Order of the Court

(88) It is unanimously held that the first part of clause 4 of the Haryana Rice Bran (Distribution and Price) Control Order, 1981, which is in the following terms, be and is hereby struck down:—

> "The maximum sale price of the rice bran sold against permits as mentioned in clause 3 shall be as determined by the Director, from time to time."

(89) Held by majority that the remaining part of clause 4 as also the Control Order as a whole is valid and constitutional. The writ petition is dismissed without any order as to costs.

S. S. Sandhawalia, C.J.

M. R. Sharma, J.

Gokal Chand Mittal, J.

H.S.B.

FULL BENCH

Before P. C. Jain, D. S. Tewatia, K. S. Tiwana, Harbans Lal and G. C. Mital, JJ.

TEJA SINGH,—*Petitioner.*

versus

UNION TERRITORY OF CHANDIGARH and others,—*Respondents.*

Civil Writ Petition No. 1522 *of* 1973.

September 20, 1980.

Constitution of India 1950—*Article* 226—*Writ jurisdiction (Punjab and Haryana) Rules* 1976—*Rule* 32—*Code of Civil Procedure* (*V of* 1908)—*Section* 141, *Order* 22 *Rules* 3 & 4 *and Order* 23 *Rule* 1—*Limitation Act* (*XXXVI of* 1963)—*Provisions of the Code*

of Civil Procedure—Whether applicable to petitions under Article 226—Explanation to section 141—Whether has any effect on the operation of Rule 32 of the writ rules—Decision in a writ petition—When operates as res judicata—*Dismissal of a petition by one word 'Dismissed'—Such order of dismissal—Whether bars a subsequent writ petition on the same cause of action—Death of a party to a writ petition—Legal representatives of the deceased—Whether necessary to be impleaded—Order 22 Rules 3 & 4—Whether applicable—Provisions of Limitation Act—Whether apply—Writ petition withdrawn without permission to file a fresh one—Subsequent writ petition on the same cause of action—Whether barred—Provisions of Order 23 Rule 1—Whether applicable.*

Held, (1) that in the matters which have not been specifically dealt with by the writ Rules, the provisions of the Code of Civil Procedure, so far as they can be made applicable, would apply to the proceedings under Article 226 of the Constitution ;

(2) that the explanation added to section 141 of the Code of Civil Procedure, by the Amendment Act, does not in any way nullify the effect of rule 32 of the Writ Rules ;

(3) that when a writ petition is dismissed after contest by passing a speaking order, then such decision would operate as *res judicata* in any other proceeding such as suit, a petition under Article 32 etc. ;

(4) that if a petition is dismissed only on the ground of laches or the availability of an alternate remedy or on a ground analogous thereto, then any other remedy by way of suit or any other proceeding will not be barred on principle of *res judicata* :

(5) that even in cases where a petition is dismissed on the ground of laches or on the ground of alternate remedy or on a ground analogous thereto, a second petition on the same cause of action under Article 226 would be barred ;

(6) that there is an exception to proposition (5) that where the first petition is dismissed on the ground that alternate remedy under the Act has not been availed of, then after availing of the statutory remedy under the Act, a second petition may be maintainable on the principle that the same has been filed on a cause of action which has arisen after the decision of the appropriate authority under the Act ;

(7) that a second petition on similar facts and in respect of the same cause of action by the same party would not be maintainable even if his earlier petition has been disposed of by one word 'Dismissed' ;

(8) that the provisions of Order 22 Code of Civil Procedure would apply to the proceedings under Article 226 of the Constitution ;

(9) that provisions of Order 23, rule 1 of the Code of Civil Procedure would apply to the writ proceedings and that a petition which has simply been got dismissed as withdrawn would be a bar to the filing of a second petition on the same facts and in respect of the same cause of action ;

(10) that the provisions of the Limitation Act are not applicable to the writ proceedings or the miscellaneous applications filed in the writ proceedings. (Para 27).

Ram Kale vs. *The Assistant Director of Consolidation & others* 1977 P.L.R. 100 OVERRULED.

Case referred by the Division Bench consisting of the Hon'ble Mr. Justice Prem Chand Jain, and the Hon'ble Mr. Justice Kulwant Singh Tiwana, on 23rd November, 1978 *to a Full Bench for an important question of law involved in the case. The Full Bench consisting of The Hon'ble Mr. Justice Prem Chand Jain, The Hon'ble Mr. Justice D. S. Tewatia, The Hon'ble Mr. Justice Kulwant Singh Tiwana, the Hon'ble Mr. Justice Harbans Lal and the Hon'ble Mr. Justice G. C. Mital, dated 20th September,* 1980 *again referred the case to a Division Bench for final disposal of the case. The Division Bench consisting of the Hon'ble Mr. Justice Kulwant Singh Tiwana and Hon'ble Mr. Justice Surinder Singh has finally decided the case on 16th March,* 1981.

Anand Swaroop Senior Advocate with G. S. Chawla, and M. L. Bansal, Advocates, *for the Petitioner.*

Gurbachan Singh, Advocate, *for respondent Nos.* 1 *to* 3.

G. S. Grewal, Additional Advocate-General (P.), *for No.* 2.

R. S. Mongia, Advocate, *for No.* 5.

JUDGEMENT

Prem Chand Jain, J.

(1) Whether provisions of the Code of Civil Procedure would apply to the writ proceedings, is the prime and important question which falls for our determination in these cases.

(2) I do not propose to refer to the facts of the cases which have been set down for hearing before us as for answering the aforesaid question, it is not necessary to do so and that each case will have to be gone into on its own facts by the Bench before which the cases will go back, in the light of the answer returned by us to the aforesaid question. But the circumstances which necessitated the reference may be stated.

(3) C.W.P. No. 1522 of 1973 came up for hearing before a Division Bench on November 23, 1978, when an argument was advanced on behalf of the contesting respondents that the provisions of the Code of Civil Procedure applied to writ proceedings as has been provided under rule 32 of the Writ Jurisdiction (Punjab and Haryana) Rules, 1976 (hereinafter referred to as the Writ Rules) ; and that in view of the provisions of Order 23, rule 1, of the Code of Civil Procedure, C.W.P. No. 1522 of 1973 was not maintainable as in respect of the same cause of action the earlier petition, C.W. No. 1064 of 1973 was got dismissed as withdrawn without obtaining permission to file a fresh petition. In L.P.A. No. 269 of 1979, which came up for hearing before another Division Bench, the objection that was raised on behalf of the respondents was that the writ petition had abated as the sole petitioner had died and his legal representatives were not brought on the record within the prescribed period of limitation. In other words, the question agitated before the Bench was that provisions of Order 22 applied to Writ proceedings.

(4) On the other hand, the stand taken by the learned counsel for the petitioner/appellant was that provisions of the Code of Civil Procedure did not apply to writ proceedings. In support of this contention reliance was placed solely on an ealier Full Bench case decided by three learned Judges in *Ram Kala* v. *The Assistant Director, Consolidation of Holdings, Punjab, Rohtak and others,* (1). The question that arose in *Ram Kala's* case was whether article 137 of the Limitation Act does or does not apply to an application for adding or substituting parties to a petition under Article 226 of the Constitution. Before the Bench two arguments were raised. The first argument advanced was that in a petition under Article 226 of the Constitution of India, civil rights of the parties are involved and the procedure laid down in the Code of Civil Procedure, so far

(1) 1977 P.L.R. 100.

as it can be made applicable to proceedings which partake of the nature of civil proceedings and by virtue of section 141 of the Code and other provisions of the Code, including Order 22, does apply to such proceedings. While repelling the aforesaid argument, it was observed thus :—

> "The proceedings under Article 226 of the Constitution relating to civil matter are no doubt civil proceedings but on that ground alone it cannot be held that the Code of Civil Procedure governs such proceedings. This Court may while exercising jurisdiction under Article 226 of the Constitution draw upon the principles enunciated in the Code of Civil Procedure, for, the principle contained therein are by and large based on the principles of natural justice. Nevertheless, it can devise its own procedure for rendering speedy and efficacious justice in the circumstances of the case. Section 141 of the Code of Civil Procedure lays down that the procedure provided in that Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction but this provision cannot be pressed into service for putting procedural fetters in the way of this Court for exercising jurisdiction under Article 226 of the Constitution for, the adoption of that course would practically strangulate this jurisdiction."

Thereafter, reference was made to some judicial decisions and ultimately it was held as under :—

> "In view of the binding precedent of the Supreme Court and the preponderance of opinion in this Court, we hold that Order 22, Code of Civil Procedure, does not apply to the writ proceedings."

(5) The second contention raised before the Bench related to the applicability of the provisions of article 137 of the Limitation Act and on that aspect it was observed as follows :—

> "As already noticed, this Court while exercising jurisdiction under Article 226 of the Constitution does not try a suit as commonly understood. It is settled law that when a

Court is invested with a particular jurisdiction under an Act of the Parliament, it also gets invested with the authority to take all ancillary steps which are necessary to exercise that jurisdiction. A petition presented to this Court exercising jurisdiction under Article 226 of the Constitution cannot necessarily be regarded as an application, under the Code of Civil Procedure. It is an entirely different matter that while entertaining and deciding such an application, this Court may draw upon the principles of the Code of Civil Procedure which are based on equity, justice and good conscience but in doing so this Court seldom takes recourse to the penal provisions of the said Code. All that has to be seen is whether the grant of such an application would promote the ends of justice or not. We are, therefore, of the view that Article 137 of the Schedule to the Limitation Act cannot be held to govern an application filed in the High Court exercising jurisdiction under Article 226 of the Constitution of India."

(6) The correctness of the aforesaid view was challenged by the learned counsel for the respondents on the ground that rule 32 of the Writ Rules was not brought to the notice of the learned Judges and that in the wake of that rule, the view taken in *Ram Kala's* case deserved to be reconsidered. It is in this situation that a larger Bench has been constituted for deciding the question which has been formulated in the earlier part of the judgment.

(7) In exercise of the powers conferred under Article 225 of the Constitution, this Court has made rules regulating the form and other details of procedure of writ petitions filed under Article 226 of the Constitution. Rule 32 of the Writ Rules, with which we are concerned, reads as under :—

"32. In all matters for which no provision is made by these rules, the provisions of the Code of Civil Procedure, 1908 shall apply *mutatis mutandis* in so far as they are not inconsistent with these rules."

(8) The contention of Mr. Anand Swarup, Senior Advocate, which was also adopted by Mr. Sangha, learned counsel, was that

the right to file a petition under Article 226 is a constitutional right which could not be taken away by framing rules as such rules have been enacted for the purpose of laying down procedure as to how a petition under Article 226 is to be dealt with. In other words, what was sought to be argued by the learned counsel was that the rules which have been framed only provide the procedure for dealing with a petition under Article 226 of the Constitution and that these rules in no way affect the right of a litigant to approach this Court under Article 226 of the Constitution any number of times and at any time. It was also submitted by the learned counsel that under section 141 of the Code of Civil Procedure an explanation has been inserted by Code of Civil Procedure (Amendment) Act, 1976, which clearly goes to show that the expression "proceedings" does not include any proceedings under Article 226 of the Constitution. Section 141 of the Code of Civil Procedure reads as under :—

> "141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
>
> Explanation.—In this section, the expression 'proceedings' includes proceedings under Order IX, but does not (include any proceeding under Article 226 of the Constitution."

(9) So far as the explanation, which has been added to section 141 by the Amendment Act is concerned, it may be observed that it has only set at rest the controversy which had arisen earlier regarding the interpretation of the words "proceedings in any Court of civil jurisdiction" with regard to their applicability to a petition under Article 226 of the Constitution. Before the addition of the explanation, one view was that a writ proceeding is one of a "Court of civil jurisdiction" and this section applied to such proceedings. The other set of cases had taken the view that a writ proceeding is a proceeding of a special nature and not one in a "Court of civil jurisdiction" and therefore, this section did not apply. There was a third view also that a writ proceeding was not in the nature of a civil suit and that consequently the provisions of this section could not be invoked so as to apply the provisions of the Code to such proceeding. As earlier observed, by the addition of the explanation the question stands settled that the expression "proceedings" in the section does not include a proceeding under Article 226 of the Constitution.

(10) Mr. Anand Swarup, learned counsel, has tried to take advantage of the explanation, but to me, it is quite evident that the newly added explanation has no relevance at all to the decision of the point involved in these cases. The explanation only provides that the word "proceedings" would not include any proceeding under Article of the Constitution. There would have been some force in the contention of Mr. Anand Swarup if this Court in exercise of its power under Article 225 had not framed any rules. But in the presence of the Writ Rules which have been validly framed by this Court, the explanation loses its force. It was not contended by Mr. Anand Swarup, and rightly so, that in view of the provisions of the explanation, the Writ Rules would be deemed to be non-existent and would stand superseded. As has been earlier observed, the explanation had to be added by the Parliament in order to remove the controversy which had arisen with regard to the interpretation of the provision of section 141 as it stood before the Amendment Act, 1976. Thus, the provisions of the explanation to section 141 are of no help to the petitioner/appellant before us, nor does it advance their case, nor does it help us one way or the other in solving the problem with which we are faced in these cases.

(11) This brings me to the contention of Mr. Anand Swarup that a litigant is entitled to approach this Court at any time and for any number of times for the same relief as a constitutional right has been given to him under Article 226 of the Constitution. What was highlighted by the learned counsel was that the rules framed by this Court could not abridge or curtail this right in any manner. In other words, what was contended by Mr. Anand Swarup was that till the time a petition filed by a litigant was disposed of on merits by passing a speaking order, the right of the litigant was not taken away, nor could he be precluded from filing petitions under Article 226 if his earlier petitions were disposed of without dealing with the controversy on merits.

(12) Mr Anand Swarup, learned counsel, cited certain cases before us in support of his view-point, and the main case relied upon was in *Hoshnak Singh* v. *Union of India, etc.* (2). The facts of that case are that Hoshnak Singh, appellant was allotted on

(2) AIR 1979 SC 1328.

quasi-permanent basis land measuring 32½ standard acres in village Daulatpur. The Union of India acquired land measuring 1243 kanals 5 marlas which included 15 acres of land of the appellant for constructing a railway line. Thereafter, more acquisition was made by the Union of India in which the land of the appellant was also included. In the case of first two acquisitions, cash compensation was paid to the appellant. In the case of third acquisition which took place in July, 1953, cash compensation was not paid. The appellant approached the authorities for payment of compensation. In the meantime, after the introduction of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, allotment of land to the appellant which was till then on quasi-permanent basis was converted into permanent basis. As the appellant was clamouring for compensation for the land taken from him, the Chief Settlement Commissioner, Punjab made an order on 17th March, 1961, whereby a reference made from the Evacuee Property Department was accepted and the permanent settlement rights conferred on the appellant in respect of 1 standard acre and 15½ units of land were cancelled. The appellant questioned the correctness of that order by filing a petition under Article 226 of the Constitution which was dismissed *in limine* on 22nd March, 1961. After the dismissal of the petition, the appellant approached the Financial Commissioner requesting him to pay cash compensation for the land taken over by the Union of India. It appears that nothing tangible came out, with the result that the appellant preferred a petition under section 33 of the Act challenging the order dated 17th March, 1961 of the then Settlement Commissioner cancelling the permanent settlement rights conferred upon the appellant. That application was rejected by the Joint Secretary to the Government of India. Thereafter, the appellant filed a writ petition in which rule nisi was issued and return was filed by the Under Secretary to the Government of Punjab. At the time of hearing an objection was raised that in view of the dismissal of the earlier petition bearing on the same subject, the present petition was barred by the principles of *res judicata*. The learned Single Judge upheld the objection and the petition was dismissed. The appellant filed an appeal under Clause X of the Letters Patent, but did not succeed. Still dissatisfied, the appellant approached the Supreme Court by special leave against the order of the learned Single Judge and also of the letters patent bench dismissing the appeal in limine. At the

time of hearing of the appeal, a similar objection about the maintainability of the writ petition was raised before their Lordships of the Supreme Court on behalf of the respondents, but the same did not prevail and while repelling the objection it was observed thus :—

> "The earlier petition was dismissed by a non-speaking, one word, order 'dismissed'. The High Court may as well dismiss the petition *in limine* on the ground of delay or laches or on the ground of alternative remedy. The second petition after pursuing the alternative remedy would not be barred by the principles analogous to *res judicata*. More often a petition under Article 226 is dismissed on the ground that before invoking the extra-ordinary jurisdiction of the High Court, if the petitioner has an alternative remedy under a statute under which the right is claimed by the petitioner, the Court expects the petitioner to exhaust the remedy and in such a situation the petition is dismissed *in limine*.
>
> If after preferring an appeal or revision under the statute under which the right is claimed by the petitioner a petition under Article 226 is filed irrespective of the fact that the revision or appeal was dismissed and the original order which was challenged in the first petition had merged into the appellate or revisional order nonetheless the second petition in the circumstances would not be barred by the principles analogous to *res judicata* because the cause of action is entirely different and the merger of the order cannot, stand in the way of the petitioner invoking the jurisdiction of the High Court under Article 226.
>
> In the leading case of *Daryao and others* v. *State of U.P. and others* (3) this Court in terms said that if the petition filed in the High Court under Article 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

(3) 1962 (1) SCR 574.

the writ petition would not constitute a bar to the subsequent petition under Article 32 except in cases where the facts found by the High Court may themselves be relevant even under Article 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 says that the dismissal was for the reasons that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar except in cases indicated in the judgment. Then comes an observation which may better be quoted:—

'If the petition is dismissed *in limine* without passing a speaking order then such dismissal 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 Article 32.'

* * * * * *
* * * * *

It must follow as a necessary corollary that a subsequent petition under Article 226 would not be barred by the principles analogous to *res judicata*. Reaffirming the view taken on this point in *Daryao's case* in *R. D. Sharma* v. *State Bank of India* (1968) 3 SCR 31, the preliminary objection about the bar of *res judicata* was negatived. *It is, therefore incontrovertible that where a petition under Article* 226 *is dismissed* in limine *without a speaking order such a dismissal would not constitute a bar of* res judicata *to a subsequent petition on the same cause*

of action, more so, when on the facts in this case it appears that the petition was dismissed presumably because the petitioner had an alternative remedy by way of a revision petition under section 33 of the 1954 Act which remedy he availed of and after a failure to get the relief he moved the High Court again for the relief."

(13) Mr. Anand Swarup laid great emphasis on the observations of the learned Judge in the abovementioned judgment in paragraph 10, which have been underlined by me, for showing that dismissal of the first petition was not treated to be a bar to the filing of the second petition. What was intended to be shown from the aforementioned observations, by the learned counsel, was that if dismissal of an earlier petition could not operate as a bar to the filing of a second petition, then how could dismissal of a petition as withdrawn be a bar to the filing of a fresh petition.

(14) Though I have made reference in detail to the judgment in Hoshnak Singh's case, yet I may observe that the said decision is not at all helpful for deciding the point in issue nor is it an authority to determine whether provisions of the Code of Civil Procedure would apply or not to the writ proceedings when it has been so specifically provided under the rules validly framed by this Court under Article 225 of the Constitution. The reading of the judgment in *Hoshnak Singh's case* shows that the point that needed decision was whether the dismissal of earlier petition on same and similar facts would operate as a bar to the filing of a second petition on principles analogous to *res judicata.* On the facts of that case it was held that the dismissal of the earlier petition would not operate as *res judicata* because the dismissal of the earlier petition was treated not to be on merits, but was taken to be on the ground that an alternate remedy was available. It would be pertinent to observe that in *Hoshnak Singh's* case it was not held by their Lordships that principles analogous to their Lordships that principles analogous to *res judicata* could not be invoked in writ proceedings.

(15) Moreover, the contention of Mr Anand Swarup that a litigant can approach this Court under Article 226 any number of times in respect of the same cause of action if his earlier petition has been disposed of by one word 'dismissed' and that the dismissal of the petition would not operate as a bar to the filing of a second petition is again not legally sustainable. It is not necessary to deal

with the subject in detail as we have an authoritative pronouncement of the Supreme Court in *The Workman of Cochin Port Trust* v. *The Board of Trustees of the Cochin Port Trust and another* (4), whether it has been observed thus:—

> "It is well-known that the doctrine of *res judicata* is codified in Section 11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of *res judicata* or the principle of *res judicata* has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive *res judicata* is engrafted in explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also principles not only of direct *res judicata* but of constructive *res judicata* are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as *res judicata* and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of *res judicata* also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.
>
> In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this Court on almost all grounds which were in the High Court. There is no question, therefore, of applying the principles of constructive *res judicata* in this case. What is, however, to be seen is whether from the order dismissing the

(4) A.I.R. 1978 S.C. 1283.

special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relations to the merits of the award. A writ proceeding is a different proceeding. Whatever can be held to have been decided expressly, implicitly or even constructively while dismissing the special leave petition cannot be re-opened. But the technical rule of *res judicata* although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on an uncertain assumption that the issues must have been decided. It is not safe to extend the principle of *res judicata* to such an extent so as to found it on mere guess work. To illustrate our view point we may take an example. Suppore a writ petition is filed in a High Court for grant of a writ of certiorari to challenge some order or decision on several grounds. If the Writ Petition is dismissed after contest by a speaking order obviously it will operate as *res judicata* in any other proceeding, such as, of suit, Article 32 or Article 130 direct from the same order or decision. If the Writ Petition is dismissed by a speaking order either at the threshold or after contest, say, only on the ground of laches or the availability of an alternate remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of *res judicata*. Of course, a second writ petition on the same cause of action either filed in the same High Court or in anohter will not be maintainable because

the dismissal of one petition will operate as a bar in the entertainment of another writ petition. Similarly, even, if one writ petition is dismissed *in limine* by a non-speaking one word order,'dismissed', another writ petition would not be maintainable because even the one word order, as we have indicated above, must necessarily be taken to have decided impliedly that the case is not a fit one for exercise of the writ jurisdiction of the High Court. Another writ petition from the same order or decision will not lie. But the position is substantially different when a writ petition is dismissed either at the threshold or after contest without expressing any opinion on the merits of the matter, then no merit can be deemed to have been necessarily and impliedly decided and any other remedy of suit or other prooceeding will not be barred on the principle of *res judicata.*"

Reference may also be made to a Full Bench authority of this Court in *Bansi and another* v. *Additional Director, Consolidation of Holdings* (5), wherein it has been observed thus:—

"There are orders and orders. A question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the Article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either upholds it or does not. In either case, the controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correbate the decision in every case with the facts in controversy especially where the question is one of the jurisdiction of the Court or tribunal. The answer to the question whether the order is final or not will not depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable provided the other conditions are satisfied, otherwise not.

(5) A I.R. 1967 Pb. 28.

In the case before the Supreme Court *Ramesh's case* (6), the question raised was whether the Commissioner, Nagpur Division, had jurisdiction to set aside the discharge of the debt ordered by the Claims Officer. This decision was challenged by a proceeding under Article 226. The High Court summarily dismissed the petition, that is, it uphold the jurisdiction and the Supreme Court held that in the circumstances it makes no difference whether the High Court makes a speaking order or not, for by this order this High Court has finally decided the question of jurisdiction. Since the order which was passed was final for the purpose of appeal to the Supreme Court, it was decided that the High Court was in error in refusing the certificate under Article 133(1) (a) and (b) of the Constitution.

This judgment is very helpful for deciding the point under consideration before us. In the earlier writ petition (Civil writ No. 2946 of 1965) as well as the writ petition (Civil Writ No. 3005 of 1965) giving rise to this Letters Patent Appeal, what was challenged was the jurisdiction of respondents Nos. 1 and 2 to make the impugned orders. The previous writ petition was dismissed *in limine* on the 3rd December, 1965, and the dismissal *in limine* of the previous writ petition amounted to affirming the jurisdiction. That order, on the principle laid down in *Rameshes case* (supra) was final so far as this Court was concerned and it could be challenged either by way of a review petition or by taking steps to file an appeal to the Supreme Court apart, of course, from recourse to the petition to the Supreme Court under Article 32 of the Constitution. To entertain the second petition on the same grounds would amount to by passing these recognised legal procedures.

Such a course would also be wrong not only on principle but also on grounds of propriety and public policy, which subject to the well recognised exception, require finality of judicial proceedings so far as the same Court is concerned. These rules of practice and propriety were enunciated as far back as 1892 in *the Queen* v. *Mayor and*

(6) 1966 Cur. L.J. 152.

Justices of Bomin (7), and have been endorsed by the Bench of this Court in 1965 by Punjab LR 862 at p. 866.

The second case to which reference may be made is in *Union of India and others* v. *Diwan Chand and others* (8), wherein also the question of *res judicata* had been raised on the plea that the writ petitioner having challenged the legality of the order of cancellation of allotment and having failed in his attempt to have it set aside because of the order of dismissal of his earlier writ petition, cannot be allowed to reagitate the same matter over and again on principle analogous to those was passed *in limine*. The contention of the learned counsel in that petition was that the earlier dismissal was not *res judicata* as the previous order of dismissal was not shown to have been made on merit. The contention was repelled and the learned Judges observed thus:—

> "Learned counsel for both the parties are agreed that the order dismissing the previous writ petition consisted of a single word 'Dismissed'. According to Mr. Chawla, that order cannot be said to have been made on merits because it is not a speaking order. The argument is fallacious. Had the order been passed because of laches on the part of the writ petitioner or for the reasons that an alternative remedy was available to him or on a ground analogous thereto, the order would certainly have said so. Its silence on these points is conclusive to show that the dismissal was ordered on merits. In the absence of any specific reasons making out that the dismissal was ordered on account of a technical defect or some such reason such a defect or reason cannot be read into it."

(16) Mr Anad Swarup, learned counsel, drew our attention to the judgment of the Supreme Court in *Daryao and others* v. *State of U.P. and others* (9), which is the basic authority dealing with the question of *res judicata*. That decision is not at all helpful to the learned counsel. In *Daryao's* case, the question of bar of *res judicata* was being considered in respect of the petitions made to the

(7) (1892) 2 Q.B. 21.
(8) 1978 P.L.R. 494.
(9) A.I.R. 1961 S.C. 1457.

High Court under Article 226 of the Constitution vis-a-vis the petitions based on similar facts made to the Supreme Court under Article 32 of the Constitution and that the point which has been debated by Mr. Anand Swarup that if a petition under Article 226 of the Constitution is disposed of *in limine* by one word 'Dismissed', then the same would not be a bar to the filling of second petitioner in the High Court and based on similar facts, was never the question before their Lordships.

(17) Thus it is quite evident that the principles of *res judicata* are attracted only when a writ petition is dismissed after contest by passing a speaking order as in that event the decision would operate as *res judicata* in any other proceeding such as suit or a petition under Article 32 etc. But where a petition is dismissed only on the ground of laches or the availability of an alternate remedy or on a ground analogous thereto, then any other remedy by way of suit or any other proceeding will not be barred on principles of *res judicata.* Further where a petition is dismissed on the ground of laches or on the ground of alternate remedy or on a ground analogous thereto, a second petition *on the same cause of action* under Article 226 would be barred. But again, it may be observed that where a petition is dismissed on the ground that alternate remedy under the Act has not been availed of, then after availing of the statutory remedy, a second petition would be maintainable on the principle that the same has been filed on a cause of action which has arisen after the decision of the appropriate authority under the Act. Further, a second petition on similar facts and in respect of the same cause of action by the same party would not be maintainable even if his earlier petition has been disposed of by one word 'Dismissed'.

(18) Coming to the point in issue, I find that rule 32, which has been reproduced in the earlier part of the judgment, clearly specifies that the provisions of the Code of Civil Procedure would be applicable *mutatis mutandis* insofar as they are not inconsistent with the rules. In view of the specific rule there can be no gainsaying that the intention of this Court while framing rule 32 was clear to the effect that all the provisions of the Code of Civil Procedure would apply to the writ proceedings in so far as they could be made applicable and were not inconsistent with the writ rules. For regulating the form and other details of procedure, rules had to be framed. In exercise of the power vested in this Court under Article

225, writ rules have been framed. While framing the rules, this Court could have re-written certain provisions of the Code of Civil Procedure in the shape of rules which were necessary for regulating the form and other details of procedure of writ petitions. But instead of unnecessarily wasting time it was thought proper to apply all the relevant provisions of the Code of Civil Procedure by enacting a rule of the kind of rule 32. It would be pertinent to observe here that it was not contended by Mr. Anand Swarup that in case a rule in the same terms as Order 23, rule 1 or Order 22 of the Code had been incorporated in the Writ Rules, then such a rule could be ignored on the ground that it curtailed the constitutional right of a party to approach this Court under Article 226 of the Constitution. In other words, it was not controverted by the learned counsel that for the purpose of dealing with a petition under Article 226, rules could be framed which could have had the same effect as the provisions of the Code of Civil Procedure have. That being so, I fail to understand as to how the provision of rule 32 of the Writ Rules can be ignored on the ground that in case the provisions of Code of Civil Procedure are made applicable, then it would result in curtailment of the constitutional right of a person to approach this Court under Article 226 of the Constitution. Moreover, the argument of the learned counsel that by applying the provisions of the Code of Civil Procedure the constitutional right of a litigant to approach, this Court shall stand curtailed is wholly untenable. By framing rules no constitutional right has been taken away. The High Court is empowered to make rules. The Writ Rules regulate the form and prescribe procedure as to how a petition under Article 226 of the Constitution shall be dealt with. If by the applicability of the rules a petition is found to be not maintainable then it cannot justifiably be ugred that some constitutional right is being taken away. A distinction has to be drawn between the right available to a litigant to file a petition under Article 226 of the Constitution and the power of this Court to deal with such a petition. The rules which have been framed are only a guideline for the proper exercise of the power by this Court in writ proceedings and do not take away the right to file a petition.

(19) To me, it appears that the question, though simple but of some importance, has been unnecessarily complicated. The

Court has power to make rules and in exercise of that power rules have been framed. Rule 32 specifically says that the provisions of the Code of Civil Procedure, so far as they are not inconsistent, would regulate the form and other details of procedure for writ proceedings. In the wake of this specific rule, there cannot be any justification to hold that the provisions of the Code of Civil Procedure would not apply. If the contention of Mr. Anand Swarup is accepted, then rule 32 would be rendered nugatory. The view which I am taking finds full support from the solitary judgment of the Karnataka High Court in *M. R. Channarayapa* v. *The Tahsildar and Returning Officer, Malur and another* (10). In that High Court, writ rules have been framed and rule 39 of theirs is identical with rule 32 of this Court. One of the questions that arose in the aforesaid case before the learned Judge was whether the provisions of Order 27 of the Code of Civil Procedure would apply to writ proceedings or not and the learned Judge on that aspect of the matter observed thus:—

> "The Writ Proceedings Rules of 1977 made by this Court, regulating the form and other details of procedure of writ petition filed under Article 226 of the Constitution, do not regulate the service of notices on the parties. By Rule 39 of the Rules, the provisions of the Civil Procedure Code in matters not specifically dealt with by the Rules and to the extent they are necessary, are made applicable to proceedings under Article 226 of the Constitution. In matters of procedure, it is permissible to rely on the provisions made in the Code with such modification as are necessary in the context. I am, therefore, of the opinion that Order 27 of the Code of Civil Procedure is applicable to writ proceedings before this Court. In Order 27 of the Code of Civil Procedure, we have to read the words 'writ petition' wherever the word 'suit' occurs."

(20) As a result of the aforesaid discussion, I find no escape from the conclusion that in the matters which have not been specially dealt with by the Writ Rules, the provisions of the Code of Civil Procedure to the extent they are necessary would be applicable to proceedings under Article 226 of the Constitution.

(10) A.I.R. 1980 Karnataka 72.

(21) After having arrived at the aforesaid conclusion, it would not have been necessary for me to deal with some of the specific provisions of the Code, which would become applicable to the writ proceedings; but in view of the judgment of this Court in *Ram Kala's* case, which has to be specifically dealt with and also with a view to elucidate the point further I have decided to advert to certain provisions of the Code the applicability of which would be attracted to the Writ Proceedings.

(22) Order 1, rule 1 and Order 2, rule 3 talk of joinder of more than one plaintiff and causes of action. Cases have arisen in this Court where petitions have been filed jointly by more than one petitioner and joining several distinct causes of action. In such cases the non-maintainability of the petition on the ground of misjoinder of parties and causes of action, has to be decided keeping in view the aforesaid provisions. In cases where there are numerous petitioners or respondents having the same interest, resort can be made to the provisions of Order 1, rule 8.

(23) Reference may now be made to Order 22. Our attention was drawn, besides *Ram Kala's* case, to some other judicial decisions for the proposition that Order 22, rules and 4, would not apply to writ proceedings. But all those decisions have not taken into consideration the provisions of rule 32 and have been rendered on the interpretation of un-amended section 141 of the Code of Civil Procedure. When a party dies, then a writ petition cannot be heard and the legal representatives of the deceased have to be brought on there cord so as to enable the Court to hear the petition on merits as in the absence of the legal representatives of a party to the petition, it would not be permissible to hear the petition, on merits. In case a party dies and the legal representatives are not brought on the record, then the Court is bound to dismiss that petition for want of necessary parties. The question that now arises for consideration is as what should be the period of limitation for bringing on record the legal representatives of the deceased because the question of abatement would arise only when the legal representatives of the deceased are not brought on the

record within the period of limitation. In other words, what has to be seen is whether the provision of the Limitation Act would also be attracted while dealing with the applications filed under Order 22 for bringing on record the legal representatives of the deceased? In my view, the answer has to be in the negative. Rule 32 only make applicable the provisions of the Code of Civil Procedure. There is no rule which may provide for the applicability of the provision of the Limitation Act. So far as writ proceedings are concerned, there can be no gainsaying that the provisions of the Limitation Act do not apply nor have they been made applicable. A petition under Article 226 of the Constitution is not a suit and it is also not a petition or an application to which the Limitation Act applies. If such is the position of law with regard to the applicability of the provisions of the Limitation Act to writ petitions, then *a fortiori* the same principle would apply to miscellaneous applications filed in the writ petitions, It, therefore, follows that the provision of the Limitation Act would not apply to an application filed under Order 22 for bringing on record the legal representatives of the deceased.

(24) The question that would now arise is as to what considerations or factors have to be kept in mind while dealing with an application filed under Order 22. The answer to this question is very simple, i.e., that whatever considerations are taken note of while dealing with a petition under Article 226, would be adverted to for deciding an application under Order 22. For filling writ petitions no period has been indicated which may be regarded as an ultimate limit of action. There is no lower limit nor is there any upper limit and generally each case is judged on its own facts and in case it is found that a party has been guilty of avoidable delay, then on that ground the Court refuses to exercise its extraordinary jurisdiction. The same factors would be taken into consideration while dealing with an application under Order 22. Whenever a petitioner/applicant is able to satisfy that an application has been filed within a resonable time and any unnecessary delay has been avoided, then he would be entitled to a favourable order. In case it is found that the petitioner/applicant is guilty of laches, then the application would deserve to be rejected. As earlier observed, each case will have to be seen and judged on its own facts. In this view of the matter, I am constrained to hold

that the view taken in *Ram Kala's case* that Order 22 of the Code of Civil Procedure does not apply to the writ proceedings is not correct.

(25) This brings me to the provisions of Order 23 rule 1 of the Code. As has come in the contention of Shri Anand Swarup, the applicability of this provision was sought to be avoided solely on the plea that a petition which has been dismissed as withdrawn could not be a bar to the filing of the second petition as in a petition which is got dismissed as withdrawn, the merits of the controversy are not gone into; but this approach of the learned counsel is without any merit. It is correct that in the petition which is dismissed as withdrawn, the merits of the controversy are not gone into but that fact by itself would not entitle a litigant to claim entertainment of his second petition in the wake of the provisions of Order 23 rule 1 which become applicable to writ proceedings by virtue of rule 32. It may be noticed that the applicability of the provisions of Order 23 rule 1 shall have a very salutory effect as it would minimise to a great extent the chances of the abuse of the process of this Court. To elucidate the point further, I take an example. A litigant files a petition in this Court which comes up for motion hearing. During the arguments an impression is gathered that the Bench is not agreeing and the petition is likely to be dismissed and on the basis of that impression the petition is got dismissed as withdrawn. Thereafter, on same facts and in respect of the same cause of action a second writ petition is filed. Now in such case, if the contention, of Mr Anand Swarup is accepted, then the second writ petition must be entertained and disposed of on merits one way or the other by passing a speaking order. Such a course, if adopted, would, in my opinion, not only result in the abuse of the process of the Court, but would also give handle to a dishonest and unscrupulous litigant to harass his opponent.

(26) By the applicability of the provisions of Order 23 rule 1, no constitutional right of a litigant is being taken away. A litigant has a right to withdraw his petition; but in case he wishes to file a fresh petition on the same cause of action, then permission of the Court has to be taken, and for that purpose, proper legal foundation has to be laid.

(27) As a result of my aforesaid discussion, I come to the following conclusion:—

(1) That in the matters which have not been specifically dealt with by the writ Rules, the provisions of the Code of Civil Procedure, so far as they can be made applicable, would apply to the proceedings under Article 226 of the Constitution.

(2) That the explanation added to section 141 of the Code of Civil Procedure, by the Amendment Act, does not in any way nullify the effect of rule 32 of the Writ Rules.

(3) That when a writ petition is dismissed after contest by passing a speaking order, then such decision would operate as **res judicata** in any other proceeding such as suit, a petition under Article 32 etc.

(4) That if a petition is disimssed only on the ground of laches or the availability of an alternate remedy or on a ground analogous thereto, then any other remedy by way of suit or any other proceeding will not be barred on principle of **res judicata.**

(5) That even in cases where a petition is dismissed on the ground of laches or on the ground of alternate remedy or on a ground analogous thereto, a second petition on the same cause of action under Article 226 would be barred.

(6) That there is an exception to proposition (5) that where the first petition is dismissed on the ground that alternate remedy under the Act has not been availed of, then after availing of the statutory remedy under the Act, a second petition may be maintainable on the principle that the same has been filed on a cause of action which has arisen after the decision of the appropriate authority under the Act.

(7) That a second petition on similar facts and in respect of the same cause of action by the same party would not be maintainable even if his earlier petition has been disposed of by one word 'Dismissed'.

(8) That the provisions of Order 22 Code of Civil Procedure would apply to the proceedings under Article 226 of the Constitution.

(9) That provisions of Order 23, rule 1 of the Code of Civil Procedure would apply to the writ proceedings and that a petition which has simply been got dismissed as withdrawn would be a bar to the filing of a second petition on the same facts and in respect of the same cause of action.

(10) That the provisions of the Limitation Act are not applicable to the writ proceedings or the miscellaneous applications filed in the writ proceedings.

(28) The case would now be placed for final disposal before the Bench.

D. S. Tewatia, J.—I agree.

N.K.S.

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