
(2001) 08 AHC CK 0019
In the Allahabad High Court
Case No : Special Appeal No. 892 of 2001

Guru Charan Lal Srivastava	Vs	APPELLANT
Hindustan Aeronautics Ltd. and Others		RESPONDENT

Date of Decision : 29-08-2001

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 2(1), 7
Constitution of India, 1950 — Article 132, 133, 134, 135, 136

Citation : (2001) 4 AWC 2621 : (2001) 3 UPLBEC 2365

Hon'ble Judges : S.K. Sen, C.J;R.K. Agrawal, J

Bench : Division Bench

Advocate : A.K. Srivastava, for the Appellant; Bharti Sapru, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Aganval, J.—Guru Charan Lal Srivastava has filed present special appeal against the judgment and order dated July 11, 2001 passed by the learned single Judge, wherein the writ petition filed by the appellant-writ petitioner, had been dismissed, as not maintainable in view of the fact that the appellant-writ petitioner had earlier filed Writ Petition No. 33778 of 1995, which was also dismissed as withdrawn on 19.12.1995.

2. We have heard Sri Ashok Kumar Srivastava. learned counsel for the appellant and Miss Bharti Sapru, learned counsel appearing for the respondents. Briefly stated the facts giving rise to the present appeal are as follows :

According to the appellant-writ petitioner, he was appointed on July 20, 1962 in the unit Air Craft Manufacturing Depot. Air Force Station, Kanpur as A.C. Mechanic Grade III T/340. On June 1, 1964, he was sent on deputation to Hindustan Aeronautics Limited, Kanpur where he continued till August 31, 1991. His designation was "Mechanic B" in the Hindustan Aeronautics Limited. Kanpur. A Voluntary Retirement Scheme was introduced by the Management of Hindustan Aeronautics Limited which was known as "H.A.L. Employees Voluntary

Retirement Scheme, 1990. The appellant-writ petitioner also gave his option for voluntary retirement under the aforesaid scheme and was retired on 31.8.1991 vide order dated 10.8.1991.

3. According to the appellant-writ petitioner, he made an application on 11.2.1991 revoking his option to be voluntarily retired. The application dated 11.2.1991 was rejected by the respondents' authorities on 15.9.1995. He challenged the said order before this Court by filing Civil Misc. Writ Petition No. 33778 of 1995 in which he claimed the following reliefs :

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 15.9.1995 vide Annexure "18" to the writ petition and vide Annexure No. "1" at page 36 dated 10.8.1991.

(ii) issue writ, order or direction in the nature of mandamus commanding the respondents to restore the services of the petitioner prior to the date of 31.8.1991 without break in service with all consequential benefit of the intervening period of H.A.L.

(iii) issue any other writ, order or direction which this Hon"ble Court deems fit proper in circumstances of the case. In alternative petitioner prays for full and final settlement all dues by commanding respondents within period of one month.

(iv) award the cost of the writ petition to the petitioner."

4. The aforesaid writ petition was dismissed as withdrawn on the request made by his counsel vide order dated December 19, 1995. It may be mentioned here that during this period, the petitioner had already received the entire amount, which was due, and payable to him under the Voluntary Retirement Scheme.

5. After withdrawing the aforesaid writ petition, the petitioner filed another writ petition before this Court being Civil Misc. Writ Petition No. 37496 of 1995 giving rise to the present special appeal. The said writ petition was presented on December 19, 1995 itself before this Court. The appellant-writ petitioner has prayed the following reliefs in the aforesaid writ petition :

(a) to issue writ, order or direction in the nature of mandamus commanding the respondents to restore the service of the petitioner ignoring the voluntary retirement order and treat the petitioner in continuous service without break and also to pay regular monthly salary to the petitioner as per revised pay scale.

(b) to issue writ, order or direction in the nature of certiorari quashing all the orders passed for voluntary retirement of the petitioner and also order dated 15.9.1995 refusing the petitioner to resume duty.

(c) issue such other and further writ, order or direction as this Hon"ble Court may deem fit and proper in the Circumstances of the case.

(d) cost of the writ petition may be awarded in favour of the petitioner.

6. This writ petition was admitted on July 15, 1999. It came up for final disposal

before the learned single Judge on July 11, 2001 when a preliminary objection regarding the maintainability of the writ petition was raised by Miss Bharti Sapru, learned counsel appearing for the respondents. The objection was to the effect that the appellant-writ petitioner having filed a Writ Petition No. 33778 of 1995 praying for the same relief which has been dismissed as withdrawn without any liberty to file a fresh writ petition, the second writ petition for the same relief was not maintainable. The other objection was that the appellant-writ petitioner had not disclosed this fact of filing of the earlier writ petition and getting it dismissed as withdrawn in the second writ petition and, therefore, he had not approached this Court with clean hands. Both the objections were sustained by the learned single Judge and the writ petition was dismissed as not maintainable.

7. The learned counsel for the appellant-writ petitioner submitted that the writ petition having been admitted, the learned single Judge was not justified in dismissing the writ petition on the ground of being not maintainable. He further submitted that under Rule 7 of Chapter 22 of the Rules of the Court, the first writ petition had not been rejected and, therefore, the second writ petition filed by the petitioner was maintainable and mere not disclosure of this fact would not warrant the dismissal of the second writ petition. He relied upon the following decisions :

1. K.N. Singh and Ors. v. State of U. P. and Ors. (1999) 1 UPLBEC 368 (FB).
2. Cottage Industries Exposition (P.) Ltd. v. Additional District Magistrate Civil Supplies R.C.O., Varanasi and Ors. AIR 1992 761.
3. Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen and Another,

8. So far as the question of having taken the amount due and payable under the Voluntary Retirement Scheme so as to stop him from challenging the order of voluntary retirement is concerned, the learned counsel relied upon a decision of the Supreme Court in the case of Nar Singh Pal Vs. Union of India and Others,

9. The learned counsel for the respondent, on the other hand, submitted that under Chapter XXII, Rule 7 of the Rules of the Court, the second writ petition on the same fact and relief was not competent as the earlier writ petition has been dismissed by this Court vide order dated December 19, 1995 without giving any liberty to the appellant-writ petitioner to file another writ petition. According to her, it is immaterial as to whether the earlier writ petition has been dismissed as withdrawn or on any technical ground. Until and unless liberty is given by the Court to file a fresh writ petition, the second writ petition is not maintainable. She also relied upon the decision of the Supreme Court in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, , and also a decision of this Court in the case of Abdul Ghaffar and Anr. v. Ishtiyag Ahmad and Ors. 1989 Awn 297.

10. It is not in dispute that the appellant-writ petitioner had earlier filed Civil

Misc. Writ Petition No. 33778 of 1995 claiming substantially the same reliefs which he has claimed in Civil Misc. Writ Petition No. 37496 of 1995. Reliefs claimed in both the writ petitions have already been reproduced above. From a perusal of the reliefs claimed in the two writ petitions, it will be seen that in both the writ petitions, the appellant-writ petitioner has claimed the same reliefs. The Writ Petition No. 33778 of 1995, has been dismissed by this Court vide the judgment and order dated December 19, 1995, The said order is reproduced below :

"Heard.

Counsel for the petitioner wants to withdraw the writ petition.

The petition is dismissed as withdrawn."

11. No liberty or permission to file another writ petition was given to the petitioner by this Court while dismissing the writ petition as withdrawn. The effect of the order dated December 19, 1995 is that the writ petition has been rejected. Thus, the provisions of Rule 7, Chapter XXII of the Rules of the Court which reads as follows :

"7. No second application on same facts.--Where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts."

Is fully applicable and the second writ petition was not maintainable".

12. Moreover, the principle laid down by the Hon"ble Supreme Court in the case of Sarguja Transport Service (supra), would be applicable in the present case. In the said case, the Hon"ble Supreme Court has held as follows :

"9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryoo's case (supra) is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII 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 extraordinary 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. In the instant case the High Court was right in holding

that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under stands on a different footing altogether. We, however, leave this question open."

13. In the case of Abdul Ghaffar (supra), this Court has held that for the applicability of Rule 7, Chapter XXII of the High Court Rules, it is not necessary that the earlier writ petition should have been dismissed on merits. In the aforesaid case, this Court has held as follows :

"18. The submission is that since the first petition was not dismissed on merits, the second petition was maintainable. I do not agree. Rule 2 (1) quoted above clearly provides that if the Court does not find sufficient reasons to admit the petition it may reject it. The rule does not say that the rejection can only be on merits. The non-appearance of a petitioner can also be one of the reasons on the basis of which the petition can be rejected. If once the application is rejected there is clear prohibition in Rule 7 that the second application shall not be competent on the same facts. The Rules in my opinion are against the petitioner's case. The first petition having been rejected, the second petition was clearly not competent. The preliminary objection raised by the learned counsel for the respondents is correct."

Thus, the second writ petition in respect of the same subject-matter since the earlier had been withdrawn without permission to file afresh is not maintainable.

14. So far as the cases relied upon by the learned counsel for the appellant-writ petitioner is concerned, it may be mentioned here that the Full Bench of this Court in the case of K. N. Singh (supra), had held that when the Court had expressed in clear terms that it had not adjudicated on the submission made by the two direct recruits, the judgment of the Lucknow Bench on the mere reading of it may not be read as res-judicata hearing writ petition for that very relief which was not adjudicated and not decided by the Lucknow Bench.

15. Similar view was expressed by this Court in the case of Cottage Industries Exposition (P.) Ltd. (supra). The decision of Hon''ble Supreme Court in the case of Ahmedabad Manufacturing and Calico Printing Co. Ltd. (supra), has no application to the facts of the present case. In the aforesaid case, an award was given by the Industrial Tribunal. The award was challenged directly by the employers before the Hon''ble Supreme Court by filing SLP under Article 136 of the Constitution of India. The SLP was subsequently withdrawn vide order dated August 21. 1972. The Hon''ble Supreme Court had passed the following order :

"Upon hearing the counsel. Court allowed the SLP to be withdrawn."

Four days thereafter, the employer filed a petition under Article 226 of the Constitution of India before the High Court challenging the award. Before the High Court, a preliminary objection was raised that the High Court should not exercise discretion in granting relief to the employer under Article 226 of the Constitution after the withdrawal of the leave petition unconditionally which objection prevailed with the High Court. On these facts, the Hon''ble Supreme Court had held that the permission to withdraw the leave petition cannot be equated with an order of its dismissal.

16. The nature and the jurisdiction exercised by the Hon''ble Supreme Court under Article 136 of the Constitution of India came up for consideration before the Apex Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, . The Hon''ble Supreme Court has held as follows :

"13. The appellate jurisdiction exercised by the Supreme Court is conferred by Articles 132 to 136 of the Constitution. Articles 132, 133 and 134 provide when an appeal thereunder would lie and when not. Article 136 of the Constitution is a special jurisdiction conferred on the Supreme Court which is sweeping in its nature. It is a residuary power in the sense that it confers an appellate jurisdiction on the Supreme Court subject to the special leave being granted in such matters as may not be covered by the preceding Articles. It is an overriding provision conferring a special jurisdiction providing for invoking of the appellate jurisdiction of Supreme Court not fettered by the sweep of preceding Articles. Article 136 opens with a non-obstante clause and conveys a message that even in the field covered by the preceding Articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammelled reservoir of power incapable of being confined to definitional bounds : the discretion conferred on the Supreme Court being subjected to only one limitation, that is. the wisdom and good sense or sense of justice of the Judges. No right of appeal is conferred upon any party, only a discretion is vested in Supreme Court to interfere by granting leave to an applicant to enter in its appellate jurisdiction not open otherwise and as of right.

14. The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps (i) granting special leave to appeal ; and (ii) hearing the appeal. This distinction is clearly demonstrated by the provisions of Order XVI of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution shall be in Form No. 28. No separate application for interim relief need be filed, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex parte unless there be a caveat. The Court, if

it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in SLP is issued or who had filed a caveat, shall be entitled to oppose the grant of leave of interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the SLP. On hearing the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution are two clearly distinct stages. In our opinion the legal position which emerges is as under:

1. While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction ; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave ;
2. If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out ;
3. If leave to appeal is granted the appellate jurisdiction of the Court stands invoked : the gate for entry in appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him. though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noting the respondent ;
4. In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

Dismissal at stage of special leave without reasons no res judicata, no merger.

15. Having so analysed and defined the two stages of the jurisdiction conferred by Article 136, now we proceed to deal with a number of decisions cited at the Bar during the course of hearing and dealing with the legal tenor of an order of

Supreme Court dismissing a special leave petition. In *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another*, a three-Judge Bench of this Court has held that dismissal of SLP by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute *res judicata*. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted. That may be due to various reasons. During the course of the judgment, their Lordships have observed that dismissal of a SLP under Article 136 against the order of a Tribunal did not necessarily bar the entertainment of a writ petition under Article 226 against the order of the Tribunal. The decision of Madras High Court in the *Management of Western India Match Company, Ltd. Vs. Industrial Tribunal and Another*, was cited before their Lordships. The High Court had taken the view that the right to apply for leave to appeal to Supreme Court under Article 136, if it could be called a "right" at all, cannot be equated to a right to appeal and that a High Court could not refuse to entertain an application under Article 226 of the Constitution on the ground that the aggrieved party could move Supreme Court under Article 136 of the Constitution. Their Lordships observed that such a broad statement of law is not quite accurate, although substantially it is correct."

17. Thus, the SLP stands on entirely different footing than that of a writ petition under Article 226 of the Constitution of India. While the withdrawal of the SLP would not prohibit the aggrieved party to file a writ petition under Article 226 of the Constitution of India before the High Court, by withdrawing the writ petition the said person cannot be permitted to file afresh writ petition if no liberty has been given by the Court at that time to file a fresh petition.

18. So far as the decision of the Hon"ble Supreme Court in the case of *Nar Singh Pal (supra)*, is concerned, it may be mentioned here that in the said case, the Hon"ble Supreme Court has held as follows :

"13. The Tribunal as also the High Court, both appear to have been moved by the fact that the appellant had encashed the cheque through which retrenchment compensation was paid to him. They intended to say that once retrenchment compensation was accepted by the appellant, the chapter stands closed and it is no longer open to the appellant to challenge his retrenchment. This, we are constrained to observe, was wholly erroneous and was not the correct approach. The appellant was a casual labour who had attained the "temporary" status after having put in ten years" of service. Like any other employee, he had to sustain himself, or may be, his family members on the wages he got. On the retrenchment of his services, there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a meagre amount of Rs. 6,350 was utilised by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. As pointed out earlier, the

termination of the appellant from service was punitive in nature and was in violation of the principles of natural justice and his constitutional rights. Such an order cannot be sustained."

19. In the present case, the appellant-writ petitioner had out of his own free will opted to be retired voluntarily. He also accepted the entire amount due and payable to him under the said scheme and enjoyed its fruit for a considerable period of more than four years. It is not a case of retrenchment or termination of his services by the employer. Thus, no benefit can be derived by him from the principle laid down by the Hon"ble Supreme Court in the case of Nar Singh Pal (supra).

20. In view of the foregoing discussions, we do not find any legal infirmity in the judgment and order of the learned single Judge, The special appeal is dismissed.