

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No. 4503 of 2015**

- Abhay Kumar Kapre S/o Purushottam Kapre Aged About 42 Years R/o Vardhaman Nagar, Mamta Nagar Road, Near Ganesh Mandir, Rajnandgaon, District Rajnandgoan (Chhattisgarh)

---- **Petitioner****Versus**

1. State Of Chhattisgarh Through The Secretary, Department Of Higher Education, Mantralaya, Mahanadi Bhawan, Naya Raipur, Raipur (Chhattisgarh)
2. General Administration Department, Through Its Secretary, Mantralaya, Mahanadi Bhawan, Naya Raipur, Raipur (Chhattisgarh)
3. The Chhattisgarh Public Service Commission, Through Its Secretary, Shankar Nagar Road, Raipur (Chhattisgarh)

---- **Respondents**

For Petitioner : Shri Mateen Siddiqui,
Advocate.

For Respondents/State : Shri Y.S. Thakur, Deputy
Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board**15/12/2015**

(1) The petitioner herein (Abhay Kumar Kapre) had filed Writ Petition No.5308/2014 before this Court claiming quashment of advertisement dated 5.9.2014

(Annexure P-1) so far as it relates to relaxation of age in Clause 4(ii) & Clause 4(xi) and claiming age relaxation. This writ petition was disposed of by this Court by order dated 9.9.2015 in terms of order passed by the Division Bench of this Court in W.P. (S) No.5201/2014 decided on 27.8.2015.

(2) The order dated 27.08.2015 passed in W.P. (S) No.5201/2014 (Dr. Mrs. Bhawna Nigam Vs. Union of India & others) states as under:-

“37. Resultantly, the writ petitions are dismissed and all interim orders are vacated, except to the limited extent for reconsidering grant of 5% relaxation to reserved category candidates at the Higher Secondary level. If the other Petitioners invoke Rule 24, it is for the State to consider matters in accordance with law. “

(3) The aforesaid order has attained finality. This second writ petition has been filed by the same petitioner (Abhay Kumar Kapre) claiming following reliefs:

“10.1 That, this Hon'ble Court may kindly be pleased to declare the Clause 4(ii) of the advertisement (Annexure P/1) is discriminatory, arbitrary and ultra-vires to Article 14 & 16 of Constitution of India, as the relaxation in age should have been in addition

to the clause 4 of the advertisement for government servant;

10.2 That, this Hon'ble Court may kindly be pleased to declare the clause 4(vi) being ultra-vires, when compared with clause 4(ii) of the advertisement, thus being violative of Article 14 and 16 of the Constitution of India;

10.3 That this Hon'ble Court may kindly be please to direct the respondent State/Chhattisgarh Public Service Commission to allow the petitioner to participate in the selection process in respect of advertisement Dated 05.09.2014 (Annexure P/1).

10.4 To kindly make any other order that may be deemed fit and just in the facts & circumstances of the case including awarding of the costs to the petitioner.”

(4) Learned counsel appearing for the petitioner would submit that in the first writ petition filed by the petition he has only sought quashment of the advertisement dated 05.09.2014 (Annexure P-1) whereas in the instant writ petition he has sought to declare the Clause 4(ii) of the Advertisement (Annexure P-1) is *ultra vires* and, therefore, disposal of the earlier writ petition will not be bar and this writ petition can be entertained by this Court for consideration.

(5) It is well settled that principle of *res judicata* applies to all proceedings under Section 11 of the CPC, though the provisions of the CPC do not apply to miscellaneous (writ) petition by virtue of Section 141 of the CPC (kindly see **G.K. Dudani and others v. S.D. Sharma and others**¹).

(6) In **Daryao and others v. State of U.P. and others**², the Constitution Bench held that the decision rendered in the writ petition on merits would be binding upon the parties unless it is set aside. The Constitution Bench held as under:

“If a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the constitution

(7) Thus, it is authoritatively held by their Lordships of the Supreme Court that once an issue has been heard finally and decided by a High Court in a writ proceeding under Article 226 and/or 227 of the Constitution of India

1 1986 (supp) SCC 239 (Para 18)

2 AIR 1961 SC 1457 (1)

on merits after full contest, the said finding would operate as *res Judicata* in a subsequent proceeding involving the same issue between the same parties.

(8) The Constitution Bench in the matter of **District Recruit Class II Engineering Officers' Association V. State of Maharashtra**³ their Lordships of the Supreme Court has held that the principle of constructive *res Judicata* is also applicable in writ proceedings. It is held therein as under :-

“35..... 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 writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order can not 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.....

³ (1990) 2 SCC 715

47(K). That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of *res Judicata* including the rule of constructive *res Judicata* if the same has been earlier decided by a competent Court by a judgment which became final.”

(9) In the matter of **Forward Construction Co. And others V. Prabhat Mandal and others**⁴, their Lordships of the Supreme Court has held that the principle of constructive *res Judicata* underlying under Explanation IV of Section 11 of CPC is applicable to writ proceedings and observed in paragraph 20 as under :-

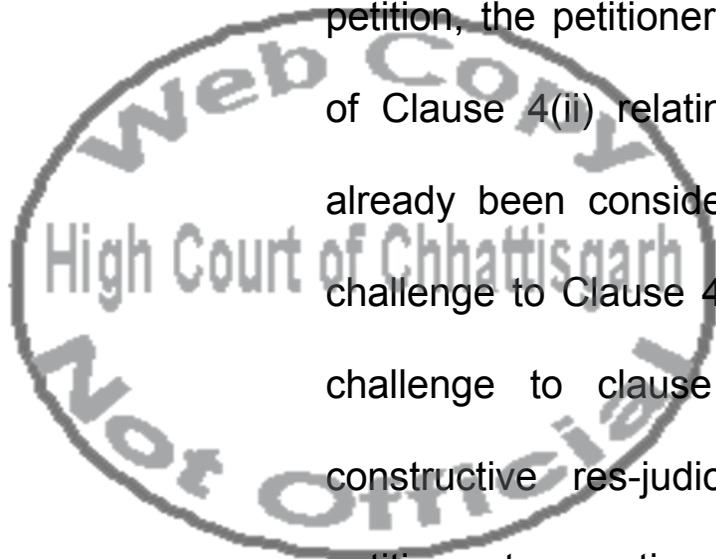
“20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as *res Judicata* as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11 CPC provides that 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. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might

4 (1986) 1 SCC 100

and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.”

(10) Thus, in light of the authoritative pronouncement rendered by their Lordships of the Supreme Court in above-stated judgments particularly **District Recruit Class II Engineering Officers' Association** (supra) and **Forward Construction Co. and others** (supra), it is quite vivid that principle of constructive *res judicata* is also applicable to the writ proceedings. In the case in hand, first writ petition bearing No.5308/2014 claiming quashment of Clause 4(ii) and Clause 4(xi) relating to relaxation of age came to be disposed of in terms of the order dated 27.08.2015 passed by Division Bench of this Court by which petitioner's writ petition stands

dismissed subject to limited relief to the reserved category candidate, which has, now again instant writ petition i.e. W.P. No. 4503/2015, been filed claiming declaration that Clause 4 (ii) of the advertisement dated 05.09.2014 (Annexure P-1) is discriminatory and arbitrary and Clause 4(vi) is *ultra vires*. In the considered opinion of this Court, principles of *res judicata* & constructive *res judicata* both are squarely attracted to the facts of the present case. In the first writ petition, the petitioner has already claimed quashment of Clause 4(ii) relating to age relaxation, which has already been considered and rejected and the fresh challenge to Clause 4(ii) is hit by *res judicata* and the challenge to clause 4(iv) is hit by principles of constructive *res-judicata*, as it was open to the petitioner to question the legality and validity of clause 4(vi) in the earlier writ petition, but he choose not to do so. In fact petitioner claimed relief in earlier writ petition in shape of para 10.2 to provide benefit extended to shiksha karmies in clause 4(ii) and after being unsuccessful in that writ petition has filed this writ petition and, as such, in the considered opinion of this Court, the petitioner's instant writ petition is hit by principles of *res judicata* and constructive *res judicata* and, therefore, the writ petition as framed and filed



deserves to be and is accordingly dismissed but without
imposition of cost (s).

Sd/-
(Sanjay K. Agrawal)
Judge

D/-



HEAD NOTE

English

(1) Principles of constructive *res judicata* is also applicable in writ proceedings.

Hindi

(1) आन्वयिक पूर्व न्याय के सिद्धांत रिट कार्यवाहियों में भी लागू होंगे।

