

|              |
|--------------|
| S. No.3      |
| Regular List |

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH**  
**AT SRINAGAR**

Uploaded on 24.04.2026

**WP(C) No.297/2022**  
**CM No. 794/2022**

**Ghulam Mohammad Hajam & Anr.**

.....Petitioner(s)

Through: Mr.Javid Ahmad Parray, Advocate.

V/s

**UNION OF INDIA AND ORS**

... ..Respondent(s)

Through: Mr. Bashir Ahmad Zargar and  
Mr. A.S.Sodhi, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

**ORDER**  
23.04.2026

1. The petitioners through the medium of present petition have sought the following reliefs:-

- I. An appropriate writ, order or direction, holding the petitioners entitled for the family pensioner benefits accrued in lieu of the death of the Constable Mohammad Amin Hajam in the wake of the remarriage of the respondent No.07 and commanding the respondents 01 to 05 not to release the pensioner benefits in question in favour of the respondent No.07 and make the payment of the same to the petitioners being the dependent parents of the deceased constable.
- II. An appropriate writ, order or direction, commanding the respondent No.06 to make payment of the pension amount which has accumulated in the account lying with his bank to the petitioners.
- III. Any other writ, order or direction which this Hon'ble Court deems just and proper, be issued in favour of the petitioner for the same would be in consonance with law and justice."

2. Respondent No.7 in her objections to the writ petition has raised preliminary objection with regard to the maintainability of the writ petition. It has been submitted that the writ petition is not maintainable as the petitioners had filed a civil suit before the Court of learned Sub Judge, Pattan on the same cause of action against the respondents herein, which stands dismissed in terms of order dated 13.06.2022 passed by the said Court.

3. Vide order dated 24.03.2025 the petitioners were directed to place on record copy of Civil suit titled *Ghulam Mohammad Hajam and Anr. vs Union of India and Ors* as well as the certified copy of the order passed by learned Sub Judge, Pattan in the said suit. Pursuant to the said direction, the petitioners have placed on record certified true copy of the plaint filed by them before the Court of learned Sub Judge, Pattan. A certified true copy of order dated 13.06.2022 passed in the said suit has also been placed on record.

4. A perusal of the plaint filed by the petitioners before the learned Sub Judge, Pattan would reveal that in the said suit the petitioners have prayed for the following reliefs:-

- “a. A Decree of declaration, declaring the plaintiffs entitled to the family pension in lieu of the death of their son, being his only surviving dependant parents, in view of the revival of their right on remarriage of the defendant No.06.
- b. A decree of permanent injunction, whereby the official defendants be permanently restrained from making the payment of the family pension to the

defendant No.06, having lost her entitlement by remarriage.

- c. A decree of mandatory injunction, commanding the official defendants to make the payment of the family pension to the plaintiffs being the only surviving dependant parents of the deceased defence personal.
- d. Any other order or direction which this Hon'ble court deems fit and proper in the attending facts and circumstances of the case be also passed in favour of the plaintiffs and against the defendant."

5. The aforesaid suit came to be dismissed for non prosecution by the learned Civil Court vide its order dated 13.06.2022. The same is reproduced as under:-

"Nemo for the plaintiffs present. Ld.Counsel for defendant No.6 present. Perusal of the order sheet reveals that for the last two hearings nobody is appearing on behalf of plaintiff and today also nobody is present on their behalf which shows that plaintiffs are not interested in pursuing the suit. In view of the same, the instant suit is dismissed in default of appearance of plaintiffs. Be consigned to record."

6. I have heard learned counsel for the parties on the question of maintainability of the present writ petition and I have also perused record of the case.

7. It is not in dispute that the petitioners had filed a civil suit before the Court of learned Sub Judge, Pattan against the respondents herein, in which they had prayed for a decree of declaration that they are entitled to the family pension in lieu of death of their son, being his only legally surviving dependents/parents in view of the revival of their right on re-marriage of defendant No.6, who happens to be respondent No.7 herein. A decree of permanent injunction restraining the official

defendants from making any payment of family pension to defendant No.6/respondent No.7 herein was also sought with a mandatory injunction that official defendants should make the payment of family pension to the plaintiffs/petitioners herein.

8. A perusal of the reliefs prayed in the present writ petition as quoted hereinbefore would reveal that exactly similar reliefs were sought by the petitioners herein against the respondents/defendants in the Civil suit. Thus, the cause of action and even the relief prayed in both the cases is the same. The suit filed by the petitioners stands dismissed for non-prosecution.

9. Order XXIII Rule 1 governs the legal position with regard to effect of withdrawal of suit or abandonment of part of claim.

It reads as under:-

### ***ORDER XXIII***

#### *Withdrawal and Adjustment of Suits*

#### ***[1. Withdrawal of suit or abandonment of part of claim.—***

*(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

*Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*

*(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*

*(3) Where the Court is satisfied,—*

*(a) that a suit must fail by reason of some formal defect, or*  
*(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim,*  
*It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*  
*(4) Where the plaintiff—*  
*(a) abandons any suit or part of claim under sub-rule (1), or*  
*(b) withdraws 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.*  
*(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff.]*

10. Sub rule (4) quoted above provides that in a case where plaintiff abandons any suit or part of claim or withdraws any suit or part of a claim without permission to institute fresh proceedings, he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

11. In the present case the petitioners admittedly had filed a civil suit before the Court of Sub Judge Pattan in respect of the same subject matter which is the subject matter of present writ petition. The said suit came to be dismissed for non-prosecution by the said Court on 13.06.2022, meaning thereby, that the petitioners/plaintiffs abandoned the claim set up by them before the Civil Court. It is not the case of petitioners that they had

sought any permission to institute fresh proceedings nor does order dated 13.06.2022 passed by the Sub Judge Pattan suggest so. Therefore, in the face of provisions contained in Sub rule (4) of Order XXIII Rule 1 of CPC, the petitioners are precluded from instituting fresh proceedings, including a writ petition in respect of the same subject matter.

12. The question whether the provisions contained in Order XXIII Rule 1 of CPC are applicable to writ proceedings came up for consideration before this Court in the case of *Zamindaran Lorow and others vs State and Ors*, 2008(II) SLJ 495. While holding that the said provision is applicable even to writ proceedings, a co-ordinate Bench of this Court relied upon the following observations made by the Supreme Court in the case of *Sarguja Transport Service vs. T.A. Tribunal Gwalior*, (1987) 1 SCC 5.

“The Code as it now stands thus makes a distinction between 'abandonment' of a suit and 'withdrawal' from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission referred to in Sub-rule (3) of Rule 1 of Order XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter against after abandoning the earlier suit or by withdrawing it without the

permission of the Court to file fresh suit. *Invito beneficium non datur*. 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 reason 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 *res judicata* 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 the parties under whom they are 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 rule of *res judicata* applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prayer adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in Sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in Sub-rule (3) in order to prevent the abuse of the process of the Court.

The point for consideration is whether a petitioner after withdrawing 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*) AIR 1961 SC 1457 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 extra ordinary writ jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of the writ petition filed in High Court without permission to file a fresh 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. 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 personal liberty to 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.”

13. In view of the foregoing analysis of legal position, it is clear that principles of Order XXIII Rule 1 of CPC are applicable even to writ proceedings. Therefore, if a party abandons his suit in respect of a particular subject matter, he is precluded from filing a writ petition on same subject matter and same cause of

action without obtaining leave of the Court where he had instituted the suit.

14. Learned counsel for the respondents has contended that in terms of Rule 4 of Order IX CPC, if a suit is dismissed for non-appearance of the plaintiff, a fresh suit can be brought by such plaintiff on the same cause of action, as such, the petitioners were well within their rights to institute the present writ petition even if their suit had been dismissed for non prosecution by the Civil Court.

15. I am afraid, the contention of the learned counsel for the petitioner in this regard is misconceived, because in the present case the suit has not been dismissed by the civil Court either in terms of Rule 2 or in terms of Rule 3 of Order IX of CPC. It is not a case where suit of the plaintiff was dismissed on account of failure of the petitioners to pay costs or on account of the fact that none of the parties had appeared before the Civil Court at the time when the suit was called on for hearing. In the present case when the suit of the petitioners was dismissed for non-prosecution by the Civil Court, defendant No.6/respondent no.7 herein was present before the Court. This is clear from a perusal of order dated 13.06.2022 passed by learned Sub Judge Pattan.

16. Thus, dismissal of the suit filed by the petitioners is not covered either by Rule 2 or Rule 3 of Order IX of CPC, but it is

covered by Rule 8 of Order IX of CPC. The consequences of dismissal of a suit for non-appearance of plaintiff when the defendant has appeared before the Court, are governed by Rule 9 of Order IX. The said rule specifically provides that when a suit is wholly or partly dismissed under Rule 8, the plaintiff is precluded from bringing a fresh suit on same cause of action. Therefore, in the present case the petitioners are precluded from filing a fresh suit or a writ petition, because their suit was dismissed by the Civil Court when defendant no.6 was present before the Court. The contention of the learned counsel for the petitioners is, therefore, without any substance.

17. For what has been discussed hereinbefore, it is clear that the present writ petition is not maintainable in view of the bar contained in sub rule (4) of rule 1 of Order XXIII of CPC, the principles whereof are applicable to the writ proceedings as well.

18. Accordingly, the objection raised by respondent No.7 is upheld. The writ petition is held to be not maintainable and is dismissed accordingly.

(SANJAY DHAR)  
JUDGE

**SRINAGAR**  
23.04.2026  
Sarveeda Nissar

Whether the order is speaking: Yes/No  
Whether the order is reportable: Yes