# Nand Kishore vs State Of Punjab on 21 September, 1995

## Equivalent citations: 1995 SCC (6) 614, JT 1995 (7) 69

## Author: M.M. Punchhi

## Bench: M.M. Punchhi, A.M Ahmadi

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           PETITIONER:
NAND KISHORE

        Vs.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT21/09/1995

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
AHMADI A.M. (CJ)

CITATION:
 1995 SCC  (6) 614        JT 1995 (7)    69
 1995 SCALE  (5)582


ACT:



HEADNOTE:



JUDGMENT:
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J U D G M E N T Punchhi, J.

Whether the plea of constructive res judicata was rightly raised against the appellant, in the facts and circumstances of this case, is the significant question, which arises for determination in this appeal by special leave, against the judgment and decree dated 13-8-1974 of the Punjab and Haryana High Court at Chandigarh, in Regular First Appeal No.156 of 1965.

Supportive of the abovesaid appeal is a highly belated special leave petition, invited by this Court on 6-12-1990 from the appellant, against the judgment and order dated 5- 2-1962 of the Punjab High

Court at Chandigarh in Writ Application (Civil) No.1061 of 1961, in circumstances which we will mention later.

These can conveniently be disposed of by a common order.

The facts involved are not in dispute. A brief resume thereof will suffice. The appellant, Nand Kishore joined service in the erstwhile Patiala State in May 1941. On the formation of Pepsu State he was taken as an Assistant with effect from September 1, 1956. On the merger of Pepsu with the State of Punjab, he was integrated as an Assistant in the Punjab Civil Secretariat at Chandigarh, in the Food Distribution Branch. Having completed ten years qualifying service he was compulsorily retired on January 6, 1961 from the service by an order in the following terms:

> "ORDER OF THE GOVERNOR OF PUNJAB Sanction is accorded under the provisions of Rule 5.32(b) of the Punjab Civil Services Rules, Volume II, to the compulsory retirement from Government Service of Shri Nand Kishore, Assistant Food Distribution Branch, Punjab Civil Secretariat with immediate effect.

2. He will be entitled to such proportionate pension and death-cum-

retirement gratuity as may be admissible under the rules.

Chandigarh Dated the sd/-

6th January, 1961 E.N. Mangat Rai, Chief Secretary to Govt.

Punjab"

> The representations of the appellant to the Government and memorial to the Governor brought him no relief. Thereafter he moved the Punjab High Court in Writ Application No.1061 of 1961 praying for quashing of the order dated January 6, 1961 retiring him compulsorily. The writ petition came up for hearing before a division bench consisting of Tek Chand and I.D. Dua, JJ. The impugned order of compulsory retirement was challenged by him on a variety of grounds inter-alia urging that he was not governed by Rule 5.32 of the Punjab Civil Service Rules, Volume II and that rather he was governed by the new Pension Rules. All the pleas of the appellant were repelled. It was factually noted by the Bench that Rule 5.32 of the Punjab Civil Service Rules, Volume II clearly contemplated the existence of power in the Government to retire a permanent servant compulsorily after 10 years of qualifying service. The writ petition was dismissed on February 2, 1962. It is worth bearing in mind that the appellant did not at that stage question the validity of Rule 5.32 and the High Court too on its own did not engage itself to the question. The matter rested there.
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> The scenario changed thereafter. In Moti Ram Deka & ors. v. N.E. Frontier Railway & ors. [AIR 1964 SC 600] this Court was called upon to consider the validity of Rules

148(3) of the Railway Rules. These Rules authorised the termination of service of the railway employee by serving him with a notice for a requisite period, or paying him salary for the said period, in lieu of notice. This Court held that a person who substantively holds a permanent post had a right to continue in service subject to two exceptions, i.e., (i) superannuation; and (ii) compulsory retirement. The second exception was affirmed by this Court with the reservation that Rules of compulsory retirement would be valid if having fixed a proper age of superannuation, they permit compulsory retirement after putting in a minimum period of service. This Court observed that if the compulsory retirement permitted the authority to retire a public servant at a very early stage of his career, the question whether such a Rule would be valid might have to be considered on a proper occasion.

Encouraged by the decision in Moti Ram Deka's case, the appellant on February 24, 1964, filed a suit in the Court of Senior Subordinate Judge, Patiala for a declaration that the order of compulsory retirement dated January 6, 1961, passed as it was under Rule 5.32 of the Punjab Civil Service Rules, Volume II, after ten years of qualifying service, was invalid, and that he should be treated to have continued in the service of the Punjab Government, enjoying all the necessary rights and benefits thereof. He also claimed the additional relief regarding payment of pay etc. Shortly after the institution of the suit, on April 1, 1964, this Court in Gurdev Singh Sidhu v. State of Punjab and Anr. [1964(7) SCR 587] got the opportunity to apply the principles evolved in Moti Ram Deka's case to a compulsory retirement case under the second proviso to Article 9.1 of the Pepsu Service Regulations as amended by a notification dated January 19, 1960. The said proviso empowered the Government retaining an absolute right to retire any Government servant after he had completed 10 years qualifying service without giving any reason and the government servant any right to claim special compensation on this account. This right however was not to be exercised by the Government except when it was in public interest to dispense with further services of a Government servant, such as on account of inefficiency, dishonesty, corruption or infamous conduct. This Court took the view that it was not permissible for a State while reserving to itself the power of compulsory retirement by framing Rules prescribing a proper age of superannuation to frame another one giving it the power to compulsory retire a permanent government servant at the end of ten years service, for that Rule cannot fall outside Article 311(2) of the Constitution.

Undisputably the Pepsu Regulation in question was identical to Rule 5.32 of the Punjab Civil Service Rules, Volume II. Since the suit of the appellant was based on the law as declared by this Court in Moti Ram Deka's case and later on Gurdev Singh Sidhu's case, the State of Punjab took up the plea in its written statement that the suit, because of the earlier decision in the writ application, was barred by principles of res-judicata. The appellant reacted to the defence by stating that the prevailing view of the Punjab High Court was that a judgment in a writ petition did not operate as res-judicata and so he should get a decree in his favour. The Trial Court thus on

the issue of the suit being barred by principles of res-judicata or not, ruled in favour of the appellant on the basis of the view then prevailing in the High Court. On the other issue, whether the order dated January 6, 1961 of compulsory retirement was illegal, void etc. the Court ruled that since Article 9.1 of the Pepsu Regulations had been struck down in Gurdev Singh Sidhu's case and since Rule 5.32 of the Punjab Civil Service Rules, Volume II was identical in nature, the latter Rule therefore was invalid and consequently the impugned order of compulsory retirement passed thereunder was illegal and invalid. As a necessary consequence the suit of the appellant was decreed. He was granted the declaration that his compulsory retirement was illegal and consequently a decree for Rs.11321.75 as arrears of salary etc. with costs.

The State of Punjab went up in Regular First Appeal before the Punjab and Haryana High Court raising one and the only one point that the suit of the appellant was barred by principles of res-judicata, and consequently the order of compulsory retirement of the appellant could not be upset. The matter was placed before a division bench consisting of S.S. Sandhawalia and M.R. Sharma, JJ. who after considering the matter, on the basis of the case law by then developed, referred the following question of law for decision by a Full Bench:

"Whether the decision of the High Court declining to issue a writ of mandamus on the assumption that a statutory rule was valid, operates as res-judicata in a subsequent suit instituted after the statutory rule had been declared as unconstitutional by the Supreme Court of India"

In the Full Bench constituted, the same learned Judges were members, the added Presiding Judge being B.R. Tuli, J. The learned Judges of the Full Bench could not agree to the answer and thus they differed. S.S. Sandhawalia, J. answered the question formulated in the affirmative and B.R. Tuli, J. agreed with him. M.R. Sharma, J. however answered the question in the negative. The decision was made on May 8, 1974 per majority and the question was answered in the affirmative. The case was ordered to go back to the Division Bench for decision. Then the Division Bench consisting of S.S. Sandhawalia and Manmohan Singh Gujral, JJ. on August 13, 1974 allowed the appeal of the State of Punjab following the dictum of the Full Bench. Aggrieved against the said decision, the appellant sought leave and so Civil Appeal No.632 of 1975 is before us to challenge principally the view of the Full Bench of the High Court.

The aforesaid appeal appears to have been heard for quite sometime on 6-12-1990 by a three-member Bench, as would appear from the Court Proceedings extracted below. The bench was goaded to invite a special leave petition by the appellant against the order dated 5-2-1962 of the Punjab High Court in Writ Application No.1061 of 1961 accompanied by an appropriate application for condonation of delay. The Court Proceedings dated 6-12-1990 read thus:

"We have heard this appeal for some time. In the meantime we think it will be better if the petitioner is advised to file a special leave petition from the order of the High

> Court dated 5.2.1962 in writ petition No.1061/61 with an appropriate application for condonation of delay. If that petition were to be accepted then perhaps many of the points which are raised in this civil appeal may not be necessary to be gone into. In this view of the matter, we adjourn this appeal for a period of 8 weeks. Counsel should file the SLP within three weeks from today and serve a copy on the counsel for the State of Punjab. The counsel will so arrange the papers that when the matter is listed, both the civil appeal and SLP are ready for final hearing."

The step of the three-member Bench so taken reveals its mind as reflected in the above proceedings. Their Lordships wanted to do substantial justice. It was thought better to advise the petitioner to file a special leave petition. As we view this order, having invited the petitioner to file the special leave petition, it is no longer advisable or appropriate for us to retrace back the step put forward by the three-member Bench. It is significant to recall that the writ application was dismissed on February 5, 1962 and the moment Moti Ram Deka's case appeared on the scene, the appellant on February 24, 1964, within limitation, brought forward his suit which got strengthened by Gurdev Singh's case appearing within a couple of months of its filing. The appellant-special leave petitioner was thus bonafide pursuing an appropriate remedy for all these years. In these circumstances, we think that an appropriate case for condonation of delay of the intervening period has been made out. We, therefore, allow CC 11644/91 and condone the long durated delay in these exceptional circumstances. On doing so, we grant leave to appeal. The appeal thus arising and the Civil Appeal No.632 of 1975 may now be disposed of together.

As said before it has never been disputed that Rule 5.32 of the Punjab Civil Service Rules, Volume II is identical in text, terms and purport with the second proviso to Article 9.1 of the Pepsu Service Regulations. Gurdev Singh's case thus would mandate us to hold that Rule 5.32 of the Punjab Civil Service Rules, Volume II should meet the same fate, holding that the Rule be struck down as invalid since it contravenes Article 311(2) of the Constitution. Holding so the order of compulsory retirement of the appellant dated January 6, 1961 is struck down and the appellant is held entitled to restoration of the decree of the Trial Court.

Putting aside for the moment the course above-adopted, let us otherwise examine the view of the Hon'ble Judges of the Full Bench of Punjab and Haryana High Court on the question formulated. It is well known that the general principle underlying the doctrine of res-judicate is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities, and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fairplay and justice. These principles stand enunciated in Daryao and others v. The State of U.P. & Others [1962(1) SCR 574]. This court in The Amalgamated Coalfields Ltd. & Anr. v. The Janapada Sabha, Chhindwara [1963 (Supp.)(1) SCR 172] opined that constructive res- judicata was an artificial form of res-judicata enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petitions filed under Article 32 and Article 226 of the Constitution. The court then had the occasion to point out that when a matter related to taxation and assessment levied for a different year, the doctrine of res-judicata was itself inapplicable. This Court still spelled out the

binding effect of a decision made under Article 141 of the Constitution as follows:

> "If for instance, the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to the High Court or brought before this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the assessee for a subsequent year. That, however, is a matter on which it is unnecessary for us to pronounce a definite opinion in the present case. In this connection, it would be relevant to add that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would, under Art.141, have a binding effect not only on the parties to it, but also on all courts in India as a precedent in which the law is declared by this Court. The question about the applicability of res judicata to such a decision would thus be a matter of merely academic significance."

Gajendragadkar, C.J. who authored the judgment in the above-quoted case of The Amalgamated Coal Fields Ltd's case, later in Devilal Modi v. Sales Tax Officer, Ratlam & Others [1965(1) SCR 636] yet applied the principles of res judicata holding that if the doctrine of constructive res judicata was not applied to writ proceedings, it would be open to a party to take one proceeding after another and urge new grounds every time, which was plainly inconsistent with the considerations of public policy. This decision was followed in State of U.P. v. Nawab Hussain [1977(3) SCR 428].

On another facet of res judicata, this Court in Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhoy [1970(3) SCR 830] had the occasion to observe as under:

> "A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue.....A decision on an issue of law will be 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 proceedings, 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) When this Court strikes down a statutory provision holding it to be unconstitutional, it derives its authority to do so under the Constitution. Under Article 141, the law declared by it is of a binding character and as commandful as the law made by a legislative body or an authorised delegee of such body. The Court is thus a "competent authority" within the scope of the words above emphasised. On the other hand the majority view expressed in the Full Bench decision that "the Courts of record including the Supreme Court only interpret the law as it stands but do not purport to amend the same. Their Lordship's decisions declare the existing law but do not enact any fresh law", is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the

Court says it is. Patently the High Court fell into an error in its appreciation of the role of this Court.

Bearing the above principles in mind what at best was said by the State of Punjab was that failure to raise the constitutionality of Rule 5.32 in the writ petition preferred by the appellant would imply, on the principle of "might and ought", that the opportunity of controverting the matter had been lost and that it should on the principles of constructive res judicata be taken that the matter had been actually raised and adversely decided. But in Forward Construction Co. and Others. v. Prabhat Mandal and Others [1986(1) SCC 100], this Court has taken the view that where a matter has been constructive in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided.

It would then have to be seen the twin play of the notion of deemed constitutionality and bar of constructive res judicata. Raising the constitutionality of a provision of law, as it appears to us, stands on a different footing than raising a matter on a bare question of law, or mixed question of law and fact, or on fact. There is a presumption always in favour of constitutionality of the law. The onus is heavy on the person challenging it. It is by the discharge of onus that the presumption of constitutionality can be crossed over. When a person enters a Court for relief and does not challenge the constitutionality of the law governing the matters directly and substantially in issue, it only means and implies that he goes by the presumption of constitutionality. He cannot on this stance be deemed to have raised the question of constitutionality and the question of constitutionality to have been decided against him and such matter to have been directly and substantially in issue. The constitutionality of the Rule relating to compulsory retirement cannot be deemed to have been questioned and decided against the appellant on the principles of "might and ought" or it being "directly and substantially in issue". It cannot be taken as a rule that one of the pleas, either by the plaintiff or the defendant, in every suit or proceeding, must of necessity relate to the constitutionality of the law on which the cause is founded or defended in order to obviate the plea of constructive res judicata being raised in an eventuality. It cannot also be taken as a rule that constitutionality of the law involved is a matter directly and substantially in issue, and if not raised renders a mute decision in favour of its constitutionality barring the plea being raised in a subsequent suit. If there be read such a rule in all civil litigation, it would, to our mind, be against public policy vexing and burdening the courts to go into the constitutionality of provisions of law in every case. When under the impugned rule, the Government assumed to itself the power to compulsorily retire a permanent government servant after ten years of qualifying service, the court's act of striking that Rule as unconstitutional is the law which appeared on the scene, not only to break the presumption of constitutionality but to declare it void. In a sense the offending provision was never there and in the other it was henceforth not there. In either event, it would be within the ambit of the emphasised words in Mathura Prasad's case.

It thus seems to us that the view of the Full Bench of the High Court was erroneous on first principles. In the question referred to the Full Bench, no assumption could be made that a statutory Rule was valid when the court declined to issue a writ of mandamus, or its being treated as res judicata for the purpose of the subsequent suit. Mathura Prasad's case did not merely stop at dealing with decisions relating to the jurisdiction of the Court trying the earlier proceeding, but had further gone to say that the principles of constructive res judicata would not apply when the law has since the earlier decision been altered by a competent authority. And in the context, this Court is a competent authority to alter the law when it declares it to be unconstitutional. Alteration does not limit alone to change therein but is inclusive of the power of striking down. Thus even if we were to decline the belated special leave petition of the appellant against the judgment and order of the High Court dated 5-2-1962 passed in Writ Application No.1061 of 1962, the appellant would be entitled to succeed in having the impugned order of the High Court upset in Civil Appeal No.632 of 1975, for the suit of the appellant could not, in any event, be held to be barred by principles of res judicata.

Accordingly we would compositely allow both the appeals, set aside the respective judgments and orders of the High Court holding that the order of compulsory retirement of the appellant under Rule 5.32 was void and inoperative and the appellant entitled to the meaningful relief of arrears etc. as claimed by him in the plaint, and in accordance with the judgment of the Trial Court. The appellant shall get his costs throughout only in Civil Appeal No.632 of 1985.