

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Kausik Chanda**

W.P.A. No.14708 of 2024

RAJESH DEY

-VERSUS-

KOLKATA MUNICIPAL CORPORATION AND OTHERS

For the petitioner : Mr. Anirban Majumdar, Adv.,
Mr. Sayantan Mullick, Adv.

For Kolkata Municipal Corporation : Mr. Srijan Nayak, Adv.,
Mr. Subhrangshu Panda, Adv.

Hearing concluded on : 14.01.2025

Judgment on : 27.01.2025

Kausik Chanda, J.:-

The petitioner, in respect of the same cause of action, filed W.P.A. No. 375 of 2024, which was dismissed for default on April 29, 2023, in the presence of the State.

2. It is pertinent to quote the order dated April 29, 2023, in its entirety:

“None appears on behalf of the petitioner at the time of call. No accommodation is sought for.

State is represented.

WPA 375 of 2024 is dismissed for default.”

3. The issue to be addressed is whether the present writ petition, based on the same cause of action, is maintainable.

4. When a suit is dismissed under Order 9, Rule 3 of the Code of Civil Procedure, 1908 (“the Code”), the plaintiff may file an application for restoration under Order 9, Rule 4, or may file a fresh suit, subject to the law of limitation. However, when the plaintiff is absent, and in the presence of the defendant, the suit is dismissed for default by the court, the provisions of Order 9, Rule 8 of the Code apply. In such cases, under Order 9, Rule 9, the plaintiff is only entitled to apply for restoration of the suit and is precluded from filing a fresh suit.

5. While the provisions of the Code do not apply *stricto sensu* in a writ proceeding, it is important to note that, under the Rules of the High Court at Calcutta concerning applications under Article 226 of the Constitution of

India, the provisions of the Code apply “as far as it can be made applicable.” The relevant part of the Writ Rules is quoted below:

“53. Save and except as provided by these Rules and subject thereto, the provisions of the Code of Civil Procedure (Act V of 190) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Courts.”

6. Order 9, Rule 3 deals with the neutral fault of both parties, whereas Order 9, Rule 8 addresses the fault of the plaintiff when the defendant has made an effort to appear and defend. In the scenario under Order 9, Rule 3, there is no issue of harassment or unfairness to the defendant. If both parties are absent, neither party can claim an advantage, and the court treats the situation neutrally, allowing the plaintiff to file a fresh suit if he so chooses.

7. The bar on filing a fresh suit under Order 9, Rule 8 ensures that the plaintiff cannot circumvent their negligence by filing a fresh suit, thereby compelling the defendant to face repetitive litigation.

8. This provision exists to protect the defendant’s right to contest the continuation of the suit after its dismissal. In such cases, the plaintiff, in the restoration application, must demonstrate a sufficient cause for his absence, and the defendant is afforded an opportunity to contest the

application on its merits. The plaintiff is compelled to act promptly and file a restoration application, rather than abandoning the case and starting afresh. Such a restoration application should be filed within 30 days from the date of dismissal, ensuring a prompt response from the plaintiff in accordance with Article 122 of the Limitation Act, 1963. The Court may impose costs on the plaintiff for restoration, compensating the defendant for any inconvenience caused.

9. This principle is supported by the judgment of the Supreme Court reported at **(2018) 11 SCC 449 (*Dharampal (dead) Through Legal Representatives v. Punjab Wakf Board*)**. The relevant excerpt from the judgment is as follows:

“24. In our opinion, in order to examine such plea, what is relevant at the first instance is to find out as to whether dismissal of the suit is under Rule 3 or Rule 8 of the Order 9 of the Code. If it is under Rule 3 then filing of fresh suit is permissible as provided under Rule 4 but if the dismissal is under Rule 8 then fresh suit may be barred as provided under Rule 9.”

10. The learned advocate for the petitioner, to sustain this writ petition, has relied upon the judgment of the Division Bench of this Court reported at **(2008) 3 CHN 602 (*Rinku Mondal (Biswas) v. Union of India*)**. Additionally, reliance has been placed on the judgment of the Hon’ble Supreme Court reported at **(1962) 1 SCR 574 (*Daryao v. State of U.P.*)**.

11. In my view, the judgment in the **Rinku Mondal (Biswas)** case is not applicable to the present matter. In that case, a writ petition was dismissed for default. A restoration application was filed, but it was dismissed with costs. Subsequently, the petitioner filed a fresh writ petition on the same cause of action, which was again dismissed by a learned Single Judge of this Court. An appeal was filed against the dismissal, and the Division Bench held that the second writ petition was maintainable based on the facts of the case.

12. However, the Division Bench did not have the occasion to consider the issue of whether a fresh writ petition may be filed on the same cause of action when the earlier writ petition was dismissed for default in the presence of the respondent.

13. Similarly, reliance on the **Daryao** case is also misplaced. In that case, it was held that when a writ petition under Article 226 of the Constitution of India is dismissed as withdrawn, there is no bar to file an application under Article 32 of the Constitution of India before the Supreme Court based on the same cause of action. The issue in the present case is entirely different. Moreover, **Daryao** has been distinguished by the Supreme Court in its subsequent decision reported at **(1987) 1 SCC 5 (Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior)**, wherein it was held that when a petitioner withdraws a petition filed in the High Court under Articles 226/227 without permission

to file a fresh petition, the remedy under Articles 226/227 is deemed to have been abandoned in respect of the cause of action relied upon in the writ petition. Consequently, the petitioner would not be allowed to file a fresh petition in the High Court under the same article, although other remedies, such as filing a suit or a writ petition before the Supreme Court under Article 32, remain available.

14. In view of the foregoing, the present writ petition is not maintainable before this Court, since the earlier dismissal order dated April 29, 2023, records the appearance of the State.

15. Consequently, W.P.A. No. 14708 of 2024 is dismissed.

16. This order, however, does not preclude the petitioner from filing a restoration application in accordance with the law.

17. Urgent certified website copy of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(Kausik Chanda, J.)