

(1994) 01 BOM CK 0040
In the Bombay High Court
Case No : C.R.A. No. 871 of 1990

Rasta Peth Education Society

APPELLANT

Vs

Pethkar Udhao Bhimashankar

RESPONDENT

Date of Decision : 20-01-1994

Acts Referred:

Citation : (1994) 4 BomCR 410 : (1995) 2 LLJ 908 : (1994) 1 MhLj 725

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : Subhash Langote, for the Appellant; P.K. Hushing, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Saraf, J.—This revision application is directed against the order of the Civil Judge, Pune dated September 11, 1990 rejecting the preliminary objection of the applicant to the maintainability of the suit on the ground of availability of alternate remedy under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("the Act") and the rules framed thereunder and bar of res judicata.

2. The applicant, Rasta Peth Education Society, runs a number of educational institutions at Pune. The respondent was employed as a teacher in a school run by the applicant since 1965. In the year 1984 an enquiry was instituted against him on various charges in which he was found guilty. It appears that by a letter dated April 19, 1984 addressed to the Head Master of the School, the respondent applied for voluntary retirement and also sought permission to take up any other employment in the meantime. By a letter of the same date to the Chairman of the Enquiry Committee instituted to go into the charges against him, he reiterated his desire to go on voluntary retirement and intimated his decision not to join the school again in any event. By still another letter of the same date addressed to the chairman of the Enquiry Committee, he pleaded guilty of all the charges against him and expressed regrets. He also prayed for sympathetic

consideration of his prayers, probably referring to the prayer for permission to go on voluntary retirement and to take up any other work in the meantime. The Secretary of the School by his letter dated April 28, 1984 informed the respondent about the submission of the decision of the Enquiry Committee to the Society for further action. A copy of the decision of the Enquiry Committee was also forwarded to the respondent. It was further stated in the said letter:

"You have pleaded guilty to all the charges levelled against you and expressed your regrets and you have also requested to consider (your case) sympathetically.

As per the decision of the Enquiry Committee:

- (a) You will go on leave without pay from the commencement of the Education year 1984-85 in response of your application.
- (b) You will never work in this school hereafter as a teacher.
- (c) You will retire voluntarily immediately on receiving orders regarding voluntary retirement.

You should hand over the charge to the Head Master immediately on receipt of this letter."

It appears that on May 15, 1984 the applicant acknowledged the above letter dated April 28, 1984 and intimated the Secretary of the applicant-Society that he had handed over charge to the Supervisor on April 20, 1984. He also informed that he had returned the books to the Library and thus complied with all the requirements of his above letter. However, subsequently, he filed an appeal u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("Act of 1977") and Rules made thereunder challenging the order dated April 28, 1984 and seeking relief of reinstatement and backwages. This appeal was filed on July 9, 1984. The respondent filed another appeal on August 1, 1984 purporting to be corrected appeal. The appeal was found to be barred by limitation. The contention of the respondent teacher was that it was within time. It was, however, contended that even if it was held to be barred by limitation there was sufficient cause for alleged delay which would justify condonation. The Tribunal, however, dismissed the appeal on the ground of limitation. The order of the Tribunal was challenged by the respondent in the High Court by filing a writ petition which was dismissed by the High Court at the admission stage. The respondent thereafter filed a civil suit in the Court of Civil Judge, Senior Division, Pune challenging the order of the applicant-society dated April 28, 1984 and seeking relief of reinstatement with back wages and other monetary benefits. The applicant, who was defendant in that suit, filed a written statement and raised, inter alia, preliminary objection in regard to the maintainability of the suit on the ground of (i) availability of specific remedy by way of appeal u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and (ii) on the ground of res judicata.

3. The Civil Judge, Senior Division, Pune by his order dated September 11, 1990

held that the suit was maintainable and was not barred on the ground of res judicata. The preliminary objection of the applicant-society was thus rejected. The society has challenged the above order by filing the present Civil Revision Application.

4. I have heard the learned counsel for the applicant-society. The submission of the counsel is that there being specific remedy provided in the Act of 1977 against the impugned order, civil suit is not maintainable. Counsel further submits that the applicant having already availed of his right of appeal by filing the appeal which was dismissed on the ground of limitations he is debarred from taking recourse to remedy by way of Civil Suit even if such a remedy is held to be not barred by the provisions of 1977 Act. He also submitted that the principle of res judicata applies and the suit is barred even on that count.

5. The learned counsel for the respondent, on the other hand, submits that the Act of 1977 has not excluded the jurisdiction of the civil court either in explicit terms or by necessary implication and that being so, the availability of right of appeal under the said Act, even if any, will not take away the right to approach the civil court. Counsel also submits that no appeal lies u/s 9 of the Act of 1977 against the impugned order because section 9 provides appeal only to an employee who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank by the orders passed by the management or is superseded by the management while making the appointment to any post by promotion. According to him, in the instant case, a perusal of the letter of the applicant-society dated April 28, 1984 clearly goes to show that it neither amounts to dismissal nor removal or termination. It is a vague order which cannot be brought within any of the clauses of Section 9 of the Act. In any event his submission is that even if appeal lies u/s 9 remedy by way of civil suit is not barred. According to the counsel, Section 12 of the Act of 1977 makes it clear that what is barred is any legal proceeding in any court in respect of matters decided by the Tribunal under the said Act and not in respect of disputes in regard to service matters of teachers as such. So far as res judicata is concerned, the submission is that the principle of res judicata has no application in the instant case. As regards the effect of filing of appeal on the availability of remedy by way of civil suit, the submission is that the appeal being dismissed at the inception on the ground of limitation it cannot be said that the respondent has availed of the right of appeal under the Act of 1977.

6. I have carefully considered the rival submissions. So far as the exclusion of the jurisdiction of the Civil Court is concerned, it is well-settled that such exclusion is not to be readily inferred. It must either be explicit or clearly implied. Equally well-settled is the proposition that the mere fact that a special statute provides for certain remedies does not, by itself, necessarily exclude the jurisdiction of the civil court to deal with a case brought before it in respect of some of the matters covered by the said statute. Reference may be made in this connection to the decision of the Supreme Court in *Dhulabhai and Others Vs. The*

State of Madhya Pradesh and Another, , where it was observed that where there is no express exclusion of the remedies by way of civil suit, it may be necessary to see if the statute creates a specific right or liability and provides for determination of such right or liability and further lays down that all the questions about said right or liability shall be determined by the Tribunal so constituted, and whether remedies normally associated with actions in civil suits are prescribed by the said statute or not. This aspect was further dealt with by the Supreme Court in *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others*, . In that case, the Supreme Court while considering the principles governing the jurisdiction- of the civil court in relation to an industrial dispute, laid down that if the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy. This aspect was again dealt with by the Supreme Court in *Raja Ram Kumar Bhargava (Dead) by Lrs. Vs. Union of India (UOI)*, . It was observed:

"Generally speaking, the broad guiding considerations are that wherever a right, not preexisting in common-law, is created by a statute and that statute itself provides a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil court's jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil Courts jurisdiction, then both the common-law and the statutory remedies might become concurrent remedies leaving open an element of election to the persons of inherence.

7. From the above decisions of the Supreme Court, it is clear that in the absence of exclusionary provision the availability of the remedy by way of appeal under the relevant service rules by itself is not sufficient to infer exclusion of the jurisdiction of the civil court. The jurisdiction of the civil court in such a case would depend upon the conditions indicated above. The remedy available under the Act, will not operate as a bar to the jurisdiction of the Civil Court. Such remedy under the special statute will be deemed to be concurrent leaving it open to the aggrieved person to choose one of them. In the instant case, the only provision excluding the jurisdiction of the civil court is Section 12 of the Act which is in the following terms;

12. Decision of Tribunal to be final and binding: Notwithstanding anything contained in any law or contract for the time being in force, the decision of the Tribunal on an appeal entertained and disposed of by it shall be final and binding on the employee and the management; and no suit, appeal or other legal proceeding shall be brought in any Court, or before any other Tribunal or authority, in respect of the matters decided by the Tribunal.

8. It is clear from a reading of the above section that what is barred under this section is suit, appeal or other legal proceeding in any court or Tribunal "in respect of the matters decided by the Tribunal". This section does not prohibit suit or other proceedings in any civil court in any matter for which appeal has been provided in this Act. There is nothing in the scheme of the Act to justify inference of implied exclusion of the jurisdiction of the civil court. In such a situation, as observed by the Supreme Court, it is open to the suitor to select one of the two forums - appeal under the Act or a civil suit. If he opts for civil suit, the remedy available under the Act by way of appeal will not operate as a bar.

9. The next question which falls for determination is whether filing of an appeal after the expiry of the prescribed time which was dismissed as time barred would amount to availing of the remedy by way of appeal. The answer, in my opinion, is in the negative. Once an appeal is barred by limitation, one cannot file the same as a matter of right. He can only file the appeal with an application for condonation of delay. Only if the delay is condoned, the appeal may be entertained. If the delay is not condoned, the appeal is not entertained at all. Dismissal of an appeal in such a case, in effect, amounts to refusal to entertain the appeal. In such a case it is difficult to hold that remedy by way of appeal has been availed of.

10. So far as bar of res judicata is concerned, evidently, it has no operation in a case like the present one. The principle of res judicata is based on the need of giving a finality to judicial decisions. As observed by the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, what it says is that once a res is judicata, it shall not be adjudged again. Thus for res judicata to operate, the issue must have been heard and finally decided. The principle, therefore, cannot be applied to the present case where the appeal being barred by limitation, was not even entertained.

11. The learned counsel for the applicant-society submits that the suit of the respondent is vexatious because he has himself accepted all the charges against him and offered to go on voluntary retirement and it was only in pursuance of his own offer that the impugned order was passed. I have considered the above submission. I am, however, of the opinion that all these aspects are not relevant for deciding the question of maintainability of the civil suit. These can be urged before the civil court after the suit is entertained.

12. For the above reasons, I do not find any merit in this revision application. The same is, therefore, dismissed. Rule is discharged.

13. Under the facts and circumstances, there shall be no order as to costs.

14. Certified copy expedited.