

(1994) 03 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 15 of 1989

Jugal Kishore

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 09-03-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Article 113, 72

Citation : AIR 1995 HP 8 : (1995) 1 ShimLC 44

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Pandit Om Parkash, A.A.G., for the Respondent

Final Decision : Allowed

Judgement

1. The appeal was admitted for hearing on the following questions of law:

1. Whether on a proper construction of the provisions of the Indian Limitation Act, the suit was within limitation?

2. Whether the respondent, public bodies could be allowed to defeat the legitimate claim of the plaintiff by setting up narrow and technical plea of limitation?

3. Whether in the facts and circumstances of the case, Article 113 of the Limitation Act applied to the case?

2. The facts, in brief, are that plaintiff on 30th April, 1979, filed an application under Order XXXIII, Rule 1 of the CPC (hereinafter called as "the Code"), seeking to sue the defendants as an indigent person. It was claimed by him that he was prosecuting his studies as a student of 8th class in Government Middle School, Ripoh Misran, District Una, during 1973-74. He appeared in the annual examination in the month of March, 1974 but was declared fail in the said examination. Suspecting some foul play, he approached the District Education

Officer, Una, for re-evaluation of the answer-sheets. In the meanwhile he had already got himself admitted in 8th Class in Government High School, Amb, as a failed student of 8th Class. Through letter Ex. PW 1 / A dated 11th Sept. 1974, the District Education Officer, informed the plaintiff that a decision had been taken to the effect that he is placed in compartment in mathematics and that he should join provisionally in the 9th class in any High School, subject to the ultimate clearance in the compartment in mathematics paper. A request thereafter, was made by him to the Headmaster, Government High School, Amb, to admit him in 9th Class, which request was turned down arbitrarily without any reason. Frustrated with this attitude, the plaintiff sought admission provisionally in the 9th class in Government High School, Joh, in District Una. He appeared in the mathematics paper for clearing his compartment in the month of March, 1975 but was not allowed to take the examination of 9th class by the Headmaster Government High School, Joh, to which class he had sought provisional admission. He continued studies even thereafter and during 1976 appeared in the 10th class examination conducted by Himachal Pradesh Board of School Education.

3. Despite the fact that the plaintiff had appeared in the mathematics paper for clearing his compartment in March, 1975, his result was not declared by the authorities and consequently declared of the result of 10th class was also withheld by the Board. Plaintiff had been approaching the higher authorities through his father but without any effect. It is the plaintiff's case that defendants were bound to declare his result of 8th class in mathematics paper. The same could not have been withheld. Non-declaration of the result has resulted in causing irreparable loss and injury to him. He has not been in a position to prosecute his studies further. Thus alleging gross negligence, on the part of the defendants, he laid a claim of Rs. 1,00,000/- against the defendants but confined it to Rs. 50,000/-, which was done after service of notice u/s 80 of the Code.

4. The plaintiff was permitted to sue as an indigent person by the trial court. The suit was contested by the defendants by filing written statement, wherein it was disputed that the plaintiff was prosecuting his studies in 8th class. Earlier he was declared failed but after getting his papers re-checked, he was placed under compartment in mathematics and was allowed to join provisionally in any High School in 9th class. In the meanwhile, he had already sought admission to 8th class in Government High School, Amb, where he remained admitted from 23rd April, 1974 to 17th October, 1974. Thereafter, he joined Government High School, Joh, provisionally in 9th class. It is also admitted that the plaintiff appeared in the compartment examination in mathematics paper of 8th class from Government High School, Joh. It is also not in dispute by the defendants that his result of 8th class compartment examination in mathematics paper has not been declared. The reason assigned for non-declaration of the result is that after having failed, he got admission provisionally in the 9th class in Government High School, Joh, without obtaining school leaving certificate from Government

High School Amb. As such, he contravened the provisions of Education Code, on account of which, his result of 8th class compartment was withheld and that he was rightly reverted to 8th class under the rules. In this factual background, legal objection was also taken that the suit was barred by limitation, since the cause of action, if any arose to plaintiff in March, 1974 and that the suit ought to have been filed within a period of one year. The suit filed on 30th April, 1979 was clearly barred by limitation.

5. The trial Court dismissed the suit. The issue of limitation was decided against the plaintiff. It was held that the cause of action, if any, accrued to him in April, 1975 when the plaintiff acquired knowledge that he should join 8th class afresh after his result had been withheld. The suit therefore, ought to have been filed by April 1976. It was noticed that the plaintiff, who was borne on 2nd October, 1957, was minor, therefore, he should have filed the suit on or before 2nd October, 1976. The suit filed on 30th April, 1979 was held not to be in time. It was also held that the defendants were not at fault, therefore, there was no question of the plaintiff being compensated by the defendants.

6. Feeling aggrieved, the plaintiff carried the matter in appeal, where also a prayer was made by him to prosecute the appeal as an indigent person but ultimately, this prayer was turned down and he affixed appropriate court-fee on the appeal. The lower appellate court came to the conclusion that the defendants acted not only recklessly and carelessly but were also highly negligent in not declaring the result of the examination in mathematics paper of the plaintiff, in which he had appeared in 1974. The plaintiff was held to be a victim of an act of malfeasance of the defendants. It was also held that his entire career had been ruined due to the negligent acts of the defendants, for which no money can be said to be sufficient to compensate his loss. A sum of Rs. 50,000/- claimed by the plaintiff was held to be too meagre a sum for compensating the loss suffered by him. Thus the claim of the plaintiff, though on merits was found to be sustainable but the same was negated on the question of limitation. The lower appellate court declined to grant decree in his favour by holding that the suit ought to have been filed within a period of one year from the date of accrual of cause of action. Since the plaintiff attained majority in October, 1975, the suit ought to have been filed in October, 1976. It is this judgment and decree, which is under challenge in the instant appeal.

7. I have heard the learned counsel for the parties and gone through the record. Learned counsel for the appellant has vehemently urged that both the courts below were not right in deciding the issue of limitation against the plaintiff. The plaintiff fell aggrieved against the acts of the defendants in not declaring his result of the mathematics paper, in which he appeared in March, 1975. Till 1978, defendants were assuring that action was being taken on the plaintiff's representation and the Director of Education had been in correspondence with the District Education Officer. Since, the result was not declared and no intimation was given to the plaintiff, even till the date of filing the suit, the

finding cannot be sustained in the eye of law. Moreover, the case is governed under Article 113 of the Limitation Act, 1963 (hereinafter called as "the Act"), for which period of limitation is three years. The genuine claim ought not to have been defeated on this too technical ground. Learned counsel for the respondent has urged that finding of fact recorded by the lower appellate court that cause of action accrued in 1975 and that the suit ought to have been filed within one year, at least from the date of attaining the majority, are not liable to be interfered with, since it is Article 72 of the Act, which will govern such a suit for which period of limitation is one year.

8. Before dealing with the submissions on the question of limitation, I do not find it to be a case where any interference is called for in the findings recorded on merits by the lower appellate court, wherein it has been held that the defendants had been highly negligent in dealing with the plaintiff and not declaring his result. It is pertinent to notice here that the result was not declared till the filing of the suit and even in the written statement, the defendants have not pleaded that they are still ready and willing to declare the result. The defence of the defendants is that they are justified in withholding the result. The result was also not declared during the pendency of the litigation and even not till date.

9. The defence, as noticed above, has been that the plaintiff could not have sought admission to the 9th class in Government High School, Joh, without obtaining the school leaving certificate from Government High School, Amb, and as such he contravened the provisions of the Education Code, on account of which his result of 8th class compartment was withheld and was rightly reverted to 8th class under the rules. This plea has been found to be wholly unsustainable by the appellate court, more particularly, in view of the communication of the District Education Officer dated 11th Sept. 1974.

10. After the plaintiff was declared as failed in 8th class, he made a representation to the District Education Officer for re-marking of his paper. In the meantime, he had sought admission to the 8th class in Government High School, Amb, as a failed candidate of 8th class. On 11th Sept. 1974, the following communication was received by the plaintiff from the District Education Officer:

"After careful consideration of your representation, it has been decided to place your ward under compartment in Mathematics in the 8th class annual examination held in March, 1974, as a special case. This will help your son to seek admission provisionally in the IX class in any High School. You are, therefore, advised to apply for the school leaving certificate to the Hedmistress Govt. Middle School, Rapoh-missran who has been directed separately to issue you the requisite SLC and get your son admitted in any school of your choice."

11. It is in the statement of DW 2 Shadi Lal that on 21st October, 1974, the plaintiff was admitted provisionally to 9th class in Government High School, Joh, on the strength of school leaving certificate issued by Government Middle School, Rapoh-missran. In case the plaintiff had sought admission to the 9th class

provisionally in Government High School, Joh, in pursuance to the aforementioned communication dated 11th Sept. 1974, and that also on the strength of the school leaving certificate from Government Middle School, Rapoh-missran, the contention of the defendants that the school leaving certificate of Government High School, Amb, ought to have been produced before seeking admission at Joh is totally unjustified, since it was neither the requirement of communication dated 11th Sept. 1974, which was the authority, on which he was admitted provisionally in Joh school nor it was otherwise required under the rules. Thus, the lower appellate court was perfectly right in having recorded a finding that the defendants acted recklessly on a ground, which is highly unsustainable and it was due to their acts of negligence that the plaintiff suffered and his entire career stood ruined.

12. Even on the question of quantum of compensation, no interference is called for. A student having good prospects in life was prevented from prosecuting the studies further. He had already appeared in class 10th examination of the Board and naturally the said result could not be declared because of the non-declaration of the 8th class result by the defendants. The claim of Rs. 50,000/-, as laid by the plaintiff, has been held to be justified by the lower appellate court and rightly so.

13. Now coming to the question of limitation. Both the courts below erred in assuming that the suit ought to have been filed within a period of one year and presumably it has been held so by assuming that Article 72 of the Act would govern such a suit. Article 72 of the Act reads as under:

"72. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.

One year

When the act or omission takes place

Prior to the coming into force of the Act, the corresponding provision in Limitation Act 1908 was Article 2. A bare reading of this Article would show that it relates to a suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force in the territories to which this act extends and provides a period of limitation of one year from the time the Act or omission takes place. Prima facie, this Article cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority. The defendants have nowhere pleaded that the act of omission is complained by the plaintiff is in pursuance of a statutory authority. Article 72, in fact, is meant to provide for cases where a public official or a public authority does an act injurious or possibly injurious to another under powers conferred or honestly believed to be conferred by some Act of the Legislature. It does not apply to a case where the damages arise not from the doing of the actor the omission to do it, but from doing it in an improper manner out of malice or

carelessness. Such like cases under the Limitation Act 1963 (1908) were governed by Article 36, for which now there is no corresponding Article in the Act and thus they will now be governed by the residuary Article 113, for which period of limitation is three years from the date of accrual of cause of action and which says as under:

"113. Any suit for which no period of limitation is provided elsewhere in this Schedule.

Three years

When the right to sue accrues.

14. Scope of Articles 2 and 36 of the Limitation Act, 1908 was considered by the Supreme Court in *State of Punjab Vs. Modern Cultivators, Ladwa*, in which an action had been brought for damages for inundation of plaintiffs land due to breach of a canal in the management of the defendant. It was held that Article 2 cannot apply to omissions in following the statutory duties because it cannot be suggested that they are in pursuance of any enactment. Act or omission which can claim statutory protection or is alleged to be in pursuance of a statutory command may attract Article 2 but the act or omission must be one which can be said to be in pursuance of an enactment". A decision of Full Bench of Lahore High Court in *Mohammad Sadat Ali Khan v. Administrator, Corporation of City of Lahore* AIR 1945 Lah 324, was approved in which all rulings on the subject were discussed elaborately by Justice Mahajan, who pointed out that "act or omission must be those which are honestly believed to be justified by a statute". In the instant case, neither it has been pleaded by the defendants nor pointed out that the act in not declaring the result or omitting to declare the result is such an act or omission which honestly is believed to be justified by any legislative enactment. Thus there is no scope of application of Article 72 of the Act, which corresponds to Article 2 of 1908 Act. Article 36 in 1908 Act provided a period of limitation of two years for a suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specifically provided in any other Article and the period of limitation was no commence when malfeasance, misfeasance or non-feasance takes place. Admittedly, there is no corresponding Article in the Act to Article 36 of 1908 Act. It is also not disputed by the learned counsel for the respondent that in case the suit is not covered by Article 72 then it would definitely be covered by the residuary Article 113 of the Act, where the period of limitation is three years from the date when the right to sue accrues.

15. In *National Bank of Lahore Ltd. Vs. Sohanlal Sehgal and Others*, it was held that Article 36 applied to acts or omissions commonly known as torts by English lawyers. They are wrongs independent of contract. In para 6 of the report, the court held that:

"The scope of Article 36 of the First Schedule to the limitation Act is fairly well settled. The said article says that the period of limitation "for compensation for

any malfeasance, misfeasance or nonfeasance independent of contract and not herein specifically provided for" is two years from the time when the malfeasance, misfeasance or nonfeasance takes place. If this article applied, the suits having been filed more than 2 years after the loss of the articles deposited with the Bank, they would be clearly out of time. Article 36 applied to acts or omissions commonly known as torts by English lawyers. They are wrongs independent of contract. Article 36 applies to actions "ex delicto" whereas Article 115 applies to actions "ex contractu".

"These torts are often considered as of three kinds, viz., non-feasance or the omission of some act which a man is by law bound to do, misfeasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful". But to attract Article 36 these wrongs shall be independent of contract. The meaning of the words "independent of contract" has been felicitously brought out by Greer, L.J., in *Jarvis v. Moy Davies, Smith, Vandervell and Co.*, (1936) 1 KB 399 at p. 405 thus:

"The distinction in the modern view, for this purpose, between contract and tort may be put thus. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract it is tort and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

If the suit claims are for compensation for breach of the terms of the contracts, this article has no application and the appropriate article is Article 115, which provides a period of 3 years from compensation for the breach of any contract, express or implied, from the date when the contract is broken. If the suit claims are based on a wrong committed by the Bank or its agent dehors the contract, Article 36 will be attracted."

16. From the facts on record, the damage suffered by the plaintiff is due to the defendant's nonfeasance, being an omission on the part of the defendants to perform an act when there is an obligation to perform it. In other words, the act of omission is the non-declaration of result, which the defendants were under an obligation to declare. The lower appellate court has wrongly treated it to be an act of misfeasance. Strictly speaking it cannot be construed as an act of misfeasance, since misfeasance is an improper performance of some lawful act. In view of the above, the suit of the plaintiff would be governed by Article 113 of the Act, for which period of limitation would be three years.

17. The question, which now requires to be considered is as to when the right to sue would accrue to the plaintiff. It is not in dispute that the examination was taken in the month of March 1975. The result was to be declared thereafter. It was not declared till the date of filing of the suit. The plaintiff appeared for 10th class examination of the Board in March/April, 1976. In the meanwhile, plaintiff

had been making representations to the defendants and till 1st April, 1978, the matter was still under consideration of the defendants, for which reference was made to the four communications available on the record. The first being a communication dated 3rd Sept. 1977 from Mr. B.L. Handa, Director of Education, which is to be following effect:

"With reference to my memo No. EDN-H(B)-9(2)-1/75 dated the 26th April, 1975 (copy enclosed for ready reference) addressed to the District Education Officer, Una and a copy thereof endorsed to the Headmaster, Govt. High School, Amb (Una) on the subject.

It appears that the case of Sh. Jugal Kishore s/o Shri Ram Chand, has not been properly dealt with by you, which resulted unnecessary delay and harassment to the student concerned.

Since the case is hanging fire for the last three years, it is, therefore, desired that the whole case may be examined afresh and result of 8th class compartment examination declared under intimation to the undersigned within a weeks time positively. Your detailed comments and action in the matter should reach me by 12th Sept. 1977 positively."

18. Copy of the above communication was sent to the District Education Officer, Headmaster, Government High School, Amb, as also to the plaintiffs father. The fourth copy was also endorsed to the Secretary, Board of School Education, Himachal Pradesh, with reference to his letter dated 30th August, 1977. From the above, not only it is clear that no decision had been taken on the plaintiff's case but anxiety was shown by the Director due to the carelessness of the concerned authorities.

19. Ex. PW1/A is the communication dated 14th Sept. 1977, from the Director of Education to the District Education Officer inviting his attention to the earlier two reminders dated 26th April, 1976 and 3rd Sept. 1977 asking for a early action. Again on 7th February, 1978, third communication was sent by the Director of Education with a copy to the plaintiffs father calling upon to expedite the declaration of 8th class result. The fourth communication is dated 1st April, 1978 from the Director of Education to the District Education Officer, pointing out that despite repeated reminders, no intimation had been sent as to why the result had not been declared and also to declare the result. From the above, it cannot be said that the suit which was instituted on 30th April, 1979, by the plaintiff, for which period of limitation would be three years, was barred by limitation, since the result in the normal courses ought to have been declared in the year 1975. When it was not declared, the plaintiff started making representations and the Director of Education assured that the same would be declared, for which information was sought by the Director of Education from the District Education Officer and till 1st April, 1975, there was no response from the District Education Officer. Thus, the suit filed by the plaintiff was within the period of limitation.

20. In view of the above, questions Nos. 1 and 3 formulated deserve to be

answered in the affirmative and there is no need to answer question No. 2.

21. In the result, the appeal is allowed. The judgments and decrees passed by the courts below are set aside. The suit of the plaintiff is decreed with costs throughout. A decree for Rs. 50,000/- is passed in favour of the plaintiff.

22. Since the plaintiff was permitted to sue as an indigent person by the trial court and no court-fee had been paid on the plaint, but there is no need to make any order for recovery of the amount by the State Government, as provided under Order XXXIII, Rule 1 of the Code, since the State of Himachal Pradesh is one of the defendants, against whom decree has been passed with costs.