

**(1999) 12 DEL CK 0113**

**In the Delhi High Court**

**Case No : Regular Second Appeal No. 70/83**

R.B. Saxena

APPELLANT

Vs

N.D.M.C.

RESPONDENT

**Date of Decision : 22-12-1999**

**Acts Referred:**

Specific Relief Act, 1963 — Section 34

**Citation :** (2000) 3 AD 94 : (2000) 84 DLT 843

**Hon'ble Judges :** K. Ramamoorthy, J

**Bench :** Single Bench

**Advocate :** Mr. Ashok Kumar Mahajan, for the Appellant; Ms. Alapana Poddar, for the Respondent

## **Judgement**

K. Ramamoorthy, J.—The plaintiff in the suit is the appellant. Before I deal with the findings of the courts below, it is necessary to note a few facts.

2. The second respondent Mr. K.S. Awasthy was appointed as Senior Vernacular Teacher on the scale of pay Rs.68-170. On 29.7.1957 the appellant was appointed as Sr. Vernacular Teacher in the same grade. The second respondent did not possess a degree. In the year 1959 as evidenced by Ex. DX-1 the Govt. of India introduced a policy that if one was to be appointed as Language Teacher, i.e. TGT, the candidate should be graduate in that language. On 1.11.1960 the second respondent who was already in the service of the N.D.M.C. as Senior Vernacular Teacher, was appointed as Language Teacher in the scale of Rs. 170,380. On that date, the second respondent did not possess the degree is a fact not in dispute. There was a representation by the appellant which was rejected by the N.D.M.C. and there was an appeal to the Chief Commissioner which was allowed and another post was created. On 5.8.1961 the appellant was appointed in that post. The appellant made a representation that his position as teacher should be from 1959 i.e. from the date of the policy. That was also rejected. In the year 1971 the N.D.M.C. sent the case of the second respondent for confirmation in the post to which he was appointed on 1.11.1960. On

13.1.1972 the Directorate of Education wrote to the N.D.M.C. and that letter is marked as Ex. P.3. The Director of Education mentioned in that letter that the second respondent Mr. K.S. Awasthy did not possess the requisite qualification on 1.11.1960. He became qualified on the date when he acquired degree of Shastri Examination from Kashi Vidyapeeth, Varanasi in the year 1965. On 26.10.1972 the Establishment sub-committee passed a resolution recommending that the second respondent be fixed in the Primary Teacher's scale of Rs.118-225 for the period from 1.11.1960 to 30.4.65 because of his not having graduate qualification. The committee recommended that whatever money was over paid recovery may be waived. The sub-committee further recommended that the appellant should be fixed as senior over the second respondent. The resolution of the sub-committee is marked as Ex. PX-2. 3. On 3.11.1972 the N.D.M.C. passed a resolution accepting the view taken by the Establishment sub-committee. The part of the resolution reads as under:-

"Resolved that the minutes of the meeting of the Establishment Sub-Committee be approved. Regarding item No. (1) of the minutes regarding regularization of appointment of Sh. K.S. Awasthy, Junior language Teacher, the seniority of Sh. Ram Babu Saxena be fixed over Sh. K.S. Awasthy after inviting objections from the affected teachers."

3. In the year 1971 the post of language Teacher was already upgraded to PGT in the scale of Rs. 300-600. On 21.4.1970 a circular was issued by the Directorate of Education and the Circular reads as under:-

"Subject: Directions for Selection and Promotions of Principal/Teachers.

I am directed to request that some of the Principals and management have pointed out some difficulties in the rules given in Delhi Education code, 1965 specifically for the selection of Principals and Teachers, approval of Posts, filling up the vacancies etc. In this respect following decisions have been taken which should be strictly followed by all Schools:-

1. Selection of Principal (Details)
2. Fill the post of Principal in leave vacancy (Details).
3. In regard to Teachers (Details).

(a) All post for teachers in aided schools will be treated as non-selection post. If any post in higher grade is vacant in any school, then the senior most teacher of that subject should be promoted to fill up that vacancy.

Teachers performance may be satisfactory for the promotion; His inspection reports for last years and character role should be good; he/she should possess a minimum of 3 years teaching experience in his/her grade. If the teacher fulfills aforesaid conditions then he may be promoted after the approval of education officer. Only in special circumstances, a relaxation of 6 (Six) months may be granted in teaching experience, by the Deputy Education Officer (ZONAL).

(b) There should be a representative of Education Department in the selection committee for teachers. Education officer will nominate one person for selection committee out of Government representatives on school management Committee.

(c) If no teacher of prescribed qualification is available for any post in the school, then to select a candidate from outside, the management will invite names from employment exchange. If suitable candidates are not available in the employment exchange then management will invite names by advertising the vacancy in the press with the prior approval of Education Officer. Education officer under these circumstances will inform his decision within 10 days time positively.

4. Filling up the vacancy on temporary basis."

4. That is marked as Ex. DW1/2. On 14.2.1972 the second respondent was appointed to the upgraded post. The appellant submitted his representation objecting to the same claiming to be senior to the second respondent. After sending notice through lawyer to the N.D.M.C. the appellant institute the suit on 10.7.1972 praying for a declaration that he was senior to the second respondent in the cadre of T.G.T. and he was, entitled to consequential benefits. He also challenged the action of the N.D.M.C. in appointing second respondent as P.G.T. on 14.2.1972. The learned Subordinate Judge dismissed the suit on 24.5.1970. The appellant preferred an appeal to the learned Addl. District Judge and the appeal was dismissed on 24.7.1972. Hence the second appeal.

5. This Court while admitting the appeal had framed the following questions of law as found in paragraph 7 of the Grounds of Appeal :-

"a. Whether 2 officials having different qualifications and different scale of pay and performing different duties could be treated as equal irrespective of the fact that at a later stage scale of pay of both the posts was equalized.

b. Whether the judgment of learned single judge of this Court in R.C. Sharma and Others Vs. Union of India and others remains a law on the face of judgment of a division Bench of this Hon"ble Court in B.P. Mandal and others Vs. Union of India and Others."

6. The case of the N.D.M.C. was that the second respondent had always been senior to the appellant and while the appointment was made in 1972 to the post of P.G.T. The appellant and the second respondent were interviewed and having considered them the second respondent was selected and appointed. The plaintiff can never claim to be senior to the second respondent who was appointed earlier point of time. The learned Subordinate Judge framed the following issues for decision:-

1. Whether the plaintiff is senior to the defendant No. 2 as alleged by the former? If so its effect? (On plttf).

2. Whether the post of Post Graduate trained Hindi (Language) Teacher is a upgraded post as alleged by the plaintiff. If so its effect? (On plttf).
3. Whether the said post is a created post as alleged by the defendants? If so its effect? (on defendant).
4. Whether the appointment of defendant No. 2 to the said post is illegal, and void as alleged by the plaintiff? (on plttf).
5. Whether the plaintiff has been discriminated by the deft. No.1. If so its effect. (On plaintiff)
6. Whether the suit is bad for want of notice u/s. 49 of the Punjab Municipal Act?
7. Whether the suit is barred u/s. 34 Specific Relief Act? (On defendants)
8. Relief, if any.
9. Whether the suit is barred u/s. 25 of Education Act, 1973.?

7. The question whether there was an up gradation was mooted out before the learned Sub Judge. The Subordinate Judge found that it was only an up gradation and not the creation. On the question whether the plaintiff was senior to the second defendant, the learned Subordinate Judge found that the second defendant was senior. On issue Nos. 1, 3 and 5 the learned Subordinate Judge found against the plaintiff. The learned Subordinate Judge had rested its decision on the fact that both the plaintiff and the second defendant were interviewed for the purpose of selection as junior language Teacher, plaintiff was not found fit and the second defendant was appointed. The learned Subordinate Judge made the following observations in Para 17 of its judgment:-

"The plaintiff was appointed as metric S.V. Teacher with effect from 29.7.57 vide Ex. D1W. 66 and ex. D1W/14. He was promoted as Junior Language teacher with effect from 5.8.61 in the scale of Rs.170-350. The plaintiff was confirmed in the scale of Rs. 68- 170 with effect from 29.7.58 as per Ex.A1. Ex.D1W/14 mentions that he was working as Assistant teacher. As per ex.D1W/14 and Ex.D1W/15 the plaintiff was a trained Graduate (J.T.C.) S with Prabhakar (Honors in Hindi) He was teaching classes 6th to 8th. He has contended that he was working as Junior Languages teacher right from July 1959 when his claim for seniority and scale was not given by the committee he made representations to Authorities which are Ex. D1W/14 to Ex. D1W/17, Ex. D1W/20, Ex. D1W/25 to Ex. D1W29, Ex. D1W/35 to Ex. D1W/43. As per Ex. D1W/18 all posts in the grade of 68-170 were abolished as a result of new fixation by the Director of Education in the Higher Secondary Schools. As per old fixation there were only two posts of Junior language teacher but as per new fixation their number was raised to four. In the year 1957 the grade of Junior language teacher was Rs. 160-250. The plaintiff was not appointed as a language teacher. The post of metric S.V. Teachers were abolished in the Higher Secondary Schools after up-gradation and the plaintiff was transferred to a primary school. The plaintiff as well as the defendant No. 2

appeared before the interviewing authority for the purpose of selection as Junior Language teacher. The plaintiff could not succeed and defendant No. 2 was appointed in the said scale or the said post. One more post of Language teacher was created in the same school vide resolution No. 72 dated 4.8.61 Ex. D1W/22 and the plaintiff was promoted a Junior Language teacher against this post with effect from 5.8.61. The plaintiff requested for the grade of Rs.170-380 with effect from 1.7.59 but the same was rejected by the Education Officer vide order Ex. D1W/24 on the ground that the plaintiff was not designated as Language Teacher. The case of the plaintiff was also rejected by the Director of Education as not tenable as no person junior to him was appointed as language teacher. Also there was no post of Language teacher available with effect from 1.7.59. As per Ex. D1W/30 the plaintiff was only a metric S.V. teacher and he could be asked to teach any subject. There was no post of Junior language teacher as such prior to 4.8.61 because the two posts of metric Trained Teacher were converted as the post of Junior Language teacher vide resolution dated 22.7.60. As such there were no posts of Language teacher before the creation of this post. At the time of inter- view for the two upgraded post defendant No. 2 topped the list. The plaintiff also does not dispute this fact. He also admits in his statement that defendant No.2 as senior to him as metric S.V. teacher. It is not the case of the plaintiff that defendant No. 2 was not qualified for the post of junior Language teacher. The plaintiff was informed vide letters Ex. D1W/31 and Ex. D1W/67 by Secretary N.D.M.C. he was appointed as metric S.V. Teacher to teach all subjects and by teaching Hindi he did not get qualified for the scale of language teacher."

8. In paragraph 20 (second paragraph 20 noted in the judgment) the learned Subordinate Judge observed :-

"There is another way of looking at defendant No. 2 was given the scale of Rs. 170-380 w.e.f. 1.11.60. I have already discussed the qualifications required for the said scale. Defendant No. 2 did not possess any of those qualifications so as to entitle him to that scale. He was entitled to the scale of Rs.160-300. The Director of Education considered the case of the defendant No. 2 for his entitle to the said scale of Rs. 170-380 and had found that defendant No. 2 was not qualified for the same at that time. It is evident from Ex.D2/1/2 and Ex.P3. The committee keeping in view the directions previously declared the plaintiff as senior to defendant No. 2 but later on it reconsidered the matter and declared the plaintiff as Junior to defendant No.2. But this giving of the scale to the defendant No. 2 by the defendant- committee formerly and subsequently is hardly material. The seniority does not depend upon the scale but it depends upon the entering of the service. At the same time how can the plaintiff be considered for the post of a Junior Language teacher with effect from 1.7.59 when no such post was existing. The two posts that were up-graded were given to defendant No. 2 and one more person and it is not the case of the plaintiff that defendant No. 2 did not possess the requisite qualification for the same. When the other posts come into being the plttff. was given the same. So there is

no question of discrimination. The plaintiff himself in his statement admits that when the defendant No.2 was senior to him. So there was no discrimination at that time. There cannot be discrimination subsequently when defendant No. 2 was given the scale of Rs.300-600 because the post was a selection post and not a non selection. The plaintiff fails even if the post is held as non-selection post because defendant No. 2 was senior to him. When a senior is appointed and junior is not appointed there is no question of discrimination. This issue is decided against the plaintiff."

9. The learned Subordinate Judge had proceeded on the premise that the resolution dated 3.11.1972 was reconsidered by the N.D.M.C. and the plaintiff was considered junior to the second defendant and that had become final. The learned Addl. District Judge had held that after the resolution dated 3.11.1972 nothing was done by the N.D.M.C. and, Therefore, the plaintiff cannot claim to be senior to the second respondent. The question of reconsideration as adumbrated by the Subordinate Judge in its judgment was projected by the N.D.M.C. at the time of the arguments. Nothing has been placed on record by the N.D.M.C. to substantiate this fact. The learned Subordinate Judge should have focused its attention on two important aspects when there were rival claims to seniority. One is the qualification prescribed for the post; the other is date of entry into the post. The facts in the instant case are clear as noticed above. Though the second respondent's entry was earlier in point of time, his entry was not in accordance with law and regular and that was pointed out by the as early as on 13.1.1972 and that has not been considered in its proper perspective by the learned Subordinate Judge. There is an elaborate discussion on the documents filed but the core of the matter had been completely missed by the learned Subordinate Judge. The findings on the issues were not on the facts and on the materials placed before the Court but on the mere assumption by the learned Subordinate Judge.

10. The learned Addl. District Judge, as I had pointed out above, discussed the documents but without having a hang of the facts necessary for the consideration of the question. The learned Addl. District Judge discussed the Circular dated 21.4.1970 in paragraph 15. It was common ground before the learned Addl. District Judge if what is stated by the Directorate of Education in the circular was correct that would entitle the plaintiff to claim seniority over the second defendant. That is got over by the learned Addl. District Judge by saying that it would not apply to the N.D.M.C. as it would apply only to the aided Schools. The learned Addl. District Judge had committed a very serious illegality in appreciating the circular. That circular was issued to all the Managers and Principals of the Aided Schools and also the M.C.D. and N.D.M.C. The distinction made by the learned Addl. District Judge without appreciating that there was absolutely no difference. Once the Directorate of Education represent, Government had issued directions that would apply to all Schools. The N.D.M.C. is part of the Government, Therefore, the learned Addl. District Judge had taken a perverse view in this behalf. This would suffice for the purpose of upsetting the

judgment of the lower courts. The documents Ex. P.2 and P.3 filed by the plaintiff-appellant would also clinch the issue. The view taken by the courts below on facts cannot be sustained and, accordingly, they are set aside.

11. It was brought to my notice that second respondent died pending the second appeal. That cannot be put against the plaintiff-appellant. Whatever the relief the plaintiff would be entitled to has to be given to him.

12. The N.D.M.C., as a public authority, must have placed all the documents before the lower court and should have projected the documents in their proper perspective. Taking a technical objection that the circular would be applicable only to the aided schools is not expected from an authority like the N.D.M.C.

13. The second appeal, accordingly, stands allowed. The plaintiff-appellant shall be entitled to costs throughout.