

**HIGH COURT OF JAMMU AND KASHMIR  
AT JAMMU**

**LPA No. 45/2018, IA No. 1/2018.**

Date of Order: 31.08.2018.

**State of J&K and others  
Vs  
Nisha Sharma**

**Coram:**

**Hon'ble Mr. Justice Dhiraj Singh Thakur, Judge  
Hon'ble Mrs. Justice Sindhu Sharma, Judge**

**Appearance:**

For the appellant(s)/petitioner (s) : Mr. Ravinder Gupta, AAG.  
For the respondent(s) : Mr. Rahul Pant, Advocate.

- |     |  |   |          |
|-----|--|---|----------|
| i)  | Whether to be reported in Digest/Journal/Media | : | Yes / No |
| ii) | Whether to be reported in Press/Media          | : | Yes / No |

**(Oral)**

**Per : D. S. Thakur –J**

**01.** The instant Letters Patent Appeal has been preferred against the judgment and order dated 01.12.2016, passed in SWP No. 674/2013, whereby the writ petition has been allowed *inter alia* with a direction to the respondents to give retrospective effect to the appointment of the petitioner/respondent herein notionally in accordance with her merit position in the select list, with a further direction to fix her seniority and salary accordingly.

**02.** Briefly stated, the material facts are as under:-

**03.** An advertisement notice bearing No. 07 of 1995 dated 12.10.1995 came to be issued by the official respondents. The petitioner/respondent herein on considering herself eligible applied and was not selected. Being aggrieved of her non-selection she filed SWP No. 686/1997, claiming that she had not been given an additional weightage of her M. Ed. Degree, which would take her merit to 58.10 points, as against the last candidate selected, who had secured 55 points. Vide judgment and order dated 21.11.2000, the Writ Court in SWP No. 686/1997 issued a mandamus with a direction to the respondents to consider the case of the petitioner on the basis of her M.Ed. qualification.

This led to the petitioner's appointment on 08.08.2003.

**04.** In the second round of litigation, the petitioner/respondent herein filed a writ petition bearing SWP No. 523/2009, sought retrospective effect to her appointment as Teacher with effect from the date others came to be appointed in the said list. By virtue of judgment and order dated 26.04.2011, while allowing the writ petition, the Court issued a direction for consideration of the petitioner's case for the said relief.

It is pertinent to mention here that a plea of delay and laches raised by the official respondents in the said petition was found untenable and accordingly rejected.

05. Pursuant to the directions so issued, case of the petitioner was considered and rejected vide order dated 30.08.2012. The basis of the rejection, as seen from the order issued by the Director School Education, Jammu is as under:-

“.....

.....

Whereas the Adm. Department desired that the appointments cannot be given retrospective effect because such action may adversely effect the seniority of persons appointed earlier vide letter No. Edu/legal/J/504/2012 dated 17.07.2012.

Now therefore case of the petitioner for retrospective effect w.e.f. 1997 has been examined in compliance with the directions of the Hon'ble High Court dated 26.04.2011, in pursuance to the instructions of the Adm. Department dated 17.07.2012 and found devoid of any merit, which is hereby rejected.”

06. Aggrieved of the order of rejection, the petitioner/respondent herein filed yet another writ petition bearing SWP No. 674/2013, challenging the said order of rejection. By virtue of judgment and order dated 01.12.2016, the petition was allowed. The order of rejection was set aside with a direction to the respondents to consider the case of the petitioner/ respondent herein for her appointment retrospectively on notional basis, in accordance with her merit position in the merit list from the date others were so appointed and to fix her seniority accordingly. It is against the aforementioned order dated 01.12.2016, the instant appeal has been filed.

07. The only ground of challenge in the present appeal against the judgment and order impugned is that the Writ Court committed an error in allowing the writ petition and issuing the directions, inasmuch as, it failed to appreciate that the relief sought in regard to her claim for retrospective effect was barred not only by delay and laches but also on the principles of constructive *res judicata*.
08. Per contra, Mr. Rahul Pant, learned counsel for the respondent herein urged that the issue of delay and laches raised in the earlier round of litigation was noticed by the Writ Court while disposing of SWP No. 523/2009, but rejected. It was urged that it was only thereafter that order of consideration was passed, which became the subject-matter of challenge before the Writ Court in SWP No. No. 674/2013. It was thus urged that the appellants cannot now be permitted to raise the issue of delay and laches for the second time and that the issue is hit by the principles of *res judicata*. On the issue of constructive *res judicata*, learned counsel for respondent urged that the State having not raised the plea at the time when the matter was contested in writ petition bearing SWP No. 523/2009, cannot be permitted now to raise.
09. It was stated that a plea, which was available to the appellants-State and which could have been raised as a matter of defence ought to have been taken in the earlier round of litigation,

therefore, having not been so taken, the appellants cannot now be permitted to urge the same.

10. Heard learned counsel for the parties.
11. There is considerable force in the argument of the learned counsel for the respondent in regard to both the issues of delay and laches as also constructive *res judicata*. From the record, it appears that while disposing of the writ petition bearing SWP No. 523/2009, the Writ Court had rejected the plea of the State that the petition was barred by delay and laches. The plea that the petitioner had kept quiet from 2003 till 2009, when the petition was filed, suffered from delay and laches, was a plea, which was rejected by the Court. This judgment was never challenged in appeal proceedings and attained finality. As a consequence of compliance to the judgment, the order of rejection was passed, which became the subject matter of dispute in the present round of litigation.
12. The issue of delay and laches, therefore, cannot now be permitted to be raised, as the State has in compliance to the Court directions did consider but erroneously rejected the case of the petitioner, which thus became the subject matter of challenge before the Writ Court in SWP No. No. 674/2013.
13. Equally untenable is the plea of constructive *res judicata* raised by the learned counsel for the appellants. What was urged by

the learned counsel for the appellants was that the petitioner/ respondent herein ought to have raised a claim with regard to her retrospective benefits in her first writ petition, i.e., SWP No. 686/1997 and, therefore, having not done so, the petitioner is estopped in law on the basis of principles of constructive *res judicata*. It needs to be noticed that the State did not raise any such plea in the second round of litigation bearing SWP No. 523/2009 and had only raised the plea of delay and laches.

14. A plea of *res judicata*/constructive *res judicata* is a plea in bar and shall be deemed to have been waived, if not specifically raised. If a party does not raise such a plea, then the defence, which might be available to a respondent is lost. Therefore, not taking such a plea in SWP No. 523/2009, the appellants-State could not have raised the issue for the first time in SWP No. 674/2013. Although, learned counsel for the appellants urged that the issue of constructive *res judicata* was argued before the Writ Court, yet nothing is forthcoming from the judgment and order impugned dated 01.12.2016. In case the issue was argued, it would have been open for the appellants to file an appropriate review petition before the Court. Insofar as, we are concerned, from the record, we can safely say that the issue with regard to constructive *res judicata* not having been raised even in the third round of litigation, cannot now be permitted to be raised in the appeal proceedings.

**15.** For the reasons mentioned above, we cannot persuade ourselves to take a view from that of one taken by the Writ Court. The appeal is found to be without any merit and is, accordingly, **dismissed** along with connected IA.

( Sindhu Sharma )  
Judge

(Dhiraj Singh Thakur)  
Judge

**Jammu**  
31.08.2018  
(Muneesh)

