

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 12th July, 2010*

+ **RSA No.65/2009**

CHAMELI DEVI Appellant
Through: Mr.Raman Duggal & Mr.Jagdish
Prasad, Advocates.

Versus

MUNICIPAL CORPORATION OF DELHI & ORS.
.....Respondents
Through: Mr.Rahul Kumar, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1. Chameli Devi, the appellant before this Court was aggrieved by the order dated 22.9.2003 whereby a letter was issued to her by the respondent/MCD retiring her from services with immediate effect.

2. On 14.02.1980 the appellant was appointed as a Paniwali (water carrier) on temporary basis in the MCD. Her services were continued. She did not have any documentary proof of her date of birth including a birth certificate. On 10.6.1987 she was directed to undergo a medical examination for verification of her health and date of age to be conducted by the medical officer of the Hindu Rao Hospital.

3. The case of the appellant is that her date of birth had been ascertained as 15.10.1947 and the said date had accordingly been

entered in her service record on 13.4.1988 depicting her date of birth as 15.10.1947. Dispute centres around this date of birth. The case of the respondent being that the date of birth of the appellant was not 15.10.1947 but 10.6.1942 and the same finds entered in her service book. Further case of the respondent/MCD was that in view of the fact that the petitioner was born on 10.6.1942, she was deemed to be retired on 30.6.2002 but this had been overlooked by the department and was only realized on 22.9.2003 when the letter terminating her services with immediate effect had been issued to her.

4. Chameli Devi filed her first round of litigation by way of Civil Writ Petition (CWP) No.6397/2003 which was heard by this Court. This petition runs into six pages. Ground- G which was one of the grounds under challenge clearly stated that the date of birth of the petitioner depicted as 10.6.1942 had been falsely created by the department only to retire her in an illegal manner and her entire birth record had been changed which is in violation of her fundamental rights as also against the principles of natural justice and fair play.

5. This writ petition was decided on 8.12.2004. Para 4 and 5 of the said judgment make a reference to an affidavit purported to have been filed by Chameli Devi wherein she had given her date of birth as 15.10.1947. Reference has also been made to the medical examination conducted of the petitioner which had led to the determination of her date of birth as 10.6.1942 which was accordingly incorporated in her service book. The Court had opined that last minute changes in the date of birth by the petitioner in the absence of any evidence are to be frowned upon

and the petitioner herself appears to be confused as to what was her date of birth as she herself had filed contrary documents i.e. photocopies of cards of the employment exchange wherein even as per her own showing her date of birth had been recorded as 15.10.1947 and another document showing her date of birth of the year 1950. The Court found no merit in her grievances and her petition was dismissed.

6. The petitioner preferred a Letter Patent Appeal (LPA) no.401/2005 before Division Bench of this Court. Para 3 of the judgment passed in LPA is relevant and which reads as follows:-

“So far as the appeal is concerned, it is required to be noted that by the well reasoned decision, learned Single Judge has dismissed the writ petition. However, with a view to check whether the date of birth was recorded in the service book of the appellant or not, we issued notice to the respondents and service book is produced before us. It is clear that the entry is made in the service book. It specifically states that as per medical certificate attached on page No.5 and 6. It refers to date of birth of the appellant as 10.06.1942 and as indicated in service record as 15.10.1947 is rounded and we are satisfied that it was entered in the service book pursuant to medical examination of the appellant. The change was made on 13.04.1988. It is clear from the signatures made by the officer concerned. Therefore, we are of the opinion that no interference is called for and the appeal is dismissed.”

7. A review petition was thereafter preferred before the Division Bench which was dismissed on 29.7.2005.

8. The SLP against the order dated 29.7.2005 was also dismissed on 31.3.2006.

9. This is the first part of the litigation which had been preferred by the petitioner.

10. The second round of litigation preferred by the petitioner

started with her filing a suit which was suit no.1380/2006 which was a suit for declaration and mandatory injunction. The plaint runs into 21 pages. The prayers made in the suit *inter alia* reads as follows:

- "a) That a decree of Declaration may kindly be passed in favour of the plaintiff and against the defendants declaring the order of retirement of plaintiff dated 22.9.03 and subsequent order passed by the defendant as illegal, arbitrary, null and void and the same may be set aside and the plaintiff is entitled to resume her duties and receive all her consequential reliefs from the date of her alleged retirement.
- b) That a Decree of Declaration may also be passed in favour of the plaintiff against the defendants declaring tampering/changing of Date of Birth in the Service Book of the plaintiff from 15.10.1947 to 10.6.42 on or after 11.9.03 as illegal, arbitrary, unconstitutional and against the Principles of Natural Justice.
....."

11. This suit was decided by the Civil Judge on 29.7.2008. A preliminary issue was framed which *inter alia* reads as follows:

"Whether the suit of the plaintiff is barred by 'res-judicata' under the provisions of Section 11 of the CPC? OPD"

12. The findings of the Court are contained in paras 8 to 12. It would be useful and relevant for the purpose of deciding this second appeal to extract this portion which reads as follows:-

"8. I have carefully gone through the case file and I have given my considered thoughts to the arguments addressed by the Counsels for the parties. Perusal of the record indicates that the present suit had been filed by the plaintiff for declaring the order of retirement of the plaintiff dated 22.09.2003 as illegal, arbitrary, null and void. Perusal of the record further indicates that the said order has already been challenged by the plaintiff before the Hon'ble High Court

vide Writ Petition bearing No. WP(C) 6397/03 and the Hon'ble High Court has not found any infirmity or illegality in the retirement order dated 22.09.2003 and therefore, the said petition was dismissed by the Hon'ble High Court of Delhi vide orders dated 08.12.2004 by holding as under:-

"5. From the foregoing it would be reasonable to presume that in view of the affidavit filed earlier by the petitioner and her subsequently being sent for determination of age to the Medical Officer, in May, 1987 petitioner was fully aware of the examination being done for the purpose of determination of her age. Thus, it can safely inferred that petitioner was aware of the Medical Officer having determined the date of birth as 10.6.1942. Petitioner did not protest against the said date of birth for over 15 years and allowed the same to continue. It is only on the eve of retirement that the petitioner has chosen to stake the claim of date of birth being 15.10.1947 so as to gain additional five years of service."

9. It was further held by the Hon'ble High Court as under:-

"7.The grievance regarding correction of date of birth should not be made or entertained after over a decade and half, especially on the eve of superannuation. There appears some uncertainty in the mind of petitioner herself about her date of birth. During the course of arguments two photocopies of Employment Exchange identity card have been shown; one showing date of birth as 1950 and the other as 15.10.1947.

In view of the foregoing discussion, coupled with the petitioner having failed to tender any proof with regard to date of birth seeking a change in the date of birth as recorded by the Corporation in 1987, belatedly in 2002 cannot be permitted.

The petition is dismissed.

10. Perusal of the record further indicates that the order passed by the Hon'ble High Court on 08.12.2004 was challenged before the division bench of the Hon'ble High Court in LPA no.401/05 and the same was also dismissed by the Hon'ble High Court vide orders dated 21.02.2005 by holding as under:-

"3. So far as the appeal is concerned, it is required to be noted that by the well reasoned decision, learned Single Judge has dismissed the writ petition. However, with a view to check whether the date of birth was recorded in the service book of the appellant or not, we issued notice to the respondents and service book is produced before us. It is clear that the entry is made in the service book. It is specifically states that as per medical certificate attached on page nos.5 and 6. It refers to date of birth of the appellant as 10.6.1942 and as indicated in service record as 15.10.1947 is rounded and we are satisfied that it was entered in the service book pursuant to medical examination of the appellant. The change was made on 13.04.1988. It is clear from the signatures made by the officer concerned. Therefore, we are of the opinion that no

interference is called for and the appeal is dismissed.”

11. Perusal of the record further indicates that the order dated 21.02.2005 was again challenged by the plaintiff before the Hon’ble High Court in review petition bearing no.190/05 in LPA no.401/05 and the same was also dismissed by the Hon’ble High Court vide order dated 29.07.2005 as under:-

“29.07.2005

Present: Mr. V.K.Tandon, Advocate for the appellant.

+ RP No.190/2005 in L.P.A 401/2005

No ground to review the order.

Dismissed.

CM No.10356/2005 (U/S 5 of the Limitation Act)

No ground to condone the delay.

Dismissed.

CHIEF JUSTICE

SANJAY KISHAN KAUL, J

12. Perusal of the record further indicates that the plaintiff has challenged the order dated 21.02.2005 before the Hon’ble Supreme Court of India, vide SLP No.26067/2005 but the same was also dismissed by the Hon’ble Supreme Court in Limine vide order dated 31.03.2006.

13. Perusal of the documents placed on record by the plaintiff and the defendants and the perusal of the orders passed by the Hon’ble High Court as well as Hon’ble Supreme Court in various petitions, as discussed above, clearly indicates that the plaintiff has challenged the impugned order dated 22.09.2003 before the Hon’ble High Court as well as Hon’ble Supreme Court of India and the present suit has been filed for the grant of same relief and therefore in the considered opinion of this Court, the same is barred under the provision of Section 11 of the CPC, being ‘Res-judicata’ and accordingly the present issue is decided in favour of defendant and against the plaintiff.

It is ordered accordingly.

File be consigned to Record Room after due compliance.”

13. Suit was dismissed on this preliminary issue.

14. The first appeal was decided on 31.1.2009. Appellant Chameli Devi did not get any relief from the first Appellate Court

either. The findings of the Trial Judge were endorsed.

15. The matter has now reached at the stage of second appeal. Grievances of Chameli Devi still appear to be unaddressed.

16. The substantial questions of law which have arisen and which have been formulated by this Court reads as under:-

1. "Whether the Courts below have misapplied the doctrine of res-judicata as contained in Section 11 of the CPC and have erroneously dismissed the claim of the petitioner without taking into account the fact that subsequent information which had come her way under the Right to information Act was not available with her at the time of the filing of the writ petition ?.

2. Whether the courts below have erred in not appreciating that an order obtained by fraud would vitiate the entire proceedings and have not considered its effects thereto?

17. Counsel for the appellant has urged that the petitioner has applied for certain documents under the Right to Information Act which have been supplied to her only after the decision in the writ petition which revealed the fraud played upon the appellant and as such the question of the same matters in issue having been finally heard and decided upon by the writ court when the relevant material was not with the appellant at that time could not and did arise. It is submitted that this contention of the appellant has not been appreciated by the Trial Court.

18. The thrust of the arguments of the learned counsel for the appellant is that the plea of fraud had not been set up by the appellant/petitioner at the time when she had filed her writ petition; plea of fraud had been taken up only in the subsequent suit which plea had neither been considered nor adjudicated upon

by the first Court; the entire proceedings thus stand vitiated; substantial justice has to be advanced and it is the duty of the Court to unravel the truth which is the ultimate goal of a Court dispensing justice. It is submitted that the explanation III of Section 11 clearly postulates such a situation and in the absence of a specific adjudication on the plea of fraud which had not been given by the Court hearing the writ petition, the suit proceedings could not have been stayed by the application of this doctrine.

19. It has been urged that the grounds as contained in the writ petition are clearly distinct and different from the averments which have been made in the suit; the present suit has alleged fraud which did not find mention in the writ petition. Reliance has been placed upon (2000) 3 SCC 319 Ram Chandra Singh Vs. Savitri Devi and Ors. to substantiate his submission that the Court has inherent jurisdiction to grant relief on an application filed even after the suit had been decreed and the principle of res judicata would not apply if the decree is found to have been obtained by fraud. This proposition is not in dispute. In this case a preliminary decree and thereafter a final decree had been passed in a partition suit. During the course of objections in the executing Court confirming the auction-sale in favour of an auction purchaser who had deposited the bid amount, an application had been preferred by the auction purchaser stating that the decree had been obtained by fraud being collusive. The particulars of the alleged fraud had been depicted and so stated; in this context it was held that once it is found that a decree had been obtained by fraud the principle of res judicata would be inapplicable. Facts of this case are distinct and are inapplicable to the present scenario. Counsel for the

appellant has also placed reliance upon (2005) 7 SCC 605 Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. to support the same proposition.

20. Reliance has also been placed upon AIR 1964 SC 1013 Amalgamated Coalfields Ltd & Anr Vs. Janapada Sabha Chhindwara & Ors. It is submitted that where a point raised in a particular matter had not been taken up and no opinion had been expressed on it, in the subsequent petition the earlier decision would not operate as constructive res judicata. In this case the validity of the increase in the rate of tax from 3 pie to 9 pie per ton had been sought to be raised; this point had admittedly not been taken into consideration in the first petition as the relevant material was not available on record; as such the Court had refrained from giving any opinion. In the light of these facts the Supreme Court had held that the subsequent petition where the attack against the validity of the notice was based on the different grounds and distinct from the grounds raised on the earlier occasion and as such not being the same grounds which had been urged on the earlier occasions, principle of constructive res judicata would be inapplicable to the facts of the instant case.

21. Learned counsel for the appellant has further relied upon (2000) 3 SCC 350 Sajjadanashin Sayed MD. B.E. EDR.(D) Vs. Musa Badabhai Ummer & Ors. as also AIR 1983 SC 930 Kunwar Ram Nath & Ors. Vs. The Municipal Board, Pilibhit to support his submission that where the matter is not 'directly and substantially' in issue in the earlier proceeding and it was only 'collaterally and incidentally' in issue, the principle of res judicata would be inapplicable. It is submitted that to decide this proposition the

plaint, written statement, the issues and the judgment in the earlier suit have to be considered before drawing a conclusion that the matter in both the proceedings 'directly and substantially' in issue. This proposition is again undisputed.

22. These arguments have been countered by the learned counsel for the respondent. Reliance has been placed upon a Division Bench judgment of this Court, AIR 1989 Delhi 301 Vivek Jain Vs. Union of India and Anr. In this case, the Court had held where the writ Court had chosen to decide disputed questions of fact which had been raised before it, it is a decision of a competent jurisdiction and would operate as *res judicata*. The relevant extract of this judgment *inter alia* reads as follows:-

“The writ Court assumed jurisdiction and dealt directly with the questions of discrimination and departure from norms or standards. When there is jurisdiction of the subject matter, then the decision of all questions arising in the case is but an exercise of that jurisdiction. The decision operates as *res judicata*, as rendered by a competent Court.”

23. This appeal has to answer the substantial question of law as framed by it. The grievance of the petitioner in her writ petition was all along that she had been illegally, arbitrarily and against the principles of natural justice retired from her services on 22.9.2003. Her fundamental rights had been violated. A false entry had been manipulated in her service records; her date of birth was 15.10.1947 and this was evident from the medical examination conducted of the petitioner at the time when she joined her services as also the subsequent entry in her service book which had been made on 13.4.1988. By falsely manipulating the record her date of birth was shown as 10.6.1942 forcing her to retire

much prior to the age when she would have superannuated.

24. The Single Bench of this Court hearing her writ petition had examined the affidavit filed by her depicting her date of birth as 15.10.1947, her medical record as also the service book; the court had drawn the conclusion that the petitioner had slept over her right for the last fifteen years and the medical officer in May 1987 having depicted her date of birth as 10.6.1942, she chose to agitate this only on the day of eve of her retirement and in the absence of any other evidence forthcoming from her side her petition seeking relief was dismissed.

25. The extract of her service book (page 95 of the paper book) shows that her date of birth earlier depicted as 15.10.1947 has been rounded off as there is a corresponding entry which states that as per the medical test her date of birth is 10.6.1942. This document had been not only noted but scrutinized in detail by the Division Bench of this Court while deciding and disposing of the LPA on 21.12.2008. The Court had observed that this change was made in the service book of the petitioner on 13.4.1998 indicating her date of birth as per her medical examination to be 10.6.1942 and not 15.10.1947 which has been rounded off. This order has been passed after calling for the service book of the petitioner.

26. Thereafter the review petition as also the SLP preferred by the Chameli Devi before the Supreme Court had been dismissed.

27. In the second round of litigation filed by Chameli Devi, the prayers made in her suit have been as aforementioned. The said prayers seek a declaration to the effect that the order of her retirement dated 22.9.2003 is illegal, arbitrary; the second prayer states that there has been a tampering/ change of date of her birth

in the service book from 15.10.1947 to 10.6.1942 which is illegal and unconstitutional and against the principles of natural justice; there is not a whisper of the word “fraud” in these prayer clauses.

28. It is thus evident that the prayers made in the suit are not different and in fact almost verbatim the prayer made in the CWP 6397/2003 preferred by the petitioner wherein she had sought a quashing by a writ of certiorari the termination letter dated 22.9.2003 on the ground that there has been a manipulation in her date of birth which has been changed to 10.6.1942 from 15.10.1947 which is violative of her rights and against the principles of natural justice and fair play.

29. It is in this back ground that the applicability of the principles of res-judicata as contained in Section 11 of the Code of Civil Procedure have to be questioned. Will they or will they not apply to the instant situation?

30. This Court is of the view that they would squarely apply to the facts of the case. This doctrine of res-judicata is based on the need of giving a finality to a judicial decision. It is a rule of public policy. It is based on the principle of equity, justice and good conscience as also to prevent an abuse of the process of the court in order not to allow the same parties to re-agitate and re-litigate the same issues which had already been heard and decided. The matter in issue before the writ court is the same matter which was the subject matter of the civil suit for declaration by the plaintiff. The parties to the litigation are also the same. The relief claimed in the writ petition as also in the suit is again the same. There is also no dispute to the proposition that the principle of res-judicata also applies to the writ proceedings.

31. In 2001 II AD (Delhi) 596 M/s Jhalani Tools (India) Ltd. Vs. Union of India and Others it was held that once it has been established that the relief sought in a later writ petition was the same relief which has been claimed in the earlier writ petition as well this doctrine as contained in Section 11 of the CPC would bar the hearing of the second petition.

32. In AIR 1991 SC 1732 Government of Andhra Pradesh Vs. M. Narasimha Murty it was held that if a question is raised and not decided it will be treated as decided against the petitioner and would operate as res-judicata. This is contained in Explanation V of Section 11 of the CPC. In this back ground the submission of the learned counsel for the appellant that his plea that he had received documents under the Right to Information Act only after the writ petition had been disposed of which had revealed this fraud played upon the appellant has little relevance keeping in view the fact that these document relied upon by him and specifically mentioned at page 45, 95, 99 of the paper book are the very same documents which had been duly considered and appreciated in the writ proceedings and the orders of the Division Bench of this Court while disposing of the LPA on 21.2.2005 had in fact made a special reference to this service record. Thus the argument that these documents were not considered by the writ court is both false and misconceived.

33. Further the submission of the appellant that his plea of fraud even presuming that it was raised at the time when the writ petition was heard, yet it was never adjudicated upon is again misconceived.

34. The orders passed by the Single Judge of this Court while

deciding the writ petition had merged with the order passed in the proceeding before the Division Bench which were disputed in the LPA; they further merged with the review application filed and dismissed by the Division Bench and thereafter in the SLP which also stood dismissed in limini. In the LPA the petitioner had specifically averred that she had not been shown her service book which she was entitled to as per the rules; this was being denied to her on one pretext or the other; it was only later on she learnt that the department had committed a malafide. Malafides has been alleged in ground (R) of the said petition. While disposing of the LPA on 21.2.2005 the Division Bench of this Court had specifically recorded that in view of the grievances nursed by the petitioner the respondent is directed to produce her service book; thereafter the entry in the service book had been perused and the reference to the scoring out of the date of birth as 15.10.1947 which had been rounded off had been considered in the context of the date of birth then being recorded as 10.6.1942; further it had been categorically held that this change had been made on 13.4.1988 and appeared to be evident from the signatures of the officer concerned. These were all findings of facts given by the Division Bench of this Court after the perusal of the service record of the petitioner; the question of malafide raised was considered and so rejected; the Division Bench holding that no interference was called for. In this view of the matter it does not now lie in the mouth of the petitioner to state the question of malafides or fraud had neither been considered nor raised or adjudicated upon in the writ proceedings.

35. On all counts, not only on the count of res-judicata but also

of the applicability of the principle of constructive res-judicata this court finds no scope for interference in the findings of the Courts below.

36. Even otherwise a mere passing phraseography making a reference to fraud without depicting or detailing the fraud; the prayer clause in the plaint running into four sub-clauses also making no reference at all to any fraud by the department, it is clear that this argument has been set up only as one more last ditch effort on the part of the petitioner to re-agitate the same matter which already stand fully and finally decided. The submission of the learned counsel for the respondent that defendant no.2 and 3 i.e. DEO of the Education Department and Head Master of the Principal Primary School have also been arrayed in the suit only to overcome the bar of res judicata and are even otherwise superfluous parties also finds force in view of the fact that even presuming that the prayers as sought for in the plaint were to be decreed in favour of the plaintiff there is no effective relief which has been sought against either defendant nos.2 or defendant no.3. This submission also carries weight.

37. Both the Courts below had in the context of the facts before it applied this doctrine as engrafted in Section 11 of the Code on sound legal parameters which calls for no interference. The substantial questions of law are answered accordingly. Appeal is without any merit. It is dismissed.

INDERMEET KAUR, J.

JULY 12, 2010
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