

OD-1-2

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE

RVWO/11/2024 WITH WPO/1786/2023; IA NO: GA/1/2024
THE LEARNED REGISTRAR CITY CIVIL COURT CALCUTTA AND ANR

VS

AMAR GUHA ROY AND ANR

RVWO/13/2024 WITH WPO/1786/2023; IA NO: GA/1/2024

SARMISTHA BHATTACHARYA AND OTHERS

VS

THE STATE OF WEST BENGAL AND OTHERS

BEFORE:

The Hon'ble JUSTICE RAJASEKHAR MANTHA

Date : 4th July, 2024.

Appearance :

Mr. Siddhartha Banerjee, Adv. Mr. Vivekananda Bose, Adv. Mr. Rahul Kumar Singh, Adv. Mr. Soumyajit Majumder, Adv. Mr. Ratikanta Pal, Adv. ... for the review petitioner in item 2.

Mr. Amitesh Banerjee, Sr. Adv. Mr. Debangshu Dinda, Adv., for State in item 1;

Ms. T. Samanta, Adv., ... for the State in item 2.

Mr. Debnath Ganguly, Adv. Mr. Aranya Saha, Adv. Mr. Supriyo Dutta, Adv. ... for respondent no.1 in items 1, 2.

The Court : -

1. Review is sought both by the Judgeship of the City Civil Court at Calcutta in RWWO/11/2024 and Sarmistha Bhattacharya and others (Group-B & C employees) of the Judgeship of the City Civil Court at Calcutta in RVWO/13/2024, of a portion of the judgement and order dated 6th February, 2024, passed in WPO/1786/2023, by this Court.
2. Review of the said order is sought to the extent that this Court has allowed actual promotion to the original writ petitioner/respondent to the post of Bench Clerk Grade-2 from Group D with immediate effect.

FACTS OF THE CASE

3. The facts of the case have otherwise been narrated in the order dated 6th February, 2024 and this Court is not inclined to reiterate them here except to the extent necessary.
4. The writ petitioner was appointed in Group-D post in the City Civil Court at Calcutta on May 19, 2009. His appointment came to be challenged by a section of employees who had filed WP 25442 (w) of 2010. The petitioner, as already recorded in the order dated August 11, 2023, ought to have been confirmed in his post within two years in terms of the applicable rules. He was not confirmed for the alleged pendency of the WP 25442 (w) of 2010.
5. In the said writ petition, there was no restraint order on the respondents from considering the writ petitioner's confirmation. The writ petitioner's

confirmation was taken up in the year 2017 and effected from September 1, 2017. WP 25442(w) of 2010 was dismissed for default in the year 2018.

6. This Court by the order dated 6th February 2024, directed the writ petitioner to be treated as having been confirmed from the year 2011, i.e. 2 years after his appointment, by reference to the Civil Courts Clerical and Inferior Services (Recruitment, Discipline and Appeal) Rules, 1941 and the West Bengal District Courts (Constitution of Service, Recruitment, Appointment, Probation and Discipline of Employees) Rules, 2015.
7. Prior thereto, the writ petitioner had filed WPO/489/2023, challenging the order of confirmation only WEF 1st Sept 2017. The following prayers were made in WPO/489/2023:-
 - a) A Writ of/in the nature of Mandamus commanding the Respondents and each of them and/or their men, subordinate and/or authorities and/or any of them, more particularly the Respondent No.2 herein to withdraw and/or revoke and/or annul and/or rescind the order no.424 dated September 15, 2017 and thereby pass necessary order for confirming the post of the petitioner with effect from May 19, 2012 in accordance with government notification being memo no.6060-F dated June 25, 1979.

- b) A writ of/in the nature of Mandamus commanding the Respondents and each of them and/or their men, subordinate and/or authorities and/or each and/or any of them, more particularly the Respondent No.1 to consider and give pending promotion and any other subsequent promotion to the writ petitioner in accordance with government notification being memo no.6060-F dated June 25, 1979, memo no.5916(62) dated August 05, 1981 and Memo No.5140-J dated July 20, 2009 in a time bound manner.
- c) A Writ of/in the nature of Mandamus commanding the Respondents and each of them and/or their men, subordinate and/or their men, subordinate and/or authorities and/or each and/or any of them, more particularly the Respondent Nos.2 and 3 to furnish a report before this Hon'ble Court stating the reasons as to why the application dated February 27, 2023 filed under section 6(1) of the Right to Information Act, 2005 by the advocate on behalf of the petitioner was not replied to.
- d) A Writ of/in the nature of Prohibition, prohibiting the Respondents and each of them and/or their men, subordinate and/or authorities and/or each and/or any of them, more particularly the Respondent Nos.1 and 2 not to give effect to and/or further effect to the order no.61 dated February 22,

2023 and order no.73 dated February 27, 2023 for conducting written examination till the disposal of the instant writ petition.

- e) Issue a Writ of/in the nature of Certiorari calling upon the Respondents and each of them to transmit the records of the case to this Hon'ble Court so that this Hon'ble Court may certify the same and do conscionable justice.
- f) Pass Appropriate Direction(s)/Order(s).
- g) Issue Rule Nisi in terms of Prayers (a), (b) and (c) above.
- h) Pass such other order or orders and/or further orders as to your Lordship may deem fit and proper for the ends of Justice.

8. While disposing of the said writ petition, a co-ordinate Bench had recorded in the order dated August 11, 2023, at internal page 3 of the order as follows:

“It is submitted on behalf of the petitioner, that the petitioner prays for deletion of prayer (b) in the present writ petition. Such prayer is dismissed as withdrawn.”

ARGUMENTS OF THE PARTIES

- 9. The main thrust of the argument of the Review Applicants in this proceeding is based on the aforesaid observation of the Co-ordinate Bench in the order dated August 11, 2023.
- 10. Several other arguments have been advanced which this Court does not feel need to address. The relevant arguments of the learned counsel Mr. Amitesh Banerjee for the Judgeship and Mr. Siddhartha Banerjee along

with Mr. Vivekananda Bose for the employees of the Judgeship in RVWO/11/2024 and RVWO/13/2024 respectively, are as follows:

- (a) The writ petitioner, Amar Guha Roy, having abandoned/withdrawn his prayer for promotion and such prayer having been dismissed as withdrawn by the co-ordinate Bench, could not have revived it in WPO 1786 of 2023 in view of Order 23 Rule 1 of the Code of Civil Procedure, 1908.
- (b) In addition to Order 23, the writ petitioner's prayer for promotion is barred by the principles of res judicata. The bar would prevent the petitioner from agitating any prayer for promotion from any retrospective date prior to WPO/1786/2023.
- (c) The prayer for promotion is even otherwise barred by delay and laches since the petitioner approached the Court about 11 years after the approval of his cause of action for the same.
- (d) Unlike other service benefits, a claim for promotion from a retrospective date should not normally be entertained as it affects the rights of several other persons who have already been promoted in the interregnum.
- (e) There was no prayer in WPO/1786/2023 for any retrospective promotion. This Court, therefore, ought not to have entertained the prayer made from the Bar by learned counsel for the writ petitioner for any retrospective promotion.

- (f) Mr. Siddhartha Banerjee and Mr Bose, learned counsel for the petitioner, only upon rule 53 of the Writ Rules framed by the Hon'ble Chief Justice of this Court, argue that the CPC applies to writ petitions.
- (g) Reliance in this regard is placed on the decision of the Supreme Court in the case of **Sarguja Transport Service -vs- State Transport Appellate Tribunal, M.P. Gwalior, and others, reported in (1987) 1 SCC 5 (paragraphs 7 & 9)** and the case of **Upadhyay & Co. -vs- State of U.P. and Ors. reported in (1999) 1 SCC 81 (paras 11 to 15)**. They have also placed the decision of **M.J. Exporters Private Ltd. -vs- Union of India & Ors. reported in (2021) 13 SCC 543 (paras 14 to 16)**.
- (h) On the proposition that promotion cannot be claimed as a matter of right and must be claimed not less than six months or a year after the promotion process, reliance is placed on the case of **P.S. Sadasivaswamy -vs- State of Tamil Nadu reported in (1975) 1 SCC 152 (para 22)** and the decision of **State of Mysore -vs- C.R. Seshadri & Ors. reported in (1974) 4 SCC 308 (paras 2 to 8)**.

11. Mr. Debnath Ganguly, learned counsel appearing for the writ petitioner, has in reply, relied upon the decision of **Akella -vs- K. Hanumanth Rao, reported in (2022) Live Law (SC) 638**. He has also placed the decision of **Prem Kishore -vs- Brahm Prakash, reported in (2023) SCC Online**

(SC) 356, particularly paragraph 34 thereof, to argue that the principle of res judicata does not apply in writ petitions in every case and situation. He has argued that a proceeding withdrawn without an adjudication on the same would not amount to res judicata.

ANALYSIS OF THIS COURT

12. This Court has very carefully considered the arguments advanced by the learned counsel for the parties. What is undisputed is that the prayer for promotion was made as a consequential relief made to the original prayer for confirmation which was specifically withdrawn before the earlier Bench in WPO/489/2023.
13. In fact, the co-ordinate Bench in its order dated 11th August 2023, while disposing of WPO/489/2023, has specifically dismissed the prayer of the petitioner, for promotion, as withdrawn. No leave has either been sought or reserved to the petitioner to re-agitate the prayer for promotion in any subsequent proceeding.
14. It would therefore follow that the writ petitioner was happy to receive his confirmation from the date on which he was entitled to, i.e. two years after his initial appointment, as on August 11, 2023. He was estopped from making any such prayer for promotion in future. It is for this reason that no prayer was made for promotion with retrospective effect in WPO/1786/2023.
15. The decisions cited by learned counsel Mr. Siddhartha Banerjee assisted by Mr. Bose, would squarely apply in the facts of the case not only as

principles of law but also in view of the conduct of the writ petitioner. In

M.J. Exports (supra) at Para 13 and 14 it was held as follows:

“13. Mr K. Radhakrishnan, learned Senior Counsel appearing for the Department, has drawn our attention to the order dated 2-8-2004 which was passed in *M.J. Exports (P) Ltd. v. Union of India* [*M.J. Exports (P) Ltd. v. Union of India*, WP No. 1278 of 2004, order dated 2-8-2004 (Bom)] . His submission was that in the earlier round of litigation before the High Court when the demand of interest was questioned, it was given up inasmuch as after arguments on this issue, the counsel for the appellant had withdrawn the writ petition. At that time, while allowing the appellant to withdraw the writ petition, the dispute was confined only to the calculation of interest as is clear from the order dated 2-8-2004 [*M.J. Exports (P) Ltd. v. Union of India*, WP No. 1278 of 2004, order dated 2-8-2004 (Bom)] itself which specifically referred to the averments made in Paras 6 and 7. These paragraphs have already been extracted above. In Para 6 particularly, Respondent 1 made some remarks about the calculation of the interest and had stated that it needed recalculation. Therefore, after the dismissal of the said writ petition as withdrawn, the only issue that remains for consideration was how much interest is payable and the correct calculations thereof. It is a matter of record which flows from the correspondence exchanged thereafter between the parties that insofar as the Department is concerned, it only reworked the amount of interest and demanded interest in the sum of Rs 4,67,02,251 after reducing the figure from Rs 8,43,62,504 because of the reasons already stated above.

14. Consequently in the second writ petition, when the appellant as well as its counsel knew that the issue as to whether the interest is payable or not on other grounds had already been foreclosed in the earlier writ petition, the counsel for the appellant did not make any submission with regard to the aforesaid plea raising the issue in show-cause notice and limited his prayer from the date from which the interest was to be paid.”

16. In **Sarguja Transport (supra)** at Para 7, 8 and 9 it was held as follows:

“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 v. State of U.P.* [AIR 1961 SC 1457 : (1962) 1 SCR 574] 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 case* [AIR 1961 SC 1457 : (1962) 1 SCR 574] is to be found at p. 593 and it is as follows:

“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.”

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 case* [AIR 1961 SC 1457 : (1962) 1 SCR 574] 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.”

17. The aforesaid observations would impose a clear bar on any prayer for promotion being reiterated by the petitioner in WPO 1786 of 2023 not only by res-judicata but also permanently end his right to claim any promotion in any proceeding subsequent to WPO 489 of 2023.

18. In **Upadhyay & Co. (supra)** at Para 12 and 13 it was held as follows:

“12. The above principle has been incorporated as a rule in the realm of suits. Order 23 Rule 1 of the Code of Civil Procedure deals with withdrawal of suit or abandonment of part of the claim. Sub-rule (3) says that the court may in certain contingencies grant permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) reads thus:

“1. (4) Where the plaintiff—

(a) abandons any suit or part of a claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

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 v. STAT* [(1987) 1 SCC 5 : 1987 SCC (Cri) 19]). 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)

“[W]e 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 the 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.”

19. It is a settled proposition of law that the Civil Procedure Code 1908 does apply to writ petitions albeit not *stricto sensu*. The principles thereunder however must be applied as far as possible and cannot be disregarded completely in writ petitions. The said principles contain the essence of the principles of natural justice, propriety and fairness. The application of the principles act as a basic guide for procedure in adjudication of writ petitions and are also necessary to prevent multiplicity of proceedings on the self-same cause of action, abandoned or otherwise. The principles have in some cases been ignored in exercise of extraordinary powers

under Article 226 of the Constitution and for doing substantial justice to the parties in a given case.

20. There is also substance in the arguments advanced by the review applicants that sufficient water has already flown under the bridge creating rights in favour of third parties during the long period during the petitioner's engagement and the date of his confirmation under orders of this Court. The petitioner cannot seek a relief which would trample upon the rights already created and accrued in favour and benefit of third parties. Such parties were not even notified of the instant proceedings. A relief not prayed for cannot even otherwise be granted on oral prayers.

21. In **P.S. Sadasivaswamy (supra)** at Para 2 it was held as follows:

“....A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.....”

20. On the proposition that a relief not claimed should not be entertained by a writ court useful reference may be made to the decision of **Bharat Amratlal Kothari -Vs- Dosukhan Samadkhan Sindhi** reported in **(2010) 1 SCC 234**. At Paras 30 to 33 it was held as follows:

“30. Though the provisions of the Code are not made applicable to the proceedings under Article 226 of the Constitution, the general principles made

in the Civil Procedure Code will apply even to writ petitions. It is, therefore, incumbent on the petitioner to claim all reliefs he seeks from the court. Normally, the court will grant only those reliefs specifically prayed for by the petitioner. Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner.

31. In *Krishna Priya Ganguly v. University of Lucknow* [(1984) 1 SCC 307] , overlooking the rule relating to grant of admission to postgraduate course in Medical College, the High Court in the exercise of powers under Article 226 of the Constitution directed the Medical Council to grant provisional admission to the petitioner. This Court set aside the order passed by the High Court observing that: (SCC p. 319, para 26)

“26. ... in his own petition in the High Court, the respondent had merely prayed for a writ directing the State or the college to consider his case for admission yet the High Court went a step further and straightaway issued a writ of mandamus directing the college to admit him to the MS course and thus granted a relief to the respondent which he himself never prayed for and could not have prayed for.”

32. Again, in *Om Prakash v. Ram Kumar* [(1991) 1 SCC 441] , this Court observed: (SCC p. 445, para 4)

“4. ... A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute.”

33. Though a High Court has power to mould reliefs to meet the requirements of each case, that does not mean that the draftsman of a writ petition should not apply his mind to the proper relief which should be asked for and throw the entire burden of it upon the court.”

21.The District Judgeship must take responsibility for not having defended the other employees in these proceedings or highlighted the consequences to such employees by allowing retrospective promotion to the writ petitioner.

CONCLUSION AND DIRECTIONS

22.In the light of the discussions above, the application for review is allowed in part to the extent that the petitioner shall not be allowed promotion from Group-D at all. He shall, however, get all actual financial benefits

that would have been payable to him as if he were notionally promoted to Bench Clerk Grade-2.

23. Let all financial benefits accruing to the petitioner upon each date of promotion on which promotion processes were undertaken upto the post of Bench Clerk Grade-2 be made available to the petitioner as if he was notionally promoted. The petitioner shall, however, continue in Group-D post.

24. Let the financial benefits as directed hereinabove and the original order in review dated February 6, 2024 be made available to the petitioner within a period of one month from date.

25. RVWO/11/2024 and RVWO/13/2024 are allowed in part as indicated above. All connected applications stand disposed of without any order as to costs.

26. Urgent Xerox certified copy be given to the parties in compliance of the usual terms and conditions.

(RAJASEKHAR MANTHA, J.)

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