

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 629 of 2016

- Prahlad Kumar Choubey S/o Shri Ramlal Choubey, Aged About 42 Years R/o Police Line, Rajnandgaon, Tahsil And District Rajnandgaon (Chhattisgarh)

---- Petitioner

Versus

1. State Of Chhattisgarh Through The Secretary, Health And Family Welfare Department, Mahanadi Bhawan, Mantralaya, New Raipur (Chhattisgarh)
2. The Chief Medical And Health Officer, Rajnandgaon, District Rajnandgaon, Chhattisgarh.
3. The District Malaria Officer, Rajnandgaon, District Rajnandgaon (Chhattisgarh)
4. State Of Madhya Pradesh, Through The Secretary, Health And Family Welfare, Vallabh Bhawan, Bhopal (Madhya Pradesh)

---- Respondents

For Petitioner	:	Mr. J.K. Gupta, Advocate
For State	:	Mr. Dhiraj Wankhede, Govt. Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava
Oral Order

08-07-2016

Heard on question of maintainability of the petition.

- 1) Learned State counsel raised objection to the very maintainability of the petition on the submission that in respect of the same cause of action, the petitioner had earlier filed a petition before this Court, which was dismissed as withdrawn vide order dated 16.07.2012 in W.P.(S) No. 3176 of 2005. As no liberty was granted, it is contended, the second petition, on the same cause of action, is not maintainable. Reliance is placed in the matter of ***Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and others***¹, ***Haryana State Coop. Land Development Bank v. Neelam***² and ***Ramesh Chandra Sankla v. Vikram Cement***³.

¹ (1987) 1 SCC 5

² (2005) 5 SCC 91

³ (2008) 14 SCC 58

- 2) On the other hand, learned counsel for the petitioner submits that when W.P.(S) No. 3176 of 2005 was earlier listed before this Court on 16.07.2012, the counsel for the petitioner got confused, therefore, he could not present the case of the petitioner before the Court. In these circumstances, somehow, the prayer was made for withdrawal of the petition and the petition was dismissed as withdrawn. Realizing that a mistake was committed, Review Petition was filed by the petitioner. It was dismissed as withdrawn with a clarification that the Court has not expressed any opinion for the non-maintainability of the writ petition, therefore, now the petitioner has filed second writ petition. There is no intention of giving up the issue. It is only a matter of mistake that the petition came to be withdrawn. Reliance is placed in the matter of ***Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani and another***⁴, ***Ramakrishna Vivekananda Mission v. State of West Bengal and others***⁵ and ***Malkiat Singh and another v. Joginder Singh and others***⁶.
- 3) A perusal of order dated 16.07.2012 passed in W.P.(S) No. 3176 of 2005 shows that the case was represented by a counsel and the counsel made statement that he may be permitted to withdraw the petition. Permission was accordingly granted and the petition was dismissed as withdrawn. There is nothing, either in the order or in the application filed in the petition to indicate background, which led to withdrawal of the petition and show that the petitioner wants to pursue the matter. The

⁴ AIR 1993 SC 1182

⁵ AIR 2004 SCW 7254

⁶ AIR 1998 SC 258

reason assigned in the petition is that the counsel, in confusion, submitted before the Court that the petitioner may be permitted to withdraw the petition. In the considered opinion of this Court the petition is liable to be rejected at the threshold. The petition was dismissed as withdrawn on 16.07.2012.

- 4) The legal position with regard to maintainability of second petition on the same cause of action, when the earlier petition has been dismissed as withdrawn without any liberty is no longer *res integra*. In the case of ***Surguja Transport*** (supra) it was held by the Hon'ble Supreme Court in para 9 as follows :

“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 v. State of U.P.***⁷ 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

⁷ (1962) 1 SCR 574

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.”

- 5) In subsequent decision of **Ramesh Chandra** (supra) the aforesaid legal position was adumbrated after survey of its earlier decision including the decision passed in *Surguja* (supra) as follows :

“54. In the leading case of **Daryao v. State of U.P.**, (1962) 1 SCR 574, a Constitution Bench of this Court was called upon to decide whether withdrawal of a writ petition would operate as res judicata. The Court held that an order of withdrawal would not constitute res judicata inasmuch as there is no decision on the *merits* by the Court. The Court, however, proceeded to observe that when a petition is withdrawn by the party without obtaining liberty from the Court to file a fresh petition on the same subject-matter, *as a general rule*, the petitioner is precluded from filing a fresh petition or an appeal against such an order because "he cannot be considered to be a party aggrieved by the order passed by the Court permitting withdrawal of the petition".

55. **In Sarguja Transport Service v. State Transport Appellate Tribunal**, (1987) 1 SCC 5, the Appellate Tribunal set aside permit granted in favour of the petitioner by the Regional Transport Authority to run a stage carriage. The petitioner filed a writ petition under Article 226 of the Constitution in the High Court of Madhya Pradesh against the order of the Tribunal but withdrew it. Then he filed a fresh petition. The High Court dismissed it holding that after the withdrawal of the first petition, the second petition was not maintainable. The aggrieved appellant approached this Court. Dismissing the appeal and considering the ambit and scope of Order XXIII of the Code and distinguishing it from the doctrine of res judicata under Section 11 of the Code, this Court observed: (*Sarguja* case, SCC pp.10-11, para 7)

"7. 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 parties under whom they or 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 prior adjudication of a suit or an issue 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".*

(emphasis supplied)

56. In **A.K. Bhattacharya v. Union of India**, 1991 Supp (2) SCC 109, the petitioner filed a writ petition in the High Court of Gauhati under Article 226 of the Constitution seeking Selection Grade in Tripura Civil Service and also promotion to the IAS cadre. A statement was made by the Advocate General that the case of the petitioner would be considered for Selection Grade in Tripura Civil Service. The petitioner, in view of the said statement, did not press the second relief. Subsequently, however, the petitioner prayed for that relief by filing a petition in this Court under Article 32 of the Constitution. Dismissing the petition, this Court commented: (*Bhattacharya case*, SCC p. 111, para 6)

"6. He (petitioner) cannot, in this petition under Article 32 of the Constitution, ask for the same relief which he had himself given up in the High Court".

[see also *State of Gujarat v. Bhaterdevi Ramnivas Sanwalram*, (2002) 7 SCC 500]

57. In **Murtujakhan v. Municipal Corpn. Of Ahmedabad**, (1975) 16 Guj LR 806, a petition was filed under Article 226 of the Constitution challenging the constitutional validity of the Bombay Town Planning Act,

1954. The respondents appeared, filed affidavits and contested the petition on merits. Ultimately, however, the petition was withdrawn by the petitioner since the point raised in the petition as to validity of the Act was covered by the decisions of this Court and as such nothing survived. Then again a fresh petition was filed by the petitioner challenging the validity of the Act. Dismissing the petition and applying the general principle of res judicata, the Court observed: (*Murtujakhan case*, *Guj LR p. 817, para 22*)

"22.The consequence of the withdrawal of the said writ petition in the eye of law was that it stood dismissed on merits albeit on a concession made by or on behalf of the petitioner to the effect that the question of the constitutional validity of the Act was no longer open in view of the decisions of the Supreme Court. In other words, the effect of the dismissal by withdrawal was that the challenge of the petitioner to the actions of the respondents under the Act on the ground that the said Act itself was ultra vires stood concluded by an adverse decision of this Court based on his own concession."

The Court proceeded to state : (*Guj LR p. 817, para 22*)

"22. ...the petitioner having himself abandoned without reservation the previous writ proceeding initiated in this very Court with eyes open and after due deliberation cannot now be allowed to pick up the thread after a lapse of five years and to start a fresh proceeding to reagitate the very point which he expressly gave up in the previous proceeding. He had set the machinery of law in motion but solemnly brought it to an abrupt halt, indeed forsaken it in midstream, in proclaimed obeisance to the decisions of the Supreme Court. He cannot be permitted to resume it now after a number of years and be heard to say that despite his earlier proclamation, he still wishes to persist in raising the same point in this litigation. *Courts moved upon a prerogative writ are not the forum to flog a dead horse or to resuscitate a ghost already laid to rest*".

(emphasis supplied)

58. In ***Bakhtawar Singh & Anr. v. Sada Kaur & Anr.***, (1996) 11 SCC 167, this Court observed that if the plaintiff withdraws the suit and there is no evidence to show that the suit was bound to fail by reason of some "formal" defect or there were sufficient grounds for allowing the plaintiff to institute a fresh suit in respect of the same subject-matter and for the same relief, after the withdrawal

of the earlier suit, the action of filing fresh suit would be barred under Order XXIII of the Code.

59. In ***K.S. Bhoopathy & Ors. V. Kokila & Ors.***, (2000) 5 SCC 458, this Court stated that the Court has to discharge the duties mandated under the provisions of the Code in taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation for the same cause of action.

60. We may also refer to a recent decision of this Court in ***Sarva Shramik Sangathan (KV), Mumbai v. State of Maharashtra & Ors.***, (2008) 1 SCC 494. In that case, an application under Section 25-O of the Industrial Disputes Act, 1947 was filed by the employer for closure of undertaking. The application was, however, withdrawn since attempts were made for settlement of the matter. The efforts were not successful and hence, the management filed fresh application. It was contended by the Union that since earlier application filed by the employer was withdrawn, the second application was hit by Order XXIII of the Code. The Union relied upon *Sarguja Transport Service* case. Negating the contention, holding the application maintainable and distinguishing *Sarguja Transport Service* case, this Court held that the action of the Management of withdrawal of first petition was bona fide. It was not a case of Bench-hunting with a view to avoid an adverse order likely to be passed against it. *Sarguja Transport Service* case had, therefore, no application. It was also observed that provisions of the Code of Civil Procedure do not strictly apply to industrial adjudication. The second application was, therefore, held maintainable.

61. 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 a fresh round of litigation and the Court will not allow him to reagitate the claim which he himself had given up earlier.”

- 6) It is not a case, where on certain defects the petitioner has withdrawn the petition. It is based on public policy which provides that second petition on the same cause of action is barred, otherwise it would become

impossible to avoid multiplicity of litigation because in every case where petition is dismissed as withdrawn without liberty, such kind of statement can be made that counsel was confused. The judgements relied on by the petitioner have no application in the present case.

- 7) In the result, objection raised by learned State counsel is sustained and the petition is dismissed as not maintainable.

Sd/-
(**Manindra Mohan Shrivastava**)
JUDGE