

(2015) 04 CHH CK 0008
In the Chhattisgarh High Court
Case No : WPS No. 5242 of 2014

Promod Kumar Gajbhiye

APPELLANT

Vs

The State of Chhattisgarh and Others

RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 21, 226, 227, 32

Citation : (2015) 146 FLR 20

Hon'ble Judges : Prashant Kumar Mishra, J

Bench : Single Bench

Advocate : Parag Kotecha, for the Appellant; Shashank Thakur, Govt. Adv.,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar Mishra, J.—In this writ petition under Article 226 and 227 of the Constitution of India, the petitioner is seeking quashment of the order dated 7/1/2008 (Annexure P/8) and memo dated 21/11/2007 (Annexure P/9) and has prayed for direction to the respondents to pay salary from 1/4/2005 to 7/1/2008 and for his reinstatement with full backwages and other consequential benefits.

2. Admittedly, the petitioner had earlier preferred a writ petition for the same relief bearing WP(S) No. 3811/2009 wherein the following order was passed on 18/6/2009 :

"Shri Punit Ruprel, Adv. for the petitioner.

Ms. Sunita Jain, PL for the State.

The case is listed for orders on defaults.

On the request of learned counsel for the petitioner, one week time is granted to make good the defaults, failing which the petition shall stand dismissed for want of prosecution without reference to the Bench."

3. Since the petitioner failed to remove the defects within the stipulated time as allowed by the Court, the writ petition was dismissed for want of prosecution. The petitioner, thereafter, preferred an application for restoration of the writ petition bearing MCC No. 734/2014. The said MCC was barred by limitation of 1855 days, for which an application for condonation of delay was also filed. By order dated 10/9/2014 the Division Bench of this Court refused to condone the delay and as a consequence the MCC was also dismissed.

4. In the present petition, this Court required the petitioner to satisfy about the maintainability of the petition.

5. It has been urged by the learned counsel for the petitioner that the earlier petition was not decided on merits, therefore, principles of res judicata would not apply and the present petition is maintainable.

6. On the other hand, learned counsel for the State would submit that the writ petition is not maintainable because the petitioner having failed to remove the default in the earlier petition and his restoration application having already been dismissed, the order dated 18/6/2009 passed in WP (S) No. 3811/2009 has attained finality and fresh petition on the same cause of action is not permissible.

7. Having heard learned counsel for the parties and on perusal of the orders passed by this Court in WP(S) No. 3811/2009 and MCC No. 734/2014, this Court is of the considered opinion that the present petition is not maintainable because even if principles of res judicata may not per se apply, but the principle of estoppel would apply and on the principle of public policy, the petitioner having once preferred a petition which was dismissed for want of prosecution, he cannot be permitted to file a fresh petition on the same cause of action.

8. In *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, AIR 1987 SC 88 : (1986) JT 808 : (1986) 2 SCALE 757 : (1987) 1 SCC 5 : (1987) 1 SCR 200 : (1987) 1 UJ 28 , the following has been held by the Supreme Court :

"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 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 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."

(Emphasis supplied)

9. Yet again in *Deb Narayan Shyam and Others Vs. State of West Bengal and Others*, (2005) 1 ESC 90 : (2005) 104 FLR 843 : (2004) 10 JT 320 : (2004) 10 SCALE 124 : (2005) 2 SCC 286 : (2005) SCC(L&S) 214 : (2005) 2 SLJ 264 , the Supreme Court has approved the law laid down in *Sarguja Transport Service* (supra).

10. In view of the law laid down by the Supreme Court in *Sarguja Transport Service* (supra) and *Deb Narayan Shyam* (supra), it is to be seen that in the present case also the petitioner having already preferred a writ petition desired to prosecute the same, but abandoned the same by not removing the default in the petition, when the petition was dismissed for want of prosecution, he did not move any application for restoration of the writ petition for more than 5 years, therefore, his prayer for restoration of the writ petition was also dismissed.

11. If the argument raised by the petitioner that the earlier petition having not been dismissed on merits the subsequent petition is maintainable, is accepted, then there would be no end to litigation and the petitioner may prefer n....number of petitions, one after another after dismissal of the previous petition for want of prosecution or after withdrawing the earlier writ petition and this may also encourage Bench hunting.

12. The Supreme Court in *Tamilnad Mercantile Bank Share Holders Welfare Association Vs. S.C. Sekar and Others*, (2010) 1 CompLJ 357 : (2008) 13 JT 49 : (2008) 16 SCALE 205 : (2009) 2 SCC 784 , held thus :--

"51. The superior courts of this country must discourage forum shopping. A person seeking equity must do equity. A party cannot take recourse to a machination which amounts to abuse of process of court."

13. In *M/s. Chetak Construction Ltd. Vs. Om Prakash and Others*, (1998) 4 AD 220 : AIR 1998 SC 1855 : (1998) 3 JT 269 : (1998) 3 SCALE 153 : (1998) 4 SCC 577 : (1998) 2 SCR 1016 : (1998) AIRSCW 1653 : (1998) 4 Supreme 191 , the

Supreme Court held that a litigant cannot be permitted "choice" of the "forum" and every attempt at "forum-shopping" must be crushed with a heavy hand.

14. Shri Kotecha has referred the decision of the Supreme Court rendered in *Kandapazha Nadar and Others Vs. Chitraganiammal and Others*, AIR 2007 SC 1575 : (2007) 3 CTC 767 : (2007) 5 JT 605 : (2007) 148 PLR 210 : (2007) 5 SCALE 707 : (2007) 7 SCC 65 : (2007) 5 SCR 174 , to submit that withdrawal of the suit without liberty to file fresh suit does not constitute "decree", therefore, there being no adjudication on merits, the petitioner is entitled to maintain the present petition.

15. In the said matter before the Supreme Court the issue was of applicability of principles of *res judicata* in the second round litigation and in that context it has been held that the earlier order of withdrawal of suit without liberty to file fresh suit would not constitute "decree", however, the issue with which this Court is faced in the present writ petition never came up for consideration before the Supreme Court, therefore, the said judgment is not applicable in the facts of the present case.

16. As a sequel, the writ petition, being not maintainable, is liable to be and is hereby dismissed.