



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No.1879 of 2019.

Reserved on : 28.07.2021.

Date of decision: 02.08.2021.

Vinod Kumar

.....Petitioner.

Versus

Union of India and others

.....Respondents.

Coram

**The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.
The Hon'ble Mr. Justice Satyen Vaidya, Judge.**

Whether approved for reporting?¹ Yes

**For the Petitioner : Mr. Lalit K. Sharma,
Advocate.**

**For the Respondents: Mr. Shashi Shirshoo, Central
Government Standing
Counsel.**

(Through Video Conferencing)

Tarlok Singh Chauhan, Judge

The instant petition has been filed for grant of
the following substantive reliefs:-

“(i) That the impugned oral order dated
06.08.2019 whereby respondent No.4 has directed
the petitioner not to report for his duty as Lab.
Assistant in ECHS Polyclinic, Solan, District Solan, H.P.

¹***Whether the reporters of the local papers may be allowed to see the Judgment?Yes***

after 18.08.2019 may kindly be set aside and quashed.

(ii) That a writ in the nature of certiorari may kindly be issued thereby quashing and setting aside the impugned letter dated 04.02.2019 **Annexure P-8** and by way of writ of mandamus the respondent may kindly be directed to allow the petitioner to hold the post of Lab. Assistant at Ex-Servicemen Contributory Health Scheme (ECHS) Polyclinic Solan, District Solan, H.P. till the disposal of issue raised in SLP No. 36359/2016 in the Hon'ble Apex Court against the judgment passed by this Hon'ble Court in CWP No. 9093/2014 decided on 02.12.2016.

(iii) That in alternate the respondent may be directed to utilize the services of the petitioner as X-Ray Technician in case the post of Lab Assistant by all means is not required at all at Poly Clinic Solan as the respondents themselves have registered the name of the petitioner as Radiation Professional with respect to ECHS Polyclinic Solan and he has issued BARC Accredited TLD certificate by Defence Laboratory Jodhpur."

2. On 16.02.2008, the respondents issued the employment notice for the direct recruitment to the different posts on different Polyclinic under Ex-Servicemen Contributory Health Scheme in ECHS Polyclinic Solan and other places. In this notice, the applications from desirous eligible candidates for the post of Lab. Assistant at

Polyclinic, Solan were invited within fifteen days. The petitioner being eligible submitted his candidature within the stipulated period.

3. On 05.03.2008, the respondents conducted interview and out of five other candidates, the petitioner was selected for the above post. On 28.03.2008, the ECHS Station Headquarter, Kasauli, issued the appointment letter of MED Staff (Lab Assistant) in favour of the petitioner, who was directed to report for duty at ECHS, Polyclinic Solan by 01.04.2008.

4. The petitioner joined as Lab Assistant at ECHS, Polyclinic Solan, on 01.04.2008 and on the said date an agreement of employment was executed wherein the contractual period of 12 months was mentioned as initial period and the same was made renewal for 12 months at a time and subject to attaining the maximum age as prescribed in Appendix A to Government of India, Ministry of Defence Letter No. 24(6)/03/US/WE/D (RES) dated 22.09.2003 or as amended from time to time upto the age of 58 years.

5. The respondents after the completion of contractual period of 12 months entered upon the renewal

contract of employment on the same terms and conditions on yearly basis and last agreement was made on 22.09.2018 and 29.10.2018 wherein the contract of employment was further renewal upto 18.08.2019.

6. However, the respondents on 04.02.2019 issued notice to the petitioner that his services will be terminated with effect from 31.03.2019 constraining him to approach this Court by filing CWP No. 401/2019. This petition was disposed of on the basis of the instructions imparted by the respondents that the services of the petitioner shall be retained till the expiry of the contract period i.e. November, 2019.

7. On 06.08.2019, respondent No.4 orally directed the petitioner not to report for duty after 18.08.2019, hence, the petition.

8. The respondents contested the petition by filing reply wherein in preliminary submissions, it has been averred that the petitioner has suppressed material and important facts from this Court while filing the present petition. It is claimed that the petitioner had earlier filed CWP No. 401/2019 on the same and similar facts for the

same relief and the same was decided by this Court on 29.03.2019 by observing as under:-

“Learned Assistant Solicitor General of India informs that as per the instructions received by him, contract of the petitioner is valid till November, 2019 and he shall be retained in service till the expiry of the contract period i.e. November, 2019 and at this stage, instant writ petition has been rendered infructuous. Ordered accordingly. Pending applications, if any, also stand disposed of.”

9. In the other preliminary submissions, it is averred that the petitioner has suppressed another vital fact from this Court that the vacancy of the Lab Assistant on which the petitioner was employed has since been abolished vide letter dated 10.01.2019.

10. On merits, it is contended that the petitioner had accepted the terms of his appointment on contractual basis with his eyes wide open and, therefore, he is estopped from filing the instant petition.

11. We have heard the learned counsel for the parties and gone through the material placed on record.

12. At the outset, it needs to be noticed that it is the specific case of the petitioner that he had right to hold the

post in question till his superannuation or atleast till the matter was not decided by the Hon'ble Supreme Court in SLP. However, in case, the order dated 29.03.2019 passed in CWP No. 401/2019 (supra) is now adverted to, the petitioner did not object to the petition being disposed of with the limited relief permitting him to continue till November, 2019. Nowhere, the petitioner impressed upon the Court at that time to claim that he had right to continue till his superannuation or till the disposal of the appeal.

13. In such circumstances, the principles contained under Order 2 Rule 2 of the Civil Procedure Code are clearly applicable to the facts of the instant case.

14. It is more than settled that avoiding the multiplicity of legal proceedings should be the aim of all courts and, therefore, a litigant cannot be allowed to split up his claim and file writ petition in piecemeal fashion. If the litigant could have, but did not without any legal justification claim a relief which was available to him at the time of filing earlier writ petition, the same claim cannot be allowed to be subsequently agitated by filing another writ petition.

15. In this context, it shall be apt to refer to the judgment of the Hon'ble Supreme Court in ***M/s. D. Cawasji and Co., etc vs. State of Mysore and another***, AIR 1975 SC 813 wherein it was held as under:

"[18] But, that however, is not the end of the matter. In the earlier writ petitions which culminated in the decision in (1968) 2 Mys LJ 78 = (AIR 1969 Mys 23) the appellants did pray for refund of the amounts paid by them under the Act and the High Court considered the prayer for refund in each of the writ petitions and allowed the prayer in some petitions and rejected it in the others on the ground of delay. The Court observed that those writ petitioners whose prayers had been rejected would be at liberty to institute suits or other proceedings. We are not sure that, in the context, the High Court, meant by 'other proceedings', applications in the nature of proceedings under Article 226, when it is seen that the Court refused to entertain the relief for refund on the ground of delay in the proceedings under Article 226 and that in some cases the Court directed the parties to file representations before Government. Be that as it may, in the earlier writ petitions, the appellants did not pray for refund of the amounts paid by way of cess for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in these writ petitions why they did not make the prayer for refund of the amounts paid during the years in question. Avoiding multiplicity of

unnecessary legal proceedings should be an aim of all courts. Therefore, the appellants could not be allowed to split up their claim for refund and file writ petitions on this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund and directing them to resort to the remedy of suits.”

16. In ***Commissioner of Income Tax, Bombay vs. T.P. Kumaran***, (1996) 10 SCC 561, the Hon’ble Supreme Court observed as under:

“[4] The tribunal has committed a gross error of law in directing the payment. The claim is barred by constructive res judicata under Section 11, Explanation IV, Civil Procedure Code which envisages that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit. Hence when the claim was made on earlier occasion, he

should have or might have sought and secured decree for interest. He did not seek so and, therefore, it operates as *res judicata*. Even otherwise, when he filed a suit and specifically did not claim the same, Order 2 Rule 2 Civil Procedure Code prohibits the petitioner to seek the remedy separately. In either event, the OA is not sustainable.”

17. Where the principle of constructive *res judicata* would apply to writ petition was subject matter of consideration before the Hon’ble Supreme Court in ***Avinash Nagra vs. Navodaya Vidyalaya Samiti and others***, (1997) 2 SCC 534 wherein it was held as under:

“[13] The High court also was right in its conclusion that the second writ petition is not maintainable as the principle of constructive *res judicata* would apply. He filed the writ petition in first instance but withdrew the same without permission of the court with liberty to file the second writ petition which was dismissed. Therefore, the second writ petition is not maintainable as held by the High court in applying the correct principle of law. Thus considered we find no merit in the appeal for interference.”

18. Apart from above, the provisions of Code of Civil Procedure are not applicable in writ jurisdiction by virtue of the provision of section 141 but the principles enshrined

therein are applicable. (vide **Gulabchand Chhotalal Parikh** vs. **State of Gujarat**, AIR 1965 SC 1153, **Babubhai Muljibhai Patel** vs. **Nandlal Khodidas Barot**, AIR 1974 SC 2105 and **Sarguja Transport Service** vs. **STAT**, AIR 1987 SC 88)

19. The question posed before this Court otherwise stands directly answered by this Court in **Kundlu Devi and another** vs. **State of H.P. and others**, Latest HLJ 2011 (HP) 579 wherein it was held as under:

“4. The contention of the learned counsel for the petitioners is that though the grievance with regard to quantum was dealt with, the grievance with regard to the claim for rent and occupation charges during the period the property was in possession of the Government has not been dealt with. According to the petitioners, they are entitled to the same in view of the decision of the Apex Court in R.L. Jain Versus DDA, (2004) 4 Supreme Court Cases 79. We do not think that it will be proper for this Court at this stage in proceeding under Article 226 of the Constitution of India to go into the question as to whether the petitioners are entitled to that component of compensation. That grievance the petitioners have pursued in accordance with the procedure prescribed under the Land Acquisition Act, 1894 initially before the Collector, thereafter before the Civil Court and finally in appeal before the High

Court. According to the petitioners, though this grievance was raised, the same has not been adverted to. If that be so, a civil writ petition or for that matter any other collateral proceeding is not the remedy. All contentions, which a party might and ought to have taken, should be taken in the original proceedings and not thereafter. That is the well settled principle under Order II Rule 2 CPC. Order II 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.”

5. This Rule is based on the principle that the defendant shall not be vexed twice for one and the same cause. The Rule also seeks to prevent two

evils, one the splitting of claims and the other splitting of remedies. If a plaintiff omits any portion of the claim or omits any of the remedies in respect of the cause, he shall not be permitted to pursue the omitted claim or the omitted remedy. The requirement of the Rule is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause which gives occasion for and forms foundation of the suit. If that cause of action enables a person to ask for a larger and broader relief than to which he had limited his claim, he cannot thereafter seek the recovery of the balance of the cause of action by independent proceedings. This principle has been also settled by the Apex Court in *Sidramappa versus Rajashetty*, AIR 1970 SC 1059.

6. Order II Rule 2 applies also to writ proceedings. The left out portion of a cause of action cannot be pursued in a subsequent writ proceedings. All claims which a petitioner might and ought to have taken, should be taken in one proceedings and only in one proceedings. {See the decision of the Supreme Court in *Commissioner of Income-tax vs. T.P. Kumaran*, 1996(1) SCC 561}.

7. Equally, a person who has filed the suit seeking certain relief in respect of a cause of action is precluded from instituting another suit for seeking other reliefs in respect of the same cause of action. He shall not be entitled to invoke the writ jurisdiction of the High Court for obtaining the very same relief.

In other words, if a second suit is barred, a writ petition would also be barred. What is directly prohibited cannot be indirectly permitted. That is the principle underlying under Order II Rule 2 CPC.”

20. Apart from the above, it has specifically come in the reply filed by the respondents that they have already abolished the vacancy of Lab. Assistant against which the petitioner had been working vide letter dated 10.01.2019. The petitioner has not assailed this action of the respondents by amending the petition or even filing rejoinder.

21. It is more than settled that power to abolish a post is inherent in the right to create it. The Government has always the power, subject, of course, to the constitutional provisions to reorganize a department to provide efficiency and to bring about economy that it can abolish an office or post in good faith. However, the action to abolish a post should not be just a pretence taken to get rid of an inconvenient incumbent which is not a fact situation obtaining in the instant case.

22. Lastly and more importantly, the appointment of the petitioner was purely on contract basis and on a

consolidated pay for a fixed period. The period of contract was extended from time to time and thereafter the post was abolished. Since, the contractual period had expired, the petitioner has no right to continue.

23. The power of the Government in abolishing a post and the role of the Court for interference has succinctly been summarized by the Hon'ble Supreme Court after taking into consideration the majority of the earlier judgments in ***State of Haryana and others versus Navneet Verma (2008) 2 SCC 65*** wherein it was observed as under:-

"11. Before proceedings to ascertain the answer for the above question, it is useful to refer to the appointment order of the Government of Haryana dated 13-7-1993 whereby the respondent herein was appointed as Accounts Executive in HBPE. Among the other terms, Clause-2 of the said order is relevant which reads as under:

"This offer of appointment is purely against temporary post which is liable to be abolished at any time and carries no promise of subsequent permanent employment. No offer of permanent vacancy can be made to him at present. Consequently his services can be terminated without notice whenever there is no vacancy against which he can be retained."

It is clear that the respondent herein was appointed purely against temporary post and it is liable to be abolished at any time. The said clause makes it

clear that the post has no assurance or promise for a permanent employment. It also makes it clear that his services can be terminated without notice whenever there is no vacancy against which he can be retained. Now, with this background, let us consider the law laid down by this Court with regard to power of the Government in abolishing temporary/permanent post."

24. In view of the aforesaid discussion, we find no merit in this writ petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

(Tarlok Singh Chauhan)
Judge

(Satyen Vaidya)
Judge

2nd August, 2021.
(krt)