

In the High Court of Judicature at Madras
Reserved on: 8.7.2015 and Pronounced on: 21.7.2015

Coram

The Honourable Mr.Justice V.RAMASUBRAMANIAN
and
The Honourable Mr.Justice K.RAVICHANDRABAABU

Writ Petition No.10673 of 2015

M.Nedunchezian ...Petitioner
Vs

The Bar Council of Tamil Nadu &
Puducherry rep.by its Secretary
Madras High Court Campus,
Chennai-104. ...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Mandamus directing the respondent to include the petitioner's candidature for enrolment as an advocate on the rolls of the respondent forthwith.

For Petitioner : Mr.M.Nedunchezian
Party in person
For Respondent : Mr.S.Y.Masood

O R D E R

V.RAMASUBRAMANIAN, J

The petitioner, whose application for enrolment as an advocate was not entertained by the Bar Council, has come up with the above writ petition seeking the issue of a Writ of Mandamus to direct the Bar Council to enroll him.

2. Heard Mr.M.Nedunchezian, petitioner appearing in person and Mr.S.Y. Masood, learned counsel for the respondent.

3. The petitioner was a freelance reporter in a monthly magazine known as 'Thuppariyum Visaranai'. The petitioner became a subscriber to two chit groups in the Pattukottai Branch of a non banking finance company by name Sriram Chits Tamil Nadu (Private) Limited, having head office at Chennai. He bagged the chit amount in the first auction. On the ground that he committed default in payment of the instalments, the company initiated arbitration proceedings in A.R.C.No.34 of 2005 before the Deputy Registrar of Chits. An award

was passed, as against which, a statutory appeal was filed by the petitioner under the Tamil Nadu Chit Funds Act, 1961. It was dismissed by the Government and the petitioner appears to have filed a revision on the file of the Madurai Bench of this Court under Article 227 of The Constitution.

4. Apart from working out his statutory remedies against the action initiated by the Non-Banking Finance Company, the petitioner also wrote an article in November 2007 in the magazine for which he was a freelance reporter, criticising the action of the non banking financial company. The article was perceived by the non banking finance corporation as a malicious propaganda causing extensive damage to their reputation. Therefore, the said company filed a private complaint in C.C.No.59 of 2008 on the file of the Judicial Magistrate No.1, Thanjavur against the writ petitioner herein as well as the editor and the publisher of the aforesaid monthly magazine. The private complaint was taken on file and processes were issued to the petitioner and other accused, for the alleged offences under Sections 499, 500 and 501 of the Indian Penal Code. The criminal complaint is pending trial.

5. Perhaps, after tasting litigation first hand, the petitioner got interested in law and joined a law college in Bangalore and completed a three year degree in law from a college affiliated to Bangalore University. On the basis of the said degree, the petitioner applied to the Bar Council of Tamil Nadu seeking enrolment. In the application for enrolment, submitted in June 2013, the petitioner disclosed the pendency of the criminal complaint. Therefore, in view of the order passed by a learned Judge of this Court in CrI.O.P.(MD). No.14573 of 2014, the Bar Council did not pass his application for enrolment.

6. Hence, the petitioner filed a writ petition in W.P.No.26216 of 2013 on the file of this Court. After the writ petition was heard and orders were reserved on 21.2.2014, the petitioner sought to withdraw the said writ petition without reserving any liberty. Therefore, the said writ petition was dismissed by an order dated 17.7.2014 by the learned Judge without any liberty.

7. But, it appears that after the dismissal of the writ petition filed by the petitioner herein on 17.7.2014, two orders came to be passed in M.P.(MD).No.2 of 2014 in CrI.O.P.(MD).No.14573 of 2014 on 1.8.2014 and 11.8.2014, permitting the enrolment of 658 candidates. In the order passed on 11.8.2014, the learned Judge observed that candidates, who have not declared their criminal background, should not be enrolled and that the right of enrolment of those candidates would be decided at the time of final disposal. Therefore, contending that there is change of circumstances, entitling him to come up with a fresh writ petition, the petitioner has come up with this writ petition.

8. The contention of the writ petitioner is two fold namely

(a) that a person facing a private complaint for an alleged offence under Section 499 of the Indian Penal Code cannot be taken to be of a criminal background, so as to make him ineligible for enrolment as an advocate; and

(b) that since the petitioner joined the three year degree in law in the academic year 2008-09, Rule 28 of Schedule III of the Rules of Education, 2008 would not apply.

9. Before considering the above contentions on merits, it is necessary to see if the present writ petition is maintainable, after the withdrawal of the first writ petition without reserving any liberty to the petitioner. Therefore, we shall examine the question of maintainability first.

10. There can no dispute about the fact that the withdrawal of a writ petition without reserving any liberty to come up again would operate as a bar for a fresh writ petition. Though the order dismissing a petition as withdrawn may not operate as res judicata, it would tantamount to abandonment.

11. In *Daryao vs. State of UP* [AIR 1961 SC 1457], the Supreme Court held that an order of withdrawal would not constitute res judicata in as much as there is no decision on the merits. However, when a petition is withdrawn by the party without obtaining liberty from the Court to file a fresh petition on the same subject matter, the petitioner is precluded as a general rule, from filing a fresh petition or an appeal against such an order.

12. In so far as civil cases are concerned, this principle is traceable to Order XXIII, rule 1 of the Code. In *Sarguja Transport Service v. S.T.A. Tribunal, Gwalior* {AIR 1987 SC 88}, the Supreme court first explained the rationale behind Order XXIII Rule 1 of the Code as follows:

"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 again 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 loose 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."

13. Pointing out the distinction between the principle underlying Order XXIII, rule 1 of the Code and the rule of res judicata, the Supreme court observed as follows:-

"The principle underlying the above rule is grounded on public policy, but it is not the same as the rule of res judicata contained in section 11 of the Code.....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 prior 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."

14. On the question as to whether the principles of Order XXIII, rule 1 of the Code would apply to writ proceedings, the court observed:-

"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 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."

15. Eventually the Supreme court held:-

"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."

16. Therefore, in the case on hand, the withdrawal of the previous writ petition, without reserving any liberty, would certainly operate as a bar for a fresh writ petition on the same cause of action. But the case of the petitioner is that the cause of action for the present writ petition is not the same as that of the previous one.

17. The petitioner has stated in paragraph 6 of the affidavit in support of his writ petition that when his previous writ petition was argued, a question relating to his eligibility for admission under Rule 28 was raised and that after he produced all original certificates, orders were reserved in his first writ petition on 21.2.2014. But, subsequently he found his name included in the list of candidates released by the Bar Council for enrolment on 2.8.2014 and that therefore, he withdrew the writ petition.

18. But, the order passed by the learned Judge dismissing the writ petition on 17.07.2014 does not disclose the reason for the petitioner withdrawing his previous writ petition. The order dated 17.7.2014 passed in the previous writ petition of the petitioner in W.P.No.26216 of 2013 reads as follows:-

"Though the petitioner, appearing as party-in-person, gave a letter to the Registry on 10.10.2014, seeking permission to withdraw the writ petition with liberty to file a fresh writ petition, this Court, indicated that liberty would not be granted. Thereafter, the petitioner made the following endorsement in the bundle:

"I herewith withdraw the petition on 17.07.2014".

2. In view of the endorsement made by the petitioner, the writ petition is dismissed as withdrawn

without any liberty. No costs. Connected M.Ps. are closed."

19. However, as pointed out earlier, the petitioner has specifically pleaded in para 6 of his affidavit that the only reason for the withdrawal of his previous writ petition was the inclusion of his name in the enrolment list dated 2.8.2014. This averment is not controverted by the respondents in the counter affidavit filed by them. On the contrary, the averment contained in para 6 of the affidavit of the petitioner is supported by the enrolment list released by the Bar Council for the enrolment fixed on 2.8.2014. It is seen from the enrolment list for 2.8.2014 that the name of the writ petitioner was included at serial number 51.

20. Obviously, the petitioner had argued his previous writ petition, without fear of consequences and the learned Judge had reserved orders on 21.2.2014. But the moment his name was included at serial number 51 in the list of candidates to be enrolled on 2.8.2014, the cause of action with which he had approached the Court with W.P.No. 26216 of 2013 did not survive. Therefore, the petitioner gave a letter for withdrawal on 10.7.2014 and the writ petition was dismissed as withdrawn on 17.7.2014. In such circumstances, the withdrawal of his first writ petition, especially after orders were reserved and especially after the inclusion of his name in the list of candidates for enrolment on 2.8.2014, cannot operate as a bar for the present writ petition.

21. But unfortunately, after the petitioner withdrew his writ petition on 17.07.2014, his name was removed from the list of candidates notified for enrolment on 2.8.2014. This removal was actually a subsequent cause of action, on which the petitioner is certainly entitled to approach this Court. While the inclusion of his name in the list for enrolment on 2.8.2014, put an end to the original cause of action that led to the filing of the first writ petition, the eventual removal of his name from the list for enrolment on 2.8.2014, gave rise to a fresh cause of action. Hence, the present writ petition based upon this fresh cause of action, cannot be said to be barred.

22. Moreover, there was yet another development. In the batch of cases in which the Bar Council was directed to put off the enrolment of persons with criminal antecedents, two orders came to be passed by the learned Judge on 1.8.2014 and 11.8.2014. Therefore, there has been a change of circumstances, after the petitioner withdraw his first writ petition. Hence, we are of the considered view that the withdrawal of the first writ petition without reserving any liberty, would not operate as abandonment, at least in so far as the present case is concerned.

23. That takes us to the next two questions namely, (i) as to whether the degree in law obtained by the petitioner from a Law College in Bangalore was valid or not for the purpose of enrolment and (ii) as to whether the criminal complaint of defamation pending

against him would make him a person with criminal background, so as to disentitle him from getting enrolled.

24. On the first question, the Secretary of the Bar Council of Tamil Nadu has filed an affidavit to the following effect:

"I submit that the petitioner has joined M.H. College of Law, Bangalore University in the year 2008 and completed 3 year Law Course in the year 2011. Though he is more than 21 years, the age limit rule came into force in the year 2009. The petitioner has joined the Law Course in the year 2008. Therefore, he cannot be disqualified on the basis of age factor."

25. In the light of the stand taken by the Bar Council in the counter affidavit, it is clear that there is no objection with regard to the eligibility of the petitioner for enrolment with particular reference to the Rules of Legal Education 2008. Hence, the first issue is to be decided in favour of the petitioner.

26. The second issue, appears to be a little ticklish. What is actually pending against the writ petitioner is a private complaint lodged by a non-banking finance company under Section 200 of the Code of Criminal Procedure, alleging that by publishing articles against them, containing defamatory statements, the petitioner had committed an offence punishable under Sections 499 and 500 of Indian Penal Code.

27. We are conscious of the fact that the very constitutionality of Sections 499 and 500 IPC is in question before the Supreme Court in a batch of cases. Therefore, keeping the same in mind, let us have a look at the issue.

28. "Publish at your own peril" appears to be the philosophy adopted by our country in the last few decades after Independence. But it appears that a number of countries, both developed and developing, have repealed Laws making defamation a Criminal Offence.

29. While interpreting Article 19 of the International Covenant on Civil and Political Rights, which guarantees freedom of expression, the United Nations Human Rights Committee appears to have urged the States to consider decriminalising defamation. The Committee had observed as follows:

"defamation laws must be crafted with care to ensure that they comply with paragraph 3 and they do not serve, in practice, to stifle freedom of expression. The Committee further stated in its authoritative interpretation of the right to freedom of expression under the ICCPR that defamation laws should "avoid excessively punitive measures and penalties".

30. In a Joint Declaration made in 2002 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE

Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression have stated that:

"Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."

31. The European court of Human Rights appears to have held that "the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings" in defamation cases. Though it did not completely rule out criminal defamation, it advised States to act "in their capacity as guarantors of public order without a formulation in bad faith."

32. In September 2014, the Law Commission of India published a joint consultation paper on Media Law, in which it considered the need to repeal Section 499 of the IPC on the ground that it violated international norms and also indicated that the penalty of incarceration up to two years was clearly disproportionate. The Amnesty International also made a series of suggestions to the Law Commission including the repeal of Sections 499 and 500 of IPC. Further, it strongly recommended that civil defamation be codified and if it is retained as a criminal offence, the law should not use imprisonment as a punishment for those convicted of defamation, in line with international standards on freedom of expression.

33. In United Kingdom, the Defamation Act of 2013, decriminalized libel and afforded protection to those publishing material on matters of public interest. A new process aimed at helping potential victims of defamation online was introduced, to facilitate the resolution of the dispute directly with the person who has posted the statement.

34. In the United States of America, the Freedom of Speech and Expression is an absolute right and 24 States do not have formatted legislations on criminal defamation. However, some States do restrict criminal prosecutions for defamation to certain offences. For instance, defaming a bank is considered a criminal offence in the State of Illinois.

35. In France, defamation is not decriminalized, but, it restricts the punishment to fine and does not grant imprisonment. In Australia, even though criminal defamation laws do exist, in practice, if a civil defamation suit can be resorted to, then that is given primary importance. In Canada, the Parliament was pressed to decriminalise media offences, consequent to the reports published by two editors who faced prison sentences, with regard to the blaming of deforestation and other environmental damage in the Guerra area on a multinational activities by the local community representatives.

36. The Defamation Act of 2013 repealed the Act of 1963 completely decriminalizing defamation in Jamaica. Apart from this, in the Caribbean, the States of Colorado, Grenada and some States of Mexico wiped off from their criminal law books, libel entirely, pursuant to the ongoing effort to remove the criminal defamation laws. The Parliament of Trinidad and Tobago has approved a bill to partially decriminalise defamation. Out of the members of the European Union, Cyprus, Romania, Estonia, Ireland and United Kingdom have repealed criminal defamation laws.

37. Bulgaria, Bosnia-Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro and Serbia, after turning to democracy, dispensed with the sanction of imprisonment and legislated to impose only a fine or corrective labour, for libel. In 2011, Montenegro removed criminal libel altogether.

38. Therefore, the trend all over the world appears to be towards decriminalisation of defamation. The Supreme Court is also seized of the issue. In such circumstances, it is not possible for us to convince ourselves that the filing of a private complaint of defamation against a person for writing articles in a magazine, could make the respondent in the criminal case, a person with criminal background so as to dis-entitle him to enrol as an advocate.

39. In view of the above, the writ petition is allowed, directing the respondent to process the application of the petitioner for enrolment, if he satisfies all other eligibility criteria for enrolment. There will be no order as to costs.

Sd/-
Assistant Registrar

True Copy

सत्यमेव जयते
Sub Assistant Registrar

To
The Secretary, Bar Council of Tamil Nadu & Puducherry, Madras High Court Campus, Chennai-104.

2 cc to Mr.M.Nedunchezian ,Party in person Advocate Sr.No.36856
1 cc to Mr.S.Y.Masood, Advocate Sr.No.37155

RS/gr

W.P.No.10673 of 2015

PPA (CO) PMK.28.7.2015