

(2019) 04 UK CK 0174

In the Uttarakhand High Court

Case No : Special Appeal No. 301 Of 2019, Delay Condonation Application No. 4599 Of 2019

Jagdish Singh Rawat And Others

APPELLANT

Vs

State Of Uttarakhand And Others

RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 23 Rule 1
Constitution Of India, 1950 — Article 21, 32, 226

Citation : (2019) 04 UK CK 0174

Hon'ble Judges : Ramesh Ranganathan, CJ; N.S. Dhanik, J

Bench : Division Bench

Advocate : Arun Pratap Shah, S.S. Chaudhary, M.S. Rawat, D.S. Patni

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. Delay of 55 days in preferring the appeal is not opposed and the delay is, therefore, condoned. Delay Condonation Application is allowed.

2. This appeal is preferred against the order passed by the learned Single Judge in Writ Petition (S/S) No.46 of 2019 dated 08.01.2019. The appellants herein filed Writ Petition (S/S) No. 46 of 2019 seeking a mandamus commanding respondent nos. 2 to 4 to extend pay-scale and other facilities to them, as were given to regular employees of the Corporation, along with all other consequential benefits.

3. The petitioners, in Writ Petition No.46 of 2019, were also among the petitioners in Writ Petition (S/S) No.1203 of 2013; in its order dated 21.03.2018, this Court had observed that the said writ petition (Writ Petition (S/S) No.1203 of 2013) be treated to be filed only by petitioners 1, 2, 3, 6 and 7 therein, since the other petitioners had not pressed the writ petition. Among those petitioners, in Writ Petition (S/S) No.1203 of 2013 who did not press for adjudication of the writ

petition, were the appellants-writ petitioners herein. Liberty was neither sought before the learned Single Judge to file a fresh writ petition later, nor was any such liberty granted.

4. In the order under appeal, the learned Single Judge observed that the only plea taken, for filing the writ petition, was that there was lack of communication between the parties and their counsel earlier when the Counsel did not press the writ petition in so far as the petitioners herein are concerned; lack of communication would not constitute an excuse to invoke the writ jurisdiction consecutively for the same set of reliefs, that too when the earlier writ petition was dismissed without reserving liberty to file a fresh writ petition; in terms of the Vakalatnama, the counsel has been given authority not to press the proceedings; and a second writ petition would be barred by the principles enunciated under the Code of Civil Procedure, 1908.

5. Before us the very same contentions, as were put forth before the learned Single Judge, are urged by Mr. Arun Pratap Sah, learned counsel for the appellants-writ petitioners. When we asked learned counsel whether it was the earlier counsel's fault in not pressing for an adjudication of Writ Petition (S/S) No.1203 of 2013, learned counsel would answer in the affirmative. When we asked him, thereafter, whether the appellants-writ petitioners had initiated action, against the earlier counsel, by way of a compliant before the Bar Council, learned counsel would submit that they did not.

6. Having filed a writ petition, and having chosen not to press for its adjudication, and even without reserving liberty to file a fresh writ petition later, it is not open to the appellants-writ petitioners to file a writ petition afresh seeking the same set of reliefs all over again. In *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior, and others* : (1987) 1 SCC 5, the Supreme Court observed:-

".....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 *Daryao's case* 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 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 of the Constitution of India since such withdrawal does not amount to *res judicata*, the remedy under Article 226 of the Constitution of India 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 Article 21 of the Constitution since such a case stands on a different footing altogether. We however leave this question open....."

(emphasis supplied)

7. In the light of the aforesaid observations of the Supreme Court, in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior, and others* : (1987) 1 SCC 5, the learned Single Judge was justified in not entertaining a second writ petition seeking the same relief, when the earlier writ petition for the same relief was dismissed as not pressed; and the petitioners therein had neither sought, nor were they granted, liberty to file a fresh writ petition.

8. Mr. Arun Pratap Sah, learned counsel for the appellants-writ petitioners, would submit that non-payment of pay-scales, on par with regular employees of the Corporation, is a continuing wrong; and the appellants-writ petitioners are, therefore, entitled to approach this Court again, despite not pressing for the earlier writ petition, since the period for which regular pay-scales are now being sought by the appellants-writ petitioners is for the subsequent period. The very entitlement of the appellants-writ petitioners to be treated on par with the regular employees of the Corporation, and to be paid regular scales of pay, was in issue in the earlier writ petition; and, as that writ petition was dismissed as not pressed, the same issue cannot be agitated all over again in subsequent writ proceedings. The contention that there is a continuing wrong does not, therefore, merit acceptance.

9. In an intra-Court appeal interference is justified only if the order under appeal suffers from a patent illegality. We find no such infirmity in the order under appeal.

10. The appeal fails and is, accordingly, dismissed. No costs.