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SARGUJA TRANSPORT SERVICE

v.

STATE TRANSPORT APPELLATE TRIBUNAL, M.P., GWALIOR AND OTHERS

NOVEMBER 12, 1986

B

[E.S. VENKATARAMIAH AND M.M. DUTT, JJ.]

Constitution of India, 1950: Articles 21, 32, 226 & 227—Writ Petition withdrawn without permission to file a fresh petition—Effect of—Petitioner whether precluded from filing any fresh petition/suit in respect of the same subject matter.

C

Civil Procedure Code, 1908: Order XXIII, Rule 1—Applicability of to cases of withdrawal of writ petitions.

Sub-rule (1) of rule 1, Order XXIII of the Code of Civil Procedure
D **permits a plaintiff to abandon his suit against all or any of the defendants at any time after the institution of the suit; sub-rule (3) lays down that where the court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit, it may grant permission to him to withdraw from such suit with liberty**
E **to institute a fresh suit, while sub-rule (4) provides that where the plaintiff abandons any suit under sub-rule (1) or withdraws from it without the permission referred to in sub-rule (3), he shall be precluded from instituting any fresh suit in respect of such subject matter.**

The provisions of the Code of Civil Procedure, 1908 are not in
F **terms applicable to the writ proceedings. However, the procedure prescribed, therein, as far as it can be made applicable, is followed by the High Court in disposing of the writ petitions.**

The petitioner withdrew its earlier writ petition filed under Art. 226/227 of the Constitution without permission of the Court to file a
G **fresh petition. Later on it filed another writ petition against the order assailed in the first petition. The High Court summarily dismissed it taking the view that no second writ petition lies against the same order where the earlier petition was not withdrawn with permission to file a fresh petition.**

H **In this petition for special leave it was contended that since the**

High Court had not decided the earlier petition on merits but had only permitted the petitioner to withdraw it the withdrawal could not be treated as a bar to the subsequent writ petition.

On the question: Whether a petitioner after withdrawing a writ petition filed by him in the High Court under Art. 226/227 of the Constitution without permission to institute a fresh petition can file a fresh writ petition in the High Court under these Articles, and whether it would advance the cause of justice if the principle underlying rule 1, Order XXIII of the Code of Civil Procedure is adopted in respect of the writ petitions under these Articles.

Dismissing the special leave petition, the Court,

HELD: 1. The High Court was right in holding that a fresh 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. [208D]

2.1 The principle underlying rule 1, Order XXIII of the Code of Civil Procedure 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, should be extended in the interest of justice on the ground of public policy to cases of withdrawal of writ petition also. [206D, 208A]

2.2 *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 would loose it. [206E]

2.3 Where a petitioner withdraws a writ petition filed by him in the High Court under Art. 226/227 without permission to institute a fresh petition he should be deemed to have abandoned the remedy under these Articles in respect of the cause of action relied on in the writ petition and barred from filing a fresh petition. [207H, 208C]

3.1 The principle embodied in rule 1, Order XXIII of the Code is founded on public policy. It is not the same as the rule of *res judicata* contained in s. 11 of the Code, which 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, there is no prior adjudica-

tion of a suit nor an issue is involved. The plaintiff is precluded from instituting any fresh suit in respect of the same subject matter to prevent the abuse of the process of the Court. [206G, H, D, 207B]

3.2 Such withdrawal would not bar other remedies like a suit or a petition under Art. 32 of the Constitution before the Supreme Court in a case involving the question of enforcement of fundamental rights since such withdrawal does not amount to *res judicata* and there has been no decision on the merits by the High Court. [208C, 207E]

Daryao and Ors. **v.** *The State of U.P. and Ors.*, [1962] 1 SCR 575, referred to.

[A 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 stands on a different footing altogether. This question is left open.] [208E]

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 5665 of 1986

From the Judgment and Order dated 17.1.1986 of the Madhya Pradesh High Court in Misc. Petition No. 188 of 1986.

B.P. Singh and Ranjit Kumar for the Petitioner.

The Order of the Court was delivered by

VENKATARAMIAH, J. On the expiry of the period of a permit to run a stage carriage on the route Jashpurnagar—Ambikapur issued under the Motor Vehicles Act, 1939 (hereinafter referred to as 'the Act') in favour of the Janta Transport Co-operative Society, the petitioner and some others filed applications for the grant of the said permit before the Regional Transport Authority, Bilaspur. The Janta Transport Co-operative Society also made an application for the renewal of the permit in its favour. The application for renewal filed by the 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, the petitioner and others, the Regional Transport Authority granted the permit in favour of the petitioner. The said order was challenged in appeal by M/s. Ali Ahmed & Sons—respondent No. 3, which 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 the petitioner. The State Transport Appellate Tribunal heard all the appeals together. The Tribunal by its order dated 19.9.1985 set aside the order granting the permit in favour of the petitioner on two grounds, namely, that Mohd. Jhahid Khan, the proprietor of the petitioner concern was a practising advocate and that he had ceased to carry on the transport business in his individual capacity and granted the permit in favour of M/s. Ali Ahmed & Sons. Aggrieved by the order of the Tribunal the petitioner filed a writ petition in M.P. No. 2945 of 1985 on the file of the High Court of Madhya Pradesh at Jabalpur under Articles 226/227 of the Constitution of India. That petition was taken up for hearing on 4.10.1985 by the High Court. On that day the High Court passed the following order:—

> "Shri Y.S. Dharmadhikari, learned counsel for the petitioner seeks permission to withdraw the petition. He is permitted to do so. The petition is dismissed as withdrawn."

Later on the petitioner again filed another writ petition before the High Court in M.P. No. 188 of 1986. That petition came up for hearing on 17.1.1986. At the conclusion of the hearing the High Court passed the following order:—

> "Shri P.R. Bhave for the petitioner heard on admission.
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> 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.
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> Accordingly, the petition is dismissed summarily."

A Aggrieved by the above order rejecting the writ petition at the stage of admission, the petitioner has filed the above special leave petition requesting the Court to grant the special leave to prefer an appeal against the order of the High Court.

B The main contention urged before this Court by the learned counsel for the petitioner is that the High Court was in error in rejecting the writ petition out of which this case arises, on the ground that the petitioner had withdrawn the earlier writ petition in which he had questioned the order passed by the Tribunal on 4.10.1985 without the permission of the High Court to file a fresh petition. It is urged by the learned counsel that since the High Court had not decided the earlier C petition on merits but only had permitted the petitioner to withdraw the petition, the withdrawal of the said earlier petition could not have been treated as a bar to the subsequent writ petition.

In this case we are called upon to consider the effect of the withdrawal of the writ petition filed under Articles 226/227 of the D Constitution of India without the permission of the High Court to file a fresh petition. The provisions of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') are not in terms applicable to the writ proceedings although the procedure prescribed therein as far as it can be made applicable is followed by the High Court in disposing of the writ petitions. Rule 1 of Order XXIII of the Code provides for E the withdrawal of a suit and the consequences of such withdrawal. Prior to its amendment by Act 104 of 1976, rule 1 of Order XXIII of the Code provided for two kinds of withdrawal of a suit, namely, (i) absolute withdrawal, and (ii) withdrawal with the permission of the Court to institute a fresh suit on the same cause of action. The first category of withdrawal was governed by sub-rule (1) thereof, as it F stood then, which provided that at any time after the institution of a suit the plaintiff might, as against all or any of the defendants 'withdraw' his suit or abandon a part of his claim. The second category was governed by sub-rule (2) thereof which provided that where the Court was satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there were sufficient grounds for allowing the plaintiff to G institute a fresh suit for the subject-matter of a suit or part of a claim, it might, on such terms as it thought fit, grant the plaintiff permission to withdraw from such suit or abandon a part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Sub-rule (3) of the former rule 1 of Order XXIII of the Code provided that where the plaintiff withdrew from a suit or H abandoned a part of a claim without the permission referred to in

sub-rule (2) he would be liable to such costs as the Court might award and would be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. Since it was considered that the use of the word 'withdrawal' in relation to both the categories of withdrawals led to confusion, the rule was amended to avoid such confusion. The relevant part of rule 1 of Order XXIII of the Code now reads thus:—

> "Rule 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:
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> **** **** **** ****
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> (3) Where the Court is satisfied—
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> (a) that a suit must fail by reason of some formal defect, or
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> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,
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> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.
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> (4) Where the plaintiff—
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> (a) abandons any suit or part of claim under sub-rule (1), or
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> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),
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> 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."

It may be noted that while in sub-rule (1) of the former rule 1 of Order XXIII of the Code the words 'withdraw his suit' had been used, in sub-rule (1) of the new rule 1 of Order XXIII of the Code, the words 'abandon his suit' are used. The new sub-rule (1) is applicable to a case

A where the Court does not accord permission to withdraw from a suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. In the new sub-rule (3) which corresponds to the former sub-rule (2) practically no change is made and under that sub-rule the Court is empowered to grant subject to the conditions mentioned therein permission to with-
B draw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) of the new rule 1 of Order XXIII of the Code provides that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he would be liable for such costs as the Court might award and would also be
C precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

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
D 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
E 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 benificium 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
F 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
G 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
H 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.

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 and Ors.* v. *The State of U.P. and Ors.*, [1962] 2 S.C.R. 575 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'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."

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

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 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 B 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 C 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 D 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 E 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.

F Even on merits we do not find any ground to reverse the decision of the High Court. In the result we dismiss the special leave petition.

P.S.S.

Petition dismissed.