

MANU/BH/0136/2017

Equivalent Citation: AIR2017Pat35, 2017(1)PLJR909, 2017(1)PLJR909, 2017(2)RCR(Civil)579

IN THE HIGH COURT OF PATNA

Civil Writ Jurisdiction Case No. 421 of 1988

Decided On: 17.01.2017

Appellants: **Ram Kinkar Das**
Vs.

Respondent: **State of Bihar and Ors.**

Hon'ble Judges/Coram:

Hemant Gupta, Actg. C.J., Anjana Mishra and Sudhir Singh, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Kamal Nayan Choubey, Sr. Adv., Ashok Kumar Garg, Animesh Kumar, Dineshwar Pandey, Noma Yunus and Yogendra Dwivedi

For Respondents/Defendant: A.K. Dubey, A.C. to A.A.G. 11

JUDGMENT

Hemant Gupta, Actg. C.J.

1. Heard learned counsel for the parties. The present writ application has been placed before this Bench in view of the order passed by the Division Bench of this Court on 20th of February, 1988 wherein, the correctness of Full Bench judgment of this Court in the case reported as Rita Mishra and others v. Director, Primary Education, Bihar & Ors., MANU/BH/0005/1988 : 1987 PLJR 1090 : (AIR 1988 Pat 26 (FB)) was doubted.

2. In Rita Mishra's case, the earlier Division Bench judgment reported as Kishori Singh v. The State of Bihar & Ors. MANU/BH/0088/1985 : AIR. 1985 Patna 298 was relied upon to hold that a second petition on similar facts in respect of the same cause of action by the same party would not be maintainable. The view of the Full Bench was doubted and consequently the matter has been placed before this Bench.

3. The brief facts leading to the said reference is that Guru of the present petitioner instituted a Title Suit claiming a declaration that the properties mentioned therein were personal and private properties and the Trust being private could not be subjected to the provisions of the Bihar Hindu Religious Trusts Act, 1950. It is asserted that he has been substituted as Mahanth of the private Math on 27th of October, 1983 after the death of his Guru. It appears that the proceedings were initiated for appointing the successor of the Math after the death of the Guru of the petitioner as a vacancy said to have become available on the basis of report of the Postman the Guru has died. Thereafter the Trustee was appointed. The writ application C.W.J.C. No. 133 of 1987 was filed against the supply of vacancy by the Board under Section 33 of the Bihar Hindu Religious Trusts Act, 1950. The said writ application was withdrawn. It is thereafter, the petitioner filed an application in the Title Suit for ad interim injunction. Such application was finally dismissed on 10th of March, 1987. The petitioner challenged the said order in Misc. Appeal vide M.A. No. 7 of 1987 which was dismissed on 25th of November, 1987. In the present petition, the petitioner has again sought quashing of the order dated 7th of August, 1986 filling up

the purported vacancy. It is in these circumstances; the correctness of the earlier judgment in Rita Mishra's case was doubted.

4. In the present case, learned counsel for the petitioner refers to a Constitution Bench judgment reported as Daryao and others v. State of U.P. and others, MANU/SC/0012/1961 : AIR 1961 Supreme Court 1457 and B. Prabhakar Rao and others v. State of Andhra Pradesh and others, MANU/SC/0330/1985 : AIR 1986 Supreme Court 210 to contend that the dismissal of the petition without speaking order which will include withdrawal of a writ application will not bar the invocation of the jurisdiction of the Court again in a petition under Article 226 of the Constitution of India.

5. On the other hand, learned counsel for the respondents refers to Supreme Court judgment reported as Puran Singh and others v. State of Punjab and others, MANU/SC/0298/1996 : (1996) 2 SCC 205 : (AIR 1996 SC 1092) and Ramesh Chandra Sankla and others v. Vikram Cement and others, MANU/SC/7810/2008 : (2008) 14 SCC 58 : (AIR 2009 SC 713) to contend that the second petition would not be maintainable as a matter of public policy.

6. We have heard learned counsel for the parties and find that second petition on the same cause of action would normally be not entertained. In Daryao's case: (MANU/SC/0012/1961 : AIR 1961 SC 1457) (supra) the Supreme Court was considering the invocation of jurisdiction under Article 32 of the Constitution of India. The Court examined a situation when a petition under Article 226 of the Constitution is dismissed not on merits but on account of laches of the party or that the party had an alternative remedy available to it. The Court held that in such circumstances, the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 of the Constitution. The relevant extract from the judgment reads as under:--

"(19) We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may

strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Art. 32. 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. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us."

7. The said observations of the Supreme Court are in the context of dismissal of the writ petition by the High Court on any ground other than on merits and invocation of jurisdiction of the Supreme Court under Article 32 of the Constitution. But the situation in the present case is invocation of jurisdiction of High Court again after the dismissal of a writ petition by the High Court. The said judgment referred to by the counsel for the petitioner does not deal with the question of the invocation of the jurisdiction again of the High Court after withdrawal of the earlier petition.

8. In B. Prabhakar Rao's case, (MANU/SC/0330/1985 : AIR 1986 SC 210) (supra), the writ petitions were dismissed in limine by the Supreme Court and thereafter, another petition was filed before the Supreme Court. It was in these circumstances, the Court said that dismissal in limine may inhibit the discretion of the Court but not the jurisdiction. The relevant paragraph of the said judgment reads as under:--

"23. We may now refer to two arguments which were mentioned in passing but were not pursued. The first was that a writ petition similar to Writ Petitions Nos. 3420-3426/83 etc. had been filed earlier and had been dismissed in limine by a Bench of this Court. We do not see how the dismissal in limine of such a writ petition can possibly bar the present writ petitions. Such a dismissal in limine may inhibit our discretion but not our jurisdiction. So the objection such as it was, was not pursued further. So also the second objection which related to the non-joinder of all affected parties to the litigation. We are quite satisfied that even if some individual affected parties have not been impleaded before us, their interests are identical with those and have been sufficiently and well represented. Further, the relief claimed in Writ Petitions Nos. 3420-3426 of 1983 etc. is of a general nature and claimed against the State and no particular relief is claimed against any individual party. We do not think that the mere failure to implead all affected parties is a bar to the maintainability of the present petitions in the special circumstances of these cases where the actions are really between two "warring groups"."

9. This is again in respect of the proceedings initiated before the Supreme Court under Article 32 of the Constitution wherein another writ petition was filed before the Supreme Court after dismissal of the first writ petition in limine.

10. Section 141 of the Code of Civil Procedure was amended vide Central Act No. 104 of 1976 wherein explanation was added to mean that the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution. Such explanation was examined by the Supreme Court

in a judgment reported as Puran Singh and others v. State of Punjab and others, MANU/SC/0298/1996 : (1996) 2 SCC 205 : (AIR 1996 SC 1092, Para 9) wherein, the Court has observed as under:-

"11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious."

11. In another judgment reported as Ramesh Chandra Sankla and others v. Vikram Cement and others, MANU/SC/7810/2008 : (2008) 14 SCC 58 : (AIR 2009 SC 713 Para 50), the Supreme Court was seized of a situation wherein earlier petition under Article 226 was withdrawn. It was held that it will be a matter of public policy that a person should not start a fresh round of litigation and the Court will not allow to re-agitate the claim which he himself had already given up earlier. Paragraph 61 reads as under:-

"61. From the above case law, it is clear that it is open to the petitioner to withdraw a petition filed by him. Normally, a court of law would not prevent him from withdrawing his petition. But if such withdrawal is without the leave of the court, it would mean that the petitioner is not interested in prosecuting or continuing the proceedings and he abandons his claim. In such cases, obviously, public policy requires that he should not start a fresh round of litigation and the court will not allow him to re-agitate the claim which he himself had given up earlier."

12. A Division Bench of this Court in a judgment reported as The State of Bihar & Ors. v. Shri Ramesh Prasad & Anr., (2015) 1 PUR 645 considered the Puran Singh's case, (MANU/SC/0298/1996 : AIR 1996 SC 1092) (supra) and held that the provisions of Code of Civil Procedure cannot per se apply to writ proceedings although certain principles enunciated therein have to be applied in writ proceedings from time to time. It was held that there cannot be any automatic application of the provisions of the Code of Civil Procedure in the matter of writ petitions or writ appeals. The Court observed as under:--

"Section 141 of the Code of Civil Procedure clearly lays down that the procedure provided in the said Code is to be followed in regard to suits and are to be made applicable in all proceedings in any Court of civil jurisdiction but by its Explanation while the word "proceedings" includes proceeding under Order IX but does not include one under Article 226 of the Constitution of India. It is thus, evident that the provisions of the Code of Civil Procedure cannot per se apply to writ proceedings although certain principles enunciated therein have been applied in writ proceedings from time to time. Thus, there cannot be any automatic application of the provisions of the Code of Civil Procedure in the matter of writ petitions or writ appeals and for the said reason the period of three years prescribed in the residuary Article 137 of the Limitation Act would not also be attracted in proceedings arising out of Article 226 of the Constitution of India including writ appeals. Thus, there cannot be any fixed period so far as substitution of the heirs and legal representatives in a writ petition or writ appeal is concerned. That has also been clearly held by the Supreme Court in Puran Singh's case (supra) holding that there is no question of abatement and it is for the Court to take into consideration the facts and circumstances of a particular case for the purpose of condoning or not the delay in filing the application for substitution of the legal representatives. That being the legal position, we do not think that it is open to the Courts to prescribe any fixed period for the purpose of filing a substitution petition and for abatement of the writ petition or writ appeal due to non-substitution on that account."

13. In view of the discussion above, we find that the provisions of Code of Civil Procedure are not per se applicable to the writ proceedings but the principles of the Code of Civil Procedure which advance the public policy, which are equitable and just, can be extended to the writ proceedings.

14. In Rita Mishra's, (MANU/BH/0005/1988 : AIR 1988 Pat 26 (FB)), the writ application filed by 15 petitioners was withdrawn on 27th of September, 1985 and soon thereafter i.e. on 30th of September, 1985, another writ application on the same averments was filed. In these circumstances, it was held that the second petition is not maintainable. We do not find that the said decision requires reconsideration.

15. The unconditional withdrawal of the earlier writ petition would bar the second petition on the same cause of action not in terms of Order XXIII, Rule 1 of the Code of Civil Procedure but in terms of public policy of not permitting the litigants to come to the Court time and again on the basis of same cause of action. In view of the opinion rendered on the question framed on the issues referred to the Full Bench, the matter be placed before the Bench as per roster for appropriate orders.

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