

Before S.S. Saron & Sneh Prashar JJ.

SUNIL SINGH—Petitioner

versus

**MINISTRY OF ENVIRONMENT AND FORESTS AND
OTHERS—Respondents**

CM No.5110 of 2016 in

CWP No.20032 of 2008

February 22, 2017

Constitution of India, 1950—Arts. 32 and 226—Code of Civil Procedure, 1908—O.II RL.2—Ss. 11 (Res judicata) and 141—Application for transfer of petition to Green Tribunal—Once the application for transfer of writ petition to the Tribunal was dismissed by the High Court or was withdrawn and a writ petition filed before the Supreme Court u/a 32 was dismissed as withdrawn with liberty to agitate the same before the High Court and the petition before the Tribunal was also dismissed—Principal of res judicate, S.141 and Order II Rule 2 of CPC would apply to any subsequent application for transfer on the same ground or on any other ground—Contention that the technicalities of these provisions are not applicable to PILs cannot be accepted when applicant suffered earlier orders in that very PIL—Rules based on Public policy—Only course is to get the earlier orders recalled or modified or challenge in accordance with law.

Held that, the present proceedings are under Article 226 of the Constitution. Therefore, the question whether Order II Rule 2 read with Section 141 CPC would apply to a proceeding under Article 226 of the Constitution is to be considered. In this regard Rule 32 of the Writ Jurisdiction Rules may be adverted to, which 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.”

(Para 32)

Further held that, in terms of above Rule 32, in all matters for which no provision is made by the Writ Jurisdiction Rules, the provision of the CPC are to apply *mutatis mutandis* insofar as they are not inconsistent to the said Rules. With regard to withdrawal of suits

and applications, there is no such specific provision in the Writ Jurisdiction Rules.

(Para 33)

Further held that, a perusal of the above shows that by virtue of Explanation to Section 141 of the CPC since proceedings under Article 226 of the Constitution are excluded from the expression “proceedings”, therefore, CPC is not required to be followed in the proceedings under Article 226 unless the High Court had itself made a provision of the CPC applicable under Article 226. In the present case, this Court has made the proceedings of the CPC applicable in terms of Rule 32 of the Writ Jurisdiction Rules. Therefore, in case the applicants/ petitioners had earlier relinquished their claim for transfer of the cases to the learned Tribunal by withdrawing their applications, then they are not liable to reiterate the same after a co-ordinate Bench had accepted their prayer for withdrawing the applications. The matter in issue is being considered and is to be considered in Public Interest Litigation (PIL) which is pending. The fact that the principle of relinquishing the claim earlier is inapplicable in respect of a public interest litigation or a petition filed for public interest, which is not an adversarial system of adjudication, is inconsequential as the earlier application had been declined by a co-ordinate Bench in a public interest petition only.

(Para 35)

Further held that, in the circumstances, we hold that the applications for transfer of cases to the learned Tribunal having been earlier dismissed as withdrawn by a co-ordinate Bench, the same cannot be re-agitated, especially when the respondents have seriously objected to the same and have pleaded that there is a bar to the maintainability of a second application after the first one had been dismissed. Therefore, we find no merit in the applications and the same are accordingly dismissed.

(Para 41)

Nivedita Sharma, Advocate,
for the applicants/petitioners.

Arun Gosain, Central Government Counsel
for respondents No.1 and 7 in CWP No. 20032 of 2008 and
for respondents No. 2 and 4 in CWP No. 13594 of 2009.

Lokesh Sinhal, A.A.G, Haryana
for respondent No.4 in CWP No. 20032 of 2008 and

for respondent No. 1 in CWP No. 13594 of 2009.

R.S. Rai, Senior Advocate, with
Rajeev Anand, Advocate,
for respondent No.3 in CWP No. 20032 of 2008.

M.S. Sidhu, Advocate,
for respondent No. 5 in CWP No. 20032 of 2008.

S.S. SARON, J.

(1) The present civil miscellaneous applications have been filed by the petitioners of the respective petitions i.e. Sunil Singh v. Ministry of Environment and Forest (CWP No.20032 of 2008) and Qutab Enclave Residents Welfare Association v. The State of Haryana and others (CWP No.13594 of 2009). In both the said civil miscellaneous applications a prayer has been made for transferring both the cases i.e. the writ petitions pending in this Court to the learned National Green Tribunal at New Delhi ('Tribunal' - for short) or whatever order deemed fit in the facts and circumstances of the case may be passed.

(2) It is submitted on behalf of the applicants/petitioners that during pendency of the case, the Parliament enacted the National Green Tribunal Act, 2010 ('Act' - for short) and the learned Tribunal has been established under the Act, which is headed by a retired Hon'ble Judge of the Supreme Court. The matters like the present case are the domain of and would more appropriately be dealt with by the learned Tribunal. In fact, the learned Tribunal is already seized of several matters pertaining to degradation of ground water, river water and other such matters pertaining to the environment.

(3) Ms. Nivedita Sharma, Advocate for the applicants/petitioners submits that in a recent decision in the case of **S.P. Muthuraman** versus **Union of India**, O.A. No.37 of 2015 (M.A. 219, 293 and 294 of 2015) and **Manoj Mishra** versus **Union of India**, O.A. No.213 of 2014 (M.A. 755 of 2014 and M.A. 177 of 2015), the learned Tribunal, in a case transferred to it, in terms of order dated 07.07.2015 considered the effect of notification dated 14.09.2006 in pursuance of which the 'Environment Clearance Regulations, 2006' were framed which require 'Environment Clearance' being obtained prior to commencement of any activity or project. In the said judgment, a reference was made to an earlier decision of the learned Tribunal in **Forward Foundation** versus **State of Karnataka and others**, O.A. No.222 of 2014, decided on 07.05.2015 where the Project Proponents

had raised the construction on the wet lands and the Rajakaluves (storm water drains), affecting the same, without obtaining prior Environmental Clearance. The learned Tribunal while appointing a special Committee referred to various questions relating to environment and ecology and prohibited the Project Proponents from creating any third-party interests. The learned Tribunal further imposed 5 per cent of the project cost as environmental compensation on the Project Proponent for degrading and damaging the environment and ecology of the area in question and it required the Committee to submit a report to it.

(4) Therefore, it is submitted that the present is an appropriate case where this Hon'ble Court may transfer the matters to the learned Tribunal in the interest of justice.

(5) Reply has been filed by DLF Universal Limited (respondent No.3 in Sunil Singh's case) (supra), which has been taken on record by a separate order passed today.

(6) In terms of the reply, it is submitted that the application for transfer of the case is not maintainable in the present form. The Act, it is submitted, was notified on 02.06.2010 and the present case is pending in this Court since the year 2008 and various interim directions have been passed from time to time before and after the notification to enforce the Act. The petitioner, it is stated, kept taking advantage of the various interim orders towards its prayer knowing well about the enforcement of the Act. He never moved any such application. The petition was admitted on 20.05.2014 after various status reports were filed by the respondents authorities from time to time towards the compliance of the interim orders. It was only at the present stage in order to forum hunt and to seek a re-look of the matter that the application for transfer of the cases to the learned Tribunal has been filed. Therefore, it is submitted that the application is liable to be dismissed on this ground alone.

(7) It is also submitted that the petitioner had intentionally and deliberately not disclosed the filing of earlier civil miscellaneous application, i.e. C.M. No.12053 of 2015, with the same and similar prayer for transfer of the writ petition to the learned Tribunal. The aforesaid civil miscellaneous application, (i.e. C.M. No.12053 of 2015), was dismissed as withdrawn after hearing by this Court. It was only on the objection taken by the respondents regarding the concealment of the earlier civil miscellaneous application, i.e. C.M.

No.12053 of 2015, which was dismissed as withdrawn that the applicant disclosed the said application as a matter of record. A similar civil miscellaneous application, i.e. C.M. No.11203 of 2015, was filed in 'Qutab Enclave Residents Welfare Association's case (CWP No.13594 of 2009) (supra) in which DLF Universal Ltd. (respondent No.3 in Sunil Singh's case) is not a party, but both the cases were heard together. However, the transfer petition that was filed before the Hon'ble Supreme Court was only in the present case, i.e. in Sunil Singh's case, and no such transfer application was filed in the other case, i.e. Qutab Enclave Residents Welfare Association's case (supra), in which the application for transfer had been withdrawn unconditionally. From this, it is stated that it was very clear that the withdrawal of the application in the other case was a clear *res judicata* because no such transfer application had been filed in the other case, i.e. Qutab Enclave Residents Welfare Association's case (supra), nor the order had been recalled. Hon'ble the Supreme Court, it is submitted, did not set aside the order of withdrawal and only granted liberty to approach the High Court for appropriate redress. It is stated that the said order does not give any right to the petitioner to file a fresh application which is barred by the principle of *res judicata*. Besides, when the said transfer petition was dismissed, the only liberty which the Court had granted was "to approach the High Court for appropriate redress" and the petition had been withdrawn with liberty as prayed for. It is stated that the petitioner - Sunil Singh has not annexed the said transfer petition; however, a perusal of the order passed by Hon'ble the Supreme Court did not allow the petitioner to move a fresh petition for transfer of the petition as had been prayed in the present application and, therefore, the present application is not maintainable. It is stated that there is no bar to hearing of the matter in issue in the main civil writ petition by this Court in exercise of powers under Articles 226/227 of the Constitution. The only bar of jurisdiction which is provided under the Act is in terms of Section 29 of the Act. Therefore, the transfer of a writ petition as being prayed for by the petitioner, it is submitted, is not sustainable.

(8) It is also stated that the present case is restricted to the regulation of sub soil/ground water in DLF Cyber City of Gurgaon and the said scope was specifically recorded in the order dated 17.12.2008 and in pursuance of that, various orders have been passed by this Court including directions from time to time. Some of the directions which were passed from time to time were duly complied with by the respondent through various status reports and many illegal bore-wells

which were being used for extracting water for construction activities were sealed and finally the respondents were asked to file a consolidated affidavit to show how the requirement of drinking water and the water needed for construction activities would be met in future which was evident from the order dated 21.08.2012. Thereafter, it is stated, various affidavits in the form of status reports were filed and this Court had passed various directions thereafter as well in particular to strictly comply with the time schedule given for the completion of the work as had been recorded in the affidavit so that the problem of underground water could be resolved. It is also stated as relevant to mention that a similar matter, i.e. Mukesh Sharma v. State of Haryana and others in CWP No.23839 of 2014, had come up for hearing before this Court wherein a similar issue was raised. The said petition, it is stated by the learned counsel for respondent No. 3, is still pending and it relates to seeking permission to dig bore-wells as there was no other source of water supply.

(9) Mr. Lokesh Sinhal, Additional Advocate General, Haryana for respondent No.4 in Sunil Singh's case (supra) and respondent No. 1 in Qutab Enclave Residents Welfare Association's case (supra) submits that the petitions were admitted on 20.05.2014 and at that time the Act had been notified, which was notified on 02.06.2010. At that stage, nothing was urged for transferring the case to the learned Tribunal. Besides, it is submitted that several interim orders have been passed in the case and directions issued by the Court have been complied with.

(10) Mr. Arun Gosain, Advocate appearing for respondents No. 1 and 7 in Sunil Singh's case (supra) and for respondents No. 2 and 4 in Qutab Enclave Residents Welfare Association's case (supra) submits that the substantive directions issued by this Court have been complied with by respondents for whom he is appearing and facts and circumstances of the case do no warrant the transfer of the cases to the learned Tribunal.

(11) We have given our thoughtful consideration to the matter and the contentions raised by learned counsel for the parties.

(12) It is to be noticed that the petitioner - Sunil Singh (in CWP No. 20032 of 2008), had earlier filed C.M. No.12053 of 2015 seeking transfer of the present case from this Court to the learned Tribunal. Similar C.M. No.11203 of 2015 was filed by petitioner - Qutab Enclave Residents Welfare Association (in CWP No. 13594 of 2009) for transfer of the said case to the learned Tribunal.

(13) Both the civil miscellaneous applications were dismissed as withdrawn on 04.11.2015 by passing an identical order, which reads as under:-

“Present: Ms. Nivedita Sharma, Advocate,
for the applicant-petitioner.

Learned counsel prays that the applicant-petitioner may be permitted to withdraw the application.

Application is, accordingly, dismissed as withdrawn.”

(14) The petitioner - Sunil Singh filed Transfer Petition (Civil) No.428 of 2016 before the Hon'ble Supreme Court titled 'Sunil Singh v. Ministry of Environment and Forest and others', with a prayer to transfer the present case to the Tribunal. The Supreme Court on 06.04.2016 passed the following order:

“Learned counsel for the petitioner seeks leave to withdraw this petition reserving liberty for the petitioner to approach the High Court for appropriate redress.

The transfer petition is dismissed as withdrawn with liberty prayed for.”

(15) The learned counsel appearing for the petitioners in both the cases accepts the position that no such transfer petition was filed before the Supreme Court in Qutab Enclave Residents Welfare Association's case (supra). However, it is submitted by the learned counsel for the applicants/petitioners that Hon'ble the Supreme Court had given liberty in Sunil Singh's case (supra) to approach this Court again for appropriate redress and the same can also be urged in Qutab Enclave Residents Welfare Association's case (supra). It is submitted that in the circumstances and in accordance with the observations made by Hon'ble the Supreme Court, the applicants/petitioners are once again approaching this Court for necessary orders transferring the matters to the learned Tribunal.

(16) It is submitted that the learned Tribunal is a specialized body duly equipped to deal with all the issues raised in the instant writ petitions. Therefore, it would be in the fitness of things that the present cases are transferred and sent to the learned Tribunal for adjudication.

(17) The issue that is primarily to be considered in the civil miscellaneous applications is whether the cases are liable to be transferred to the learned Tribunal.

(18) It is not in dispute that earlier similar civil miscellaneous applications were filed in this Court which were dismissed as withdrawn on 04.11.2015. Thereafter, Transfer Petition (Civil) No. 428 of 2016 was filed in the Supreme Court which was dismissed as withdrawn with liberty prayed for i.e. reserving liberty for the petitioner to approach the High Court for appropriate redress.

(19) According to learned counsel for the petitioners, Hon'ble the Supreme Court gave liberty to the petitioner in Sunil Singh's case (supra) to approach this Court again and, therefore, the order dated 04.11.2015 permitting the petitioner to withdraw the earlier petition would not be barred by the principles of *res judicata*. However, according to learned Senior Counsel for respondent No.3 in Sunil Singh's case (supra), the only liberty which Hon'ble the Supreme Court had granted was to approach this Court for appropriate redress and the petition was withdrawn with liberty as prayed for. Learned Senior Counsel for respondent No.3 in Sunil Singh's case (supra) has submitted a copy of Transfer Petition (Civil) No. 428 of 2016 and has referred to the averments made in the 'List of Dates and Events' therein, in which it is *inter alia* averred that the petitioner moved an application before this Court for transfer of the petition to the learned Tribunal but the Court was not inclined and did not agree to the transfer of the petition and the petitioner was constrained to withdraw its application of transfer. It is further stated that while deciding the application for transfer, the High Court constrained the petitioner to withdraw the application of transfer by order dated 04.11.2015. It is submitted by learned Senior Counsel for respondent No. 3 in Sunil Singh's case (supra) that instead of placing on record the order dated 04.11.2015 passed by this Court in Sunil Singh's case (supra), the petitioner in the transfer petition before Hon'ble the Supreme Court placed on record the order dated 04.11.2015 passed in Qutab Enclave Residents Welfare Association's case (supra) as Annexure P8. Therefore, had the petitioner placed on record the order dated 04.11.2015 passed in Sunil Singh's case (supra), it would be evident that Hon'ble the Supreme Court would have noticed that in Sunil Singh's case (supra), an application for transfer of the case to the learned Tribunal had been dismissed as withdrawn simpliciter. Even otherwise, it is submitted that by not placing on record of Supreme Court the order dated 04.11.2015 passed by this Court in Sunil Singh's case (supra), it is to be taken that the said order had never been assailed and the transfer petition filed in Hon'ble the Supreme Court was independent of the transfer application filed in this Court. Besides, had the order dated 04.11.2015 passed by

this Court in Sunil Singh's case (supra) been placed on record before the Supreme Court, it would have been clearly borne out that there was no constraint as had been mentioned in the transfer petition filed by Sunil Singh before Hon'ble the Supreme Court and the petitioner misled Hon'ble the Supreme Court by placing on record the order passed by this Court in Qutab Enclave Residents Welfare Association's case (supra) and then wrongly stating that the petitioner was constrained to withdraw the application for transfer before this Court vide order dated 04.11.2015.

(20) Learned counsel for the applicants/petitioners, however, submits that both the orders withdrawing the application for transfer of the cases were identical. The Registry of the Supreme Court had raised an objection in this regard. It was informed that both the matters were identical and connected and that same orders were passed.

(21) According to learned Senior Counsel for respondent No. 3 in Sunil Singh's case (supra), this is nowhere borne out from any of the records that have been submitted by the petitioner - Sunil Singh. Therefore, the earlier applications having been dismissed, according to learned Senior Counsel for respondent No. 3 in Sunil Singh's case (supra), the petitioners in both the cases are barred from re-agitating the matter, especially when the order passed in Sunil Singh's case (supra) was suppressed from the Supreme Court. As such, the second application for transfer of the case is legally not maintainable and is barred by the principles of constructive *res judicata* and amounts to relinquishment and abandonment of the claim for transfer of the case to the learned Tribunal and is, thus, barred by the provisions of Order II Rule 2 read with Section 141 of the Code of Civil Procedure ('CPC' - for short) and Rule 32 of the Writ Jurisdiction (Punjab and Haryana) Rules, 1976 ('Writ Jurisdiction Rules' - for short) which provides that in all matters for which no provision is made by the Rules, the provisions of the CPC shall apply *mutatis mutandis*, insofar as they are not inconsistent with the Rules.

(22) It is evident and in fact it cannot be disputed that there was no such constraint to withdraw the applications for transfer that has been mentioned in the order dated 04.11.2015. However, in the 'List of Dates and Events' in the transfer petition filed by Sunil Singh - petitioner in Hon'ble the Supreme Court, it is stated as follows:-

August, 2015	The petitioner moved an application before the Hon'ble High Court for transfer of the instant
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	petition to the NGT but the Court was not inclined and did not agree to the transfer of the petition and the petitioner was constrained to withdraw its application of transfer.
04/11/15	While deciding the above application for transfer the High Court constrained the petitioner to withdraw the application of transfer by its order dated 04.11.2015.

(23) As already noticed, the order dated 04.11.2015 passed in Sunil Singh's case (supra) was not placed on record in the transfer petition filed in the Supreme Court although a similar order passed in the case of Qutab Enclave Residents Association's case (supra) was placed on record as Annexure P8. The explanation stated to have been given by learned counsel for the petitioner that this was clarified before the Registry of the Hon'ble Supreme Court is not before us. In fact, we are bound by the statement of facts as recorded by the Judges of the co-ordinate Bench of this Court, which is to the effect that the petition was dismissed as withdrawn. The order dismissing the applications for transfer of the cases to the learned Tribunal was passed by a co-ordinate Bench of this Court (S.K. Mittal J. and Mahavir S. Chauhan J.). Both of them are no longer Judges in this Court.

(24) Hon'ble the Supreme Court in *State of Maharashtra versus Ramdas Shrinivas Nayak*¹, held that the Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in Court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who had made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must

¹ AIR 1982 SC 1249

necessarily end there. It was further said that a party of course may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

(25) Hon'ble the Supreme Court in *Commissioner of Endowments and others* versus *Vittal Rao and others*², reiterated that the statement of fact recorded in the judgment is conclusive of the facts so stated and cannot be contradicted by affidavit or other evidence. The party which feels that a fact had been wrongly recorded in the judgment must invite the attention of the Judge recording the statement immediately to the said fact, while the matter was still fresh in his mind and seek rectification. It was further held that sometimes in rare and appropriate case a party may be allowed to resile from a concession on the ground that the concession was made on a wrong appreciation of law and had led to gross injustice but he cannot call in question the very fact of making the concession as recorded in the judgment.

(26) Therefore, we are bound to accept the fact as recorded by the co-ordinate Bench of this Court on 04.11.2015 that is the petitioner had withdrawn the applications for transfer of both the cases and this was without any constraint. The fact even if it is to be taken that the Bench was not inclined to accept the prayer for transfer of the cases to the learned Tribunal and, therefore, the petitioner was constrained to withdraw the application of transfer by its order dated 04.11.2015, it would have been just and proper that the order dated 04.11.2015 passed by this Court in Sunil Singh's case (supra) should have been placed on record in the transfer petition filed before Hon'ble the Supreme Court rather than a similar or identical order passed in the connected case of Qutab Enclave Residents Welfare Association's case (supra). Besides, the Supreme Court in its order dated 06.04.2016 had acceded to the prayer of the petitioner - Sunil Singh to withdraw the petition reserving liberty to the petitioner to approach the High Court for appropriate redress. The transfer petition was dismissed as withdrawn with liberty as prayed for. This did not in any manner mean that the order dated 04.11.2015 passed by this Court had in any manner become inoperative. Even otherwise, in case the petitioner was to seek the transfer of the cases pending in this Court to the learned Tribunal

² (2005) 4 SCC 120

despite the earlier applications having been dismissed as withdrawn on 04.11.2015, it would have been appropriate if a review application had been filed rather than again file civil miscellaneous applications for transfer of the cases on an issue which had already been withdrawn and, therefore, is to be taken as abandoned.

(27) The other plea that a specialized Tribunal has been constituted to look into aspects that are involved in the present cases and it provides remedies, therefore, the cases are liable to be transferred to the learned Tribunal and the bar to the entertainment of the second applications for transfer of the cases to the learned Tribunal may be considered.

(28) The doctrine of *res judicata*, it is submitted by learned counsel for the applicants/petitioners, is codified in Section 11 of the CPC and the rule of constructive *res judicata* is in Explanation IV of Section 11 of CPC. It is provided therein that when any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

(29) Reliance in this regard has been placed on the judgment in *The Workmen of Cochin Port Trust* versus *The Board of the Trustees of the Cochin Port Trust and another*³. Besides, it is submitted that for application of principle of constructive *res judicata* or *res judicata* there has to be a decision on merits of the case so as to determine the rights of the parties and a withdrawal of an application would not operate as *res judicata* or constructive *res judicata*. Reliance is also placed on *Daryao* versus *State of U.P.*⁴. It is submitted that the present petition raises very serious concerns regarding complex issues pertaining to continued environmental degradation in and around Gurgaon and the manner in which the ECC was granted on an application filed by respondent No.3, in nine out of ten buildings that had already been built and the applicant did not disclose this fact. Besides, grant of ECC raises several other concerns with regard to management and functioning of the authorities vested with responsibility to manage and protect the environment such as Central Ground Water Authority (CGWA) and the state government etc. which are acting in a manifestly illegal manner and are at the cross purpose with their mandate, causing irreversible damage to the environment.

³ AIR 1978 SC 1283

⁴ AIR 1961 SC 1957

Reliance is placed on *V. Purshottam Rao versus Union of India*⁵ therefore, it is prayed that the cases may be transferred to the learned Tribunal.

(30) It is not in dispute that earlier civil miscellaneous application, i.e. C.M. No.12053 of 2015, filed by Sunil Singh-petitioner for transfer of the case from this Court to the learned Tribunal was dismissed as withdrawn on 04.11.2015.

(31) The provisions of Order II Rule 2 CPC, it is to be noticed, relate to relinquishment of part of claim. It is provided that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any part of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Section 141 CPC relates to 'miscellaneous proceedings'. It is provided that the procedure provided in this Code (CPC) in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. In terms of the Explanation, it is provided that in this Section (i.e. Section 141), the expression "proceedings" includes proceedings under Order IX, but does not include any proceedings under Article 226 of the Constitution.

(32) The present proceedings are under Article 226 of the Constitution. Therefore, the question whether Order II Rule 2 read with Section 141 CPC would apply to a proceeding under Article 226 of the Constitution is to be considered. In this regard Rule 32 of the Writ Jurisdiction Rules may be adverted to, which 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.”

(33) In terms of above Rule 32, in all matters for which no provision is made by the Writ Jurisdiction Rules, the provision of the CPC are to apply *mutatis mutandis* insofar as they are not inconsistent to the said Rules. With regard to withdrawal of suits and applications, there is no such specific provision in the Writ Jurisdiction Rules.

(34) In *V. Purshottam Rao v. Union of India* (supra), referred to by the learned counsel for the applicants/petitioners, in para 19 of the report, Hon'ble the Supreme Court stated as under:

⁵ (2001) 10 SCC 305

“19. Coming to the second question, Explanation IV to Section 11 of the Civil Procedure Code postulates that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Order 2 Rule 2 of the Code of Civil Procedure provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and if he omits to sue in respect of, or intentionally relinquishes, any portion of his claim, then he shall not be afterwards sue in respect of the portion, so omitted or relinquished. By virtue of Explanation to Section 141 of the Code of Civil Procedure, sine proceedings under Article 226 of the Constitution are excluded from the expression “proceedings”, therefore, the Civil Procedure Code is not required to be followed in a proceeding under Article 226 unless the High Court itself has made the provisions of the Civil Procedure Code applicable to a proceeding under Article 226. Then again, the principles of Section 11 as well as Order 2 rule 2, undoubtedly contemplate an adversarial system of litigation, where the Court adjudicates the rights of the parties and determines the issues arising in a given case. The public interest litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such case, merely brings it to the notice of the Court, as to how and in what manner the public interest is being jeopardized by arbitrary and capricious action of the authorities.”

(35) A perusal of the above shows that by virtue of Explanation to Section 141 of the CPC since proceedings under Article 226 of the Constitution are excluded from the expression “proceedings”, therefore, CPC is not required to be followed in the proceedings under Article 226 unless the High Court had itself made a provision of the CPC applicable under Article 226. In the present case, this Court has made the proceedings of the CPC applicable in terms of Rule 32 of the Writ Jurisdiction Rules. Therefore, in case the applicants/ petitioners had earlier relinquished their claim for transfer of the cases to the learned Tribunal by withdrawing their applications, then they are not liable to reiterate the same after a co-ordinate Bench had accepted their prayer for withdrawing the applications. The matter in issue is being considered and is to be considered in Public Interest Litigation (PIL)

which is pending. The fact that the principle of relinquishing the claim earlier is inapplicable in respect of a public interest litigation or a petition filed for public interest, which is not an adversarial system of adjudication, is inconsequential as the earlier application had been declined by a co-ordinate Bench in a public interest petition only.

(36) In the case, *The Workmen of Cochin Port Trust v. The Board of Trustees of the Cochin Port Trust and another* (supra), it was said that it is well known that the doctrine of *res judicata* is codified in Section 11 CPC 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*, it was said, is engrafted in Explanation IV of Section 11 CPC and in many other situations also principles not only of direct *res judicata* but of constructive *res judicata* are also applied. If by nay 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.

(37) There is no dispute to the said proposition, however, this Court has made the proceedings of the CPC applicable in terms of Rule 32 of the Writ Jurisdiction Rules. Besides, a similar prayer for transfer of the cases to the learned Tribunal had been made which was withdrawn. Therefore, it would be imprudent and inappropriate to allow a similar prayer to be made again merely because the earlier applications that were filed were got dismissed as withdrawn from this Court; besides, it was also withdrawn from Hon'ble the Supreme Court. The learned counsel for the petitioner - Sunil Singh sought leave to withdraw the petition reserving liberty for him to approach the High Court for appropriate redress. The transfer petition was accordingly dismissed as withdrawn with liberty prayed for. The liberty prayed for

was to approach this Court for appropriate redress which can mean redress only in accordance with law and not urge a claim or make a prayer which had already been made and withdrawn.

(38) In *Daryao v. State of U.P.* (supra), it was said that the argument that *res judicata* is a technical rule and as such is irrelevant in dealing with petitions under Article 32 of the Constitution could not be accepted. It was said that the rule of *res judicata* as indicated in Section 11 CPC has no doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It was said that it is in the interest of public at large that finality should attach to the binding decisions pronounced by the Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32. It was also said that it makes no difference to the application of the rule of *res judicata* that the decision on which the plea of *res judicata* is raised is a decision not of Supreme Court but of a High Court exercising its jurisdiction under Article 226. It was held that if a writ petition is dismissed *in limini* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar, would depend on the nature of the order. If the order is on merits, it would be a bar; if the order shows that the dismissal was for reason that the petitioner was guilty of laches or that he had an alternative remedy, it would not be a bar.

(39) The contention of the learned counsel appearing for the applicants/petitioners is that it has been held that if a writ petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32 of the Constitution because in such a case there is no decision on the merits by the Court.

(40) There is no dispute to the said proposition. In the present case, the order declining to transfer the cases to the learned Tribunal is admittedly not a speaking order but it is an order withdrawing the applications for transfer of the cases. There is, therefore, admittedly no decision on merits. However, as already noticed, the same would amount to relinquishment or abandonment of the plea for transfer of the cases which once having been relinquished or abandoned cannot be re-agitated or in any case cannot be lightly re-agitated by merely filing another application, especially when the same also been dismissed as

withdrawn from Hon'ble the Supreme Court. The applications for transfer of cases were dismissed as withdrawn and these were not withdrawn on any technical grounds like laches etc. Rather these were withdrawn unconditionally. Therefore, the petitioner cannot be permitted to re-agitate the matter for the same relief.

(41) In the circumstances, we hold that the applications for transfer of cases to the learned Tribunal having been earlier dismissed as withdrawn by a co-ordinate Bench, the same cannot be re-agitated, especially when the respondents have seriously objected to the same and have pleaded that there is a bar to the maintainability of a second application after the first one had been dismissed. Therefore, we find no merit in the applications and the same are accordingly dismissed.

(42) A photocopy of this order be placed on the file of other connected case.

Payel Mehta