

(1992) 01 AHC CK 0114

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 1588 of 1991

Sunil Kumar and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: Jan. 17, 1992

Acts Referred:

- Constitution of India, 1950 - Article 226, 226(3)
- Payment of Wages Act, 1936 - Section 15, 2, 20, 4, 5

Citation: (1992) 1 AWC 290

Hon'ble Judges: S.C. Varma, J

Bench: Single Bench

Advocate: K.D. Misra and V.B. Upadhyay, for the Appellant; A.N. Srivastava, for the Respondent

Final Decision: Dismissed

Judgement

S.C. Varma, J.

A preliminary point was raised by the Respondents regarding the maintainability of the petition.

2. The fact, in short, may be briefly stated. 21 excise shops of country spirit of Bisalpar, District Pilibhit were put to auction on 7-3-1991 for the excise year 1991-92. The Petitioners who are 14 in number offered the highest bid of Rs. 91,05,000 and were required to deposit half of the security amount as envisaged in Rule 20(1)(i) of the U.P. Excise Licences (Tender cum auction) Rules, 1991. The claim of the Petitioners is that the auction was over at 6.00 p.m. and they delivered Bank draft of Rs. 94,0000/- at 11.30 p.m. to the Excise Inspector. A First information report was lodged by the District Excise Officer, Pilibhit against the Petitioners that the bidders did not deposit the security amount of the auction. However, the Excise Inspector handed over the Bank draft on 8-3-1991 to the District Excise Officer. The Excise Commissioner accepted G-12 statement of the bid of the Petitioners on 1-5-1991.

The Respondent No. 4 who had offered the second highest bid challenged the approval of the Excise Commissioner before the State Government. On reference made by the State Government to the Excise Commissioner, the application of Respondent No. 4 was rejected on 30-3-1991, upholding the order accepting the bid in favour of the Petitioners. The Respondent again challenged the order dated 30-3-1991 before the State Government and the State Government passed an ex parte order directing the Excise Commissioner not to accord final sanction. However, the Excise Commissioner, by an order dated 1-5-1991 accepted form 12A in respect of the aforesaid auction subject to the result of the proceedings before the State Government initiated by the Respondent No. 2. It was made clear that in case the application is allowed, the auction would stand automatically cancelled. The State Government ultimately, by an order dated 10-12-1991, cancelled the auction dated 7-3-1991, and directed for reduction of 21 country spirit shops of Bisalpur. It may be stated that the Petitioners operated the licence during this period. At this stage the 14 Petitioners who were excise licencees presented the present writ petition No. 1588 of 1991 before the Stamp Reporter and thereafter filed it before the Joint Registrar on 18-12-1991 which came up for consideration on 19-12-1991. Simultaneously another writ petition challenging the same order of the State Government dated 10-12-1991 was presented for reporting before the Stamp report Lucknow Bench on 17-12-1991 by 7 Petitioners out of the aforesaid 14 and the Petitioners reported as cognizable by a Division Bench. This petition also came up for consideration on 19-12-1991. On 19-12-1991 this petition was got dismissed by a Division Bench by the following order:

It is stated by Sri M. Naseerullah, Learned Counsel for the Petitioners that the petition may be dismissed as withdrawn.

We accordingly dismissed the petition as withdrawn.

sd. Section Ahmad

sd. Shobha Dikshit.

19-12-1991.

3. On 19-12-1991, writ petition No. 1588 of 1991 was taken up for hearing before the learned Single Judge. The case was directed to be put up on the next date to enable the Learned Counsel for the Respondent No. 4 to file a counter affidavit. On 20-12-1991, an application along with an affidavit was filed to dismiss the writ petition as not maintainable in view of the fact that similar petition has been dismissed by the Lucknow Bench on 19-12-1991. The Respondents were directed to file a certified copy of the order dated 19-12-1991 and the case was fixed for orders on 2-1-1992.

4. Another petition by the same 14 Petitioners by the same counsel was filed during vacations on 27-12-1991 and a Bench of Hon"ble K.K. Birla and Hon"ble B.P. Singh, JJ

was nominated. Copy of this petition was given to the learned standing counsel who accepted notices for Respondents 1, 2 and 3. An application was alleged to have been filed by Respondent No. 4 with the prayer that information be given about the hearing of the petition which he apprehended to be filed against the order dated 10-12-1991 and he may be given an opportunity of hearing before the petition is entertained. It appears that no orders were passed on this application. In this petition, the Petitioners had alleged that in view of the directions made in the order dated 10-12-1991 cancelling the auction dated 7-3-1991, the Respondents are going to hold fresh auction on 30-12-1991 without proper publicity and as such prayed for the quashing of the advertisement dated 26-12-1991 as also for necessary direction commanding the Respondent No. 3 not to put 21 country spirit shops of Bisalpur to reduction in pursuance of the advertisement dated 26-12-1991. The Division Bench passed the following order on 28-12-1991.

Learned Standing Counsel has accepted notice for Respondents, No. 1, 2 and 3 put up this petition for orders on 2-1-92 along with writ petition No. nil of 1991 Sunil Kumar v. State of U.P. filed on 18-12-1991.

It has been contended by the Learned Counsel for the Petitioners that they have been operating as excise licensees of 21 country liquor shops of Bisalpur group district Pilibhit since 1-4-1991 that their licences have been cancelled by the State Government by order dated 10-12-1991 without giving any opportunity to seven of the Petitioners and that no proper publication of auction proposed to be held on 30-12-1991, has been made as the publication has been made on 26-12-1991 for the first time. The impugned auction regarding 21 shops of liquor of Bisalpur group district Pilibhit to be held on 30-12-1991 is stayed till 8-1-1992.

sd. K.K.B.

sd. B.P.S.

28-12-1991.

5. The aforesaid petition was listed again before the bench of Hon^{ble} S.D. Agarwala and Hon^{ble} S.P. Srivastava, JJ and the following order was passed:

Heard Sri V.B. Upadhyaya, learned Senior Counsel for the Petitioner, Sri A.N. Srivastava, Learned Counsel for the Respondent No. 4, and the learned standing counsel.

The Petitioner does not want to press this petition. The petition is, accordingly dismissed. The interim order dated 28-12-1991 is hereby vacated. It is made clear that it would be open to the State Government to hold auction of the shops in dispute in accordance with law.

A copy of this order may be given to the Learned Counsel on payment of usual charges within two days.

sd. SDA

sd. SPS

2-1-1992.

6. Writ petition No. 1588 of 1991 came up for consideration before me on 8-1-1992 and the present preliminary objection was raised.

7. The learned Advocate General appearing on behalf of Respondents 1, 2 and 3 has very vehemently contended that similar petition challenging the same order having been dismissed by the Division Bench, the present petition is not maintainable. The learned Advocate General contended that Petitioners cannot be allowed to pursue similar remedy by two petitions and after one having been dismissed as withdrawn without expressing any reason and at the instance of the Petitioners, the second petition without seeking permission is precluded on the principle underlying Order 23 Rule 1 Code of Civil Procedure. The Learned Counsel, in support of his argument placed reliance on [Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others](#), . The learned Advocate General placing strong reliance on the aforesaid decision submitted that since no permission to file fresh writ petition was obtained while getting the petition dismissed as withdrawn the present writ petition was not maintainable in respect of the same subject matter. The learned Advocate General also placed reliance on Abdul Ghaffar v. Ishtiyah Ahmad 1989 (1) AWC 306 Virendra Kumar Agarwal v. Uma Shankar Pathak 1991 (1) ARC 117, Goverdhan Kagaj Udyog Bankuta Agra v. U.P. Financial Corporation 1991 (1) AWC 278.

8. The learned Advocate General further contended that the Petitioners have not come with clean hands and had adopted the tactics of bench hunting as they filed another writ petition on 27-12-1991 in which they challenged the advertisement dated 26-12-1991 for re-auction which was in pursuance of the order dated 10-12-1991. The Petitioners had in effect challenged the order dated 10-12-1991 and after they obtained an interim order staying the auction proposed to be held on 30-12-1991, the purpose was served and they again got this petition also dismissed as withdrawn. According to the learned Advocate General, since in this petition also, the subject matter of the dispute was the same, merely because the Petitioners have not specifically challenged the order dated 10-12-1991 in so many words, yet in effect the challenge would be to the aforesaid order as the holding of auction was as a consequence thereof and in pursuance of the aforesaid order. The Petitioners, in these circumstances, unless they get rid of the main order i.e. order dated 10-12-1991 cannot get the ultimate relief on mere quashing of advertisement and for holding the re-auction. In these circumstances the withdrawal of the writ petition as not pressed would again come in the way of the maintainability of the present writ petition. Even this withdrawal was without the permission to file another writ petition and there was nothing to indicate that the withdrawal was after expressing

some reason.

9. The Learned Counsel for the Petitioners Sri V.B. Upadhyaya submitted that by inadvertence, two Petitioners were filed on the same date, both at Allahabad and at Lucknow Bench concerning the same subject matter. In fact the petition at the Lucknow Bench was filed by those 7 Petitioners who, it was alleged, were not afforded any opportunity nor were arrayed as parties in proceedings before the State Government when the order dated 10-12-1991 was passed. Apart from the other grounds on which the order dated 10-12-1991 was challenged, this was additional ground to challenge the order and as such under a bonafide mistake they were also joined along with other licensees as Petitioners in the petition before the High Court at Allahabad. At the time when the petition came up for consideration before the Division Bench at Lucknow without raising any argument on merit, the mistake was realised and as there was an inherent defect in filing the petition, the same was got dismissed as withdrawn. Of course an objection was also raised on behalf of Respondent No. 4 that a similar petition was pending in the High Court at Allahabad as well. The Learned Counsel submitted that the petition was also defective as it was cognizable by a single judge being against an order passed by the State Government in revision and in these circumstances at the outset, a request was made for the dismissal of the petition as withdrawn. Learned Counsel submitted that in these circumstances there was no requirement of seeking permission to file fresh petition and the present petition is neither bad on the ground of public policy as also on account of indulging in Bench haunting tactics. As regards the third petition filed on 27-12-1991 the Learned Counsel submitted that he had disclosed all the facts in his petition including the pendency of writ petition No. 1588 of 1991 as also about the dismissal of the writ petition at Lucknow Bench by order dated 19-12-1991. The Petitioners on the basis of a separate cause of action that due publicity had not been given and the re-auction fixed for 31-12-1991 is not in accordance with the prescribed mandatory rules, had only challenged the holding of auction on 31-12-1991. The dismissal of this writ petition on 2-1-1992 would neither operate as res judicata nor on that basis the present petition be treated as not maintainable.

10. Learned Counsel placed reliance on [Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen and Another](#), . Relying on the aforesaid decision, the Learned Counsel submitted that the permission to withdraw the petition cannot be equated with an order of its dismissal on merit. The technical rule of res judicata is also a wholesale rule based on public policy and cannot be stretched too far to bar the trial of identical issues in separate proceedings merely on an uncertain assumption that the issues must have been decided. In absence of any indication in the order itself, it would not be correct to come to the conclusion that the court intended to dismiss the petition on merit.

11. Sri A.N. Srivastava, appearing on behalf of the Respondent No. 4, apart from adopting the arguments of the learned Advocate General, has further contended that the dismissal of the writ petition by order dated 2-1- 1992 would operate as resjudicata as the principles of constructive resjudicata have been extended to proceedings under Article 226 of the constitution. The Learned Counsel further argued that the dismissal of both the writ petitions of the Petitioners which were in respect of the same subject matter without any reservation and the unequivocal withdrawal would, in the circumstances of the case, establish that the second petition on the same subject matter by the same parties can not be entertained. The Learned Counsel, in support of his contention, pieced reliance on [A.R. Antulay Vs. R.S. Nayak and Another](#), [The VIth Income Tax Officer, City Circle II-A, Bangalore Vs. K.Y. Pillaiah and Sons](#), and Asharfi Devi v. District Judge 1985 (2) ARC 372.

12. Dealing with the first contention of the Learned Counsel for the Respondents regarding the petition filed at the Lucknow Bench, I do not think under the facts and circumstances of the case, the dismissal of the petition as withdrawn would bar the maintainability of the present writ petition No. 1588 of 1991. It may be that by inadvertence, two petitions in respect of the same subject matter challenging the same order were filed simultaneously. In the present case, one petition has been filed at Allahabad on the same date and the other at the Lucknow Bench. It is quite possible that initially those 7 Petitioners who were also included in the petition filed at Allahabad had no knowledge that a similar petition on the same date had been filed on their behalf as well. The reason for filing separate petition at Lucknow Bench by these 7 Petitioners appears to be plausible as they were differently placed inasmuch as they were neither alleged as parties nor were afforded any opportunity of hearing by the State Government in passing the order dated 10-11-1991. Since there was yet another defect that the petition was cognizable by the Single Judge although it was wrongly reported as cognizable by the Division Bench and was filed before the Division Bench, the Petitioners at the out-set realised the inherent defects and the mistake committed by them as such without advancing any argument on merits got "the petition dismissed as withdrawn in the background that a similar petition was pending on their behalf at Allahabad as well. It may be that this mistake was pointed out by the Learned Counsel appearing on behalf of Respondent No. 4 as well, but there is no material on record to establish that any arguments on merit were advanced on behalf of the Petitioners. In view of the facts and circumstances, I am of the view that there was no necessity for seeking permission to file another writ petition before it was got dismissed as withdrawn. It is true that a formerly instituted petition, if got dismissed as withdrawn without obtaining the permission to file another petition, the second petition relating to the same subject matter would bar its maintainability. In the present case, the law laid down by the Hon"ble Supreme Court in Sarguja Transport Service (Supra) would not bar the maintainability of petition No. 1588 of 1991.

13. In my opinion, the Petitioners cannot escape the application of the aforesaid law as laid down by the Hon"ble Supreme Court in Sarguja Transport Service (supra) regarding the maintainability of the present writ petition in view of the orders passed on 2-1-1992 on the petition filed on 27-12-1991. The same Petitioners have very cleverly drafted the third petition and after mentioning the entire facts have confined their challenge to the advertisement dated 26-12-1991 for auctioning the shops on 30-12-1991. It cannot be denied that the advertisement was in pursuance of the orders of the State Government dated 10-12-1991. The Petitioners cannot get any effective relief merely by challenge to the advertisement dated 26-12-1991. Even if it is accepted that the Petitioners had challenged this advertisement merely on the ground that it was without due publicity and not in accordance with rules and that the order dated 10-12-1991 has not been challenged, what in effect the position would be, firstly the Petitioners are not aggrieved by order dated 10-12-1991 or in case they are challenging only the advertisement for auctioning the shops on 30-12-1991, would it mean that they had submitted to the order cancelling their licence and they are merely aggrieved by advertisement for re-auction which was without proper publicity. The Petitioners, in the garb to challenge the advertisement dated 26-12-1991, are in effect aggrieved by the order dated 10-12-1991 and would be deemed to have challenged the same in seeking the aforesaid relief. Apart from other grounds taken in the petition, one of the ground is very significant which is quoted below:

Because the Petitioners licences were cancelled by the State Government without affording an opportunity to Petitioners 8 to 14.

14. This ground further indicates that the Petitioners are in effect aggrieved by the order dated 10-12-1991 and on that account had challenged the advertisement which was also, in their opinion was not in accordance with law on an additional ground as well. In my opinion, the Petitioners cannot challenge the advertisement dated 26-12-1991 alone unless they challenge the order dated 10-12-1991 as well. Otherwise it would be deemed that either they are not aggrieved by the order dated 10-12-1991 or they had submitted to the aforesaid order. It is clear that it is only on submitting to the order dated 10-12-1991, the Petitioners can challenge the advertisement dated 26-12-1991 for the re-auction of the shops which was in pursuance of the order dated 10-12-1991.

15. In this back ground and in this view of the matter, if we examine the order dated 2-1-1991 getting the petition dismissed as withdrawn without any reservation or without giving any reasons whatsoever, the unequivocal withdrawal without seeking permission to file fresh petition would affect the maintainability of the present writ petitions.

16. The Petitioners have very innocently got this petition dismissed as withdrawn after their purpose was served in getting the auction postponed which was scheduled to be held on 30-12-1991. The Petitioners, however, did not realise that

this petition which has been decided earlier and in which the same question was substantially involved would be treated as former petition and on the principles of constructive resjudicata as well the present writ petition would not be maintainable. The law laid down in Sarguja Transport Service (supra) would be fully applicable in the present case. The relevant portion of the decision is quoted below:

The law confers upon a man -no rights or benefits which he does not desire, whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reasons, the code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in Sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of resjudicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

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 Article 226/227 of the constitution 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 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.

But we are of the view that the principle underlying Rule 1 Order 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 resjudicata 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 Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in the High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the

Constitution since such withdrawal does not amount to resjudicata, the remedy under Article 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.

It was argued that if the case set up by the Petitioners is accepted that they have only challenged the proceedings for reauction, it would necessarily mean that they have surrendered to the order dated 10-12-1991 and thus after the dismissal of the writ petition, they cannot be allowed to challenge the order dated 10-12-1991 in the present writ petition. It is also to be seen whether the Petitioners could have challenged the order dated 10-12-1991 in the former writ petition filed on 27-12-1991 and decided on 2-1-1991 and even if they have not done so then such a matter in the eye of law to avoid multiplicity of litigation and to bring about finality in it would be deemed to have been constructively in issue and, therefore, is taken as decided. In [Ram Parkash Sharma Vs. State of Haryana](#), the Hon"ble Supreme Court has held as under:

It is well known that the doctrine of resjudicata is codified in Section 11 of the CPC but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the CPC and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication, then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.

What is, however, to be seen is whether from the order dismissing the SLP in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the Respondent.

Of course a second writ petition on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one

petition will operate as a bar in the entertainment of another writ petition. Similarly even if one writ petition is dismissed in limine by a non speaking one word order dismissed, another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie.

17. The validity of the decision to advertise for reauction of the shops could only be considered if the validity of the order dated 10-12-1991 is to be examined. Otherwise if only the proceedings for reauction are to be considered, it would be possible when the parties submit or surrender to the order dated 10-12-1991 in pursuance to which the proceedings for reauction have been initiated. Thus the dismissal of the writ petition in which the advertisement for reauction was challenged and got dismissed as not pressed would necessarily deem to have decided by implication the validity of the order dated 10-12-1991.

18. I have held above that the petition filed on 27-12-1991 was also a petition relating to the same subject matter and the principle of constructive resjudicata would be applicable and since the same was got dismissed as withdrawn without seeking permission to file fresh petition or without keeping any reservation there is no justifiable reason to permit the Petitioner to invoke the extraordinary jurisdiction under Article 226 of the constitution once again. The present petition in these circumstances, would not be maintainable and is liable to be dismissed.

19. The preliminary objection, therefore, succeeds. The writ petition is dismissed as not maintainable. The interim order dated 8-1-92 is discharged.