

M/S. Upadhyay & Co vs State Of U.P. & Others on 1 December, 1998

Bench: S.Saghir Ahmad, K.T. Thomas

PETITIONER:

M/S. UPADHYAY & CO.

Vs.

RESPONDENT:

STATE OF U.P. & OTHERS.

DATE OF JUDGMENT: 01/12/1998

BENCH:

S.SAGHIR AHMAD & K.T. THOMAS.,

JUDGMENT:

DER-----

Shashtri Bridge at Allahabad runs across river Ganga. Motor vehicles playing on National Highway No.2 and passing through the said bridge have to pay toll charges. The bridge is named after Lal Bhadur Shashtri, former Primer Minister of India who is well remembered for his honesty and simplicity. River Ganga is adored in India with reverence in the belief that her holy water cleanses the believers of their sins. Ironically, that bridge built across that river was used by the petitioner as a means to amass wealth dishonestly. Unfortunately, such unwholesome conduct was facilitated on account of certain orders passed by the Allahabad High Court, Petitioner, who flourished in the aforesaid wealth having been insulated with the court orders against any outside interference for a long time, could not continue preening in such opulence as he was caught in the meanwhile. He is now being asked to return the ill-gotten wealth. Strategy of subterfuge played by him even thereafter did not work for long and he is now facing stringent measures for recovery of the booty.

Initially petitioner was allowed to collect the toll at specified rates for a period of one year which expired on 23-3-1991. For a succeeding period of three years petitioner competed with other bidders in a public auction. When his bid was not accepted by the authorities he filed Writ Petition No. 32974 of 1991 before the Allahabad High Court and got an interim order by which he was permitted to continue to collect toll charges from vehicles passing over the bridge. By a notification issued by the Government of India on 19.2.1992 the rates of toll were raised. The idea then dawned on the petitioner to take advantage of the enhanced rates. He then filed another Writ Petition (WP No. 22439/92) praying for permitting him to collect toll at the revised rates. A single judge (Mr. Justice A.P. Singh) before whom the said writ petition came up for admission passed an extraordinary order

which reads thus:-

"Admit.

Issue Notice.

Learned standing counsel prays for and is granted one month's time to file counter affidavit, three weeks thereafter are allowed to the petitioner to file rejoinder affidavit. List thereafter. In the meantime the petitioner will be allowed by the respondents to charge toll fees on the rates notified by the Government notification dated 19.2.1992 Annexure 4 to the writ petition. The respondent are, however, restrained from enhancing the bid money of the theka till further orders of this Court."

But the said order remained alive only for a period of less than 2 years because this Court interfered with it by an order dated 16.3.1994 while disposing of two SLPs. This Court then observed thus:

"It need be recorded that in the matter of realisation of public revenue, courts have been and should remain reluctant to stay recovery unless an exceptional case is made out. No such exceptional case is made out here. The impugned orders are, therefore, set aside leaving it open to the State of take such effective steps as are necessary to recover public revenues as due. The High Court shall now proceed with the main matter and dispose it of in accordance with law."

Undaunted by the above order passed by this Court the petitioner filed a new writ petition in the High Court of Allahabad and a Division Bench (Dubey and A.P. Singh, JJ) passed an order in it on 23.3.1997 which too is unusual and it needs extraction here. The order reads:

"Learned Standing Counsel prays for and is granted one month's time to file counter Affidavit Rejoinder Affidavit may be filed within another three weeks. List for orders thereafter on 16th May, 1994. Status quo with respect to collection of fees over Shashtri Bridge situated at River Ganga on National Highway No.2 at Allahabad.

The State of U.P. challenged the aforesaid order before this Court in S.L.P. (C) No. 9835/94. However, while the SLP was pending another Division Bench of the High Court vacated the aforesaid strange order dated 23.3.1994. When the said development was brought to the notice of this Court, SLP (C) 9835/94 was disposed of by an order in which following observations were made by a two-Judge Bench (B.P. Jeevan Reddy and S.C. Sen, JJ) of this court:

"The Hon'ble Chief Justice of Allahabad High Court is requested to list the said writ petition and other connected writ petitions, if any, before his own court at an early date or assign the same to an appropriate Bench for early disposal. The Court may also decide the liability of the respondent for the period beyond the original

auction-lease period.

It is made clear that the Government is free either to auction the right to collect the toll fees over the said bridge or to make any other alternative arrangement, as they may deem fit. It is equally open to the Government to take such steps as they think appropriate to recover monies due to it from the respondent.

We are constrained to pass these unusual and exceptional order because we felt acutely distressed by several similar orders passed by the High Court in matters relating to collection of toll fees on bridges in the State of Uttar Pradesh.

Petitioner who was aware of the said order of the High Court adopted his next strategy by reporting to the High Court that he was not pressing writ Petition No. 32974/91. A Division Bench of the High Court (Katju and Chauhan, JJ) then felt the need to be circumspect at the seemingly innocuous submission made by the petitioner. When a scrutiny was made, learned judges came across the directions contained in the order passed by this Court extracted above. Hence the Division Bench of the High Court passed the following order on 3.5.1996:

"It appears that rates of toll had been revised to almost double compared to the previous rate, but by the interim order of this court dated 24.6.92 the Government was restrained from enhancing the bid money. IN these circumstances, we are of the opinion that petitioner has to refund to the Government the extra illegal amount which he has pocketed. In our opinion, the bid money for the period for which the petitioner collected toll after 23.11.91 over Shastri Bridge should be recalculated by the Commissioner, Allahabad Division, Allahabad within one month from today. The bid of the petitioner for the period after 23.11.91 shall be enhanced proportionate to the enhancement of the rates by the revision in the rates. The enhanced amount of bid money shall be payable with interest at 15% by the petitioner to the Government with effect from the date of enhancement of the rate of toll."

Pursuant to the above directions, the commissioner of Allahabad Division passed proceedings on 1.6.1996. The relevant portion of which is this:

"Therefore I hereby order that M/s. Upadhyay & Co., Village Saroya, Post Karantadih, Ballia, shall deposit the amount of rupees 2,07,63,556/- (TWO CRORES SEVEN LAKHS SIXTY THREE THOUSAND FIVE HUNDRED FIFTY SIX) in the Government Treasury within fifteen days of passing of this order, in compliance of the above said order of Hon'ble High Court and information be conveyed."

Petitioner thereafter filed a new petition in the High Court of Allahabad (Writ Petition No. 19593/96) challenging the validity of the order passed by the Commissioner of Allahabad Division. Learned Judges directed the petitioner to pay 50% of the amount mentioned in the Commissioner's order forthwith and to furnish security for the balance amount. The said writ petition is still

pending.

In the meanwhile, petitioner challenged the order of Allahabad High Court dated 3.5.1996 by filing SLP(c) No. 12673 of 1996 in this court. But for reasons better known to the petitioner he withdrew the SLP on 9.7.1996. Thereafter, he filed an application before High Court for clarification of the order dated 3.5.1996, but the Division Bench did not find anything to be clarified about that order and hence dismissed the petition on 10.10.1997.

The present special leave petitions are filed against the two orders of the High Court, one dated 3.5.1996 and the other dated 10.9.1997.

We made a recapitulation of the events as above for the purpose of showing that the petitioner has absolutely no case in the present SLPs. He cannot, at any rate, now challenge the order of the High Court dated 3.5.1996 over again having withdrawn the SLP which he filed in challenge of the same order. it is not a permissible practice to challenge the same order over again after withdrawing the Special Leave Petition without obtaining permission of the court for withdrawing it with liberty to move for special leave again subsequently.

The above principle has been incorporated as a rule in the realm of suits. Order 23 Rule 1 of the Code of Civil Procedure deals with withdrawal of suit or abandonment of part of the claim. Sub-rule (3) says that the court may in certain contingencies grant permission to withdraw from suit with liberty to institute a fresh suit in respect of the subject matter of such suit. Sub-rule (4) reads thus:

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraw from a suit or part of a claim without the permission referred to in sub-rule (3).

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (*Sarguja Itransport Service vs. State Transport Appellate Tribunal, Gwalior*, 1987 1 SCC 5). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it 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 withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned 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. If so, he cannot file a fresh

petition for the same cause once again. The following observations of E.S. Venkataramiah, J. (as the learned chief Justice then was) are to be quoted here:

"We are of the view that the principle underlying Rule 1 of Order 233 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.

Of course their Lordships added that the above rule is not applicable to writ petitions involving personal liberty "since such a case stands on a different footing altogether.

We have no doubt that the above rule of public policy, for the very same reasoning, should apply to special leave petitions filed under Art.136 of the Constitution also. Even otherwise, the order passed by the Division Bench of the High Court on 3.5.1998 does not warrant interference on merits as the learned judges of the High Court have taken into account all the relevant facts and came to the correct conclusion.

We also agree with the Division Bench of the High Court that the order dated 3.5.1996 does not require any clarification. In fact the attempt of the petitioner was to get the order reviewed. Since there was no error apparent on the face of the record the petitioner termed his petition as one for clarification. The Division Bench of the High Court has dismissed it rightly.

Accordingly we dismiss these Special Leave Petitions.