
(2015) 09 SHI CK 0058
In the High Court Of Himachal Pradesh
Case No : LPA No. 374 of 2012

Sunder Lal

APPELLANT

Vs

Himachal Pradesh State Forest Corporation and Others

RESPONDENT

Date of Decision : 03-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 21, 226, 32
Industrial Disputes Act, 1947 — Section 25-O, 25-O(1), 25-O(3)

Citation : (2015) 09 SHI CK 0058

Hon'ble Judges : Mansoor Ahmad Mir, C.J.; Dharam Chand Chaudhary, J

Bench : Division Bench

Advocate : Kunal Verma, for the Appellant; Pranay Pratap Singh, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dharam Chand Chaudhary, J—Challenge herein is to the judgment dated 25th June, 2012 passed by learned Single Judge in CWP No. 309 of 2012, whereby while taking note of the dismissal of earlier writ petition, CWP(T) No. 11752 of 2008, filed by the appellant (hereinafter referred to as the "writ petitioner") on the same cause of action and on similar grounds, as withdrawn and without reserving any liberty to file fresh writ petition, has dismissed the same.

2. The writ-petitioner was working as Forest Guard in respondent No. 1-Corporation and retired as such from Forest Working Unit, Rohroo under forest Working Division, Sawra, District Shimla. Being Incharge of Private Sale Lot, Chuck Sheeladesh, Tehsil Rohroo during the period from 1995 to January, 2000, he along with his superiors i.e. Mast Ram Kashyap, Assistant Manager and Tarveej Kumar, B.O. was found to have failed in the discharge of his duties sincerely and honestly and thereby caused huge financial loss to respondent No. 1-Corporation. Therefore, departmental inquiry was ordered to be initiated against him and also aforesaid S/Shri Mast Ram and Tarveej Kumar. They were

served with common charge-sheet. On the conclusion of the inquiry, the Inquiry Officer, however, exonerated all of them from the charges framed against each of them. The disciplinary authority though disagreed with the findings recorded by the Inquiry Officer, however, without recording tentative reasons and proposed to impose penalty of Rs. 53,709/- upon each of them. Their version on the penalty so proposed to be imposed upon them was sought and after taking the same on record, the penalty was imposed vide office order dated 22.12.2004, Annexure P-8. The writ-petitioner had assailed the penalty so imposed upon him by filing Original Application in the H.P. State Administrative Tribunal, which later on came to be transferred to this Court and registered as CWP(T) No. 11752/08. Sh. Tarveej Kumar Sharma aforesaid had also assailed the penalty so imposed upon him vide order, Annexure P-8 in the H.P. State Administrative Tribunal and the same was registered as CWP(T) No. 11751 of 2008. It appears that on account of disciplinary proceedings initiated against the writ-petitioner and the pendency of CWP(T) No. 11752/08, proficiency step-up/increment as admissible to him under Assured Career Progression Scheme was withheld by respondent No. 1-Corporation. Therefore, the writ-petitioner with a view to get the same released in his favour decided to withdraw the writ petition and submitted application, Annexure R-2 to the reply filed in the writ petition to the competent authority i.e. Director (South) Himachal Pradesh State Forest Corporation, Shimla, the 2nd respondent submitting therein that amount of penalty i.e. Rs. 53,709/- stands deposited in the office of 3rd respondent on 22.09.2010 and that since learned counsel representing him in the pending writ petition was out of station, therefore, on his arrival at Shimla, he will withdraw the writ petition also and produce the copy of the order. Along-with Annexure R-2, he also furnished receipt Annexure R-2 (Colly.) as proof qua deposit of Rs. 53,709/- in the office of 3rd respondent. On his depositing the amount in question and also having given undertaking to withdraw the writ petition, the respondent-Corporation had allowed him to withdraw the due and admissible benefits under the Assured Career Progression Scheme, as is apparent from the perusal of memo dated 18.03.2011, Annexure P-1(Colly.) to the writ petition. Later on the writ-petition (CWP(T) No. 11752/08) was dismissed as withdrawn vide order dated 15.12.2010, Annexure P-10/R-1 to the writ petition/reply filed thereto.

3. The writ petition filed by Sh. Tarveej Kumar aforesaid, a similarly situated person on the same cause of action and with similar grounds, has been allowed by this Court vide judgment dated 23.12.2010, Annexure P-9 to the writ petition. The petitioner also seeks similar benefit as has been granted to Sh. Tarveej Kumar Sharma.

4. Learned Single Judge after hearing the parties on both sides and taking into consideration pleadings and also other material available on record has dismissed the writ petition vide judgment under challenge in this appeal while holding that since the previous instituted writ petition, CWP(T) No. 11752/08 filed on the same cause of action and similar grounds was withdrawn by him without seeking permission to file fresh, therefore, he is not entitled to the relief sought.

5. The challenge to the judgment passed by learned Single Judge is on the grounds inter-alia that the same is against law and facts of the case and also that when the Inquiry Officer has exonerated him from the charges as framed; the disciplinary authority could have not imposed any penalty upon him. Learned Single Judge allegedly adopted a hyper-technical approach in the matter and erred in law in not appreciating that the case of the writ-petitioner was squarely covered by the judgment of this Court in CWP(T) No. 11752/08, Annexure P-9.

6. The following points arise for determination in the present appeal:

"1. Whether withdrawal of Civil Writ Petition No. 11752/08 by the petitioner without seeking liberty to file fresh writ on the same cause of action, in the given facts and circumstances does not bar the institution of subsequent writ petition?

2. In case point No. 1 is answered in affirmative, whether the petitioner is entitled to the same relief as a Co-ordinate Bench of this Court has granted to Tarveej Kumar Sharma, the petitioner in CWP(T) No. 11751/08 vide judgment Annexure P-8 to original writ petition?"

7. Now if coming to point No. 1 supra, the law is no more res-integra. The apex Court in *Sarguja Transport Service versus State Transport Appellate Tribunal, Gwalior and others*, AIR 1987 Supreme Court 88, while discussing the scope of Order 23 Rule 1 of the Code of Civil Procedure and also the principle of res-judicata and considering the question of filing fresh writ petition in a situation when the previously instituted writ petition on the same cause of action was sought to be withdrawn without reserving any liberty to file fresh, has held that in the interest of administration of justice, the same should be extended to the cases of withdrawal of writ petition, may not be on the ground of res-judicata but on the ground of public policy. This judgment reads as follows:

"9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Art. 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* (supra) is of no assistance. But we are of the view that the principle underlying R. 1 of O. 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 Art. 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 Art. 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Art. 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 Art. 21 of the Constitution since such a case stand on a different footing altogether. We, however, leave this question open."

8. It is seen from the ratio of the judgment *ibid* that the factors such as preventing of Bench hunting and the writ petitions are mostly sought to be withdrawn without any liberty to file fresh at a stage when the Court is not inclined to admit the same with malafide intention by such unscrupulous persons have weighed with the Hon'ble Supreme Court while holding that in a case of this nature, fresh petition cannot be filed. However, a Larger Bench of the Supreme Court in *Sarva Shramik Sanghatana (K.V.) Mumbai versus State of Maharashtra and others*, AIR 2008 Supreme Court 946 has distinguished the decision in *Sarguja Transport's* case *supra* and held that the same cannot be treated as a euclid formula and in case the withdrawal of the previous petition was not tainted with any malice or for extraneous reasons and rather bonafide, the subsequent petition is not barred. This judgment reads as follows:

"10. Learned counsel for the appellant has strongly relied on the decision of this Court 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 . He has submitted that in that decision this Court has laid down that if a writ petition filed in a High Court is withdrawn without permission to file a fresh writ petition, a second writ petition for the same relief is barred. Learned counsel for the appellant submitted that in the order of the Labour Commissioner dated 12.4.2007, a copy of which is Annexure P-4 to this appeal, it is only mentioned that the applicant company is allowed to withdraw its application under Section 25-O(1) seeking permission for closure of its textile mill, but there is no mention in the said order that the Company is given liberty or permission to file a fresh application under Section 25-O(1). Accordingly, he submitted that the decision of *Sarguja Transport* case (*supra*) squarely applies to the present case. He submitted that although the decision in *Sarguja Transport* case (*supra*) related to a writ petition, the ratio of that decision was based on public policy, and hence it was also application to proceedings under Section 25-O of the Industrial Disputes Act.

11. We have carefully examined the decision of the *Sarguja Transport Service* case (*supra*). In the said decision it is mentioned in paragraph 8 as follows:

"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 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."

12. In paragraph 9 of the said decision, it is also mentioned as follows:

"But we are of the view that the principle underlying R.1 of O. XXIII of the Code 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 as explained above. It would also discourage the litigant from indulging in bench-hunting tactics."

13. We are of the opinion that the decision in *Sarguja Transport case* (*supra*) has to be understood in the light of the observations in paragraphs 8 & 9 therein, which have been quoted above. The said decision was given on the basis of public policy that, if while hearing the first writ petition the Bench is inclined to dismiss it, and the learned counsel withdraws the petition so that he could file a second writ petition before what he regards as a more suitable or convenient bench, then if he withdraws it he should not be allowed to file a second writ petition unless liberty is given to do so. In other words, bench-hunting should not be permitted.

14. It often happens that during the hearing of a petition the Court makes oral observations indicating that it is inclined to dismiss the petition. At this stage the counsel may seek withdrawal of his petition without getting a verdict on the merits, with the intention of filing a fresh petition before a more convenient bench. It was this malpractice which was sought to be discouraged by the decision in *Sarguja Transport case* (*supra*).

15 to 18. xxxxx xxx xxx xxxx

19. We have referred to the aforesaid decisions and the principles laid down therein, because often decisions are cited for a proposition without reading the entire decision and the reasoning contained therein. In our opinion, the decision of this Court in *Sarguja Transport case* (*supra*) cannot be treated as a Euclid's formula.

20. In the present case, we are satisfied that the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent-company had received a letter from the Deputy Labour Commissioner on 5.4.2007 calling for a meeting of the parties so that an effort could be made for an amicable settlement. In fact, the respondent-company could have waited for the expiry of 60 days from the date of filing of its application under Section 25-O(1), on the expiry of which the application would have deemed to have been allowed under Section 25-O(3). The fact that it did not do so, and instead applied for withdrawal of its application under Section 25-O(1), shows its bona fide. The respondent-company was trying for an amicable

settlement, and this was clearly bona fide, and it was not a case of bench hunting when it found that an adverse order was likely to be passed against it. Hence, Sarguja Transport case (supra) is clearly distinguishable, and will only apply where the first petition was withdrawn in order to do bench hunting or for some other mala fide purpose."

9. The point in issue in the case in hand is squarely covered by the decision of the Hon"ble Apex Court in Sarva Shramik Sanghatana's case supra in favour of the writ petitioner, because in the case before the Apex Court, the application under Section 25-O(1) was sought to be withdrawn bonafide by the respondent-Corporation, consequent upon the letter of Deputy Labour Commissioner, whereby a meeting of the parties was called to make efforts for an amicable settlement. The respondent-Corporation in that case though could have waited for the expiry of 60 days from the date of filing of the application under Section 25-O(1) of the Act and as on the expiry of such period, the application would have been deemed to be allowed in terms of Section 25-O(3) of the Act, however, it did not do so and instead applied for withdrawal of the application under Section 25-O(1) immediately on receipt of letter from Deputy Labour Commissioner, hence found to have acted bonafide. It was not found to be an instance of Bench hunting and rather the withdrawal of application was merely for the purpose of an amicable settlement, hence bonafide. The Apex Court, therefore, held that the subsequent application was not barred. Similar are the facts in the case in hand, because neither the Court was declined to admit CWP(T) No. 11752/08 instituted by the petitioner previously nor the present is a case of Bench hunting and rather the previous writ petition was withdrawn by the writ petitioner enabling him to get the increment withheld by the respondent-Corporation on account of inquiry initiated against him and the pendency of the writ petition. As a matter of fact, as per memo dated 18.03.2011, Annexure P-1 (Colly.) to the reply filed in the original writ petition, Sh. Tarveej Kumar Sharma aforesaid had also given an undertaking to withdraw the writ petition, CWP(T)No.11751/08 in order to get the increment released in his favour and further promotion, which was withheld by the respondent-Corporation on account of penalty imposed upon him and the pendency of writ petition. Though the increment was released in his favour and he was also promoted, however, he did not withdraw the writ petition and rather prosecuted the same to its logical end. As a result thereof, judgment Annexure P-9 came to be passed by another Co-ordinate Bench quashing thereby the office order, whereby the penalty of recovery of Rs. 53,709/- was imposed upon said Sh. Tarveej Kumar and also the original petitioner. True it is that the liberty was granted to the respondent-Corporation to proceed with the matter in accordance with law, however, as per the statement made by learned counsel representing the respondent-Corporation and taken on record, on the previous date, the amount of penalty i.e. Rs. 53,709/- imposed upon said Sh. Tarveej Kumar Sharma was not recovered from him consequent upon the judgment Annexure P-9. This order reads as follows:

"Mr. Pranay Pratap Singh, learned counsel for the respondents, stated at the Bar

that he is under instructions to make a statement that Shri Tarveej Kumar Sharma, Deputy Ranger, had also questioned the punishment made by the disciplinary authority, stands exonerated by the disciplinary authority in terms of the judgment made by a learned single Judge of this Court in CWP(T) No. 11751 of 2008. His statement is taken on record."

Therefore, the only inescapable conclusion would be that the judgment Annexure P-9 stands implemented and the penalty imposed upon him is set aside. The petitioner, a similarly situated person dealt with departmentally under the similar circumstances and with the same charges and even the penalty imposed upon him is also same as well as imposed vide common order, cannot be treated indifferently and allowed to be discriminated against similarly situated person i.e. Tarveej Kumar Sharma aforesaid nor the writ petition can be said to be barred merely that the previous writ petition was withdrawn by the writ petitioner. Learned Single Judge has failed to draw a distinction in a case where the withdrawal of the previously instituted petition was tainted with malice and for bench hunting and those like the present one, where the withdrawal of the previous writ petition was bonafide having no element of malice and has, therefore, erred in law while dismissing the writ petition on the sole ground that the previously instituted writ petition was withdrawn by the writ petitioner without seeking liberty to file fresh. The judgment under challenge is, therefore, not legally sustainable.

In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. There shall be a direction to the respondent-Corporation to extend the benefit of judgment Annexure P-9 rendered by a Co-ordinate Bench of this Court in CWP(T) No. 11751/08 titled Tarveej Kumar Sharma versus Himachal Pradesh State Forest Corporation and others, in case the same has attained finality to the petitioner and refund Rs. 53,709/- to him, within two months from the date of production of a copy of this judgment before 1st respondent, failing which together with interest @ 9% per annum from the date of this judgment till the payment is made.

10. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.