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Central Administrative Tribunal
Principal Bench

RA No. 133/2003 in
OA No. 125/2002

New Delhi this the 16th day of October, 2003.

Hon'ble Mr. Shanker Raju, Member (J)

S.R. Korada - Applicant
(By Advocate Shri Kumar Parimal)

- Versus -

Union of India & Anr. - Respondents
(By Advocate Shri N. S. Mehta)

O R D E R

Applicant, a Scientist 'C' working in RDI Division in Department of Scientific and Industrial Research was transferred from CDI to Adviser KVS, approached this Court in OA-2478/2001. By an interim order dated 28.8.2001 transfer was kept in abeyance. Accordingly respondents issued office order dated 27.9.2001, keeping in abeyance the transfer of applicant.

2. By an order dated 17.12.2001 in OA-2478/2001 on instructions from the client learned counsel of applicant sought permission to withdraw the OA, which was allowed and OA was dismissed as withdrawn, with ^{out} liberty to assail the cause of action in fresh proceedings. Resultantly, interim orders were also vacated.

3. Applicant's transfer which had been kept in abeyance on 27.9.2001 was revived by an office order dated 10.1.2002 by the respondents which led to filing of OA-125/2002.

4. By an order dated 15.1.2002 with the following observations OA was dismissed as hit by the provisions of

res judicata:

"I have considered the matter. It would appear, prima facie, that the applicant has a case, as his being an agricultural scientist transferring him to engineering division would be utilising his services in a field, which is not in his speciality. The fact, however, is that the applicant had filed an earlier OA 2478/2001 challenging the order dated 27.9.2001 posting him from RDI Division to Adviser (KVS) but the same has been withdrawn without grant of any liberty for agitating the matter once again. The order impugned in that OA had been held back as an interim relief, but with the disposal of the OA by withdrawal of the same by the applicant, the interim order also should be vacated. The respondents have passed this order giving effect to the earlier transfer which have been kept in abeyance in terms of the interim directions. What the respondents have done is only giving effect to the earlier order dated 27-9-2001, as the challenge against the said order has been withdrawn by the applicant. Applicant is seeking its revival by this OA. The matter is clearly hit by the principle of res-judicata and cannot be agitated at this stage. The OA therefore, fails and is accordingly dismissed.

5. Applicant approached High Court of Delhi in CWP No.1461/2002 wherein by the following order dated 19.3.2002 the writ petition was allowed and the order of the Tribunal was set aside:

"Keeping in view the fact that earlier O.A. was withdrawn and in view of the decisions of the Apex Court, particularly, in Krishan Lal v. State of J & K reported in (1994) 3 SCC 433, we are of the opinion that principle of res judicata would not apply in this case.

Writ petition is therefore allowed. Impugned order is set aside.

We, however, make it clear that we have not gone into the merits of the case. Parties shall appear before the learned Tribunal on 8th April 2002."

6. On remand back of the case the same was heard afresh and with the following directions/observations OA was dismissed as not maintainable:

"9. The impugned order dated 10.01.2002 (at Annexure A-1) reads as under:-

"Office Order"

Office order of even number dated 27th September, 2001 through which transfer of Dr. S.R. Korada (Shri Korada Srinivas Rao) Scientist 'C' from RDI Division to Adviser (KVS) was kept in abeyance is withdrawn with immediate effect. Consequently, Shri Korada Srinivasa Rao, Scientist 'C' should report for duty to Adviser (KVS)

DSIR through Shri R.R. Abhyankar, Scientist 'G' with immediate effect.

Perusal of the above makes it evident that the Deptt. had issued an earlier order on 27.9.2001, which has been referred to by the respondents at Annexure R-1. The order is as follows:

"Office Order"

In pursuance of interim order of dated 21st September, 2001 in O.A. No.2478, filed by Dr. S.R. Korada Scientist 'C', the Central Administrative Tribunal, Principal Bench, New Delhi, Office order of even number dated 28th August, 2001, in so far as relates to transfer of Dr. S.R. Korada, Scientist-C from RDI Division to Adviser (KVS) is kept in abeyance with immediate effect. Consequently, he should report back to RDI Division with immediate effect, until further orders.

The said order has been issued in pursuance of the Tribunal's status quo order dated 21.9.2001 in OA 2478/2001, filed by the applicant, against the earlier transfer. Subsequently, the OA No.2478/2001 has been dismissed by me as having been withdrawn by the applicant. My order dated 7.12.2001, reads as below:

"Shri Parimal, upon instructions from his client prays for permission to withdraw the OA. Shri N. S. Mehta learned Sr. counsel states that interim orders have to be vacated. As the learned counsel for the applicant prays for permission to withdraw the OA, the same is granted. The OA is dismissed as withdrawn. Interim orders are vacated."

I note that no liberty has been granted while dismissing the OA as withdrawn, to file a fresh OA on the same issue or to revive it. Obviously the cause of action in OA 2478/2001 has abated and the respondents have given effect to their earlier order held in abeyance by the order dated 27.9.2001. This order does not give effect to any fresh cause of action and the OA is therefore not maintainable.

8. In his pleadings the applicant has also referred to OA No.3391/2001, filed by him challenging the chargesheet issued to him. The same, however, has no relevance to the issue in this case and will be disposed of separately.

9. OA in the above circumstances fails and is accordingly dismissed. No costs."

7. Applicant approached against the aforesaid order High Court of Delhi in CWP No.2549/2003, wherein at the show cause notice stage, following orders have been passed:

"One of the contentions urged by learned counsel for the petitioner is that despite order dated 19 March

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2002 passed in CWP No.1461/2002, vide the impugned order the Tribunal has taken the same view, which was not approved by this Court. Learned Counsel states at the Bar that order dated 19 March 2002 was duly brought to the notice of the Tribunal but somehow it has escaped the notice of the Tribunal.

Learned counsel prays that hearing in that matter may be held over to enable him to move an appropriate application before the Tribunal.

As prayed, list on 31 July 2003."

The above CWP was disposed of with the following order on 12.9.2003.:

"It is pointed out by learned counsel for the petitioner that the review application filed against order dated 24 March 2003, impugned in this petition, is now coming up for consideration on 1 October 2003.

In view of the fact that a review application against the order impugned in this writ petition, has been filed and notice has been issued to the respondents, we feel that there is no point in keeping this writ petition pending for awaiting the decision in the review application, as prayed by learned counsel for the petitioner.

8. Learned counsel for review applicant Sh. Kumar Parimal adduced lengthy arguments by contending that once the High Court has observed that principle of res judicata could not have been applied. The Tribunal has dismissed the OA vide order dated 24.3.2003 without going into the observations of the High Court and to this effect there is an error apparent on the face of the record that decision is per incuriam.

9. On the other hand, respondents' counsel Sh. N. S. Mehta, took a preliminary objection as to maintainability of review. Taking resort to Order 23, Rules (3) and (4) of CPC it is contended that though res judicata does not apply to the present case but as applicant has abandoned his claim by withdrawing the OA without any permission sought from the Court he is precluded from instituting the aforesaid OA, which rests upon the same subject matter and the claim raised in the earlier OA.

10. It is further stated by Sh. Mehta that a review cannot be maintainable on an erroneous view taken in law by the Court. The avenue of review cannot be used to re-agitate the matter.

11. In the rejoinder review applicant denies the preliminary objection and stated that as the High Court had accorded liberty to applicant to file review and as notices have been issued on review it was the intention of the High Court while setting aside the order to re-consider on merits by this Court and it cannot be dismissed on maintainability.

12. Moreover, by referring to the decision of the Apex Court in L. Chandra Kumar v. Union of India & Others, 1995 (2) SLJ 27, it is contended that once a direction is given by the High Court vide order dated 19.3.2002, the matter should have been heard on merits.

13. I have carefully considered the rival contentions of the parties and perused the material on record.

14. Earlier applicant without seeking any liberty withdrew OA-2478/2001 where there has been a challenge to the transfer order.

15. Subsequently the Tribunal in its order dated 15.1.2002 dismissed the case as barred by res judicata. On setting aside of the above order by the High Court vide its order dated 19.3.2002 the matter has been listed before the Tribunal for hearing. From the aforesaid it can be legally inferred that res judicata would not apply to the facts and circumstances of the case as the issue between the parties has not been finally adjudicated in OA-2478/2001.

16. A review as per Section 22 (3)(f) of the Administrative Tribunals Act, 1985 is maintainable only on the ground of any error apparent on the face of the record and also on discovery of new material which was not in possession of the contesting parties even after exercise of due diligence. It is also settled position of law that a mistake as referred to above should strike on the face of it and would not require any long drawn

process to unearth it. A review cannot be used to re-agitate the matter or re-argue the same, as in appeal. The aforesaid conclusion is well supported by the following decisions:

- i) Chandra Kanta & Anr. v. Shaik Habib, AIR 1975^u SC 1500^u.
- ii) Meera Bhanja v. Nirmala Kumari Choudhury, AIR 1995 SC 455.
- iii) Subhash v. State of Maharashtra, 2002 (1) SC SLJ 28.

17. The order passed by the Tribunal on 24.3.2003 though not specifically taken into consideration the decision of the High Court, wherein the matter has been observed not to be hit by the doctrine of 'res judicata' but yet the OA was not dismissed for as barred by res judicata. The Tribunal had resorted to the provisions of Order 23, Rules (3) and (4) which are applicable as to the maintainability of OA and an estoppel to applicant precludes him from raising the same grievance and cause of action which had been part of the earlier OA. In absence of withdrawal with liberty to file a fresh proceeding the present review cannot be entertained. Order 23 (XXIII), Rules (3) and (4) are reproduced below:

"(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 the 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."

18. If one has regard to the above, when a petitioner withdraws the claim without permission referred to in sub rule (3) *ibid* he is precluded from instituting any fresh suit in respect of such matter or the claim.

19. Having regard to the above in OA-2478/2001 applicant had impugned his transfer order effected in August, 2001. The aforesaid order was kept in abeyance in view of the order passed by the Tribunal staying the operation. What has been issued vide impugned order dated 10.1.2002 is revival of order dated 27.9.2001 in so far as it gives effect to the transfer of applicant. As by way of challenge to order dated 10.1.2002 the order of transfer issued earlier had been assailed once applicant withdraws the OA on the cause of action of his transfer without any permission and *liberty* of the Court to institute fresh proceedings, now assailing the same order of transfer precludes him from maintaining the fresh OA.

20. The Tribunal on the aforesaid doctrine and provisions in CPC held the OA being not maintainable as the order passed does not give effect to any fresh cause of action.

21. I do not find any error apparent on the face of record to warrant any interference in the order passed.

22. The decision of the High Court was taken into consideration impliedly by not holding maintainability of the OA in view of the doctrine of *res judicata* but independently of it, as nothing precludes the Tribunal

from considering the provisions of law, in so far as maintainability of the proceedings is concerned. The same have been resorted to and as in view of Order 23 Rules (3) and (4) of the C.P.C. OA is not maintainable the same has been held to be non-maintainable, with the result OA was dismissed. The aforesaid decision is neither per incuriam of the decision of the High Court nor suffers from any legal infirmity. Moreover, it is pertinent to state that the High Court has not directed any course of action for disposal of the RA and accordingly the RA is being disposed of strictly in accordance with rules and law on the subject.

23. As the scope and ambit of the RA is limited, finding no error apparent on the face of record, the RA is dismissed.

S. Raju
(Shanker Raju)
Member (J)

'San.'