

**Central Administrative Tribunal
Principal Bench, New Delhi**

Order Reserved on: 05.05.2016
Order Pronounced on: 03.06.2016

**RA No. 256/2015
OA No. 622/2014**

**Hon'ble Dr. B.K. Sinha, Member (A)
Hon'ble Mrs. Jasmine Ahmed, Member (J)**

Union of India
Through
The Secretary,
M/o External Affairs,
South Block, New Delhi-110001 - Review Applicant

(By Advocate: Mr. H.K. Gangwani)

VERSUS

Chander Bhan,
R/o D-108, Sector-IX,
Vijay Nagar, Ghaziabad -Respondent

(Respondent in person)

O R D E R

Dr. B.K. Sinha, Member (A):

The instant RA has been filed under Section 22(3)(f) of Administrative Tribunals Act, 1985 read with Rule 17 of CAT (Procedure) Rules and Order 47 Rule 1 & 2 of CPC seeking review/modify of the order of this Tribunal dated 22.07.2015 in OA No. 622/2014.

2. The review applicant (respondent in the OA) has principally taken six grounds for his Review Applicant. In the first instance, contrary to the respondent's

(applicant in OA) submission that copy of the below benchmark ACRs was not communicated to him and were supplied to him as late as on 27.12.2013 pursuant to his request under the RTI Act, 2005; the respondent was well aware all along of all the grading in his ACRs in 2010 itself for the period 2003 to 3/2009 as the same was annexed in his letter to the Foreign Secretary in October, 2010 and also in his OA No. 622/2014. The respondent had been informed of the adverse remarks in his ACRs by the review applicant Ministry vide letter dated 24.05.2007 for the period from 12/2005 to 03/2006 with option to make representation in the case, if so desired and for the period from 11/2006 and 03/2007 vide letter dated 02.07.2007. The respondent had acknowledged the receipt of both the afore letters and even represented to the review applicant Ministry to expunge the adverse entries made in his ACRs. In the second instance, the review applicant Ministry undertook a comprehensive examination of the adverse remarks for the period December, 2005 to March/2006 and November/2006 to March/2007 and upon objective assessment of the two ACRs, had decided to expunge 13 out of 19 adverse remarks in the respondent's ACR for December/2005 to March/2006 and 3 out of 11 from

November/2006-March/2007. The other adverse remarks, which were retained in his ACR, were communicated to the respondent vide order dated 18.11.2008. In the third instance, the respondent (original applicant in OA) had approached this Tribunal vide OA No. 3076/2009 with request to quash the said OM dated 18.11.2008 of the review applicant Ministry. This plea had been turned down by this Tribunal vide its order dated 09.11.2009 holding that *there is very little scope for judicial review. Once the adverse remarks cannot be stated to be an outcome of malafides nor are against rules, it would be difficult to interfere in the matter.* The respondent has challenged the afore order of the Tribunal before Hon'ble High Court vide WP (C) No. 1653/2010. However, the Hon'ble High Court, vide order dated 05.07.2010, set aside the review applicant Ministry's order dated 18.11.2008 with direction to re-decide the statutory appeal filed by the petitioner (original applicant in OA) with reasons. In the fourth instance, the review applicant Ministry, after having examined the statutory appeal and contents of ACRs recorded for the period from 12/2005 to 03/2006 and 11/2006 to 03/2007, had found no grounds for justification for expunging the retained adverse remarks. This decision of the Ministry

had been duly conveyed to the respondent along with detailed reasons for retaining each of the adverse remarks vide order dated 20.09.2010. In the fifth instance, the review applicant had alleged that the respondent has concealed these vital facts that he had sought remedy by approaching this Tribunal vide OA No. 3076/2009 and Hon'ble High Court vide WP(C) No. 1653/2010 in 2009 and 2010 respectively. Therefore, the OA bearing no. 622/2014 was clearly hit by constructive *res judicata*. Thus, the original applicant had not approached with clean hands. The review applicant Ministry had already complied with the directions of the Hon'ble High Court of Delhi and also examined the representation of the original applicant to expunge the adverse remarks in his ACRs. In the sixth instance, the review applicant further submits that Government of India OM No. 21011/1/2010-Esst.A had been issued in April, 2010 while the DPC for the respondent had already held in May, 2009 and therefore, said OM could not have been applied retrospectively.

3. The respondent has filed a counter affidavit alleging that the RA has been filed just to delay the execution of the justice by the review applicant. The respondent in counter affidavit submits that adverse remarks were

communicated to him when the benchmark was nowhere in sight. In terms of DOPT OM dated 18.02.2008, the DPC may not feel itself bound by either of the grading in the matter, i.e. by the reporting or the reviewing officer. The issue, as per the respondent, is that whether the DPC after setting the benchmark and observing that certain parts of his ACRs being below benchmark, were conveyed the same to him as observed by the Tribunal in the matter of **Ashok Kumar Aneja vs. Union of India** (OA No. 24/2007 decided on 07.05.2008) and Hon'ble Supreme Court in the matter of **Dev Dutt vs. Union of India & Ors.** [(2008) 8 SCC 725). The respondent, while submitting in brief the back ground of ACRs, stated that the two DPCs for 2008-09 and 2009-10 had considered the same set of ACRs for seven previous years as against five previous years. The respondent further submits that the DPC for 2009-10 had recommended the review applicant for promotion, whereas the DPC for 2008-09 had not found him fit for promotion without recording any justification. This leads one to doubt the integrity of the DPC held for 2008-09. The respondent has further referred to the case of **D.K. Singh vs. Union of India & Ors.** (OA No. 311/2010 decided on 01.06.2010) to contend that in cases where the assessment of DPCs are

apparently in line with the grading in the ACRs, the DPC should appropriately substantiate its assessment by giving reasons as per office memorandum dated 18.02.2008. The DPC did not record its findings for not recommending the respondent for promotion. The respondent further submitted that the details of below benchmark ACRs were not communicated to him by the DPC as per the directions of the Tribunal in the case of **Ashok Kumar Aneja Vs. Unon of India** (supra) and the the Hon'ble Supreme Court in **Dev Dutt vs. UOI & Ors** (supra). The respondents also submitted that the two ACRs, i.e., 12/2005 to 03/2006 and 11/2006 to 03/2007 were never communicated to him by the DPC as per the decisions of Hon'ble Tribunal in **Ashok Kumar Aneja Vs. Unon of India** (supra) and the Hon'ble Supreme Court in **Dev Dutt vs. UOI & Ors** (supra). The respondent was asked to send his representation to the review applicant Ministry on email. The respondent also refers to the order of the Hon'ble High Court in WP(C) No.1653/2010 which was pleased to direct as under:-

“8. Thus, we dispose of the writ petition setting aside the order dated 18.11.2008, with a direction to the Appellate Authority to re-decide the Statutory Appeal filed by the petitioner and while so doing give reasons by dealing with the issues raised in the Appeal.”

The afore direction of the Hon'ble High Court itself is a stricture on the functioning of the review applicant Ministry. Despite the High court's direction to re-decide the issue while giving reasons, there was no change in the appellate authority's order dated 20.09.2010 compelling the petitioner (respondent herein) to represent against the order of the appellate authority. The respondent failed to pursue the matter as he was busy with his foreign posting and is not prepared to change his stand. The respondent has, therefore, prayed for dismissal of the Review Application.

4. The review applicant has also filed the rejoinder wherein he has reiterated the points already raised in the review application.

5. We have considered the pleadings of rival parties as also the documents adduced and the citations relied upon on either side and have patiently heard the arguments advanced by the parties.

6. The only issue to be considered by us in this matter is that whether the respondent (original applicant) has concealed the vital facts from the Tribunal in his OA and

has thereby obtained orders made on the basis of incorrect representation.

7. In this regard, we find that the scope of the review application has been defined in a landmark decision in **West Bengal & Ors Vs. Kamalsengupta & Anr.** [2008(8) SCC 612], the Honble Supreme Court after having considered the important decisions on the subject and defined the difference between the review and appeal, held as follows:-

“35. The principles which can be culled out from the above noted judgments are :

- (i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a Civil Court under Section 114 read with Order 47 Rule 1 of CPC.
- (ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.
- (iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.
- (iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).
- (v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- (vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger bench of the Tribunal or of a superior Court.

(vii) While considering an application for review, the Tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/Tribunal earlier.

In the instant case, the review has only been sought in this limited point. We are not going to permit re-argument of the case but consider that as to what extent the limited issue is substantiated.

8. As regards the issue that the order of the Tribunal dated 22.07.2015 has been passed in OA No. 622/2014 on the basis of inappropriate DoP&T OM dated 13.04.2010, can be better raised in appeal as the papers were there. Therefore, we confine ourselves only up to first issue regarding concealment of vital facts.

9. It is to be noted that the respondent (original applicant) in his communication dated 25.10.2010 addressed to the Foreign Secretary has submitted as under:-

“The DPC for the panel year 2008-09 ignored my empanelment without taking into consideration myh excellent ACRs for over 4 years as against adverse entries in the report for couple of months which were not even valid/admissible in terms of several of DOPT OM's and MEA Circulars – copies enclosed at page No.3 to 9. No action was also taken on my representation of 17.11.2009 to AS (AD) – copy enclosed at page No.10.”

The review applicant has also enclosed details of the ACRs from 2003 to 3/2009 to his Review Application as provided by the Ministry at the request of the respondent. Further, we find that vide communication dated 24.05.2007 (Annexure-III of the Review Application), the adverse remarks being communicated by one Debnath Shaw, which he seeks to get improved. At Annexure-IV, we find the communication dated 02.07.2007 containing the adverse entries in his ACRs for the period 12/2005 to 03/2006. Vide communications dated 12.06.2007 and 25.07.2007 (Annexure-V and Annexure-VI), we find the respondent representing to the review applicant Ministry to acknowledge the adverse entries made in both ACRs. i.e., 12/2005 to 03/2006 and 11/2006 to 03/2007 and there is even a detailed explanation towards adverse entries. In Annexure-VII, there is another communication dated 16.11.2008 from the said Debnath Shah, Joint Secretary (CNV) to the respondent that the Ministry had

undertaken a comprehensive examination of the adverse remarks in the ACRs of the respondent for the period December/2005 to March/2006 and November/2006 to March/2007 and decided to expunge 13 out of 19 adverse remarks while retaining others on record. In Annexure-VIII, there is an order dated 09.09.2009 in OA No. 3076/2009 holding that there was very little scope for judicial review as the representation of the applicant had been considered objectively. There is also a decision of the Hon'ble High Court of Delhi in WP(C) No. 1653/2010 (Annexure-IX) which we have already referred to. Annexure-X is the compliance made to the orders of the Hon'ble High Court after having re-examined the ACRs for the period from 12/2005 to March/2006 and 11/2006 to March/2007 and finding no grounds for expunging the retained adverse remarks. For the sake of greater clarity, we reproduce the decision of the appellate authority dated 20.09.2010 in respect of ACR of the respondent for the period 12/2005 to 03/2006 dated 20.09.2010 as under:-

“ACR for the period 12/05 – 03/06

The adverse remark about **Nature and quality of work** reads *“Through he is hard working, he does not take pains to learn the rules. He is very careless even in mentioning dates in the notes. He joined the*

Mission on 10.12.2006. This is not the first time he made mistake in date."

It was observed that Shri Chander Bhan's response with regard to above adverse remarks, submitted vide his representation dated 12.06.2007, reflects a casual attitude and a finger-pointing exercise on his part. His contention that *"All such errors are of routine nature....RO himself was found making such errors"* is unacceptable to the Appellate Authority, who finds no merit in expunging these remarks.

Another adverse remark recorded in the ACR referred to **knowledge of sphere of work** and reads *"He does not know the rules."*

The Appellate Authority observed that there are documented instances of Shri Chander Bhan himself admitting to be unfamiliar with the extant rules and regulations. Further, in his representation, Shri Chander Bhan sought to underline his performance in his previous deployments, which have no relevance to the period of the ACR in question. The Appellate Authority found no justification for expunction of the remark.

The adverse remark about **Decision making ability** reads "Very poor".

The Appellate Authority noted the fact that the Reporting Officer had highlighted two instances of the decisions taken by Shri Chander Bhan not being in consonance with the extant rules and regulations. It was noted further that Shri Chander Bhan's argument regarding his decision making ability during his stay in the Finance Division was irrelevant and without rationale. The Appellate Authority, therefore, decided in favour of retaining the remarks in the ACR.

With regard to **Ability to guide, inspire and motivate subordinate officials**, the adverse remark reads *"He cannot motivate subordinate officials. Also he cannot promote team spirit."*

The Appellate Authority noted that prior to recording this remark in Shri Chander Bhan's ACR, the Reporting Officer, in his official communication to the Ministry, had clearly reported an instance OF

Shri Chander Bhan misbehaving with his subordinates. In his communication, the Reporting Officer had mentioned that Shri Chander Bhan often created friction with his colleagues and subordinates in the Mission. Instead of refuting these adverse remarks in specific terms, Shri Chander Bhan generally mentioned in his representation that he had an encouraging attitude towards his subordinates. Recognizing the specific instances of Shri Chander Bhan's less than professional style of dealing with his colleagues and subordinates in the Mission during the period of the ACR, the Appellate Authority decided to retain the remarks recorded in the ACR.

10. Having objectively considered the afore issue, it clearly emerges that the respondent has concealed a certain vital facts from this Tribunal. He was bound to bring these facts to the notice of this Tribunal and has thereby obtained a decision in his favour. The respondent has also hidden from the Tribunal that he had already sought remedy by approaching this Tribunal and Hon'ble High Court in 2009 and 2010 respectively. Hence, the OA No. 622/2014 is hit by constructive res judicata. Now, we take some time to delve on the issue of constructive *res judicata*. In this regard, the Hon'ble Supreme Court in the case of **M. Nagabhushana vs. State of Karnataka & Ors.**, 2011(13) SCC 408 have held as under:-

"14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium'

which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet bis vexari, si constet curiae quod sit pro una eadem causa' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest."

11. In **Bihar State Government Secondary Teacher Association vs. Bihar State Education Service Association**, (2012) 11 SCALE 291, the Hon'ble Supreme Court have held as under:-

"44. This entire discussion leads us to only one conclusion that the learned Single Judge who heard the petition CWJC No. 10091/2006, which began the third round of litigation filed on behalf of the Bihar Education Service Association, had no business to re-open the entire controversy, even otherwise. The State Govt. had already passed a resolution dated 7.7.2006 after the order of this Court dated 19.4.2006. While examining the legality of that resolution (which was defended by the State Govt. at this stage before the learned Single Judge) the entire controversy was once again gone into. The law of finality of decisions which is enshrined in the principle of res-judicata or principles analogous thereto, does not permit any such re-examination, and the learned Judge clearly failed to recognize the same.

45. For the reasons stated above, these appeals (arising out of SLP Nos. 26675-76 of 2010) are allowed. The judgment and order passed by the Division Bench of Patna High Court in LPA No. 418/2009 and other LPAs dated 21.5.2010, and that of the learned Single Judge dated 31.10.2007

in CWJC No. 8679/2002 are set-aside and the said Writ Petition is hereby dismissed. Consequently the notification dated 19.11.2007 issued pursuant to the decision of the Single Judge will also stand quashed and set-aside. The State Govt. Resolution dated 7.7.2006 is upheld. The State shall proceed to act accordingly. I.A. Nos. 19-20/2011 are dismissed. As stated by Mr. Patwalia, learned senior counsel for the Appellants, the Appellants no longer press for the action for contempt arising out of CWJC No. 8679/2002. Contempt Petition Nos. 386-387/2011, will also accordingly stand disposed of, as not pressed.”

12. In view of the afore examination, we find that the respondent has indeed concealed the vital facts from this Tribunal. Had he disclosed these facts, the decision would have been otherwise. The respondent had also concealed the facts that he had already moved OA No. 3076/2009 with the same prayer and subsequently the Hon’ble High Court vide WP(C) No. 1653/2010. Therefore, we find that there is a substantive merit in the instant Review Application. Accordingly, we allow the Review Application. No costs.

(Jasmine Ahmed)
Member (J)

(Dr. B.K. Sinha)
Member (A)

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