

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

**MISC. APPLICATION NO.536 OF 2019
IN
ORIGINAL APPLICATION NO.136 OF 2018**

Shri Kiran Vishnu Patil.)
Age : 55 Yrs, Occu.: Assistant)
Commissioner of Police transferred from)
Turbhe Division to Control Room,)
Navi Mumbai and residing at Sarovar)
Darshan, D-1402, Chandanwadi,)
Thane (W).)...**Applicant**

Versus

1. The Commissioner of Police,)
Navi Mumbai, having office at)
Navi Mumbai Police Commissionerate)
C.B.D. Belapur, Navi Mumbai – 614.)
2. Shri Amol Zende.)
Aged : Adult, transferred as)
Assistant Commissioner of Police,)
Control Room, Navi Mumbai)
transferred to Turbhe Division,)
Navi Mumbai.)
3. The State of Maharashtra.)
Through Principal Secretary,)
Home Department, Mantralaya,)
Mumbai – 400 032.)...**Respondents**

And

Shri Bharat Govind Gade.)
Aged : 56 Yrs., Working as ACP, Turbhe)
DN, Navi Mumbai.)...**Intervener**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondents 1 & 3.

None for Respondent No.2.

Shri A.V. Chatuphale, Advocate for Intervener.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 01.12.2020

JUDGMENT

1. This Misc. Application is filed to recall the order dated 06.11.2018 passed in O.A.No.136/2018 and to decide the O.A. on merits.

2. Briefly stated facts giving rise to this M.A. are as under :-

The Applicant is serving as Assistant Commissioner of Police (ACP). In the year 2017, he was posted at Turbhe, Navi Mumbai. His normal tenure was two years. However, by transfer order dated 25.01.2018, he was transferred to Control Room, Navi Mumbai mid-tenure and in his place Shri Amol Zende (Respondent No.2 in M.A.) was posted. The Applicant challenged his transfer order dated 25.01.2018 by filing O.A.No.136/2018 contending that his transfer is in violation of provisions of Maharashtra Police Act. During the pendency of O.A, the State Government again transferred him as ACP, Greater Mumbai by order dated 20.06.2018. In view of this subsequent development, the Applicant has filed application for amendment i.e. M.A.No.461/2018 to challenge the subsequent transfer order dated 20.06.2018 in pending O.A. No.136/2018. However, the then Hon'ble Chairman on hearing the parties rejected the application for amendment by reasoned order dated 11.09.2018 with the observation that the transfer order dated 20.06.2018 is fresh cause of action which is distinct and independent from the subject matter of challenge in O.A.No.136/2018 and liberty was given to the Applicant to challenge the transfer order dated 20.06.2018 by filing independent O.A. Thereafter, O.A.No.136/2018 was taken up for hearing on merit and it was dismissed by the then Hon'ble Chairman

by reasoned order dated 06.11.2018. Para Nos.7 to 12 of the order are material, which are as follows :-

“7. Today after the hearing was completed learned Advocate has stated in regards to subsequent transfer i.e. transfer order dated 20.06.2018 as follows :-

Applicant has chosen to prefer representation, and has represented before the Government for cancellation of Transfer order dated 22.06.2018, but has obeyed the transfer order.

8. Besides oral arguments Applicant has also placed on record written arguments.

9. This Tribunal is of the view that present O.A. could have been pursued had the Applicant challenged the transfer order in this Tribunal and eventually the transfer order, would have been stayed or ultimately had transfer order dated 22.06.2018 been set aside.

10. Once the Applicant has obeyed the order may be endured and complied it, and has chosen the course of representing before the Government but the Government has not stayed / modified the order dated 22.06.2018, the cause of action for presuming the present O.A. has ceased to exist.

11. In view of subsequent development, even if present O.A. could succeed, applicant cannot be restored the post of Assistant Commissioner of Police, Special Branch, Navi Mumbai by whatsoever permutations and combinations. Whenever any particular final relief cannot be granted, issues of whatever important academic, interest need not and ought not be decided, and this Tribunal declines to undertake / decline to decide those.

12. Hence Original Application is dismissed with costs.”

3. Thereafter, the Applicant had filed independent O.A.No.13/2019 to challenge the transfer order dated 20.06.2018 which was heard and decided on merit by this Tribunal on 23.09.2019 by quashing transfer order dated 20.06.2018. Consequently, he was reposted at Control Room, Navi Mumbai. In the meantime, Intervener Shri Bharat G. Gade was posted in place of Amol Zende at Turbhe by order dated 15.02.2020.

4. It on the above background, the Applicant has filed this M.A. to recall the order dated 06.11.2018 passed in O.A.136/2018 and to decide

the said O.A. on merit. Shri Bharat Gade intervened in M.A. and allowed to be joined as Intervener.

5. Shri A.V. Bandiwadekar, learned Advocate for the Applicant sought to contend that O.A.No.136/2018 was not decided on merit and particularly in view of subsequent decision rendered by this Tribunal in O.A.39/2019 since transfer order dated 20.06.2018 is quashed, now O.A.136/2018 needs to be decided on merit. According to him, the right of the Applicant to challenge the transfer order dated 25.01.2018 and reinstatement at Turbhe cannot be foreclosed without deciding O.A.136/2018 on merit. He, therefore, submits that the Tribunal can exercise inherent powers under Section 151 of Civil Procedure Code and O.A.No.136/2018 needs to be decided on merit.

6. Per contra, Shri A.V. Chatuphale, learned Advocate for Intervener objected the very maintainability of M.A.No.536/2019 contending that once O.A.136/2018 is decided by reasoned order, it is not permissible to reopen the matter by filing such M.A. and the remedy was to file Review Application within time limit or to challenge the order passed in O.A.136/2018 before higher forum. He has further pointed out that recourse of review now cannot be taken, as the matter does not fall within the ambit of pre-requisite of Review Application and secondly, no such Review Application was filed within time limit. Thus, according to him, the Applicant is attempting to revive old cause of action which ceased to exist and prayed to dismiss the M.A.

7. Whereas, Shri A.J. Chougule, learned Presenting Officer adopted the submission advanced by the learned Advocate for Intervener and prayed to reject the M.A.

8. In view of submission advanced at the Bar, the issue posed for consideration is whether the M.A. in its form is maintainable and order passed in O.A.136/2018 on 06.11.2018 can be recalled in the manner

sought to be done by the Applicant. In my considered opinion, the answer is in emphatic negative.

9. There is absolutely no dispute about the factual aspects and transfers orders. O.A.No.136/2018 was filed challenging transfer order dated 25.01.2018 whereby the Applicant was transferred from ACT, Turbhe to ACP, Control Room. But during the pendency of O.A, he was again transferred by order dated 20.06.2018 as ACP, Greater Mumbai. Admittedly, his M.A.461/2018 for amendment to challenge the transfer order dated 20.06.2018 was rejected, and thereafter, O.A.No.136/2018 was heard on merit and was dismissed. While dismissing the O.A, the Tribunal specifically observed that the Applicant has obeyed transfer order dated 20.06.2018 by joining as ACP, Greater Mumbai, and therefore, cause of action to challenge the transfer order dated 25.01.2018 ceased to exist. True, later Applicant had challenged transfer order dated 20.06.2018 by filing independent O.A.No.39/2019 and the same was allowed by Judgment dated 23.09.2019. Consequent to it, the Applicant was posted as ACP, Control Room, Navi Mumbai. Now, he wants to revive his old claim for reinstatement as ACP, Trubhe.

10. At this juncture, in so far as maintainability and availability of the ground to recall order dated 06.11.2018 passed in O.A.136/2018 is concerned, all that, the Applicant's pleading is confined to Para No.13 of O.A, which is as follows :-

“13. The Petitioner states that in the circumstances above, the Petitioner is entitled to file this M.A. with a request to recall the earlier order dated 6.11.2018 which was passed on the technical ground and not on merits and thus to hear the O.A. on merits. This is more so, when in the light of the latest decision rendered in favour of the Petitioner by the Hon'ble Tribunal on 23.9.2019 which was given for the first time to the Petitioner the cause of action to file such M.A. which is filed without any loss of time.”

11. Thus, the only ground for filing this M.A. seems to be decision rendered by this Tribunal in O.A.39/2019 decided on 23.09.2018

thereby order dated 20.10.2018 was quashed and he was reinstated as ACP, Control Room, Navi Mumbai.

12. Now, incidentally, the question arises whether the Judgment delivered by the Tribunal in O.A.No.39/2019 delivered on 23.09.2019 can be said has given rise to fresh cause of action to the Applicant for reopening O.A.136/2018 and I am afraid that no such course is permissible in the eye of law. By Judgment dated 23.09.2019, the Tribunal has quashed and set aside the transfer order dated 20.06.2018 thereby reinstating the Applicant as ACP, Control Room, Navi Mumbai and by no means, it can be construed as a date of accrual of cause of action to reopen O.A.No.136/2018 which was decided on merit after hearing the parties. Once the Tribunal delivered the Judgment on 06.11.2018, it cannot be reopened in this manner after the lapse of more than one year by filing such M.A. without quoting any provisions of law as to under which it is permissible in law.

13. Once the Tribunal decides the O.A. on merit, the aggrieved party has two options. First option is to challenge the Judgment/order by filing Writ Petition before Hon'ble High Court or to file Review Application under order 47 Rule 1 of Civil Procedure Code read with Section 22(3)(f) of Administrative Tribunals Act, 1985. Except these two statutory remedies, there is no such remedy available to recall the Judgment by filing such M.A.

14. True, initially, the Applicant had challenged the order dated 06.11.2018 passed in O.A.136/2018 by filing Writ Petition No.3504/2020 before the Hon'ble High Court, but he seems to have chosen not to pursue the Writ Petition and accordingly, Writ Petition was disposed of. Indeed, he availed parallel proceedings by filing M.A.536/2019 before this Tribunal which was filed on 01.10.2019 and at the same time also filed Writ Petition No.3504/2020 before the Hon'ble High Court, which came to be disposed of by order dated 27th October, 2020. The order passed by Hon'ble High Court is as follows :-

“1. Although the prayer in this writ petition is for quashing of order dated November 6, 2018 passed by the Maharashtra Administrative Tribunal, Mumbai in O.A.No.136 of 2018. Mr. Yadav, learned advocate appearing for the petitioner (the original applicant before the Tribunal) submits that the petitioner would be satisfied if the Tribunal is directed to finally decide M.A. No.536 of 2019 seeking recall of the order dated November 6, 2018 within such time as may be fixed by this Court.

2. Mr. Pable, the learned AGP representing the respondents has no objection to such an order being passed.

3. In such view of the matter, this writ petition stands disposed of with a request of the Tribunal to expedite its decision on M.A. No.536 of 2019 as early as possible, preferably within two months from date of communication of this order.”

15. It is on this background, this M.A. is being decided. Thus, fact remains that though initially the Applicant had challenged the order dated 06.11.2018, he chose not to pursue the remedy of Writ Petition and want to fall back on M.A.536/2019. Be that as it may, the question is whether the subsequent decision rendered by this Tribunal in O.A.39/2019 can be a ground to recall the order dated 06.11.2018 of O.A.136/2018 and the answer is in negative, as the same indeed should not be the ground for view in view of ratio of Hon’ble Supreme Court in **Civil Appeal No.1694/2006 (State of West Bengal Vs. Kamal Sengupta & Anr.) decided on 16.06.2008** as pointed out by the learned Advocate for Intervener.

16. In **State of West Bengal’s** case (cited supra), the Hon’ble Supreme Court had dealt with various earlier Judgments regarding powers of Court to review its own Judgment and held that decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision of coordinate or larger bench of the Tribunal or of a superior Court. The Hon’ble Supreme Court held that the powers of review can be exercised only on the ground enumerated in order 47 Rule 1 of CPC and not otherwise. It would be apposite to reproduce Para Nos.11 and 28 of the Judgment, which are as follows :-

“11. Since the Tribunal’s power to review its order/ decision is akin to that of the Civil Court, statutorily enumerated and judicially recognized limitations on Civil Court’s power of review the judgment /decision would also apply to the Tribunal’s power under Section 22 (3)(f) of the Act. In other words, a Tribunal established under the Act is entitled to review its order/ decision only if either of the grounds enumerated in Order 47 Rule 1 is available. This would necessarily mean that a Tribunals can review its order/ decision on the discovery of new or important matter or evidence which the applicant could not produce at the time of initial decision despite exercise of due diligence, or the same was not within his knowledge or if it is shown that the order sought to be reviewed suffers from some mistake or error apparent on the face of the record or there exists some other reasons, which, in the opinion of the Tribunal is sufficient for reviewing the earlier order/ decision.

28. 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.”

17. Now turning to the facts of the present case, O.A.No.136/2018 was heard and decided by Judgment dated 06.11.2018. Admittedly, the Applicant has not filed Review Application contemplated under Order 47 Rule 1 of CPC against the Judgment dated 06.11.2018 within the period of limitation. He remained silent for near about one year and thereby acquiesced the position. Later, he filed his M.A. on 01.10.2019 only on the ground that his subsequent O.A.No.39/2019 was allowed by Judgment dated 23.09.2019, and therefore, the cause of action accrued to him on 23.09.2019 for filing this M.A. which is difficult to conceive in law. The Hon'ble Supreme Court in the matter of **State of West Bengal's** case (cited supra) categorically ruled that the Judgment and order can be recalled only in exercise of powers of review confined to the grounds available under Order 47 Rule 1 of CPC and such order cannot be reviewed under Section 22(2)(f) of Administrative Tribunals Act on the basis of subsequent decision, may be of superior Court. Admittedly, no such Review Application was filed and no such ground exists to invoke the powers of review. Thus, what cannot be done directly cannot be done indirectly in such novel manner.

18. Suffice to say, even one treat this M.A. as Review Application, in that event also, the review is not permissible, as there is no discovery of evidence which the Applicant could not produce at the time of initial decision despite exercise of diligence or there is error apparent on the face of record, as contemplated under Order 47 Rule 1 of CPC. Needless to mention, which cannot be done even by exercising powers of review, the same cannot be done by filing such MA which itself is not comprehended in law. The filing of M.A. is nothing but a futile attempt to revive old and dead cause of action and nothing but flogging dead horse.

19. The submission advanced by the learned Advocate for the Applicant that the Tribunal can exercise inherent power under Section 151 of CPC to recall the order dated 06.11.2018 passed in O.A.136/2018

is fallacious and misconceived. Section 151 of CPC provides inherent power of the Court to make such orders, as may be necessary for the ends of justice and to prevent abuse of process of the Court. It is well settled principle of law that inherent powers under Section 151 of CPC can be invoked only in absence of specific provision of CPC to redress the grievance. Whereas, in the present case, the remedy of filing Review Application which was available to the Applicant was not availed. The reliance placed by the learned Advocate for the Applicant on the decision of Hon'ble Supreme Court in **(2006) 3 SCC 699 (Jet Plywood Limited Vs. Madhukar Nowlaka & Anr.)** is misplaced. In that case, the order permitting withdrawal of Suit which was granted without permission having been sought to file a fresh Suit was recalled under inherent power and such application was held maintainable under Section 151 of CPC, as the CPC is silent in this regard, and therefore, in such situation, the Hon'ble Supreme Court held that Court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. Similarly, reliance placed on the decision **2019(6) Mh.L.J. 827 (Varun Pahwa Vs. Renu Chaudhary)** which pertains to the powers of Court in the matter of amendment of pleadings is totally misplaced. The application for amendment made by the Applicant in O.A.No.136/2019 was rejected by the Tribunal by reasoned order dated 20.06.2018 which had attained finality. Therefore, the issue of amendment is foreclosed.

20. Section 151 of CPC does not confer any powers but indicates that there is power to make such orders as may be necessary for the ends of justice and to prevent an abuse of the process of the Court. It is well settled that if ordinary rules of procedure result in injustice and there is no other remedy then recourse of Section 151 can be taken. The remedy of Review available to the Applicant was not availed and even if it was availed, it would not have assisted to him as it does not fall within the scope of review. The order passed on 06.11.2018 in O.A.136/2018 has attained finality and now it cannot be reopened in the principle of *fait accompli*.

21. The totality of aforesaid discussion leads me to conclude that the M.A. is absolutely untenable and once O.A.136/2018 was decided on merit on hearing the parties, it has to be termed as decision on merit and now it cannot be recalled under guise of M.A. and such M.A. is liable to be dismissed. It is nothing but abuse of process of law. Hence, the following order.

ORDER

The Misc. Application No.536 of 2019 stands dismissed with no order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai
Date : 01.12.2020
Dictation taken by :
S.K. Wamanse.

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