

Controller Weights and ors. Vs. Maqbool Ahmad

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Court : Jammu and Kashmir

Decided On : Aug-19-2004

Reported in : 2005(1)JKJ211

Judge : S.N. Jha, C.J. and Nisar Ahmad Kakru, J.

Acts : Code of Civil Procedure (CPC) - Order 23, Rule 1; ;[Constitution of India](#) - Article 226

Appeal No. : L.P.A. No. 44/2004

Appellant : Controller Weights and ors.

Respondent : Maqbool Ahmad

Advocate for Pet/Ap. : None for the appearing parties

Disposition : Petition dismissed

Judgement :

Nisar Ahmad Kakru, J.

1. Writ petitioner (respondent No. 1 herein) claiming to man the post of a Watchman, sought the indulgence of the writ Court by medium of SWP No. 419/2003 to command the State and its functionaries to continue him on the said post and to release salary in his favour for the period commencing from April, 2001

and onwards on the strength of the order of appointment which reads:

In pursuance of the D.P.C. decision and in light of SRO 126 Sh. Maqbool Ahmad Khan (T.D.C. Pass) S/o Khadim Hussain Khan R/o Niloosa Pashwari Tehsil Uri Dist. Baramulla is temporarily appointed in the grade of Rs. 2550-3200 as Watchman and is posted Inspectorate Sopore against available post. He will however allowed to join only after producing of Police verification/character certificate.'

2. Writ petition came up consideration before the Court on 24-03-2003 and the following order was passed which may be noticed:

'Notice. Notice in the CMP also. On the assumption that the order of appointment relied upon by the petitioner is genuine one, is provided that his legitimately earned wages shall be released subject to objections of other side. Needless to say that the direction aforementioned shall not work as an impediment for the respondents to investigate/examine the validity of the order of appointment and shall be free to deal with the matter, if order of appointment is found invalid or unsustainable in law. Be listed after service is complete.

In response to the notice reply was filed by the opposite part (appellants herein) stating therein reference made to the decision of the Departmental Promotion Committee (DPC for short) relates to an arrangement of the Assistant Controllers and no power was ever conferred upon the Deputy Controller by the DPC to make the appointment on the post of Watchman. It was further averred that the Deputy Controller has no competence to make appointment on the post ion question. In the face of such stand the petitioner in his wisdom chose to withdraw the writ petition, consequently, dismissed as withdrawn on 06-02-2004.

3. Here begins another phase of litigation through subsequent writ petition filed in quick succession accompanied by a motion for interim relief which was granted on 03-03-2004 having the effect of allowing the petitioner to continue and entitling him to the salary attached to the post. It is this direction which is impugned by medium of this Letters Patent Appeal but amazingly the appellants' counsel opted for oblivion. Same is true of the counsel for the respondent No. 1 leaving no option for

us but to decide the matter without assistance of the learned counsel for the parties. It needs a mention here that in the withdrawal application the writ petitioner had sought liberty to challenge the order of disengagement but no such relief is claimed as is evidence by the prayer made in the second writ petition which runs as under:--

(a) by issuance of a writ of mandamus or any other appropriate writ, order or direction, respondents be directed:

(i) to treat the petitioner to be in continuous service and to pay him the salary and other benefits with effect from 05/2001 and onwards.

(ii) They be further directed not to disengage or discontinue the petitioner from service on any ground whatsoever, but to allow him to continue in service. They be also directed to prepare his service record and given him benefit of seniority etc. accordingly.'

To mark the difference, if any, between the reliefs sought in two petitions it may be pertinent to reproduce the prayer clause of the earlier writ petition also:

(I) A writ of mandamus commanding the respondents to pay the outstanding salary of the petitioner from 4/2001 onwards without any interruption and be allowed to continue.

(II) By issuance of writ of mandamus or any other appropriate writ, order or direction respondents be directed to continue the petitioner in service against them post of Watchman and the other service benefits be paid to him without any impediment or obstruction and if an, action is desired to be undertaken the petitioner shall be associated with that after providing chance of hearing.'

Perusal of the prayer clauses leave no room for any confusion that both the writ petitions have been filed for similar reliefs which shows that the ground for withdrawal of writ petition to challenge the order of disengagement was nothing but a camouflage.

4. In addition to what is said above there is yet another impediment which weighs heavily against the petitioner traceable to the order dated 06.02.2004 passed in the application of withdrawal extracted hereunder:

For the reasons detailed in this application, it is allowed and the writ petition is dismissed as withdrawn with liberty to a fresh, if fresh cause accrues'

It is manifestly clear from the order that liberty to file a fresh petition could be availed of by the petitioner provided a fresh cause would accrue to him, therefore, the first and foremost question that needs to be addressed to is as to whether a fresh cause did arise for institution of second writ petition and which is that cause. To have the answer, we have gone through the pleadings of the parties meticulously but we don't find reflection of any event which could be said to have occurred subsequent to 06.02.2004, that is the date when the writ petition was dismissed as withdrawn. We also find that in the objections filed against admissibility of the second writ petition the respondents therein have questioned the competence of the Deputy Controller as also of the DPC to make the appointment and have also refuted the contention of the petitioner that power was conferred on the Deputy Controller by the DPC. It is clear that the stand taken in opposition to the first writ petition is reiterated against the admissibility of second writ petition as well which stance of the appellants was not countered by the petitioner. As a matter of fact upon revelation of facts debasing his claim, he chose to withdraw the writ petition, resultantly, abandoned his claim on the cause which was available to him before 06.02.2004.

5. We are not oblivious of the fact that Rule 1 order 23 CPC cannot be read into Article 226 of the [Constitution of India](#) but law is no more res integra that principle underlying the said provision does apply to the writ petitions in the interests of administration of justice by dint of public policy. It goes without saying that adherence to the principle is a healthy practice, for, very often it happens that when the counsel fails to persuade the bench to grant an interim relief, a prayer is made for withdrawal of the writ petition so as to take a chance before the other bench through a fresh petition, thus if the principle of abandonment is not applied, tendency of bench hunting will get encouraged leading to multiplicity of

proceedings and unending litigation. As is seen in the case on hand, the learned Counsel for the petitioner in the earlier writ petition not only failed to get the interim relief for continuation of the petitioner but the observations made in the order provided for investigation/examination into the validity or otherwise of the order of appointment. The order being not suitable to the situation of the petitioner, a short cut method was adopted by withdrawing the writ petition followed by another on the same cause. This unhealthy practice needs to be arrested as otherwise the system will be drawn to a state of confusion.

6. Viewed thus, we hold that when a writ petition is withdrawn, it amounts to abandonment of cause and the writ Court would normally refuse to exercise its extra ordinary writ jurisdiction under the Constitution on the same cause, of course, exceptions apart like the ones when a person is deprived of his life or personal liberty in contravention of the procedure established by law, when State exchequer is a casualty, when exercise of discretion under Article 226 is warranted to mitigate the sufferings of the people or such like other eventualities depending upon the facts of each case but there is no possibility of entertaining a matter once again where a petitioner is guilty of deceitful conduct as is true of respondent No. 1 (writ petitioner) who has withdrawn the writ petition apparently for two fold reasons, one to escape the fall out of the direction reproduced in Para 2 hereinabove, the other to obtain an interim relief of his choice.

7. We would now like to consider the plight of the respondent 1 in the light of the judgments cited in the writ petition, one being *Bachhittar Singh v. State of Punjab* reported in AIR 1963 SC 395 and the other *Union of India v. Dinannath Shantaram Karekar* reported in (1998)7 SCC 569. These are the cases which, inter alia, deal with the mode and procedure of departmental enquiries. Law is settled that ratio of a decision is attracted provided facts are similar. Similarity of the facts being wanting, judgments supra have no application. Reference is also made to *Tagin Litin v. State of Arunachal Pradesh and Ors.* reported in AIR 1996 SC 2121. Para 12 of the judgment may be noticed:

12. Here we are concerned with appointment to a post. An appointment to a post of office postulates:

- (a) a decision by the competent authority to appoint a particular person;
- (b) incorporation of said decision in an order of appointment; and
- (c) communication of the order of appointment to the person who is being appointed.'

8. It emerges from the judgment supra that with a view to bring an order within the ambit of appointment, one of the conditions that has to be established is that appointment to a post is made in pursuance of a decision of the competent authority. Whether this condition is fulfilled, the facts of the case assume significance. Case of the petitioner is that his appointment was made in pursuance of a decision of the DPC. In the normal course appointment is made by the competent authority on the basis of recommendations made by the Board. True it is that departure cannot be said to be impermissible provided a different course is envisaged by service rules and in the absence of rules, by administrative instructions. In the given situation the petitioner is required to show that:

- (a) the DPC is vested with the power to make direct recruitment.
- (b) the Deputy Controller issued the order in pursuance of an order of appointment passed by the DPC.

9. What is there to establish, the aforementioned conditions needs to be appreciated in the light of averments made in the writ petition and material annexed thereto. We have thoroughly gone through the writ petition but we find not even a whisper indicating any rules or administrative instructions which would empower the DPC to make direct appointment. There is also no documentary proof annexed with the writ petition which would show the authority of the DPC much less decision/sanction/approval to the appointment of the petitioner on the post in question. At the risk of repetition be it reiterated that in Tagin Litin's case relied upon by learned counsel for the petitioner, the apex Court has held that an appointment to a post of office postulates among other conditions, a decision by the competent authority to appoint a particular person and as per the averments made in the writ petition the decision to appoint the petitioner was taken by the

DPC which is non existent. Thus testing the case of the writ petitioner on the touchstone of judgment supra, the claim on the post is bereft of substance. Otherwise also, we find no merit in the writ petition.

10. In the result the writ petition is dismissed along with CMPs. Interim direction is vacated. As a corollary the LPA succeeds, and the order of the learned Single Judge is set aside. No order as to costs.

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