ORISSA HIGH COURT: CUTTACK

W.P.(C) NO.9268 OF 2018

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Krupasindhu Behera ..... **Petitioner**

-Versus-

Union of India, New Delhi & Others ..... **Opp. Parties**

For Petitioner : M/s.Prasanta Kumar Panda, S.B.Das, A.N.Dash & K.B.Mohanty.

For Opp. Parties : M/s. Alok Kumar Mohanty, C.G.C

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MR. JUSTICE B.P.SATAPATHY

DATE OF HEARING & DATE OF JUDGMENT ON:: 18.11.2022

B.P.SATAPATHY, J. The Present Writ Petition has been filed challenging the order dated 11.05.2018 passed by the learned Central Administrative Tribunal, Cuttack Bench (in short 'Tribunal') in O.A No.260/140/2018 and the Office Order No. Admn-I/1288 dtd.27.02.2018 of the Opposite Party No.4.

2. The factual matrix giving rise to the present case is that the Petitioner being a disable person, he was provided with the appointment as against the post of T.S. Sorting Assistant on 19.01.1982 in the Office of the Senior Superintendent, R.M.S. (N) Division as an "other category" candidates. The Petitioner subsequently was transferred to the Office of the Director of Accounts (Postal), Cuttack (Opp. Party No.4), where he joined as a Lower Division Clerk (L.D.C) on 27.02.1986. The Petitioner thereafter was promoted

to the post of Junior Accountant on 26.07.1990 and also qualified the Departmental Examination which he passed on 10.19.1990. The Petitioner taking into account his continuance as a Junior Accountant w.e.f. 26.07.1990 became eligible for being promoted to the rank of Sr. Accountant, Group-C post (at present Group-B) w.e.f. July, 1993 i.e. on completion of three years of minimum qualifying service from the date of joining in the post of Jr. Accountant due to introduction of reservation in favour of the persons with disabilities in the posts filled by promotion vide Office Memorandum dated 20.11.1989 of the Department of Personnel and Training, Government of India under Annexure-2.

2.1. The Petitioner basing on the said Office Memorandum under Annexure-2 when staked his claim for promotion to the cadre of Sr. Accountant w.e.f. July, 1993, the said claim was turned down by the Office of

Opposite Party No.4. Challenging such denial of promotion, the Petitioner made a complaint before the competent authority i.e. Chief Commissioner for persons with disabilities as per the policy decision of the Union Government. In the said complaint, Opposite Party No.4 also filed his objection containing that the Petitioner cannot be promoted to the post of Sr. Accountant as the post of Jr. Accountant and Sr. Accountant have not been identified by the Department. After due hearing of the matter, the competent authority vide his order dated 06.08.2004 under Annexure-4 opined that the Petitioner be considered for his promotion to the post of Sr. Accountant w.e.f. from the date he became eligible and on completion of the required qualifying service by convening review D.P.C. Since prior to approaching the Chief Commissioner for persons with disabilities, the Petitioner claiming similar benefits had approached the learned Central Administrative Tribunal, Cuttack

Bench, Cuttack (in short 'Tribunal') in O.A No.1257 of 2003, learned Tribunal vide order dated 20.07.2006 disposed of the matter with the observation that since the Chief Commissioner in its judgment dated 6.8.2004 had already directed the competent authority to consider the case of the Petitioner for his promotion to the post of Sr. Accountant, no further direction is necessary and accordingly disposed of the matter in terms of the order passed on 06.08.2004 under Annexure-4.

2.2. Challenging the order passed by learned Tribunal on 20.07.2006 under Annexure-5, the respondents filed Review Application No.09/2006. But the said Review Application was dismissed vide order dated 19.11.2009 under Annexure-6 and the Writ Petition filed challenging the order dated 20.07.2006 of the learned Tribunal in W.P.(C) No.15857 of 2006 was also dismissed for non-prosecution vide order dated 13.05.2015. The Petitioner after dismissal of the Writ

Petition was given promotion to the post of Sr. Accountant by preponing the date of promotion to 1.1.1994 vide order dated 06.11.2015 under Annexure-8. Thereafter, when vide office order dated 27.02.2018 under Annexure-9, the promotion extended in favour of the Petitioner from 1.1.1994 was treated as notional promotion with actual benefit from the date of joining as Sr. Accountant i.e. 5.4.2004, the said order was challenged before the learned Tribunal in O.A No. 260/140/2018. But learned Tribunal without applying judicial mind to the facts of the case and the nature of order challenged before it came to a wrong conclusion that the O.A is not maintainable being barred by *res judicata* and accordingly dismissed the same vide the impugned order dated 11.05.2018 under Annexure-12.

2.3. It is the submission of the learned counsel appearing for the Petitioner that pursuant to the order passed by the Chief Commissioner for persons with disabilities under Annexure-4, which was confirmed by the learned Tribunal in its order dated 20.07.2006 in O.A No.1257 of 2003 under Annexure-5 and further confirmed with dismissal of W.P.(C) No.15857 of 2006 vide order dated 13.05.2015, the Petitioner vide order under Annexure-8 was given promotion to the post of Sr. Accountant w.e.f. 1.1.1994. Subsequently, when the said order of promotion issued under Annexure-8 was modified vide office order dated 27.02.2018 under Annexure-9 by holding that the date of promotion of the Petitioner to the post of Sr. Accountant from 1.1.1994 till he joined in the said post will be treated as notional promotion and the Petitioner will only be entitled to get the actual benefit from the date of joining i.e. 5.4.2004, the Petitioner challenging the said order approached the learned Tribunal in O.A No.260/140/2018. It is accordingly contended that with passing of the order under Annexure-8, the order passed by learned Tribunal in O.A No.1257 of 2003 was complied with and the Petitioner was given promotion to the post of Sr. Accountant w.e.f. 1.1.1994. Subsequently, when the said order was modified by holding the promotion from 1.1.1994 till the actual joining as notional promotion vide order dated 27.02.2018 under Annexure-9, the Petitioner challenging the same approached learned Tribunal in O.A No.260/140/2018.

2.4. It is accordingly contended that the office order dated 27.02.2018 passed under Annexure-9 gives rise to new cause of action as the Opposite Parties contrary to the order passed under Annexure-8 passed a different orders by holding the promotion of the Petitioner from 1.1.1994 till the date of joining as Sr. Accountant as notional promotion. Therefore, it is contended that against the said order passed under Annexure-9, the Petitioner rightly approached the learned Tribunal in the aforesaid O.A, but learned Tribunal without applying judicial mind to the facts of the case illegally came to a conclusion that when the matter has already been adjudicated by the learned Tribunal in an earlier O.A, it cannot be permitted to be re-adjudicated and reopened under the grab of the present O.A. While holding so, learned Tribunal illegally held the O.A as not maintainable being barred by *res judicata*. Accordingly, it is contended that since the order under Annexure-9 was passed by modifying the order passed on 06.11.2015 under Annexure-8 with a different proposition, the said order gives rise to a new cause of action and accordingly it cannot be held as not maintainable being barred by *res judicata*. It is also contended that learned Tribunal in O.A No.1257 of 2003 simply upheld the order passed by the Chief Commissioner for persons with disabilities in its order dated 6.8.2004, wherein direction was given to the Opposite Parties to consider the claim of the Petitioner for his promotion to the rank of Sr. Accountant. The said order was ultimately complied with, with passing of the order dated 6.11.2015 under Annexure-8 and the matter with regard to compliance of the order of the learned Tribunal passed in O.A No.1257 of 2003 comes to an end with passing of the said order. Since thereafter the order under Annexure-9 was issued with a different stipulation it gives rise to a new cause of action and the O.A was accordingly filed challenging the same. But as stated above, learned Tribunal without proper appreciation of the grounds taken in the O.A and without applying its judicial mind held the O.A as not maintainable on the ground of *res judicata.*

3. Mr. A.K.Mohanty, learned Central Government Counsel on the other hand submitted that since the order dated 27.02.2018 passed under Annexure-9 and which is the subject matter of challenge in O.A No.260/140/2018 was a modified order to the order passed under Annexure-8 originally, it is to be held that the said order was passed in violation to the order passed by the learned Tribunal on 20.07.2006. Accordingly, it is contended that if at all

the order passed by the learned Tribunal in O.A No.1257 of 2003 was not implemented in letter and spirit, the Petitioner is at liberty to file Contempt Petition as held by the learned Tribunal in the impugned order. It is further contended that since the issue with regard to the promotion of the Petitioner to the rank of Sr. Accountant is already decided with passing of the order on 20.07.2006 in O.A No.1257 of 2003, similar claim cannot be re-agitated and learned Tribunal has rightly held the same as barred by principle of *res judicata*.

4. We have heard Mr. P.K.Panda, learned counsel for the Petitioner and Mr. A.K.Mohanty, learned Central Government Counsel. Perused the materials available on record on the consent of the learned counsel appearing for both the Parties, the matter was heard finally and disposed of at the stage of admission.

5. This Court after going through the pleadings made and the materials available on record

finds that when the claim of the Petitioner for his promotion to the rank of Sr. Accountant was not considered, the Petitioner while on the one hand approached learned Tribunal in O.A No.1257 of 2003, but on the other hand prior to fling of the same had moved the Chief Commissioner for Persons with Disabilities. The said Commissioner vide its judgment dated 6.8.2004 under Annexure-4, disposed of the matter with a direction on the Opposite Parties to consider the claim of the Petitioner for promotion to the Post of Sr. Accountant w.e.f. from the date he became eligible on completion of qualifying service by reviewing the relevant D.P.C. The order passed by the Chief Commissioner on 6.8.2004 under Annexure-4 was taken into consideration by the learned Tribunal and O.A No.1257/2003 was disposed of vide order dated 20.07.2006 under Annexure-5 with a direction on the Opposite Party to consider the case of the Petitioner in terms of the judgment and order passed on 6.8.2004 by the Chief Commissioner. It is also found that even though the said order passed by the learned Tribunal on 20.07.2006 was challenged before this Court in W.P.(C) No.15857 of 2006, but the Opposite Parties also filed Review Petition No.09/2006 seeking review of the order dated 20.07.2006. The said review application though was dismissed vide order dated 19.11.2009 under Annexure-6, but the claim of the Petitioner was never considered as directed by the learned Tribunal as well as by the Commissioner.

6. After dismissal of the Writ Petition filed by the Opposite Parties by this Court in W.P.(C) No.15857 of 2006 vide its order dated 13.05.2015, the Petitioner was given the promotion vide order dated 06.11.2015 under Annexure-8. Vide the said order, the Petitioner was given promotion to the post of Sr. Accountant w.e.f 1.1.1994 and in the said order nothing was indicated to treat the period of promotion from 1.1.1994 on notional basis and the said order was

issued in compliance to the order dated 13.05.2015 passed in W.P.(C) No.15857 of 2006. Subsequently, when the Opposite Parties passed another order on 27.02.2018 under Annexure-9 by modifying the original order passed under Annexure-8, the Petitioner being aggrieved challenged the same in O.A No.260/140/2018.

7. Since the order under Annexure-9 was passed contrary to the original order passed under Annexure-8 as per the considered view of this court, it is to be treated as a fresh order giving rise to a fresh cause of action in favour of the Petitioner. Therefore, while holding so, this Court is of the opinion that learned Tribunal committed gross irregularity by holding that the Original Application is barred by the principle of *res judicata.* Since the question of *res judicata* is mixed question of law and fact, in view of the decision of the Hon'ble Apex Court in the case of ***Sajjadanashin Sayed Md. B.E.Edr.(D) by L.Rs vs.***

Musa Dadabhai Ummer and Others reported in ***AIR 2000 SC 1238***.

8. Hon'ble Apex Court in Para-29 of the judgment in the case of ***Sajjadanashin Sayed Md. B.E.Edr.(D) by L.Rs (supra)*** reported in ***AIR 2000 SC 1238*** held as follows:-

> *"**29**. xxx xxx xxx*
>
> *It is well settled that an earlier decision which is binding between the parties loses its binding force if between the parties a second decision decides to the contrary. Then, in the third litigation, the decision in the second one will prevail and not the decision in the first.*
>
> *xxx xxx xxx".*

We are not in agreement with the view taken by the learned Tribunal.

9. The finding of the learned Tribunal that the impugned order is not amenable for fresh challenge being barred by the principle of *res judicata* is not just and proper. Therefore, this Court is inclined to quash the order dated 11.05.2018 passed by the learned Tribunal in O.A No.260/140/2018 and remit the matter

to the learned Tribunal to decide the same on merit. Since the O.A is of the year 2018 and the Petitioner has attained the age of superannuation in the meantime, learned Tribunal shall do well to dispose of the matter within a period of six months from the date of receipt of this order, if there is no other legal impediment.

10. With the aforesaid observations and directions, the Writ Petition stands disposed of.

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B.P.SATAPATHY,
JUDGE

DR. B.R.SARANGI, J. I agree.

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DR. B.R. SARANGI,
JUDGE

Orissa High Court, Cuttack
The 10th of November, 2022, Subrat (Sr. Steno)