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

+ **W.P.(C) 12216/2019**

SUNITA DEVI

.....Petitioner

Through: Mr. M. Rais Farooqui and Ms.
Iffat Fatima, Advocates

versus

**SOUTH DELHI MUNICIPAL CORPORATION
AND ANR.**

.....Respondent

Through: Mr. Arun Birbal and Mr. Sanjay
Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT (ORAL)

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11.12.2024

C. HARI SHANKAR, J.

1. The Central Administrative Tribunal¹ has, by the impugned judgement dated 24 April 2019, dismissed the petitioner's Original Application OA 1270/2019 without going into merits, as barred either by the principle of *res judicata* or by the principle of constructive *res judicata*, without specifying which principle applies. Even while doing so, the Tribunal has adversely commented on the merits of the OA.

2. In our considered opinion, neither principle, of *res judicata* or

¹ "the Tribunal" hereinafter



of constructive *res judicata*, applies. For reasons which would be come apparent from the discussion which follows, we are also of the view that the adverse observations of the Tribunal, on the merits of the petitioner's claim, were not justified.

Facts, leading up to the impugned order

3. Certain teachers, who were working with the Municipal Corporation of Delhi² applied for participation in a process of selection, initiated by the MCD in 2007, for appointment of Primary Teachers. Their candidature was rejected on the ground that they were overage. They, then, approached this Court under Article 226 of the Constitution of India. This Court transferred the writ petition to the Tribunal, where it was registered as TA 23/2011. The Tribunal disposed of the said TA on 30 January 2012, directing that the applicants in that case be treated as departmental candidates and be granted relaxation in age to the extent admissible under the applicable Regulations. In the event of their being found eligible, the Tribunal directed that the said applicants be appointed as Primary Teacher, with consequential benefits.

4. The South Delhi Municipal Corporation – consequent on trifurcation of the MCD – issued order dated 23 November 2015, promoting the applicants in TA 23/2011 as Primary Teacher and granting them the benefit of notional increments and notional seniority.

² MCD



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5. The petitioner, thereafter, filed OA 2691/2012, for promotion to the post of Primary Teacher after granting age relaxation. By order dated 19 July 2013, the Tribunal disposed of the OA with a direction to the respondents to declare the petitioner's result after granting her age relaxation as sought.

6. In compliance with the said directions, the respondent appointed the petitioner as Primary Teacher *vide* order dated 12 November 2014.

7. The petitioner, thereafter, instituted OA 1270/2019 before the Tribunal, seeking the benefit of seniority and notional increments in the scale of Primary Teacher w.e.f.³ 2 February 2009.

8. The Tribunal has dismissed the OA with the following observations and findings:

“5. The direction issued in TA No.23/2011 reads as under:-

11. In view of the above position, in our considered view, the applicants herein are not entitled for age relaxation in terms of the judgment of the Hon“ble High Court in WP (C) No. 7297/2007 (supra). But, being contractual employees under the MCD, they are entitled to be treated as departmental candidates and they have to be given age relaxation to that extent as admissible to 4 OA No.1270/2019 regular employees of MCD and the respondents shall consider their candidature afresh.

12. We, therefore, direct the respondents to examine the cases of each of the applicants and if they come within the purview of the aforesaid judgment of the Apex Court in Dr. Jamuna Kurup (supra), they shall be given age relaxation and those who fulfill that condition and otherwise found suitable shall be given appointment as Teacher (Primary)

³ with effect from



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with all consequential benefits except back wage at the earliest and in any case within a period of two months from the date of receipt of a copy of this order. No order as to costs.

6. Nowhere it was mentioned that the appointments, if made, shall have retrospective effect. However, the respondents have chosen to issue order dated 23.11.2015 which reads as under:-

“South Delhi Municipal Corporation
Education Department: HQ
Dr. Shyama Prasad Mukherjee Civic Centre
E-Block, 23rd Floor, JLN Marg, N. Delhi-02

No.D/ADE/Admn./Edu./HQ/2015/4803

Dated 23/11/15

In compliance of Hon’ble Central Administrative Tribunal ordered dated 30.01.2012 passed in the matter of Veena Kumari & Ors. Vs. DSSSB and Anr., TA No.23/2011 the notional seniority and notional increment of the following Teachers (Primary) will be fixed w.e.f. 02.02.2009 under post code 165/2007 and their pay be fixed accordingly.

S N o	Name	Applicant No.	Father Name	Zone	School Name	Address
1	Veena Kumari	1	Parmeshwar Prasad Singh	Karol Bagh Zone	MCPS 'H' Block Naraina Vihar	35/3, Uri Enclave Near Brar Square, Delhi Cantt., New Dehi-10
2	Mamta	2	R.K Dhingra	Civil Line	MCPS Sukurpu r G-1st	Delhi seeds and pesticide s 121 Village, Bharolla, New Sabzi Mandi, Azadpur, New Delhi
3	Geeta Rani	3	Umed Singh	Rohni Zone	MCPS Rohini	D-6/8, Sec15,



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					Sector-26	Rohini, New Delhi-89
4	Alka Manral	4	Ishwar Chand Jain	Najafgarh Zone	MCPS Darka Sec-1st	C-102/2, Sadh Nagar, Palam Colony, New Delhi
5	Preeti Gupta	5	Vjay Kumar Gupta	Shahdara (South)	MCPS Marginal Bandh New -Ist	4/2979- B, Street No.3, Shalimar Park Extensio n, Shahdra, Delhi
6	Mamta Aggarwal	7	B.S Mittal	Civil Line Zone	MCPS Kewal Park	B-36, Majlis Park, Main Road, Delhi-33
7	Ravinder Kumar	9	Ram Kishan	Shahdara (North)	MCPS Jyoti Colony- IInd	A-32, Shera Mohalla, Vill., Garhi Lajpat Nagar, New Delhi.
8	Rajiv Kumar	10	Fateh Singh	West Zone	MCPS D1-A, Janakpur i	RZ-5A/1, Shankar Park, West Sagar Pur, New Delhi.
9	Renu	12	Mukh Ram Singhal	Civil Line Zone	Majlish Park-Ist	B-203, Siv Vihar, Rohtak Road, New Delhi-87
10	Renu Kumari	13	Kishan Chand	Civil Line Zone	MCPS Devaram Park	3584, Street No.5,



						Narang Colony, Tri Nagar, Delhi-35
11	Mukesh Bala	14	Jai Kishan Gahlot	Narela Zone	MCPS Begumpur-Ist	RZ-B-256, Gopal Nagar, Najafgarh, New Delhi-43
12	Mujesh Bala	15	Jai Kishan Gahlot	Narela Zone	MCPS Nagloi Main-IInd	RZ-B-256, Gopal Nagar, Najafgarh, New Delhi-43
13	Neetu	16	Om Prakash	Civil Line Zone	MCPS Timarpur-I	22, New Market, Timarpur, New Delhi-54
14	Veena	17	PC Mohanpuria	Karol Bagh Zone	MCPS Bapa Nagar-Ist	H-19/66, Sec-7, Rohini, New Delhi-85

They will be entitled for notional seniority, increments and others applicable benefits etc. as admissible to their batch mates of post code 165/2007. They will not be eligible for back wages. The above said pay fixation is subject to final clearance from Audit.

This issues with the prior approval of competent authority.”

7. Things would have been different altogether had there been a specific direction in the OA filed by the applicant regarding the date of appointment or date of commencement of seniority. The direction issued in the said OA reads as under:-

“15. In view of the above position, all the three OAs are allowed. Respondents are directed to declare the results of the applicants by giving them relaxation in age and offer appointments as Teacher (Primary) within a period of three months from the date of receipt of a certified copy of this order, provided they fulfil all other eligibility conditions



and are found fit for such appointments. No costs.”

8. It is clear that no mention was made about the retrospective appointment or the date with reference to the reckoning of seniority or fixation of pay scale. If the applicant was of the view that she is entitled to certain reliefs, it was obligatory on her part to claim 7 OA No.1270/2019 then in that very OA. Assuming that such relief was claimed, it is deemed to have been rejected. Either way, the principle of *res judicata* or constructive *res judicata*, as the case may be, comes into play.

9. We do not find any merit in the OA, and it is dismissed accordingly. There shall be no order as to costs.”

9. Aggrieved by the decision of the Tribunal, Sunita Devi, the applicant before the Tribunal, has approached this Court under Article 226 of the Constitution of India.

10. We have heard Mr M. Rais Farooqui, learned Counsel for the petitioner and Mr Arun Birbal, learned Counsel for the respondent.

11. To a query from the Court as to how, when the petitioner was not even promoted as Primary Teacher, she could have claimed seniority or any other consequential relief in OA 2691/2012, Mr Birbal submits that there was no proscription on her doing so and that, in fact, the applicants in TA 23/2011 had done so. He further submitted that it was only 6 years after the disposal of OA 2691/2012 on 19 July 2013 that the petitioner chose to re-approach the Tribunal by means of OA 1270/2019. The OA was, therefore, in his submission, grossly delayed as well.

12. On the correctness of the finding of the Tribunal that the petitioner’s OA 2691/2012 was barred by *res judicata* or constructive



res judicata, Mr Birbal, however, fairly leaves the matter to the Court.

13. We proceed to address the issues that arise.

14. A reading of the impugned order reveals that the Tribunal has, in one breath, held OA 2691/2012 to be barred by *res judicata* or constructive *res judicata* and also pronounced on the merits of the petitioner's claim.

15. The concept of *res judicata* stands statutorily crystallized in Section 11⁴ of the Code of Civil Procedure, 1908⁵, and Explanation IV thereto embodies the principle of constructive *res judicata*.

16. *Res judicata* is the abbreviated form of the maxim *res judicata pro veritate accipitur*, which translates to “a decision of a judicial authority must be duly accepted as correct”.

17. A proper understanding of the principle of *res judicata*, or constructive *res judicata*, and its application, would require the provision to be contradistinguished from Order II Rule 2⁶ of the CPC.

⁴ 11. **Res judicata.** – 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 III. – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

⁵ CPC, hereinafter

⁶ 2. **Suit to include the whole claim.** –

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) *Relinquishment of part of claim.* – Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.



This distinction was thus noted by the Supreme Court in *Kunjan Nair Sivaraman Nair v Narayanan Nair*⁷:

“13. Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence “*interest reipublicae ut sit finis litium*” (it concerns the State that there be an end to law suits) and partly on the maxim “*nemo debet bis vexari pro una et eadem causa*” (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

14. The above position was noted in *Deva Ram v Ishwar Chand*⁸.

15. The doctrine of *res judicata* differs from the principle underlying Order 2 Rule 2 in that the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim, while the latter requires the plaintiff to claim all reliefs *emanating from the same cause of action*. Order 2 concerns framing of a suit and requires that the plaintiffs shall include whole of his claim in the framing of the suit. Sub-rule (1), inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make *in respect of the very same cause of action*. If he relinquishes any claim to bring the suit within the jurisdiction of any court, he will not be entitled to that relief in any subsequent suit. Further sub-rule (3) provides that the person entitled to more than one reliefs *in respect of the same cause of action* may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for such relief he shall not afterwards be permitted to sue for relief so omitted.

16. The expression “cause of action” has acquired a judicially settled meaning. In the restricted sense cause of action means the

(3) *Omission to sue for one of several reliefs.* – A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

⁷ (2004) 3 SCC 277

⁸ (1995) 6 SCC 733



circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. *Compendiously the expression means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in "cause of action".*

17. In Halsbury's Laws of England (4th Edn.) it has been stated as follows:

“ ‘Cause of action’ has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. ‘Cause of action’ has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.”

18. As observed by the Privy Council in *Payana Reena Saminathan v Pana Lana Palaniappa*⁹ the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion is, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit whether the same evidence will maintain both actions. (See *Mohd. Khalil Khan v Mahbub Ali Mian*¹⁰.)

18. *Alka Gupta v Narender Kumar Gupta*¹¹ examined, in considerable depth, the interplay between Order II Rule 2 and *res judicata*. Observing that the judgement of the Single Judge, as well as of the Division Bench, of this Court, had “ignored several basic

⁹ (1914) 41 IA 142 : 18 CWN 617

¹⁰ AIR 1949 PC 78 : (1948) 2 MLJ 318 : 75 IA 121

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principles” of the CPC, the Supreme Court proceeded to exposit the law thus:

“1. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon

12. ...The object of Order 2 Rule 2 of the Code is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

13. This Court in **Gurbux Singh v Bhooralal**¹² held:

“6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.”

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action.

¹¹ (2010) 10 SCC 141

¹² AIR 1964 SC 1810



14. In the instant case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the Trial Bench and the Appellate Bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under Order 2 Rule 2 of the Code was not attracted

15. The first suit was for recovery of balance price under an agreement of sale. The agreement dated 29-6-2004 was not an agreement relating to dissolution of the firm constituted under the deed of partnership dated 5-4-2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it related to sale of the undivided half-share in the second floor at Rohini, 50% (property bearing No. 8, Pocket and Block C-9, Sector 8, Rohini, Delhi 110085) and 50% share of the business that was being run *in that premises*, that is, premises at Rohini. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of Takshila Institute constituted under the deed of partnership dated 5-4-2000, carrying on business at Bhera Enclave, Paschim Vihar, Delhi 110087 and for payment of the amounts due on dissolution of the said firm.

17. *The cause of action for the first suit was non-payment of price under the agreement of sale dated 29-6-2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under the deed dated 5-4-2000. The two causes of action are distinct and different. Order 2 Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of "Takshila Institute" and the second*



suit referred to a partnership in regard to business run at Paschim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action.

18. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of the plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code.

III. The second suit was not barred by constructive res judicata

19. The learned Trial Bench passed the order on 13-3-2009 on the preliminary issue (Issue 1) relating to *res judicata*. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of *res judicata* except the following observation at the end of the order: “Of course it cannot be said that the present suit is barred by *res judicata* inasmuch as the said claims were not decided in that case. But the principle of constructive *res judicata* is applicable.” This was not interfered by the Appellate Bench. Both proceeded on the basis that the suit was not barred by *res judicata*, but barred by principle of constructive *res judicata* without assigning any reasons.

20. Plea of *res judicata* is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive *res judicata*. The plaintiff who is sought to be prevented by the bar of constructive *res judicata* should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive *res judicata*, nor had the appellant-plaintiff an opportunity to meet the case based on such plea.

21. *Res judicata* means “a thing adjudicated”, that is, an issue that is finally settled by judicial decision. The Code deals with *res judicata* in Section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

“11. *Res judicata*.—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.”

22. Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of *res judicata* to any suit or issue:

- (i) The matter must be directly and substantially in issue in the former suit and in the later suit.
- (ii) The prior suit should be between the same parties or persons claiming under them.
- (iii) Parties should have litigated under the same title in the earlier suit.
- (iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.
- (v) The court trying the former suit must have been competent to try the particular issue in question.

23. To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression “former suit” refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that:

“*Explanation IV.*—Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The principle of constructive *res judicata* emerges from Explanation IV when read with Explanation III both of which explain the concept of “matter directly and substantially in issue”.



24. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive *res judicata*. Constructive *res judicata* deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed.

25. The principle underlying Explanation IV to Section 11 becomes clear from ***Greenhalgh v Mallard***¹³ thus:

“... it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*”

(emphasis supplied)

26. In ***Direct Recruit Class II Engg. Officers' Assn. v State of Maharashtra***¹⁴, a Constitution Bench of this Court reiterated the principle of constructive *res judicata* after referring to ***Forward Construction Co. v. Prabhat Mandal***¹⁵ thus:

“35. ... 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 decided as incidental to or essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence.”

In the instant case, the High Court has not stated what was the ground of attack that the appellant-plaintiff ought to have raised in

¹³ (1947) 2 All ER 255 (CA)

¹⁴ (1990) 2 SCC 715

¹⁵ (1986) 1 SCC 100



the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.”

19. In *Sulochana Amma v Narayanan Nair*¹⁶, the principle of *res judicata* was thus explained:

“5. Section 11 of CPC embodies the rule of conclusiveness as evidence or bars as a plea as issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a court competent to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit would operate as res judicata. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies, been decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the tribunals other than the civil courts.

6. ... The result that would flow is that *an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal*, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies.”

20. In *Deva Ram v Ishwar Chand*¹⁷, the Supreme Court observed that the principle of *res judicata* “bars a trial of a suit or issue *which was raised and decided* in previous suit”. *Mathura Prasad Bajoo*

¹⁶ (1994) 2 SCC 14

¹⁷ (1995) 6 SCC 733



Jaiswal v Dossibai N.B. Jeejeebhoy¹⁸ explained the principle thus:

“5. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the “matter in issue” may be an issue of fact, an issue of law, or one of mixed law and fact. *An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto.* A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. *When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties.* A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.”

(Emphasis supplied)

21. Apropos the doctrine of constructive *res judicata*, it was held, in

¹⁸ (1970) 1 SCC 613



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Jodh Singh v Bhagwan Das-Nanak Chand¹⁹, that “in order to invoke in aid the doctrine of constructive *res judicata*, as embodied in Explan. 4 to Section 11 of the CPC, *there must be a decision by the Court either in express terms or by necessary implication*”. In ***Moran Mar Basselios Catholicos v Thukal Paulo Avira***²⁰, the Supreme Court observed that “if non-payment of Ressiassa could be made a ground of attack, it should have been taken in that suit and *that not having been done, it cannot be now put forward according to the principles of constructive res judicata*”.

22. Thus, it is clear that the principles of *res judicata*, and constructive *res judicata* relate to issues that have been raised and decided between the same parties. While *res judicata* bars an issue *which stands decided* from being raised again, constructive *res judicata* bars an issue *which could have been raised but was not raised* from being raised again.

23. In the present case, there is no dispute about the fact that, at the time of filing OA 2691/2012 – and, indeed, till its decision and the implementation of the decision – neither had the petitioner been granted age relaxation, nor had her results been declared. No occasion for the petitioner to seek consequential reliefs, at the stage when the issue of whether she would be held to be entitled even to age relaxation was still at large, arose. The mere fact that other applicants, who may have approached the Tribunal earlier for age relaxation and appointment may have also sought post-appointment consequential

¹⁹ AIR 1937 Lah 404



reliefs, cannot constitute a legitimate basis to hold that the petitioner was also necessarily required to do so.

24. OA 1270/2019 could not, therefore, have been held to have been barred either by *res judicata* or by constructive *res judicata*. Neither was the issue of the petitioner's entitlement to seniority and increments raised, nor was it decided by the Tribunal in its order dated 19 July 2013. The petitioner could not, therefore, have been foreclosed from raising these issues in a subsequent OA on the ground of *res judicata*. The pre-requisites for *res judicata* to apply, as delineated in para 22 of *Alka Gupta*, clearly do not apply in the present case.

25. Nor would constructive *res judicata* operate against the petitioner, as, even before she had been granted age relaxation and her results declared, she was not obliged to claim, from the Tribunal, seniority and increments. These were entitlements which arose *subsequent to and as a consequence of the implementation, by the respondents, of the directions contained in the judgment dated 19 July 2013, of the Tribunal in OA 2691/2012*. The entitlement of the petitioner to seniority and increments was not, therefore, *an issue which could have been pleaded by the petitioner in OA 2691/2012*. The petitioner could not, therefore, have been foreclosed from pleading these entitlements in her subsequent OA 1270/2019.

26. Nor can it be said that OA 1270/2019 was predicated on the same cause of action as OA 2691/2012. The cause of action for



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preferring OA 1270/2019, in fact, arose *after, and as a consequence of*, the judgement dated 19 July 2013 in OA 2691/2012. It cannot, therefore, be said that the petitioner was barred from preferring OA 1270/2019 by virtue of Order II Rule 2 of the CPC either.

27. Insofar as the observations of the Tribunal regarding the merits of the petitioner's claim are concerned, we are of the opinion that the Tribunal ought to be directed to re-examine the merits of the case, as it has held, separately, that the petitioner's OA 1270/2019 was barred by *res judicata* or constructive *res judicata*. The correctness of the finding of the Tribunal that, merely because the judgement dated 19 July 2013 in OA 2691/2012 did not specifically grant benefits of notional seniority and increments, etc., to the petitioner, the respondent was foreclosed from doing so, may be open to debate. The Tribunal itself observes, in para 7 of the impugned order, that "things would have been different altogether had there been a specific direction in the OA filed by the applicant regarding the date of appointment or the date of commencement of seniority". One presumes that the reference to "direction in the OA filed by the applicant" should be read "direction in the judgement dated 19 July 2013 passed in the OA filed by the applicant". Even so, whether the absence of any such specific direction, in the said judgement, would altogether disentitle the petitioner to retrospective benefits, may be arguable.

28. We do not venture to express any opinion thereon, one way or the other. We deem it appropriate, however, that the Tribunal should



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re-examine the entitlement, of the petitioner, to the reliefs sought in OA 1270/2019, uninfluenced by any observations contained in the impugned order dated 24 April 2019.

Conclusion

29. Accordingly, the impugned judgment is set aside. OA 1270/2019 is remanded to the Tribunal for consideration afresh, uninfluenced by any observations contained in the impugned judgment.

30. All issues, save those decided by this judgement, shall remain open for contest before the Tribunal, and for decision by the Tribunal, as and when urged.

31. The writ petition stands allowed to the aforesaid extent.

C. HARI SHANKAR, J.

MANOJ JAIN, J.

DECEMBER 11, 2024/yg

Click here to check corrigendum, if any