JAYAWARDENA AND FIVE OTHERS
v.
DEHIATTAKANDIYA MULTI PURPOSE CO-OPERATIVE SOCIETY LTD. AND FIFTY OTHERS

COURT OF APPEAL
S. N. SILVA, J. (P/CA)
C.A. 197/95
JUNE 30, 1995.

Writ of Certiorari – Previous application of 1st Petitioner withdrawn – Second application by same Petitioner on the same grounds with 5 others – Rule 47 of S.C. Rules 1978 – Rule 3(2) Court of Appeal (Appellate Procedure Rules 1990) – S. 406 Civil Procedure Code S. 60(c) Co-operative Societies Law No. 5 of 1972 as amended by Act No. 11 of 1992.

The six Petitioners challenged the Order made by the 2nd Respondent (Deputy Commissioner of Co-operatives) appointing 3, 4, 5 Respondents as members of the Committee of Management of the 1st Respondent Society as *ultra vires* and made in excess of jurisdiction.

A previous application filed by the 1st Petitioner – President of the 1st Respondent Society – challenging the same Order was withdrawn by him without reserving the right to institute a fresh application. It was contended that in view of the motion for withdrawal of the 1st Petitioner and the Order of dismissal made by the Court, the Petitioners cannot now seek to invoke the jurisdiction of this court, once again in respect of the same matter.

Held:

(1) The first application was by the 1st Petitioner who was the President of the 1st Respondent Society. The second application has been filed jointly by the 1st Petitioner together with other members of the Committee of Management of the 1st Respondent Society. The Order challenged is the same in both applications, the ground of challenge is also the same, it also appears that the motions for withdrawal was entirely free of any conditions.

(2) A petitioner has no right to relief by way of a Writ. As the Petitioner has withdrawn an application for a Writ without reserving his right to institute fresh proceedings he will be barred, in the absence of exceptional circumstances, from instituting a fresh application in respect of the same matter.

***Per* Silva, J.**

'It is thus seen that it is in the Public interest that a party should not be vexed twice upon litigation in respect of the same matter. The Supreme Court Rules

require a Petitioner to state that he has not invoked the jurisdiction of the court previously in respect of the same matter.

The formulation of Rule 47 (S.C. Rules) and Rule 3(2) Court of Appeal Rules that a Petition should contain an averment that the jurisdiction of this Court has not been previously invoked in respect of the same matter, clearly indicates that a party may not institute fresh proceedings, in respect of the same matter after the previous application has been concluded.

The contents of Rule 47 and Rule 3(2) appear to be based on the doctrine of *Res Judicata*. This doctrine is founded upon the maxim *Nemo debit fis vexari, pro una et eadem causa* which is itself an outcome of the wider maxim interest *rei publicae ut fius litium*. It is thus seen that it is in the public interest that a party should not be vexed twice upon litigation in respect of the same matter.

Case referred to:

1. *Herath v. Attorney-General* – 60 NLR 193

APPLICATION for Writ of Certiorari.

Mahanama de Silva for the Petitioner.
T. M. S. Nanayakkara for the Respondents.

Cur. adv. vult.

July 21, 1995.

S. N. SILVA, J. (P/CA)

The six Petitioners and the 6th Respondent are elected members of the Committee of Management of the 1st Respondent society. The society was set up with a working capital of Rs. 1 million said to have been provided by the Mahaweli Authority. This application for a writ of Certiorari has been filed on the basis that the 2nd Respondent (Deputy Commissioner of Co-operatives) made an appointment by order dated 5.12.1994 (g) acting *ultra vires*, in excess of his jurisdiction. The order 'G' is an appointment of the 3rd, 4th and 5th Respondents, being the Civil Engineer, Mahaweli Economic Agency, Assistant Engineer Divisional Office Lihiniyagama and Principal Henanigala South School Nawa Medagama, as members of the Committee of Management of the 1st Respondent of the 1st Respondent Society. According to the order it has been made in terms of Section 60C of the Co-operative Societies Law No. 5 of 1972 as amended by Act No. 11 of 1992. The appointment is for a period of one year that is up to 6.12.1995.

The 2nd, 3rd, 4th and 5th Respondents have raised an objection, *in limine* to this application on the basis that a previous application filed by the 1st Petitioner challenging the validity of the same order was withdrawn by the 1st Petitioner without reserving the right to institute a fresh application. It was submitted by learned Counsel for these Respondents that in view of the motion for withdrawal of the 1st Petitioner and the order of dismissal made by this Court, the Petitioners cannot now seek to invoke the jurisdiction of this Court, once again in respect of the same matter. Learned counsel for the Petitioners conceded that a previous application (CA 28/95) was filed by the 1st Petitioner being the President of the Society challenging the validity of the order marked 'G' in this application. It appears that the same order had been marked 'G' in application CA 28/95 as well. It was also conceded that the ground of challenge was the same in application CA 28/95 as in this application. Counsel who appeared for the 1st Petitioner in that application moved in open court to withdraw the application on 1.2.95. The court allowed the motion for withdrawal and dismissed the application without costs. It was conceded by learned counsel for the Petitioners that the 1st Petitioner did not make any reservation of his right to re-institute proceedings at the time of the motion for withdrawal. Hence it is common ground that the previous application filed by the 1st Petitioner was in respect of the same order that is challenged in this application, was based on the same ground as urged in this application and was dismissed by this court on 1.2.95 upon an unconditional motion for withdrawal. Learned counsel for the Petitioners submitted that the previous application was withdrawn on the basis of a settlement and that this application has been filed since the respondents violated that settlement. On the other hand counsel for the respondents submitted that the Petitioners have violated the arrangements that were made. But, he submitted that the withdrawal was unconditional and that the arrangement was to elect the 3rd Respondent as the President of the Society and that the 1st Petitioner resiled from that arrangement. It was also submitted by learned counsel for the Respondents that since this application has been filed jointly by the 1st to 6th Petitioners and the 1st Petitioner is barred from instituting a fresh application the application itself is not property constituted and should be rejected.

I have carefully considered the submissions of Learned counsel regarding the preliminary objection that has been raised. The 1st Petitioner was the President of the 1st Respondent Society. He filed

application bearing No. CA 28/95 on 12.1.95 for a Writ of Certiorari to quash the order dated 5.12.94 made by the 2nd Respondent. These applications has been filed jointly by the Petitioner in application CA 28/95 together with other members of the Committee of Management of the 1st Respondent Society. The order challenged, as noted above, is the same in both applications. The ground of challenge is also the same. According to the documents filed, after objections were tendered in C.A. 28/95, on 1.2.95 the case had come up in open court and counsel who then appeared for the present 1st Petitioner moved to withdraw the application. The motion for withdrawal has been made in open court. There is no record of counsel informing court of any settlement or arrangement between the parties, or the basis of which the motion for withdrawal was made. If there was any such arrangement counsel who appeared in that application or the registered Attorney should have filed an affidavit to that effect. In the absence of a specific record in the proceedings of C.A. 28/95 and in the absence of any affidavit by counsel or the registered attorney who appeared in that case, it has to be assumed that the motion for withdrawal was entirely free of any conditions. That the application has thereupon been dismissed without costs.

Learned counsel for the Respondents submitted that the 1st Petitioner is barred from making repeated applications to this court in respect of the same subject matter, and on the same ground. He submitted that it is contrary to public policy to allow a Petitioner to withdraw an application unconditionally and then after the dismissal of the first application to permit the same petitioner to institute fresh proceedings on the same matter on the same grounds.

The application is for a Writ of Certiorari. A Petitioner has no right to a remedy by way of Certiorari which pertains to the extraordinary jurisdiction of this Court. The conduct of the 1st Petitioner is material in considering whether the 2nd application filed by him should be entertained. The Supreme Court Rules relevant to applications for Writs and other applications has at all times contained a provision that a petition should include an averment that the jurisdiction of the Court of Appeal has not been previously invoked. Rule 47 of the Supreme Court Rules 1978 contains a specific provision which reads thus:

> "The petition and affidavit except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not been previously invoked in respect of the same matter. Where such averment is found to be false the application may be dismissed"

Rule 3(2) of the Court of Appeal (Appellate Procedure Rules of 1990), relates to the same matter and reads thus:

> "The petition and affidavit except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked the petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed."

The formulation of the foregoing Rules that a petition should contain an averment that the jurisdiction of this Court has not been previously invoked in respect of the same matter, clearly indicates that a party may not institute fresh proceedings in respect of the same matter after the previous application has been concluded. This formulation is a clear guide that there could be no situation where a second application can be filed by the same party on the same subject matter. Indeed there could be situations where there is fresh material on the basis of which a party may seek leave of court to institute fresh proceedings in respect of the matter challenged in the previous proceedings. There may also be situations where a specific reservation is made, reserving the right of the petitioner to institute fresh proceedings at a future date. In the absence of any exceptional circumstances such as fresh material or reservation as aforesaid, it would be inconsistent with the said Rules for a party to institute a subsequent application regarding the matter that has been challenged in a previous application.

Counsel for the Petitioners submitted that the Respondents resiled from an agreement on the basis of which the previous application was withdrawn. As noted above, there is no evidence of any such agreement. In any event there is a different version as to an arrangement, emanating from the Respondents. These matters are not within the purview of the order that is challenged in this application. **The Court was not apprised of in C.A. 28/95 of any arrangement or agreement on the basis of which the application was withdrawn.** There is no possibility of inquiring into these allegations and counter allegations that do not pertain to the subject matter of the application namely, the order marked 'G'. If the court is to inquire into these matters it would have to embark on a course far removed from the basis of challenge of the order marked 'G'. I am of the view that it is not within the competence of this court in considering the validity of an administrative order which is challenged in an application for a Writ of Certiorari, to consider the conduct of parties in relation to an alleged agreement or arrangement on the basis of which a previous application is said to have been withdrawn. For all purposes the Court has to assume that the withdrawal was unconditional and the dismissal entered on 1.2.95 is a final determination of the application of the 1st Petitioner challenging the validity of the order marked 'G'.

The contents of Rule 47 and Rule 3(2) referred above appear to be based on the doctrine of *res judicata*. By *Res Judicata* is meant the termination of the controversy by a judgment of a court. This is accomplished either by an adverse decision or by discharge from liability. In the case of *Herath v. Attorney-General* [1] a bench of 3 Judges of the Supreme Court considered the implications of this doctrine. Basnayake, CJ. cited an authority which expresses the view that the doctrine is founded upon the maximum ***"nemo debet bis vexari pro una et eadem causa*** which is itself an outcome of the wider maxim ***interest reipublicae ut sit fins litium*** (p217). It is thus seen that it is in the public interest that a party should not be vexed twice upon litigation in respect of the same matter. The Supreme Court Rules have clear an underpinning of the aforesaid element of public interest. It is for that reason that the Rules require a petitioner to state that he has not invoked the jurisdiction of the court previously in respect of same matter. The basic assumption is that if a party has

invoked the jurisdiction of the court previously in respect of the same matter, he is barred from invoking the jurisdiction for the second time save in exceptional situations as noted above. If this principle is not applied, it would happen as in this case, where a party who has withdrawn his earlier application without any reservation retains another counsel and makes a second foray to this court by way of a fresh application. Any arrangement or agreement that has not been notified to court at the time of withdrawal of an application cannot be pleaded and made the subject of fresh proceedings.

The Civil Procedure Code which regulates the procedure of Civil Courts is not applicable to a proceedings before this Court for a Writ of Certiorari. However the Code has been in operation for over a century and its provisions would be a useful guide to the basis on which this Court should decide the question at issue. Section 406 of the Code states thus:

> 406 (1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff–
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> (a) that the action must fail by reason of some formal defect, or
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> (b) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned,
>
> the court may grant such permission on such terms as to costs or otherwise as it thinks fit.
>
> (2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part."

In view of the foregoing provision a plaintiff in a civil action would be barred from instituting another action in circumstances as stated above. A civil action is instituted as of right to redress a wrong. On the other hand the granting of a Writ is a discretionary remedy in the exercise of the extraordinary jurisdiction of this Court. A petitioner has

no right to relief by way of a writ. The conduct of a petitioner is relevant in considering whether his application should be entertained. For the reasons stated above. I am of the view that a petitioner who has withdrawn an application for a writ without reserving his right to institute fresh proceedings will be barred, in the absence of exceptional circumstances, from instituting a fresh application in respect of the same matter. Therefore I have to uphold the objection of learned counsel for the Respondents that the 1st Petitioner cannot file this application in view of the order of dismissal made against him in CA 28/95 on 11.2.95.

The last matter to be considered is whether the entire application should be dismissed in view of the order made in CA 28/95 against the 1st Petitioner. The 2nd to 6th Petitioners as members of the Committee of Management have *locus standi* to challenge the order marked 'G' in an application for a Writ of Certiorari. It is probable that they stood by and allowed the 1st Petitioner being the President to file application 28/95. However the order in CA/28/95 is against the 1st petitioner and cannot bar the other Petitioners who have a sufficient *locus standi* as noted above from challenging the validity of the decision marked 'G' in a separate application. But there is merit in the submission of learned counsel for the Respondents that the petition filed by the Petitioners is badly constituted since it is a joint application of all the Petitioners including the 1st Petitioner. That alone would not be a ground for the rejection of the entire petition. I would therefore allow the objection of the Respondents and reject this application in so far as it relates to the 1st Petitioner. The other Petitioners may, if they are so advised move to proceed with this application upon filing an amended petition, by themselves to the exclusion of the 1st Petitioner. I therefore grant to the 2nd to 6th Petitioners time till 22.8.95 to file an amended petition if they are so advised. The question of accepting the amended petition will be considered by court after necessary papers are filed. Mention on 22.8.1995. The application of the 1st Petitioner is dismissed with costs fixed at Rs. 2500/- to be paid by the 1st Petitioner to the 2nd to 5th Respondents.

Application of the 1st Petitioner dismissed.
Other Petitioners granted permission to file amended Petition.