

IN THE HIGH COURT OF JUDICATURE AT PATNA

CWJC No.7403 of 2008

Tantia Construction Ltd., a Company incorporated under the provisions of the Companies Act, 1956 having its Registered Office situated at 25/27, Netaji Subhas Road, Kolkata-700 001 [West Bengal] through its Executive Director, Ramesh Kumar Khaitan, S/o Shri S.N. Khaitan, Resident of GC-92, Salk Lake, Sector-3, P.O. & P.S. Bidhan Nagar, District Kolkata [West Bengal].

----- Petitioner

Versus

1. The State of Bihar through its Principal Secretary, Road Construction Department, Government of Bihar, Vishwasaraiya Bhawan, Bailey Road, Patna.
2. The Engineer-in-Chief-cum-Special Secretary, Road Construction Department, Government of Bihar, Vishwasaraiya Bhawan, Bailey Road, Patna.
3. The Executive Engineer, New Capital Road Division, Road Construction Department, Patna.
4. The Executive Engineer, Patna West Road Division, Road Construction Department, Patna.
5. The Executive Engineer, Patna City Road Division, Road Construction Department, Patna.

----- Respondents

For the Petitioner : Mr. Gautam Kejriwal, Advocate
For the State : Mr. P.K. Shahi, Advocate General with
Mr. P.K. Verma, A.A.G.-II.

P R E S E N T
HON'BLE JUSTICE MIHIR KUMAR JHA

Mihir Kr. Jha, J

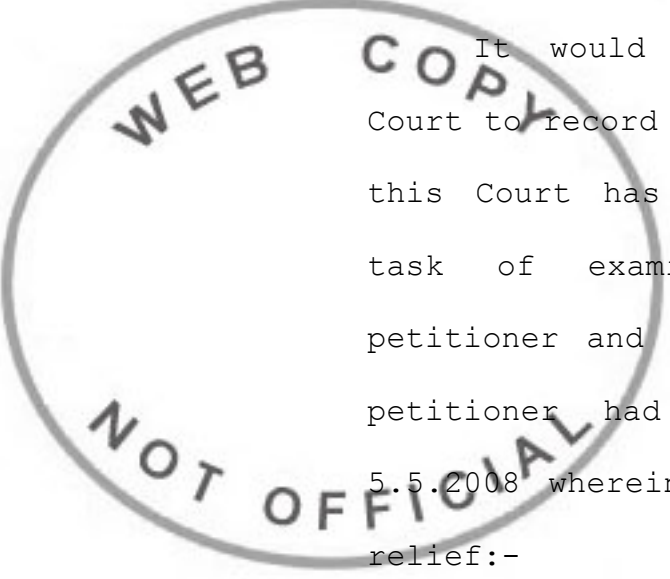
Heard counsel for the parties.

Reference may be made to the earlier order of this Court dated 19.5.2008, which reads as follows:-

"This case was mentioned at 2.15 P.M. by Mr. Gautam Kejriwal, counsel for the petitioner seeking leave to withdraw the writ application in order to avail internal remedy. Accordingly, this application was permitted to be withdrawn. However, before the order could have been signed Mr P.K.Verma, Adll. Advocate General No. XI has submitted that the case was mentioned without his leave and in fact without informing him. He further submits that

the petitioner after filing of this writ petition has moved the Calcutta High Court by filing a suit without taking leave from this court and as such he has serious objection to the prayer for withdrawal of the writ application for which in fact an I.A. Application (I.A. No. 2991/2008) was filed by the petitioner on 14.5.2008 is still pending.

In view of the fact that this case was mentioned for withdrawal without consent and/or prior intimation to the respondents, the earlier order dictated at 2.15 according leave to withdraw this writ application is recalled."



It would be thus necessary for this Court to record the factual matrix under which this Court has to dwell into an unpleasant task of examining the conduct of the petitioner and its counsel Mr. Kejriwal. The petitioner had filed this application on 5.5.2008 wherein it had prayed for following relief:-

- (i) For quashing of the Order No. 171 dt. 30.04.2008 passed by the Respondent-Executive Engineer, New Capital Road Division, Patna by which he has rescinded the contract entered into vide Agreement No. 1 (SB)/2006-07 dt. 15.12.2006 in purported exercise of Clause 3(a) of the said Agreement as being wholly arbitrary & illegal;*
- (ii) For restraining the Respondents from taking any step to give effect to the*

said Order of Rescission of the Contract of the Petitioner vide Impugned Order No. 171 dt. 30.04.2008;

(iii) For a direction to the Respondents to allow the Petitioner Company to complete the remaining work of the contract on the same terms & conditions after rescheduling the time period, and extending the same by reasonable time, and by providing all required assistance as promised by the Respondents at the time of entering into the contract and subsequently to enable the Petitioner to successfully complete the remaining work within the scheduled time frame;

(iv) For restraining the Respondents from arbitrarily invoking the Risk & Cost Clause without any determination/adjudication of the reason for the delay in execution of the work as per the Schedule at the time of entering into the Agreement;

(v) For a direction to the Respondents to release the payment of the completed work which has been kept in hold by the Respondents to enable the Petitioner Company to complete the balance work at the earliest with smooth flow of cash funds;

(vi) For restraining the Respondents from unilaterally taking any penal & coercive measure against the Petitioner Company without determination & adjudication of the fact due to which the progress of the work was slow and which has been made a ground for termination of the contract of the Petitioner; and for any other relief(s) for which the



Petitioner may legally be found entitled to in the facts & circumstances of the present case.

When this writ petition was filed and was taken up for out of turn hearing, it appears that a learned Single Judge of this Court on 7.5.2008 had passed an order for listing this case before another Bench after obtaining necessary permission from the Hon'ble the Chief Justice.

It has to be also noted here that the petitioner had filed an interlocutory application being I.A. No. 2991 of 2008 on 14th of May, 2008 wherein following relevant averments were made:-

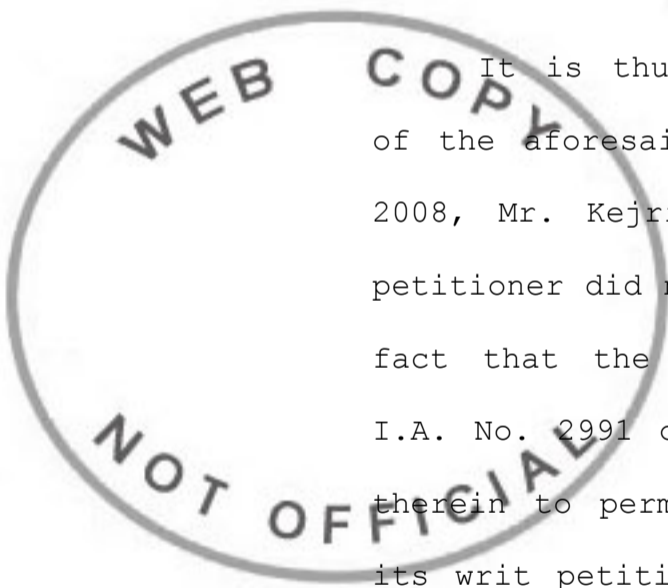
- "1. That the Present Interlocutory Application is being filed for withdrawing the Main Writ Petition filed by the Petitioner.
2. That the Petitioner states that the Petitioner has been advised to withdraw the Writ Petition for taking appropriate steps in terms of the contract with the Respondents before the appropriate Forum.

It is, therefore, prayed that Your Lordships may graciously be pleased to allow this Application, and permit the Petitioner to withdraw its Main Writ Petition with a liberty to file any other Writ Petition at an appropriate stage.-----"

However when the case was listed before

this Court on 19.5.2008, an oral prayer as noted above in the order of this Court dated 19.5.2008 was made at the commencement of the proceeding by Sri Gautam Kejriwal, the Advocate on record of the petitioner in this case, for allowing him to withdraw this application. Such oral prayer made to this effect in fact was also allowed but as has been noted in the order passed at 4.15 Pm. on 19.5.2008, such prayer seeking withdrawal of the writ petitioner, was recalled in view of a very serious objection raised by learned Additional Advocate General No.11.

It is thus clear that despite pendency of the aforesaid prayer in I.A. No. 2991 of 2008, Mr. Kejriwal, learned counsel for the petitioner did not choose to even disclose the fact that the petitioner had already filed I.A. No. 2991 of 2008 with a specific prayer therein to permit the petitioner to withdraw its writ petition with a liberty to file any other writ petition at an appropriate stage. Consequently, this Court must hold that Mr. Kejriwal by making an oral prayer for withdrawal of the application for seeking internal remedy had sought to suppress the actual prayer made in the withdrawal application which as noted above was some sort



of conditional withdrawal seeking liberty for filing another writ petition on the same subject at an appropriate stage.

It is this practice and device adopted by the petitioner which has been seriously objected to by the State. Learned Advocate General appearing on behalf of the State had in fact submitted that such withdrawal of the writ petition was malafide and was intended to suppress the most relevant fact that for the same cause of action, the petitioner had already moved Kolkata High Court by filing an application under Section 9 of the Arbitration and Conciliation Act, 1996 on 13th of May, 2008. It must be noted that on 13th of May, 2008 when the petitioner had filed the aforementioned application being A.P. No. 248 of 2008 before the Kolkata High Court, even the withdrawal application (I.A. No. 2991/2008) was not filed before this Court which as noted above came to be filed only on 14th of May, 2008.

Learned Advocate General had also produced the original copy of the petition filed by the petitioner before the Kolkata High Court under Section 9 of the Arbitration and Conciliation Act, 1996 wherein the following prayers were made:-

(a) *Injunction restraining the*

respondent from receiving any money in respect of the bank guarantees morefully described in paragraph 12 above and being Annexure G hereto;

(b) Injunction restraining the respondent from giving any effect or further effect or making any further demand or accepting any sum in furtherance to the letters being Annexure N hereto;

(c) Injunction restraining the respondent from giving any effect or further effect or acting in terms of or in furtherance to the purported letter of termination dated 30th March 2008 being Annexure M hereto;

(d) The purported notice of termination being Annexure M hereto adjudged void, delivered up and cancelled;

(e) A fit and proper person be appointed as Receiver/Special Officer and the Receiver/Special Officer so appointed be directed to do the following:-

- i) Make an inventory of the tools, plants, materials and machinery at the site and submit a report thereof to this Hon'ble Court.
- ii) Remove the tools, plants, materials and machinery and make over the same to the petitioner.
- iii) Obtain the original bank guarantees and keep the same in its custody to ensure non-invocation thereof.

(b) Injunction restraining the

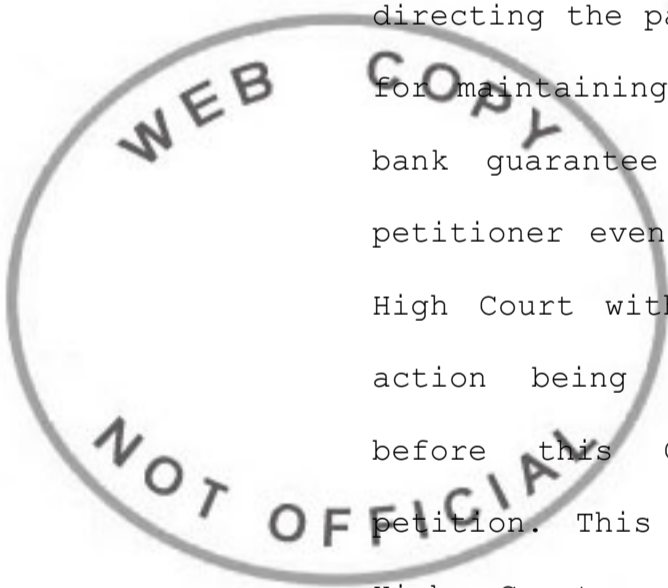


respondent from interfering with the petitioner's possession and user of the machinery morefully described in Annexure O hereto;

(c) Ad-interim orders in terms of prayers above;

(d) Such other or further orders as Your Lordships may deem fit and proper."

It has to be kept in mind that when the said application was filed by the petitioner before the Kolkata High Court registered as A.P. No. 245 of 2008 on 13.5.2008 an interim order was also obtained therein by the petitioner on that very day i.e. 13.5.2008 directing the parties including State of Bihar for maintaining the status-quo in respect of bank guarantee furnished on behalf of the petitioner even without apprising the Kolkata High Court with regard to same of cause of action being agitated by the petitioners before this Court in the present writ petition. This fact again of moving Kolkata High Court was also suppressed by the petitioner in the I.A. No. 2991 of 2008 filed before this Court. Since the affidavit in support of I.A. No. 2991 of 2008 was sworn by Ramesh Kumar Khaitan claiming to the Executive Director of the petitioner company who is said to be the resident of Salk Lake, Kolkata, it cannot be believed that he was not aware of



filing of the petition before the Kolkata High Court being A.P. No. 245 of 2008 which was filed with an affidavit of Mr. Ishwari Prasad Tantia, the Chairman and Managing Director of the petitioner company.

Under such circumstances, the submission of learned Advocate General that the petitioner was indulging in bench-hunting tactics and having failed to get relief from this Court had sought to withdraw the writ petition by duping this Court has to be accepted.

Reliance placed by the learned Advocate General on the judgment of the Apex Court in the case of ***Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior & Ors.*** reported in ***AIR 1987 SC 88*** seems to be also apt.

As a matter of fact, the objection raised by the state in rejoinder by way of objection to the prayer of the petitioner for withdrawal of the writ petition contains the details of such suppression and malafides on the part of the petitioner and having perused them, this Court must hold that the petitioner had acted in a malafide manner in getting its writ petition withdrawn even without informing this Court with regard to the pendency of the proceeding in Kolkata High Court and also by choosing to make an altogether different prayer

in the withdrawal application wherein withdrawal was sought with a leave/liberty to file another writ petition.

Counsel for the petitioner, however, had submitted that filing of an application under Section 9 of the Arbitration & Conciliation Act, 1996 was strictly in terms of the agreement between the parties, inasmuch as, the recourse of resolution of any dispute was to be taken by way of invoking arbitration clause. He had further submitted that as to whether Kolkata High Court will have a jurisdiction or not in the matter cannot be and should not be adjudicated by this Court, inasmuch as, the proceeding is still pending before the Kolkata High Court where the State of Bihar, the respondent in this petition, could easily raise and press this question.

This Court after hearing the parties would find that the conduct of the petitioner and the manner in which this writ petition was sought to be withdrawn was altogether bad and must be condemned. This Court must hold that the petitioner after filing of this writ petition, despite there being an arbitration clause clearly coming in its way in maintaining its writ petition before this Court, had abandoned the said remedy in the midstream even without informing this Court

that it had already moved Kolkata High Court for almost same and similar relief. This part of suppression of fact by the petitioner would therefore clearly disentitle it to file any fresh writ application for the same cause of action before any Court as was held by the Apex Court in the case of ***Daryao & Ors. Vs. State of U.P. & Ors.*** reported in ***AIR 1961 SC 1457*** laying down the general rule that the petitioner is precluded from filing writ petition or an appeal against an order because he cannot be considered to be a person aggrieved by the order passed by the Court permitting withdrawal of the petition. The said view in fact was further explained by the Apex Court in the case of ***Avinash Nagra Vs. Navodaya Vidyalaya Samiti & Ors.*** reported in ***1997 (2) SCC 534*** wherein the Apex Court had held that the second writ petition for the same cause of action was not maintainable when the petitioner had filed earlier the writ petition and had withdrawn the same without permission of the Court with a liberty to file the second writ petition.

The question however would still remain as to whether a Court when approached for withdrawal of a writ petition or even a suit can compel the petitioner to continue a proceeding against its wishes? In the opinion

of this Court, whenever a writ petition is filed and a prayer thereof is made for withdrawal of the writ petition, it can either allow withdrawal of writ petition with a leave to file a fresh writ application or even without giving such liberty to file a fresh writ petition for the same cause of action but it cannot compel the petitioner to continue with the proceedings of a writ petition even if the writ petitioner wants to withdraw it. To that extent, the provision of Order 23 Rule 1 of the Code of Civil Procedure would be applicable even in a writ proceeding as also held in the case of *Sarguja Transport Service* (supra). The case of *Sarguja Transport Service* (supra) infact would squarely answer the applicability of the provisions of Order 23 Rule 1 of the Code of Civil Procedure wherein the Apex Court had held as follows:-

"The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lost it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata

contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court."

In view of the provisions under Order 23 Rule 1 of the Code of Civil Procedure only a filing of a fresh suit for the same cause of action without leave of the Court is barred and therefore, this Court on the same analogy must hold that the petitioner cannot file another writ petition for the same cause of action before any court.

It must be, however, made clear that the question of maintainability of second writ petition for the same cause of action, in

terms of Order 23 Rule 1 of the Code of Civil Procedure, would arise only when the said second writ petition is filed and the Court where such writ petition is filed will have to find out as to whether such writ petition was maintainable in absence of leave given in the first writ petition for filing a subsequent writ petition for the same cause of action. This aspect of the matter, therefore, can be gone into by the Kolkata High Court as to what effect this order refusing petitioner the leave to file a fresh writ petition for the same cause of action, will have on the pending proceedings under Section 9 of the Arbitration and Conciliation Act in A.P. No. 245 of 2008 which apparently is not a writ petition under Article 226 of the Constitution of India.

The law in this context as settled by the Apex Court in the case of *Sarguja Transport Service* (supra) seems to be that though a second writ petition would not be maintainable after withdrawal of the first writ petition without leave/liberty of the Court in the first writ petition, the said doctrine would not be applicable to a suit filed after the withdrawal of the first writ petition. The Apex Court in fact in *Sarguja Transport Service* case (supra) had made this position clear by making following

observations:-

"[W]e are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interest of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission."

Thus, this Court having considered all aspects of the matter would accord leave to the petitioner to withdraw its writ petition but by clearly recording that it will have no liberty to file fresh writ petition for the same cause of action before any court and to that extent prayer made in I.A. No. 2991 of 2008 is hereby rejected.

In the facts and circumstance of this case, though the conduct of the petitioner

being wholly reprehensible was good enough for awarding an exemplary cost but considering the young career of Mr. Gautam Kejriwal, the Advocate for the petitioner who was primarily responsible for duping this Court in making prayer for withdrawal of the writ petition without informing the State Counsel and mentioning the case listed at serial no. 4133 on 19.5.2008 and that too without informing this Court that an interlocutory application being I.A. No. 2991 of 2008 for the same purpose was already pending, would close this matter by reminding him that he is a member of noble profession and should, therefore, behave in a manner befitting to the best of the standard of legal fraternity as has been laid down by this Court in the case of Abhijit Ganguly Vs. Sri Md. Jalaluddin reported in 1997 (2) P.L.J.R. 1007.

"In this regard we may also observe that an onerous duty is cast upon the counsel in such matters to advise their clients in the right perspective. In this regard we are reminded of the observations made by the Apex Court in the case of "In Re Sanjiv Datta, Deputy Secretary Ministry of Information and Boardcasting" reported in 1995(3) SCC 619, that legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. The legal profession is different from other professions in that what the lawyers do, affects not only an

individual but the administration of justice which is the foundation of the civilized society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his profession and in his private and public life. The Apex Court has also observed that "Of late, we have been coming across several instances which can only be described as unfortunate both for legal profession and the administration of justice. It becomes, therefore, our duty to bring into the notice of the members of the profession that it is in their hands to improve the quality of the service they render both the litigant public and to the courts, and to brighten their image in the society". It has further been held by the Apex Court that "the society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. If the profession is to survive, the judicial system has to be vitalized."

This Court would therefore instead of referring the matter relating to apparent misconduct committed by Mr. Gautam Kejriwal Advocate for the petitioner to Bihar State Bar Council for cancellation of his license would record its strong displeasure against him with a hope and belief that he would never indulge

in such acts in future.

With the aforesaid observations, this
writ application is dismissed as withdrawn.

Patna High Court
Dated 18th September 2009
Rsh/A.F.R.

(Mihir Kumar Jha, J.)

