(2010) 03 CAL CK 0055

Calcutta High Court

Case No: A.P.O. No. 37 of 2009 and G.A. 2312 of 2009 and W.P. No. 480 of 2007

General Manager (PA), Allahabad Bank and Others		APPELLANT
	Vs	
Shib Sankar Mukherjee		RESPONDENT

Date of Decision: March 12, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11
- Constitution of India, 1950 - Article 226

Citation: AIR 2010 Cal 105 : (2011) 263 ELT 360 : (2011) 23 STR 305

Hon'ble Judges: Tapan Kumar Dutt, J; Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench: Full Bench

Advocate: Jayanta Mitra, Jaharlal De and Deepak Jain, for the Appellant;Arunava Ghosh, Sibnath Bhattacharji and Tapan Kumar Mitra, for the Respondent

Judgement

Bhaskar Bhattacharya, J.
This matter has been assigned to us on a reference made by a Division Bench of this Court consisting of Ashim Kumar Banerjee and Debasish Kar Gupta, JJ, (hereinafter referred to as the Referring Bench) for the purpose of deciding the following question by describing the question so formulated as "one of law":

Whether the application of the respondent No. 1 for retirement under the voluntary retirement scheme 2000 could be rejected by the appellant bank even after denying promotion to the respondent No. 1 to the higher post?

2. The facts giving rise to the present reference may be summed up thus:

(a) The respondent No. 1 filed an application under Article 226 of the Constitution of India Being W.P. No. 815 of 2001 thereby challenging an order dated March 13, 2001 by which the respondent No. 1 was informed by his employer, the appellants, that his application for retirement under the scheme for voluntary retirement offered by

the employer had been rejected.

(b) The said writ application was allowed on June 14, 2002 by a learned single Judge of this Court on contested hearing by quashing the said order and directing the appropriate authority under the scheme to take a decision in the matter in accordance with law.

(c) An appeal being No. 165 of 2003 was preferred by the appellants against the said order dated June 14, 2002 and the Division Bench consisting of Subhro Kamal Mukherjee and R. N. Banerjee, JJ. (hereinafter referred to as the First Division Bench) dismissed the said appeal on September 27, 2006 thereby directing the competent authority under the said scheme to reconsider the request of the respondent No. 1 for his voluntary retirement from the service of the Appellant-Bank in accordance with law. While disposing of the said appeal, the said Division Bench made the following observations:

The Hon''ble Judge, while dealing with this matter, had indicated that the petitioner although was in the competition for promotion to the post of the Assistant General Manager, Computer Department, he was not found suitable for such higher post and another officer from the general category was found suitable for the said promotional post. The Hon''ble Single Judge, accordingly, observed that ''petitioner is suffering stagnation for a long period of years. It is not the bank''s case that there is suitable promotion opportunity for the petitioner for utilizing his experience in the computer nor the bank has shown that his qualification and experience in computer is being utilized with the special interest of bank in continuing him in service.

In view of such undisputed fact of petitioner''s not getting any promotion for a long time, the bank''s decision that the petitioner''s service is required for the bank''s interest does not stand. The Hon''ble single Judge has pointed to such lacunae in the stand of the Bank in this regard.

(d) The appellants did not challenge the aforesaid order of the First Division Bench and consequently, the appellant No. 2, being the competent authority under the said scheme, pursuant to the order of the First Division Bench, passed a fresh reasoned order dated November 24, 2006 thereby again rejecting the prayer of the respondent No. 1 for voluntary retirement.

(e) The aforesaid order dated November 24, 2006 rejecting the prayer of the respondent No. 1 for voluntary retirement was challenged by the respondent No. 1 by filing a fresh writ application being W.P. No. 480 of 2007.

(f) A learned single Judge of this Court set aside the said order dated November 24, 2006 with a direction upon the appellant No. 2 to consider the application of the respondent No. 1 for voluntary retirement in the light of the observations made in the body of the said judgment.

(g) Being dissatisfied, the appellants preferred to fresh mandamus-appeal against the order of the learned single Judge being A.P.O. No. 37 of 2009 and while hearing the said mandamus-appeal, the Referring Bench noted the observations of the First Division Bench that has been quoted earlier by us and held that Their Lordships were unable to agree with the above observations of the First Division Bench on the above issue and gave a different reason.

(h) After making such observations, deviating from the earlier view taken by the First Division Bench, Their Lordships of the Referring Bench felt that as Their Lordships proposed to take a view contrary to the one taken by another Division Bench, the judicial propriety demanded that the matter should be referred to the Hon''ble Chief Justice for constitution of a larger Bench for the purpose of deciding the question that we have already quoted above and in making such reference, Their Lordships relied upon the following observations of the Apex Court in the case of Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others,

It would be difficult for us to appreciate the judgment of the High Court. One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.

3. After hearing the learned Counsel for the parties and after considering the facts giving rise to the present reference, we are of the opinion that the present reference is incompetent for the following reasons:

4. A reference to a Larger Bench is made when a Bench finds that there is already a precedent of a co-ordinate Bench of the same-, Court on a particular point of law and the referring Bench is unable to concur with that earlier view on the question of law taken by the co-ordinate Bench. In other words, the reference must be on a pure question of law already decided by a co-ordinate Bench which is a precedent on that point of law. There is no scope of referring a question of fact or even a mixed question of law and fact already decided by a co-ordinate Bench in the earlier judicial proceedings between the selfsame parties or parties claiming through them which has since attained finality for not preferring appeal to a higher forum at the instance of the party aggrieved.

5. In the case before us, the point that has been formulated by the Referring Bench is a pure question of fact or at the most, a mixed question of law and fact already decided in one way by the First Division Bench. The party aggrieved by the finding given by the First Division Bench had the opportunity of challenging such finding before the higher forum but no appeal was filed against such finding and as such,

such finding is binding upon the parties and the doctrine of res judicata would be applicable in the subsequent proceedings between the parties or their representatives.

6. In this connection, we may profitably refer to the following observations of the Supreme Court in the case of Ishwar Dutt Vs. Land Acquisition Collector and Another, while dealing with the question of res judicata.

In "The Doctrine of Res Judicata'' 2nd Edition by George Spencer Bower and Turner, it is stated:

A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it....

22. Reference, in this connection, may also be made to Ram Chandra Singh v. Savitri Devi JT 2005 (2) (SC) 439.

23. Yet recently in Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others, in which one of us was a party, this Court observed, 20,05 AIR SCW 2548 : AIR 2005 SC 2392, paras 29 and 30:

The object and purport of principle of res judicata as contained infection 11 of the CPC is to uphold the rule of conclusiveness of judgment, as to the point decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent Court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment.

The principle of res judicata envisages that a judgment of a Court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another Court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.

It was further noticed:

In Pandit Ishwardas Vs. State of Madhya Pradesh and Others, , this Court held (para 6 of AIR):

In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim....

24. Yet again in Arnold v. National Westminster Bank Pic. (1991) 3 All ER 41, the House of Lords noticed the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject-matter, in such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, prevent the latter from being reopened. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. Here also bar is complete to relitigation but its operation can be thwarted under certain circumstances. The House then finally observed : but there is room from the view that the underlying principles upon which estoppel is based, public policy and justice have greater force in cause of action estoppel, the subject-matter of the two proceedings being identical, than they do in issue estoppel, where the subject-matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue if faintly without any real hope of success.

25. In Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), the Constitution Bench held that the principle of res judicata is also applicable to subsequent suits where the same issue between the same parties had been decided in an earlier proceeding under Article 226 of the Constitution.

26. It is trite that the principle of res judicata is also applicable to the writ proceedings. (See Himachal Pradesh Road Transport Corporation Vs. Balwant Singh,

27. In Bhanu Kumar Jain Vs. Archana Kumar and Another, it was held : 2005 AIR SCW 270 : AIR 2005 SC 626, para 18:

It is now well-settled that principles of res judicata applies in different stages of the same proceedings. (See Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, and Prahlad Singh Vs. Col. Sukhdev Singh,

28. In Y. B. Patil (supra) it was held AIR 1977 SC 392:

4. ...It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent state of that proceeding....

It was further observed:

In a case of this nature, however, the doctrine of ''issue estoppel'' as also ''cause of action estoppel'' may arise. In Thoday (supra) Lord Diplock held:

...Cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a Court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgment was given on it, it is said to be merged in the judgment.... if it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per res judicatam.

The said dicta was followed in Barber v. Staffordshire Country Council (1996) 2 All ER 748. A cause of action estoppel arises wherein two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. (See C. (a minor) v. Hackney London Borough Council (1996) 1 All ER 973).

(See The Doctrine of Res Judicata, 2nd Edn. by Spencer Bower and Turner p. 149)

(Emphasis supplied by us)

7. Thereafter, the Referring Bench, even if, did not agree with the finding given by the First Division Bench, was bound to accept such finding as the doctrine of res judicata stood in the way of Their Lordships in reopening the same. The doctrine of res judicata cannot be surmounted by making reference to a Larger Bench. The opening phrase of Section 11 of the CPC is that "No Court shall try any suit or issue...." thereby taking away the jurisdiction of the subsequent Court to re-open a concluded issue.

8. The decision relied upon by the Referring Bench in support of Reference merely reiterates principle of judicial decorum of following the precedent of a co-ordinate Bench except by way of reference to a Larger Bench but by taking aid of such decision, a Court cannot overcome the principles of res judicata on an issue of fact or even an issue of mixed question of law and fact which is not only binding upon the parties but also upon the Court subsequently dealing with the concluded issue.

9. We have already pointed out that the question formulated by the Referring Bench is not a pure question of law but basically an issue of fact already decided in the

facts of the case by the First Division Bench.

10. We, therefore, hold that the Reference is competent and accordingly, we return the Reference to the Referring Bench without deciding the issue framed for the reasons discussed above.

11. In the facts and circumstances, there will be, however, no order as to costs.

Tapan Kumar Dutt, J.

12. I agree.

Prasenjit Mandal, J.

13. I agree.

14. Urgent photostat certified copy of this judgment be supplied to the parties, if applied for, within a week from date upon compliance of all the requisite formalities.