of matters of claim or defence. The principle underlying explanation-Iv is that where the parties have had an opportunity of controverting a matter that should be taken to be same thing as if the matter had been actually controverted and decided...." The Ernakulam Bench of the Central Administrative Tribunal also considered this issue and held in OA 569/89, in which one of us (Sh. N. Dharmadan) was a party, as follows:

> "...The doctrine of contructive resjudicata 'in reality is an aspect or amplification of the general principle'. We get a clear statement of this doctrine at p.152 of Spencer Bower & Turner on 'Resjudicata', II Edn, 'where the decision set up as a resjudicata necessary involves a judicial determination of some question of law or issue of fact, in the sense that the decisions couldn not have legitimately or rationally pronounced by the Tribunal without at the same time, and in the same breath, so to speak, determining that, question on issue in a particular way, such a determination even though not declared on the fact of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms but beyond these limits, there can be no such thing as a res judicata by implication.'
> (emphasis supplied)

...../

> "Gagendragadkar, J, as he then was, said in Daryao V. State of UP and others, AIR 1961 SC 1457, 'it is in the interest of public at large that a finality should attach to the binding decisions pronounced by the Courts of comptent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation.' This is again reiterated in Gulam Abbas V. State of UP and others, 1982 (1) SCC 71 by Justice Tulzapurkar.."

13. The above decisions, therefore, clearly lay down that rules of res-judicata and constructive resjudicata, being based on high public policy, apply to proceedings under Art. 226 and 32 of the Constitution. So far as the proceedings under Sec.19 of the Administrative Tribunals Act 1985 are concerned there is absolutely no scope for any doubt regarding the application of the above principles. The Act contemplates a specialised institution having much wider powers to do justice to the public servants. The powers of the High Court, civil court and Labour Court are rolled into one and vested in the Tribunal contemplated under the Administrative Tribunals Act. The Supreme Court in Union of India V. Paras Laminators (P) Ltd, (1990) 4 SCC 453 said ' the Tribunal functions as a Court within the limits of its jurisdiction. Further more, though the powers of the Tribunal are limited and its area of jurisdiction is clearly defined

...../

but
/within its jurisdiction being a judicial body, it has all incidental and ancillary powers which are necessary to evoke fully effective the express grant of statutory powers.." So, this Tribunal is not barred by any of the technicalities of the procedural provisions in entertaining the applications/ as in the case of Writ Application filed in this case The second objection is also devoid of any substance. It is over-ruled.

14. In the present case when the applicant approached this Tribunal and filed OA 234/86 he apprehended termination which happened on the very next day of the filing of the application. But he did not seek permission either to amend the application by incorporating additional grounds and prayers assailing the termination even though he was fully aware of the position. He had full opportunity in the pending proceedings to fight against the Postal Department, if the termination was an illegal act on their part. But he did not make use of such opportunity and obtained a judgment Annexure-II dismissing the application. This Tribunal held 'we have to hold that the applicant has not established her claim for

for appointment on a regular basis.....she is not a person found qualified for the post. As already stated in the counter affidavit it has clearly been stated that the applicant was not duly qualified as per the guidelines." The Tribunal also decided the eligibility of the applicant to continue in the post of EDBPM, Kakkazham Post Office and dismissed the application. The contentions now urged by the applicants were all available to her at the time when the earlier petition was filed and she might have and ought to have raised them on the earlier occassion. Hence these are barred by the principles of constructive resjudicata and cannot be allowed to be raised in these proceedings.

15. In the result, we are of the opinion that there is no substance in this application. It deserves to be rejected. Accordingly, we dismiss the same, but without any order as to costs.

31/5/91.

(N. Dharmadan)
Member (Judicial)

31.5.91.

(N.V. KRISHNAN)
Member (Administrative)

ganga