
(2009) 08 SHI CK 0043
In the High Court Of Himachal Pradesh

Sh. Sudarshan Sharma

APPELLANT

Vs

B.S.N.L. and Others

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, 11

Citation : (2009) 3 ShimLC 300 : (2009) 2 ShimLC 384

Hon'ble Judges : Surinder Singh, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—The petitioner by means of this writ petition has prayed that the tender awarded by the respondents Bharat Sanchar Nigam Limited (BSNL) in favour of private respondent No. 5 be quashed, the petitioner be declared to be the only eligible bidder and the respondent No. 5 be held to be disqualified.

2. The case of the petitioner is that for the last many years he has been handling the transportation of telecom stores of the BSNL Store Depot Jassur to various stations. According to the petitioner, the respondents first floated a tender on 6.11.2008 for handling and transportation of telecom stores by Motor Vehicles in November, 2008. One of the conditions of the original document was that the person must produce attested copy of the registration with EPF authorities. According to the petitioner, the private respondent did not fulfil this condition and his tender was bound to be rejected. However, with a view to help the private respondent the BSNL invited fresh bids and modified the terms and conditions of the bid and according to the fresh conditions not those bidders who were registered with the EPF authorities but also those who have applied for registration with the Employees Provident Authority were made eligible. According to Sh.Anup Rattan this modification was made only with a view to help the private respondent. He further contents that the private respondent's application for registration with the EPF authorities had been rejected by that stage and the tender of the petitioner was rejected on flimsy grounds.

3. On the other hand, the case of the respondents is that the condition with regard to the registration with EPF authorities was modified to widen the scope of the tender since the petitioner had a monopoly and for the last five years nobody else was eligible on this count alone. To ensure that there is more competition this condition of the bid was modified. The respondents have also raised a preliminary objection that the petitioner is not entitled to claim any relief in this petition in view of the fact that he had earlier filed a suit before the Civil Judge (Senior Division) Kangra and he had omitted to claim this relief in the suit. According to the BSNL the petitioner cannot be permitted to go forum hunting and file a suit as well as a writ petition virtually in respect of the same cause of action. The plaint filed by the petitioner before the Civil Judge (Senior Division), Kangra has been attached as Annexure R-5/3.

4. The allegations made in the suit are that the private respondent was not eligible for grant of EPF Code by the EPF authorities and therefore he is not eligible. He has also challenged the disqualification of his bid. It is therefore apparent that the cause of actions in the writ petition and civil suit are identical. The Suit was filed on 25.3.2009 and bids were opened on 26.3.2009. Along with the civil suit the petitioner has also filed an application for grant of stay restraining the BSNL for opening the financial bid. This application was dismissed on 26.3.2009. The writ petition was drafted on 26.3.2009 but filed in the Court on 28.3.2009. In the writ petition though a passing reference has been made about the filing of the civil suit, neither the copy of the plaint was attached nor any reference was made to the filing of the application for grant of stay or the dismissal thereof. The petitioner for reasons best known to him chose to initiate legal proceedings before the Civil Court. After having failed to obtain a stay order from the Civil Court he cannot be permitted to file the present writ petition that too without disclosing the factum of his stay application having been dismissed.

5. Writ Petitions are decided on the basis of the affidavits and it is well settled law that a person coming to Court must disclose all relevant facts. It would be relevant to refer to the following allegations made by the petitioner in regard to the suit filed by him:

10 ...The petitioner thereafter again preferred civil suit when fresh tender process was initiated to restrain the respondents from completing the process of tender. It is specifically submitted that the impugned action of the respondents of disqualifying the petitioner was never challenged before any court of law....

6. It is apparent that the petitioner tried to mislead the Court by stating that he had filed the suit when fresh tender process was initiated to restrain the respondents from completing the process of tender. He made a specific submission that the action of the respondents disqualifying the petitioner was not challenged before any Court of law.

7. Now it would be pertinent to make reference to the suit. In the suit the prayer was to the following effect:

Suit for the grant of decree for declaration to the effect that the defendants be not open the financial bid on 26.3.2009 and to take further proceedings, as the plaintiff fulfils the bidder's eligibility and qualifications as per Section 11, i.e. instructions for the Bidder that he is the only eligible and competent person for notice inviting tender vide No. Abridge NIT No. Tender-937/Store Carriage /2008-09/04, dated 22.1.2009 detailed NIT No. Tender-937/Store Carriage/2008-09/03, dated 22.1.2009 and for a decree of permanent injunction restraining the defendants No. 1 and 2 to open the financial bid and to take further proceedings, on 26.3.2009, under Sections 38 & 39 of the Specific Relief Act. In the alternative, for mandatory injunction ordering to restore the tender in its original shape including the financial bid.

8. It is thus clear that the petitioner's main prayer was that he is eligible and qualified for the bid. The natural corollary is that he was aggrieved against his disqualification. In para 11 of the plaint the plaintiff clearly stated that he has been declared to be disqualified vide letter dated 20.3.2009. He was free to challenge his disqualification specifically in the suit itself. It is not the case of the petitioner that the civil court did not have jurisdiction to entertain a suit claiming such relief. When a party files a suit it should claim all the reliefs claimed by it in the suit. Order 2 Rule 1 of CPC lays down that the suit should be framed in such a manner so that there can be final decision upon subject in dispute and further litigation is prevented. Order 2 Rule 2 reads as follows:

2. Suit to include the whole claim.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

9. A bare reading of this Order shows that in case a plaintiff fails to claim all the reliefs which he is entitled to make in respect of the cause of action then unless he has taken permission of the Court he is debarred from suing in respect of the portion so omitted or relinquished. When the plaintiff filed the suit he could have made a specific prayer that his bid has been wrongly held to be ineligible. In fact the plaintiff has made this prayer though in a round about way. The plaintiff has claimed in the suit that he fulfils the bidder qualification and is the only competent bidder. This virtually amounts to challenging the decision holding him to be ineligible. Even if we are to hold that this is not a specific challenge then also we are of the considered view that the petitioner cannot be permitted to

challenge the same in this writ petition on the principles laid down in Order 2 Rule 2 CPC.

10. Sh. Anup Rattan, learned Counsel for the petitioner urges that principles of Order 2 Rule 2 are not applicable to writ proceedings in view of the provisions of Section 141 of the CPC. There can be no quarrel with the proposition that the CPC per se is not applicable to writ proceedings. This has been held so in a number of cases including *Puran Singh and others Vs. State of Punjab and others*, However, after holding that the provisions of the CPC are not applicable to writ proceedings the Apex Court went on to hold as follows:

11. ...Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well recognised principles for exercise of discretionary power and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.

11. Sh. Anup Rattan, learned Counsel has also placed reliance on *Devendra Pratap Narain Rai Sharma Vs. State of Uttar Pradesh*, *v. Purushotham Rao v. Union of India and Ors.* (2001) 10 SCC 305, *Association of Registration Plates Vs. Union of India (UOI) and Others*, and *B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others*, and urges that the provisions of CPC are not applicable to writ proceedings.

12. In *v. Purushotham Rao's* case (supra) the Apex Court held that the provisions of Order 2 Rule 2 are not applicable to the writ proceedings. The question framed by the Apex Court is in Para 17 and reads as follows:

(b) Would the principle of constructive res judicata as provided u/s 11 explanation 4 of the CPC or Order 2 Rule 2 CPC apply to a public interest litigation and if so, in the case in hand, can it be said that the writ petitions filed by the Centre for Public Interest Litigation in Delhi High Court from out of the judgment of which the present appeals have been preferred, are barred by the aforesaid principles on the ground that in the petition filed under Article 32 by the said Centre, no prayer for cancellation of illegal allotments had been made, though could have been made? and what is the impact of the observations made by the three Judge Bench in the review petition filed by Captain Satish Sharma, which stood disposed of by the judgment reported in *Common Cause, A Registered Society Vs. Union of India and Others*,

13. The answer to the aforesaid question has been given in para 19 which reads as follows:

21. Coming to the second question, Explanation (IV) to Section 11 of the CPC postulates 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. Order II Rule (2) of the CPC provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and if he omits to sue in respect of, or intentionally relinquishes. any portion of his claim, then he shall not afterwards sue in respect of the portion, so omitted or relinquished. By virtue of explanation to Section 141 of the Code of Civil Procedure. since proceedings under Article 226 of the Constitution is excluded from the expression "proceedings", therefore, the CPC is not required to be followed in a proceeding under Article 226 unless the High Court itself has made the provisions of CPC applicable to a proceeding under Article 226. Then again, the principles of Section 11 as well as Order II Rule 2, undoubtedly contemplate an adversarial system of litigation, where the Court adjudicates the rights of the parties and determines the issues arising in a given case. The Public Interest Litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such case, merely, brings it to the notice of the Court, as to how and in what manner the public interest is being jeopardised by arbitrary and capricious action of the authorities....

14. In our opinion the law laid down by the Apex Court does not apply to the present case on two grounds; one that the judgment rendered by the Apex Court was in respect of public interest litigation which is non-adversarial in nature. Here we are not dealing with a public interest litigation but with a personal interest litigation. Secondly the Apex Court was dealing with a situation where both the proceedings were writ proceedings. In such a eventuality there can be no doubt that even the principles of Order 2 Rule 2 would not apply. However, in the present case the petitioner filed a civil suit. What Order 2 Rule 2 prohibits is not only the filing of a subsequent suit. Order 2 Rule 2(2) clearly lays down that where a plaintiff omits to sue in respect of , or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. Similarly Order 2 Rule 2 (3) provides that if one relief has not been prayed for, the plaintiff cannot later sue for the said relief. Therefore, what has been prohibited is the right to sue. The right to sue by its very nature would mean the right to file any legal proceedings which would include a writ petition. We may compare the provisions of Order 2 Rule 2 with Order 9 Rule 9. Under Order 9 Rule 9 if a suit is dismissed in default of appearance of the plaintiff and the said order is not set-aside the plaintiff is debarred from filing a fresh suit in respect of the same cause of action. Therefore, what is barred is a suit and not all legal proceedings. On the other hand under Order 2 Rule 2 the right to sue has been taken away. The right to sue is a much wider phrase and will cover the filing of a writ petition.

15. We also feel that the petitioner by his conduct is not entitled to claim any relief from this Court. He misled the Court by claiming that he has not challenged

his disqualification. He purposely did not annex the copy of the plaint with the writ petition. He totally withheld the fact that he had filed an application for grant of stay which application was dismissed before the writ petition was actually filed in the Court. The petitioner is guilty of suppressing material facts and trying to mislead this Court. We therefore dismiss the writ petition with costs assessed at Rs. 10,000/-.