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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH:NEW DELHI

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R.A. 302 of 1994 in O.A. No.187 of 1990

Dated New Delhi, this 8th day of February,1995

Hon'ble Shri J. P. Sharma,Member(J)
Hon'ble Shri B. K. Singh,Member(A)

Union of India, through
Divisional Personnel Officer
Northern Railway
Moradabad.(U.P.) ...Review Applicant

(By Advocate: Shri R.L. Dhawan)

Versus

Shri S. K. Gupta
S/o Shri Gauri Shankar Agarwal
Assistant Station Master
Pilkhuwa N.R. Moradabad Division
P.O. Pilkhuwa
Dist. Ghaziabad
U.P. ...Respondent

By Advocate: Shri O. N. Moolri

JUDGEMENT

Shri B. K. Singh,M(A)

This R.A. has been filed against the order dated 5.8.94 in O.A. No.187/90. It is an interlocutory order passed ex-parte after hearing the learned counsel for the applicant when none was present on behalf of the respondent . Shri R. L. Dhawan,learned counsel for the respondent appeared when the court was rising and the order had been dictated in the open court.

2. The R.A. lies under the provisions of order 47 Rule 1 read with Section 114 of the CPC on the following grounds:

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(i) An error apparent on the face of the record. The error can be factual or legal. This should stare one in the face without needing any elaborate arguments to establish the same;

(ii) discovery of a new fact or evidence which can materially change the ratio of the judgement and which was not within the knowledge of the review applicant when the order was made; and

(iii) Any other sufficient or reasonable cause analogous to what has been mentioned in (i)&(ii) above.

3. It was argued by the learned counsel for the applicant that the factum of delay is admitted and that the cost was imposed because the right of the respondent to file a reply had already been forfeited when the reply was filed in 1992. A M.P. for condonation of delay was moved and the Co-ordinate Bench of this Tribunal passed the order taking into consideration the reply filed in 1992. The learned counsel for the respondent rebutted this argument and said that there is an error apparent on the face of the record because the Division Bench passed the order under the impression that the counter reply was being filed on 13.7.94. But in reality, the reply had been filed as back as 1992. The M.P. for condonation of delay was still under consideration when this order imposing the cost was passed. The normal procedure should have been to condone the delay and to take the reply filed in 1992

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on record. This unfortunately was not done and the M.P. filed by the applicant for condonation of delay is still pending and there are no orders to the effect that the M.P. /delay was condoned. regarding condonation of/.A perusal of the order of the Division Bench dtd.13.7.94 clearly indicates that the impression which the Division Bench had was that the reply was being filed on 13.7.94 and it was not mentioned by the learned counsel for the original applicant that the reply was filed in 1992 and the Division Bench also inadvertently did not peruse the record to find out the facts in that regard. The order is quoted below:

> "The respondents filed their reply at a very late stage, i.e. on 13.7.94. They moved an application for condonation of delay."

The above sentence indicates that there is an error apparent on the face of the record. The order further mentions that the respondent moved an application for condonation of delay. There is no order regarding taking of the counter on record and the disposal of the M.P. filed in this regard. The interlocutory order, therefore, suffers from these glaring infirmities. The subsequent order dated 1.9.94 clearly indicates that Registry was directed to place reply and the M.P. for condonation of delay on record for its consideration and the case was listed for considering the matter regarding the condonation of delay. The learned counsel for the original applicant only argued that there cannot be any

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review against the interlocutory order. A perusal of the CPC will indicate that order XXXIX Rule 4 goes against the contention of the learned counsel for the original applicant. It lays down as follows:

"Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:"

A proviso was added to this rule by Amendment Act,1976 with effect from 1.2.77. It reads as follows:

"**Provided** that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party."

4. The provisos are absolutely clear and unambiguous. The interlocutory order was passed without hearing the opposite party or without giving any notice to him and as such this interlocutory order cannot be sustained on grounds of an error apparent on the face of the record and also on ground of ex-parte order granted on a wrong impression that the counter reply was being filed on 13.7.94 whereas the fact is that the reply was filed in 1992 with a M.P. for condonation of delay which ought to have been considered and on which both the parties should

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have been heard before passing this interlocutory order and thus this order cannot be sustained on ground of first proviso to Rule 4 of Order XXXIX. The second proviso is also relevant since the respondent was not given an opportunity of being heard and the order was passed ex-parte.

5. Even if the order is served on the respondent, the money is not to be realised from the Public Exchequer and the responsibilities will have to be fixed on an individual officer and it has also been stipulated that it should not only be realised from them but disciplinary action should also be taken against them. Such an interlocutory order will cause undue hardship to the officers in the Railway Administration behind whose back this order has been passed. Admittedly they have not been heard and no opportunity had been given to them to explain the reasons for delay. If the right to file the counter was forfeited, the matter should have been heard and rival contentions of the parties should have been taken for deciding the OA without a counter reply and without a rejoinder, but in the interest of justice, it is necessary to dispose of the M.P. for condonation of delay and to take the reply filed in 1992 on record granting the applicant time to file the rejoinder so that the pleadings are complete and the O.A. is finally heard and disposed of.

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6. In the light of the foregoing observations, the interlocutory order passed on 5.8.94 is recalled.

(B. K. Singh)
Member(A)

(J. P. Sharma)
Member(J)

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