

(2003) 07 RAJ CK 0109

In the Rajasthan High Court

Case No : Special Appeal (Writ) No. 505 of 2003

Alok Gupta

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-07-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3)
Constitution of India, 1950 — Article 226, 227
Rajasthan High Court of Judicature Rules, 1952 — Rule 382

Citation : (2004) 2 RLW 887 : (2003) 4 WLC 534

Hon'ble Judges : S.K. Keshote, J;K.S. Rathore, J

Bench : Division Bench

Advocate : Prakash Chandra Jain, for the Appellant;

Final Decision : Dismissed

Judgement

S.K. Keshote, J.—This special appeal u/s 18 of the Rajasthan High Court Ordinance, 1949 is directed by the appellant against the order dated 21st of December, 2002 of the learned single Judge in S.B. Civil Writ Petition No. 9796/2002.

2. The learned Single Judge dismissed the writ petition of the appellant out of which this special appeal arises on the ground that in this matter the writ petition is not maintainable before the learned single Judge. The learned Single Judge placed reliance in support of his order on the decision of the Hon"ble Apex Court in L. Chandra Kumar v. Union of India (1).

3. The appellant joined his service as Indian Defence Estate Service Group-A Officer in the year 1987. In the month of July, 2001, he was, on transfer, posted as Defence Estate Officer, Rajasthan Circle, Jaipur.

4. Under the order of the respondent No. 3 dated 24th of May, 2002 the appellant was placed under suspension in contemplation of the departmental enquiry. The appellant challenged this order by filing the O.A. No. 256/2002 on

29th of May, 2002 before the Central Administrative Tribunal, Jaipur Bench, Jaipur (hereinafter shall be referred to as "the Tribunal"). The respondent No. 1 to 3 before the Tribunal contested this application. The learned Tribunal under its order dated 27th of September, 2002 dismissed the O.A. No. 256/2002 of the appellant. The learned Tribunal held that the competent authority has taken a decision keeping in view the nature of the misconduct and thus it is not found it a fit case in which interference is to be made in the order of suspension of the appellant.

5. This judgment of the learned Tribunal has been challenged by the appellant before this court in D.B. Civil Writ Petition No. 7516/2002. This writ petition came up for preliminary hearing in the court on 23rd of October, 2002. The learned counsel for the appellant, who is also the counsel for the petitioner in that writ petition, prayed for withdrawal of that writ petition and accordingly the same was dismissed as withdrawn. Though, the copy of this order made in the writ petition aforesaid has not been placed on the record but the zerox copy of the certified copy thereof has been furnished to the court for the perusal by the learned counsel for the appellant. It is marked as Court Document No. 1.

6. S.B. Civil Writ Petition No. 9796/2002 has been presented on 16th of December, 2002. In the petition the prayer has been made for quashing and setting aside of the suspension order (Annexure- 1) dated 24th of May, 2002 and to pass such further orders giving him all consequential benefits with heavy costs against the respondents. The further prayer has been made for direction to the respondents to retain the appellant at the same post where he was working before the issue of the suspension order. Lastly he prayed that any other relief which this court deems fit and proper in the facts and circumstances of the present case be passed in favour of the petitioner.

7. In the writ petition in para No. 9 thereof a vague and bald reference has been made of D.B. Civil Writ Petition No. 7516/2002. We consider it appropriate to reproduce here the exact text of para No. 9 of the writ petition, which reads as under,

"9. That the petitioner filed a writ petition before Double Bench of this Hon"ble Court appealing against the order of the Hon"ble CAT but the same was withdrawn at the initial stage of admission itself on 23.10.2002."

8. The learned counsel for the appellant contended that in the writ petition the appellant has come up with altogether different case and grievance. The grievance is made that the suspension order of the appellant was not revoked. His subsistence allowance was not reviewed. His revision petition was not decided by the competent authority and the charge sheet was not served upon him for considerable long time. However fact remains, he prayed for setting aside of the suspension. It is further submitted that the appellant has already availed of alternative remedy by approaching to the learned Tribunal.

9. We have given our thoughtful consideration to the contentions made by the

learned counsel, for the appellant.

10. In L. Chandra Kumar's case (supra), their Lordships of the Hon'ble Supreme Court held that Clause 2 (d) of Article 323-A and Clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Referring to Section 28 of the Administrative Tribunals Act, 1985 held that the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B are, to the same extent, unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution, is a part of the inviolable basic structure of our Constitution. The Court further observed - while this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals, what their Lordships of the Hon'ble Supreme Court held, created under Article 323-B of the Constitution, are possessed of the competence to test the constitutional validity of the statutory provisions and the Rules. All decisions of the Tribunals will, however, be subject to scrutiny before the Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will nevertheless continue to act like the court of first instance in respect of the areas of law for which they have been constituted. It is held-it will not, therefore, be open for the litigants to directly approach the High Court even in cases where they question the vires of statutory legislations, except where the legislation which creates the particular Tribunal is challenged, overlooking the jurisdiction of the Tribunal concerned.

11. The Tribunal constitution under the Administrative Tribunals Act, 1985 is to act like court of first instance in respect of the areas of law for which it has been constituted. It is not open for the litigants to directly approach the High Court in service matters. In the service matters the litigant has first to go to the Tribunal. In the service matters as it fall under the Administrative Tribunals Act, 1985 the litigant directly cannot approach to this Court under Article 226 of the Constitution. This bar is clearly provided by their Lordships of the Hon'ble Supreme Court in L. Chandra Kumar's case (supra). The learned Single Judge dismissed the writ petition of the appellant on the ground that the matter lies to the Division Bench.

12. In view of the decision of the Apex Court aforesaid the appellant directly cannot approach to this Court by this petition and thus this petition is not maintainable.

13. There is yet another ground on which this writ petition is not maintainable.

14. In the writ petition the prayer has been made for quashing and setting aside of the order of the respondent under which the appellant has been placed under suspension i.e. Annexure-1 to the writ petition dated 24th of May, 2002. The appellant has challenged that order before the Tribunal by filing the O.A. No.

256/2002. That O.A. has been dismissed and the order of the respondent placing the appellant under suspension has been held to be valid. That order of the learned Tribunal has been challenged by the appellant by filing D.B. Civil Writ Petition No. 7516/2002 before this Court and that has been withdrawn.

15. Rule 382 of the Rules of High Court of Judicature for Rajasthan, 1952 (for short, "the Rules, 1952") lays down a bar on entertainment of the second application on the same facts. It provides that where an application has been rejected it shall not be competent for the applicant to make a second application on the same facts. In the Rules, 1952 the application means the application for a direction under Article 226 of the Constitution other than the writ in the nature of habeas corpus.

16. The Tribunal is the first court in the service matter as provided in the Act, 1985. Earlier the writ petitions were filed in service matters by the Central Government employees/officers. In this matter the O.A. has been filed by the appellant to challenge the order of the respondent placing him under suspension, before the Tribunal, which has been decided against him and by virtue of Rule 382 of the Rules, 1952 this petition is not maintainable. The reference here may have to the Division Bench decision of this Court in Ram Singh v. State of Rajasthan (2).

17. The cause of action in the present case is the order of the respondent under which the appellant has been placed under suspension. That order has attained finality so far as to the Tribunal and this Court are concerned, as against the judgment of the learned Tribunal in O.A. No. 256/2002 the Writ Petition No. 7516/2002 has already been decided on 23.10.2002. The writ petition has been dismissed as withdrawn on the request of the counsel for the appellant. He did not pray for grant of liberty to file a fresh petition nor this court has given any permission to the appellant to file the fresh petitioner. The appellant after withdrawal of his earlier writ petition filed against the order of the Tribunal under which the order of respondent placing him under suspension has been held valid, without liberty to institute a fresh petition, cannot file a petition against the very order of the respondent.

18. It is a writ of certiorari i.e. to challenge the order of the respondent placing the appellant under suspension.

19. In order to prevent a litigant from abusing the process of the court by instituting suits again and again for the same cause of action without any good reason, the Civil Procedure Code, 1908 insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in Order 23 Rule 1 (3) of the C.P.C. Their Lordships of the Hon"ble Supreme Court in the case of Sarguja Transport Service v. S.T.A. Tribunal, Gwalior (3), held that the principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata. Their Lordships further held that this principle underlying R.I of 0.23 should be extended in the

interest of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy. That would also discourage the litigant from indulging in bench hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extra ordinary jurisdiction of the High Court under Article 226 once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 since such withdrawal does not amount to res judicata, the remedy under Article 226 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ.

20. While considering the question whether it would or would not advance the cause of justice if the principle underlying R. 1 of O.23 of the C.P.C. is adopted in respect of the writ petitions filed under Article 226/227 of the Constitution of India, their Lordships of the Hon"ble Supreme Court in Sarguja Transport Service's case (supra), observed that it is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. Their Lordships of the Hon"ble Supreme Court further observed that a court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is held that once a petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. The reference here may have to another decision of the Hon"ble Apex Court in Upadhyaya & Company v. State of U.P. and Ors. (4). In that case their Lordships of the Hon"ble Supreme Court held,

"11. We made a recapitulation of the events as above for the purpose of showing that the petitioner has absolutely no case in the present S.L.Ps. He cannot, at any rate, now challenge the order of the High Court dated 3.5.1996 over again having withdrawn the SLP which he filed in challenge of the same order. It is not a permissible practice to challenge the same order over again after withdrawing the SLP without obtaining permission of the Court for withdrawing it with liberty to move for special leave again subsequently.

12. The above principle has been incorporated as a rule in the realm of suits. Order 23, Rule 1 of the CPC deals with withdrawal of suit or abandonment of part of the claim. Sub-rule (3) says that the Court may in certain contingencies grant permission to withdraw from suit with liberty to institute a fresh suit in respect of the subject matter of such suit, Sub-rule (4) reads thus:

"(4) Where the

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdraw from a suit or part of a claim without the permission referred to in Sub-rule (3).

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such object matter or such part of the claim."

13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petitioner. When once a writ petition filed in a High Court is withdrawn by the party concerned he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. The following observations of E.S. Venkataramiah, J. (as the learned Chief Justice then was) are to be quoted here (at p. 92 of AIR):

"We are of the view that the principle underlying Rule 1 of Order 23 of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of *res judicata* but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extra ordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to *res judicata*, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission."

Of course their Lordships added that the above rule is not applicable to writ petitions involving personal liberty "since such a case stands on a different footing altogether."

15. We have no doubt that the above rule of public policy, for the very same reasoning, should apply to special leave petitions filed under Article 136 of the Constitution also. Even otherwise, the order passed by the Division Bench of the High Court on 3.5.1998 does not warrant interference on merits as the learned Judges of the High Court have taken into account all the relevant facts and came

to the correct conclusion."

21. It is not gainsay ordinarily a litigant or his counsel does not withdraw the petition unless the court is not inclined to admit it. From the order of the Division Bench in D.B. Civil Writ Petition No. 7516/2002 it appears that the learned counsel for the appellant would have been in difficulty to get the matter admitted, he to get out from that difficulty, made a request for withdrawal of the writ petition. Naturally the prayer has not been made for grant of permission to file the fresh one for the obvious reason as what their Lordships of the Hon'ble Supreme Court said in Sarguja Transport Service's case (supra), that a court which is unwilling to admit the petitioner would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition.

22. For same cause of action, i.e. the challenge of the order of the respondent placing the appellant under suspension and prayer for quashing and setting aside thereof, the O.A. has been filed which order has been confirmed by this court in the writ petition which has been dismissed as withdrawn, this second petition is not maintainable.

23. Even if it is accepted for time being that the writ petitions has been filed by the appellant before this Court out of which this appeal arises, leaving apart the question whether it has to be dealt with in Single Bench of the Division Bench, for different reliefs or challenging the suspension order on different grounds, this remedy was still not available to the appellant. For this grievance also the appellant has to go first to the Tribunal. However, from our these observations it may not be taken by the appellant as if a verdict in his favour that the second O.A. is maintainable in the matter, before the Tribunal.

24. It is a clear case where the appellant has made an attempt to abuse the process of the court. The matter is not to be closed by the simplicitor dismissal thereof in limine. In such matters, the petitions are not only to be dismissed but exemplary costs are to be ordered against him.

25. As a result of the aforesaid discussion, this appeal is dismissed in limine with exemplary cost of Rs. 5000/- (Rs. five thousand). The appellant to deposit this amount of costs in the Relief Fund of His Excellency the Governor of Rajasthan within a period of one month from the date of receipt of the copy of this order. The receipt of the deposit of the cost in that Fund is to be placed on the record of the appeal. The appellant shall also inform to the respondent No. 3 for the deposit of the cost in the aforesaid Relief Fund. He will send zerox copy of the receipt of the deposit of the amount of the costs to the respondent No. 3 also. In case this direction is not complied with, it shall be the duty of the respondent No. 3 to file the appropriate application for taking action against the appellant for noncompliance of this direction. The copy of this order be sent to the appellant and the respondent No. 3 through registered post A.D.