CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 56/2010

Wednesday, this, the 13th day of July, 2011.

CORAM

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms. K NOORJEHAN, ADMINISTRATIVE MEMBER

Lissy John,
W/o John David,
Accountant,
O/o the Principal Chief Controller of Accounts
(Zonal Accounts Office),
Central Board of Direct Taxes,
Cochin-682 018. ....Applicant

(By Advocate Mr TC Govindaswamy)

v

1. Union of India represented by the
Secretary to Government of India,
Ministry of Finance, (Department of Expenditure),
New Delhi.

2. The Controller General of Accounts,
Ministry of Finance, (Department of Expenditure),
Lok Nayak Bhavan, Khan Market, New Delhi.

3. The Principal Chief Controller of Accounts,
Central Board of Direct Taxes,
9th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi-3. ....Respondents

(By Advocate Ms Deepthi Mary Varghese)

This application having been finally heard on 5.7.2011, the Tribunal on 13.07.2011 delivered the following:

ORDER

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER

The grievance of the applicant in this case is non-feasance on the respondents in considering the applicant for promotion to the post of Senior Accountant from the time it was due has caused her substantial prejudice and

irreparable damages and monthly recurring loss.

2. The applicant was initially appointed as a Lower Division Clerk in the organised accounts cadre on 9.12.1996. Her cadre is governed by the Central Civil Accounts Service (Group'C') Recruitment Rules, 2000. 70% of the post of Accountants, as per the recruitment rules, is filled up by direct recruitment through Staff Selection Commission while 25% shall be filled up by promotion. The remaining 5% is to be filled up by Limited Departmental Competitive Examination of LDCs. According to the applicant, she was entitled to be considered for promotion as Accountant against 25% quota after completion of 5 years of her initial tenure as LDC. Thus, her entitlement to be considered for promotion fructified from 2001 onwards.

3. Since the applicant was not earlier promoted as Accountant, she had initially filed O.A.237/2006 praying for a declaration that vacancies in the cadre of Accountants are to be filled up from among different sources (direct recruitment and promotion) by applying vacancy based roster, and not by applying post based roster. During the pendency of the aforesaid application before this Tribunal, the respondents had come up with a promotion order whereby as many as 156 individuals including the applicant came to be promoted. There was one more promotion order of 141 more individuals. Thus, there were as many as 297 promotions from LDC to Accountants.

4. In view of the order promoting the applicant vide order dated 22.6.2007, the applicant volunteered to have O.A.237/2006 closed and accordingly vide order dated 9.10.2007, the following. Order was passed:

"When the matter came up for hearing, counsel ~~counsel~~ for the applicants submitted that the reliefs prayed for have been granted and that the O.A may be closed. Learned counsel for respondents has also submitted that the applicants 1 to 4 have promoted and the 5th applicant will be considered for promotion in his turn. An amendment to that effect has also been made making the promotion vacancy based.

2. In view of the above submission made by learned counsel on both sides, the O.A is closed as infructuous. No costs."

5. Subsequently, taking over the post as Accountant, the applicant had made a number of representations as could be seen from Annexure A-4 series. In these representations, the applicant narrated the fact of her having been promoted as Accountant and also that of another promotion order whereby 141 LDCs were promoted under the 25% promotion quota and submitted that had the quota system been implemented, she would have been promoted to the post of Accountant much prior to 22.6.2007. Hence she had made the request for review of the promotion order from retrospective date.

6. As no communication was received to any of these representations, the applicant has moved this O.A seeking the following reliefs:

(i) Declare that the applicant is entitled to be considered for promotion as an Accountant in the scale of pay of Rs.4500-7000 from the date from which her promotion fell due,, applying the ratio mentioned in col.11 of Schedule to A1 against vacancies;

(ii) Direct the respondents to ante-date the applicant's date of promotion to be given effect to from the date from which the promotion actually fell due and in preference to the deputationists who were appointed against thee vacancies;

(iii) Direct the respondents to grant the applicant all consequential benefits of arrears of pay and allowances and also the benefit of seniority applying the 'quota-rota' rule."

7. Respondents have contested the O.A. According to them, the O.A is totally illconceived, not challenging any specific order and the O.A is an abuse of process of this Court. They also stated that 70% of the post of Accountant are tenable by direct recruitment failing which by deputation. All deputation made hitherto were only against the lawful quota of direct recruitment and no deputation has taken place against the promotee quota of 25%. According to the respondents, such deputationists who were earlier taken on deputation on various years prior to the promotion of the applicant and others similarly situated, came to be absorbed with effect from 2008. Thus according to the respondents in no way would the applicants be affected since the absorption of the deputationists is posterior the date when the applicant was promoted in June, 2007 as Accountant.

8. The respondents have also pleaded that the case of the applicant is restricted by resjudicata and the same precludes the applicant from staking the same claim, through a different O.A.

9. Applicant has filed rejoinder reiterating her stand as contained in the O.A.

10. Counsel for the applicant argued that the case cannot be hit by resjudicata because the cause of action in both the cases is entirely different. According to the counsel for the applicant, the present O.A arises on account of the fact that the respondents tried to justify the deputations during the period prior to 2007 though these persons were absorbed only in 2008. The repercussion of such deputation under one mode of recruitment when other mode is not pressed into service at the material point of time, would ultimately imbalance the seniority position of the applicants qua the deputationists. Since the deputationists on absorption count their seniority from initial date of their deputation or from the date they were

holding analogous post in the parent department, according to the counsel for applicant, the applicants would be put to great injustice inasmuch as, one part of the recruitment gets filled up (direct recruitment/deputation) from 2000 to 2007 while the other source of recruitment is kept high and dry (promotion) and the same has adverse effects. The counsel for the applicant further argues that the earlier recruitment rules did indicate that 70% of the posts were to be filled up by D.R, while 30% of posts pertained to promotion/LDCE. The term post has been construed as post and not as vacancies. By a subsequent decision, the DoPT has come out with an order that all the vacancies shall be rotated in the ratio of direct recruitment and promotion as the case may be. The claim of the applicant's counsel is that the error of filling up of the vacancies under one recruitment source D.R/Deputation, without simultaneously resorting to the other method of recruitment (i..e by promotion), which affects the career prospects of the applicant should be rectified by advancing the date of promotion of the applicant. He had also referred, in respect of the doctrine of re judicata a division by the High Court which has referred to the earlier decision of the Apex Court.

11. Counsel for the respondents argued that resjudicata ~~stalls~~ shares at the face of the applicant. He had stated that having taken over the promotion in 2007, the applicant cannot be permitted to raise the same issue under one pretext or the other. Enlargement of prayer comes within the mischief of resjudicata.

12. Arguments were heard and documents produced. Certain fundamental legal issues should be addressed first. When the applicant claimed promotion in the earlier OA and the same having been granted, having allowed the OA to be closed, vide order dated 09-10-2007, whether the applicant could be permitted to agitate the issue of promotion, now with retrospective effect. Respondents

contend that the applicant has abandoned his claim earlier and when he did not seek any permission of the Tribunal to file a fresh OA he cannot be permitted to agitate the same issue, with an enlargement of relief. Applicant's claim is that the earlier OA was filed on a different cause of action, while the present OA is on a different cause of action.

13. The counsel tried to justify that the case cannot fall under the doctrine of res-judicata nor under the provisions of Order XXIII Rule 1. The cause of action is entirely different though the subject matter may be the same. He argued that the earlier OA was challenging a particular order, while the latter is against an order which has been issued by the respondents later on. The restrictions under Order XXIII would come only when the cause of action is the same and not the subject matter. Respondents however, relied upon the decision of the High Court which had taken into account the decision of the Apex Court in the case of ***Sarguja Transport Service.***

14. Thus, it is to be seen as to what is the definition of the cause of action and that of subject matter. The term 'cause of action' has been interpreted in many a decision of the Apex Court.

15. In **Gurdit Singh vs Munsha Singh** (1977) 1 SCC 791, the Apex court observed:

> *41. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential*

facts without the proof of which the plaintiff must fail in his suit.

16. In **State of Rajasthan vs Swaika Properties** (1985) 3 SCC 217, the Apex Court has held as under:-

8. The expression "cause of action" is tersely defined in Mulla's Code of Civil Procedure:

"The 'cause of action' means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court." In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant.

17. In **Bloom Dekor Ltd vs Subhash Himatlal Desai** (1994) 6 SCC 322, the Apex Court explained the term 'cause of action' as hereunder:

By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court,

18. In **South East Asia Shipping Co. Ltd., vs Nav Bharat Enterprises (P) Ltd** (1996) 3 SCC 443, the Apex Court has stated as under:-

3. It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise.

19. Giving out the dictionary meaning of the term 'cause of action', the Apex court has stated in **Navinchandra vs Majithia vs State of Maharashtra** (2000) 7 SCC 640 as under:-

> *18. In legal parlance the expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person. (Black's Law Dictionary)*
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> *19. In Stroud's Judicial Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment.*
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> *20. In "Words and Phrases" (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts which give a party a right to judicial interference on his behalf.*

20. Thus, a mere order alone cannot mean a cause of action. The cause of action is a bundle of facts and thus, it is intertwined with the term 'subject matter' and as such, a finer difference as attempted to cull out by the applicant cannot change the situation. Again, the order under challenge was issued prior to the voluntary closure of the OA and in fact it is this order that satisfied the applicant when he was earlier aggrieved with another order. Had the applicant been aggrieved by the impugned order of promotion which was available at the time of pendency of the earlier OA, he ought to have agitated against the same by due amendment to his earlier O.A.

21. Another point canvassed was that by the closure of earlier case, there was no abandonment of the claim or part of it. This part has to be considered with reference to certain decided cases.

22. In **Sarguja Transport Service vs S.T.A.T.** (1987) 1 SCC 5, the Apex Court has stated as under:-

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 beneficium 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 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. (Emphasis supplied)*

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.

23. In **Ramesh Chandra Sankla vs Vikram Cement**, (2008) 14 SCC 58, the Apex Court has held as under:-

61 .....Normally, a court of law would not prevent him from withdrawing his petition. But if such withdrawal is without the leave of the court, it would mean that the petitioner is not interested in prosecuting or continuing the proceedings and he abandons his claim. In such cases, obviously, public policy requires that he should not start a fresh round of litigation and the court will not allow him to re-agitate the claim which he himself had given up earlier.

62. In Sarguja Transport Service, (1987) 1 SCC 5, extending the principles laid down in Daryao, Venkataramiah, J. (as His Lordship then was) concluded:

"9. ... we are of the view that the principle underlying Rule 1 of Order 23 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 withdrawal 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."

24. The above would go to show that once on a 'subject matter' a petition filed is withdrawn without the leave of the court, there is no further petition on the same subject. By claiming retrospective promotion, what is sought for is only an enlargement of the same claim as in the prior O.A. Thus, the applicant cannot be permitted to file this OA and the respondents are fully right in their contention in this regard.

25. Counsel for the applicant argued that the question would not have cropped up but for the fact that one source of recruitment had been adopted, while the promotion source had been kept untouched for six years and since seniority is based on the date of appointment/promotion, the applicant's seniority would be detrimentally affected by the deputationists who would steal an edge over the applicants. This is a consequential action and the cause of action in this regard would arise at a later point of time when the seniority list is prepared. Again, the counsel for the respondents submitted that since the absorption of the deputationists is posterior to the date of promotion of the applicant, the same should not unduly affect the prospect of the applicant. In any event, the cause of action for claiming seniority has not arisen so far. It is open to the applicant to challenge the same on valid grounds as and when the situation arises.

26. With the above observations, **the OA is dismissed**. No cost.

K NOORJEHAN
ADMINISTRATIVE MEMBER

Dr K.B.S.RAJAN
JUDICIAL MEMBER

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