

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO. 27 OF 2015
IN
WRIT PETITION NO. 957 OF 2014

Royal Palms (India) Pvt. Ltd. & Anr.Petitioners

V/s.

The State of Maharashtra & Ors.Respondents

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Mr. Pradeep Sancheti, Senior Advocate with Mr. Prateek Sakseria
a/w. Mr. Nimay Dave a/w. Mr. F.N. Pavri, Ms. P.R. Patel, i/by.
Mulla & Mulla & Cragie Blunt and Caroe, Advocate for the
petitioner.

Smt. G.R. Shastri, Additional Government Pleader for State,
respondents no.1 to 8.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 5TH APRIL, 2016.

P.C. :-

1). By this petition, the petitioners seek review of the
following order dated 26th August, 2015 by which their Writ Petition
No. 957 of 2014 was disposed off :-

“1. After the petition is fully argued out, Mr. Sekseria, the learned advocate for the petitioners seeks to withdraw the same. The Petition is allowed to be withdrawn. He requests for liberty to the petitioner to file appropriate proceedings and for extension of the ad-interim reliefs for a period of four weeks. In the facts and circumstances of the case, both requests are rejected.

2. In view of disposal of the writ petition, the Notice of Motion does not survive, the same is accordingly disposed off.”

2). The petitioner had preferred Special Leave Petition to challenge the above order and the Apex Court disposed off the same by the order quoted below :-

“. We have heard Mr. Shiv Kumar Suri, learned counsel appearing for the petitioner. Having regard to the nature of the impugned order dated 26.08.2015 passed by the learned Single Judge of the High Court, we grant liberty to the petitioner to file appropriate application for modification of the same on the ground that all his rights to seek any remedy of his grievance would stand foreclosed.

. Be noted that we have not expressed any opinion on any aspects of the case.

. With the aforesaid observation, these special leave petitions are disposed of.”

3). The present petition is filed in exercise of the liberty granted by the Apex Court. It may be noted at the outset that, the present petition for review is being argued by a different Counsel, though the learned Advocate who had argued the Writ Petition is present to assist the Counsel arguing the Review Petition.

4). Paras-1 to 6 of the Review Petition narrate history of the Writ Petition and the order thereon. The averments to support the review are found at paras-7 and 8, wherein the petitioners state that they are seeking review of that part of the order which denies them liberty to adopt appropriate proceedings in respect of the land in question and that they are not challenging the rest of the order. It is pleaded that the order under review has caused grave prejudice to them, in as much as, it has effectively foreclosed the petitioner's "right to initiate appropriate proceedings and/or defend any further action on the part of the respondents in respect of the land in question". Para-8 contains submission that, in the event of the Court not being inclined to review the order, this Court should record, review the order and permit the petitioner to adopt appropriate proceedings, this Court should record reasons for rejection of the request for liberty. The petition thus as a matter of fact does not set out any specific ground that can be available in law for review by the Court of its own

order.

5). Mr. Sancheti, the learned Senior Counsel submits across the bar that, there is an error of law apparent on the face of the record, in as much as, the order under review is not in accordance with Order 23 Rule 1(3) Civil Procedure Code. He argues that, when the application was made to withdraw the writ petition with liberty to file appropriate proceedings, there could not have been an order simply allowing withdrawal but refusing liberty to file fresh proceedings because such order would be without jurisdiction. Order 23 Rule 1(3) is indivisible and the application thereunder must be either allowed in its entirety or rejected in its entirety.

6). It would be convenient to note here the provision of Order 23 Rule 1(3) Civil Procedure Code :-

“ORDER XXIII R.1 Withdrawal of suit or abandonment of part of claim.-

(1)

(2)

(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 a 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)

(5)”

7). Mr. Sancheti seeks to draw support for his submission from two decisions of this Court and one each from Madras High Court and Allahabad High Court. The citations of the four decisions are :-

(i)Neeraj M. Gwalani Vs. Jenny Neeraj Gwalani, reported in 2010 (5) ALL MR page 213.

(ii)Mario Shaw v. Martin Fernandez and another, reported in AIR 1996 Bombay page 116.

(iii)Rajasundari w/o. Sivaramakrishnan v. Gowri alia Avaduai Ammal & Ors. reported in AIR 2006 Madras page 156.

(iv)Bharat and Ors. v. Ram Pratap and Others, reported in AIR 1985 Allahabad page 61.

The proceedings involved in all the decisions cited, were civil suits directly governed by the provisions of the Civil Procedure Code. The

decision of our High Court in *Mario Shaw* case (supra) and the decision of the Madras High Court, arose out of applications for withdrawal of the suits made on account of objection to the jurisdiction of the Courts, territorial/subject matter, taken by the defendants to the suit. In the decision in *Neeraj Gwalani's* case (supra), our High Court was considering an application under Order 23 Rule 1(3) for withdrawal of Marriage Petition because the pleadings were realised to be insufficient and defective. Whereas, the decision of the Allahabad High Court, considers a slightly different question. In the proceedings before it, an application specifically under Order 23 Rule 1(3) made for withdrawal of the suit with liberty to file fresh suit, had been allowed without grant of liberty in express words. In the circumstance, the defendants contended that the fresh suit was barred by *res-judicata* in the absence of specific leave. Thus, the question to be considered was, more of construction of the judgment or order than of deciding an application under the provision. While considering the issues in the respective proceeding, it is observed, in all the four decisions, that, where an application is made under Order 23 Rule 1(3) Civil Procedure Code, the Court has to consider whether there is any formal defect in the suit or whether there exists any other ground which the Court considers to be sufficient to grant withdrawal of the suit with permission to file fresh

suit. The Court, thereafter, may either allow the application as a whole or dismiss it as a whole. It has no jurisdiction to consign the suit as withdrawn while refusing to grant permission to the plaintiff to bring fresh suit in respect of the same subject matter and on the same cause of action. If liberty to bring fresh suit is not granted by the Court, it has to dismiss the application requiring the plaintiff to prosecute the suit on merits as it stands.

8). Mr. Sancheti, submits that the principle underlying the provision of Order 23 Rule 1(3) Civil Procedure Code has been extended by the Apex Court to writ petition. He refers to three decisions of the Apex Court for the purpose i.e. (i) **Sarguja Transport Service Versus. State Transport Appellate Tribunal, M.P. Gwalior, and Others reported in (1987) 1 SCC page 5**, (ii) **Haryana State Co-op. Land Development Bank v. Neelam reported in AIR 2005 SC page 1843**, and (iii) **Bhagubhai Dhanabhai Khalasi and Another vs. State of Gujarat and Others, reported in (2007) 4 SCC page 241**.

9). In *Sarguja Transport* case (supra), the Apex Court has considered in depth, the provision of Order 23 Rule 1(3) Civil Procedure Code, the principle underlying it and the reasons for

extending the principle to writ petitions. The relevant discussion reads as under :-

“7. 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 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 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 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.”

8. 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 Art. 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 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) 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.”

10). In *Haryana State Co-operative* case (supra), the question for consideration of the Apex Court was applicability of principle of *res-judicata* to writ petitions. In the facts of that case, a workman had withdrawn writ petition without permission to file fresh proceedings. Withdrawal had been sought to pursue alternative efficacious remedy before the Labour Court. It was held that, since writ petition was not adjudicated on merits, the proceedings filed before the Labour Court were not barred by *res-judicata* and the principle embodied in Order 23 Rule (1) Civil Procedure Code would not be applicable in case of such nature. This decision is thus in a completely different set of facts and as such is distinguishable.

11). In the third decision cited of *Bhagubhai's* case (supra), the Single Judge had refused to entertain the writ petition on the

premise that the same involved disputed questions of fact. He had opined that the appellant may agitate his grievance before an appropriate forum. In the intra-court appeal, the Division Bench without entering into the merits of the matter had permitted the appellant to withdraw the appeal by specifically denying permission to reserve right to agitate grievances before an appropriate forum. Then the matter was carried further to the Apex Court, which held that the appellant had been placed in a worse position by the Division Bench. Therefore, part of the order whereby and whereunder the Division Bench had refused to grant leave to the appellant to ventilate his grievance before an appropriate forum could not be sustained. The appeal was allowed to that limited extent. These facts of the case before the Apex Court are entirely different from the facts in the case on hand.

12). In view of the above discussion, the submissions on the Review Petition are required to be considered on the backdrop of Order 23 Rule 1(3) Civil Procedure Code and the decision of the Apex Court in *Sarguja* case. The writ petition concerned herein was argued fully for admission. When it was plain to the learned Advocate appearing for the petitioners, that the Court was unwilling to admit the petition, he sought an adjournment to enable him to take

instructions for withdrawal of the petition. The petition was accordingly adjourned to the very next day. On that day, the learned Advocate requested for withdrawal of the petition and the withdrawal was permitted. After the order for withdrawal was dictated, he sought liberty to file appropriate proceedings with request for continuation of the *ad-interim* reliefs. It was obvious that the petitioners did not want the Court to pass order on the merits of the petition. Otherwise, when it was made clear that there was no question of granting liberty as prayed because the petition was argued on merits and the Court was not inclined to admit it, the petitioners had an option not to withdraw the petition and take the order on the merits of the petition. But no such step was resorted to. The intention of the petitioners becomes further clear from the averments in the review petition. They sought review of only part of the order. This cannot be permissible. When a review is to be sought of such an order, it cannot be only of part of the order denying liberty. Otherwise, it would amount to compelling the Court to grant liberty. Therefore, the present petition cannot be said to be a *bonafide* petition.

13). There is one more aspect of the matter. When the principle underlying the provision of Order 23 Rule 1(3) Civil Procedure Code, is to be extended to writ petitions, it must be

extended in it's entirety and not piecemeal to suit conveniences of the petitioners. It was necessary for the petitioners, to make out case under Order 23 Rule 1 sub-rule 3(a) and 3(b) CPC for the purpose. No such case was pleaded either then or even pleaded now. Having instituted the proceedings in this Court, the petitioners cannot be permitted to abandon that because the Court is not inclined to be with them and institute fresh proceedings.

14). Coming to the grievance of the petitioners that, the order has effectively foreclosed the petitioners right to initiate appropriate proceedings or defend any action against them, I find no merit in the same. If the petitioners desire to resort to any alternative remedy available to them, it is always open for them to advance submissions in law on the applicability of bar of *res-judicata* to such proceedings.

15). For the above reasons, the review petition is dismissed with costs. The petitioners shall pay costs quantified at Rs.2,00,000/- to respondent no.1, State of Maharashtra.

(SMT. R.P. SONDURBALDOTA, J)