
(2019) 07 UK CK 0119

In the Uttarakhand High Court

Case No : Central Excise Appeal (CEXA) No. 12, 13 Of 2019

Bion Plastics & Others

APPELLANT

Vs

Commissioner CGST & Others

RESPONDENT

Date of Decision : 15-07-2019

Acts Referred:

Central Excise Act, 1944 — Section 35G
Code Of Civil Procedure, 1908 — Order 23 Rule 1(3)
Constitution Of India, 1950 — Article 21, 32, 226, 227

Citation : (2019) 07 UK CK 0119

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Kumar Verma, J

Bench : Division Bench

Advocate : Pulak Raj Mullick, Shobhit Saharia

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. This appeal is filed, under Section 35-G of the Central Excise Act, 1944, against the order passed by the CESTAT, New Delhi in Excise Appeal Nos. 50166 of 2016 and 51678 of 2016 dated 22.09.2017.

2. Against the very same order, passed in Excise Appeal Nos. 50166 of 2016 and 51678 of 2016 dated 22.09.2017, the appellant herein had earlier filed Central Excise Appeal Nos. 41 & 42 of 2018; and the learned counsel for the appellant had sought permission to withdraw Central Excise Appeal Nos. 41 of 2018 and 42 of 2018 stating that the appellant intended to pursue the rectification application filed by them. Both the appeals were dismissed as withdrawn by order dated 13.12.2018.

3. The appellant herein, thereafter, filed an application for rectification which was dismissed by order dated 06.05.2019. Instead of challenging the order passed by the CESTAT dated 06.05.2019, rejecting the rectification application, the appellant has instead preferred the present appeals questioning the very same

order passed by CESTAT, New Delhi in Excise Appeal Nos. 50166 and 51678 of 2016 dated 22.09.2017.

4. While seeking permission to withdraw Central Excise Appeal Nos. 41 & 42 of 2018, the appellant neither sought liberty to file an appeal, later against the order passed by CESTAT in Excise Appeal Nos.50166 and 51678 of 2016 dated 20.09.2017 nor was any such leave granted. In "Sarguja Transport Service Vs. S.T.A. Tribunal, Gwalior": AIR 1987 SCC 88, the Supreme Court observed:-

"..... 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.

.....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'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 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 since such withdrawal does not amount to res-judicata, the remedy under Article 226 of the Constitution 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....." (emphasis supplied)

5. The principles laid down by the Supreme Court, in *Sarguja Transport*, both with regards Order 23 Rule 1(3) C.P.C, and Articles 226 and 227 of the Constitution, would also apply to an appeal under Section 35-G of the Central Excise Act, 1944. Since the appellant neither sought, nor were they granted, liberty to prefer an appeal against before this Court, these two appeals are liable to be dismissed on this short ground.

6. The appeals fail and are, accordingly, dismissed. However, without costs.