

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.58/2020

Mansavi Vadiakar

Maiden name : Suman Pundalik Naik

H.No.B.21/6,

Near St. Anthony Chapel,

Bainguinim, Sao Pedro,

Old Goa, Tiswadi, Goa 403 402

.... Petitioner.

Versus

1. State of Goa,
through the Chief Secretary,
having office at the Secretariat,
Porvorim, Goa.

2. Secretary (Health),
Govt. of Goa, Having office at
the Secretariat, Porvorim, Goa.

3. The Director,
Directorate of Health Services
Govt. of Goa,
Panaji, Goa.

4. The Dean,
Goa Medical College,
Govt. of Goa. Bambolim, Goa.

5. The Under Secretary (Health),
Govt. of Goa,
Having office at the Secretariat,
Porvorim, Goa.

6.The Director (Administration)
Goa Medical College,
Government of Goa,
Bambolim, Goa.

7. The Principal,
Institute of Nursing Education,
Government of Goa,
Bambolim, Goa,

8. Goa University,
through its Registrar,
Taleigao Plateau, Goa.

.... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mr. T. Sequeira, Advocate
for the Petitioner.

Mr. D. Pangam, Advocate General with Ms. Maria Correia,
Advocate for the Respondents No.1 to 7.

Smt. A.A. Agni, Senior Advocate with Ms. J. Savaikar, Advocate for
Respondent No.8.

***Coram: M.S. Sonak &
Smt. Bharati H. Dangre, JJ.***

Reserved on: 20th January 2021

Pronounced on: 22nd January 2021

JUDGMENT: - (Per M.S. Sonak, J.)

Heard Mr. S.D. Lotlikar, the learned Senior Advocate,
who appears along with Mr. T. Sequeira for the Petitioner, Mr. D.J.
Pangam, the learned Advocate General, who appears along with Ms.

Maria Correia, Additional Government Advocate for Respondents No.1 to 7 and Smt. A. Agni, the learned Senior Advocate, who appears along with Ms. Savoikar for Respondent No.8.

2. Rule. The rule is made returnable forthwith, with the consent of and at the request of the learned Counsel for the parties.

3. On 25/5/1981, the Petitioner was appointed as a Staff Nurse at the Goa Medical College on regular basis. On 13/4/2010, the Petitioner requested the Dean, Goa Medical College to forward her application to the Directorate of Health Services for appointment to the post of Clinical Instructor at the Institute of Nursing Education. She also requested that she be permitted to work in the Institute of Nursing Education by way of working arrangement, pending the process leading to her appointment as a Clinical Instructor in the Institute of Nursing Education.

4. On 15/4/2010, three posts of Clinical Instructor in the Directorate of Health Services were rendered surplus, and at least, two of such surplus Clinical Instructors were redeployed as Clinic Instructors in the Institute of Nursing Education. It is the case of the Petitioner that these two redeployed Clinical Instructors were junior to the Petitioner in the seniority list of staff nurses circulated on 14/2/2008.

5. The Petitioner, thereafter, applied to the Minister of Health that she be considered for appointment as Clinical Instructor in the Institute of Nursing Education. On this application itself, the Health Minister moved a note to the Director of Health Services, urging consideration of the Petitioner's request. The Directorate of Health Services, based on the note from the Health Minister, issued a letter dated 17/11/2011 to the Dean, Goa Medical College to consider the transfer of the Petitioner to the Institute of Nursing Education, as a working arrangement.

6. By an order dated 7/8/2012, the Petitioner was promoted to the post of Clinical Instructor (Group 'B' Non-Gazetted) in the Institute of Nursing Education on ad hoc basis for an initial period of one year or till the post was filled up on regular basis, whichever was earlier. This order is to be found at Annexure I collectively – 62 of the paper book. This order states that the ad hoc promotion will not bestow any claim for a regular appointment and the service rendered on ad hoc basis in the grade of Clinical Instructor will not be counted for the purpose of seniority in the grade or for eligibility for promotion to the next higher grade if any.

7. In pursuance of the order dated 7/8/2012, the Petitioner was relieved from her duties as Staff Nurse at the Goa Medical College on 12/09/2012, to enable her to join the post of Clinical Instructor at the Institute of Nursing Education under the

Directorate of Health Services, Panaji. On 13/9/2012, the Petitioner joined as Clinical Instructor at the Institute of Nursing Education and, there is no dispute whatsoever that the Petitioner continued to discharge duties as Clinical Instructor from the said date until she was made to retire from the post on 30/4/2018 on the attainment of the age of 60 years.

8. The Petitioner, in the course of her services as Clinical Instructor at the Institute of Nursing Education, between 13/9/2012 and 30/4/2018 i.e. a tenure of almost about 6 years, addressed representations dated 15/9/2014 and 17/10/2016, urging regularisation of her services as Clinical Instructor and also seeking promotion to the next higher post of Sister Tutor. The Petitioner also addressed a representation dated 30/1/2018, pointing out that since she was a member of the teaching staff at the Institute of Nursing Education, she was entitled to continue in service until she attains the age of 62 years and could not be retired on the attainment of the age of 60 years. Until her retirement on 30/4/2018, the services of the Petitioner as Clinical Instructor were never regularised. On 11/9/2015, the Petitioner was informed about the *ex post facto* approval for the extension of her ad hoc promotion to the post of Clinical Instructor for a further period of one year with effect from 7/8/2014 and up to 6/8/2015.

9. The Petitioner raised the following two grievances by

instituting the present petition:-

- (a) The first grievance relates to non-regularisation of her services as Clinical Instructor and the consequent denial of promotion to the post of Sister Tutor; and
- (b) The retirement of the Petitioner upon her attainment of the age of 60 years, when it was the case of the Petitioner that she was entitled to continue in service until she attained the age of 62 years.

10. Mr. S.D. Lotlikar, the learned Senior Advocate for the Petitioner contended that there was no valid reason to promote the Petitioner to the post of Clinical Instructor on 7/8/2012 merely on ad hoc basis for a period of one year. He submits that there was a regular vacancy to the post of Clinical Instructor in the Institute of Nursing Education; the Petitioner's selection was by a regularly constituted DPC; the Petitioner fulfilled the eligibility criteria prescribed in the Recruitment Rules and the Petitioner was the senior-most in the cadre of Staff Nurse. He submits that at least two staff nurses who were, in fact, junior to the Petitioner, were deployed regularly as Clinical Instructors. He submits that at least one of such redeployed Clinical Instructor was promoted to the post of Sister Tutor sometime in the year 2017. But, the Petitioner was denied regularisation for no good reason and consequently, even denied the opportunity of being considered for promotion to the next higher post of Sister Tutor.

11. Mr. Lotlikar submits that all this was quite arbitrary and, therefore, the Petitioner is entitled to a declaration that her appointment as Clinical Instructor with effect from 7/8/2012 was on regular basis and not on ad hoc basis. He submits that the Petitioner is further entitled to promotion to the post of Sister Tutor, at least from the date on which one of her juniors was promoted to the said post, together with all consequential benefits. He points out that in the returns filed on behalf of the Respondents, there is no explanation as to why the relief of regularisation and subsequent promotion was denied to the Petitioner despite her representations.

12. Mr. Lotlikar submits that irrespective of the issue of regularisation as Clinical Instructor, the Petitioner was entitled to continue in services until she attains the age of 62 years, and her retirement at the age of 60 years was quite arbitrary and in breach of the provisions of Section 15A of the Goa University Act, 1984 (said Act). He submits that the post of Clinical Instructor in the Institute of Nursing Education is, undoubtedly, a teaching post and in terms of Section 15A of the said Act, the Petitioner was entitled to continue in service until she attains the age of 62 years. He relies on the decision of this Court in *Smt. Madhuri Savoikar vs. State of Goa and others*¹ in support of the Petitioner's case.

¹ WP No.375/2011 decided on 26/9/2019.

13. Mr. D. Pangam, the learned Advocate General submits that this Petition is barred by delay and laches, particularly regarding the plea for regularisation or further promotions. He submits that there is a non-joinder of necessary parties as well. He submits that if the Petitioner had grievance regards her non-appointment on regular basis on 7/8/2012, then, in the Petition which is instituted in the year 2020, i.e. almost after 8 years from the alleged accrual of the cause of cause of action, is barred by delay and laches.

14. Mr. Pangam submits that there are neither any clear averments in the Petition, nor is there any material to suggest that the Petitioner's promotion as Clinical Instructor on 7/8/2012 was based on some regularly constituted DPC or with the consultation of the Goa Public Service Commission. He submits that there is no material on record that such promotion was after considering the candidature of all eligible candidates who fell within the zone of consideration at the relevant time. He points out that the material on record suggests that such promotion on ad hoc basis was on the recommendation of the Hon'ble Minister and was intended to operate as a working arrangement until the regular appointment was made to the said post. He submits that any attempt at the redressal of the Petitioner's this grievance, at this stage, would involve holding of several review DPCs and upsetting all that has transpired in 8 years between 2012 and 2020. He points out that the others who are likely to be affected, are not even made parties to this Petition. He, therefore, submits that the

first grievance of the Petitioner lacks merit and, in any case, ought not to be entertained on the ground of delay and laches.

15. Mr. Pangam submits that the provisions of Section 15A of the said Act would apply only in case of a member of the teaching staff, holding the post on a substantive basis and not on ad hoc basis. He submits that the decision of this Court in *Smt. Madhuri Savoikar* (supra) was in the context of the incumbent holding post of Sister Tutor on probation *i.e.* on regular basis. He, therefore, submits that there was no error in retiring the Petitioner upon her attaining age of 60 years.

16. The rival contentions now fall for our determination.

17. In this case, the record does bear out that the cause of action for the Petitioner to complain about non-appointment on regular basis to the post of Clinical Instructor in the Institute of Nursing Education arose for the first time on 7/8/2012. This is because the order dated 7/8/2012 did promote the Petitioner to the post of Clinical Instructor, but such promotion was only on ad hoc basis and that too for a period of one year or until a regular appointment was made, whichever was earlier. Although there is nothing on record to indicate that the Petitioner lodged her protest at the time of her promotion, the record bears out that the Petitioner addressed representations dated 15/9/2014 and 17/10/2016 urging

regularisation of her services as Clinical Instructor in the Institute of Nursing Education. This Petition was, however, instituted only on 24/1/2020 i.e. after a period of almost 7 months from the date on which she was made to retire from services attaining the age of 60 years i.e. on 30/4/2018. This Petition was instituted after 7 years from the date of first representation and 6 years from the date of the second representation. There is no explanation in the Petition or, in any case, there is no cogent explanation in the Petition as to what prevented the Petitioner from instituting the Petition within a reasonable period from the first accrual of the cause of action.

18. On the aspect of regularisation, apart from the issue of delay and laches, we find that there are no proper pleadings or, in any case, there is no proper material on record to establish that the Petitioner's promotion vide order dated 7/8/2012 was based on the recommendations of the regular DPC, or after consultation with the GPSC. There is also no material on record to establish that at the time of promotion of the Petitioner vide order dated 7/8/2012, cases of all other eligible candidates who fell within the zone of consideration, were also considered and assessed. All these matters could have been looked into, had the Petitioner instituted her Petition soon after she was denied regular promotion to the post of Clinical Instructor. Even these infirmities could have been remedied at that time and directions could have been issued to constitute a regular DPC or to consult the GPSC for making a regular

appointment to the post of Clinical Instructor. However, as indicated earlier, such an exercise will not be possible or even appropriate at this stage, particularly since the same would involve the rights of others who are not even parties in this Petition.

19. Besides, this is not a case where the Petitioner right from 7/8/2012 has been deprived of salary or other financial emoluments on account of non-regularisation of her services as Clinical Instructor. The regularisation is pressed for at this stage basically in support of further relief of promotion to the next higher post of Sister Tutor. The learned Advocate General stated that hardly any promotions were made during this period to the post of Sister Tutor. In any case, the grant of any such relief would involve directions to constitute review DPCs which, would have to review the promotions already made. The parties who are promoted and likely to be affected, have not even been impleaded as the Respondents to this Petition. At this point of time, the grant of any relief, particularly on the aspect of any directions to consider or to promote the Petitioner to next higher post, is barred by the doctrine of unexplained delay and laches. The mere filing of two representations cannot be construed as a sufficient explanation for the delay and laches involved in the matter. In the facts of the present case, therefore, it will not be appropriate to grant any such relief to the Petitioner at this stage.

20. In so far as the issue of retirement age is concerned,

however, the Petitioner is on a substantially firm footing. In this regard, at the outset, reference is required to be made to the provisions of Section 15A of the said Act, as they obtained during the relevant period. Section 15A of the said Act reads as follows :

“15A. Retirement age.-(1) The retirement age on superannuation of the teaching staff of the Goa University and of the affiliated colleges of the Goa University, whether aided by the Government or not, including the Principals of such colleges, shall be sixty two years.”

21. There is no dispute whatsoever that the Institute of Nursing Education is affiliated with Goa University. There is also no dispute that the post of Clinical Instructor is a teaching post and the incumbent holding the post of Clinical Instructor is a member of the teaching staff of the Institute of Nursing Education. There is ample material on record that from 13/9/2012, the Petitioner was discharging teaching duties as Clinical Instructor at the Institute of Nursing Education until she was made to retire on 30/4/2018. This means that for a period of almost 6 years, without any break, the Petitioner was treated as a member of the teaching staff of the Institute of Nursing Education, which is affiliated with the Goa University. There is also no dispute that the salary and emoluments commensurate to the post of Clinical Instructor were, throughout, paid to the Petitioner, and even the pension is now fixed based on the Petitioner's last drawn pay as a Clinical Instructor.

22. Having regard to the aforesaid undisputed factual circumstances, we cannot countenance the hyper-technical submission made on behalf of the State that the Petitioner ought not to be granted the benefit of enhanced retirement age of 62 years in terms of Section 15A of the said Act merely because there may not have been a formal order regularising the services of the Petitioner as Clinical Instructor. Concerning the relief of the enhanced age of superannuation, the principles of delay and laches do not apply. This Petition was instituted on 24/1/2020 within hardly 6-7 months from the date on which the Petitioner was forced to retire on attaining the age of 60 years. The Petitioner, on 30/1/2018, had already represented that she ought to be permitted to continue in service until she attains the age of 62 years and not retired on attaining the age of 60 years.

23. In *Smt. Madhuri Savoikar* (supra), this Court on the interpretation of the provisions of Section 15A, had extended the benefit of enhanced age of superannuation i.e. 62 years to Sister Tutor from the Institute of Nursing Education. Even in the said case, the State had urged that the Petitioner was only a probationer who did not have the degree of M.Sc. (Nursing) and, therefore, in terms of the relevant recruitment rules or the notification issued by the UGC, was not even entitled to be appointed as Sister Tutor. This contention on behalf of the State was rejected by holding that it was too late for the

State to urge such a contention after having required the incumbent to discharge the duties as Sister Tutor for several years.

24. The affidavit filed by Dr. Geeta Kakodkar on behalf of Respondent No.3, clearly admits that in terms of the norms prescribed by the Indian Nursing Council (INC), the post of “*Tutor*” is a teaching post. The affidavit, in paragraph 8 proceeds to state that in the light of the prevalent INC norms, the posts of Sister Tutor and Clinical Instructor were to be revived as Tutors. The affidavit, in paragraph 12, proceeds to state that the Government of Goa had even approved the proposal and redesignated the posts of Clinical Instructor and Sister Tutor to that of Tutor as per the INC norms, without a change in the pay scales. With all this, it is more than apparent that the post of Clinical Instructor in the Institute of Nursing Education, is a teaching post, and the Petitioner holding such a post right from the year 2012, was always regarded as a member of the teaching staff at the Institute of Nursing Education, which is affiliated to the Goa University. Thus, the Petitioner was entitled to the benefit of enhanced retirement age up to 62 years in terms of Section 15A of the said Act. Denial of such benefit of enhanced retirement age to the Petitioner was contrary to law, besides being discriminatory and consequently, violative of Article 14 of the Constitution of India.

25. Accordingly, we hold that retiring the Petitioner with effect

from 30/4/2018 consequent upon her attaining age of 60 years was not proper because, the Petitioner was entitled to continue in service as Clinical Instructor until 30/4/2020, by which date she would have attained the enhanced age of superannuation of 62 years.

26. At this stage, it is not possible to reinstate the Petitioner since she has already attained the enhanced age of superannuation of 62 years. However, it will be appropriate to follow the course adopted by us in the case of *Smt. Madhuri Savoikar* (supra) and to direct the Respondents to pay the Petitioner all financial benefits like differential salary, increments, etc. based on the premise that the Petitioner continued in service until 30/4/2020. The Petitioner's retiral benefits will also have to be reworked and paid to the Petitioner based on this premise.

27. For all the aforesaid reasons, we allow this Petition partly, by holding that the retirement of the Petitioner with effect from 30/4/2018 was not legal or proper and we direct the Respondents to pay the Petitioner all financial benefits like differential salary, increments, etc. based on the premise that the Petitioner continued in service until 30/4/2020. The Petitioner's retiral benefits be also reworked and paid to the Petitioner based on this very premise. All this exercise will have to be completed within three months from today, failing which, the Respondents will have to pay interest on these amounts to the Petitioner at the rate of 9% per annum.

28. Rule in this Petition is made absolute in the aforesaid terms.
There shall be no order as to costs.

29. All concerned to act based on an authenticated copy of this
order.

Smt. Bharati H. Dangre J.

M.S. Sonak, J.