IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 1320 of 2016

Reserved on: 05.12.2019

Date of decision: 9.12.2019.

State of H.P. & Anr. ..... Petitioners

Vs.

P. C. Sharma ..... Respondent

Coram:
The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.

Whether approved for reporting?[1]. *Yes*

For the petitioners : Mr. Vinod Thakur, Addl. A.G. with Mr. Narender Thakur, Ms. Divya Sood, Dy. A.Gs.

For the respondents : Ms. Ranjana Parmar, Sr. Advocate with Mr. Karan Singh Parmar, Advocate.

Justice Tarlok Singh Chauhan, Judge

Aggrieved by the order passed by the learned Tribunal in TA No. 2022/2015, decided on 26.11.2015 whereby it allowed the petition filed by the petitioner (respondent herein) for correction of date of birth from 28.05.1957 to 28.05.1958, the respondents (petitioners herein) have filed the instant petition.

2. It is not in dispute that the respondent had earlier filed petition being CWP(T) No. 10716/2008 seeking therein the same relief and the same was disposed of vide order dated 05.05.2011.

[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes.***

3. The learned Single Judge while deciding the case took into consideration the fact that even though the petitioner's year of birth was 1958, however, this fact only came in the knowledge when his father was serving in the Army and died there. The petition was disposed of with the direction to the respondents (petitioners herein) to decide the request of the petitioner after making a fact finding inquiry wherein respondent was required to produce that entry in the record of Birth and Death in support of his claim.

4. The question of delay and latches in applying for change of date of birth was explicitly determined in favour of the respondent, as would be evident from paras 3 and 4 of the judgment, which read as under:-

> "3. Now according to the petitioner, he came to know about the alleged error about the year of his birth, on the death of his father and after getting certificate Ex.A-2 from the Army Authorities, how could he have applied for correct of his date of birth, within one year of joining of service.
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> 4. As a matter of fact, an employee can approach the appointing authority, for correction of date of birth within five years of his joining the service, per Note-6, below Rule 56 of the Fundamental Rules. In this case, the period is to be counted not from the date of entry in Government service, but from the date of knowledge that the year of birth is not correctly recorded."

5. Surprisingly, despite the clear cut direction of this Court, the respondents (petitioners herein) rejected the case of the petitioner (respondent herein) only on the ground of delay

after referring to Rule 56 of the Fundamental Rules and quoting certain judgments of the Hon'ble Supreme Court, as is evident from the orders so passed, the relevant portion of which is as under:-

> And whereas, while considering the matter, the law laid down by the Hon'ble Supreme Court in case cited as AIR 2010 SC 2295, titled as Punjab & Haryana High Court at Chandigarh vs. Megh Raj Garg and another wherein law laid down by the Hon'ble Apex Court in Union of India vs. Harnam Singh (1993) 2 SCC 162 was followed; have been kept in view. As per the judgment of Hon'ble Apex Court, the declaration of age and date of birth at the time of entry into Govt. service is conclusive and binding on the Govt. servant. The only exception to this is that a Govt. servant can make an application for correction of age within five years of entry into Govt. service as per provision of F.R. 56. Hence, there is no illegality by refusing to accept the prayer made by the petitioner for correction of his date of birth on the basis of change effected by the H.P. Board of School Education in the date of birth recorded in his matriculation certificate after limitation period. As per the judgment of Hon'ble Supreme Court of India in another case titled Union of India vs. Harnam Singh, the Hon'ble Apex Court envisages that "It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of birth of a Govt. servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those

> who sleep over their rights and allowed the period of limitation to expire."
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> In view of the fact of the case, provisions of F.R.-56 & law laid down in case cited as AIR 2010 SC 2295, titled as Punjab & Haryana high Court at Chandigarh vs. Megh Raj Garg and another wherein law laid down by the Hon'ble Apex Court in Union of India vs. Harnam Singh (1993) 2 SCC 162, the case of the petitioner is not maintainable and deserves to be rejected and accordingly disposed of."

6. Once that be so, then obviously no fault can be found in the order of the learned Tribunal whereby the date of birth of the petitioner has been ordered to be corrected, especially, when the petitioner had produced primary evidence in support of his date of birth.

7. The learned Additional Advocate General would once again argue again that the claim of the respondent was barred by delay and latches and beyond the period prescribed under F.R. 56, however, this plea is not at all available to the petitioners especially when they have not challenged the judgment passed by this Court in CWP(T) No. 10716/2008 (supra).

8. If at all the respondents (petitioners herein) were aggrieved by the aforesaid order, they should have assailed the same by filing Letters Patent Appeal before this Court.

9. Once the judgment has attained finality, then it is not open to the petitioners to argue what has been specifically held against them in the earlier litigation.

10. One important consideration of public policy is that the decision pronounced by the Court of competent jurisdiction should be final unless or until modified or reversed by the appellate authority and the very principle underlying the same is that no one should be made to face the same kind of litigation twice because such a process would be contrary to consideration of fair play and justice.

11. In **Union of India vs. K. M. Sankrappa , 2001 (1) SCC 582**, the Hon'ble Supreme Court deprecated the practice of interference by the executive without challenging the Court order before the superior forum and it was observed as under:-

> ".....The Government has chosen to establish a quasi judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal, consisting of a retired Judge of a High Court or a person qualified to be a Judge of a High Court and other experts in the field gives its decision that decision would be final and binding so far as the Executive and the Government is concerned. To permit the Executive to review and/or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial Board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the Executive. Under our Constitution the position is reverse. The Executive has to obey judicial orders. Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. The Legislature may, in certain cases, overrule or nullify the judicial or executive decision by enacting an appropriate legislation. However, without enacting an appropriate

> legislation, the Executive or the Legislature cannot set at naught a judicial order. The Executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts and decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal."

12. In view of the above, we are of the considered opinion that it was not permissible for the petitioners to have sat over the order of this Court and such an attitude tantamount to contempt of Court and arbitrariness as it is not possible for the executive to scrutinise the order of the Court.

13. In taking this view, we are fortified and fully supported by the judgment of the Hon'ble Supreme Court in **Union of India vs. Ashok Kumar Agarwal, 2013 (16) SCC 147**, wherein it was held as under:-

> 45. It is astonishing that in spite of quashing of the suspension order and direction issued by the Tribunal to re-instate the respondent, his suspension was directed to be continued, though for a period of six months, subject to review and further subject to the outcome of the challenge of the Tribunal's order before the High Court. The High Court affirmed the judgment and order of the Tribunal dismissing the case of the appellants vide impugned judgment and order dated 17.9.2012. Even then the authorities did not consider it proper to revoke the suspension order.

46. Placing reliance upon the earlier judgments in Mulraj v. Murti Raghunathji Mahaaraj, AIR 1967 SC 1386, Surjit Singh & Ors. etc. etc. v. Harbans Singh & Ors. etc. etc., AIR 1996 SC 135; Delhi Development Authority v. Skipper Construction Company (P) Ltd. & Anr., AIR 1996 SC 2005; and Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors., AIR 2008 SC 901, this Court in Manohar Lal (D) by LRs. v. Ugrasen (D) by LRs. & Ors., AIR 2010 SC 2210 held that any order passed by any authority in spite of the knowledge of order of the court, is of no consequence as it remains a nullity and any subsequent action thereof would also be a nullity.

47. In Union of India & Ors. v. Dipak Mali, AIR 2010 SC 336, this court dealt with the provisions of Rules 1965 and the power of renewal and extension of the suspension order. The court held that if the initial or subsequent period of extension has expired, the suspension order comes to an end because of the expiry of the period provided under rule 10(6) of the Rules 1965. Subsequent review or extension thereof is not permissible for the reason that earlier order had become invalid after expiry of the original period of 90 days or extended period of 180 days.

48. In State of U.P. v. Neeraj Chaubey, (2010) 10 SCC 320 and State of Orissa & Anr. v. Mamata Mohanty, (2011) 3 SCC 436, this Court held that in case an order is bad in its inception, it cannot be sanctified at a subsequent stage. In Mamta Mohtanty, it was held:

> “37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in

violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (Vide Upen Chandra Gogoi v. State of Assam,AIR 1998 SC 1289, Mangal Prasad Tamoli v. Narvadeshwar Mishra, AIR 2005 SC 1964; and Ritesh Tewari v. State of U.P.,AIR 2010 SC 3823)"

(Emphasis added)

49. In view of the above, the aforesaid order dated 31.7.2012 in our humble opinion is nothing but a nullity being in contravention of the final order of the Tribunal which had attained finality. More so, the issue could not have been re-agitated by virtue of the application of the doctrine of res judicata.

50. This Court in Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi & Anr., AIR 1960 SC 941 explained the scope of principle of res-judicata observing as under:

"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

A Similar view has been re-iterated in Daryao & Ors. v. State of U.P. & Ors., AIR 1961 SC 1457; Greater Cochin Development Authority v. Leelamma Valson & Ors., AIR 2002 SC 952; and Bhanu Kumar Jain v. Archana Kumar & Anr., AIR 2005 SC 626.

51. In Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr., (1999) 5 SCC 590, this Court has explained the scope of finality of the judgment of this Court observing as under:

> "17.....One important consideration of public policy is that the decision pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the appellate authority and other principle that no one should be made to face the same kind of litigation twice ever because such a procedure should be contrary to consideration of fair play and justice.
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> 26.....Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it."

52. In view of above, we are of the considered opinion that it was not permissible for the appellants to consider the renewal of the suspension order or to pass a fresh order without challenging the order of the Tribunal dated 1.6.2012 and such an attitude tantamounts to contempt of court and arbitrariness as it is not permissible for the executive to scrutinize the order of the court.

14. In **State of Uttrakhand and others vs. Kanhaya Lal, 2014 (14) SCC 388**, the Hon'ble Supreme Court considered somewhat similar issue wherein despite clear cut direction of the learned Single Judge, the Additional Director of Education without

investigating the aspect properly has re-visited the entire case and had virtually over-ruled the order passed by the learned Single Judge.

15. The Hon'ble Supreme Court in such situation found that the action of the Additional Director of Education was contemptuous of the order of the Hon'ble High Court and it was observed as under:-

> "3. On a perusal of the SLP paper book, we are disturbed to note that pursuant to the Orders of the learned Single Judge, the Additional Director of Education, Garwal Division, Pohri, instead of investigating the aspect whether or not any other obstacles existed, has revisited the entire case and has virtually over-ruled the Order passed by the learned Single Judge. Having perused the Report/Order of the Additional Director of Education, Pohri dated 23.5.2008, it would be possible to view his action as contemptuous of the Orders of the High Court. The learned Single Judge had directed for appointment to the post of Assistant Teacher (Language) L.T. Grade "unless there was some other impediment in selection".. As we have already opined, the Additional Director of Education has not disclosed "any other impediment" and instead has merely reiterated the already articulated case of the State, which had not found favour with the High Court. It is palpably clear that the Additional Director of Education, Garwal Division, Pauri, has contumaciously adorned itself with appellate powers over the decision of the learned Single Judge of the High Court. We shall desist from making any further directions, however, leaving it open to the respondent to initiate proceedings, if so advised."

16. In the same judgment, the Hon'ble Supreme Court has also deprecated the practice of the State to engage a teacher into fighting a futile litigation, the relevant portion of the judgment as contained in para-5, read as under:-

> "5. We do not wish to make any further observations on the approach and the conduct of the Additional Director of Education, Garwal Region, Pohri, in terms of his Order dated 23.5.2008. In this case, the writ petitioner is a Teacher and it is unfair to him to be repeatedly drawn into fighting futile, if not frivolous litigation by the State. It has become the practice of the State to carry on filing appeals even where the case does not deserve it, knowing fully well that private respondents will be physically fatigued and economically emasculated in pursuing protracted litigation."

17. In **E.T. Sunup vs. C.A.N.S.S. Employees Association and another, 2004 (8) SCC 683**, the Hon'ble Supreme Court made the following observations:-

> "16. It has become a tendency with the Government officer to somehow or the other circumvent the orders of court and try to take recourse to one justification or other this shows complete lack of grace in accepting the orders of the court This tendency of undermining the court's order cannot be countenanced This Court time and again has emphasized that in democracy the role of the court cannot be subservient to the administrative fiat. The executive and legislature has to work within Constitutional frame work and the judiciary has been given a role of watch dog to keep the legislature and executive within check."

18. As observed above, the matter had been sent back to the petitioners for a decision, which was required to be considered only on the merits of the case and it was not at all open to the Officers of the petitioners to have simply rejected the case on the basis of delay and latches, which findings had already been rendered by the learned Single Judge against the petitioners. In fact, such an attitude tantamounts to contempt of the Court and arbitrariness and as held by the Hon'ble Supreme Court, it is not permissible for the executive to secrutinise the order of the Court.

19. We would have not hesitated to issue contempt notice to the officer of the petitioners, who decided the representation but we refrain from doing so, since the concerned officer, as informed by the State, stands retired.

In view of the aforesaid discussion, we find no merit in this appeal and the same is accordingly dismissed.

(Tarlok Singh Chauhan),
Judge

(Chander Bhusan Barowalia)
Judge

Dated: 9.12.2019
(Sanjeev)