

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

WRIT PETITION NO.1033 OF 2017

WITH

WRIT PETITION NO.1258 OF 2017

WITH

WRIT PETITION NO.1259 OF 2017

WITH

WRIT PETITION NO.1260 OF 2017

WITH

WRIT PETITION NO.1261 OF 2017

Kamal Galani,
Age-59, Occ: Business
801, Gym. View,
16th Road, Khar (West),
Mumbai-400 052.

.... Petitioner

- Versus -

1. The Assistant Commissioner of
Income-tax, 23(3), 104-A, 1st Floor,
Matru Mandir, Tardeo Road,
Mumbai-400 007.
2. The Joint Commissioner of Income-tax
- 23(3), 1st Floor, Matru Mandir,
Tardeo Road, Mumbai-400 007.
3. The Commissioner of Income-tax
- 23, 1st Floor, Matru Mandir,
Tardeo Road, Mumbai-400 007.
4. The Union of India,
Through the Secretary,
Ministry of Finance,

Department of Finance,
Government of India,
North Block,
New Delhi – 110 001.

.... Respondents

Mr. J.D. Mistri, Senior Counsel with Mr. Madhur
Agrawal i/by Mr. Atul K. Jasani for the Petitioner.

Mr. Anil C. Singh, Additional Solicitor General with
Mr. Abhay Ahuja, Mr. A. Narayanan, Ms Indrayani
Deshmukh & Ms Geetika Gandhi for the Respondents.

CORAM: S.C. DHARMADHIKARI &
SMT. VIBHA KANKANWADI, JJ.

DATE : AUGUST 14, 2017

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):-

1. By these petitions under Article 226 of the
Constitution of India, the petitioner is seeking the following
reliefs:-

“(a) that this Hon'ble Court be pleased to issue a
Writ of Certiorari or any other writ order or direction
under Article 226 of the Constitution of India calling for
the records of the case leading to the issue of the
impugned notice, passing of the impugned order and
issuing of the impugned penalty notice and after going
through the same and examining the question of
legality thereof quash, cancel and set aside the
impugned notice dated 30th March, 2015 (Exhibit C),
impugned order dated 19th August, 2015 (Exhibit M)

and impugned penalty notice dated 24th August, 2015 (Exhibit Q).

(b) that this Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus, or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India, ordering and directing the Respondents to withdraw the impugned notice dated 30th March, 2015 (Exhibit C), impugned order dated 19th August, 2015 (Exhibit M) and impugned penalty notice dated 24th August, 2015 (Exhibit Q);”

2. Upon such petitions and on copies thereof being served, an affidavit in reply in each of these petitions has been filed on behalf of the respondents in which they have raised a preliminary issue to the maintainability of these petitions. The argument is that this very petitioner had filed a earlier petition being Writ Petition No.2823 of 2015 on the same cause of action and claiming identical reliefs, as are reproduced above. That writ petition was heard for admission by this Court on two occasions and reliance is placed on an order passed in that writ petition and which is dated 21-12-2016. That order reads as under:-

“On 30th November, 2016 when this Petition was heard, the learned Additional Solicitor General submitted that Petition should not be entertained by us in our writ

jurisdiction under Article 226 of the Constitution of India. This for the reason that the Petition contains incorrect statements.

2 In particular, attention was drawn to paragraph 4(b) thereof to the effect “*The Petitioner did not have any property in India and as a non-resident, as the Petitioner has no source of income in India, the Petitioner has not filed any return of income in India*”,. This, the learned Additional Solicitor General states is not correct and places reliance upon an Assessment Order dated 30th July, 2004 which records statements on the Petitioner's behalf indicating that the Petitioner did have property in India during the period covered these Petitions.

3 On the above facts being pointed out, Mr. Mistri, learned Senior Counsel appearing for the Petitioner took time to take instructions from the Petitioner with regard to the correctness of the statement made by him in the Petition. The Petition was adjourned to 7th December, 2016 and thereafter on 7th December, 2016 at the instance of the Petitioner, to today.

4 Today, Mr. Mistri, learned Senior Counsel appearing for the Petitioner, on instructions, states that the Petitioner at the relevant time, did have property in India. However, it is the contention of Mr. Mistri, learned Senior Counsel that the same would make no material difference for the purposes of this Petition being entertained. *Prima facie*, we are not convinced but would take a final view on the same only after hearing the Petitioner. Moreover, in case, Mr. Mistri, learned Senior Counsel is able to explain the apparently incorrect statement as not affecting the invocation of the extraordinary remedy under Article 226 of the Constitution of India, then there are other issues which would be required to be considered for admission of the Petition. We are informed by Counsel for both the sides that the submission may take time.

5 Considering the fact that this Court closes for

vacation from 24th December, 2016, we may not be able to hear the parties fully before 24th December, 2016, coupled with the likelihood of change in assignments, post vacation, it may not be advisable to hear the Petitions partly i.e. only on one issue. Therefore, it would be best that Petition be heard fully at the stage of admission by the Bench hearing Income Tax matters post vacation.

6 We, therefore, adjourn the hearing of this **Petition** to **18th January, 2017** at a date convenient to both parties.

3. It is then claimed that the earlier petition was placed on 17-2-2017 and noting the earlier order, this Court had heard the petition for some time on 15-2-2017 but eventually on 17-2-2017 it passed the following order:-

“2. Thereafter the petition was heard for sometime on 15th February, 2017 and then it was adjourned to today and shown as part heard.

3. Today Mr. Mistri, learned Senior Counsel appearing for the petitioner seeks to withdraw these petitions.

4. Petition's are allowed to be withdrawn.

5. Ad-interim orders, if any, stand vacated.

6. Petitions dismissed as withdrawn. No order as to costs.”

4. Mr. Anil Singh, learned Additional Solicitor General,

appearing for the respondents, would rely upon the first affidavit in reply filed on behalf of the respondents in these petitions on 23-6-2017 raising a preliminary objection. He would submit that an additional affidavit in reply has been tendered today by the respondents without prejudice to their rights and contentions on the point of maintainability of these writ petitions. Mr. Anil Singh would submit that he has been instructed to invite an objection on the preliminary point, particularly on the maintainability of these petitions.

5. The learned Additional Solicitor General would submit that the earlier writ petitions were withdrawn simpliciter without seeking any liberty to file fresh petitions with same reliefs and on the same cause of action. The orders at pages 144 and 147 of the paper-books would indicate that the petitioner argued the petitions for some time, took his chance and when the Court was not inclined to grant any relief, withdrew the petitions simpliciter. The order for withdrawal of the petitions is allowed to be made without seeking any liberty to file fresh writ petitions on the same cause of action. Such being the order of

this Court, the learned Additional Solicitor General would submit that these fresh petitions, having been filed on 12-4-2017 and 5-6-2017, be dismissed as not maintainable.

6. Mr. Singh has taken us through the memo of the earlier writ petitions and the prayers, and the memo of the present writ petitions and the prayers to submit that everything therein is identical. The writ petitions are filed on the same cause of action.

7. Mr. Singh also submits that except deleting one paragraph from the earlier petitions about the petitioner having no property in India, there is absolutely no change. In such circumstances and relying upon the Judgments of the Hon'ble Supreme Court rendered in the cases of **Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others**, reported in AIR 1987 SC 88 and **Upadhyay & Co. v. State of U.P. and others**, reported in (1999) 1 SCC 81, it is urged that the present petitions be dismissed.

8. Mr. Mistri, learned Senior Counsel appearing on behalf of the petitioner, in meeting this preliminary objection, would submit that true it is that the earlier petitions were withdrawn. Further true it is that there is no liberty sought to file fresh writ petitions. However, it is the respondents' fault for they alleged that the petitioner suppressed a material fact about his status, particularly about his citizenship. He suppressed the fact that he was an Indian resident, according to the respondents. However, according to Mr. Mistri, the record would indicate that despite prolonging the matter, seeking to re-open the assessment and after a substantial period, it is discovered that there is no suppression. There is no suppression of the material fact which was sought to be highlighted in the earlier round of litigation. If there is no such suppression and that is evident from the statement made in para 10 of the additional affidavit in reply tendered today, then, this Court should not uphold a hyper-technical objection. Mr. Mistri would rely upon the averments in the earlier petitions and the present petitions about the status of the petitioner. Mr. Mistri submits

that the allegation is that there was a misstatement about a material fact in the earlier writ petitions and when it is discovered now, there is no such misstatement on a material fact, then, the effect of the orders passed in the earlier petitions should not influence the maintainability of the present writ petitions.

9. Mr. Mistri would submit that in the later Judgments of the Hon'ble Supreme Court, the Hon'ble Supreme Court has confined and restricted the applicability of the doctrine in **Sarguja Transport Service** (supra) to cases, firstly, of the nature which are serious, namely, suppression of material fact and secondly, involving Bench hunting tactics. Mr. Mistri would elaborate this contention by submitting that Sarguja Transport's principle is applied when a petitioner argues a petition before a Bench of the High Court, takes his chance, finds it inconvenient or not convenient to argue the case any further, applies for withdrawal and such petition is dismissed as withdrawn, it is then a second petition at the instance of such a petitioner on the same cause of action and claiming identical relief, was held to

be not maintainable. We should not, according to Mr. Mistri, extend the Sarguja Transport's principle to the facts and circumstances of the present case. Consequently, he would submit that the writ petitions be entertained and the preliminary objection be overruled.

10. With the able assistance of the learned Senior Counsel appearing for both sides, we have perused the petitions. A copy of one of the earlier writ petitions filed was handed in by the learned Additional Solicitor General. It is not in dispute that the very petitioner who is before this Court in the present petitions was the petitioner in the earlier round. Mr. Kamal Galani had impleaded the same parties as party-respondents. In para 1 of the earlier petition, he had stated that he is an individual and is a citizen of India. In memo of the earlier petition, he clarified, that he has challenged notice dated 30-3-2015 issued by the Assistant Commissioner of Income-tax at Mumbai under Section 148 of the Income Tax Act, 1961 (for short, "the I.T. Act") and order dated 19-8-2015 passed by that very respondent, rejecting the objections of the petitioner

challenging the validity of the reassessment proceedings for the Assessment Year 2002-03, and notice dated 24-8-2015 issued by respondent No.1 to that petition under Section 274 of the I.T. Act seeking to levy penalty under Section 271(1)(b) of the I.T. Act.

11. The same facts and circumstances were narrated.

12. The memo of the present petitions would indicate that paragraphs from the memo of the earlier petitions are reproduced. There may have been a statement here or there about the petitioner's status and citizenship, but the fact remains that the entire memo reveals a challenge to that very notices and order, namely, 30-3-2015, 19-8-2015 and 24-8-2015.

13. It is common ground that the earlier writ petitions were heard by this Court on several occasions. When Writ Petition No.2823 of 2015 was heard on 21-12-2016, the learned Additional Solicitor General pointed out that the petition should not be entertained for it contains incorrect statements. Thus,

incorrect statements were referred to and extensively in the order passed on 21-12-2016. When the order was passed on 21-12-2016, the Court noted that the petitioner is making an attempt to satisfy it that there is no suppression of any material fact. However, the hearing of the earlier writ petition was adjourned and when it was placed on 15-2-2017, it was argued and was treated as a part-heard case. When it was placed again on 17-2-2017, the above reproduced order came to be passed.

14. At this stage, one must notice the Judgment in the case of Sarguja Transport Service (supra), which is heavily relied upon by the Additional Solicitor General. The appellant before the Hon'ble Supreme Court, Sarguja Transport Service, alleged that on the expiry of the period of permit to run a stage carriage, issued under the Motor Vehicles Act, 1939 in favour of one Janta Transport Co-operative Society, Sarguja and some others filed applications for grant of the said permit in their favour. The earlier licensee/permit holder, Janta Transport Co-operative Society, also made an application for renewal of the permit in its favour. The application for renewal filed by Janta Transport

Co-operative Society was rejected by the Regional Transport Authority on the ground that it was barred by time. On a consideration of the relative merits of the other applicants, namely, Sarguja and others, the Regional Transport Authority granted the permit in favour of Sarguja. That order was challenged in appeal by one M/s. Ali Ahmed & Sons, the third respondent before the Supreme Court, who was also an applicant for the said permit before the State Transport Appellate Tribunal. The other unsuccessful applicants also filed separate appeals questioning the grant in favour of Sarguja Transport. All these appeals were taken together and heard extensively and on 19-9-1985 the Tribunal set aside the order granting the permit in favour of Sarguja Transport on two grounds. It granted permit in favour of M/s. Ali Ahmed & Sons. Aggrieved by that order of the Tribunal, Miscellaneous Petition No.2945 of 1985 was filed in the High Court of Madhya Pradesh at Jabalpur, invoking Articles 226 and 227 of the Constitution of India. That petition was taken up for hearing on 4-10-1985. On that day, the High Court passed an order recording the

statement of seeking of leave by the petitioner to withdraw the petition. Leave was granted and the petition was dismissed as withdrawn. Later on another writ petition was filed before the High Court being Miscellaneous Petition No.188 of 1986. That came up for admission/hearing on 17-1-1986. The High Court passed the following order:-

“Shri P.R. Bhave for the petitioner heard on admission.

This writ petition is directed against the order of the State Transport Appellate Tribunal setting aside the grant in favour of the petitioner, and instead giving the permit to the respondent No.3. The petitioner earlier filed writ petition No.M.P.No.2945/85 against the impugned order which was withdrawn on 4-10-1985. No second writ petition lies against the same order. The earlier petition was not withdrawn with permission to file a fresh petition. Besides, we do not find any merit in this petition. The Appellate Tribunal has granted the permit to the respondent No.3 as he has been found superior to the petitioner. Besides, he being a practising lawyer could not be doing the transport business. Similar petition of other operators has already been dismissed by this Court.

Accordingly, the petition is dismissed summarily.”

15. Aggrieved by this order of the High Court dismissing the writ petition at the stage of admission, Sarguja Transport filed a Special Leave Petition in the Hon'ble Supreme Court. The

main contention was that the High Court was in error in rejecting the writ petition out of which the cases arises, on the ground that the petitioner had withdrawn the earlier writ petition without permission of the High Court to file a fresh petition. The argument canvassed precisely was that the earlier petition was not decided on merits but simpliciter withdrawn. That would not constitute a bar to the maintainability of the second/subsequent writ petition. Pertinently, the cause of action was identical, so also reliefs and the parties. The precise argument before the Hon'ble Supreme Court was that Articles 226 and 227 find a place in the Constitution of India. That is a remedy which is extra-ordinary, equitable and discretionary, but vesting in the High Court for rendering complete and substantial justice. That is not comparable to the remedy of a suit which can be brought in the Competent Civil Court. If that is withdrawn, the consequences enshrined in Order XXIII, Rule 1 of the Code of Civil Procedure, 1908 (for short, "the CPC") coupled with Section 11 of the CPC would be visited on the appellant/plaintiff. Meaning thereby, a suit being withdrawn,

without liberty to file a fresh suit on the same cause of action, would result in the dismissal of the subsequent suit as not maintainable. That is in consonance with the rule and principle of *res judicata*. While in that regard Section 11 was relied upon, the argument was that this should be confined and restricted to a suit and governed by the CPC. The procedural, so also the substantive provisions in CPC would not govern the disposal of a writ petition under Article 226 of the Constitution of India.

16. It is that argument which is extensively dealt with in Sarguja Transport, and in paras 7, 8 and 9, the Hon'ble Supreme Court held thus:-

“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 R. 1 of O. 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 R. 1 of O. 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 R. 1 of O. 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 R. 1 of O. 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 R. 1 of O. XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution 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 v. State of U.P.*, (1962) SCR 574 : (AIR 1961 SC 1457) in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Art. 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 Art. 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 R. 1 of O. 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 Art. 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 Art. 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Art. 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 fight 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 Art. 21 of the Constitution since such a case stands on a different footing altogether. We, however, leave this question open.”

17. The Hon'ble Supreme Court had elevated the issue and considered it on the touchstone of public policy. It has not rested its conclusion by merely saying or holding that this is a technical rule and should not, therefore, result in injustice or miscarriage of justice. It did not hold that this rule would apply only to such a litigant who abuses the process of the Court by

instituting suits again and again on the same cause of action, without any reason. The law insists that he should obtain the permission of the Court to file a fresh proceeding and that is how it held that 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 CPC. It is in these circumstances that the rule was applied also to writ petitions under Articles 226 and 227 of the Constitution of India to hold that the second writ petition was not maintainable and rightly dismissed.

18. This very Judgment was followed in the case of **Upadhyay & Co.** (supra) and the principle was extended because the petitioner before the Hon'ble Supreme Court, Upadhyay & Co., was allowed to collect the toll at specified rates for a period of one year at Shastri Bridge at Allahabad, running across River Ganga. For a succeeding period of three years, the petitioner competed with other bidders in a public auction and when his bid was not accepted by the authorities, he filed Writ Petition No.32974 of 1991 before the Allahabad High Court and

got an interim order by which he was permitted to continue to collect toll charges from vehicles passing over the bridge. By a Notification issued by the Government of India on 19-2-1992, the rates of toll were raised. That is how another writ petition was filed taking advantage of the enhanced rates being Writ Petition No.22439 of 1992 so as to enable the collection of toll at the revised rates. That petition was placed before a learned single Judge of the Allahabad High Court who passed the order quoted in para 3 of the Judgment of the Hon'ble Supreme Court. That order remained alive for a period of less than two years until the Hon'ble Supreme Court interfered with it and as noted in para 4.

19. Undaunted by the order of the Hon'ble Supreme Court, a new writ petition was filed in the Allahabad High Court by the very petitioner Upadhyay in which, on 23-3-1997, a Division Bench passed the order quoted in para 5. The State of Uttar Pradesh challenged that order by a Special Leave Petition in the Supreme Court and when it was pending, another Division Bench of the High Court vacated the earlier order dated

23-3-1997. When the said development was brought to the notice of the Hon'ble Court, the Special Leave Petition came to be disposed of. Then the petitioner being aware of the said order of the Hon'ble Supreme Court adopted another strategy by reporting to the High Court that he was not pressing his earlier petition of 1991. The Division Bench before which that writ petition was placed was alerted on account of several intervening circumstances. It is in these circumstances that the petitioner Upadhyay & Co. was directed to deposit a sum of Rs.2,07,63,556/- by the Commissioner of Allahabad Division on 1-6-1996 pursuant to the order of the Division Bench dated 3-5-1996 in Writ Petition No.32974 of 1991.

20. It is in these circumstances that the petitioner filed a writ petition challenging the order dated 1-6-1996 being Writ Petition No.19593 of 1996 in the Allahabad High Court. When that petition was pending, the petitioner also filed a Special Leave Petition challenging the order of the Allahabad High Court dated 3-5-1996, which was passed in its 1991 petition. Once the above events were noted by the Hon'ble Supreme

Court, the Hon'ble Supreme Court found that the very order of 3-5-1996 cannot be challenged over again by the very writ petitioner because it withdrew the Special Leave Petition which had been filed earlier challenging the same order. That is how the principle in *Sarguja Transport (supra)* was extended and the Additional Solicitor General appearing before us is right in relying upon paras 9, 11, 12 and 13 of the Judgment in *Upadhyay's case (supra)*. In para 15, the Hon'ble Supreme Court once again emphasised the rule of public policy.

21. Mr. Mistri has relied upon two Judgments of the Hon'ble Supreme Court, the first in the case of **Arunima Baruah v. Union of India and others**, reported in (2007) 6 SCC 120 and the other in **Sarva Shramik Sanghatana (KV), Mumbai v. State of Maharashtra and others**, reported in (2008) 1 SCC 494.

22. In the first Judgment in the case of **Arunima Baruah** (*supra*), the Hon'ble Supreme Court was considering a peculiar situation. The appellant before the Supreme Court filed a suit in

the District Court and moved an application for grant of injunction therein. On such an application, the trial Court issued only a notice to the defendant but did not grant injunction. The appellant before the Supreme Court/plaintiff in that suit filed a writ petition in the High Court on 10-4-2001. The suit was filed on 28-3-2001 and the application for interim injunction was filed on 9-4-2001. However, the pendency of the suit was not disclosed in the writ petition. Before the writ petition came up for preliminary hearing, the appellant/plaintiff filed an application in the suit for withdrawal of the same. That application was filed on 12-4-2001 but on account of Lawyers strike, it could not be moved. In the meanwhile, the writ petition came up for preliminary hearing, notice was issued. In the meanwhile, the trial Court took up the application for withdrawal of the suit and allowed the withdrawal on 30-4-2001. A learned single Judge of the Delhi High Court, however, dismissed the writ petition on the ground of suppression of material facts. The intra-court appeal was also dismissed on the same ground.

23. That is why the appellant approached the Supreme Court and urged that as on the date of the hearing of the writ petition, the suit already stood withdrawn and in such circumstances the writ petition could not have been dismissed on the ground of availability of alternate remedy. It is in this context that all the observations relied upon by Mr. Mistri have been made. We cannot forget this context and the background. Secondly, existence of an alternate remedy by itself and without anything more may not be a relevant factor as the Hon'ble Supreme Court holds but additionally even if that remedy is existing, efficacious, still, it is the discretion of the High Court to entertain a writ petition despite the existence of an alternate, equally efficacious remedy. It is a rule of caution and prudence rather than an absolute bar for entertainment of a writ petition. Similarly, when there is no suppression of material fact as was found in that case, then, the judicial review cannot be denied.

24. The fact situation before us is not identical. It is not that earlier a suit was filed and thereafter a writ petition and

when the writ petition was taken up, the suit was withdrawn. Therefore, the issue of alternate remedy would not be relevant. The situation before us is completely different. Hence, the Judgment in **Arunima Baruah** would not be of any assistance to the petitioner.

25. In the second Judgment in the case of **Sarva Shramik Sanghatana** (supra), there as well, we should note the facts. The Century Industries Textiles Limited, a company before the Hon'ble Supreme Court, third respondent, had entered into certain agreement with its recognised Union and to reduce the work force. There was a scheme of voluntary retirement offered. The scheme was improved upon after discussion and negotiations. After the manufacturing activities came to an end in the textile mill, the company made an application under Section 25-O of the Industrial Disputes Act, 1947 seeking permission for closure. That application was dated 13-2-2007. Before that application could be decided, the company received a letter from the Deputy Commissioner of Labour, Mumbai, which stated that the Hon'ble Minister for Labour, Government

of Maharashtra has convened a meeting so that the issue could be discussed. The company gave its willingness but pointed out that its application under Section 25-O(1) is pending and it is to be decided within sixty days, failing which it is deemed to have been allowed. The application was made on 13-2-2007 and the sixty days would shortly expire. That is why in order to create a conducive atmosphere for discussion, the respondent-company withdrew this application but reserved its right to move a fresh application under Section 25-O, as and when necessary. That is how the withdrawal was allowed by the Commissioner of Labour on 12-4-2007. The company then took a stand that it was interested *bona fide* in finding an amicable solution but even after the meeting, as above, such a solution could not be found. That is how the fresh application under Section 25-O(1) was filed seeking permission of closure and this application was moved on 11-5-2007.

26. It is in this context that the challenge raised by the workmen to the maintainability of the second closure application was decided by this Court. The writ petition was

filed in the Bombay High Court by the workmen praying that the Deputy Commissioner of Labour should be directed not to take any further proceedings in relation to the second/fresh application for closure. However, that writ petition was dismissed. Hence, the Special Leave Petition.

27. It is in this context that the argument of the workmen/Union and relying upon Sarguja Transport (supra) was considered by the Supreme Court. Pertinently, Sarguja Transport's was a case of a writ petition filed in the High Court, withdrawn unconditionally and without liberty and thereafter a second writ petition in the High Court on the same cause of action. The Hon'ble Supreme Court in Sarva Shramik Sanghatana (supra) refused to extend the principle therein to the maintainability of the second closure application. Thereafter, the Hon'ble Supreme Court found and relying upon the observations in paras 8 and 9 of Sarguja Transport reproduced above, that Bench hunting should not be permitted. However, in para 13, the Hon'ble Supreme Court again emphasised that there is a malpractice prevalent and which is to be discouraged

and that was discouraged by Sarguja Transport. However, all the observations in the subsequent paragraphs are to emphasise that the principle in Sarguja Transport's case cannot be applied as a formula and in every case. We have, therefore, no hesitation in agreeing with Mr. Mistri that Sarva Shramik Sanghatana (*supra*) would denote that Sarguja Transport's principle cannot have absolute application and to every case irrespective of the facts and circumstances therein. However, when we find before us from the above reproduced order of this Court in the present petitioner's earlier petitions and the subsequent withdrawal thereof without any liberty that this petitioner has also indulged in Bench hunting tactics, then, we would be failing in our duty if we do not apply Sarguja Transport's principle to the present facts and circumstances. We have clearly noted the observations of this Court and which point towards an abuse of this Court's jurisdiction. The Court was persuaded to go on with the matter despite the objection raised by the respondents about the status of the petitioner. The petitioner despite noticing this position insisted on arguing the writ petition and argued it. After a

preliminary hearing, on finding that it is not possible to get over the objection raised and the allegation of suppression of a material fact, the petitioner withdrew the writ petition, but without seeking any liberty to file a fresh petition on the same cause of action. We would be acting contrary to judicial discipline, if we entertain a second writ petition on the same cause of action but with a marginal improvement, as pointed out. This is not a case where substantial justice demands that we overlook the point of maintainability. This is a clear case where knowing the state of law and being aware of the legal position, a decision was taken to withdraw the writ petition without seeking any liberty, as above. In the circumstances, the bar, as enacted by the Hon'ble Supreme Court and which is founded on public policy, is clearly attracted. We do not think that the second writ petition can be entertained.

28. As a result of the above discussion, we uphold the preliminary objection of the learned Additional Solicitor General and dismiss these writ petitions.

29. Needless to state that disposal of these writ petitions does not mean the Court has at any time expressed any opinion on the merits of the controversy, including the contentions which can be raised and are permitted to be raised in law before the Assessing Officer and in all further forums.

(SMT. VIBHA KANKANWADI, J.)

(S.C. DHARMADHIKARI, J.)