
(2013) 09 BOM CK 0142

In the Bombay High Court

Case No : W.P. No. 4303 of 2002 and Civil Appln. (W) No. 2391 of 2013

Govind

APPELLANT

Vs

Presiding Officer

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2014) 2 MhLj 90

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

A.B. Chaudhari, J.—Civil Application No. 2391/2013 seeking amendment of the Writ Petition, is allowed. Amendment be carried out forthwith. This Writ Petition is directed against the judgment and order dated 21-10-2002 passed by the learned Presiding Officer, School Tribunal, Nagpur arising out of the order dated 23-2-2001 passed by respondent No. 2-Education Officer on the representation of the petitioner purportedly under Rule 12 of the Maharashtra Employees of Private Schools Rules, 1981 (in short "the Rules of 1981").

2. In support of the Writ Petition, Mr. V.G. Bhamburkar, learned counsel for the petitioner, strenuously contended that the seniority list finalized by the Education Officer under Rule 12 of the Rules of 1981 on his representation and then confirmed by the School Tribunal in the cadre of Senior Clerk by the said order as compared with the respondent No. 4-Mr. Dolas and respondent No. 5-Mr. Tripathi is clearly illegal. According to him, respondent No. 4-Mr. Dolas was appointed as Senior Clerk on 1-4-1976 and thereafter he was promoted as Head Clerk on 1-9-1985. However he was demoted to the post of Senior Clerk due to the act of misconduct on 1-9-1990 and, as such, remained in the cadre of Senior Clerk till he was again promoted on 1-2-1992 to the post of Head Clerk. According to him, the period from the date of demotion to the date of second promotion in the post of Head Clerk on 1-2-1992 was required to be ignored. Insofar as his comparison with the respondent No. 5-Mr. Tripathi is concerned, learned counsel for

petitioner has submitted that there was only one post available for promotion as on 23-6-1979 but the promotion order of the even date 23-6-1979 in respect of the petitioner as well as Mr. Tripathi was issued. However, the petitioner joined the post of Senior Clerk immediately after his promotion on the same date namely, 23-6-1979 as against Mr. Tripathi who joined the promotional post on 2-7-1979/13-7-1979 i.e. afterwards. Since the respondent No. 5 Tripathi did not join on the date of order of promotion namely 23-6-1979, both the Education Officer as well as the School Tribunal committed an error of law in counting his seniority from 23-6-1979 merely because the promotion order of the post of Senior Clerk is of the said date. He then argued that there was therefore no occasion for the Tribunal or the Education Officer to consider the date of birth of Mr. Tripathi for counting seniority on that basis since Note 2 to Guideline No. 3 has no application in view of the fact that Mr. Tripathi joined later in the point of time than the petitioner. He also submitted that as a matter of fact since Mr. Tripathi did not sign the muster roll till 13-7-1979 he could not be shown senior since he did not join he promotional post on 23-6-1979. Learned counsel for the petitioner, therefore, prayed for modification of the order and fixation of seniority of the petitioner above Mr. Tripathi as well as Mr. Dolas in the cadre of senior Clerk.

3. None appears on behalf of the respondent No. 3 Management.

4. Per contra, Mr. C.F. Bhagwani, learned counsel for respondent No. 5(i) to (iii) opposed the Writ Petition and supported the impugned orders. He pointed out that during the pendency of this petition, Mr. Tripathi expired and his legal heirs have been brought on record as per the order made by this Court. According to him, the respondent No. 5 being senior in age to the petitioner, he was rightly held to be senior to the petitioner in the cadre of senior Clerk. That apart, according to him, there is no provision showing that the date of joining is the deciding factor. According to him, there are no guidelines or rules showing that the date of joining and not the date of birth in the promotional post would be relevant for the purposes of fixation of seniority; and that in the absence thereof no fault can be found about the finding recorded by the School Tribunal.

5. Per contra, learned A.G.P. Mrs. S.S. Jachak pointed out that earlier one more petition being Writ Petition No. 4158/2000 was filed by the petitioner in the matter of seniority list and the following order came to be passed by this Court:

Mr. Bhamburkar, learned counsel for the petitioner submits that the petition has become infructuous as the grievance of the petitioner is already met, Petition is dismissed as infructuous.

Mrs. Jachak, learned A.G.P. submits that after the said order was passed by this Court, the petitioner filed the Appeal before the School Tribunal and, therefore, neither the Appeal was maintainable nor the present petition is maintainable.

6. I have heard learned counsel for the rival parties. I have also perused the impugned orders and the record shown to me during the course of hearing by

the learned counsel for the rival parties. I will have to deal with the preliminary objection first, raised by learned A.G.P. The aforesaid order of this Court in Writ Petition No. 4158/2000 that was filed by the petitioner is not an order on merits of the seniority list or the claim made by the petitioner in the Appeal. It is neither a decision nor any adjudication between the parties. In the case of *Daryao and Others Vs. The State of U.P. and Others*, , the Supreme Court stated the legal position thus in para. 19 of the judgment:

(19). We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata* against a similar petition filed under Art. 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusion thus reached by us are confined only to the point of *res judicata* which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will not proceed to examine the position in the six petitions before us.

In the light of the above pronouncement by the Supreme Court, in my opinion, the said order in Writ Petition No. 4158/2000 made by this Court can, at the most, be construed as "withdrawal simpliciter" without any liberty. In the absence of any adjudication by this Court, I do not think that the petitioner was prevented from filing the Appeal. At any rate, the Appeal against the order of the

Education Officer dated 30-3-2001 is after filing of Writ Petition No. 4158/2000 which was a different cause of action. At any rate, it is not the case of either of the parties that the petitioner's grievance was really satisfied as is stated in the order by the counsel for the petitioner. In *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, , the Supreme Court held thus,

9.But we are of the view that the principle underlying R. 1 of O. 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 extraordinary jurisdiction of the High Court under Art. 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 Art. 32 of the Constitution since such withdrawal does not amount to *res judicata*, the remedy under Art. 226 of the Constitution 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.

That being so, I do not think that the petitioner could be denied the remedy of filing Appeal which he did. Hence, the said preliminary objection is not accepted.

7. As regards comparison of the case of the petitioner for seniority with respondent No. 4 Mr. Dolas, the submissions made by Mr. Bhamburkar will have to be rejected outright for the simple reason that Mr. Dolas entered the cadre of senior Clerk way back in the year 1976 and even in the year 1990 when he was brought in the said cadre, he was again promoted in the cadre of Head Clerk but insofar as the petitioner is concerned, he was promoted after a decade to the post of Head Clerk on 1-4-2001. The petitioner, therefore, could not be placed above Mr. Dolas in the above seniority list of the senior Clerks.

8. The next question is about the seniority of the petitioner as compared to respondent No. 5-Mr. Tripathi. The only point for determination is whether the date of order of promotion namely 23-9-1976 is relevant or the date of joining the said promotional post is relevant? It does not appeal to me that a person whose order of promotion is issued on a particular date with the other person does not join for months together, would still become senior to the person who joined the post immediately on the post of promotion. Therefore, to say that the date of joining is not relevant is absurd. The date of joining the promotional post would commence the working of the person in the promotional post and, as such, would be the point from which seniority will have to be counted. Merely because there is absence of rule or guideline on that aspect, it would be preposterous to accept the submission made by Mr. Bhagwani, Advocate. In the instant case, the petitioner joined on 23-6-1979 in the cadre of Senior Clerk but respondent No. 5-Mr. Tripathi joined on 2-7-1979; and the other version is that

he joined on 13-7-1979 because he did not sign the muster roll till that date namely 13-7-1979. Looked from that point of view, in my opinion, there was no occasion for the School Tribunal or the Education Officer to give benefit of date of birth to respondent No. 5-Mr. Tripathi as to the seniority over the petitioner since the petitioner had earlier joined on 23-6-1979. The order made by the Education Officer as well as the Tribunal to that extent must be held to be illegal and the seniority of the petitioner must be fixed above Mr. Tripathi/respondent No. 5 in the cadre of Senior clerk. Respondent No. 5 died during the pendency of this petition and his legal representatives have been brought on record. The upshot of the above discussion is that the Writ Petition must succeed in part. In the result, I make the following order:

ORDER

- i) The Writ Petition No. 4303/2002 is partly allowed.
- ii) The judgment and order dated 21-10-2002 passed by the learned Presiding Officer, School Tribunal, Nagpur in Appeal No. 14/2001 as well as the order dated 23-2-2001 made by the Education Officer/respondent No. 2, are set aside.
- iii) It is held that the petitioner is senior to respondent No. 5 Mr. R.D. Tripathi in the cadre of Senior Clerk and shall be placed in the seniority list accordingly.
- iv) The Management as well as the Education Department shall accordingly carry out these orders and extend all the benefits if any available to the petitioner, by fixing the seniority as stated hereinbefore, and proceed further in accordance with law.
- v) It is made clear that benefits received by respondent No. 5 of the seniority granted to him by the impugned orders shall not be disturbed in any manner whatsoever.
- vi) Writ Petition is disposed of accordingly.
- vii) No order as to costs.