



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5295 OF 2023**

Rajendra Tribhuvandas Navare,
Age 67 years, Address R/o 37,
Telegraph Society, Vijapur Road,
Solapur, Maharashtra

... PETITIONER

versus

1. Solapur Municipal Corporation,
Indrabhavan, Solapur.
2. The Commissioner, Indrabhavan,
Solapur Municipal Corporation
3. Transport Administrator,
Transport Department,
Rajendra Chowk Depot,
Ravivar Peth, Solapur.
4. Health Engineer,
Public Health, Water Supply
Department, Indrabhavan, Solapur

... RESPONDENTS

Ms. Gayatri Singh, Senior Advocate with Ms. Shreya Kohapatra i/by Mr. V.G.Sreeram, for Petitioner.
Mr. Sameer Kumbhakoni, for Respondent Nos.1 and 2.
Mr. Vijay Killedar, for Respondent No.3.

CORAM: N.J.JAMADAR, J.
RESERVED ON : 18 AUGUST 2023
PRONOUNCED ON : 12 JANUARY 2024

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. The Petitioner, a retired daily wager, who was employed with Solapur Municipal Corporation – Respondent No.1, has assailed the legality, propriety and correctness of a judgment and order dated 17 January 2022 passed by the learned Member, Industrial Court, Solapur in Complaint (ULP) No.15 of 2016, whereby the complaint came to be dismissed on the ground that it was barred by principle of res-judicata.

3. The background facts leading to this Petition can be stated, in brief, as under :

3.1 The Petitioner was appointed as peon on daily wages on 3 September 1992 in the office of the Transport Administrator – Respondent No.3. In the year 2010 the Petitioner was transferred to the office of Health Engineer, Public Health and Water Supply Department – Respondent No.4, a department of Solapur Municipal Corporation. On 10 February 2016, the Petitioner was transferred back to the Transport department. The Petitioner stood retired on 29 February 2016.

3.2 A week prior to the retirement, the Petitioner filed a complaint (ULP) No.15 of 2016 alleging unfair labour practices under Items 5, 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the Act, 1971) before the Industrial Court at Solapur.

3.3 The substance of the complaint of the Petitioner was that the Petitioner had completed 240 days of service with the Transport Department in the year 1998

itself. Yet, despite having rendered 23 years of continuous and uninterrupted service, the Petitioner was made to retire as a daily wager only. The Respondents availed services of the Petitioner as a temporary workman for years together with the object of depriving him of the status and privileges of a permanent employee. In the process, the Respondents also indulged in invidious discrimination amongst the employees by depriving the Petitioner of the benefits, which were extended to other similarly situated employees.

3.4 It was specifically alleged that the Petitioner was deprived of the remuneration which was admissible to the post of Peon under awards and the recommendations of the Pay Commissions. Thus, there was failure to implement award and settlements. By exploiting the vulnerable position of the Petitioner, the Respondents also indulged in acts of force and compelled him to work for a meager remuneration for 23 years. There was a breach of principle of equal pay for equal work also. The Petitioner, thus, prayed for grant of permanency with all consequential benefits with retrospective effect, grant him pay and allowances in terms of the recommendations of the Pay Commissions with retrospective effect and pay arrears of pay and allowance and also a declaration that the Respondents had indulged in unfair labour practices under Items 5, 6, 9 and 10 of Schedule IV of the Act, 1971 and a direction to them to cease and desist from indulging in those unfair labour practices.

3.5 Written statements were filed on behalf of Respondent Nos.1, 2 and 4,

and Respondent No.3. The Respondents contested the claim of the Petitioner. It was, inter alia, contended that the Petitioner was never appointed as Peon and his status was that of a daily wager only. It was denied that the Respondents indulged in any unfair labour practices. Respondent Nos.1, 2 and 4 also contended that the Petitioner had filed complaint (ULP) No.56 of 2005 for identical reliefs. The said complaint came to be dismissed by the Industrial Court by a judgment and order dated 21 December 2012 on merits. Therefore, the said decision operated as res-judicata and the instant complaint was not maintainable.

3.6 The Petitioner led evidence. The Respondents did not adduce any evidence in the rebuttal. After appraisal of the pleadings and evidence, the learned Member, Industrial Court, Solapur, was persuaded to dismiss the Complaint, principally on the ground of bar of res-judicata. The learned Industrial Court, as is evident from the record, had not framed the issue of res-judicata initially. From the perusal of the impugned judgment and order, it becomes evident that the learned Member, Industrial Court considered it appropriate to frame the issue of res-judicata for the purpose of the determination of the complaint as the parties were extensively heard on the aspect of bar of res-judicata as well. Thus, while pronouncing the judgment, the learned Member, Industrial Court, framed the issue of res-judicata as issue 1A. Having found the said issue was required to be decided in the affirmative and the complaint was required to be dismissed on the said count alone, the learned

Member, Industrial Court did not decide rest of the issues. It was also noted that the Petitioner was guilty of suppression of facts as the institution of the previous complaint and the decision thereon were not referred to in the instant complaint.

3.7 Being aggrieved, the complainant has preferred this Petition.

4. I have heard Ms. Gayatri Singh, learned Senior Advocate for the Petitioner, Mr. Sameer Kumbhakoni, learned Counsel for Respondent Nos.1 and 2 and Mr. Vijay Killedar, learned Counsel for Respondent No.3. With the assistance of the learned Counsel for the parties, I have also perused pleadings, evidence and the documents on record.

5. Ms. Singh submitted that the impugned judgment and order suffers from a serious procedural error. The learned Member, Industrial Court, had not framed the issue of res-judicata and the said issue came to be framed at the time of pronouncement of the judgment. Had the issue been framed before the conclusion of the trial, the Petitioner would have had an opportunity to adduce evidence and advance submissions qua the said issue. The framing and determination of the issue at the stage of the judgment deprived the Petitioner of an efficacious opportunity of hearing, urged Ms. Singh.

6. Ms. Gayatri Singh would urge the bar of res-judicata was also not properly appreciated. In the previous complaint, only the issue of permanency was agitated. The issue of permanency, according to Ms. Singh, was an ongoing industrial

dispute. The grant of permanency essentially turns upon the existence of vacancies. When the vacancies subsequently arise, an employee may become eligible to grant benefit of permanency. Thus, the Petitioner could not have been non-suited on the ground that prior to a decade and half, a complaint was lodged and it was dismissed.

7. It was further submitted that in the instant complaint, the Petitioner had specifically raised a substantial issue of equal pay for equal work. The Petitioner had alleged that the Respondents indulged in an unfair labour practice in not giving pay and allowances as were admissible and paid under the award and pay commission recommendations to similarly circumstanced employees. This part of the complaint was not at all covered by the decision in complaint ULP No.56 of 2005. In this view of the matter, according to Ms. Singh, the impugned order deserves to be quashed and set aside.

8. Mr. Kumbhakoni, learned Counsel for Respondent Nos.1 and 2 submitted that, indisputably, the decision in complaint (ULP) No.56 of 2005 had attained finality. If the Petitioner was aggrieved by the decision, the only course open to the Petitioner was to challenge the same. However, without disclosing the said fact, the Petitioner could not have again instituted a complaint of unfair labour practices. Thus, the learned Member, Industrial Court, committed no error in dismissing the complaint on the ground of bar of res-judicata.

9. Mr. Killedar, learned Counsel for Respondent No.3 submitted that it is

well recognized that the principle of res-judicata applies to the proceedings before the industrial adjudicator. The learned Member, Industrial Court was, therefore, fully justified in holding that the complaint was barred by the principle of res-judicata. Mr. Killedar took the Court through the pleadings in previous complaint and the judgment in complaint (ULP) No.56 of 2005 to bolster up the submission that the identical question was agitated before and decided by, the Industrial Court in Complaint (ULP) No.56 of 2005.

10. To lend support to the aforesaid submission, Mr. Killedar placed a very strong reliance on the judgment of the Supreme Court in the case of **Chairman and Managing Director, Fertilisers and Chemicals Travancore Ltd. and Anr. V/s. General Secretary, Fertilizers and Chemicals Travancore Employees Association and Ors.**¹ In the said case, the Supreme Court after adverting to the earlier decisions of the Supreme Court in the cases of **R.C.Tiwari V/s. M.P.State Co-op. Mktg. Federation Ltd.**², Pondicherry Khadi and Village Industries Board V/s. P. Kulothangan³ and **ZP Engineering Division V/s. Digambara Rao**⁴ held that the question as to whether the principle of res judicata defined in Section 11 of Code of Civil Procedure, 1908 applies to the labour proceedings or not , remains no more res integra and stands answered by the aforesaid three decisions of Supreme Court.

1 (2019) 11 SCC 323

2 (1997) 5 SCC 125

3 (2004) 1 SCC 68

4 (2004) 8 SCC 262

11. Mr. Killedar further submitted that the legality and correctness of the earlier decision cannot be questioned by instituting a fresh proceeding. Even if it is assumed that the earlier decision was wrong, yet, till it was set aside, it continued to operate as res-judicata. To this end, a strong reliance was placed on a decision of the Supreme Court in the case of **J. Kodanda Rami Reddy V/s. State of Andhra Pradesh and Ors.**⁵ wherein it was held that it is well settled that a decree will be a nullity only if it is passed by a court usurping a jurisdiction it did not have. But a mere wrong exercise of jurisdiction or an erroneous decision by a court having jurisdiction, will not result in a nullity. An order by a competent court, even if erroneous, is binding, unless it is challenged and set aside by a higher forum.

12. Mr. Killedar further submitted that the rule of res-judicata embodies the principle of public policy which is an inseparable part of rule of law. Attention of the Court was invited to the Constitution Bench judgment of the Supreme Court in the case of **Daryao and Ors. V/s. State of U.P. and Ors.**⁶ In the said case, in the context of the applicability of rule of res-judicata in writ jurisdiction, the Supreme Court enunciated that it is in the interest of public at large that a finality should be attached 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

5 (2011) 1 SCC 197

6 AIR 1961 SC 1457

judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

13. It is well established that though the Industrial Court is untethered by the strict and technical rules prescribed in the Code of Civil Procedure, 1908, and is, subject to rules that may be made, free to follow such procedure as it may think fit, yet the general principle of res-judicata applies to the proceedings before the industrial adjudicator as well. The principle of res-judicata incorporates the underlying public policy of giving finality to the litigation and preventing a party from being vexed twice for the same cause. Thus, there can be no quarrel with the proposition that the principle of res-judicata applies to the proceedings before the Labour and Industrial Court.

14. In the facts of the case, a pivotal question that warrants consideration is whether the learned Member, Industrial Court, was justified in non-suiting the Petitioner in the manner as manifested by the impugned judgment.

15. In the case of **Workman of the Straw Board Manufacturing Co. Ltd. V/s. M/s. Straw Board Manufacturing Co. Ltd.**⁷ a three judge Bench of the Supreme Court emphasised that though the principle of res-judicata applied with equal force to the industrial dispute, yet whether a matter in dispute in a subsequent case had already been directly and substantially in issue between the same parties

⁷ (1974) 4 SCC 681

and the same had been heard and finally decided by the tribunal will be of pertinent consideration and will have to be determined before holding in a particular case that the principles of res judicata are attracted. The observations in paragraph 27 read as under :

“27. It is now well established that, although the entire Civil Procedure Code is not applicable to industrial adjudication, the principles of res judicata laid down under section 11 of the Code of Civil Procedure, however, are applicable, wherever possible, for very good reasons. This is so since multiplicity of litigation and agitation and re-agitation of the same dispute at issue between the same employer and his employees will not be conducive to industrial peace which is the principal object of all labour legislation bearing on industrial adjudication. But whether a matter in dispute in a subsequent case had earlier been directly and substantially in issue between the same parties and the same had been heard and finally decided by the Tribunal will be of pertinent consideration and will have to be determined before holding in a particular case that the principles of res judicata are attracted.” (emphasis supplied)

16. What test should be applied to determine whether the matter which was contested was directly or substantially in issue or collaterally and incidentally in issue, was propounded by the Supreme Court in the case of **Sajjadanashin Sayed Md. V/s. Musa Dadabhai Ummer**⁸ wherein it was held that one test is that if the issue was “necessary” to be decided, it would be treated as directly and substantially in issue as the judgment was, in fact, based upon such a decision. The other principle is that the

8 (2000) 3 SCC 350

issue must be decided on the facts of each case, the material test to be applied being whether the Court considers the adjudication of the said issue material and essential for its decision. The Supreme Court further explained the material which ought to be considered to arrive at such determination. It was held that one has to examine plaint , written statement, issues and judgment to find out if the matter was directly or substantially in issue.

17. The aforesaid pronouncement was followed by the Supreme Court in the case of **Rithwik Energy Generation Pvt. Ltd. V/s. Bangalore Electricity Supply Company Ltd. and Ors.**⁹ The observations in paragraph 15 reads as under :

“15.In Sajjadanashin Sayed (supra), one of the issues that arose for consideration was what exactly is an issue which is directly and substantially in issue, as opposed to being collaterally and incidentally in issue. After referring to various authorities, both English and American, this Court ultimately referred to and relied upon Mulla’s Civil Procedure Code (15th Edition) in which two tests were set out. One test is that if the issue was “necessary” to be decided for adjudicating on the principal issue, and was decided, it would be treated as directly and substantially in issue as the judgment was, in fact, based upon such a decision. The other principle is that the issue must be decided on the facts of each case, the material test to be applied being whether the Court considers the adjudication of the said issue material and essential for its decision.” (emphasis supplied)

18. In the case of **Jaswant Singh and Anr. V/s. Custodian of Evacuee Property, New Delhi**¹⁰ the Supreme Court had expounded the test to determine

9 (2018) 17 SCC 223

10 (1985) 3 SCC 648

whether the subsequent suit is barred by res-judicata. It was observed in paragraph 14 as under :

“14. The main ground urged in support of the above appeal by the appellants of whom. appellant No. 1, Jaswant Singh is the auction purchaser, is that the order dated March 28, 1949 passed by the Sub-Judge, Ist Class, Delhi having become final, it would operate as A a bar to any enquiry into the application which had been made by the Custodian after the promulgation of Ordinance No. XII of 1949 and Ordinance No. XXVII of 1949. This ground is based on the principles underlying section 11 of the Code of Civil Procedure, 1908. That section provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. Explanation IV to that section provides that any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been directly and substantially in issue in such suit. It is well settled that in order to decide the question whether a subsequent proceeding is barred by res judicata it is necessary to examine the question with reference to the (i) forum or the competence of the Court, (ii) parties and their representatives, (iii) matters in issue, (iv) matters which ought to have been made ground for defence or attack in the former suit and (v) the final decision..... A cause of action for a proceeding has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in the other words to the media upon which the plaintiff or the applicant asks the court to arrive at a conclusion in his favour. In order that a defence of res

judicata may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings.”

19. If the impugned order is tested in the light of the aforesaid position in law, two features emerge which merit consideration. One, the procedural aspect. Two, the correct application of principle of res-judicata.

20. Undoubtedly the Industrial Court is not bound by the strict and technical rules of the Code of Civil Procedure, even in the matter of framing and determination of the issues. However the fact remains that the Industrial Court had settled the issues which did not include the issue of res-judicata. The parties led evidence and the trial in the complaint concluded. At the stage of judgment, the learned Member, Industrial Court, as is evident from the observations in the impugned judgment, framed the said issue for the purpose of determination. One gets an impression that the parties had no opportunity of hearing post the framing of the said issue.

21. It must, however, be noted that at more than one places in the impugned judgment, the learned Member, Industrial Court, has observed that the parties were extensively heard on the issue of res-judicata and even the complainant had adverted

to the same in his written submissions. There is no reason to doubt these observations of the learned Member in the impugned judgment and the Court must proceed on the premise that these facts did transpire. I am also conscious of the proposition that mere failure to frame an issue, when the parties knew what was the real question in controversy and adduced evidence and/or advanced submissions may not by itself be a ground to interfere with the determination, unless such course has resulted in miscarriage of justice. However, the element of prejudice in not framing the issue before the delivery of the judgment also cannot be lost sight of.

22. Res-judicata is a mixed question of law and facts. The pleadings, issues and judgment in the former proceedings need to be examined arriving at the conclusion whether the issue had been directly or substantially issue in the former proceedings. Therefore, had the issue been framed at an anterior point of time, the parties would have been better equipped to address the same.

23. Now, the second aspect of application of principle of res-judicata. Whether the entire claim in the subsequent complaint was covered by the judgment in complaint (ULP) No.56 of 2005 so as to preclude the complainant from agitating the same. The instant complaint contains a two fold grievance. One, the denial of permanency. Two, denial of pay and allowances in terms of the applicable award and recommendations of the pay commission. It is alleged, there was a breach of equal pay for equal work.

24. I have perused the complaint in Complaint (ULP) No.56 of 2005 (former Complaint) and the judgment passed therein. Undoubtedly, the Petitioner was one of the workmen on whose behalf the Union had filed the said complaint. However, the primal grievance in the said complaint that was agitated and adjudicated was, denial of permanency. The learned Member, Industrial Court, in the former complaint, in terms observed that the workmen were not entitled to the benefit of permanency unless it could be shown that their appointments were in conformity with the rules and there were permanent sanctioned vacant posts. Having found that neither the appointment were made in conformity with the rules regulating the appointment, nor permanent vacant posts were available, it was held that the complainants were not entitled to permanency.

25. What is of material significance is what was not decided by the Industrial Court in Complaint (ULP) No.56 of 2005. The following observations in para 31 of the judgment in Complaint (ULP) No.56 of 2005 deserve extraction. They read as under :

“31. The evidence of Mr. Prakash Giri (CW-1) suggests that the daily wagers and badli employees are doing work along with permanent employees and nature of their work is same. He also admitted that the wages of permanent employees and others are different and the temporary employees and badli employees are not getting service benefits at the par with permanent employees. However, it is neither case nor evidence of complainant's side that these affected employees i.e. complainants are receiving less wages than permanent employees. The claim of complainants

is not based on the principle of equal work equal pay. If complainants are receiving less wages than permanent employees, they can claim same from management, however, on this ground they cannot claim right of permanency for above stated reasons. Particularly, their appointments were not made by following due process of selection and no sanctioned posts or vacancy exist.”

26. The aforesaid observations would indicate that in the previous complaint, the learned Member, Industrial Court, had not adjudicated the question as to whether there was discrimination amongst the workmen, there was breach of principle for equal pay for equal work or whether the affected workmen were entitled to the similar /identical dispensation. On the contrary, the learned Member held that if the grievance of the workmen was that they were receiving wages less than those paid to the permanent employees, they could claim the same.

27. Secondly, the claim for permanency is dynamic. Existence of permanent vacancies in its very nature cannot be a static feature. It also has a personal element. It is imperative to note that even during the pendency of the former Complaint, the co-employees of the Petitioner (Sr.No.6, 16, 17, 20, 21, 22 and 23 of Schedule A) were made permanent. These elements do not seem to have been examined.

28. A substantial part of the allegations in the instant complaint revolves around the alleged non-payment of salary and allowances in terms of the governing award and pay commission recommendations as well as on the principle of equal pay

for equal work. The complainant specifically prayed for payment of salary and allowances in terms of the recommendations of the pay commission and grant of arrears of differential pay since the year 1996. Whether the judgment in Complaint (ULP) No.56 of 2005 operated as a constructive res-judicata even with regard to those prayers has not been addressed.

29. In the aforesaid view of the matter, the learned Member, Industrial Court could not have dismissed the complaint in the manner in which it was dismissed by determining the issue of res-judicata alone, without rendering findings on rest of the issues.

30. I am, therefore, inclined to hold that the complaint deserves afresh determination, including on the issue of res-judicata, by the Industrial Court. The Court cannot be oblivious to the plight of a daily wager who had retired after putting 23 years of service. In my considered view, it would be expedient in the interest of justice to afford an opportunity to the Petitioner to get his grievance adjudicated by the industrial adjudicator.

31. For the foregoing reasons, the Writ Petition deserves to be partly allowed.

32. Hence, the following order :

ORDER

- (i) The Petition stands partly allowed.

(ii) The impugned judgment and order dated 17 January 2022 stands quashed and set aside.

(iii) Complaint (ULP) No.15 of 2016 is restored to the file of the learned Member, Industrial Court at Solapur.

(iv) The learned Member, Industrial Court, Solapur, is requested to decide the said Complaint afresh after providing an opportunity of hearing to the parties concerned as expeditiously as possible.

(v) By way of abundant caution, it is clarified that this Court may not be construed to have expressed any opinion on the merits of the matter, including the applicability of the bar of res-judicata. All questions including, the bar of res-judicata and constructive res-judicata, are expressly kept open for consideration and the learned Member, Industrial Court shall not be influenced by any of the observations made hereinabove which were confined to test the legality, propriety and correctness of the impugned order.

(vi) Rule is made absolute to the aforesaid extent.

(vii) In the circumstances, there shall be no order as to costs.

(N.J.JAMADAR, J.)

32 At this stage, learned Counsel for Respondent Nos.1 and 2 seeks stay.

33. Having regard to the fact that the learned Member, Industrial Court had

dismissed the complaint on the ground of bar of res-judicata and this Court has set aside the said order and directed the determination of the complaint afresh, it may be expedient to stay the effect and operation of this order for a period of four weeks.

34. Ordered accordingly.

(N.J.JAMADAR, J.)