

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 5242 of 2014

1. Promod Kumar Gajbhiye S/o Late Shankar Gajbiye Aged About 53 years R/o Village Danteswari Ward No.2, Dongargarh, Distt Rajnandgaon, Cg

---- Petitioner

Versus

1. The State Of Chhattisgarh, Through Secretary, Tribal Welfare Department, DKS Bhawan, Raipur, CG
2. The Collector Distt Rajnandgaon
3. The Ambedkar Education Society, Through Its President Station Road Dongargarh, Distt Rajnandgaon, CG.

---- Respondent

For Petitioners	Shri Parag Kotecha, Advocate
For Respondent/State	Shri Shashank Thakur, Govt. Adv.

Hon'ble Shri Justice Prashant Kumar Mishra

Order On Board

06/04/2015

1. In this writ petition under Article 226 and 227 of the Constitution of India, the petitioner is seeking quashment of the order dated 7/1/2008 (Annexure P/8) and memo dated 21/11/2007 (Annexure P/9) and has prayed for direction to the respondents to pay salary from 1/4/2005 to 7/1/2008 and for his reinstatement with full backwages and other consequential benefits.

2. Admittedly, the petitioner had earlier preferred a writ petition for the same relief bearing WP(S) NO. 3811/2009 wherein the following order was passed on 18/6/2009 :

“Shri Punit Ruprel, Adv. for the petitioner.

Ms. Sunita Jain, PL for the State.

The case is listed for orders on defaults.

On the request of learned counsel for the petitioner, one week time is granted to make good the defaults, failing which the petition shall stand dismissed for want of prosecution without reference to the Bench.”

3. Since the petitioner failed to remove the defects within the stipulated time as allowed by the Court, the writ petition was dismissed for want of prosecution. The petitioner, thereafter, preferred an application for restoration of the writ petition bearing MCC NO. 734/2014. The said MCC was barred by limitation of 1855 days, for which an application for condonation of delay was also filed. By order dated 10/9/2014 the Division Bench of this Court refused to condone the delay and as a consequence the MCC was also dismissed.
4. In the present petition, this Court required the petitioner to satisfy about the maintainability of the petition.

5. It has been urged by the learned counsel for the petitioner that the earlier petition was not decided on merits, therefore, principles of *res judicata* would not apply and the present petition is maintainable.
6. On the other hand, learned counsel for the State would submit that the writ petition is not maintainable because the petitioner having failed to remove the default in the earlier petition and his restoration application having already been dismissed, the order dated 18/6/2009 passed in WP (S) No.3811/2009 has attained finality and fresh petition on the same cause of action is not permissible.
7. Having heard learned counsel for the parties and on perusal of the orders passed by this Court in WP(S) NO. 3811/2009 and MCC No. 734/2014, this Court is of the considered opinion that the present petition is not maintainable because even if principles of *res judicata* may not *per se* apply, but the principle of estoppel would apply and on the principle of public policy, the petitioner having once preferred a petition which was dismissed for want of prosecution, he cannot be permitted to file a fresh petition on the same cause of action.
8. In **Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others**¹, the following has been held by the Supreme Court :

1 AIR 1987 SC 88

“9. 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 case 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 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.”

(Emphasis supplied)

9. Yet again in **Deb Narayan Shyam and Others v. State of W.B. and Others²**, the Supreme Court has approved the law laid down in

Sarguja Transport Service (supra).

10. In view of the law laid down by the Supreme Court in **Sarguja Transport Service** (supra) & **Deb Narayan Shyam** (supra), it is to be seen that in the present case also the petitioner having already preferred a writ petition desired to prosecute the same, but abandoned the same by not removing the default in the petition, when the petition was dismissed for want of prosecution, he did not move any application for restoration of the writ petition for more than 5 years, therefore, his prayer for restoration of the writ petition was also dismissed.
11. If the argument raised by the petitioner that the earlier petition having not been dismissed on merits the subsequent petition is maintainable, is accepted, then there would be no end to litigation and the petitioner may prefer n....number of petitions, one after another after dismissal of the previous petition for want of prosecution or after withdrawing the earlier writ petition and this may also encourage **Bench hunting**.
12. The Supreme Court in **Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar and others**³, at para 51, held thus :-

“51. The superior courts of this country must discourage forum shopping. A person seeking equity must do equity. A party cannot take recourse to a machination which amounts to abuse of process of court.”

3 (2009) 2 SCC 784

13. In **Chetak Construction Ltd. v. Om Prakash and Others**⁴, the Supreme Court held that a litigant cannot be permitted “choice” of the “forum” and every attempt at “forum-shopping” must be crushed with a heavy hand.
14. Shri Kotecha has referred the decision of the Supreme Court rendered in **Kandapazha Nadar & Ors. v. Chitraganiammal & Ors**⁵, to submit that withdrawal of the suit without liberty to file fresh suit does not constitute 'decree', therefore, there being no adjudication on merits, the petitioner is entitled to maintain the present petition.
15. In the said matter before the Supreme Court the issue was of applicability of principles of *res judicata* in the second round litigation and in that context it has been held that the earlier order of withdrawal of suit without liberty to file fresh suit would not constitute 'decree', however, the issue with which this Court is faced in the present writ petition never came up for consideration before the Supreme Court, therefore, the said judgment is not applicable in the facts of the present case.
16. As a sequel, the writ petition, being not maintainable, is liable to be and is hereby dismissed.

J u d g e

Gowri

4 (1998) 4 SCC 577

5 2007 AIR SCW 2313