IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL

MUMBAI

ORIGINAL APPLICATIONS NO.993 & 994 OF 2014

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ORIGINAL APPLICATION NO.993 OF 2014

DISTRICT : THANE

Shri Ajay Fakir Patil,)
Occ. Nil, Ex. Clerk-cum-Typist in the office of)
Government Post Basic Ashram School,)
A/P Bhopali, Tal. Vikramgad, District Thane)
R/o Nare, Post Uchat, Tal. Wada, Dist. Thane)
Address for service of notice:)
Shri A.V. Bandiwadekar, Advocate,)
9, "Ram-Kripa", Lt. Dilip Gupte Marg,)
Mahim, Mumbai 400016)..Applicant

Versus

1. The State of Maharashtra,)
Through Principal Secretary,)
Tribal Development Department,)
Mantralaya, Mumbai 400032)

2. The Additional Commissioner,)
Tribal Development Department,)
Vardan Sankul, Opp. MIDC, Thane (W))..Respondents

WITH

ORIGINAL APPLICATION NO.994 OF 2014

DISTRICT : THANE

Shri Keshav Kashinath Padwal,)
Occ. Nil, Ex. Clerk-cum-Typist in the office of)
Government Post Basic Ashram School,)
A/P Hirve, Tal. Mokhada, District Thane)
R/o At Kisal, Post Sayale, Tal. Murbad, Thane)
Address for service of notice:)
Shri A.V. Bandiwadekar, Advocate,)
9, "Ram-Kripa", Lt. Dilip Gupte Marg,)
Mahim, Mumbai 400016)..Applicant

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Vardan Sankul, Opp. MIDC, Thane (W))..Respondents

Shri A.V. Bandiwadekar – Advocate for the Applicants
Shri A.J. Chougule – Presenting Officer for the Respondents

CORAM : Rajiv Agarwal, Vice-Chairman
R.B. Malik, Member (J)
DATE : 8th July, 2016
PER : R.B. Malik, Member (J)

JUDGMENT

1. These two OAs can be decided by this common judgment. They throw up for determination of the issue of the validity of actions like these OAs when earlier OAs on the same cause of action were withdrawn without seeking leave to institute fresh ones on the same causes of actions.

2. We have perused the record and proceedings and heard Shri A.V. Bandiwadekar, the learned Advocate for the Applicants and Shri A.J. Chougule, the learned Presenting Officer for the Respondents.

3. Let us commence the discussion by referring to a common order made by the bench of the then Hon'ble Chairman which spoke through one of us (Shri Rajiv Agarwal, Vice-Chairman). That common order dated 13.6.2013 disposed off **OA No.57 of 2006 (Shri Abhiman Maruti Sarvade Versus The State of Maharashtra & Anr.) and OA No.64 of 2006 (Shri Prafulla Damodar Thakare Versus The State of Maharashtra & Anr.).** Those two applicants sought regularization of their temporary services in the post of Clerk-cum-Typist in terms of a certain GR dated 18.6.1983. After a detailed discussion the bench of this Tribunal concluded the case of those applicants to regularize their services in terms of GR dated 8.3.1999. A very detailed narration of the legal proceedings that came to be adopted thereafter to effectuate the said order of the Tribunal will neither be necessary nor germane. Suffice to mention that ultimately the said order was effectuated and the services of two applicants S/Shri Sarvade and Thakare were regularized.

4. Now, the crucial aspect of the matter in so far as these two OAs are concerned are that these applicants S/Shri A.F. Patil and K.K. Padwal had also brought OAs back in the year 2006 for exactly the same relief as sought by S/Shri Sarvade and Thakare. They were **OAs No.41 of 2006 (Shri Ajay Fakir Patil) and OA No.43 of 2006 (Shri Keshav Kashinath Padwal)**. These two OAs came up before the

Division Bench of the then Hon'ble Chairman on 12.12.2006. The entire order in fact needs to be fully reproduced herein below because of the crucial and in fact almost conclusive nature thereof for the purpose of this common judgment:

> "Order: Shri Bandiwadekar, Ld. Counsel for the applicants Shri A.F. Patil and K.K. Padwal who are present in the Court, on their instructions, seeks permission to withdraw the OA.
>
> Accepting the request made by the applicant through the Ld. Advocate Shri Bandiwadekar, we permit the applications to withdraw the OA. Accordingly OAs are disposed of as withdrawn.
>
> Sd/- Sd/-
> (V.B. Mathankar) (A.B. Naik)
> Member (A) Chairman"

5. Quite pertinently no leave to file a fresh OA on the same cause of action was even sought and quite naturally none was granted. The result, therefore, was that the two OAs brought by the present applicants came to be withdrawn unconditionally.

6. It was much thereafter that the two OAs of S/Shri Sarvade and Thakare came to be decided by a Bench of this

Tribunal as already mentioned above by the order dated 13.6.2013 and these OAs were presented on 17.11.2014. These OAs are detailed which someone could even call verbose. But we would not make any such observation. The sum and substance of the case of the applicants post substitution of these OAs is that the respondents have treated the applicants with hostile discrimination probably indicating that they too were entitled to the same relief that ultimately came to be granted to S/Shri Sarvade and Thakare. According to these applicants unfortunately or otherwise on account of personal difficulties the earlier OAs were withdrawn but they were under an impression that they hardly had any chance of success in those OAs. All these reasons have been mentioned in Para 11.6 of the OA of Shri A.F. Patil.

7. The relief sought herein is for setting aside of an order dated 4.10.2014 which is at Exhibit 'A' and in fact that order does nothing more than mentioning that S/Shri Sarvade and Thakare had been regularized in services as per the directions of this Tribunal in their OAs. This so called impugned order was in reply to an application made by the applicants on 4.8.2014. That communication is at Exhibit 'H' page 48 of the OA No.993 of 2014 of Shri Patil. It was a joint application by both these applicants addressed to the Additional Commissioner, Tribal Development Department. It was mentioned therein inter alia that they were initially

employed on temporary basis in 1995 and continued with periodical breaks till 2003. The selection committee appointed by the Government of Maharashtra was disbanded and an order was given that temporary employees be regularized in terms of the GR dated 8.10.1999. An office note was put up for that purpose. However, inasmuch as no decision was taken they moved this Tribunal with the OAs detailed above and for some unavoidable reasons the said OAs were withdrawn. However, the OAs of S/Shri Sarvade and Thakare came to bc decided in their favour. They, therefore, requested that they were appointed at the same time as S/Shri Sarvade and Thakare and whatever they got should be given to these applicants. It was in response to this particular communication that the so called impugned order which in fact does nothing except to mention an obvious and indisputablc fact about the regularization of S/Shri Sarvade and Thakare.

8. The above discussion must have made it clear as to how events kept on happening in respect of the two applicants before us. Now, for all one knows having unconditionally withdrawn the earlier OAs for the same relief which they now seek they were in the manner of speaking fence sitters and preferred to take a chance watching whatever would happen in the OAs of /Shri Sarvade and Thakare. As the discussion progresses we would be pointing out with the guidance of case law as to how the consideration of public policy is one of the

chief one and it needs hardly be emphasized that a litigant who prefers to take chance can quite certainly not qualify on the anvil of the public policy aspect of the matter.

9. The above discussion should have made it clear in our view that the real and the crucial aspect is predominantly legal. The issue is as to whether actions like these OAs after withdrawing the same for similar relief having been withdrawn without seeking leave to institute a fresh one on the same cause of action can be held to be legally competent and good actions.

10. The provisions of Section 22 of the Administrative Tribunals Act, 1985 inter alia lays down as follows:

> "22. Procedure and powers of Tribunal:
> (1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private."

11. The above quoted provision makes the express text of Civil Procedure Code (CPC) in terms inapplicable. However, read as a whole harmoniously constructing the words used therein would make it clear that the Tribunal would be guided by the principles of natural justice and the sister rules, if any, made in that behalf which would be taken note of. Now quite pertinently even the writ petitions heard by the Hon'ble High Courts are not strictly governed by the provisions of the CPC in terms as it were. But in **SARGUJA TRANSPORT SERVICE VERSUS STATE TRANSPORT TRIBUNAL, M.P., AIR 1987 SC 88 = 1987 SCR(1) 200**. The Hon'ble Supreme Court has held that though the provisions of the CPC are not in terms applicable to the writ proceedings however the procedure prescribed therein as far as it can be made applicable is followed by the High Courts in disposing off the writ petitions.

12. It is, therefore, very clear that although the provisions of CPC in terms are not applicable to the proceedings before this Tribunal but guided by the law laid down by the Hon'ble Supreme Court and the language of Section 22 of the Act itself the principles of natural justice will have to be applied and the application of the mandate of the Hon'ble Supreme Court would make the principles governing the procedure in CPC applicable even to the proceedings before the Tribunal and even otherwise if the codified procedure as to its spirit can be made applicable to the proceedings like writ petitions which

they expressly do not apply to then there is no logic behind not applying them to the proceedings before the Administrative Tribunal. The things would be different of course, if there was anything either expressly or impliedly inconsistent with the express language of the provisions of law applicable to those particular proceedings like the OAs. There is nothing in the Administrative Tribunals Act, 1985 which is inconsistent with the principles underlying the provisions of Order 23 of the CPC. Pertinently even historically by inserting Part XIV A by the 42nd constitutional amendment in good measure the powers of the High Courts have been conferred on the Tribunals constituted under Administrative Tribunals Act subject of course to the Plenary Writ Jurisdiction of the High Courts and therefore the procedure in the writ petitions can quite safely be applied to OAs heard by the Administrative Tribunals.

13. Now, Order 23 Rule 1 of the CPC provides that the plaintiff (applicant herein) could abandon his suit or part of the same against all or any of the defendants. Order 23 Rule 2 is not germane hereto. Order 23 Rule 3 provides inter alia that if the court was satisfied that the suit would fail due to some formal defect or there were sufficient grounds for allowing the plaintiff to institute a fresh suit in the subject matter of a suit or a part of a claim the Court may grant permission of withdrawal of such a suit or a part thereof with liberty to institute a fresh one on the same subject matter. This is the

provision that enshrines the procedure for allowing the withdrawal of the suit with liberty to file a fresh one. In that light turning to Order 23 Rule 4 of the CPC it lays down that if the suit was withdrawn as per Order 23 Rule 1 or without permission as set out in Order 23 Rule 3, "he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.". (emphasis supplied)

14. It is, therefore, very clear that for common understanding if a proceeding was withdrawn unconditionally without taking leave of the court for permission to bring in a fresh one on the same cause of action then there would be a bar thereto. The case law has been cited which we shall presently discuss. However, one aspect of the matter is very clear that principles emanating from the law laid down by the Hon'ble Supreme Court when applied hereto may bring in its wake failure of these proceedings. It needs also to be noted quite clearly that had it not been for this insurmountable hitch the case of the present applicants would have on all fours and fully governed by the common order of this Tribunal in S/Shri Sarvade and Thakare's OAs above referred to. But then ultimately the law has to prevail.

15. Shri Bandiwadekar, Learned advocate for the applicant relied upon **AHMEDABAD MANUFACTURING AND**

CALICO PRINTING CO. LTD. VERSUS THE WORKMEN AND ANOTHER, AIR 1981 SC 960. Shri Bandiwadekar, Ld. Advocate relied upon this particular judgment in support of his contention that the unconditional withdrawal of the earlier OAs is no undoing of the present applicants. Now, in *Ahmedabad Manufacturing* case (supra) an award made by the Industrial Court was directly challenged before the Hon'ble Supreme Court. The said petition was unconditionally withdrawn and a petition under Article 226 of the Constitution of India was moved before the Hon'ble Bombay High Court. The Hon'ble High Court was pleased to hold against the petitioner and the matter went before the Hon'ble Supreme Court. The issues were as to whether unconditional withdrawal of the earlier leave petition would amount to dismissal and if so its impact on a petition under Article 226 of the Constitution. It was held by the Hon'ble Supreme Court that the decisive aspect of the matter was reading of the order of the Hon'ble Supreme Court earlier made and there cannot be any addition or substraction thereto by way of recitals in the affidavits. It was held that the permission to withdraw leave petition could not be equated with an order of dismissal and it could not be held, therefore, that the petition before the Hon'ble High Court was either barred or in any case not maintainable. Now, pertinently the fate of the proceedings before the High Court depended upon the interpretation of the order of the Hon'ble Supreme Court while allowing the withdrawal of the earlier SLP. That was not a

matter where the petitioners themselves had voluntarily withdrawn their petitions in the sense the present applicants did with regard to the earlier OAs. The remedy available to the party in Ahmedabad Manufacturing (supra) was a constitutional remedy under Article 226 of the Constitution and, therefore, in the absence of an express or implied mandatc of the Hon'ble Supreme Court while allowing the withdrawal of the earlier SLP that remedy could not have been held barred.

16. Shri Bandiwadekar, Ld. Advocate then relied upon **THE WORKMEN OF COCHIN PORT TRUST VERSUS THE BOARD OF TRUSTEES OF THE COCHIN PORT TRUST AND ANOTHER, AIR 1978 SC 1283**. There also an industrial dispute arose and it was ultimately referred to the Central Industrial Tribunal. An award was made. It was set aside by the Hon'ble High Court in a writ petition under Article 226 of the Constitution. One of the main issues for which this judgment was cited was with regard to the principles of res judicata as codified in Section 11 of the CPC and also the general principles. It was held that if a petition under Article 226 was also dismissed in limine the same could not be revived by the way of another similar petition. It is, however, quite clear that the issue of withdrawal of an action such as is involved in these OAs was not there in that particular matter.

17. In *Sarguja Transport's* case (supra) from an order of a Tribunal the matter was carried to the Madhya Pradesh High Court. The said petition came to be withdrawn and was dismissed as withdrawn. Another petition was thereafter brought before the Hon'ble High Court. The Hon'ble High Court was pleased to make an order that since the earlier petition was not withdrawn with permission to file a fresh one, there was no merit therein and on this ground the petition was summarily dismissed and the matter went before the Hon'ble Supreme Court. Their Lordships were told inter alia that by way of the earlier order the High Court did not decide the petition on merit but only permission to withdraw the petition was granted and, therefore, there could be no bar to the subsequent writ petition. Their Lordships were then pleased to refer to the provisions of Order 23 of CPC to which a reference has been made by us above. Their Lordships held inter alia that the provisions of the CPC as they now stand make a distinction between abandonment of a suit and withdrawal from the suit with permission to file a fresh one. It was held in Para 7 as follows:

> "7. .... 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 benificium 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 rounded 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."

18. The principles laid down and the mandate of the Hon'ble Supreme Court is quite clear in the above passage. It was not so much for the principles of res judicata as it was for the public policy aspect of the matter that it was held that even for other reasons mentioned by Their Lordships in Para 9 of the judgment the subsequent action should not be entertained.

19. In **M/S. UPADHYAY AND CO. VERSUS STATE OF U.P. AND OTHERS, AIR 1999 SC 509** it was held that the ban for filing a fresh suit in circumstances like the present one is based on public policy. It is, therefore, quite clear that even if one may take into consideration the principles of res judicata or constructive res judicata but predominantly on the issue of public policy the matters like the present one will have to be decided. It cannot just be a matter good humour to let a party bring a fresh action without getting leave to do so while

withdrawing the first one. There are requirements and the principles that underlie the said requirements which must be complied with. It may, therefore, be recalled that a litigant patiently waits in the wings to find the fate of a similarly placed litigant and then trying to take advantage would in fact amount to taking disadvantage and hence would offend the public policy making him disentitled to walk away with relief. In view of the peculiar facts situation obtaining here in the theory of similarly situated persons will not be applicable. In support of that proposition Shri Bandiwadekar relied upon **MAHARAJ KRISHAN BHATT AND ANOTHER VERSUS STATE OF J & K (2008) 2 SCC (L&S) 783**. Here as already discussed the applicants will be, by recourse to this OA, will be precluded from claiming the benefit of that doctrine or for that matter any other doctrine. Public policy will be guiding principle herein.

20. Shri Bandiwadekar, Ld. Advocate referred us to **SARVA SHRAMIK SANGHATANA (KV) VERSUS STATE OF MAHARASHTRA AND OTHERS, (2008) 1 SCC (L&S) 215**. Therein the matter arose out of Industrial Disputes Act and it was held by Their Lordships that the rule of *Sarguja Transport* (supra) would apply where the withdrawal was vitiated by the vice like bench hunting etc. Now, perusal of *Sarva Shramik's* case (supra) would make it very clear that there also thc conscious withdrawal of the case to which principles underlying Order 23 of the CPC apply was not involved. In the realm of

Labour and Industrial Law there are certain peculiar features which do not apply to the matters like the present one.

21. Shri Bandiwadekar, Ld. Advocate referred us to judgment of a Full Bench of the Hon'ble Bombay High Court presided over by the Hon'ble Chief Justice in Nagpur Bench in **Writ Petition No.5297 of 2013 ARUN VISHWANATH SONONE VERSUS STATE OF MAHARASHTRA AND TWO OTHERS AND OTHER WRIT PETITIONS dated 22.12.2014.** Now, in the first place be it noted that the issue involved therein was in the context of the facts of a candidate whose caste claim was invalidated. It is in this background that the observations of Their Lordships in Para 76 of the said judgment which Shri Bandiwadekar, Ld. Advocate laid emphasis on are to be studied. It was held by Their Lordships that the question of res judicata including constructive res judicata would involve adjudication of fact and law both and, therefore, if the petition was filed to seek protection and was either withdrawn or dismissed that would not bar the subsequent petition for the same relief by res judicata. Then the peculiar features of caste scrutiny claims came to be discussed. It was held that several factors would determine the outcome of the matters like the one that was before Their Lordships like fresh cause of action due to intervening events on account of various influencing factors and as for the rest the Hon'ble Full Bench left it to be determined by the individual Division Benches.

22. Therefore, in the first place the factual and legal context in *Arun Vishwanath Sonone's* case (supra) was entirely different when compared with the present one and further there was no element of public policy involved in that particular group of matter which is at the heart of these two OAs.

23. In this view of the matter, therefore, we are very clearly of the view that the applicants cannot succeed in either directly or indirectly practically reopening the withdrawn OAs where no leave was reserved for them. That in our opinion is in actual fact of these OAs are all about under very thin veil which need not even be lifted. The whole thing is quite clearly judicially visible.

24. There is no merit in these two OAs and the only relief that the applicants may walk away with is to save them from the liability to pay cost. These OAs are, therefore, dismissed with no order as to costs.

Sd/-
(R.B. Malik)
Member (J)
8.7.2016

Sd/-
(Rajiv Agarwal)
Vice-Chairman
8.7.2016

Date : 8th July, 2016

Dictation taken by: S.G. Jawalkar.

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