

challenge is to the common judgment and order dated 6th June 2017 passed by the learned Single Judge in Company Petition No. 277 of 2011 along with Company Petition No. 128 of 2011. By the impugned order, both the company petitions for winding up were admitted and consequential directions were issued by the learned Single Judge. Being aggrieved by the said common judgment and order, the present appellant preferred Appeal (L) No. 248 of 2017 along with Appeal (L) No. 249 of 2017. The said appeals were disposed of by the order dated 11th July 2017. Clauses 2 and 3 of the said order read thus:

"2] After arguing for some time, learned counsel for the appellant seeks leave to withdraw these appeals as also the notices of motion with liberty to the appellant to file a review petition before the learned Single Judge.

3] With the aforesaid liberty, the appeals and the pending notices of motion therein are allowed to be withdrawn."

(underlines supplied)

2] In terms of the liberty granted by the Division Bench, the appellant filed review petitions in both the company petitions. The review petitions were rejected by a common judgment and order dated 2nd July 2018. Being aggrieved by the common judgment and order dated 6th June 2017 impugned in these

appeals and the order dated 2nd July 2018 rejecting review petitions, Special Leave Petition (Civil) Diary No (s). 24979/2018 was preferred by the present appellant. As stated in the synopsis in both the appeals, Special Leave Petition (for short “SLP”) was filed on 17th July 2018. During pendency of SLP, the present appeals were presented on 31st July 2018. The SLP was disposed of by the Apex Court by order dated 10th August 2018.

The order of the Apex Court reads thus:

“Learned counsel for the petitioner seeks permission to withdraw this petition with liberty to move for interim orders before the LPA Division Bench. Permission is granted. The special leave petition is dismissed as withdrawn with the liberty prayed for.”

(underline supplied)

3] When these appeals were called out for admission, a preliminary objection was raised by the learned senior counsel appearing for the respondent. His contention is that against the impugned judgment and order, the appeals were preferred by the present appellant which were withdrawn on 11th July 2017. While permitting the withdrawal, this Court had granted liberty to file review petitions before the learned Single Judge. He

submitted that there is no liberty granted to prefer fresh appeals against the same impugned judgment and order. The contention of the learned senior counsel appearing for the respondent is that the principles incorporated in Rule 1 of Order XXIII of Civil Procedure Code, 1908 (for short "said Code"), will squarely apply. The submission is that the appellant, after abandoning the earlier appeals preferred against the impugned judgment and order, cannot prefer fresh appeals.

4] The learned counsel appearing for the appellant invited our attention to the order dated 10th August 2018 passed by the Apex Court in the aforesaid SLP. He stated that the SLP was filed for challenging the judgment and order impugned in these appeals as well as the common order passed on the review petitions. He submitted that in view of the said order of the Apex Court, the appellant has a right to prosecute these appeals on merits. He submitted that the provisions of Rule 1 of Order XXIII of the said Code will have no application to these appeals which arise out of the orders passed by the Company Court. The learned counsel appearing for the appellant invited our attention

to the decision of the Apex Court in the case of ***Himachal Pradesh Financial Corporation vs. Anil Garg and ors.***¹. He submitted that merely because earlier appeals preferred against the impugned judgment and order were withdrawn, the right of the appellant to prefer the present appeals is not disturbed or is not taken away. He also submitted that the law laid down by the Apex Court in case of ***Vinod Kapoor vs. State of Goa and ors.***² will not be applicable to the facts of the present case. He submitted that earlier appeals were not decided on merits and were withdrawn with a view to enable the appellant to file applications for review. He submitted that merely because the applications for review have been rejected, the right of the appellant of challenging the impugned order is not taken away.

5] The learned senior advocate appearing for the respondent relied upon the various decisions to which we are making a reference in subsequent part of this order. He submitted that in view of Rule 6 of the Companies (Court) Rules, 1959 (for short “the Company Court Rules”), the provisions of the said Code

1 (2017) 14 SCC 634

2 (2012) 12 SCC 378

were applicable to the proceedings before the learned Single Judge and therefore, even the proceedings of the present appeals will be governed by the said Code. He submitted that Rule 1 of Order XXIII of the said Code will have application to the facts of the present case.

6] We have given careful consideration to the submissions.

Rule 1 of Order XXIII of the said Code reads thus:

*“1. Withdrawal of suit or abandonment of part of claim.
(1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.”

7] The Apex Court in case of ***Upadhyay and Co. vs. State of U.P. and others***³, had an occasion to deal with the issue of applicability of Rule 1 of Order XXIII of the said Code to the SLPs. The Apex Court was dealing with case where a SLP filed against an order of a High Court was withdrawn without obtaining a

³ (1999) 1 SCC 81

liberty from the Apex Court to file a fresh SLP. The Apex Court held that fresh SLP filed against the same impugned order was not maintainable in absence of any liberty granted by the Apex Court in earlier SLP. In paragraph 13, the Apex Court held that the prohibition imposed by Rule 1 of Order XXIII of the said Code on filing a fresh suit was based on public policy. Paragraph 13 of the said decision reads thus:

"13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (Sarguja Transport Service vs. STAT). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it 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 withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned 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. If so, he cannot file a fresh petition for the same cause once again. The following observations of E.S. Venkataramiah, J. (as the learned chief Justice then was) are to be quoted here: (scc P.12, para 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 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.

(underlines supplied)

8] The Apex Court in paragraph 13 quoted with approval its earlier decision in the case of **Sarguja Transport Service vs. STAT⁴**. The Apex Court held that the principles laid down in the said decision in the case of *Sarguja Transport (supra)* will also apply to the SLPs filed under Article 136 of the Constitution of India. The Apex Court held that for the reasons stated in its earlier judgment in the case of *Sarguja Transport (supra)* which were applicable to the writ petitions under Article 32 of the Constitution of India should also apply to the SLPs considering

4 (1987) 1 SCC 5

the fact that Rule 1 of Order XXIII of the said Code is a rule of public policy.

9] In case of *Sarguja Transport (supra)*, in paragraph 7, detailed reasons have been recorded by the Apex Court for taking a view that the principle underlying Rule 1 of Order XXIII of the said Code is a rule of public policy. Paragraph 7 of the said decision reads 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 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 loose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh

suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. 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.

(underline added)

In paragraph 9 of the aforesaid decision, the Apex Court observed that when a writ petition under Article 226 of Constitution of India is withdrawn without seeking a liberty to file a fresh petition, it may not be a bar to other remedies like a suit or a petition under Article 32 as such withdrawal will not amount to *res judicata*. However, by reason of such withdrawal,

the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner.

10] A similar issue arose in the case of *Vinod Kapoor (supra)* regarding filing second SLP after withdrawing the first SLP without reserving the liberty to file second SLP for challenging the same order which was impugned in the first SLP. Apart from applying the same principles of abandonment, the Apex Court held that the SLP/appeal against an order rejecting application for review was not maintainable in view of Rule 7 of Order XLVII of the said Code. The view taken in the case of *Vinod Kapoor (supra)* was followed by the Apex Court in the case of ***Sandhya Educational Society and anr. vs. Union of India and ors.***⁵.

11] The issue of applicability of the provisions of Rule 1 of Order XXIII of the said Code to a Letters Patent Appeal filed on the Appellate Side of this Court was considered by a Division Bench of this Court in the case of ***Saraswati Education Society and anr. vs. Santosh s/o Bhaulal Rahangdale and***

5 (2014) 7 SCC 701

anr.⁶. This was a case where a Letters Patent Appeal preferred before a Division Bench was permitted to be withdrawn and was disposed of as withdrawn. After withdrawal of the appeal, the appellants preferred an application for review of the order which was impugned in the earlier Letters Patent Appeal. The review petition was rejected and thereafter, a fresh Letters Patent Appeal was filed against the same order which was impugned in the Appeal which was withdrawn. The argument before the Division Bench on the issue of maintainability was that the earlier Appeal was withdrawn in the light of the views expressed by the Division Bench that the appellant could seek review of the impugned order. After considering Rule 28 of Chapter -XVII of the Bombay High Court Appellate Side Rules read with Section 107(2) of the said Code, the Division Bench held that the provisions of the said Code and in particular Rule 1 of Order XXIII of the said Code are applicable to the Letters Patent Appeal. As the earlier appeal was withdrawn without obtaining a leave of the Court to file a fresh appeal, the Division Bench applied the bar created by Rule 1 of Order XXIII and upheld the objection

6 (2007) (1)Mh.L.J.439

regarding maintainability of the Letters Patent Appeal.

12] Rule 6 of the Company Court Rules reads thus:

“6. Practice and procedure of the Court and provisions of the Code to apply.-

Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the court.”

Rule 6 specifically provides that the provisions of the Code, so far as applicable, shall apply to all proceedings under the Companies Act. An argument was sought to be canvassed by the learned counsel appearing for the appellant by contending that all provisions of the said Code are not applicable in the proceedings before the Company Court. Secondly, he relied upon inherent powers of the Company Court in Rule 9 of the Company Court Rules.

13] We find that no practice and procedure adopted by this Court or any provisions of the Companies Act are pointed out to

us which are inconsistent with Rule 1 of Order XXIII of the said Code. Rule 9 of the Company Court Rules reads thus:

“R.9. Inherent powers of court.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such direction or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The said rule is *pari materia* to Section 151 of the said Code. It is well settled that by exercising inherent powers, Court cannot do something which is specifically impermissible under the provisions of the said Code. In the present case, the bar created by Rule 1 of Order XXIII of the Code will apply to the present appeals. The said bar cannot be nullified by exercising inherent powers under Rule 9 of the Company Court Rules.

14] Even otherwise, Rule 1 of Order XXIII of the said Code being a rule of public policy, the principles analogous to Rule 1 of Order XXIII of the said Code are applicable to the present appeals. We have quoted the order dated 11th July 2017 passed by the Division Bench of this Court wherein while withdrawing the earlier appeals preferred against the same impugned

judgment and order, a limited liberty was sought and was granted to prefer review petitions. The review petitions were rejected. SLP was filed against the impugned judgment and order and the order passed on the review petitions. After filing SLP against the impugned judgment and order that the present appeals were preferred by the appellant. On plain reading of the order dated 10th August 2018 passed in the SLP, we find that there was no liberty granted by the Apex Court to prefer appeals against the impugned order before this Court the only liberty granted was to move for interim orders before the Letters Patent Appeal Division Bench.

15] Therefore, in our considered view, the bar created by sub-rule (3) of Rule 1 of Order XXIII of the said Code or the principles analogous to the said provisions will squarely apply to these appeals. Accordingly, the appeals are dismissed as not maintainable. There shall be no order as to costs.

16] The pending Notices of Motion do not survive and the same are disposed of.

17] At this stage, learned counsel appearing for the appellant seeks stay of the impugned order passed by the learned Single Judge. We are not inclined to grant the said relief. Firstly, there is no ad-interim or interim relief granted in these appeals and secondly, even while withdrawing SLP filed by the appellant, there was no protection granted by the Apex Court.

(M. S. SONAK, J.)

(A.S.OKA, J.)

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