

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 12665/2009**

% Judgment reserved on 08.02.2010
Judgment delivered on: 19.04.2010

IDPL VRS & Retired Employees Federation Gurgaon Petitioner
Through: Mr. S.K. Sinha with Ms. Seema
Kashyap, Advocates

versus

The Secretary, Government of India & Ors. Respondents
Through: Mr. J.P. Singh, Advs. for R-1 & 2.
Mr. Manish Vashisht with
Mr. Sameer Vashisht and Ms. Shakti
Yadav, Advocate for R-3.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J.

1. By this petition filed under Article 226 of the Constitution of India, the petitioners seek directions to direct the respondent to appoint the petitioners to the posts which they were holding on the date of VRS by way of fresh recruitment.

2. Brief facts relevant for deciding the present petition are that the petitioners' no. 2 to 329 were employees of the Indian Drugs & Pharmaceuticals Company (IDPL) and on 31.12.2002 opted for VRS which was offered by the IDPL. But subsequently, the company was rehabilitated and revived and hence fresh recruitments were made on contract basis. The case of the petitioners is that they have a preferential right of being recruited once the company is making fresh recruitments. Feeling aggrieved with the same, the petitioners preferred a writ petition under Article 32 of the Constitution of India and vide order dated 18.9.2009 the same was "dismissed as withdrawn". Without obtaining leave for filing a fresh petition from the Supreme Court, the petitioners have now approached this court by filing a writ petition under Article 226 of the Constitution of India on the same cause of action.

3. Mr. Manish Vasisht, counsel for respondent No. 3 strenuously contended that the present writ petition filed by the petitioners is not maintainable in the eyes of law as the petitioners had earlier filed a Writ Petition (Civil) No. 403/2009 under Article 32 of the Constitution of India and the said writ petition was dismissed as withdrawn by the Apex Court vide order dated 18.9.2009 and no

liberty or leave was obtained by the petitioner to approach this Court under Article 226 of the Constitution of India. The contention of counsel for the respondent was that the said unconditional withdrawal by the petitioners without taking any leave of the Court would clearly show that the petitioners had no case before the Apex Court and due to this reason alone the petitioners had withdrawn the said writ petition and hence now based on the same facts and the cause of action, the present writ petition under Article 226 of the Constitution cannot be held to be maintainable. In support of his arguments, counsel for the respondent placed reliance on the following judgments:

- 1. Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior & Ors. (1987) 1 SCC 5,**
- 2. Upadhyay & Co. Vs. State of U.P. & Ors. (1999) 1 SCC 81**
- 3. Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC 408.**

4. The other contention raised by counsel for respondent No. 3 was that the petitioners have no legally enforceable right to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. Counsel argued that the petitioners along with other large number of employees had voluntarily accepted the VRS scheme when

the decision was taken by the Government to close the respondent No.3 company and pursuant to the said decision, an option was given to all 6000 odd employees to exercise their right to give their option for the VRS, which remained open for a period of three months. It was also made clear by the respondent No. 3 that in case such option is not given by the employees then they will not be entitled to the VRS in future and will be considered only for retrenchment compensation, if any. The contention of counsel for the respondent No.3 was that pursuant to the said scheme announced in the year 2002, the petitioners had voluntarily exercised their option and as a result thereof they had received all the monetary benefits under the scheme and now after a lapse of about 7 years the petitioners, without there being any legal right created in the said scheme, cannot approach this Court under Article 226 of the Constitution of India. Counsel further submitted that the relationship of employer and employee ceased to exist once the VRS option was exercised by the petitioners, which was accepted by respondent No.3 and resultantly pecuniary benefits were given to the petitioners. Counsel contended that the said scheme was in the nature of a contract between the parties and it is not the case of the petitioners that any kind of fraud was played upon them to seek their said option. Counsel also submitted that around 6000

employees had exercised their option and pursuant to the directions given by the BIFR, the respondent had merely employed about 97 employees on contract basis and the total strength of respondent No.3 at present is 322. Counsel thus submitted that under the VRS scheme no such condition was laid down that in the event of revival of the said company, a fresh right would accrue to the employees to seek revival of their option and in the absence of any such clause in the VRS scheme, clearly the petitioners have no enforceable right to claim recruitment in the service. Counsel further submitted that no reappointment of any person, who had earlier exercised their option under VRS, has been made by respondent No.3. He, however, stated that some of the persons have been taken on contract basis for a short period. The counsel thus stated that the present petition filed by the petitioners is a gross abuse of the process of Court of law.

5. Counsel for the petitioners on the other hand submitted that the petition filed by the petitioners under Article 32 was withdrawn by the petitioners so as to seek appropriate legal remedy available to the petitioners under Article 226 of the Constitution of India and that the present petition is not hit by the principle of res judicata. Counsel further submitted that Clause 9 of the said VRS scheme clearly states that there will be no recruitment against the

vacancies arising due to VRS. Similarly in Clause 2 of the scheme, placed on page 53 of the paper book, it was made explicitly clear to the employees that there shall be no recruitment against vacancies arising out of VRS. Counsel for the petitioners submitted that the petitioners were led to believe by respondent No. 3 that no further recruitment against the same vacancies shall be made by respondent No. 3 and under that belief the petitioners exercised their option to seek voluntary retirement. Counsel thus urged that now once respondent No.3 is on the revival mode, then, necessarily the present petitioners who have been deprived of their employment under the said scheme should be taken back on employment and respondent No. 3 cannot be allowed to recruit persons either on contract basis or otherwise. Counsel further submitted that all the petitioners are willing to return the VRS compensation already received by them from respondent No. 3 in terms of Clause 3 of the said revised voluntary retirement scheme announced by the Government vide their circular No. IDP/4(52)/Estt/02 dated 20.09.2002. Counsel further urged that once respondent No. 3 has started making fresh recruitments, then the petitioners have a preferential right to be given employment on the posts they were earlier holding.

6. I have heard learned counsel for the parties at considerable length and given my anxious consideration to the arguments advanced by them.

7. First, I would deal with the preliminary objection raised by the counsel for the respondent that since no leave of the Apex Court was taken by the petitioners at the time of withdrawing the petition filed by them under Article 32 of the Constitution of India, therefore, the present petition filed under Article 226 of the Constitution of India based on the same facts and same cause of action would not be maintainable. In support of his arguments the learned Counsel for the petitioner placed reliance on the judgments of the Apex Court in ***Sarguja Transport Service (Supra)*** and ***Upadhyay & Company (Supra)***. One of the earlier cases where this question came under consideration was the case of ***Daryao Singh Vs. State of U.P. & Ors. (1962) 1 SCR 574*** where the Court was confronted with the question as to whether the dismissal of writ petitions filed by a party under Article 226 of the Constitution of India would create a bar of *res judicata* against a similar petition filed by the same party under Article 32 of the Constitution of India. Answering the said question the Apex Court held as under:-

"The next question to consider is whether it makes any difference to the application of this rule that the decision on which the plea of res judicata is raised is a decision not of this Court but of a High Court exercising its jurisdiction under Art. 226. The argument is that one of the essential requirements of s. 11 of the Code of Civil Procedure is that the Court which tries the first suit or proceeding should be competent to try second suit or proceeding, and since the High Court cannot entertain an application under Art. 32 its decision cannot be treated as res judicata for the purpose of such a petition. It is doubtful if the technical requirement prescribed by s. 11 as to the competence of the first Court to try the subsequent suit is an essential part of the general rule of res judicata; but assuming that it is, in substance even the said test is satisfied because the jurisdiction of the High Court in dealing with a writ petition filed under Art. 226 is substantially the same as the jurisdiction of this Court in entertaining an application under Art. 32. The scope of the writs, orders or directions which the High Court can issue in appropriate cases under Art. 226 is concurrent with the scope of similar writs, orders or directions which may be issued by this Court under Art. 32. The cause of action for the two applications would be the same. It is the assertion of the existence of a fundamental right and its illegal contravention in both cases and the relief claimed in both the cases is also of the same character. Article 226 confers jurisdiction on the High Court to entertain a suitable writ petition, whereas Art. 32 provides for moving this Court for a similar writ petition for the same purpose. Therefore, the argument that a petition under Art. 32 cannot be entertained by a High Court under Art. 226 is without any substance; and so the plea that the judgment of the High Court cannot be treated as res judicata on the ground that it cannot entertain a petition under Art. 32 must be rejected.

It is, however, necessary to add that in exercising its jurisdiction under Art. 226 the High Court may sometimes refuse to issue an appropriate writ or order on the ground that the party applying for the writ is guilty of laches and in that sense the issue of a high prerogative writ may reasonably be treated as a matter of discretion. On the other hand, the right granted to a citizen to move this Court by appropriate proceedings under Art. 32(1) being itself a fundamental right this Court ordinarily may have to issue an appropriate writ or order provided it is shown that the petitioner has a fundamental right which has been illegally or unconstitutionally contravened. It is not unlikely that if a petition is filed even under Art. 32 after a long lapse of time considerations may arise whether rights in favour of third parties which may have arisen in the meanwhile could be allowed to be affected, and in such a case the effect of laches on the part of the petitioner or of his acquiescence may have

to be considered; but, ordinarily if a petitioner makes out a case for the issue of an appropriate writ or order he would be entitled to have such a writ or order under Art. 32 and that may be said to constitute a difference in the right conferred on a citizen to move the High Court under Art. 226 as distinct from the right conferred on him to move this Court. This difference must inevitably mean that if the High Court has refused to exercise its discretion on the ground of laches or on the ground that the party has an efficacious alternative remedy available to him then of course the decision of the High Court cannot generally be pleaded in support of the bar of res judicata. If, however, the matter has been considered on the merits and the High Court has dismissed the petition for a writ on the ground that no fundamental right is proved or its breach is either not established or is shown to be constitutionally justified there is no reason why the said decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same facts and for the same reliefs under Art. 32.

*There is one more argument which still remains to be considered. It is urged that the remedies available to the petitioners to move the High Court under Art. 226 and this Court under Art. 32 are alternate remedies and so the adoption of one remedy cannot bar the adoption of the other. These remedies are not exclusive but are cumulative and so no bar of res judicata can be pleaded when a party who has filed a petition under Art. 226 seeks to invoke the jurisdiction of this Court under Art. 32. In support of this contention reliance has been placed on the decision of the Calcutta High Court in *Mussammatt Gulab Koer v. Badshah Bahadur* [13 C.W.N. 1197.]. In that case a party who had unsuccessfully sought for the review of a consent order on the ground of fraud brought a suit for a similar relief and was met by a plea of res judicata. This plea was rejected by the Court on the ground that the two remedies though co-existing were not inconsistent so that when a party aggrieved has had recourse first to one remedy it cannot be precluded from subsequently taking recourse to the other. In fact the judgment shows that the Court took the view that an application for review was in the circumstances an inappropriate remedy and that the only remedy available to the party was that of a suit. In dealing with the question of res judicata the Court examined the special features and conditions attaching to the application for review, the provisions with regard to the finality of the orders passed in such review proceedings and the limited nature of the right to appeal provided against such orders. In the result the Court held that the two remedies cannot be regarded as parallel and equally efficacious and so no question of election of remedies arose in those cases. We do not think that this decision can be read as laying down a general proposition of*

law that even in regard to alternate remedies if a party takes recourse to one remedy and a contest arising therefrom is tried by a court of competent jurisdiction and all points of controversy are settled the intervention of the decision of the Court would make no difference at all. In such a case the point to consider always would be what is the nature of the decision pronounced by a Court of competent jurisdiction and what is its effect. Thus considered there can be no doubt that if a writ petition filed by a party has been dismissed on the merits by the High Court the judgment thus pronounced is binding between the parties and it cannot be circumvented or by-passed by his taking recourse to Art. 32 of the Constitution. Therefore, we are not satisfied that the ground of alternative remedies is well founded”.

From the aforesaid judgment, it would be manifest that the Apex Court was primarily dealing with a question as to whether the second petition based on the same facts would be barred by the principles of *res judicata* or not. The Court in a passing reference also held that if the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32 because in such a case there has been no decision on the merits of the case by the court. While laying down this law, the court was conscious enough to clarify that the conclusion reached by them was confined only to the point of *res judicata* and in the light of this position the facts of those six petitions were examined.

8. In the matter of ***Sarguja Transport Service (Supra)*** the Apex Court was dealing with a precise question that “where the petitioner withdraws a petition filed by him under Article 226 of the

Constitution of India without seeking a permission to institute a fresh petition, then in such a case will the remedy of the petitioner to file a suit or a writ petition under Article 32 before the Supreme Court remain open to him or not?" It would be apt to mention here that the facts of the said case are more near and similar to the facts of the case at hand as here also this court is dealing with an issue where the petitioner had withdrawn the petition filed under Article 32 of the Constitution of India and based on the same facts and the same cause of action has filed this petition under Article 226 of the Constitution of India. The Apex Court in the above case examined the principles of public policy envisaged under Order 23 Rule (1) of the Code of Civil Procedure and held as under :-

*"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 Articles [226/227](#) of the Constitution of India 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 a 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. He may as stated in *Daryao and Ors. v. The State of U.P. and Ors.* [1962] 2 S.C.R. 575 in a case involving the question of enforcement of fundamental rights file a petition before the*

Supreme Court under Article [32](#) of the Constitution of India because in such a case there has been no decision on the merits by the High Court. The relevant observation of this Court in Daryao's case (*supra*) is to be found at page 593 and it is as follows:

If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article [32](#), because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other.

9. The point for consideration is whether a petitioner after with-drawing a writ petition filed by him in the High Court under Article [226](#) of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (*supra*) is of no assistance. But we are of the view that the principle underlying Rule 1 of 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 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 Article [226](#) of the Constitution once again. While the withdrawal of a writ petition filed in a 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 of India since such withdrawal does not amount to res judicata, the remedy under Article [226](#) of the Constitution of India 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. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article [21](#) of the Constitution since such a case stands on a different footing altogether. We, however leave this question open."

It would be worth mentioning here that the judgment of the Apex Court in ***Daryao Singh's case*** was referred in the above judgment and the court clearly took a view that the decision in ***Daryao Singh's case*** would be of no assistance as there the court was confronted with the issue as to whether the second petition filed under Article 32 of the Constitution of India would be barred by the principles of *res judicata*. In that case the Apex Court did not go into the question of principle of law and the public policy envisaged under Order 23 Rule (1) of the CPC. The Apex Court in ***Sarguja Transport Service's case*** also left the question open so far applicability of the said principle in the writ petition involving the personal liberty of an individual or where the writ is in the nature of habeas corpus or also where the petitioner seeks to enforce the fundamental rights granted under Article 21 of the Constitution of India are concerned.

9. The said principle under Order 23 Rule (1) as extended to the writ jurisdiction again came up for consideration in the case of ***Upadhyay & Company (Supra)*** where the Apex Court again took a view that 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 of India, but the remedy under Article 226 of the Constitution of India should

be deemed to have been abandoned by the petitioner in respect of the cause of action relied in the writ petition when he withdraws it without such permission. Relevant para of the said judgment is referred as under:-

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 Transport Service v. State Transport Appellate Tribunal, Gwalior, : [1987]1SCR200). 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 23 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 Article 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 Article 32 of the Constitution since such withdrawal does not amount to res judicata, 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."

10. Yet, in another case which is relevant to the controversy at hand is that of ***Sarva Shramik Sanghatana (KV) Vs. State of Maharashtra & Ors (2008) 1 SCC 494*** where also the Apex Court placed reliance on the principle enunciated in ***Sarguja Transport's case*** but since the facts of the case being dealt by them were distinguishable as there the court was dealing with an application of the petitioner company filed under Section 25-O (1) of the Industrial Disputes Act which was withdrawn reserving its right to move fresh application as and when necessary and hence in the background of these facts the court found that the withdrawal by the petitioner for trying to arrive at an amicable settlement with the workers was a bona fide exercise on the part of the petitioner and it was not a case of bench hunting, and therefore, held that the principle settled in ***Sarguja Transport*** case to be distinguishable. It would be, however, relevant to reproduce relevant para of the said judgment here :-

*"We have carefully examined the decision of the **Sarguja Transport Service** case (supra). In the said decision it is mentioned in paragraph 8 as follows:*

"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 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."

In paragraph 9 of the said decision, it is also mentioned as follows:

"But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interest 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."

We are of the opinion that the decision in Sarguja Transport case (supra) has to be understood in the light of the observations in paragraphs 8 & 9 therein, which have been quoted above. The said decision was given on the basis of public policy that, if while hearing the first writ petition the Bench is inclined to dismiss it, and the learned Counsel withdraws the petition so that he could file a second writ petition before what he regards as a more suitable or convenient bench, then if he withdraws it he should not be allowed to file a second writ petition unless liberty is given to do so. In other words, bench-hunting should not be permitted.

It often happens that during the hearing of a petition the Court makes oral observations indicating that it is inclined to dismiss the petition. At this stage the counsel may seek withdrawal of his petition without getting a verdict on the merits, with the intention of filing a fresh petition before a more convenient bench. It was this malpractice which was sought to be discouraged by the decision in Sarguja Transport case (supra)."

11 . It would also be worthwhile to reproduce the relevant portion of the recent judgment of the Apex Court in ***Ramesh***

Chandra Sankla & Ors. Vs. Vikram Cement (2008) 14 SCC 58

where again the Apex Court after referring to the principles of law laid down in the previous judgments of ***Daryao Singh, Sarguja Transport, Sarva Shramik cases*** held as under:-

*"From the above case law, it is clear that it is open to the petitioner to withdraw a petition filed by him. **Normally**, a Court of Law would not prevent him from withdrawing his petition. But if such withdrawal is without the leave of the Court, it would mean that the petitioner is not interested in prosecuting or continuing the proceedings and he abandons his claim. In such cases, obviously, public policy requires that he should not start fresh round of litigation and the Court will not allow him to re-agitate the claim which he himself had given up earlier.*

51. In Sarguja Transport Service, extending the principles laid down in Daryao, Venkataramiah, J. (as His Lordship then was) concluded;

*We are of the view that the principle underlying Rule 1 of 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 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 Article [226](#) of the Constitution once again. **While the withdrawal of a writ petition filed in a 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 of India since such withdrawal does not amount to res judicata, the remedy under Article [226](#) of the Constitution of India 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."***

12. Before applying the principles of law as culled out herein above, let me revert back to the facts of the present case, confining to the objections raised by the respondent with regard to the non-maintainability of the present petition. Indisputably, the petitioner had invoked the jurisdiction of the Apex Court under Article 32 of the Constitution of India to seek the same relief as has been sought by them in the present petition moved under Article 226 of the Constitution of India. In para 29 of the present petition, the petitioners have clearly stated the fact of filing of the writ petition before the Hon'ble Supreme court vide W.P.(C) No.403/2009 which was permitted to be "dismissed as withdrawn" by the order dated 18.9.2009. It would be essential here to reproduce the order passed by the Hon'ble Supreme Court in the said writ petition which is as under:-

ITEM NO.8

COURT NO.3

SECTION X

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

W R I T P E T I T I O N (C I V I L) N O (s). 403 O F 2009
(F O R P R E L. H E A R I N G)

I D P L V R S & R E T D. E M P. F E D N. T R. S E C. & O R S.

Petitioner(s)

V E R S U S

S E C. G O V T. O F I N D I A, M I N. O F C H E M. & F E R. & O R S.

Respondent(s)

Date: 18/09/2009 This Petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE S.H. KAPADIA
HON'BLE MR. JUSTICE AFTAB ALAM

For Petitioner(s) Mr. S.K. Sinha,Adv.

For Respondent(s)

UPON hearing counsel the Court made the following
O R D E R

Dismissed as withdrawn.

(N. ANNAPURNA)
COURT MASTER

(MADHU SAXENA)
COURT MASTER

13. The aforesaid order passed by the Hon'ble Apex Court clearly shows that the matter was heard by the Apex Court and then the same was dismissed as withdrawn by the petitioners. Once the matter was heard by the Apex Court at the admission stage there could have been the following possibilities:

- Firstly the court could have issued a show cause notice for admission or
- Secondly the court could have dismissed the matter in limine or

- Thirdly the petitioner could have withdrawn the petition after taking leave from the court to file the same before the appropriate court or forum or
- Fourthly finding the court inclined to dismiss the petition the counsel seeks withdrawal of the petition without inviting any observations of the court on the merits of the case.

14. As observed by the Apex Court in the case of ***Sarguja Transport (Supra)*** sometimes this practice of bench hunting is adopted by the petitioner with an intention of filing a fresh petition before a more convenient Bench and this kind of malpractice was sought to be discouraged by the Apex Court in the said case. The petitioners in the present case have not explained any reasons as why the leave from the Apex Court was not sought to seek an appropriate remedy by filing a writ petition under Article 226 of the Constitution of India and in the absence of any explanation offered in the present petition, it would be quite evident that the petition under Article 32 of the Constitution of India was withdrawn by the petitioners when the counsel for the petitioner found that the Apex Court was inclined to dismiss the petition. It is a settled legal position that when a petition under Article 32 has been dismissed then the

petition based on the same facts would not be maintainable under Article 226 of the Constitution of India and the position would be the same vice versa as well. However, if the petition under Article 226 of the Constitution of India is dismissed not on merits but on the grounds of laches, acquiescence or on the ground that there was an alternative remedy available to the petitioner, then such dismissal would not operate as a bar to a petition under Article 32 of the Constitution of India, though of course the court in disposing the application might consider whether those grounds would suffice to dismiss the petition under Article 32 also (***Joseph Pothan Vs. State of Kerala AIR 1965 SC 1514***).

15. The bar of res judicata or constructive res judicata would apply even to a petition under Article 32 of the Constitution where similar petition seeking the same relief had been filed under Article 226 before the High Court and the decision rendered against the petitioner therein has not been challenged by filing an appeal in the Supreme Court and has been allowed to become final. However, this principle, namely, the bar of res judicata or principles analogous thereto would not apply to a writ of habeas corpus where the petitioner prays for setting him at liberty. If a person under detention files a writ of habeas corpus under Article 226 before the

High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking order) and the said decision is not challenged by preferring a special leave petition under Article 136 and is allowed to become final, it would still be open to him to file an independent petition under Article 32 seeking a writ of habeas corpus as was held in ***T.P. Moideen Koya Vs. Govt. of Kerala & Ors., (2004) 8 SCC 106.***

16. There cannot be any doubt that Article 32 is a very important safeguard for the protection of the fundamental rights of the citizens and the Supreme Court has been entrusted with the solemn task of upholding fundamental rights of the citizens of this country. So far the jurisdiction of High Court under Article 226 of the Constitution of India is concerned, it is not constituted as an inferior Court in the Constitutional Scheme but enjoys wider powers to go into the various questions of facts and law and the extra-ordinary jurisdiction of the High Court is wide and extensive to issue prerogative writs for enforcement of the fundamental rights and therefore, so far the invasion or enforcement of the fundamental rights of the citizens are concerned, the jurisdiction of the Supreme Court under Article 32 of the Constitution of India and that of the

High Court under Article 226 of the Constitution of India are concurrent in nature. The said principle was reiterated by the Apex Court in a number of judgments but in the case of ***Mohammed Ishaq vs. S. Kazam Pasha 2009(7) SCALE 75*** it held that it is well settled position of law that simply because a remedy exists in the form of Article 226 of the Constitution for filing a writ in the concerned High Court, it does not prevent or place any bar on an aggrieved person to directly approach the Supreme Court under Article 32 of the Constitution. It is true that the court has imposed a self-restraint in its own wisdom on the exercise of jurisdiction under Article 32 where the party invoking the jurisdiction has an effective, adequate alternative remedy in the form of Article 226 of the Constitution. However, this rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than a rule of law. At any rate it does not oust the jurisdiction of the Apex Court to exercise its writ jurisdiction under Article 32 of the Constitution.

17. But, there may be cases where on approaching the Apex Court under Article 32 of the Constitution of India, the Apex Court may direct the petitioner to first approach the High Court under Article 226 of the Constitution of India or the petitioner may withdraw the petition so as to first exhaust his remedy under Article

226 of the Constitution of India, but in the area where the Supreme Court and the High Court exercise concurrent jurisdiction in the case of withdrawal by the petitioner to approach the High Court under Article 226 of the Constitution of India, the order passed by the Apex Court must reflect that leave has been obtained by the petitioner so as to move the High Court. In the absence of such leave, if withdrawal by the petitioner is made and that too after due hearing is given by the Apex Court, then certainly filing of the same petition based on the same cause of action seeking the same relief would be clearly hit by the principles of public policy as envisaged under Order 23 Rule 1 CPC. This is what has happened in the facts of the present case, when upon hearing, counsel for the petitioner not finding the Apex Court inclined to grant any relief sought withdrawal of the petition which was accordingly “dismissed as withdrawn” by the order dated 18.09.2009. Therefore, on the same facts and cause of action and seeking the same relief, the petitioner cannot be allowed to reagitate the same before this court by filing a petition under Article 226 of the Constitution of India. The present petition is clearly hit by the principles of law authoritatively settled by the Apex Court in the case of ***Sarguja Transport (Supra)***.

18. In the light of the aforesaid legal position discussed above, I find myself in complete agreement with the stand taken by the respondent that since the said petition of the petitioner was “dismissed as withdrawn” by the Apex Court after complete hearing was given by it, therefore, the present petition cannot be held maintainable in view of the bar envisaged under Order 23 Rule 1 CPC.

19. Since this court has taken a view that the present writ petition filed by the petitioner is not maintainable, therefore, so far the merits of the case are concerned, it would not be appropriate to give any finding on the same.

20. In the backdrop of the above position, the present petition is dismissed as being not maintainable in the eyes of law.

April 19, 2010

KAILASH GAMBHIR,J