

Krishna Mohan Mukherjee Vs. the Chief General Manager, State Bank of India

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Court : Kolkata

Decided On : Dec-23-1994

Reported in : (1995)1CALLT150(HC)

Judge : Satya Brata Sinha and ;Shree Rang Mishra, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 141; ;[Constitution of India](#) - Articles 136 and 226

Appeal No. : F.M.A.T. No. 1204 of 1990

Appellant : Krishna Mohan Mukherjee

Respondent : The Chief General Manager, State Bank of India

Disposition : Appeal dismissed

Judgement :

Satya Brata Sinha, J.

1. This appeal is directed against the judgment and order dated 27.2.1990 passed by Monoranjan Mallick, J. whereby and where- under the writ petition filed by the appellant was allowed in part.

2. The fact of the matter lies in a very narrow compass.

3. The appellant joined as a Clerk in the then Imperial Bank of India on 8th March, 1948. A notice to show-cause was served upon him on 17.12.1961 for allegedly failure on his part to credit a sum of Rs. 2030-98p. which had been received by him against a bill.

4. On 13th February, 1962 the appellant was served with a charge-sheet.

5. By an order dated 31st December, 1962 upon holding a disciplinary proceedings against him, the appellant was dismissed from services purported to be in terms of Paragraph 521(5)(b) of the Sastry Award as approved by the Desai Award.

6. The appellant filed a writ petition in this Court against the said order of dismissal. The said writ petition of the appellant was allowed by D. K. Basu, J. The State Bank of India preferred an appeal against the said order and judgment which was marked as F.M.A.T. No. 258 of 1967. A Criminal Case was instituted against the petitioner in the meanwhile, and by a judgment dated 7th October, 1972, he was acquitted. The aforementioned F. M.A.T. No. 258 of 1967 was allowed by a Division Bench of this Court by a judgment and order dated 13th June, 1975. The appellant preferred an appeal against the said judgment before the Supreme Court of India which was dismissed by a judgment dated 20th January, 1983.

7. The said decision of the Supreme Court is reported in : AIR 1983 SC915 .

8. According to the petitioner, at the relevant time, another criminal case was instituted against him by the State Bank of Varanasi in connection with a business deal wherein he was convicted and sentenced to 2 years rigorous imprisonment.

9. The appellant filed a review application before the Supreme Court of India which was also dismissed on 6th April, 1983.

10. In or about May, 1983, the appellant filed an application before the Supreme Court of India with the help of legal Aid Committee to obtain directions regarding payment of his outstanding dues and by an order dated 27th February, 1989, the

said application for direction being C.M.P. No. 66970/83 was summarily dismissed.

11. The appellant has alleged that Shri Majoj Swarup, Advocate of Legal Aid Committee, informed the petitioner by a letter dated 28th February, 1989 that while passing the aforementioned order on 27th February, 1989 the Hon'ble Judges of the Supreme Court orally observed that since the petitioner is otherwise entitled to get all his dues as on the date of his dismissal, there was no need of any clarification of the order passed in appeal nor a fresh order was necessary to be passed.

12. Relying on or on the basis of the said letter, the appellant allegedly raised his claims before the State Bank of India which was rejected.

13. The appellant, thereafter filed a writ application before this Court for a direction upon the bank to make payment which, as noticed hereinbefore, was allowed in part by a judgment dated 27th February, 1989 whereby the respondent-bank was directed to pay a sum of Rs. 500/-.

14. The appellant preferred this appeal against the said judgment. In the said appeal Mr. Justice A.M. Bhattacharya (as His Lordship then was) and Mr. Justice Ajoy Nath Roy differed in their opinion with regard to the question as to whether the dismissal of the said CMP No. 36970 of 1983 by the Supreme Court dated 27th February, 1989 would operate as res judicata, whereupon the matter by an order of Hon'ble the Chief Justice was referred to S. C., Sen, J. in terms of Clause 36 of the Letters Patent of this Court.

15. S. C. Sen, J., however, referred the matter back to the Division Bench holding that actual points of differences had not been stated by the learned Judge of the Division Bench. The learned Judge, however, recorded his agreement to Justice Bhattacharya's finding that a non-speaking order passed by the Supreme Court would not operate as res judicata.

The learned Judge in his order recorded-

'Mr. Anindya Mitra has contended that this may not be of any consequence in this case because the Constitution contemplates that the order or direction by the Supreme Court must be carried out by all subordinate authorities under Article 142 of the Constitution. This question was not argued before nor decided by the Division Bench. So, I am not expressing any opinion on this aspect of the matter also. Therefore, the case is directed to be placed before the Chief Justice for necessary directions.

The Department is directed to supply xerox copy of this order to the learned Advocates appearing for the parties on usual charges and on an undertaking to apply for and obtain certified copy of this order'.

16. This appeal in the aforementioned circumstances has been placed before us.

17. The appellant who appeared in person and Mr. Anindya Mitra, learned Senior Advocate, appearing on behalf of the respondent-bank at the outset stated that we should hear the entire appeal.

18. The appellant, Mr. Mukherjee, inter alia, raised the following contentions :-

(a) The order of the Supreme Court does not operate as res judicata,

(b) Keeping in view the subsequent judgment of the Criminal Court in terms whereof he was acquitted the order of dismissal from service should be treated to be an order of termination simpliciter and in that view of the matter, the petitioner should be held to be entitled to all the claims raised by him.

(c) Even if the order of dismissal is not treated as an order of termination simpliciter, the appellant should at least be entitled to receive full salary and allowances during the period of suspension in terms of the Sastri Award. The said claim is purported to be based on paragraph 17. 13 of the Desai Award.

(d) No bonus has been paid to the appellant for the year 1961-62 to which he is entitled thereto.

(e) He would at least be entitled to the employer's contribution towards the Provident Fund deposited by the employer.

(f) In any event, as the petitioner was dismissed from service for allegedly retaining a sum of Rs. 2034.98p. only; keeping in view of the fact that he was later on acquitted of the self-same charges by the Criminal Court, a substantial ex-gratia payment should be directed to be released in his favour for ends of justice.

19. Mr. Anindya Mitra, the learned Counsel appearing on behalf of the respondent conceded that a non-speaking order may not operate as res judicata. He, however, contended that the judgment of acquittal passed by the Criminal Court in favour of the appellant was passed during the pendency of the appeal and the same was brought to the notice of this Division Bench of this Court and in any event the entire matter having been canvassed before the Supreme Court of India, the judgment of the Supreme Court reported in : (1983)ILLJ228SC shall operate as res judicata/constructive res judicata as against the petitioner. The learned Counsel pointed out that from paragraph 8 of the judgment passed by the Division Bench it would appear that such a contention had been raised.

20. The learned Counsel further drew our attention to the statements made by the appellant in the petition for direction before the Supreme Court of India and submitted that from perusal thereof it would appear that the appellant raised claim therein to the effect that he was also entitled to get monetary benefits as on the date of dismissal.

21. The learned Counsel submitted that in view of the fact that the Supreme Court did not allow such prayer and his application for direction for payment of money having been rejected by the Supreme Court of India, the said order is binding upon the parties and in that view of the matter a fresh writ petition would not be maintainable in terms of the provisions contained in Article 142 of the [Constitution of India](#). The learned Counsel also submitted that in any view of the matter, the order of dismissal of the petitioner cannot be treated to be an order of termination simpliciter and thus the petitioner is not entitled to any reliefs from the Court.

22. The learned Counsel contended that in any event it would appear from the judgment passed by the learned single judge that most of the petitioner's claim involved a disputed question of fact and as he had failed to establish the same, the writ petition has rightly been dismissed except of a sum of Rs. 500/-.

23. Before proceeding to deal with the matter, we may note that a sum of Rs. 20,000/- has been paid to the appellant under directions of the Supreme Court of India and this Court from time to time.

24. Before us, the appellant raised a contention that the domestic enquiry was vitiated in law as the procedures laid down under the Sastri Award had not been followed in so far as the petitioner was not allowed to get the assistance of a legal practitioner and he had also not been supplied with the relevant documents. The appellant, further submitted that he had been subjected to a criminal proceedings which was started after eight years and the said Act on the part of the respondent bank, was arbitrary and mala fide.

25. It was further submitted that the staff superintendent being not the Manager of Bank was not the appointing authority of the appellant and thus the order of punishment passed against him was vitiated in law.

26. The Supreme Court in its judgment had considered the submissions of the appellant made before it in details which is reported in AIR 1983 SC 234.

27. The Supreme Court considered two submissions raised by the appellant. According to the Apex Court the factum of the arrest and imprisonment of the appellant during the period from 31.10.1972 to 1.10.1977 was of no consequence.

28. The petitioner in his application filed before the Supreme Court of India prayed that the respondents be directed to pay all amount due to him as per armexure 'A' of the said application, inter alia, on the ground that he approached the respondents for paying the dues payable to him at the time of his dismissal on 31.12.1962 as per the Sastri Award and interest thereupon; but his aforementioned prayer was not accepted. In his said application, the appellant stated-

'That the respondent did not pay amount to the petitioner and told the petitioner that since there is no order in the judgment we will not pay anything to the petitioner. Thus the respondents have confiscated all his dues including provident fund, bonus etc. The petitioner submits that the respondent is victimizing the

petitioner for moving to the Court and are harassing him by not paying the amount mentioned.'

29. Keeping in view of the aforementioned facts, we are of the considered view the although the unreasoned order of the Supreme Court cannot operate as res judicata, but the appellant cannot be permitted to question the legality or validity of the order of termination to the effect that in view of the provisions of the Sastri Award, the order of dismissal should be treated to be an order of termination simpliciter.

30. The petitioner is also not entitled to the benefit of acquittal in the Criminal case. The petitioner was dismissed from service by an order dated 31st December, 1962. The order of acquittal in the criminal case was passed on 7th October, 1972. The petitioner thus had not been dismissed from service on the basis of any conviction by a criminal Court.

31. It is now wellknown that a criminal trial and a departmental proceedings stand on different footings. The appellant, as noticed hereinbefore, had specifically brought to the notice of the appeal court, the factum of the judgment passed in his favour by the Criminal Court and had also expressly raised the said question in his application under Article 136 of the Constitution of India. He, however, did not press the said point, as it appears from the judgment of the Supreme Court of India before it. Therefore, in our opinion he cannot be permitted to raise the self-same question in this appeal once over again. In his case the principles of res judicata would be applicable not only by applying the doctrine of estoppel by records but also merger of causes of action.

32. Although, in view of the provisions contained in Section 141 of the Code of Civil Procedure, the principles of res judicata as contained in Section 11 thereof may not strict sense apply in the writ proceedings, the general principles of res judicata/constructive res judicata, are applicable. Reference in this connection may be made to Gulabchand Chhotalal Parikh v. State of Gujrat reported in : [1965]2SCR547 and Devilal Modi v. Sales Tax Officer, Ratlam and Ors. reported in : [1965]1SCR686 as also Sashibhuson Kumar v. State of Bihar reported in 1994(2) PLJR 55.

33. It is, therefore, futile to contend that the petitioner should be given all monetary benefits treating the order of dismissal passed against him as a simple termination of service. Such a contention, in our opinion will be barred under the principles of constructive res judicata.

34. With due respect, the learned Trial Judge was not correct in holding that the writ petition was maintainable in view of the oral observations made by the Supreme Court of India while disposing of his application for direction. The learned Judge evidently took into consideration the purported letter of an advocate of Legal Aid Committee addressed to the appellant.

35. In view of the fact that the Supreme Court of India dismissed the petitioner's application for direction upon the respondents to pay his dues in CMP No. 36970 of 1983 by saying 'The Civil Misc. petition is dismissed'; this Court cannot treat the lawyer's letter as an evidence of a purported direction made by the Supreme Court of India. The order of dismissal does not show any of these things and thus this Court is not free to read in the order of the Supreme Court any directions on the basis of any communication of the learned advocate.

36. In *State of Uttar Pradesh v. Nawab Hussain* reported in : [1977]3SCR428 , the Supreme Court has clearly held that if a prayer was not made at the time when the cause of action arose; the subsequent writ application praying for an additional relief will be barred under constructive res judicata, In the *Direct Recruit Class-II Engineering Officers' Association and Ors. v. State of Maharashtra and others* reported in : [1990]2SCR900 , the Supreme Court upon consideration of its earlier decision reported in : AIR 1986 SC391 held :

'.....It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier petition before the High Court. The petitioner in reply contended since the special leave petition before this court was dismissed in limine without giving any reason the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's

judgment which became final after the dismissal of the special leave petition. In similar situation, a Constitution Bench of this Court in *Daryao v. State of U.P.* : [1962]1SCR574 held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 of the same facts and for the same relief filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at page 595 (of SCR) : (at p. 1467 of AIR) of the reported judgment, thus' :

37. 'We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are subsequently the same.'

38. The decision in *Forward Construction Co. v. 'Prabhat Mandal (Regd.)*, Andheri : AIR 1986 SC391 , further clarified the position by holding that 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. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata'.

39. Similar view has been taken by the Supreme Court in *G.K. Dudani and Ors. v. S.D. Sharma and Ors.* reported in : [1986]2SCR250 .

40. Spencer-Bower and Turner in 'The Doctrine of Res judicata' stated the law in Article 114 thereof thus-

'A tribunal may exceed its jurisdiction either by embarking upon an enquiry outside its province, or, while confining its inquiry within the proper limits, by making an order in excess of its powers. In either case the result will be to nullify the decision as a res judicata in the former case, by the effect of the events, we have mentioned upon the declaratory part of the decision, and, in the second, by their effect upon its jussive or prohibitory provisions'.

41. Cause of action for alleged payment of dues of the petitioner as on the date of passing of the order of dismissed arose on the said date. The appellant, therefore, could and ought to have raised the said contention in the first writ petition itself.

43. The appellant by filing a separate application for direction before the Supreme Court of India evidently thought that a mistake was committed by him in not pressing the said contention at an earlier stage although the same was available to him.

44. Recently in Dr. S.M. Naguni Imam Dental College and Hospital v. The Dental Council of India & Ors. reported in 1994(1) PLJR 626, a Division Bench of which I was a member held :-

'In the case of the petitioner itself (reported in 1993(2) PLJR 64) a Division Bench of this Court, inter alia, observed that appropriate decision in the matter of [grant of recognition would be taken in the light of the amended provision as early as possible preferably within six months from the date of receipt of a copy of the order.

In this view of the matter, in our opinion, the submission of Mr. Prasad to the effect that this application is barred by the principle of res judicata must be held to have substance.

The House of Lords in the Indian Endurance Republic of India and Ors. v. India Steamship Co. Ltd. reported in 1993(1) ALL E.R, 998 observed as follows :

'Central to the consideration of these issue is the impact of S-34 of the 1982 Act, upon which Sheen, J. and the Court of Appeal based their conclusion that the appellants' claim should be struck out. Indeed Sheen, J. expressed the view that, if S-34 did not apply, and the case was to be decided upon the basis of the common law principle of issue estoppel, further investigation of the facts would be necessary. I propose therefore to turn first to consider the legislative purpose underlying Section 34, and the effect of the Section in the light of that legislative purpose ; and in order to carry out that task it will, in my opinion, be necessary to set the Section against the background of the common law principle of res judicata,

45. The House of Lords upon taking into consideration its earlier decision in *Thoday v. Thoday* (1964) All E.R. 341 at page 352 and *Yat Tung Investment Company Ltd. v. Dao Heng Bank Ltd.* (1975) Appeal Cases 581 at page 590 and other decision, inter alia, held that the cause of action also merges, with the judgment. It also emphasised the principles of constructive res judicata which in India is laid down in Explanation 4 appended to Section 11 of the Code of Civil Procedure'.

46. For the reasons aforesaid I have no other option but to hold that the writ petition was barred under the principles of res judicata.

47. In *Mohan Lal v. Binay Krishna* reported in : [1953]4SCR377 and *State of West Bengal v. Hemanta Kumar* reported in : 1966 CriLJ805 , it has been held that even an erroneous order would also operate as res judicata. The Apex Court held 'A wrong decision by a Court having jurisdiction inasmuch binding between the parties as a right one and may be superceded only by appeals to higher tribunals or other procedure like review which the law provides. '

48. This aspect of the matter has also recently been considered by the Apex Court in *P.K. Vijayan, v. Kamalakshi Amma and Ors.* reported in : [1994]3SCR213 in the following terms :-

'We have already seen that the Land Reforms Act is a beneficial legislation and has conferred certain benefits on the tenants. The tenant is expected to raise all

the pleas available under the statute at the relevant time. It is a sheer abuse of the process of the Court to raise at each successive stages different pleas to protract the proceedings or to drive the party to multiplicity of proceedings. It would be fair and just that the parties to raise all available relevant pleas in the suits or the proceedings when the action is initiated and the omission thereof does constitute constructive res judicata to prevent raising of the same at a later point of time. Thereby it must be deemed that they are waned.'

49. Reference in this connection may also be made to paragraph 197 of Spencer Bower and Turner on Res judicata, wherein it has been stated :-

'Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence, or otherwise some question or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings, and which, therefore, it was his duty (in a sense) to have then raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue or point so omitted to be raised, just as much as if it had been expressly raised by the party, and expressly determined against him. And this is so whether the question or issue is simply passed over through inadvertance, or is made the subject of express or implied assumption or admission.'

50. It is true as contended by Mr. Mitra that the Supreme Court is empowered under Article 142 of the Constitution to make such orders as may be necessary for doing complete justice in any case Criminal matter pending before it ; but in this case, the Supreme Court did not pass any order giving direction to any authority or to any Court. It merely dismissed the appellant's application for direction summarily. Such an unreasoned order neither attract the principles of res judicata nor Article 142 of the Constitution.

51. For the reasons aforementioned the writ petition filed by the petitioner must be held to be barred under the principles of constructive Res judicata, as he might and ought to have raised ail his claims in the earlier writ petition including the

monetary claim.

52. In terms of Rule 53 of the Rules to applications under Article 226 of the [Constitution of India](#) framed by this Court, the procedures provided in the Code of Civil Procedure in regard to suits are to be followed in all proceedings for issuing a writ. In that view of the matter even the provisions of Order 2 Rule 2 of the Code of Civil Procedure are applicable and thus, it was obligatory on the part of the petitioner to raise all claims in the writ application, cause of action wherefor had arisen at the said stage.

53. Although this petition could have been disposed of on the above findings, as the parties have addressed us on merit of the petitioner's claims, let us deal with the same briefly.

54. The learned Trial Judge rejected the claims of arrears of salary and allowances by the petitioner from 18.12.1961 to 13.12.62 on the ground that he is not entitled to full pay as he was dismissed on the ground of commission of gross mis conduct. No exception can be taken to the said finding.

55. The submission of the appellant that he was entitled to full pay during the period of suspension appears to be based upon mis construction of paragraph 557 of the Sastri Award which provides for payment of subsistence allowance at the following scale :-

(1) For the first three months one-third of the pay and allowances.

(2) Thereafter, one half of the pay and allowances for the succeeding events.

It is not disputed and the learned Trial Judge has also held that the appellant had admittedly been paid the subsistence allowance during the period of suspension. The contention of the appellant is that in paragraph 17.13 of the Desai Award, it has been observed that the State Bank of India was thence giving full salary and allowances to its employees during the period of suspension. It is not known how such observation had been made.

The operative portion of the said award states :-

'The State Bank of India and other banks will be free to give such salary and allowances as they deem fit to a workman during the period of suspension so long as the amount of such salary and allowances is at rate not less than what is provided under this award and I direct accordingly.'

56. It may be noticed that in paragraph 17.12, of the said award it is stated that 'the matter concerning subsistence allowances during the period of suspension has been carefully considered by the Sastry Tribunal. Having carefully considered all aspects of the matter I do not see any necessity for making any change therein'. It is thus evident that Sastri Award was upheld in the Desai Award. In view of the fact that the State Bank of India has denied and disputed the contention appearing in paragraph 557 of the Sastry Award the said question being a question of fact cannot be gone into in a proceedings under Article 226 of the [Constitution of India](#).

57. The learned Trial Judge, in our opinion, has also rightly rejected the claim of the appellant to the extent of six months' pay and allowances of the dismissal as he was not entitled thereto.

58. So far as the over-time payment is concerned there is dispute of factual nature which again cannot be gone into in proceedings under Article 226.

59. Same is case with regard to medical benefits. The respondent Bank does not deny that the appellant would be entitled to reimbursement in that regard but according to it the appellant had not submitted the relevant documents to sustain the claim that he had in fact incurred such expenditure.

60. With regard to the claim, of bonus for the year 1961-62 we are of the view, that the appellant might have been entitled thereto as there is no minimum period of service for an employee during the year of bonus is declared. However, an employer would be entitled to withhold the bonus only to the extent to financial loss suffered by it. As the appellant is not entitled to full pay and allowances during the period of suspension, he would be entitled to receive the benefits which allegedly had been conferred upon the employees by the employer, if any, if there is any dues in this regard, we hope that the Respondent Bank shall pay the said

amount to the petitioner.

61. So far as the claim of Provident Fund is concerned, we may note that Mr. Mitra has very fairly suggested that the said sum is lying at the hands of the trustees of the Fund constituted under Imperial Bank's Provident Fund rules and in terms thereof, it is only the trustees who can permit payment of provident fund so far as the employer's contribution is concerned. The Trustees of the provident fund are not parties in the writ petition and thus no direction in this regard can be issued. However, we have no doubt that if the appellant puts an application before the trustees, the same shall be considered in accordance with law and the trustees would exercise their discretion fairly and in a proper manner at an early date and preferably within a period of 6 weeks from the date of receipt of such an application from the appellant.

62. The appellant is also not entitled to the contributory pension fund amount. He may, however, be entitled to (if the law so permits) the pension fund only.

63. Keeping in view of the fact that the Sastry Award in the matter of payment and gratuity has been set aside by Labour Appellate Tribunal, evidently the appellant would not be entitled to any amount of gratuity as he has been dismissed from his service.

64. So far as the prayer of the petitioner that the Bank should be directed to pay a substantial amount by way of ex-gratia payment is concerned, we are not inclined to pass such an order.

65. Except by filing a criminal case against him after a considerable period, in our opinion, the State Bank of India has not done anything which can be said to be harassing in nature. The appellant has already been paid a sum of Rs. 20,000/- under the direction of Supreme Court of India as also this Court from time to time. The said amount may not be refunded by him.

66. For the reasons aforementioned, this appeal being; devoid of any merit is dismissed with the aforementioned observations.

67. However, in the facts and circumstances of the case there will be no order as to costs.

S.R. Mishra, J.

68. I agree.

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