
(2015) 07 AHC CK 0099
In the Allahabad High Court
Case No : Special Appeal No. 106 of 2015

Vikas Chandra Srivastava

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Uttar Pradesh Public Services (Tribunal) Act, 1976 — Section 6

Citation : (2015) 7 ADJ 38 : (2015) 112 ALR 190 : (2015) 6 AWC 5777

Hon'ble Judges : Dinesh Maheshwari, J; Rakesh Srivastava, J

Bench : Division Bench

Advocate : Arvind Kumar, for the Appellant

Final Decision : Dismissed

Judgement

Dinesh Maheshwari, J—By way of this intra-Court Appeal, the petitioner-appellant seeks to challenge the order dated 9.3.2015 passed in Writ Petition No. 666 (SS) of 2015 whereby, the learned Single Judge has declined to exercise writ jurisdiction under Article 226 of the Constitution of India in the appellant's challenge to the communications dated 09.09.2013 and 16.09.2013, by which, the concerned authorities were directed to file a Civil Suit for recovery of the amount of loss said to have been caused by the appellant to the Government.

2. Put in a nutshell, the basic submissions of the petitioner-appellant in the writ petition had been that no such Civil Suit was maintainable against him and hence, the orders issued for filing of the suit suffered from want of authority of law; and further, for having been issued without opportunity of hearing, called for interference in the writ jurisdiction. The learned Single Judge, however, found the writ petition to be rather misconceived with the observations that the question of maintainability of the suit was to be examined by the trial Court, where the petitioner-appellant could file his objections. The learned Single Judge, therefore, dismissed the writ petition with a short order that reads as under:--

"Supplementary affidavit filed in court, today, be placed on record.

By means of instant writ petition, the petitioner is challenging the order dated 09.09.2013 and 16.09.2013 by which directions have been issued to Engineer-in-Chief, Public works Department, to file a suit for recovery of losses caused by the petitioner to the department.

On a query being made to learned counsel for petitioner as to how the present writ petition is maintainable, learned counsel for petitioner submitted that the order of filing of civil suit against the petitioner for recovery towards the losses caused by him to the department is without authority of law and the same has been passed without affording any opportunity of hearing to the petitioner, therefore, the instant writ petition is maintainable.

Sri Badrul Hasan, learned Additional Chief Standing Counsel, while opposing the writ petition submitted that the petitioner will get ample opportunity to contest the suit by raising all pleas as have been raised by him in the instant writ petition, therefore, the writ petition is not maintainable.

I have considered the submission of learned counsel for rival parties and gone through the record as well as the impugned order.

The State Government has directed for filing of civil suit for recovery of losses caused by the petitioner to the department. The question as to whether the civil suit would be maintainable or not, is to be examined by the trial court, where the petitioner may file his objection.

In view of above, this Court, while exercising extra-ordinary jurisdiction under Article 226 of the Constitution, finds that the writ petition being misconceived is not maintainable.

Accordingly, the writ petition is dismissed."

3. Put in brief, the relevant background aspects of the matter had been that the appellant served with the Public Works Department of the Government of Uttar Pradesh and retired from service on 31.07.2005 as Junior Engineer. Prior to his retirement, departmental proceedings were initiated against the appellant by the order dated 27.3.2004 for the irregularities, said to have been committed during the period 2002-04; and he was placed under suspension by the order dated 31.3.2004. The appellant superannuated during the pendency of enquiry.

4. It appears that permission to continue with the proceedings after retirement of the appellant under Regulation 351-A of the Civil Service Regulations was granted on 10.5.2006. Ultimately, the departmental proceedings were concluded by an order of the concerned Chief Engineer dated 28.12.2006 whereby, an amount of Rs. 8.83 lakhs was ordered to be recovered from the post-retiral dues of the appellant after he was found liable for the loss caused to the Public Exchequer to the above extent.

5. Aggrieved by the aforesaid order dated 28.12.2006, the petitioner-appellant

preferred a Writ Petition [No. 1127 (SS) of 2007] which was considered and allowed by a learned Single Judge on 08.01.2010, essentially on the ground that the enquiry proceedings were conducted in disregard of the principles of natural justice and as such, the impugned order suffered from serious infirmities. The order of recovery was accordingly quashed with directions to the respondents to "make the payment of all the retiral benefits forthwith". The petitioner-appellant asserts that this order dated 08.01.2010 passed in Writ Petition No. 1127 (SS) of 2007 has attained finality.

6. The petitioner-appellant had stated grievance in the manner that in the teeth of the aforesaid order of this Court dated 08.01.2010, the respondent-Chief Engineer addressed a communication to the State Government on 22.11.2010 seeking permission to recover the loss through the Civil Court as "civil liability" of the appellant whereupon, the State Government constituted a Committee who made a recommendation for audit inspection and, on the basis of the audit report, the State Government proceeded to issue a direction to recover an amount of Rs. 30,69,072/- from the appellant by way of a Civil Suit; and a communication was, accordingly, sent by the Secretary to the Chief Engineer (Development), Public Works Department on 09.09.2013; and later on, consequential communication was issued by the Chief Engineer (Litigation) to the Chief Engineer, Faizabad Division, Faizabad on 16.09.2013 for filing of the Civil Suit. Pursuant to the aforesaid communications, a legal notice dated 31.12.2014 was sent by the ADGC (Civil), Faizabad to the appellant and upon receipt of this notice, the appellant filed the writ petition leading to this appeal against the aforesaid communications dated 09.09.2013 and 16.09.2013.

7. The writ petition was essentially founded on the ground that the said communications were wholly without jurisdiction and were issued after nine years of the retirement of appellant and without prior opportunity of hearing to him. The appellant also filed a supplementary affidavit in support of the writ petition with the submissions that there was no alternative remedy available to him to challenge to the impugned orders/directions issued by the State Government and hence, the remedy of writ petition had rightly been taken recourse of. It was also submitted that the impugned orders/directions were wholly without jurisdiction as the Service Regulations and Conduct Rules do not confer any such power on the State Government. It was yet further submitted that the impugned directions/orders had been issued in violation of the principles of natural justice. It was still further submitted that the civil liability could not be determined by the Civil Court and that the jurisdiction of the Civil Court was barred under the U.P. Public Services Tribunal Act, 1976 ["the Act of 1976"]. It was also submitted that directions could not be issued by the State Government for curtailing or attaching the pension, which is recognized as a right to property by the Hon'ble Supreme Court.

8. As noticed above, the learned Single Judge found the writ petition to be rather misconceived, particularly when the maintainability of the Civil Suit was to be

examined by the trial Court, where the appellant could file his objections.

9. Learned counsel for the appellant has strenuously argued that the learned Single Judge has not appreciated the grounds urged on behalf of the petitioner-appellant and has erred in treating the petition as misconceived. Learned counsel has particularly referred to the decision of the learned Single Judge of this Court dated 08.01.2010 in Writ Petition No. 1127 (SS) of 2007 and submitted that earlier, the question of loss to the Government was dealt with in the impugned departmental order dated 28.12.2006 and was finally pronounced against the respondents by this Court and thereafter, all the retiral dues were also paid to the appellant. Thus, according to the learned counsel, the respondents are not entitled to initiate any proceeding and that too by way of Civil Suit on the same cause of action. Learned counsel has also submitted that the impugned communications dated 09.09.2013 and 16.09.2013 could not have been challenged by the petitioner-appellant in any other proceedings and in not entertaining the writ petition would practically amount to rendering the appellant remediless in his challenge to these wholly unauthorized orders. Learned counsel has also submitted that the orders impugned, apart from being contrary to the final order of this Court, also suffer from violation of the principles of natural justice inasmuch as the appellant was not afforded any opportunity of hearing before passing the same. Learned counsel has also submitted that the proposed action against the appellant is directly barred by the principles of res judicata as also under the Act of 1976 and hence, the matter calls for interference in the writ jurisdiction. Learned counsel has referred to the decision of the Hon'ble Supreme Court in the case of Punjab State Civil Supplies Corp. Ltd Vs. Sikander Singh, AIR 2006 SC 1438 : (2006) 102 CLT 3 : (2006) 3 JT 457 : (2006) 2 LLJ 14 : (2006) 143 PLR 206 : (2006) 2 SCALE 670 : (2006) 3 SCC 736 : (2007) 1 SCC(L&S) 1073 : (2006) AIRSCW 1257 : (2006) 2 Supreme 654 and has also referred to Section 6 of the Act of 1976.

10. Having given thoughtful consideration to the submissions made on behalf of the petitioner-appellant and having examined the record, we are satisfied that the writ petition as filed by the appellant could have only been, and has rightly been, dismissed as misconceived.

11. In the first place, we are unable to find any legal right in the appellant to even question the impugned communications dated 09.09.2013 and 16.09.2013 by way of a writ petition. As noticed, they had only been intra-departmental communications from one office to the other with a direction that a Civil Suit for recovery of the amount be filed against the appellant. Such communications neither envisaged any opportunity of hearing to the appellant nor, by themselves, imposed a liability on the appellant. Pursuant to the said communications, the officers concerned appeared to have made preparations for filing of a Civil Suit and before doing so, a notice was served upon the appellant, calling upon him to make payment and informing him that on failure, a Civil Suit would be filed. These communications by themselves cannot be considered

furnishing a cause to the petitioner-appellant to maintain an action by way of writ petition. Thus, the submission that the petitioner is rendered remediless as regards his challenge to these communications remains baseless and is of no avail.

12. Apart from the above and even if it be given that upon considering himself aggrieved, the petitioner-appellant was entitled to approach this Court in the writ jurisdiction, it remains trite that exercise of writ jurisdiction is essentially that of discretion of the Court that could always be declined on the relevant facts and factors.

13. The petitioner-appellant wanted to assert, and the same has been the endeavour before us too, that the recovery of any amount from him towards the alleged loss by way of a Civil Suit would be directly hit by the principles of res judicata in view of the order dated 08.01.2010 passed in Writ Petition No. 1127 (SS) of 2007. For the order proposed to be passed, we would refrain from making final comments on the suggestion of the petitioner-appellant, but prima facie, it is difficult to accept the submissions that merely for the disciplinary proceedings having been quashed for the reasons stated in the order dated 08.01.2010 and retiral dues having been paid, the appellant has acquired total immunity from an action in the Civil Court for recovery of the amount of alleged loss caused to the Government. However, without any further comment in this regard, suffice it to observe for the present purpose that the question as to whether a particular suit or issue is to be tried by the Civil Court, or is not to be tried for having been directly and substantially in issue in a formal proceeding between the same parties, is to be determined with reference to several factors; and the plea of res judicata is required to be determined on the basis of several questions of facts. The foundation of plea of res judicata has to be laid in the pleadings before the Court and then decision on such a plea is to be invited in accordance with law. The principles of res judicata cannot be applied in abstract and that too before a Civil Suit has in fact been filed or an action has been taken, where such a plea could be taken and determined. The proper stage for determination of the question of res judicata could only be upon filing of a suit and raising of this question in appropriate manner.

14. Similarly, the other submission, as regards bar over the action per Section 6 of the Act of 1976 also appears to be a premature one. Though prima facie, it is again difficult to accede that Section 6 of the Act of 1976, which bars filing of Civil Suit against a Government or local authority, as such would bar the action of the present nature by the Government too in the Civil Court, but without final comments even in that regard, for the present purpose, suffice it say that under the Code of Civil Procedure, even a question of bar of the suit could be raised in appropriate manner and at the appropriate stage.

15. So far as the referred decision of the Hon''ble Supreme Court in the case of Sikander Singh (supra) is concerned, it is difficult to find any support to the case of the appellant therefrom. In the first place, it is noticed that the said decision

was rendered in the proceedings arising out of a Civil Suit, which was filed by the appellant-Corporation for recovery of price of quantity of wheat which was found to be short for the negligence of the defendants; and it had been a common action against the two defendants. The trial Court found defendant No. 1 alone guilty of misappropriation of the goods and held the appellant entitled to recover the amount towards price of goods and interest @ 18% per annum. The High Court, in appeal, held that the audit report was not admissible in evidence as the contents were not proved and in any event, no interest was payable on the amount of damages. The Hon''ble Supreme Court found that in the departmental proceedings, the defendant No. 1 was asked by the appellant to deposit requisite number of bags or pay the price thereof while holding him responsible towards 2/3rd of loss, and the said order was complied with and had attained finality. It was held that such a matter could not be re-opened. As regards defendant No. 2, it was noticed that no finding had been arrived at that he, for any intent and purpose, appropriated any article to his advantage and thus, the Hon''ble Supreme Court questioned as to how he could have been proceeded under the common law by way of Civil Suit? Yet further, the Hon''ble Supreme Court observed that a suit might have been maintainable only if he was found to have misappropriated the goods. The appellant has chosen to refer to paragraphs 18 and 19 of the said decision. However, it appears appropriate to reproduce paragraphs 18 to 20 of the said decision for the present purpose as under:--

"18. The Appellant is "State" within the meaning of Article 12 of the Constitution. The terms and conditions of service by and between the appellants and the respondents herein are governed by the service rules and/or terms and conditions of contract. If the respondents herein had committed misconduct they could have been and in fact were departmentally proceeded with. In the said departmental proceedings appropriate punishments had been imposed upon them. So far as Respondent-defendant 1 is concerned, therein his negligence had been held to have contributed to the loss of 2/3rd of the shortages and by way of penalty, he was asked by the Appellate Authority to deposit the requisite number of bags of wheat and/or pay the price thereof. The said order having been complied with attained finality, it is binding on the appellant. The dispute cannot, therefore, be permitted to be reopened.

19. If the Appellant herein intended to proceed further against the Respondent-defendant 1, it could have done so by questioning the correctness or otherwise of the said order of the Appellate Authority before an appropriate forum. Deposit of the requisite number of bags of wheat and/or price thereof resulted in Respondent-defendant 1's reinstatement pursuant to an order passed by the High Court as also this Court. For his act of misconduct, he had also been denied back wages. If in the departmental proceedings, Respondent-defendant 1 had been asked to pay a penalty by way of recovery of loss to the extent of which he was found responsible, we are of the opinion that no civil suit could have been maintained for the selfsame cause of action.

20. So far as Respondent-defendant 2 is concerned, no finding of fact has been arrived at that he for any intent and purport appropriated any article to his advantage. In the absence of such a finding, we fail to understand as to how under the common law, he could be proceeded against by way of a civil suit for recovery of money. A civil suit for recovery might have been maintainable only if he was found to have misappropriated the goods. Admittedly he has not. He was said to be negligent in performing his duties."

16. Thus, one of the factual aspect clearly emerging from the said decision is that as against defendant No. 1 therein, recovery of loss had already been ordered and effected; and therefore, the Hon"ble Supreme Court found that the matter could not have been re-opened. Secondly, in relation to defendant No. 2, the Hon"ble Supreme Court clearly observed that a suit for recovery might have been maintainable if he was found to have misappropriated the goods.

17. In the present case, as noticed, the departmental proceedings stood annulled with the order of the learned Single Judge dated 08.01.2010 in Writ Petition No. 1127 (SS) of 2007. There are allegations of misfeasance against the appellant; and the respondents assert that by his acts and omissions, the appellant caused loss to the Government that was required to be recovered. Though, in these proceedings, no comments are being made finally on the merits of the claim of the respondents, but in the totality of circumstances, we are clearly of the view that an action in the writ jurisdiction, so as to even prevent filing of a Civil Suit, was not to be entertained; and the learned Single Judge cannot be faulted in finding the writ petition to be entirely misconceived.

18. Accordingly and in view of the above, this Appeal fails and is, therefore, dismissed. However, in the interest of justice, we again make it clear that none of the observations herein would be construed as final opinion on the merits of the issues/questions that may be raised in an action before the Civil Court and such issues/questions shall be determined by the Civil Court strictly in accordance with law.