

(2019) 03 CAL CK 0110
In the Calcutta High Court

Case No : Wp. Central Tribunal (WP.CT) No. 239 Of 2018

Union Of India And Others

APPELLANT

Vs

R.N.Roy

RESPONDENT

Date of Decision : 29-03-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 2 Rule 2

Citation : (2019) 03 CAL CK 0110

Hon'ble Judges : Sahidullah Munsh, J; Biswajit Basu, J

Bench : Division Bench

Advocate : V.D.Sivabalan, P.C.Das

Final Decision : Allowed

Judgement

Sahidullah Munshi, J

This writ petition is at the instance of Union of India and other authorities of Andaman & Nicobar Islands challenging an order dated 06.11.2017 passed by the Central Administrative Tribunal, Calcutta Bench at Kolkata in OA No. 351/1/2016 which was filed by the respondent, Shri. R.N.Roy. The short grievance of Union of India, the petitioner herein is that suppressing an earlier order passed by the Central Administrative Tribunal in OA No. 5/A&N/94 at the instance of Shri. R.N.Roy and others, the same petitioner/respondent obtained an order completely contrary to the orders passed in his earlier application which was confirmed upto the Hon'ble Apex Court. In the said order dated 08.12.1994 of the Tribunal in OA No. 5/A&N/94 it was held "in view of the above proposition of law laid down by the Apex Court, it will not be appropriate for us to disturb the seniority list of the applicants vis-à-vis others who had been regularly appointed prior to the regular appointment of the applicants in 1986-87." While disposing of the said OA No. 5/A&N/94 the Tribunal categorically dealt with the scope of the petitioners prayer for regularisation as agitated in their application filed before the Tribunal being OA No. 5/A&N/94.

A copy of the Original Application in OA No. 5/A&N/94 has been annexed to this writ petition and paragraph 4 (c) thereof discloses "that the applicant namely R.N.Roy was initially appointed on 23rd September, 1982. The applicant Jaichandran was initially appointed on and the applicant namely Shri Babu Yohannan was initially appointed as Junior Engineer on 17th January, 1983. The applicants namely R.N.Roy, Jaichandran and Babu Yohannan are being non-local candidates were given ad hoc appointment against the regular vacancy to the post of Junior Engineer." In paragraph 4 (e) of the said application it was stated that "by Office Order No.468 dated 21st May, 1986 the services of the applicants namely R.N.Roy, Jaichandran and Babu Yohannan were regularised with effect from 1st August, 1985, though the above said applicants are continuously working as Junior Engineer against the regular vacancy since 1982. The respondent authorities did not take any action to regularise the service of the applicant from their initial appointment only because the above said applicants are non-local candidates." In the said OA No. 5/A&N/94 the petitioners inter alia made following prayers:

"An order directing the respondent authorities to regularise the applicants in their respective posts with effect from the dates of their initial appointment thereby modifying the office order No. 768 dated 22.08.1986 and 468 dated 21st May, 1986 with all consequential benefits."

Such a disclosed grievance of the petitioners were inquired in detail by the Tribunal and, ultimately, by order dated 08.12.1994 the Tribunal dismissed the application. The finding arrived at by the Tribunal in the said OA No. 5/A&N/94 is relevant for our purpose, the same is set out below:-

"There can be no doubt that the order of 1980 issued by the Government of India, on the basis of which the applicants were all appointed on ad hoc basis being non-local candidates, and were regularised subsequently in 1985 and 1986, has already been struck down by the Tribunal in 1987. But so long as that order was in force, the respondent had to comply with the provisions thereof. On the basis of that Government of India order of 1980, the applicants could not have been appointed on regular basis in 1982, they being non-local candidates, and they accepted that appointment without any protest. They were regularised in 1985 and 1986. Even then they did not raise any objection and they accepted the position as it was. From the records we find that some of the applicants suddenly woke up and made their first representation in 1990 and some in 1992 and 1993. But if the applicant had any grievance against the order of 1980 on the basis of which they were appointed initially on ad hoc basis in 1982 and subsequently regularised in 1985 and 1986, their cause of action arose at the point of time. They did not do anything and suddenly in 1990 made their first representation. It is now well settled that by making repeated representations the period of limitation cannot be extended. Even otherwise, the said judgement of the Tribunal striking down the 1980 Government of India circular was delivered in 1987. Still the applicant kept silent and made their representation,

as we have already pointed out, only in 1990, and have filed this application before this Tribunal only in 1994 challenging the order of 1986 which is not permissible under the law." The operative part of the order however says "in view of what has been discussed above, we are unable to entertain the claim of the applicants which is hopelessly barred by the law of limitation. The application is accordingly dismissed but, however without any order as to costs."

This order of the Tribunal was carried to Hon'ble Apex Court by the respondent herein by way of a Special Leave Petition. Copy of which has been annexed to this writ petition at page 64. On 09.11.1995 the Hon'ble Apex Court directed for issuing notice. It is not disputed that the said SLP was dismissed subsequently which is apparent from the status report issued by the registry of the Supreme Court of India copy of which is annexed to this writ petition at page 66. The respondent has also placed before us a copy of the order dated 08.01.1998, passed by the Hon'ble Apex Court. The said order is set out below:

"The ground on which the Tribunal refused to interfere was the delay on the part of the petitioners to move in the matter. The Tribunal has made a mention about it in paragraphs 5, 6, 7 and 8. The Tribunal was not wrong in refusing to entertain the petition after such a long delay. We, therefore, dismiss the petition."

It may be mentioned that after the said OA No. 5/A&N/94 was dismissed and affirmed by the Hon'ble Apex Court by its order dated 08.01.1996, the respondent was promoted to the post of Assistant Engineer (Civil) and subsequently on 31.01.2016 the respondent has also retired from his service while working as Assistant Engineer (Civil) in APWD. The respondent for the second time filed an application before the Central Administrative Tribunal in 2012 which was registered as OA No. 87/AN/2012. By an order dated 18.12.2015 the Tribunal allowed the petitioner's prayer for withdrawal and dismissed the said original application with liberty to file afresh. On perusal of the said application being OA No. 87/AN/2012 it appears that the petitioner made the following prayer "To pass an order directing the respondent authorities particularly the respondent No.3 to grant the second financial up-gradation under ACP scheme to applicant notionally counting his initial date of appointment with effect from 23.09.1982 as have been counted in case of Shri. Ashis Ghose, Assistant Engineer (E&M), Smt. Been Bhaliya, Junior Engineer and Shri. Vijay Krishna Mondal, Draughtsman." We are surprised to note that after the prayer was made for withdrawal of the said application containing such prayer for grant of second financial up-gradation under ACP scheme the respondent in exercise of the leave granted by the Tribunal filed the third application before the Tribunal in which the impugned order has been passed. We have already quoted the prayer earlier made in the third application before the Tribunal. The prayer made in the third application appears to be completely different from the earlier original application being OA No. 87/AN/2012. The cause of action shown in third application appears to be completely different from that of the second application presented by the respondent which was sought to be withdrawn. If leave was

granted by Tribunal to maintain a separate application on the selfsame cause of action there can be no occasion for the respondent to file a separate application making different sets of prayer. In the third application we do not find anything about the ACP benefits rather the respondent in the third application sought to agitate the issue of regularisation of his service as Junior Engineer from the date of his initial appointment with effect from 23.09.1982, the prayer which was made in the first application and which stood dismissed on merit. This attempt made by the respondent, in our view, appears to be mala fide and he has done it deliberately to mislead the Court to get a favourable order suppressing all earlier order of dismissal. We deprecate such practice and we intend not only to disallow the prayers of the respondent we desire to impose exemplary costs upon the respondent for adopting such unfair means to get an order from the Court by suppressing material facts. In course of hearing the learned advocate appearing for the respondent drew our attention to page 62 of his third application before the tribunal filed in the year 2016 which in effect a representation of the respondent addressed to the Chief Engineer, Nirman Bhawan, APWD, Port Blair (Through proper channel) claiming benefits of second ACP as has allegedly been made available to some other persons by virtue of subsequent orders of the Tribunal. The learned counsel further draws our attention to page 64 of the said application before the Tribunal whereby the EA to Superintending Engineer forwarded the representation of the respondent to the Chief Engineer. Therefore, according to the respondent it is the department who has forwarded the respondent's representation for consideration and there is no wrong for the respondent to claim the benefits as per his representation. In our view, such a representation itself was not maintainable in view of the earlier developments which the respondent knowingly suppressed and or bypassed and thereby misled all the authorities to believe that he was entitled to benefits for second stage financial up-gradation under ACP scheme on completion of 24 years continuous service with effect from 01.10.1982. This claim in the representation itself is not maintainable having regard to the first order passed by the Tribunal and which was confirmed by Hon'ble Apex Court. Therefore, it is immaterial whether such a representation was forwarded by the EA to Superintending Engineer to Chief Engineer for consideration or not. We hold that the respondent is estopped from pursuing his remedy before the authority after the Tribunal held that the seniority list could not be disturbed for the reasons stated in their order. The respondent even after his retirement in 2016 pursued with the remedy of regularisation which by no stretch of imagination can be made available to him. We specifically hold that his representation and or prayer was not maintainable before the authority on the day when it was made. It is apparent from the record that the respondent filed another Original Application (third application) before the Central Administrative Tribunal, Calcutta Bench at Kolkata which was registered as 351/1/2016 and by the impugned order dated 06.11.2017 the Tribunal allowed the application filed by the respondent and directed the petitioner/authorities to extend the benefits to the respondent herein which were extended to the applicants in some other applications before the Tribunal in OA

No. 199/AN/2008 and OA No. 70/AN/2013. The justification on which the Tribunal allowed the respondent's claim for regularisation of his service since the date of his appointment in 1982 was that on the application of some other persons similarly situated the matter went up to High Court as also the Hon'ble Apex Court but when the final order passed in OA 351/1/2016 there was no occasion for the Tribunal to deal with its earlier decision wherein it declined to disturb the seniority list holding that the applicant respondent accepted the regularisation of service from 1985-1986 and further that the said order of the Tribunal was confirmed up to the Hon'ble Apex Court.

We have heard the learned counsel for the parties in detail and we have considered their respective claims before the Tribunal as also before this Court. The respondent No.1 submits before us that there is no dispute that he was appointed in 1982 and the regularisation was made in 1985-1986 but the moment the High Court and the Hon'ble Apex Court in case of some other applicants passed an order subsequent to the respondent's promotion as Assistant Engineer, there will be severe injustice if respondent No.1 is deprived of the identical benefits. The respondent No.1 also submits that even if he has retired from his service since benefits were made available to some other persons of the same department pursuant to some other orders, there can be no reason for him not to get the similar benefits retrospectively from the date of his appointment.

We, however, are unable to accept such a submission that a person even after retirement can maintain a claim for regularisation of his service with effect from the date of his appointment in 1982, which was disputed by authority and upheld by Courts and in particular when he accepted the order of seniority and/or regularisation of his service with effect from 1985 and 1986, simply because some other persons' claim has been considered by the Court on some other plea, he should be given same benefit. Claim made by the respondent No.1 in OA No. 5/A&N/94 reached finality after the SLP filed by him was dismissed. There can be no occasion for the respondent to ventilate his grievance on a new cause of action. There cannot be any new cause of action in this case inasmuch as the decision of the Tribunal rejecting his claim for making available to the benefit of seniority by its order passed in OA No. 5/A&N/94. It has been argued by the learned counsel for the respondent that the decision taken by the Tribunal in the earlier proceeding cannot operate as *res judicata* in view of the fact that the said OA No. 5/A&N/94 was dismissed only on the ground of limitation. Learned counsel submits that if an application is dismissed on the ground of limitation the same does not operate as *res judicata* so as to take out a fresh application on the self-same cause of action.

The learned advocate appearing for the respondent in his argument relies on a decision in the case of *Erach Boman Khavar vs Tukaram Shridhar Bhat* and another reported in (2013) 15 SCC 655 and submits that the principle of *res judicata* is not attracted in a case where the adjudication of an issue has not

been consciously decided by the Court. He relies on paragraph 39 of the said decision, the same is set out below:

"39. From the aforesaid authorities it is clear as crystal that to attract the doctrine of re judicata it must be manifest that there has been a conscious adjudication of an issue. A plea of re judicata cannot be taken aid of unless there is an expression of an opinion of the merits. It is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation."

The decision is not applicable in the present case inasmuch as we have already pointed out earlier that the Tribunal consciously adjudicated upon the issue whether the petitioner was entitle to get the order of regularisation of his service with effect from 1982-83 and the Tribunal held that the regularisation made with effect from 1985-1986 was final so far the petitioner is concerned and further it was held by the Tribunal that the seniority list was not to be disturbed for reason stated in the earlier decision. Therefore, this decision has no manner of application in the present facts and circumstances of this case.

The next decision cited on the issue of local and non-local candidate in the case of Union of India and others vs Sanjay Pant and others reported in (1993) 24 Administrative Tribunals Cases 700. We are not concerned in this case about local or non local candidates. Such a dispute has already been decided and set at rest by the Tribunal holding that it could not consider the question of regularisation with effect from the date of his appointment in 1982-83. Therefore, such an issue cannot be reopened again in a subsequent proceeding and the decision so referred has no manner of application in the present case.

The decision in the case of K.C. Sharma and others vs Union of India and others reported in (1997) 6 SCC 721 cited by the learned advocate for the respondent that similarly situated person can always get benefit of the judgement is not applicable in the present facts of the case. The said decision is distinguishable on fact. In the referred decision the claim was based on a Government notification which was not allowed to them and subsequently the Court held that if similarly situated persons are benefited by the notification the Tribunal should have also allowed the petitioner, but this is not the case here.

The learned advocate for the respondent also relied on a decision in the case of Khoday Distilleries Ltd. Vs Shri Mahadeshwara Shankara Kakkare Karkhane Ltd., Kollegal passed in Civil Appeal No. 2433 of 2019 decided on 1st March, 2019 to argue that even after dismissal of SLP at its admission stage review application could not be dismissed on the sole ground that the SLP was not entertained. This decision does not commend us to hold that the respondent's third application before the Tribunal was maintainable and justifiably entertained by the Tribunal.

Lastly the learned advocate for the respondent relies on our order dated 26th March, 2019 passed in WPCT 110 of 2009 but we are afraid that the said order

being an interlocutory order, can have any binding effect, although on a different set of facts altogether.

As argued by the learned advocate for the respondent, even if it is accepted that the decision rejecting an application on the ground of limitation does not operate as *res judicata*, to get relief, a party must show his cause of action. Such cause of action has to be independent of any other things and should flow from the action of the respondent not considering his claim. Once his claim had been adjudicated upon after hearing by the Court and having no avenue for raising further grievance against such order meaning thereby the order of the Tribunal passed in OA No.5/A&N/94 having reached its finality deciding the fate of the respondent regarding his claim which has been made in the present application before the Tribunal cannot be considered to be a separate cause of action for which neither the respondent can maintain such claim by way of original application nor the Tribunal could be justified to have decided the claim in favour of the respondent. On perusal of the order passed by the Tribunal we however, are of the clear opinion that the Tribunal while dismissing the respondent's claim adjudicated the entire scope of the application; his date of appointment; regularisation made by the authorities since 1985-1986; his acceptance to the promotion as Assistant Engineer. The Tribunal in the context of his claim for regularisation and claim for seniority with effect from the date of his appointment held that the claim was a delayed claim having regard to the fact that his regularisation was made long before and if the Tribunal had to consider such claim the entire seniority list would be disturbed which might cause genuine grievance to some other persons who were considered at a higher place than that of the respondent. Therefore, on a conjoint consideration of the entire aspect of the matter, the Tribunal decided the fate of the respondent's claim. It cannot now be agitated that the said application was dismissed only on the ground of limitation. This was not a question of limitation in filing the original application before the Tribunal but the question of limitation dealt with by the Tribunal was that of the delayed claim made by the respondent. If the argument of the learned counsel for the respondent No.1 that since benefit has been made available to some other persons in some other proceedings, similar benefits should also be made available to the respondent irrespective of his position in service (whether in service or retired), cannot be entertained. We hold that if such process is introduced in the judicial system, there can be no end of any proceeding. Any order which reached finality can be given a go-by by this process which we severely deprecate, for the simple reason that although the Civil Procedure Code is not directly applicable in writ petition but its principles being applicable the respondent's claim is squarely barred under the provision of Order 2 Rule 2 of the Civil Procedure Code. Therefore, we are unable to accept the contention raised by the learned advocate for the respondent that he can still maintain the claim for regularisation of this service with effect from the date of his appointment that is the year 1982.

In view of the above discussion, we are of the firm opinion that the Tribunal

cannot have any occasion to allow the claim of the respondent. The order impugned is liable to be set aside. We accordingly set aside the order impugned dated 06.11.2016 passed by the Tribunal in OA No. 351/1/2016. However, in the facts and circumstances of the case there will be no order as to costs.