

(2015) 08 MP CK 0076
In the Madhya Pradesh High Court
Case No : Writ Petition No. 6749 of 2012

Rajesh Kumar Gupta

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 11
Constitution of India, 1950 — Article 226, 227

Citation : (2015) 08 MP CK 0076

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : Pratip Visoriya and Sandeep Bhadoriya, for the Appellant

Final Decision : Dismissed

Judgement

Sujoy Paul, J—In this petition filed under Article 226 of the Constitution, the petitioner has prayed for following relief"s:-

"(1) This, Hon"ble Court may kindly be pleased to allow the petition and the original answer-script of the petitioner may kindly be directed to be produced before this Hon"ble Court and the illegal tempering made by the respondents may kindly be declared to be void and the respondents may kindly be directed to provide the marks to the petitioner accordingly.

(2) Or alternatively in case the original answer script is destroyed, average marks may kindly be directed to be awarded to the petitioner.

(3) Further, the respondents may kindly be directed to appoint the petitioner as per his place in merit.

(4) Responsible persons for this illegal act of tempering may kindly be punished appropriately.

(5) Further, the respondent may kindly be directed to not to destroy the original answer-script of the petitioner.

(6) Cost of the petition may kindly be awarded.

(7) Any other relief, which this Hon"ble Court deems fit in the facts and circumstances may also kindly be granted."

2. Shri Pratip Visoriya and Shri Sandip Bhadoriya, learned counsel for the petitioner, contended that there are serious defects in the evaluation process of the answer sheet. Hence, the relief prayed for may be granted. Learned counsel for the petitioner have taken this Court to various documents to show that valuation process was faulty and illegal.

3. However, Shri R.D. Jain, learned senior counsel for the PSC, has taken a preliminary objection about maintainability of this petition.

4. In view of said objection, which goes to the root of the matter. I deem it apposite to first deal with the question of maintainability of this petition.

5. Respondent No. 2 has taken objection that the advertisement in question was issued on 18.8.2008. Preliminary examination was held on 11.01.2009. Main examination was held in December, 2009. Result was declared on 28.10.2010. The appointments have already been made. At this distance of time, no interference be made Shri Jain, learned senior counsel submits that initially the petitioner filed Writ Petition No. 313/2011 complaining that only 127 marks have been awarded to him out of 300 marks. The following relief was prayed in the said writ petition:-

"(i) For the purpose of adjudicating the claim of the petitioner, answer-sheets of Public Administration paper are required to be called and those may be got examined by the expert or by two of the experts of the subject. Expenditure of the same will be borne by the petitioner and if it is found that the petitioner is correct on his contention then exemplary cost may kindly be imposed upon the respondents.

(ii) Respondents may kindly be directed to produce the answer-sheets of Public Administration paper before this Hon"ble Court and those be rechecked by the experts and recounting of the marks may kindly be directed to be made.

Any other relief which this Hon"ble Court deems fit in the facts and circumstances of the case same may kindly be granted to the petitioner."

6. It is contended that the said relief was declined and writ petition was rejected.

7. The petitioner then filed second writ petition No. 2770/2012 arising out of same examination and in relation to subject of Public Administration (Paper-II). In this writ petition, he prayed for following relief"s:-

"1. This, Hon"ble Court may kindly be pleased to allow the petition and the answer script of the petitioner may kindly be directed to be evaluated by the independent expert of the subject.

2. Or alternatively this Hon"ble Court may kindly be pleased further to direct the

answer script be scrutinized by the subject expert or experts as to whether the same has been evaluated or not.

3. This Hon''ble Court may kindly be pleased to direct the verification of the copy by the hand writing expert that all the writing in awarding marks have been made by the same person or manipulation is made.

4. This Hon''ble Court may kindly be pleased to allow the petition and the respondent that, if thereafter the petitioner secures place in the merit list give him the appointment on the respective post.

5. Further, the respondent may kindly be directed to not to destroy the original answer-script of the petitioner.

6. This Hon''ble Court may kindly be pleased to stay further process of appointment.

7. Cost of the petition may kindly be awarded.

8. Any other relief, which this Hon''ble Court deems fit in the facts and circumstances may also kindly be granted."

8. It is urged that this petition (WP No. 2770/2012) is still pending, although not maintainable. The present petition is filed in relation to answer-script of General Studies (Paper I), which is allegedly tempered with. The objection of respondent No. 2 is that Writ Petition No. 313/2011 was withdrawn by the petitioner unconditionally. No liberty was prayed for and granted by this Court. In view of said withdrawal, the present petition is not maintainable. It is contended that if the petitioner is aggrieved by improper evaluation, he should have filed one petition challenging the entire selection. The petitioner cannot be permitted to file successive petitions subjectwise. It is contended that in absence of liberty given in earlier round of litigation, this petition is not maintainable. This is hit by analogous principle flowing from Section 11 (Explanation IV) of Code of Civil Procedure. Lastly, it is contended that the petition is barred by constructive res judicata. A relief which was due at the time when first petition was filed, should have been prayed in the first round itself.

9. Shri Sandip Bhadoriya, learned counsel for the petitioner, drew the attention of this Court on certain documents to contend that these documents were obtained by the petitioner after the earlier decisions in Writ Petition No. 313/2011 and 2770/2012. Hence, the said principles are not applicable.

10. I have heard learned counsel for the parties on this objection.

11. A Three-Judge Bench of Apex Court in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, AIR 1986 SC 391 : (1985) 2 SCALE 1123 : (1986) 1 SCC 100(1) : (1986) 1 SCC 100 : (1985) 3 SCR 766 Supp : (1986) 1 UJ 167 , opined as under:-

"20. So far as the first reason is concerned, the High Court in our opinion was

not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

(Emphasis Supplied)

A plain reading of this judgment shows that Explanation IV of Section 11, CPC, is very much made applicable in a proceeding filed under Article 226 of the Constitution. The principle culled out from the said judgment is that any matter which might and ought to have been made ground of attack in former proceeding shall be deemed to have been a matter directly and substantially in issue in the first matter. The principle underlying said Explanation is that where a party had an opportunity of controverting a position, that should be taken at the relevant time and decided.

12. In *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, AIR 1987 SC 88 : (1986) JT 808 : (1986) 2 SCALE 757 : (1987) 1 SCC 5 : (1987) 1 SCR 200 : (1987) 1 UJ 28 , the Apex Court opined as under:-

"8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. 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. 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 plain that when once a writ 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."

13. It is clear that when a petitioner withdraws a petition without obtaining permission to file a fresh petition, remedy under Article 226/227 is deemed to be abandoned in respect of the same cause of action. It is apt to remember here that cause of action for all the said petitions is same, i.e., declaration of result of same examination. If the petitioner is permitted to file petitions one by one, subject by subject, then it will be an abuse of process of law. This cannot be done unless a liberty is prayed for and given in the earlier round of litigation. In other words, the petitioner is aggrieved by improper evaluation. The said alleged improper evaluation was in various subjects. The petitioner should have challenged the entire illegality in one go or should have obtained liberty to assail it in subsequent proceedings. The basic purpose of applying principle of Rule 1 of Order 23, CPC, in writ petition is based on ground of public policy. It is to discourage a litigant from filing unnecessary and repeated litigations.

14. In *Madhya Pradesh Public Service Commission Vs. Om Prakash Gupta and Another*, (1997) 6 SCC 645, the Apex Court opined as under:-

"2. Thereafter, the respondent filed a second writ petition before the High Court praying that he should be selected for the post of Civil Judge, Second Class. In the second writ petition he filed an application for amendment to insert new paras 12, 13 and 14 in which he has expressed doubts regarding the key answers used in the evaluation of the written test. He also wants to amend the prayer clause by adding a prayer that the Commission should be directed to furnish the copy of the question paper, the key answers prepared by the Commission and the answer script of the respondent to enable him to demonstrate that some key answers are wrong and the respondent has been put to disadvantage and has been denied the marks to which he is entitled, on the basis of the correct answers to the questions. This amendment has been allowed. The High Court has added that in respect of the amendment, at the time of hearing the appeals, the respondent will be entitled to raise the plea of *res judicata*.

3. We fail to see how such an amendment could have been allowed. The correctness of evaluation of the answer-paper of the respondent was very much the subject-matter of the first writ petition. It was because of his contention that his answer-paper had not been correctly assessed that the High Court had directed the Commission to appoint an Expert Committee to re-evaluate his paper. Pursuant to it, his answer-paper was re-evaluated. He availed of the benefit of re-evaluation and took the opportunity of being selected by appearing at the interview. If the respondent had any doubt about the method of re-evaluation or had he wanted to contend that the key answer-paper with the help of which his answer-paper was valued or re-evaluated was not a correct key, this contention ought to have been taken by him in the first writ petition. After taking the advantage of the interim orders passed in that petition, and getting his paper re-evaluated, he cannot now contend by filing another writ petition that the key

answer-paper is wrong. Even in the proposed amendment, apart from an allegation that the key answers are wrong, there is no material on which this allegation is founded. The key answers are in the possession of the Commission. The respondent has asked for the production of the key answer-paper so that he can demonstrate that the key answers are wrong. We fail to see how such a vague allegation should be countenanced when admittedly, the respondent has not even seen the key answers. His prayer for production of key answers with a view to demonstrate that some of them are wrong, is more in the nature of a fishing inquiry. If at all such a plea had to be raised, it should have been raised in the first writ petition when he got his answer-paper re-evaluated. The contentions sought to be raised by way of an amendment of this kind in a writ petition after the disposal of the earlier writ petition are barred by principles analogous to *res judicata*."

15. In view of aforesaid judgments and analysis, it is clear that this successive petition is not maintainable. Apart from this, in *Mohd. Siddiq Ali Vs. High Court of A.P. through Registrar and Others*, AIR 2005 SC 4380 : (2006) 108 FLR 58 : (2005) 9 JT 285 : (2005) 8 SCALE 580 : (2005) 13 SCC 207 : (2006) SCC(L&S) 745 : (2005) AIRSCW 5388 : (2005) 7 Supreme 317 , the Apex Court declined interference because sufficient time was elapsed from the date of selection. The selected candidates were appointed (Para 9). In *Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another*, (1998) 7 JT 121 : (1998) 5 SCALE 490 : (1999) 1 SCC 330 : (1999) SCC(L&S) 208 : (1998) 2 SCR 187 Supp : (1999) 1 UJ 60 , the Supreme Court declined relief to the appellant therein because recruitment process had gone too far ahead. Selected candidates had already been appointed. They were working at different places. None of them were impleaded in the litigation. Same is the case here. Selection is over and selected candidates have already been appointed. They joined their respective posts/places. None of them are impleaded in the present matter.

16. For these cumulative reasons, the preliminary objection is upheld. Petition is dismissed as not maintainable. Hence, the question of adjudication of matter on merits does not arise.

17. Petition is dismissed.