IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WRIT PETITION NO.303 OF 2019

1. M/s SEW RHO Power Corporation Ltd.
   (SPV of SEW Green Energy Ltd., Formerly known as M/s SEW Energy Limited)
   6-3-871 Snehalatha,
   Greenlands Road, Begumpet, Hyderabad
   Pin- 500 016

2. M/s SEW Green Energy Limited
   (Formerly known as M/s SEW Energy Limited)
   R.O.-6-3-871 Snehalatha,
   Greenlands Road, Begumpet, Hyderabad
   Pin- 500 016

……..***Petitioners***

-***Versus***-

1. The State of Arunachal Pradesh, represented by the Chief Secretary, Govt of Arunachal Pradesh, Itanagar.

2. The Commissioner/Secretary (Power) Govt. of Arunachal Pradesh, Itanagar.

3. The Chief Engineer (Monitoring) Department of Hydro Power Development, Govt. of Arunachal Pradesh, Itanagar.

……..***Respondents***

- B E F O R E -

HON'BLE MR. JUSTICE NANI TAGIA

For the petitioners : Mr. B. Chakraborty

For the State respondents : Mr. D. Soki, learned Additional Senior Government Advocate,
Mr. L. Perme, Standing counsel,
Power Department

JUDGMENT & ORDER (ORAL)

30.10.2019

By means of this writ petition, the writ petitioner has challenged the "Notice of Intention to Terminate" dated 13.05.2019, issued by the Commissioner, Power, Government of Arunachal Pradesh, Itanagar to the petitioner in terms of Memorandum of Agreement dated 14.09.2017 entered into between the parties.

2. Mr. D. Soki, learned Additional Senior Government Advocate by referring to annexure 17 of the writ petition submits that the petitioner herein had earlier approached this Court by filing WP(C) No. 194 (AP)/2019, wherein the same notice of Intention to Terminate dated 13.05.2019 was challenged which writ petition, however, was withdrawn on 22.07.2019 without any further leave of this Court to approach this Court again. Mr. Soki, learned Additional Senior Government Advocate by relying upon the decision rendered by Hon'ble Supreme Court in the case of *Sarguja Transport Service Vs. State Transport Appellate Tribunal, Madhya Pradesh, Gwalior and Others* reported in *(1987) 1 SSC 5* submits that since the writ petition was withdrawn without any leave of this Court to file a fresh writ petition, the present writ petition would not be maintainable.

3. On the other hand, Mr. B. Chakraborty, learned counsel for the petitioner submits that subsequent writ petition for the same cause of action would be maintainable even though the earlier writ petition was withdrawn by the petitioner without taking leave of the Court to institute a fresh writ petition. In support of the submission so made, Mr. Chakraborty, learned counsel for the petitioner has relied on the following decisions of the Hon'ble Supreme Court as well as of the Gauhati High Court;

1) *(2002) 10 SSC 668 (V.D. Barot –Vs- State of Gujrat and Others) paragraph No. 4*

2) *AIR (1961) SC 1457 (Daryao and Others –Vs- State of Utter Pradesh and Others) paragraph No. 19*

3) *AIR (1986) SC 210 (Prabhakar Rao and Others –Vs- State of Andhra Pradesh and Others) paragraph No. 23*

4) *AIR (1965) SC 1514 (Joseph Pothen –Vs- State of Kerala and Others) paragraph No. 5*

5) *2003 (1) GLT 225 (Tripura Forest Development and Plantation Corporation Ltd and Others –Vs- Jiban Kr. Das Gupta) paragraph No. 7*

6) *2003 (3) GLT 675 (Mukul Kr. Hazarika –Vs- State of Assam and Others) paragraph No. 16*

4. The relevant paragraphs referred to by Mr. B. Chakraborty, learned counsel for the petitioner in respect of the decisions cited herein above are quoted herein below;

1) (2002) 10 SSC 668*(V.D. Barot –Vs- State of Gujrat and Others)*;

> *"4. We cannot subscribe to the view expressed by the High Court in the order under appeal. In the first place the High Court ought to have examined whether the rejection of the representation was justified in the circumstances set forth in the order impugned in the High Court.*

Secondly, the matter had not been abandoned as such but to enable the appellant to make representation in the matter, the petition had been withdrawn. That course of action does not amount to abandonment of the matter. Moreover, such a matter should not be dealt with in a hypertechnical manner but on the totality of the circumstances arising in the case of the appellant. Hence, we set aside the order of the High Court and remit the writ petition to the High Court for fresh disposal on merits in accordance with law. The appeal is allowed accordingly."

2) AIR (1961) SC 1457*(Daryao and Others –Vs- State of Utter Pradesh and Others)*;

"19. We, must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as &-contested matter, and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all;

but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar The petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent Gaj petition under Art. 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res jadirata which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us."

3) AIR (1986) SC 210 *(Prabhakar Rao and Others –Vs- State of Andhra Pradesh and Others)*;

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

4) AIR (1965) SC 1514 *(Joseph Pothen –Vs- State of Kerala and Others)*;

"5. The learned Advocate-General of Kerala raised a preliminary objection to the maintainability of the application on the ground that the petition is barred by the principle of res judicata in that a petition for the same relief was filed before the High Court of Kerala and was dismissed. The petitioner filed O.P.

No. 1502 of 1960 in the High Court of Kerala at Emakulam for a relief similar to that now sought in this petition. The said petition came up before Vaidialingam, J., who dismissed that petition on the ground that it sought for the declaration of title to the property in question, that the said relief was foreign to the scope of the proceedings under Art. 226 of the Constitution and that claims based on title or possession could be more appropriately investigated in a civil suit. When an appeal was filed against that order a Division Bench of the High Court, consisting of Raman Nair and Raghavan, JJ., dismissed the same, accepting the view of Vaidialingam, J., that the proper forum for the said relief was a civil Court. It is, therefore, clear that the Kerala High Court did not go into the merits of the petitioner's contentions, but dismissed the petition for the reason that the petitioner had an effective remedy by way of a suit. Every citizen whose fundamental right is infringed by the State has a fundamental right to approach this Court for enforcing his right. If by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it. In that context the doctrine of res judicata may be invoked. But where there is no such decision at all, there is no scope to call in its aid. We, therefore, reject this contention."

5) 2003 (1) GLT 225 *(Tripura Forest Development and Plantation Corporation Ltd and Others –Vs- Jiban Kr. Das Gupta)*;

"7. The issuance of the above letter is not in dispute. It was further contended by mr. Bhattacharjee, learned senior counsel for the appellants that this letter was written for the purpose of deputing the petitioner for training only and there was no assurance regarding the disposal of the matter or giving other reliefs to the petitioner. The petitioner after the withdrawal of the said writ petition, was, in fact deputed for training and he underwent training also. We, therefore, find that this is not a case of withdrawal of the writ petition simplicitor but the writ petition was withdrawn on being asked by the appellant Corporation and the petitioner might have legitimate expectation that if the writ petition was withdrawn his grievances would be redressed. Although after the withdrawal of the writ petition, the petitioner was deputed for training, but no other relief was granted to him which compelled him to file the subsequent writ petition. Under the facts and circumstances of the case, we think that there are justifiable reasons to permit the petitioner to invoke the

extraordinary jurisdiction of this Court under Article 226 of the Constitution once again."

6) 2003 (3) GLT 675 *(Mukul Kr. Hazarika –Vs- State of Assam and Others)*;

"16. This court finds enough force in the submission of Mr. Das and accordingly, in the Court's opinion, since the writ proceeding has been excluded from the meaning of the proceeding under Section 141, CPC, the right to seek constitutional remedy under Article 226 of the Constitution cannot be curtailed by application of provision of C.P.C. especially Order 23 Rule 1. Besides, in the instant writ proceeding, the petitioner has raised the question of infraction of his fundamental rights guaranteed under Article 14, 19 and 21 of the Constitution of India. Therefore, having regard to the above cited cases, it can be safely said that the writ petition is maintainable. Ratio of the judicial authorities referred by Mr. H.N. Sarma, the learned Sr. counsel in my opinion, has no applicability to the facts and circumstances of the case in hand."

5. I have heard Mr. B. Chakraborty, learned counsel for the petitioner and Mr. D. Soki, learned Additional Senior Government Advocate for the State respondent No. 1 as well as Mr. L. Perme, learned Standing Counsel for Power Department representing respondent Nos. 2 and 3 and also perused the decision relied upon by the learned counsel for the parties.

6. Having noted the decision of the Hon'ble Supreme Court as well as of the Gauhati High Court cited by Mr. B. Chakraborty, learned counsel for the petitioners, the decision cited by Mr. D. Soki, learned Additional Senior Government Advocate; namely; *Sarguja Transport Service Vs. State Transport Appellate Tribunal, Madhya Pradesh, Gwalior and Others* reported in *(1987) 1 SSC 5* be now referred to. Accordingly, the paragraphs No. 5, 6, 7, 8 and 9 which are relevant for the purpose are quoted herein below;

"5. In this case we are called upon to consider the effect of the withdrawal of the writ petition filed under Articles 226/227 of the Constitution of India without the permission of the High Court to file a fresh petition. The provisions of the Code of Civil Procedure. 1908 (hereinafter referred to as 'the

Code') are not in terms applicable to the writ proceedings although the procedure prescribed therein as far as it can be made applicable is followed by the High Court in disposing of the writ petitions. Rule 1 of Order XXIII of the Code provides for the withdrawal of a suit and the consequences of such withdrawal. Prior to its amendment by Act 104 of 1976, rule 1 of Order XXIII of the Code provided for two kinds of withdrawal of a suit. namely, (i) absolute withdrawal, and (ii) withdrawal with the permission of the Court to institute a fresh suit on the same cause of action. The first category of withdrawal was governed by sub-rule (1) thereof as it stood then, which provided that at any time after the institution of a suit the plaintiff might, as against all or any of the defendants 'withdraw' his suit or abandon a part of his claim. The second category was governed by sub-rule (2) thereof which provided that where the Court was satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there were sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. it might, on such terms as it thought fit, grant the plaintiff permission to withdraw from such suit or abandon a part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Sub-rule (3) of the former rule 1 of order XXIII of the Code provided that where the plaintiff withdrew from a suit or abandoned a part of a claim without the permission referred to in sub-rule (2) he would be liable to. such costs as the Court might award and would be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. Since it was considered that the use of the word 'withdrawal' in relation to both the categories of withdrawals led to confusion, the rule was amended to avoid such confusion. The relevant part of rule 1 of Order XXIII of the Code now reads thus:-

"Rule 1. Withdrawal of suit or abandonment of part of claim--(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

** * **

(3) Where the Court is satisfied,--

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

6. It may be noted that while in sub-rule (1) of the former rule 1 of Order XXIII of the Code the words 'withdraw his suit' had been used, in sub-rule (1) of the new rule 1 of Order XXIII of the Code, the words 'abandon his suit' are used. The new sub-rule (1) is applicable to a case where the Court does not accord permission to withdraw from a suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. In the new sub-rule (3) which corresponds to the former sub-rule (2) practically no change is made and under that sub-rule the Court is empowered to grant subject to the conditions mentioned therein permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) of the new rule 1 of Order XXIII of the Code provides that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he would be liable for such costs as the Court might award and would also be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

7. The Code as it now stands thus makes a distinction between 'abandonment' of a suit and 'withdrawal' from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission, referred to in sub-rule (3) of rule 1 of Order XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying rule 1 of Order XXIII of the Code is that when a plaintiff once

institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. Invito benificium non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will loose 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 rounded 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.

8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a

High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated in Daryao and Ors. v. The State of U.P. and Ors., [1962] 2 S.C.R. 575 in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Article 32 of the Constitution of India because in such a case there has been no decision on the merits by the High Court. The relevant observation of this Court in Daryao's case (supra) is to be found at page 593 and it is as follows:

> *"If the petition is dismissed as with- drawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other."*

9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying rule 1 of Order XXIII of the Code should be extended in the interests 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 a 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 of India since such withdraw- al does not amount to res judicata, the remedy under Article 226 of the Constitution of India 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. In the instant case the High Court was fight in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn

without permission to file a fresh petition. We, however. make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental fight guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We however leave this question open.

7. Issue which was posed in *Sarguja Transport Service* (supra) was the effect of the withdrawal of the writ petition filed under Article 226 of the Constitution of India without permission of the High Court to file a fresh petition. The Hon'ble Supreme Court after having framed the question as to whether the petitioner after withdrawing the writ petition filed by him in the High Court under Article 226 of the Constitution of India without permission to institute a fresh petition can file a fresh petition in the High Court under that Article, after consideration of relevant provisions of law as quoted herein above, has held that fresh writ petition is not maintainable in respect of the same subject matter if the earlier writ petition had been withdrawn without permission to file a fresh writ petition.

8. In the present case, it is noticed that the WP(C) No. 194 (AP)/2019, filed by the writ petitioner was withdrawn on 22.07.2019 without any leave being granted by this Court to file a fresh writ petition. The WP(C) No. 194 (AP)/2019 have not been annexed in the present writ petition by the writ petitioner. However, the submission made by Mr. D. Soki, learned Additional Senior Government Advocate that the order impugned in WP(C) No. 194 (AP)/2019 was the "Notice of Intention to Terminate" dated 13.05.2019, issued by the Commissioner, Power, Government of Arunachal Pradesh, Itanagar which again is the subject matter of the present writ petition have not been disputed by the learned counsel for the petitioner.

9. For the reasons and discussions made herein above, and, in view of the ratio laid down by the Hon'ble Supreme Court in the case of *Sarguja*

Transport Service Vs. State Transport Appellate Tribunal, Madhya Pradesh, Gwalior and Others reported in *(1987) 1 SSC 5*, I am of the view that the present writ petition would not be maintainable in the absence of leave being granted by this Court in WP(C) No. 194 (AP)/2019 to file a fresh writ petition challenging the same impugned "Notice of Intention to Terminate" dated 13.05.2019.

10. The writ petition stands dismissed as not maintainable.

JUDGE

Jumbi