

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

+ **Date of Decision: 4th July, 2017**

% **W.P.(C.) No. 7584/2015**

MAHESH KUMAR SINGH Petitioner
Through: Mr.Kripa Shankar Prasad &
Mr.Mohd. Ainul Ansari,
Advocates.

Versus

THE UNION OF INDIA & ORS.Respondent
Through: Mr.Vivekanand Mishra,
Advocate for R-1, 2 & 4.
Mr.Naresh Kaushik, with
Mr.Gaurav Sharma, Advocate
for R-3.
Mr.Surender Singh Hooda,
Advocate for R-5.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J. (ORAL)

1. The Petitioner has by the present writ petition, impugned the order dated 3rd July, 2015, passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA

No.3757/2011 whereby the original application filed by the Petitioner (Applicant) has been dismissed.

2. The admitted facts as noticed by the Tribunal, are that the Petitioner (Applicant therein), had been appointed as an ad hoc Lecturer (now known as Assistant Professor) on 10th September, 1999 in the Department of History, Army Cadet College which is a wing of the Indian Military Academy, Dehradun, pursuant to the selection based on an advertisement published in the Employment News. The Petitioner continued in service with some breaks when the Respondents issued an advertisement dated 15th April, 2001 inviting applications for ad hoc appointment to posts of Lecturers in various subjects including the post of Lecturer (History) which the Petitioner had been holding on ad hoc basis w.e.f. 10th September, 1999.

3. Being aggrieved by the issuance of advertisement issued by the Respondents for appointing fresh persons on ad hoc basis by terminating the already appointed adhoc Lecturers, a batch of OAs were filed by the ad hoc lecturers including the Petitioner before the Tribunal. The Tribunal after considering

the batch of OAs including OA No.1348/2001 filed by the Petitioner, came to the conclusion that an ad hoc lecturer could not be replaced by anyone other than a regularly selected lecturer and, therefore vide its order dated 13th December, 2001, quashed the advertisement dated 15th April, 2001 inviting applications for appointment to the post of ad hoc lecturer, including the post which the present Petitioner had been holding. In its order, the Tribunal further directed that the Petitioner and other similarly placed persons, should be permitted to continue to work on the posts which they were holding on ad hoc basis, without being subjected to any fresh selection or interviews, for holding such ad hoc posts till such time they are replaced by regularly selected lecturers, and also directed that all the Applicants therein (including the present Petitioner) would be entitled to appear for selection for regular appointment in accordance with the Rules.

4. Pursuant to the aforesaid order passed by the Tribunal, the Petitioner continued to work as an ad hoc Lecturer (History) for the next many years when the Respondent no.3 issued an

advertisement published in the Employment News dated 8th to 14th January, 2011 for filling up posts of Assistant Professors in various subjects and stated therein that the post of Assistant Professor (History) was reserved for scheduled caste candidates.

5. Feeling aggrieved, the Petitioner who belongs to General Category and had been precluded from applying for regular appointment to the post of Assistant Professor (History), approached the Tribunal by way of Original Application No.3757/2011 for quashing the aforesaid advertisement dated 8-14 January, 2011 whereby the solitary post of Assistant Professor (History) in the Army Cadet College, Indian Military Academy, Dehradun, had been reserved for scheduled caste candidates.

6. The contention of the Petitioner before the Tribunal was that there was only one post of Assistant Professor in the Department of History, ACC, IMA and as such, there could not be any reservation for the said post. In support of his contention before the Tribunal, the Petitioner relied upon the judgment of the Hon'ble Apex Court in the case of *State of*

Karnataka and Anr. Vs. K. Govindappa & Anr. reported at (2009) 1 SCC 1.

7. Before the Tribunal, the Petitioner had further contended that the advertisement had wrongly prescribed an upper age limit of 35 years, though, as per the UGC guidelines, there was no upper age limit for the recruitment of Assistant Professor in colleges.

8. In the counter affidavit filed by the Respondent nos.1, 2 & 4 before the Tribunal, the main defence taken by these Respondents was that consequent upon change in reservation policy and also on inclusion of reservation for OBCs in the Government service, the reservation points had been re-drawn and the reservation roster was being maintained for all the fifteen posts of lecturers, and was no longer being maintained with reference to subjects. The Respondents had, therefore, contended that as a result of re-casting of roster, the post of Lecturer (History) had fallen in the slot of reservation earmarked for SC/ST and had, therefore, been rightly shown as

reserved for SC category in the advertisement issued in January, 2011.

9. It transpires from the record that the Tribunal had vide its interim order dated 19th October, 2011, while permitting the Respondent nos.1 to 4 to go ahead with the selection of Assistant Professor (History) on the basis of the impugned advertisement, stayed the replacement of the Petitioner. Respondents 1 to 4 proceeded with the selection for the post of Assistant Professor (History) by considering only SC candidates in which Respondent No.5 was selected and he joined service as Assistant Professor (History) on 24th April, 2012.

10. In his counter affidavit, the Respondent no.5 reiterated the stand of the official Respondents and contended that the post of Assistant Professor (History) had been correctly reserved for scheduled caste candidates by the official Respondents. Respondent no.5 had subsequently filed written submissions before the Tribunal wherein he had contended that the Petitioner herein was overage at the time of advertisement and was therefore, even otherwise, not eligible for the post. It

further appears from the judgment that at the time of final hearing, the counsels for the Respondents had also raised the plea that in view of the decision in the earlier OA No.1348/2001 filed by the petitioner, the present Original Application filed by the Petitioner was barred by res judicata. Upon consideration of the rival contentions by the parties, the Tribunal formulated four questions for determination which are being reproduced hereinbelow:-

- “(a) Whether the post of Lecturer (History) was to be considered as a separate cadre or the part of the cadre of Lecturers (Assistant Professors)?
- (b) Whether there can be a reservation against single isolated vacancy?
- (c) Whether the applicant can be nixed consideration for regularization being overage?
- (d) Whether the original Application is barred by res judicata?”

11. The Tribunal after considering the admitted facts and the judgment of the Apex Court, came to a categorical conclusion in para 14 of its judgment that the single post of the Assistant Professor (Lecturer (History)) could not have been kept reserved for SC category and the applicant (Petitioner herein)

could not have been nixed consideration for appointment to the same on the ground that he did not belong to the reserved category.

12. After coming to the conclusion that the post of Assistant Professor (Lecturer (History)) had been wrongly reserved for SC category, the Tribunal considered the plea raised by the Respondent no.5 that the Petitioner was overage and was not entitled to seek age relaxation on the principles of res judicata, as his earlier petition being OA 1348/2001 seeking regular appointment had already been decided by the Tribunal vide its order dated 15th April, 2001, without granting him any age relaxation for the period of ad hoc services already rendered by him. Agreeing with the contention raised by the Respondent no.5, the Tribunal proceeded to hold that in the wake of directions given in its earlier order dated 15th April, 2001 passed in OA No.1348/2001, the proposition whether the Petitioner should be considered for the post in question with relaxed age or with relaxation of age limited to the extent of ad hoc service

rendered by him or not, could not be decided by the Tribunal in the OA.

13. The Tribunal while accepting the plea of constructive res judicata raised by the Respondents, was of the view that the question of the Petitioner's regular appointment was an issue in the earlier OA and, therefore, the question of age relaxation to the extent of ad hoc service rendered by him, ought to have been addressed in the earlier OA itself and, therefore, it could not adjudicate the proposition whether the Petitioner should be considered for the post with relaxed age or relaxation of age limit.

14. The Tribunal agreed with the plea raised by the Respondent no.5, that as on the cut-off date, the Petitioner was beyond the maximum age limit of 35 years, and, therefore, while holding that though it could have given directions to the Respondents to hold a fresh selection for the post of Lecturer (History), but since it was inclined to accept the plea of Respondent no.5 that the Petitioner herein was overage for the post in question, and no relief could be granted to him, it was

refraining from venturing into the area of public interest and nix the relief sought in the OA. Thus, though the Tribunal came to a categorical conclusion that the single post of Assistant Professor (Lecturer (History)) had been wrongly reserved for SC category and directions could have been given to the Respondents to hold a fresh selection for the said post, but by applying the principles of constructive res judicata, it dismissed the application filed by the Petitioner.

15. Aggrieved by the impugned order, whereby the Tribunal has even after holding that the sole post of Assistant Professor (Lecturer (History)) had been wrongly reserved for SC category, the Petitioner has filed the present writ petition.

16. We have heard the arguments of the learned counsel for the parties including, the counsel for Respondent no.5, and have given our thoughtful consideration to the issues raised on the petition.

17. The admitted facts which emerge from the documents on record are that the sole post of Assistant Professor (History) was wrongly reserved for SC category precluding the Petitioner and

other aspirants from unreserved category to apply for the same. It also clearly emerges that the Petitioner has been denied relief only because the Tribunal came to a conclusion that it could not adjudicate the proposition whether he should be considered for the post in question with relaxed age or with relaxation of age limit.

18. Upon a consideration of the rival contentions raised by the parties, we are of the view that the main question which arises for our consideration, is as to whether the principle of constructive res judicata is applicable in the facts of the case so as to warrant dismissal of the OA and also as to whether the question of age relaxation arose in the previous OA filed by the Petitioner.

19. As noticed above, the Tribunal dismissed the OA filed by the Petitioner only because it was inclined to accept the plea raised by Respondent no.5, in its written submissions, that the Petitioner was over age for the post in question.

20. The principle of constructive res judicata being a special and artificial form of res judicata enacted by Section 11 of the

CPC, in our opinion, can be applied only when the issues which ought to have been raised in the earlier proceedings, were not raised in the said proceedings. But the said principle cannot be applied merely because the issue could have been raised in the earlier proceedings, but was not raised.

21. There is a clear distinction between proceedings where the issue could have been raised, and proceedings where issue should have been raised. In our opinion, the principle of constructive res judicata cannot be applied to bar an adjudication on an issue which was neither necessary to be raised, nor averted to by the court in the earlier proceedings.

22. We are fortified in the view which we are taking by a decision of the Apex Court in case of ***Ramachandra Dagdu Sonavane (Dead) by LRs Vs. Vithu Hira Mahar (Dead) by LRs & Ors. Reported in AIR 2010 SC 818***. In para 31 which is reproduced hereinbelow, the Apex Court explained the meaning and ambit of the doctrine of constructive res judicata as under:-

31) Res-judicata and Code of Civil Procedure :- It is well known that the doctrine of res-judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally

comes into play in relation to civil suits. But apart from the codified law, the doctrine of res-judicata or the principle of the res-judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. 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 proceedings between the same parties. The Principle of res-judicata comes into play when by 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 implications even then 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 [See AIR 1978 SC 1283].”

23. To decide whether the Tribunal was justified in declining to grant any relief to the Petitioner by holding that in the wake of the earlier OA No.1348/2001, it was not possible to

adjudicate the proposition whether the Petitioner should be considered for the post in question, it would be apt to reproduce the directions given by the Tribunal in the aforesaid OA first filed by the Petitioner, which reads as follows:-

“(a) The impugned advertisement dated 15.04.2001 inviting applications for ad hoc appointment for the post of Lecturer, which the applicants have been holding, is quashed and set aside.

(b) The Respondents shall permit all the applicants to continue to work in the post they are/were holding on ad hoc basis without subjecting them to any fresh selections or interviews for holding such ad hoc post till such time, replacement regularly selected by the UPSC arrive to join duty.

(c) If the services of any one of the applicants have been terminated, he/she should be re-engaged and permitted to continue till regular appointee is report for duty, though such persons would not be entitled for back wages during the period between their dis-engagement and re-appointment.

(d) All the applicants would be entitled for monetary benefits like pay and allowances, increments and service benefits like leave etc. as are granted to a regular staff.

(e) The applicants shall also be permitted to appear for selection for regular

appointment in accordance with the Rules.
No costs.”

24. We have deliberately extracted the directions given in the earlier OA filed by the Petitioner as the same clearly show that the question of grant of age relaxation to the Petitioner or his being overage, was neither put in issue before the Tribunal nor there was any determination of the same and in fact in our view, it was not even necessary for the Tribunal in the earlier proceedings to decide the said question. The Petitioner had not reached that bridge, and it was not necessary for him to have crossed it then. The Tribunal, while deciding OA No.1348 of 2001, had merely directed that the Petitioner would be permitted to continue on ad hoc basis till he is replaced by a regularly selected lecturer, and had further directed that he along with other applicants therein, who were also working as ad hoc lecturers would also be permitted to appear for selection for regular appointment in accordance with the rules.

25. It is, thus, evident that the Tribunal in the earlier OA decided on 13th December, 2001 had, while issuing directions, specifically stated that the Petitioner and other similarly placed

ad hoc lecturers were entitled to continue to work on ad hoc basis only till such time they are replaced by regularly selected candidates and, thus, neither there was any issue regarding grant of any age relaxation to the Petitioner, nor the same could have been adjudicated in the said OA as the said decision was based only on the principle that an ad hoc employee could not be replaced by another ad hoc employee. The issue of age relaxation did not arise then, since the process for selection of regular lecturers was not notified. Only after such a process were to be notified, the question of age relaxation would have arisen, in the context of the facts which would then arise for consideration.

26. In the facts of the case, in our view, the Tribunal has not appreciated the aforesaid position and dismissed the OA by wrongly applying the principles of constructive res judicata. Even otherwise, we are also of the view that even in the present OA, there was no necessity for the Tribunal to decide the issue whether the Petitioner was entitled to any age relaxation, as the

question of age relaxation, would arise only once the post in question is re-advertised.

27. We are of the considered opinion, that in the present case, once the Tribunal came to an inescapable conclusion that the sole post of Assistant Professor (Lecturer (History)) had been erroneously reserved for SC candidates, in the advertisement published in Employment News dated 8th to 14th January, 2011 for the post of Assistant Professor (History), the advertisement was liable to be quashed with direction to the respondent Nos.1 to 4 to hold a fresh selection for the post of Lecturer (History).

28. Accordingly, the impugned order is set aside insofar as it dismissed the original OA of the Petitioner. The impugned advertisement issued in the Employment News dated 8th to 14th January, 2011 for the post of Assistant Professor (History) and all consequential actions taken pursuant thereto, are set aside and the Respondents are directed to hold a fresh selection for the post of Assistant Professor/Lecturer (History) in ACC, IMA, as expeditiously as possible by treating the said post as an unreserved post and all eligible candidates from unreserved

category including the Petitioner, would have liberty to apply for the same and seek age relaxation, if any, as per the rules.

29. The writ petition is allowed in the aforesaid terms without any order as to costs.

(REKHA PALLI)
JUDGE

(VIPIN SANGHI)
JUDGE

JULY 04, 2017/aa



सत्यमेव जयते