

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.845 of 2017

In

Civil Writ Jurisdiction Case No.8985 of 2008

=====

Krishna Ballava Singh, S/o Late Nandlal Singh, resident of Mohalla-Professor Colony, Pipra Road, Begusarai, P.S.- Township Refinery at Begusarai, District- Begusarai.

... .. Petitioner- Appellant/s

Versus

1. The State of Bihar through the Secretary, Science and Technology Department, Govt. of Bihar, Technology Bhawan, Patna-1.
2. The Special-cum-Joint Secretary, Department of Science and Technology, Govt. of Bihar, Technology Bhawan, Patna-1.
3. The Additional Secretary, Department of Science and Technology, Govt. of Bihar, Technology Bhawan, Patna-1.
4. The Deputy Secretary, Department of Science and Technology, Govt. of Bihar, Technology Bhawan, Patna-1.
5. The Director, Department of Science and Technology, Govt. of Bihar, Technology Bhawan, Patna-1.

... .. Respondents-Respondent/s

=====

Appearance :

For the Appellant/s	:	Mr. Vinod Kumar Kanth, Senior Advocate
		Mr. Chandra Mauli Chaurasia, Advocate
For the Respondent/s	:	Mr. Pushkar Narain Shahi, AAG 6
		Mr. Mritunjay Kumar, AC to AAG 6

=====

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 09-10-2018

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Single Judge dated



17.04.2017, passed in Civil Writ Jurisdiction Case No.8985 of 2008 by which the learned Single Judge has dismissed the said petition on the ground that the same is barred by principles of *res judicata*, the original writ petitioner has preferred the present Letters Patent Appeal.

2. That the original writ petitioner approached this Court by way of Civil Writ Jurisdiction Case No.8985 of 2008 for grant of first Time Bound/Personal promotion to him from the post of Assistant Professor in Civil Engineering to the post of Associate Professor in Civil Engineering etc. However, it was observed and found that for the very reliefs sought in the present writ petition, earlier the very petitioner approached this Court by way of Civil Writ Jurisdiction Case No.3580 of 2002 and by order dated 28.09.2005, the learned Single Judge dismissed the said petition. It was further observed and found that against the order passed by the learned Single Judge in Civil Writ Jurisdiction Case No.3580 of 2002, the writ petitioner preferred the appeal being LPA No.1239 of 2005, which came to be withdrawn by the original writ petitioner. Therefore, the learned Single Judge was of the opinion that the subsequent writ petition is barred by principles of *res judicata*, as the issue, which has been raised in the subsequent writ petition, has already been adjudicated by this



Court in its order dated 28.09.2005 in Civil Writ Jurisdiction Case No.3580 of 2002 and, therefore, by the impugned judgment and order, the learned Single Judge dismissed the said petition on the ground that the writ petition is barred by principles of *res judicata*.

2.1. At this stage, it is required to be noted that before the learned Single Judge it was submitted on behalf of the writ petitioner that the order passed by this Court in Civil Writ Jurisdiction Case No.3580 of 2002 dated 28.09.2005 was contrary to the judgments of the Hon'ble Supreme Court. However, as the order passed by the learned Single Judge in Civil Writ Jurisdiction Case No.3580 of 2002 in which the writ petitioner prayed for the same relief, which has been sought in the subsequent writ petition, was on merits and the same had attained finality, the learned Single Judge dismissed the petition on the ground of writ petition being barred by principles of *res judicata*. Consequently, the learned Single Judge dismissed the petition.

2.2. Feeling aggrieved and dissatisfied with the impugned order passed by the learned Single Judge dismissing the writ petition on the ground that it is barred by principles of *res judicata*, the original writ petitioner has preferred the present Letters Patent Appeal.



3. We have heard learned counsel appearing on behalf of the respective parties on the issue whether the learned Single Judge is justified in rejecting the writ petition on the ground that the same is barred by principles of *res judicata*.

4. Sri Vinod Kumar Kanth, learned Senior Counsel appearing on behalf of the appellant herein-original writ petitioner has vehemently submitted that in the facts and circumstances of the case, the learned Single Judge has materially erred in dismissing the writ petition on the ground that the same is barred by principles of *res judicata*. It is further submitted by Sri Kanth, learned Senior Counsel appearing on the appellant that the learned Single Judge ought to have appreciated the fact that even after 38 years of service, the original writ petitioner did not get any promotion and subsequently he retired on the same post in the year 2002.

4.1. It is submitted that right to be considered for promotion itself is a fundamental right as observed by the Hon'ble Supreme Court in the case of **Ajit Singh and others (II) v. State of Punjab and others**, reported in (1999) 7 SCC 209. It is further submitted that once the same is held to be a fundamental right, the principles of *res judicata* shall not be applicable and even the second petition for the same relief shall be maintainable as it has



ultimately affected the fundamental rights of the original writ petitioner.

4.2. In support of his submission that the doctrine of *res judicata* shall not be applicable with respect to fundamental rights, learned counsel appearing on behalf of the appellant has heavily relied upon the decision of the Hon'ble Supreme Court in the case of **Daryao & Ors. v. State of U.P. & Ors.**, reported in AIR 1961 SC 1457 (paragraphs – 1, 8, 15 and 19) as well as in the case of **Ashok Kumar Srivastav v. National Insurance Company Ltd. and others**, reported in (1998) 4 SCC 361 (paragraphs 11 and 12).

4.3. Making the above submissions and relying upon the aforesaid decisions, it is requested to admit and allow the present Appeal.

5. The present Appeal is vehemently opposed by Sri P.N.Shahi, learned Additional Advocate General-6, appearing on behalf of the respondents-State.

5.1. Sri Shahi, learned counsel appearing on behalf of the respondents-State has supported the impugned judgment and order passed by the learned Single Judge and has submitted that as earlier, the very writ petitioner preferred writ petition before this Court and the same came to be rejected on merits and the same has attained finality, thereafter it would not be open for the writ



petitioner to again file a writ petition and ask the very reliefs which were not granted by this Court earlier. It is submitted that the decision in the earlier round of litigation and the earlier writ petition binds the writ petitioner. It is submitted that therefore, on applying the doctrine of *res judicata*, the learned Single Judge has rightly dismissed the writ petition on the ground that the same is barred by principles of *res judicata*.

5.2. Now, so far the reliance placed upon the decision of the Hon'ble Supreme Court in the case of **Daryao** (supra) by the learned counsel appearing on behalf of the appellant, it is vehemently submitted by Sri Shahi, learned counsel appearing on behalf of the respondent-State that the said decision, in fact, would be in favour of the respondents, rather than it may help/assist the appellant-original writ petitioner. It is submitted that in the said decision, it was found that the earlier writ petition under Article 226 of the Constitution of India was not decided by the High Court on merits and, therefore, subsequent petition before the Hon'ble Supreme Court under Article 32 of the Constitution shall not be barred by principles of *res judicata*. It is submitted that however, it is specifically observed and held in paragraph 19 that if a writ petition filed by a party under Article 226 is considered on merits as a contested matter and is dismissed, the decision thus



pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution and it would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same and similar orders or writs. It is submitted that in the said decision, it is also observed by the Hon'ble Supreme Court that in such a situation, the principles of *res judicata* shall be applicable to a proceeding under Article 32 as well as Article 226 of the Constitution.

5.3. It is submitted by Shri Shahi, learned counsel appearing on behalf of the respondents-State that therefore, when the earlier writ petition being CWJC No.3580 of 2002 was dismissed by the learned Single Judge on merits, the same shall bind the appellant herein-original writ petitioner and, therefore, the second writ petition shall be barred by principles of *res judicata* and, therefore, the learned Single Judge has rightly dismissed the writ petition on the ground that the same is barred by principles of *res judicata*.

6. Heard learned counsel appearing on behalf of the respective parties at length.



7. It is required to be noted that by the impugned judgment and order, the learned Single Judge has dismissed the petition on the ground that the same is hit/barred by principles of *res-judicata* in view of the earlier dismissal of CWJC No.3580 of 2002 in which the original writ petitioner sought the very reliefs, which are subsequently sought in the subsequent writ petition.

7.1. It is the case on behalf of the appellant-original writ petitioner that as right to be considered for promotion is his fundamental right, therefore, doctrine/principles of *res judicata* shall not be applicable and, therefore, the second petition claiming promotion shall be maintainable. In support of his above submission, learned counsel appearing on behalf of the appellant has heavily relied upon the decisions of the Hon'ble Supreme Court in the case of **Daryao** (supra) as well as **Ashok Kumar Srivastav** (supra).

7.2. At this stage, it is required to be noted that in the case of **Ajit Singh and others** (II) (supra), the Hon'ble Supreme Court also considered the earlier decision in the case of **Daryao** (supra) and therefore, as such the decision of the Hon'ble Supreme Court in the case of **Daryao** (supra) is required to be considered.

7.3. On considering the decision of the Hon'ble Supreme Court in the case of **Daryao** (supra), we are of the opinion that as



such, the said decision shall not be of any assistance to the appellant and, on the contrary, the same shall help the respondents. Finally, the conclusions of the Hon'ble Supreme Court in the case of **Daryao** (supra) are in paragraph 19 which read as under:-

“19. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such



dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 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. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us.”

7.4. Thus, in the case of **Daryao** (supra), the Hon’ble Supreme Court has categorically observed and held that if the earlier order is on merits, second petition would be barred; if the order shows the earlier dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases indicated by the Hon’ble Supreme Court in the said decision.

7.5. At this stage, even the subsequent decision of the Hon’ble Supreme Court in the case of **Ramesh Chandra Sankla and others Versus Vikram Cement and others**, reported in



(2008) 14 SCC 58, is also required to be referred to. In the aforesaid decision, the Hon'ble Supreme Court refused to entertain the second petition as earlier petition was withdrawn, but without leave to file a fresh petition. In paragraphs 53 to 62, the Hon'ble Supreme Court has observed and held as under:-

“53. A question whether a petition is barred by res judicata or under Rule 4 of Order 23 of the Code is not a “pure” question of law. It is a question of fact or at any rate, a mixed question of law and fact. In absence of pleadings and necessary materials in support of such plea, petitions cannot be dismissed on the bald assertion by a party that they were not maintainable. Let us consider legal position on this issue.

54. In the leading case of *Daryao V. State of U.P.*, AIR 1961 SC 1457: (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 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. STAT*, (1987) 1 SCC 5 :1987 SCC (Cri) 19, 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 23 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 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 23. 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 23 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 : 1991 SCC (L&S) 1164 : (1991) 17 ATC 355, 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: (*Bhattacharyya 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: 2002 SCC (L&S) 1079.]

57. In *Murtujakhan Joravarkhan Babi 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 the 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 re-agitate 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* , (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 23 of the Code.

59. In *K. S. Bhoopathy v. Kokila*, (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) v. State of Maharashtra*, (2008) 1 SCC 494: (2008) 1 SCC (L&S) 215. 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 23 of the Code. The Union relied upon *Sarguja Transport Service (supra)*. Negating the contention, holding the application maintainable and distinguishing *Sarguja Transport Service (supra)*, 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 (supra)* 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 fresh round of litigation and the Court will not allow him to re-agitate the claim which he himself had given up earlier.

62. In *Sarguja Transport Service (supra)*, extending the principles laid down in *Daryao (supra)*, Venkataramiah, J. (as His Lordship then was) concluded: (*Sarguja Case (supra)*, SCC p.12 para 9)

"9. We are of the view that the principle underlying Rule 1 of Order 23 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".*

(emphasis supplied)

8. Applying the law laid down by the Hon'ble Supreme Court in the case of **Daryao** (supra) to the facts of the case on hand and the fact that the decision in earlier writ petition being Civil Writ Jurisdiction Case No.3580 of 2002 in which the same reliefs were sought, which are sought in the present writ petition and which came to be dismissed on merits, we are of the opinion that the learned Single Judge has rightly dismissed the subsequent writ petition on the ground that the same is barred by principles of *res judicata*. We see no reason to interfere with the impugned judgment and order passed by the learned Single Judge dismissing



the subsequent writ petition on the ground that the same is barred by principles of *res judicata*.

9. In view of the above and for the reasons stated above, the present Appeal fails and the same deserves to be dismissed and is, accordingly, dismissed.

(Mukesh R. Shah, CJ)

(Ashutosh Kumar, J)

Sunil/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	12.10.2018
Transmission Date	

