

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 41 OF 2007

Smt. Nanda N. Haldankar,
r/o Behind Maruti Temple,
Davorlim, Margao, Goa.

... Appellant.

Versus

1. Smt. Nalini K. Kulkarni,
wife of Krishnaji Kulkarni,
major in age, Teacher,
r/o Housing Board Colony,
Vidyanagar, Margao, Goa.
(since deceased through LR's)

1(a) Dr. Gayatri Hemant Kulkarni,
(daughter-in-law), working
in Hospicio Hospital,
Margao-Goa.

1(b) Dr. Hemant Krishnaji Kulkarni,
(son), Private Dispensary.

Both residents of House No. MIG-45,
Housing Board Colony, Vidyanagar,
Gogol, Margao, Goa.

2. Government of Goa,
through its Chief Secretary,
having office at Secretariat,
Porvorim, Goa.

3. The Director,
Directorate of Education,
Government of Goa,
St. Inez, Panaji, Goa.

4. The Samaj Seva Sangh,
a Society registered under
the Societies Registration Act
and having its office at Margao
and represented through its
President, Shri Bhagvant
Krishna Naik.
 5. The Secretary,
Samaj Seva Sangh, having office
at Margao, Goa.
 6. The Headmaster,
M & N English High School,
Comba, Margao, Goa.
- ... Respondents

Shri Devidas J. Pangam, Advocate for the Appellant.

Shri Sudesh Usgaonkar with Ms. Rosette Pereira, Advocates for the Respondent No. 1(a) and 1(b).

Shri Manish Salkar, Government Advocate for the Respondent Nos. 2 and 3.

Shri Pulkit Bandodkar, Advocate for the Respondent Nos. 4, 5 and 6.

CORAM:- C.V. BHADANG, J.

RESERVED ON:- 27th MARCH, 2015

PRONOUNCED ON:- 10th APRIL, 2015

JUDGMENT:

A dispute as to seniority between two teachers (one of whom is since dead) has dragged on for more than 28 years giving rise to the present appeal.

2. The respondent no. 1-Smt. Nalini Kulkarni (since deceased) had filed a Civil Suit No. 148/2004; [Regular Civil Suit No. 200/88/A(old)], in which the present appellant-Smt. Nanda Haldankar was the defendant no. 6. The present respondents nos. 2 to 6 were the original defendant nos. 1 to 5.

3. As per the plaint allegations, Samaj Seva Sangh, (hereinafter referred to as, Trust), registered under the Societies Registration Act was running a High School known as M & N English High School (hereinafter referred to as, High School) and was also running a Diploma Course of teaching under the name and style, as "Samaj Seva Sangh Training College" (hereinafter referred to as, Training College). Undisputedly, the High School and Training College were at the relevant time governed by Goa, Daman and Diu (Grant in Aid) Code (the Code, for short).

4. According to the original plaintiff, she was appointed as an Assistant Teacher, in the graduate category in the High School on 10.06.1968. Further according to her, after she worked for two weeks she was transferred to the Training College as Instructor. She was re-transferred to the High School with effect from 09.06.1969. Thus, in short she claimed that her seniority in the High School ought to have been reckoned from 10.06.1968 and not from 09.06.1969, as determined by the respondent no. 3, Director of Education. It appears that the management of the High School had circulated a seniority list showing the appellant senior to Smt. Nalini Kulkarni. In such circumstances, Nalini Kulkarni had sent a representation on 22.03.1985. The Director of Education after holding enquiry had decided that date of appointment of Smt. Nalini Kulkarni in Graduate category should be reckoned as 09.06.1969 and not 10.06.1968. According to the original plaintiff, the appellant had joined the services after her and she could not have been shown senior to her. It appears that feeling aggrieved by the decision of the Director, the original plaintiff had filed Writ Petition No. 188/1986 which was subsequently withdrawn. It is thereafter that, now deceased

Nalini Kulkarni filed a Regular Civil Suit as stated aforesaid, sometime in the year 1988 for the following reliefs:

(i) It may be declared that the services between the two establishments i.e. Training College and High School are transferable.

(ii) It may be declared that at the inception i.e. on 10.06.1968 , the plaintiff was appointed to the post of Assistant Teacher in High School and thereafter she was transferred to the Training College.

In the alternative to prayer (b), it may be held that the plaintiff may be given seniority from 10.06.1968, as services to both the institutions are transferable and the plaintiff be held to be entitled for notional benefits based on her date of appointment as 10.06.1968.

5. The respondent nos. 2 and 3 filed a written statement contesting the claim. It was contended that the Civil Court has no jurisdiction and the suit is not maintainable in law. It was also contended that the services inter se between the High School and Training College were not transferable. It was contended that the seniority list drawn by the management was not approved. It was denied that there was any cause of action to file the suit.

6. The respondent nos. 4, 5 and 6 contended that the suit is barred by limitation and also on principles of *res judicata* in as much as the respondent no. 1 had unconditionally withdrawn the Writ Petition No. 188/1986. It was also contended that the Civil Court has no jurisdiction. It was contended that initially the respondent no. 1 had applied for the posts of an Assistant Teacher some time in March 1967 and by order dated 02.04.1967 she was appointed from 05.06.1967, however, she did not join. The respondent no. 1 applied afresh and in response, thereto she was offered employment in the Training College which she accepted and she accordingly joined in the Training College on 10.06.1968. Thereafter by her application dated 09.06.1969, she applied for the post of Headmistress in the High School as the earlier Headmaster, Shri S.P. Joshi had left and she was asked to take the charge of Headmistress from that day itself. She worked as such during the academic year 1969-70 till June 1970 and on the appointment of another Headmaster, she started working as an Assistant Teacher. It was thus contended that the respondent no. 1 was appointed in the High School only from 09.06.1969 and not from 10.06.1968, as claimed by her.

7. The appellant (defendant no. 6) contested the suit on a similar ground, namely the suit being barred by limitation and on the ground that the Civil Court has no jurisdiction. The defence based on unconditional withdrawal of Writ Petition No. 188/1986 was also raised. It was contended that the appellant after obtaining a Post Graduation (M.A.) degree had joined the High School on 22.07.1968 and was appointed on a graduate scale. She obtained professional qualification namely, B.Ed in 1978. In short it was contended that the appellant joined High School in 1968 when the respondent no. 1 was working in Training College and as such, she could not be ranked senior to the appellant.

8. The learned Trial Court framed the following issues in the matter:-

1. Whether the plaintiff proves that her services were transferred from the High School to the Training College ?
2. Whether the plaintiff proves that the services between the said two establishments are transferable ?

3. Whether the plaintiff proves that she is entitled for seniority from 10.06.1968 ?

4. Whether the defendant nos. 1 to 6 prove that this Court has no jurisdiction ?

5. Whether the defendant nos. 3 to 6 prove that the suit is barred by *res judicata*, the claim of plaintiff having been decided in the writ proceedings ?

6. What relief ? What Order ?

ADDITIONAL ISSUE:

1. Whether the defendant nos. 3 and 5 prove that this Court has no jurisdiction to try and entertain the subject matter of the suit, because the order of Director of Education, Government of Goa can be challenged before the Administrative Tribunal and/or High Court ?

9. At the trial, the respondent no. 1 examined herself, while on behalf of respondent nos. 1 and 2, one Dr. Thomas Mathew, Deputy Education Officer was examined. On behalf of respondent nos. 3, 4 and 5, Mr. Ankush Gawas, a retired

Headmaster of the High School was examined. The appellant examined herself in her defence. The learned Trial Court by judgment and order dated 22.12.2006 has decreed the suit. Feeling aggrieved the original defendant no. 6 has come up in appeal. During the pendency of the appeal, respondent no. 1 has died and her legal representatives, 1(a) and 1(b) have been brought on record.

10. I have heard Shri Pangam, learned Counsel for the appellant, Shri Usgaonkar, learned Counsel for the respondent nos. 1(a) and 1(b), the learned Government Advocate for respondent nos. 2 and 3 and Shri Bandodkar, learned Counsel for the respondent nos. 4, 5 and 6. With the assistance of the learned Counsel for the parties, I have perused the record and the impugned judgment.

11. It is submitted by Shri Pangam, learned Counsel for the appellant that respondent no. 1 had given a letter dated 12.05.1969 which would clearly show that she joined as Acting Headmistress in the High School. It is submitted that the

appellant has joined the High School on 22.07.1968, which is prior to the joining of the respondent no. 1. It is thus submitted that the Director was right in holding that the seniority of respondent no. 1 has to be reckoned from 09.06.1969 and not from 10.06.1968, as claimed by her. The learned Counsel has also raised a submission based on the want of jurisdiction of Civil Court. It is submitted that the respondent no. 1 has unconditionally withdrawn Writ Petition No. 188/1986. Insofar as the contention of lack of jurisdiction in the Civil Court, is concerned, it is contended that although at the time the parties joined the High School, the same was governed by the Code, subsequently, the Goa, Daman and Diu School Education Act, 1984 (Act of 1984, for short) came to be enacted, which came into force on 24.07.1985. It is submitted that the suit is filed thereafter in the year 1988. The learned Counsel has referred to the provisions of Section 22 and Section 27 of the Act of 1984, in order to submit that the Civil Court would lack jurisdiction. The learned Counsel has pointed out that the provisions of Rule 87-A as amended with effect from 11.08.1994 of the Goa, Daman and Diu School Education Rules, 1986 (Rules of 1986, for short), in

order to submit that during the pendency of the suit, a remedy of appeal to the Administrative Tribunal was provided and thus, the suit was not maintainable. The learned Counsel has placed reliance on the decision of the Hon'ble Apex Court in the case of **Sarguja Transport Service Vs. S.T.A. Tribunal, Gwalior**, reported in **AIR 1987 SC 88**, in order to submit that the respondent no. 1 having withdrawn Writ Petition No. 188/1986 unconditionally and without seeking leave or permission of the Court, was not justified in filing the suit in respect of same subject matter and reliefs.

12. Shri Usgaonkar, learned Counsel for the respondent nos. 1(a) and 1(b) submitted that there is enough material on record to show that the respondent no. 1 had applied for the post of Assistant Teacher and not for the post of Instructor in the Training College. It is submitted that respondent no. 1 had joined as Assistant Teacher in the High School on 10.06.1968 and by letter dated 12.05.1969 her services were transferred to the Training College. It is submitted that she was re-transferred to the High School and for sometime, she worked as Headmistress and

thereafter as an Assistant Teacher. The learned Counsel has taken me through the impugned judgment, in order to show that the Trial Court rightly considered the oral and documentary evidence on record, to come to the conclusion that respondent no. 1 was appointed as Assistant Teacher, prior to the appellant in the High School and as such, it was the respondent no. 1 who ranked senior to the appellant. It is submitted that the learned Trial Court was justified in holding that the letter dated 09.06.1969 was obtained from the respondent no. 1 "For setting the record right". It is submitted that there is enough material on record to show that the respondent no. 1 never applied for the post of Instructor and she was in fact transferred from the High School to the Training College. So far as the objection to the maintainability of the suit is concerned, it is submitted that although the Rules of 1986 were amended during the pendency of the suit, the same will not operate retrospectively. The learned Counsel submitted that the decree in the suit operates retrospectively from the date of filing of the suit and it relates back to the date of institution and in that view of the matter, the amendment of the Rules of 1986 providing an appeal to the Administrative Tribunal, cannot have the effect of

taking away the jurisdiction of the Civil Court, to entertain the suit.

13. The learned Government Advocate for the respondent nos. 2 and 3 has submitted that the Director was right in holding that the seniority of the respondent no. 1 has to be reckoned from 09.06.1969. The learned Government Advocate has fairly submitted that as long as there is no financial implication/burden on the Government, he has nothing to add.

14. Shri Bandodkar, learned Counsel for the respondent nos. 4, 5 and 6 has also supported the appellant in order to submit that the seniority of the respondent no. 1 has to be reckoned from 09.06.1969.

15. On hearing the learned Counsel for the parties and on perusal of record, I find that the appeal has to be allowed on the ground of lack of jurisdiction in the Civil Court. It would appear from the issues which are reproduced above that the issue no. 4 covers the additional issue no. 1 also. Both these issues are on the point of jurisdiction of the Civil Court to try and entertain the

subject matter of the dispute. Before going to that issue, I would briefly go to the submission of unconditional withdrawal of Writ Petition No. 188/1986. The learned Trial Court vide issue no. 5 has found that the said petition was dismissed as withdrawn and was not decided on merits and as such, the bar of *res judicata* cannot apply. It would appear that the question is not about *res judicata*, of the principles akin to or underlying the provisions of Order XXIII, Rule 1 of the Civil Procedure Code. However, I find that even in this regard, submission on behalf of the appellant based on the decision in the case of **Sarguja Transport Service (supra)** cannot be accepted. The question before the Hon'ble Supreme Court, in the case of **Sarguja Transport Service (supra)** was whether a party can be permitted to approach the High Court by filing writ petition under Article 226 of the Constitution of India, once the party having withdrawn a similar petition without seeking leave/permission of the Court. The Hon'ble Supreme Court held that in order to prevent a litigant from abusing the process of the Court and as a matter of public policy, he should not be permitted to take re-course to similar remedy again. However, it has been further held that this

disability may not apply, if a party subsequently takes re-course to other remedy, such as filing a suit or a petition under Article 32 of the Constitution of India. The following observations in paragraph 9 of the judgment may be reproduced with profit:

"The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other

remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however, leave this question open."

(Emphasis supplied)

Thus, the withdrawal of the earlier petition cannot come in the way of the respondent no. 1, filing a suit. In such circumstances, the contention in this regard has to be refuted.

16. This takes me to the question of lack of jurisdiction in the Civil Court. It is undisputed that at the time, the appellant and the respondent no. 1 joined the High School, the services were governed by the Code. Subsequently, the Act of 1984 came into force with effect from 24.07.1985. The suit is filed in the year 1988. Section 22 and 27 of the Act of 1984 which are relevant for the purpose may be re-produced as under:

"22. Appeal.- (1) Subject to the provisions of sub-section (2), an appeal shall lie to the Tribunal from the following orders:

- (a) refusing to recognize a school under sub-section (2) of section 5;
- (b) withdrawing the recognition of a school under sub-section (3) of section 5;
- (c) stopping, reducing or suspending aid under sub-section (2) of section 7;
- (d) refusing to grant permission under sub-section (3) of section 9;
- (e) [dismissing, removing from service any employee or reducing him in rank or retiring him compulsorily or otherwise terminating his services under sub-sections (2), (2a), (4) and (4a) as the case may be, of section 11.]

(2) Every such appeal shall be preferred within thirty days from the date of communication of the order:

Provided that the Tribunal may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(3) On receipt of any such appeal, the tribunal shall, after giving the appellant a reasonable opportunity of being heard and after making such enquiry as it deems proper, pass such orders as it may deem fit, after recording the reasons therefore."

"27. Jurisdiction of Civil courts barred.- No Civil Court shall have jurisdiction in respect of any matter in relation to which the Administrator or the Director or any other person authorised by the Administrator or Director or any other Officer or authority appointed or specified by or under this Act, is empowered by or under this Act to exercise any power, and no injunction shall be granted by any civil court in respect of anything which is done or intended to be done by or under this Act."

17. It can thus be seen that remedy of appeal provided under Section 22 of the Act of 1984 is in respect of the specified orders as set out in sub-section 1 of Section 22 of the Act of 1984. Section 27 of the Act of 1984 *inter alia* provides that no Civil Court shall have jurisdiction in respect of any matter in relation to which an Administrator or Director or any person authorised by Administrator or Director is empowered to decide. The question is whether the Director was authorised to entertain the dispute as to seniority and if yes, what was the remedy available to the aggrieved party, in the event, the decision of the Director was against it. It appears that the Government of Goa has framed Rules under the Act better known as Goa, Daman and Diu School Education Rules, 1986, which were amended with effect from 11.08.1994, whereby Rule 87-A came to be introduced, which reads as under:

"87A. Seniority list.— (1) *It shall be the responsibility of the management to compile categorywise seniority list of employees in order of their seniority, as defined in rule 87, and maintain them upto date, in accordance with the norms laid down by the Director.*

(2) Draft seniority lists drawn up for each category, shall include the names of all employees of that category working in the school/schools run by the management.

(3) A copy of the draft seniority list, so drawn up for each category, shall be made available to each employee of that category, for his records.

(4) Any objection to the draft seniority list if any, shall be submitted by the employee in writing to the Head of the school within fifteen days from the date of receipt of the copy of such draft list.

(5) The management shall after due scrutiny and verification of such objections/claims as are received and after hearing each of such employees as may be affected by possible revision in the list revise, the draft list, if necessary.

(6) A copy of the revised seniority list as finalized by the management, for each category, shall be made available to each employee of that category for his/her record. The employee shall acknowledge the receipt of

such list for the record of the school.

(7) In case an employee has any objection/claim in respect of the seniority list so finalized by the management, he/she may prefer an appeal against the same to the Director, within 30 days from the date of receipt of the finalized list, who after making such enquiries as may be deemed necessary, shall decide the case:

Provided that any party aggrieved by the decision of the Director, may prefer an appeal to the Tribunal."

18. It can thus be seen that the Rule 87-A of the Rules of 1986 provides for a procedure in the matter of management drawing a seniority list of the employees as per their seniority as provided under Rule 87-A. The proviso to Rule 87-A(7) of the Rules of 1986 states that a party aggrieved by the decision of the Director, may prefer an appeal to the Tribunal. It can thus be seen that during the pendency of the suit, the Rules of 1986 came to be amended, thereby providing a remedy of appeal to employee aggrieved by adverse decision of the Director, in determining

seniority, as in the present case.

19. The next question is whether such an amendment would apply to the pending suit. The submission on behalf of the respondent no. 1 that the decree passed in the suit relates back to the filing of the suit, even if accepted, cannot come to the aid of the respondent no. 1. This is because assuming so, this would necessarily presuppose that the suit is maintainable in accordance with law. It is trite that although a right of appeal is a substantive right, it does not include a right as to forum. Thus, a distinction has to be drawn between a right of appeal and the forum before which such right is available. The provision as to forum is essentially a part of adjectival law or procedural law. It is further well settled that a change in procedural law would apply and would cover the pending dispute/litigation unless otherwise provided either expressly or by necessary implication. Rule 87-A of the Rules of 1986 as it stands, does not show that any pending proceedings, have been saved thereunder. In this regard a useful reference may be made to the case of **New India Insurance Co. Ltd. Vs. Smt. Shanti Misra**, reported in **AIR 1976 SC 237**.

Although that was a case arising under the provisions of Motor Vehicles Act, 1939 (old Act), the enunciation of the law on the point, is relevant for the present purpose. In that case on account of death of one Amarnath Misra, his heirs being his widow and two sons had become entitled to file a civil suit seeking compensation. However, shortly after the date of the accident, an Accident Claims Tribunal came to be constituted under the amended provisions of Section 110(a) and 110(f) of the Motor Vehicles Act, 1939. The question was whether action for compensation would lie before the Tribunal. The following observations in paragraph 5 of the judgment are to the point:

"On the plain language of sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising

after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-section (2) clearly show that the change forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in a simple way. But the provision of limitation of 60 days contained in sub-section (3) created an obstacle in the straight application of the well-established principle of law. If the accident had occurred within 60 days prior to the constitution of the Tribunal then the bar of limitation provided in sub-section (3) was not an impediment. An application to the Tribunal could be said to be the only remedy. If such an application, due to one reason or the other, could not be made within 60 days then the Tribunal had the power to condone the delay under the proviso. But if the accident occurred more than 60 days before the constitution of the Tribunal then the bar of limitation provided in sub-section (3) of section 110A on its face was attracted. This difficulty of limitation led most of the High Courts to fall back

upon the proviso and say that such a case will be a fit one where the Tribunal would be able to condone the delay under the proviso to sub-section (3), and led others to say that the Tribunal will have no jurisdiction to entertain such an application and the remedy of going to the Civil Court in such a situation was not barred under section 110F of the Act. While taking the latter view the High Court failed to notice that primarily the law engrafted in sections 110A and 110F was a law relating to the change of forum.”

(Emphasis supplied)

20. In the present case, also, there is nothing to suggest that the right of the appeal to the Tribunal was made available only to causes of action subsequent to the date on which Rule 87-A, of the Rules of 1986 was introduced. Thus, in my considered view, on introduction of Rule 87-A, the Civil Court lacked jurisdiction to entertain a dispute as to seniority as the remedy of appeal was provided before the Administrative Tribunal. For this reason, the impugned judgment and decree cannot be sustained.

21. In the result, the appeal is allowed. The impugned judgment and decree is set aside. The suit is hereby dismissed.

In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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