

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1140 OF 2017**

Shri Anil Govind Naik,
Teacher Grade-I,
Peoples Higher Secondary School,
Mala, Panaji-Goa, major of age,
Residing at Flat No.2/G-3,
Dukle Residency, Tamdi-Mati,
Taleigao-Goa 403 002.

... Petitioner

V e r s u s

1. The Director of Education,
Government of Goa, having
Office at Directorate of
Education , Alto Porvorim,
Bardez-Goa.
2. The People's Higher Secondary School,
Through its Principal,
Having office at Rua de Ourem,
Mala, Panaji-Goa.
3. The Chairman,
School Managing Committee,
People's Higher Secondary School,
having office at Rua de Ourem,
Mala, Panaji-Goa.
4. Mrs. Sidharthi Netravalkar,
Principal,
People's Higher Secondary School,
Mala, Panaji-Goa.

.... Respondents

(All Registered addresses)

Shri Nigel Da Costa Frias, Advocate with Adv. Maria Correia for the Petitioner.

Shri Amir Jamadar, Additional Government Advocate for the Respondent no.1 Respondent.

Mr. A. D. Bhobe, Advocate for the Respondent no.3

Mr. R. Rao, Advocate for the Respondent no.4.

CORAM: C. V. BHADANG, J.
Reserved on: 11th October, 2018.
Pronounced on: 15th October, 2018.

JUDGMENT:

This petition involves a dispute as to the seniority between the petitioner and the fourth respondent.

2. The brief facts necessary for the disposal of the petition, may be stated thus:

That the petitioner as well as the fourth respondent were appointed as teacher (Grade-I) in the respondent no.2 school by separate orders dated 5/6/1989. The petitioner has been appointed as a teacher (Grade-I) in the subject of Accountancy. The fourth respondent was appointed as a teacher (Grade-I) in Biology. Admittedly the fourth respondent being older than the petitioner was shown as senior to the petitioner, right from the date of the appointment till the year 2013, except in the provisional seniority list for the

year 2010-11.

3. The petitioner had sought extraordinary leave in order to pursue a job in Saudi Arabia for better prospects. The extraordinary leave was initially granted for two years which was extended twice. It is a matter of record that the fourth respondent was on extraordinary leave from 21/9/2007 to 30/6/2013. The fourth respondent rejoined her duties w.e.f 1/7/2013. The order granting extraordinary leave to the fourth respondent did not stipulate that the respondent no.4 had a lien over the vacancy created on account of her extraordinary leave.

4. It appears that initially the Director of Education had approved the appointment of the fourth respondent vide letter dated 3/6/1989. The Director of Education by a subsequent letter dated 8/3/1990 communicated to the Managing Trustee of the school, that the appointment of the fourth respondent is not in accordance with the rules and therefore requested to take necessary action to fill up the post by following the procedure as per rules. It appears that the said letter was issued as the Goa Board of Secondary and Higher Secondary Education (the Board, for short) had intimated to the Office of the Director of Education that the respondent no.4 who was holding a Master's Degree in Microbiology, was not eligible to be appointed as a

teacher (Grade-I) in Biology. According to the Board, the entire of syllabi of Std. XI and Std. XII Science, contains topics relating to Botany and Zoology, with a weightage of two marks being given to Microbiology in both the standards and a candidate holding a Post Graduate degree in Microbiology is not trained in 'dissecting techniques' and therefore a person holding a Postgraduate degree in Microbiology, cannot be appointed as a teacher (Grade-I) to teach Biology.

5. The Director of Education accordingly issued a circular dated 6/4/1990 stating that a Grade-I teacher in Biology should have a Postgraduate degree in the relevant subject as the syllabus of Std XI and Std. XII Science does not have any relevance to Microbiology as a subject. However, this circular was followed by another circular dated 4/6/1990 wherein the Director of Education reproduced the following clarification issued by the board:

“Microbiology/Botany/Zoology Post Graduate with either Zoology or Botany at Graduate level may be considered as eligible to be appointed as Grade I Teacher in Biology at the Higher Secondary level.”

Incidentally the fourth respondent is holding a degree BSc (Zoology) with MSc (Microbiology).

6. The petitioner sought to challenge the seniority of the fourth respondent on two grounds (i) that the fourth respondent was not eligible to be appointed as a teacher Grade-I in Biology, particularly when she was not holding a post graduate degree in either Zoology or Botany. In short, according to the petitioner the fourth respondent being a Post Graduate in Microbiology was not eligible to be appointed as teacher Grade-I in Biology. In that view of the matter, whatever service is rendered by the fourth respondent has to be treated as 'ad hoc service' and she cannot rank higher in seniority to the petitioner who was regularly appointed as a teacher Grade-I in Accountancy and (ii) that the period spent by the fourth respondent from 21/9/2007 to 1/7/2013 as 'extraordinary leave', while serving in Saudi Arabia has to be excluded while computing the seniority and eventually on rejoining the service on 1/7/2013, she cannot rank senior to the petitioner.

7. The seniority dispute went before the Director of Education in Education Appeal No.I/2011 and Education Appeal No.10/2013, pertaining to the seniority list of the year 2011-12 and of the year 2013-2014, respectively. Incidentally no seniority list was drawn for the intervening year 2012-13. Be that as it may, the Director by an order dated 1/7/2014 dismissed both the appeals, thereby maintaining the seniority of the fourth respondent over the petitioner. Feeling aggrieved, the petitioner challenged the same before the

Administrative Tribunal in Education Appeal No.3/2014. The Administrative Tribunal found that “ the aspect of appointment of the respondent no.4” cannot be the subject matter of the appeal, inasmuch as the said question cannot be agitated in terms of Rule 87-A of the Goa, Daman and Diu School Education Rules 1986 (The Rules of 1986, for short) framed under the Goa, Daman and Diu School Education Act 1984 (The Act, for short). Thus the Tribunal refused to go into the question whether the appointment of the fourth respondent was regular or not. Insofar as the second ground is concerned, the Tribunal came to the conclusion that in terms of Rule 2(i) of the Goa State Civil Services (Grant of Leave to seek employment in India or Abroad) Rules 2002, (The Rules of 2002, for short), an employee would only be dis-entitled to claim the monetary benefits or the 'chances of promotion' that may arise during the period of leave. In the opinion of the learned Administrative Tribunal, the employee cannot lose his/her seniority on account of being on leave, but the employee in fact 'exercises a lien on the job'. In that view of the matter the learned Administrative Tribunal by a judgment and order dated 11/5/2017 has dismissed the appeal. Feeling aggrieved, the petitioner has approached this Court.

8. I have heard Shri Costa Frias, the learned counsel for the petitioner and Shri Rao, the learned counsel for the respondent. I have also heard Shri

Bhobe, the learned counsel for the respondent no.3 and the learned Additional Government Advocate for the respondent no.1. With the assistance of the learned counsel or the parties, I have gone through the record.

9. Shri Costa Frias, the learned counsel for the petitioner raised two contentions (i) that the respondent no.4 was not qualified to be appointed as a teacher (Grade-I) in Biology when she was holding a Post Graduate Degree in Microbiology, as per the circular dated 6/4/1990 of the Director of Education. It is submitted that after the subsequent circular dated 4/6/1990 neither the management took any action for regularization of the service of the fourth respondent nor a fresh approval of the Director of Education was sought. It is submitted that once the Assistant Director of Education by his letter dated 8/3/1990 had asked the Management to take necessary action to fill up the post by following the procedure as per the rules, nothing was done by the management. Thus in the submission of the learned counsel for the petitioner, the appointment of the respondent no.4 cannot be said to be regular and at the highest, her appointment would be of an ad hoc nature where, she cannot rank senior to the regular employees, including the petitioner. The learned counsel has placed reliance on clause 5 of the table annexed to Rule 78 of the Rules of 1986 showing the minimum qualification

for the appointment of the teaching staff. It is submitted that clause 5 of the table shows that a person has to have a Master's Degree in the subject concerned, and the respondent no.4 not having a Master Degree in Biology to her credit, was not entitled to be appointed as a teacher Grade-I in Biology. It is submitted that the Director failed to consider this aspect and the Tribunal was also in error in holding that this aspect cannot be gone into under Rule 87-A of the Rules of 1986. In the submission of the learned counsel for the petitioner for the limited purpose of determining the question of inter -se seniority, the Director or the Tribunal could look into the question whether the appointment of the respondent was regular or otherwise and if not, the effect of the same on the inter se seniority between the parties. Reliance on behalf of the petitioner is placed on the decision of the Supreme Court in the case of **Bhupendra Nath Hazarika and anr. Vs. State of Assam and others (2013) 2 SCC 516**, in order to submit that a initial appointment made dehors the statutory rules/qualification could only be regarded as an ad hoc appointment and cannot be counted for the purpose of fixation of seniority.

10. Secondly it is contended that the period spent by the respondent no.4 on extraordinary leave would dis- entitle her to retain her position in the seniority list. Reliance in this regard is placed on Rule 2(i) of the Rules of 2002. It is submitted that the said rule is wide enough to show that during the currency of the period of the extraordinary leave, the employee concerned,

shall lose “all service benefits”. In the submission of the learned counsel for the petitioner “service benefits” within the meaning of Rule 2(i) of the 2002 rules would also include the position of the employee in the gradation/seniority list as held by the Kerala High Court in the case of **Sreekala Staff nurse Vs. The State of Kerala (Case No. WP(C) No.18777 of 2006 , MANU/KE/0888/2006** and the decision of the Supreme Court in the case of **A. Janardhana Vs. Union of India, (1983) AIR SC 769 and Qamar Jahan Vs. Uttar Pradesh Service Tribunal (1998) 9 SCC 450**. Reliance is also placed on the decision of the Supreme Court in the case of **Union of India and others Vs. Ashok Kumar Sharma (2011) 13 SCC 27**, in order to submit that except in a case of extraordinary leave being granted, on medical ground, or the competent authority while granting leave making it clear that the period spent shall count as qualifying service, the period so spent cannot enure to the benefit of the concerned employee as qualifying service and/or to retain the position in the seniority list. The learned counsel has placed reliance on Rule 21 of the Central Civil Services (Pension) Rules (Pension Rules, for short) and Fundamental Rules (F.R. 26) in order to submit that the period spent on such extraordinary leave, (particularly when the order granting such leave was silent as to whether the respondent no.4 had retained any lien on the post), cannot enure to the benefit of the petitioner, either as qualifying service or to retain her position in the seniority list. It is submitted

that in such a case, the inter- se seniority of the concerned employee has to be re-determined and re fixed when the concerned employee rejoins service. Reliance in this regard is placed on Rule 5 of the Goa Government (Seniority) Rules 1967. It is submitted that none of these aspects have been considered by the Director or the Administrative Tribunal and the impugned orders suffer from infirmity on that count.

11. On the contrary, it is submitted by Shri Rao, the learned counsel for the respondent no.4 that there is no challenge to the appointment or the nature of appointment of the respondent no.4 in the petition. It is pointed out that the respondent no.4 has since been promoted as a principal by an order dated 9/7/2014 which has been approved by the Director of Education on 11/7/2014. It is submitted that the aforesaid two orders are challenged by the petitioner in W.P. No.236/2018 which is pending before the Division Bench of this Court. It is submitted that the Director has rightly come to the conclusion that the nature of the appointment cannot be challenged or decided under Rule 87-A of the Rules of 1986. It is submitted that the petitioner had not sought any declaration of the service of the petitioner being considered as ad hoc service and the dispute is limited to the inter- se seniority between the petitioner and the respondent no.4. The learned counsel pointed out that the respondent no.4 was granted extraordinary leave which

she availed for a period of 5 years and 5 months, which is well within the maximum six years of such extraordinary leave which could be granted under Rule 2(b) of the Rules of 2002. The learned counsel submitted that Rule 2 has to be read as a whole, which would clearly indicate that only the employees who are in regular service can be granted such extraordinary leave. The learned counsel has placed specific reliance on Rule 2 (j), (o) and (p) in order to submit that they indicate that the seniority cannot be lost on account of an incumbent availing such extraordinary leave.

12. It is submitted that the circular dated 6/4/1990 is followed by the circular dated 4/6/1990 and both these circulars have to be read together. It is submitted that the respondent no.4 being a graduate with Zoology, was clearly eligible to be appointed as a teacher Grade-I in Biology. It is submitted that the petitioner did not challenge the appointment/nature of the appointment of the respondent no.4 from the year 1989 till 2013 and there is clear delay and laches in the matter of such a challenge being raised at this stage. In this regard reliance is placed on the decision of the Delhi High Court in the case of **Shamsher Singh Vs. Indo Tibetan Border Police Force (2018) SCC Online Del 9639** and the decision of the Supreme Court in the case of **Union of India and others Vs. Chaman Rana (2018) 5 SCC 798**, in order to submit that a belated challenge or interference over the

entries in the seniority list would not be permissible as it is bound to have serious administrative implications.

13. It is submitted that the seniority of an employee in the gradation list or 'chances of promotion' are not a condition of service or a 'service benefit' and 'seniority', is only an incidence of service as held by the Supreme Court in the case of **Syed Khalid Rizvi and others Vs. Union of India and others (1993) Supp (3) SCC 575**. It is submitted that the extraordinary leave does not result into break in service and consequently there would be no loss of seniority. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Dr. K. P. Hajela Vs. N. S. Verma and others (1986) 3 SCC 292**.

It is submitted that none of the two grounds as raised on behalf of the petitioner can be accepted and the petition is without any merit and it be dismissed.

14. Shri Bhobe, the learned counsel for the respondent no.3 has also supported the impugned order on contentions similar to the ones advanced on behalf of the respondent no.4. It is submitted that the subsequent circular dated 4/6/1990 has nullified the effect of the first circular and as such, there was no need to seek any relaxation, regularization or a fresh approval from

the Director of Education. It is submitted that the extraordinary leave cannot result in loss of seniority, as has been rightly held by the Administrative Tribunal.

16. The learned Additional Government Advocate has also supported the impugned order.

17. I have carefully considered the rival circumstances and the submissions made.

18. The following points arise for my determination in this petition:

(i) Whether there is delay and laches on the part of the petitioner in challenging the seniority on the ground based on circular dated 6/4/1990 and the letter from the Director dated 8.3.1990?

(ii) Whether the appointment/ service of the respondent no.4 can be considered as ad hoc appointment/service on account of the fact that the respondent no.4 is holding a post graduate degree i.e. MSc (Microbiology) and was thus not qualified to be appointed as teacher (Grade-I) in Biology? Consequentially whether the service rendered by the respondent no.4 cannot be counted to reckon her seniority over the petitioner?

(iii) Whether the avilment of the extraordinary leave by the respondent no.4

can have the effect of loss of seniority. Incidentally whether the seniority can be treated as the 'service benefit', within the meaning of Rule 2(i) of the 2002 Rules?

19. Point no.(i):

The petitioner and the respondent no.4 were appointed as teacher (Grade-I) in pursuance of the same advertisement and by separate orders dated 5.6.1989. Indisputably the respondent no.4 was shown as senior to the petitioner inasmuch as the respondent no.4 is older than the petitioner. Thus right from the year 1989 till 2011-12 the respondent no.4 ranked senior to the petitioner, except in the provisional seniority list for the year 2010-11 in which the petitioner stood at serial no.3, while the respondent no.4 was shown at serial no.12. The following note is appended to the said seniority list:

“ Mrs. Sidharthi Netravalkar (G-I) teacher has proceeded on another two years extraordinary leave to seek employment abroad from 21/9/2009 to 21/9/2011 vide Departmental approval letter dated 31/7/2009. As such, she loses her seniority with reference to her juniors “till she joins her duties and accordingly she is listed at serial no.12 in the seniority list instead of no.3”.”

(Emphasis supplied)

Thus for all practical purposes, right from the date of the appointment

till the year 2011-12 the respondent no.4 was shown senior to the petitioner in the seniority list and at no point of time any objection was raised by the petitioner to the said seniority of the respondent no.4. The first objection lodged by the petitioner is dated 18/7/2011 to the seniority list circulated on 18/6/2011 and the only ground made out was that on account of the petitioner availing the extraordinary leave she has forfeited her right of seniority, if any, over her juniors. The contention that the petitioner was not qualified to be appointed as teacher (Grade-I) in Biology, as she was holding a Post Graduate Degree in Microbiology was not raised in the said objection. In the second objection dated 31/8/2013 to the final seniority list for the year 2011-12, for the first time, it was contended that the appointment of the respondent no.4 itself was illegal as the appointment was to be made on a lecture basis. Be that as it may, there is clear delay and laches on the part of the petitioner in challenging the seniority of the the respondent no.4 particularly on the ground that she was not qualified to be appointed as a teacher (Grade-I) in Biology. The point has thus to be answered in the affirmative.

20. Point no.(ii):

Rule 78 of the 1986 Rules provides that the qualifications for the recruitment/promotion of the teaching Staff in the recognized school, whether

aided or not, shall be as prescribed in the table annexed to the said rule, subject to any change on the recommendation of the Advisory Board or the directives of the Central Government, to fall in line with the National Educational Policy. Item no.5 of the table provides that the minimum qualification for the appointment of Grade-I teacher/Sr. Instructor is a Master's Degree in the subject along with a degree in Education/Teaching. The first proviso to Rule 78 says that the aforesaid qualification shall be operative where no minimum qualification has been specified by the Affiliating Board and where the minimum qualification prescribed by the Affiliating Board are higher than those prescribed in the table, the qualification prescribed by the Affiliating Board shall be deemed to have been substituted wherever said occasion arises.

It can thus be seen that the qualification as set out in the table appended to Rule 78 of the 2002 Rules are subject to any higher qualification, if any, prescribed by the Affiliating Board.

21. In the present case indisputably the appointment of the the respondent no.4 was approved by the Office of the Director of Education on 3/6/1989. By a subsequent letter dated 8/3/1990 the Assistant Director of Education referring to a letter dated 30/1/1990 from the Goa Board of Secondary and Higher Secondary Education has stipulated as under:

“1. The entire syllabi of XIth Science and XIIth Science contain topics related to Botany and Zoology. However, a weightage of 2 marks only is given to Microbiology in both Std. XIth Science and XIIth Science.

So it is clear that as per the content requirements a Microbiology post Graduate cannot be appointed as Teacher Grade-I to teach Biology.

2. Besides a Microbiology Post Graduate is not trained in dissecting technique.

3. A Grade I Teacher should have Post Graduation degree in the relevant subject, and as the syllabus of XIth Science and XIIth Science does not have any relevance to Microbiology as a subject the Board of studies members strongly reject the appointment of Microbiology Post Graduate as Teacher Grade I to teach Biology at Higher Secondary level.”

In view of above, the appointment of Smt. Siddharthi Netrawalkar is not in accordance with rules. Hence, you are requested to take necessary action to fill up the post by following the procedure as per the rules in force.

The Director of Education accordingly issued a general circular dated 6/4/1990 in the aforesaid terms which was shortly thereafter followed by another circular dated 4/6/1990 which reads thus:

No.DE/Col.Cell/HSS/81-82/6/Pt.III/345
Government of Goa,
Directorate of Education, Panaji, Goa.
Date: 4th June, 1990.

CIRCULAR

The Circular No.DE/Col.Cell/HSS/81.82/6/Pt.III/246 dated 6.4.1990 issued by the Directorate of Education, Panaji, may please be referred. In this connection further clarification issued by the Goa Board of Secondary & Higher Secondary Education, Alto-Betim is reproduced here below for information and needful action.

“Microbiology/Botany/Zoology Post Graduate with either Zoology or Botany at Graduate level may be considered as eligible to be appointed as Grade I Teacher in Biology at the Higher Secondary level.”

22. It can thus clearly be seen that the Office of the Director of Education was only acting on the basis of the instructions/opinion of the Goa Board of Secondary and Higher Secondary Education. Both these circulars i.e. 6/4/1990 and 4/6/1990, have to be read together. The net effect of both these circulars is that a person having a Post Graduate Degree in Microbiology is eligible to be appointed as a teacher (Grade-I) in Biology in the higher secondary level, if he was having Zoology or Botany as a subject at the Graduate level. In the present case, admittedly the respondent no.4 is having the qualification Bsc. (Zoology). The circular dated 4/6/1990 shows that the Board had clarified its earlier circular dated 6/4/1990 and has in fact watered down, to a certain extent, the effect of the circular dated 6/4/1990, whereunder the Board was of the opinion that a person having a Post Graduate degree in Microbiology, cannot be appointed as a Teacher (Grade-I)

to teach Biology at the higher secondary level. Thus the contention raised on behalf of the petitioner that the respondent no.4 was not qualified to be appointed as teacher (Grade-I) to teach Biology at the higher secondary level to my mind cannot be accepted. Reliance placed on behalf of the petitioner on the letter dated 8/3/1990 of the Assistant Director of Education to my mind is misplaced. That letter was evidently based on the opinion of the Board which was expressed in its letter dated 30/1/1990 which opinion was subsequently reflected in the circular dated 6/4/1990, which was shortly thereafter clarified in the circular dated 4/6/1990 saying that a person with Post Graduate Degree in Microbiology is eligible to be appointed as a (Grade-I) teacher in Biology at the higher secondary level, if he is having Zoology or Botany as a subject at the graduation level. It thus cannot be accepted that the management was required to seek relaxation or to regularize the services of the the respondent no.4 and to seek approval to her appointment afresh. As noticed earlier, the appointment of the respondent no.4 was already approved by the office of the Director of Education on 3/6/1989 and if such appointment, so to say, had come under eclipse by virtue of the letter dated 8/3/1990, the same was removed by the clarification issued, vide circular dated 4/6/1990. Thus the entire gamut of the submissions that the appointment and the service of the respondent no.4 has to be considered as an ad hoc appointment (as it is not in accordance with the

qualification prescribed under Rule 78 of the 2002 Rules) to my mind cannot be accepted. It is necessary to emphasize that as per the first proviso to Rule 78, the qualification prescribed can only operate where no minimum qualification has been specified by the Affiliating Board and where the minimum qualification so prescribed by the Affiliating Board are higher than those prescribed in the table, the qualification so prescribed by the Affiliating Board shall prevail.

23. It can thus be seen that the first proviso to Rule 78 in no uncertain terms shows that the qualification prescribed by the Affiliating Board shall prevail and it is the Affiliating Board which is the expert body which can prescribe any such qualification as it will be “deemed to have substituted” in the table, wherever such occasion arises. Even assuming for the sake of argument that for the limited purpose of determining the question of seniority under Rule 87-A of the 1986 Rules, the Director can go into the nature of the appointment and the service rendered by the incumbent, I do not find that the contention on behalf of the petitioner that the services of the respondent no.4 have to be considered as ad hoc service “not qualifying for determining seniority” can be accepted.

24. In view of this, the decisions cited on behalf of the petitioner on the

point of ad hoc service, and those where there was a dispute as to inter-se seniority between the direct recruits and promotees cannot come to the aid of the petitioner. There cannot be any dispute with the proposition that a purely ad hoc service particularly when the appointment is not in accordance with the relevant recruitment rules, or where the person does not have the minimum qualification for the post, cannot be counted as against a regularly selected employee. However, this depends upon a finding as to whether the service of a particular employee is ad hoc or not. As noticed earlier, it is not possible to accept that the service of the respondent no.4 can be treated as ad hoc appointment or service. I also find that there is clear delay and laches on the part of the petitioner in challenging the seniority of the respondent no.4 particularly on the ground that she was not qualified for being appointed as a Assistant teacher (Grade-I) in Biology.

25. The reliance placed on behalf of the petitioner on the decision of this Court in the case of **Smt. Pushpanjali Subodha Shenvi Vs. Nagrik Seva Mandal (2017) 1 BomCR 346**, to my mind is misplaced. In that case an order of super-session of the petitioner, promoting the respondent no.4 to the post of Headmaster, on 10/7/2013 was initially challenged by the petitioner before the School Tribunal which had dismissed the appeal on 4/3/2016. It appears that the contention as raised on behalf of the petitioner was that the

respondent no.4 on the date of appointment had not become a graduate and as such, could not be considered as a trained graduate teacher and it was necessary for him to possess both a B.A degree as well as the professional qualification as B.Ed. for considering him to be a trained graduate teacher. I find that the case turned on its own facts. In that case there was no delay or laches on the part of the petitioner in challenging her super-session initially before the School Tribunal and then before this Court. The point is accordingly answered in the negative.

26. Point No.(iii):

This takes me to the second ground based on the extraordinary leave availed by the respondent no.4.

Rule 2(b) of the 2002 Rules provides that extraordinary leave may be granted to an employee for a period of two years which can be extended for a further period of two years at a time, so that the total period of the extraordinary leave shall not exceed six years.

27. In the present case, the total extraordinary leave availed by the respondent no.4 is five years, five months and nine days. Indisputably, the order granting the extraordinary leave does not stipulate as to how the said period shall be treated for the purpose of governing the seniority of the

petitioner. As noticed earlier, except for the year 2010-11, the respondent no.4 was all along shown to be senior to the petitioner. The note appended to the seniority list of the year 2010-11 shows that she was temporarily shown at serial no.12, as according to the management, she loses her seniority with reference to her juniors, "till she rejoins her duty". The question is whether the fact that the respondent no.4 has availed the extraordinary leave for pursuing a teaching job for her betterment abroad can have the effect of losing her position in the gradation list. In my considered view the answer has to be in the negative. In order to appreciate the rival contentions it would be necessary to reproduce Rule 2 of the 2002 Rules to the extent relevant as under:

- (i) Permanent officers and non-permanent officers who have completed probation in their entry cadre in the regular service of the Government may be granted leave without allowances under these rules. In such cases, for and during the currency of the period of leave, the officers shall lose all service benefits such as the earning of leave including half pay leave, pension, gratuity, increment, etc. and also promotion chances as may arise with reference to their seniority in the posts from which they proceeded on leave. They shall also lose seniority in the higher grade/grades with reference to their juniors who might get promoted to such grade/grades before they rejoin duty;
- (j) In the case of non-permanent officers in regular service who have not completed probation in the entry grade, leave without allowances may be granted subject to the condition

that they will have to start afresh and complete their probation on return from the leave without allowances. In other words, the officers will forfeit the service benefits that had accrued to them prior to their proceedings on leave and they will be deemed as new entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade as if they were new entrants;

(k) -

(l) -

(m) -

(n) -

(o) *Any permanent employee, who has not completed 20 years in service shall be eligible for grant of Extraordinary Leave, on request, under these Rules. Promotions, if any, made against the posts shall only be on ad hoc basis;*

(p) *Any vacancy created shall be filled up only on a temporary/contract basis. All such persons who have been appointed on temporary/contract basis and whose registration in Employment Exchange continues will be eligible for age relaxation for 5 years up to 45 years of age. No new registration with Employment Exchange would be allowed in all such cases.”*

It can thus be seen that under Rule 2(i) any Permanent officers and non-permanent officers who have completed probation in their entry cadre in the regular service of the Government can be granted leave without

allowances under these rules.

29. In such cases, for and during the currency of the period of leave, the officer shall lose all 'service benefits', such as earning of leave including Half Pay Leave, pension, gratuity, increment etc. and also 'promotion chances' as may arise with reference to their seniority in the post from which they proceeded on leave. Such an employee would also lose seniority in the higher grade/s with reference to their juniors who might get promoted to such grade/grades 'before they rejoin duty'.

30. Shri Costa Frias, the learned counsel for the petitioner submitted that Rule 2 (i) comes in two parts. The first part relates to such an employee losing all "service benefits" such as earning of leave including Half Pay Leave, pension, gratuity, increments etc and the second part is about the loss of the promotion chances. In the submission of the learned counsel for the petitioner, no promotional process having been undertaken during the time when the respondent no.4 was on extraordinary leave, the second part would not apply. Thus, in the submission of the learned counsel for the petitioner, the present case would fall under the first part, where the respondent no.4 would lose all 'service benefits', which according to the learned counsel for the petitioner includes the position of the respondent no.4 in the

graduation/seniority list.

31. On the contrary it is submitted by Shri Rao, the learned counsel for the respondent no.4 that the first part refers to monetary benefits in contrast with the 'promotional chances', as contained in the second part. In the submission of the learned counsel for the respondent no.1 the word "Etc." at the end of the first part has to be read "ejusdem generis" and will have to be confined to only monetary benefits and not otherwise. It is also contended that the position of incumbent in the graduation/seniority list cannot tantamount to 'service benefits'.

31. I have carefully considered the submissions made and I am unable to persuade myself to accept that the availment of the extraordinary leave by an employee can have the effect of losing seniority. In my considered view, Rule 2(i) and for that matter of that Rule 2(j) (o) and (p) have all to be read conjointly, in order to find out as to what is the effect of an employee availing of extraordinary leave on his position in the graduation/seniority list. Merely because there was no promotional process undertaken during the period, when the respondent no.4 was on extraordinary leave would not mean that the second part of the Rule 2(i) would not apply. In fact, the second part is a clear indication that the person would lose the 'promotional chances', only

during the period he/she is on such extraordinary leave and not otherwise. There is a clear contrast in Rule (j) as to the effect of a non permanent officer availing any such leave during the course of his regular service where such a leave can only be granted inter alia on the condition that he will have to start afresh and shall forfeit all the service benefits that had accrued to him prior to availing of such leave and on rejoining, he will be deemed to be a new entrant in the Government service. The only thing which is protected under Rule 2(j) is the right to rejoin Government service. In the present case it is undisputed that the case of the respondent no.4 is governed by Rule 2(i). Rule 2 (o) and (p) would further indicate, that the loss of promotional chances “as may arise with reference to their seniority” would only be for the period during which the incumbent is on such extraordinary leave. Rule 2 (o) clearly provides that promotions, if any made against the post of such employee, (which would temporarily fall vacant on account of the extraordinary leave availed of by the employee) can only be filled on ad hoc basis . Had it been the intention of the rule making authority that the employee would permanently lose the seniority on account of availment of such extraordinary leave, there was no occasion to stipulate that any promotion made, against such post, would only be an on ad hoc basis. It is also not possible to accept, at least in the wake of Rule 2(i) of the 2002 Rules, that the 'service benefits', would include the position of an incumbent

in the seniority list/gradation list. Had it been so, there was no reason to provide in Rule 2(i) that apart from the service benefit as stipulated therein, the employee shall also lose “promotional chances” as may arise with reference to their seniority during the currency of the period of leave.

32. On behalf of the petitioner strong reliance is placed on the decision of the Kerala High Court in the case of **Sreekala, J. (supra)**, in order to submit that seniority is a service benefit. In that case the petitioner was selected by the State Public Commission for the post of staff nurse in Health Service department on 19/4/1989 and she joined her duties on 18/5/1989. By an order dated 23/10/1990 she was sanctioned leave without allowances for five years for the purpose of taking up employment abroad, which was extended twice for a period of five years each. She, however, sought permission to rejoin duties on 30/4/2002 after canceling the unavailed portion of the leave. The permission as sought was granted and she rejoined duty on 18/6/2002. It may be mentioned that the petitioner had proceeded on extraordinary leave even before completion of her probation period. The petitioner could not complete the period of probation prior to her proceeding on leave and hence on rejoining duty she was shown on probation from 18/6/2002 to 7/6/2004 and the probation period early be seen that the case of the petitioner was governed by a rule akin to Rule 2(j) of the 2002 rules, where an employee

before completion of the probation proceeds on leave without allowances. In that case it is clear that the employee would forfeit the service benefits that have accrued to him and when he rejoins the service, it would be as if he was a new entrant. It was in these circumstances held that the petitioner was not entitled to reckon her seniority from the initial date of joining i.e. 19/4/1989.

It can thus be seen that the decision in the case of **Sreekala (supra)** is clearly distinguishable on facts.

33. In the case **Ex-Ct. Nardev Vs. Union of India (UOI) and others (2010) Supreme (Del) 823** disciplinary action was taken against the petitioner on the ground that a certificate of matriculation was issued by the Central Board of Higher Secondary Education, New Delhi which Board was not recognized by the Ministry of Human Resource Development, Government of India. That was challenged by the petitioner on the ground that the recruitment rules, which were applicable at the relevant time of the petitioner's recruitment did not contain any such stipulation and consequently the petitioner's removal was bad in law. The High Court directed restatement of the petitioner with all consequential benefits of seniority and notional promotion from the date his juniors were promoted with full back wages. It is difficult to understand as to how this judgment can come to the aid of the petitioner in the present case.

34. Thus in conclusion I hold that only because there was no promotional exercise conducted during the period when the petitioner was on extraordinary leave, it cannot be said that the matter is not governed by the later part of Rule 2(i) which essentially shows that the only loss of seniority of an employee while on extraordinary leave is till such employee rejoins the service. I also hold that for the purpose of Rule 2(i) mere seniority, unconnected with promotional chances, is not a 'service benefit'. Thus the contention that the petitioner lost her position in the seniority /gradation list on account of availment of extraordinary leave to my mind cannot be accepted.

35. A specific query was made to the learned counsel for the petitioner as to how the seniority of an employee who rejoins service after availing such extraordinary leave is to be fixed. The learned counsel in all fairness stated that the Rules of 2002 do not contain any such provision. Reliance, however is placed on Rule 9 of the Goa Government (Seniority) Rules 1967 which reads thus:

9. Regulation of seniority of officers selected for appointment to different posts in the same grade requiring different qualifications-The relative seniority of persons selected for appointment to various posts in the same grade requiring different qualifications (e.g. posts of Asst. Lecturer in History, Economics, Physics, Chemistry. etc.) shall be

determined by the consolidated order of merit drawn up by the selecting authority which shall invariably be asked by the department concerned while sending their requisitions for recruitment to such posts, to indicate such an order of merit while making selection to such posts.

The authority responsible for approving appointments by transfer shall indicate the inter-se order of seniority of selected persons.

In cases where no order of merit has been indicated by the selecting authority/authorities approving appointment by transfer, the relative seniority of direct recruits/transferees shall be determined on the basis of their length of service in the next lower grade. In cases of equal length of service, older in age shall rank senior to the younger one.”

36. It is not possible to accept that the aforesaid rules covers the issue of determination of seniority of an employee who rejoins service after availing extraordinary leave under Rule 2(i) of the 2002 Rules. A bare perusal of Rule 9 shows that it pertains to regulation of seniority of officers, selected for appointment to different posts in the same grade, requiring different qualifications. All that the section provides is that in cases where no order of merit has been indicated by the selecting authority/authorities approving appointment by transfer, the relative seniority of direct recruits/transfrees shall be determined on the basis of their length of service in the next lower grade. The learned counsel for the petitioner submitted that in such a case the

seniority of the employee rejoining service after availing extraordinary leave has to be fixed on the basis of the actual length of service after deducting the period spent on such extraordinary leave. The learned counsel has not pointed out any particular provision to show that the seniority has to be fixed on the basis of the length of service after deducting the period spent on extraordinary leave. No such provision has been brought to my notice.

37. Reliance has been placed on Rule 21 of the Central Civil Service (Pension) Rules 1972 which read as under :

21. Counting of periods spent on leave- All leave during service for which leave salary is payable ¹[and all extraordinary leave granted on medical certificate] shall count as qualifying service :

Provided that in the case of extraordinary leave ¹[other than extraordinary leave granted on medical certificate] the appointing authority may, at the time of granting such leave, allow the period of that leave to count as qualifying service if such leave is granted to a Government servant – (i)omitted (ii) due to his inability to join or rejoin duty on account of civil commotion; or (iii) for prosecuting higher scientific and technical studies.”

38. It is submitted that only extraordinary leave granted on medical

certificate shall count as qualifying service and not otherwise. I am afraid, the contention is misconceived. Section 21 deals about the qualifying service for determination of the pension and not seniority. That apart, there is a specific rule as contained in Rule 2 (i) of the 2002 Rules which governs a situation where a person is granted extraordinary leave for taking employment abroad which is applicable in this case.

39. Lastly reliance is placed on the Fundamental Rule 26 (F.R. 26) which pertains to the service which counts for increment in the time scale. Specific reliance is placed on F.R. 26 (b) (ii). It is difficult to accept as to how the said rule would be applicable in the present case, when the said rule pertains to entitlement of an increment in the time scale applicable to a post in which a government servant was officiating at the time he proceeded on leave. At the cost of repetition it needs to be stated that Rule 2(i) also speaks of the government servant losing all 'service benefits', including increment, however, during the "currency of the period of leave". The point is accordingly answered in the negative.

40. I have carefully gone through the orders passed by the Director as also the Administrative Tribunal and I do not find that they suffer from any infirmity so as to require interference. The petition is without any merit and is

accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/