

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 84 OF 1992

Dhondiram Bapusaheb Nangare

.....Appellant

: V/S :

1. The State of Maharashtra & Ors.

.....Respondents

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Mr. P.J. Thorat h/f. Mr. R.A. Thorat, Advocate for the appellant.

Mr. Rajan Pawar, AGP for respondents no.1 and 2.

Mr. Milind Deshmukh, Advocate for respondent no.3.

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Coram :- Smt. R.P. SondurBaldota, J.

15th January, 2015.

P.C. :-

1). This Second Appeal arises out of the concurrent findings of facts and law of the Courts below in Regular Civil Suit No.103 of 1987 filed by the appellant. The five substantial questions of law framed by the Court, at the time of its admission were in terms of Grounds 1(a) to 1(e) of the memo of appeal. The grounds read as follows :-

“(a). Whether the Courts below were correct in holding that the entitlement of the plaintiffs to continue in service till 58 years of age on the basis of his death of birth being 16th March, 1929 was not enforceable in view of the judgment in Regular Civil Suit No. 469 of 1985 ?

(b). Whether the declaration given by the Civil Court regarding the age of the plaintiff in Regular Civil Suit No. 469 of 1985 was binding on the respondents and it was not open for them to take shelter under the Government Circular of 1972 which require approval by the Deputy Director of Education ?

(c). Whether the Plaintiff having continued in service up to the age of 58 years on the basis of his birth date being 16th March, 1929 was not entitled to salary and other benefits for more than two years during which period he actually served with the respondent no.3 ?

(d). Whether the lower Appellate Court was correct in holding that the Plaintiff had not followed procedure as prescribed by law in not obtaining approval for the changed date of birth ?

(e). Whether the Education Department and the officers of the Education Department entitled to ignore the judgment and decree of the trial Court in the earlier suit declaring the plaintiffs' date of birth as 16th March, 1929 and whether there has been a total failure of justice as a result thereof ?”

2). Briefly stated, the facts concerning the dispute between the parties are as follows :-

. The appellant was appointed as Boarding Superintendent with respondent no.3, educational institution. In due course of

time, he was appointed as the Head-Master. The service record of the appellant maintained by respondent no.3 contained his date of birth as 15th February, 1927 as disclosed in the SSC Certificate in accordance with Rule 67.6 of the Secondary School Code, 2002. The appellant made a representation to respondent no.3 for change in his date of birth from 15th February, 1927 to 16th March, 1929. Respondent no.3, while intimating the appellant that, it had no objection for the change of date, informed him that, in view of the Circular dated 4th April, 1972 issued by the State of Maharashtra, the appellant was required to make an application to respondent no.2, Deputy Director of Education for change in the date of birth in the service records. By the letter dated 5th February, 1974 the appellant then claimed to have made application to the Deputy Director of Education, for rectification of the records. Respondent no.3, therefore effected the change in its records. However, respondent no.2 by his letter dated 25th September, 1995 refused to give effect to the change. Thereafter, he filed Regular Civil Suit No. 469 of 1985 in the Court of Civil Judge Junior Division, Satara for declaration of his correct date of birth and for an injunction to restrain respondent no.3 from retiring him from service before the date of super-annuation as per

the correct date of birth. The suit filed initially was against respondents no.2 and 3. Later, however, for the reasons best known to the appellant, he withdrew the suit against respondent no.2. By the judgment and order dated 11th July, 1996 the appellant's suit was partly decreed. It was declared that, the date of birth of the appellant is 16th March, 1929. However, his suit for injunction as sought was dismissed and the appellant was directed to return the benefits enjoyed by him pursuant to the interim orders passed in the suit. Admittedly, the appellant has not returned the benefits enjoyed by him pursuant to the interim order. It is also an admitted position that, the appellant has not complied with the Undertaking given by him to the Court at the time the interim relief was passed in his favour in the suit.

3). When the respondents did not take note of the date of birth of the appellant as of '16th March, 1929' despite the decree in Regular Civil Suit No. 469 of 1995, he filed a second suit i.e. Regular Civil Suit No. 103 of 1997 for a declaration that he is entitled to serve as Head-Master till he attains the age of 58 years on March, 1987 and further continues to hold the post of Head-Master till March, 1987 alongwith consequential relief of permanent injunction restraining the respondents from super-

annuating him until March, 1987.

4). The respondents contested the suit contending that the Circular issued by the Government under the Secondary School Code requires the appellant to obtain approval of respondent no.2 for change in the service records and that without such approval respondent no.3 had no authority to make any changes in the service record. The trial Court, by its judgment and order dated 29th March, 1989 dismissed the suit by holding that the appellant had failed to prove that he had a right to serve till he attained the age of super-annuation on the basis of date of birth of 16th March, 1929 and that he was not entitled to either the relief of declaration or of injunction, as prayed for by him.

5). Being aggrieved by the order of the trial Court of dismissal of the suit, the appellant approached the District Court by filing Regular Civil Appeal No. 313 of 1989. During the pendency of appeal on 5th June, 1989 the appellant filed an application for amendments to the plaint in order to include three prayers therein and the averments in support of the prayers. The three proposed prayers read as follows :-

“B-1. A Court Commissioner be appointed for taking accounts and for fixing monthly pension and the amount of total arrears till the date of the filing of the present suit.

B-2. Plaintiff be awarded 18% p.a. towards interest on the arrears amount.

B-3. Appropriate direction for the further payments as per rules and on the basis of the pension fixed as from 1-4-87 be issued.”

6). In the proposed paras-4(a) and 4(b), the appellant claimed that after his date of super annuation i.e. 31st March, 1987 the act of the respondents of “not allowing even the provisional pension to the appellant since the date of actual retirement i.e. 1st February, 1983 was wrong and vindictive. The lower appellate Court by its order dated 1st April, 1991 dismissed the application holding that the amendments proposed were not necessary for the just decision in the case and the main prayer clause included all the prayers which the appellant wanted to bring in by way of amendments. The lower appellate court also noted that, there was delay in filing the application for amendments. By the order dated 1st March, 1981 the lower appellate Court rejected the appeal holding that decree of the Court in Regular Civil Suit No. 469 of 1985 granting the relief of declaration of the date of birth to the appellant was against respondent no.3. The relief of injunction having been refused and the judgment having been accepted by the appellant by not filing an appeal therefrom, was binding on him. As such, the appellant has no right to get the relief of injunction

against the respondents for continuation in service till superannuation on the basis of date of birth as 16th March, 1929. The lower appellate Court also noted that, the appellant had not obtained permission from the authority i.e. respondent no.2 for effecting change of his date of birth in his service book which is necessary as per the Circular issued by the Government. He had not complied with the rules framed by the Government in this regard. It opined that, it was obligatory on the part of the employees of the Secondary School Code to follow the rules framed by the Government under the Secondary School Code. Further, there was no statutory provision in derogation of the rules framed under the Secondary School Code and as such there could be no relief of injunction granted to the appellant.

7). Mr. Thorat, the learned Advocate appearing for the appellant submits that, the lower appellate Court had erred in not granting the application for amendments to the appellant. It is his argument that, by the amendment the appellant was only bringing on record the subsequent events and additional reliefs required in view of the subsequent events. Perusal of the application for amendments, however, shows that the same do not contain a

specific averment that pension was being denied to the appellant. It also does not contain a specific prayer for payment of pension. Mr. Thorat, submits that respondent no.3 had infact informed respondents no.1 and 2, not to release pension to the appellant because the appellant has not yet returned the amount of salary received by him pursuant to the order passed in Regular Civil Suit No. 469 of 1985. He submits that, respondents no.1 and 2 could not have acted as per the dictates of respondent no.3. In my opinion, the lower appellate Court has correctly dismissed the application for amendments because it neither contains any specific allegation relating to the pensionary benefits nor any specific reliefs in respect thereof. There was also no explanation for the delay in filing the application. Besides, denial of pension was a subject matter different from that pleaded in the plaint. It gave an entirely new cause of action, if any, to the appellant. Therefore, the amendment sought could not be allowed.

8). Though the appellant has obtained decree of declaration in his favour as regards the date of birth, with withdrawal of the suit against respondent no.2, the declaration cannot be said to be a declaration *in rem*. It would be a declaration in *personem* against respondent no.3. Therefore, on

the basis of that decree, the appellant cannot maintain the suit against respondents no.1 and 2.

9). Thus, there is no infirmity whatsoever in the concurrent findings of both the Courts below and the questions of law framed at the time of admission of the appeal are answered accordingly. The Second Appeal is accordingly dismissed.

(SMT. R.P. SONDURBALDOTA, J)