

(1961) 03 AHC CK 0028
In the Allahabad High Court
Case No : Special Appeal No. 214 of 1958

State of Uttar Pradesh and Another	Vs	APPELLANT
Sudarshan Deo		RESPONDENT

Date of Decision : 01-03-1961

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : AIR 1963 All 358

Hon'ble Judges : M.C. Desai, J

Bench : Single Bench

Advocate : S.C. Khare, for the Respondent

Final Decision : Allowed

Judgement

FACTS

1. This was a special appeal by the State of Uttar Pradesh and the Director of Education, Uttar Pradesh, against an order of Nigam, J. of the Allahabad High Court allowing the writ petition of Sri Sudarshan Deo, under Article 226 of the Constitution, praying for the issue of a writ of mandamus directing the appellants to fix his seniority in the graded list of special Subordinate Educational Service, U. P., on the basis of the original date of this substantive appointment in that cadre, that is from March I, 1941. The appeal was heard by a Division Bench, consisting of R. Dayal and B. Upadhyaya, JJ. The Hon'ble Judges having differed in their opinions they referred two questions to a third Judge for his opinion. Thus, the matter came before M. C. Desai, J. who delivered the following opinion :

Desai, J.

The following two questions have been referred for my opinion :

"1. Whether, in the circumstances of the case, this Court should issue a writ under Article 226 of the Constitution directing the appellants to fix the seniority of Sri Sudarshan Deo, in his service and grade, as determined by the Court?

2. Whether the respondent's seniority in the Special Subordinate Service, U. P., should be determined on the basis of his substantive appointment as Supervisor, Agricultural Schools, U. P., in the Rs. 120-300 grade on the 1st March, 1941 or on the basis of his confirmation in that appointment and grade from the 1st March 1942 or from the 22nd May 1946 when that post was included in the cadre of the assistant Masters of Government Intermediate Colleges in the Special grade of the Subordinate Educational Service?"

2. The circumstances referred to in the first question are these. The respondent was appointed in July, 1935, as a trained graduate teacher, in the grade of Rs. 75-180, which was a service inferior to the Special Subordinate Educational Service. He was not appointed to the Special Subordinate Educational Service and could not be considered to be a member of it. On 7-1-1938 he was confirmed in that post. On 1-2-1940 he was appointed as a Supervisor, Agricultural Schools, in the grade of Rs. 120-300. This appointment was a temporary one. The previous incumbent of the post was a Deputy Inspector of Schools, of the Special Subordinate Educational Service (hereinafter referred to as S.S.E.S.) in the grade of Rs. 180-360. The letter of appointment of the respondent has not been filed by the respondent and it is not known on what terms he was appointed. On 1-3-1941 the appointment was made substantive but on probation for one year. On the expiry of the period of one year on 1-3-1942, he was confirmed as a Supervisor.

The post of Supervisor was a special isolated post not borne on any cadre (such as that of Deputy Inspectors of Schools) and created in 1939 as a temporary measure, and was manned in the beginning by an officer of the Agriculture Department. Some sort of a grade was fixed for the post, but it was continually revised, from time to time, in order to make it conformable to the salary that the officer was entitled to get as a member of the Agricultural Service. Subsequently the post was held by a Deputy Inspector of Schools. On 22-5-1946 the Government issued an order merging the post in the cadre of Assistant Masters, Government Higher Secondary Schools, in the S.S.E.S. In the S.S.E.S. there was a cadre of Assistant Masters, Government Higher Secondary Schools, and the post of Supervisor, which was not borne on it previously, was for the first time on 22-5-1946 made a post borne on it. The reason for including the post in this cadre was to enable the incumbent to get promotion as an Assistant Master, G. H. S. Schools. So long as the post was not included in the cadre an incumbent of it could not claim promotion like an Assistant Master, being an isolated post he would always hold it.

The respondent admits this fact; it is not his case that previous to 22-5-1946 the post of Supervisor was, or should have been treated as, borne on the cadre of Assistant Masters. The relief that he claims is based upon the order issued by the Government on 22-5-1946 and not independently of it. He does not challenge the order at all. On the inclusion of the Supervisor's post in the cadre of Assistant Masters, there arose the question how his seniority in the cadre of

Assistant Masters should be determined. Since he became a member of the cadre on 22-5-1946, the Government decided that he should be placed just after all the Assistant Masters confirmed before 22-5-1946. In other words, though he was confirmed as a Supervisor on 1-3-1942, he was treated as a confirmed member of the cadre of Assistant Masters on 22-5-1946, because it was on that date that he became a member of the cadre. He was not satisfied with the seniority assigned to him; he claimed seniority with effect from the date on which he was confirmed as a Supervisor, i.e. with effect from 1-3-1942.

His request for reconsideration of the question of his seniority having been rejected by the Government he filed a petition for a writ of mandamus, or an order or direction in the nature of mandamus

"directing opposite-parties to fix the seniority in the graded list of Special Subordinate Educational Service U. P., on the basis of the original date of the substantive appointment of the applicant in that cadre, i.e. from 1-3-1942"

and any other writ, order or direction to which he was entitled. The petition was filed against the State of Uttar Pradesh and the Director of Education, Uttar Pradesh. His contention was that his seniority, in the gradation list of the cadre of Assistant Masters, should have been fixed not on the basis of the date on which the post of Supervisor was included in the cadre but on the basis of the date on which he was appointed substantively to the post or the date on which he was confirmed in the post.

What he wanted in other words is that though the post was included in the cadre on 22-6-1946, he should be deemed to be a member of a post borne on the cadre with effect from the date on which he was substantively appointed or on which he was confirmed in the post. He stated in paragraph 6 of his rejoinder-affidavit that though he was appointed substantively as a Supervisor on 1-3-1941 and was confirmed on 1-3-1942, the question of his grade was finally decided on 22-5-1946, and that the decision "has to take effect from the date on which the deponent was substantively appointed," because he "could not be confirmed twice in the same grade." The application was opposed by the opposite-parties who claimed that the respondent's seniority was correctly fixed. In the course of arguments before my brother Nigam, counsel for the opposite-parties is said to have stated that the respondent

"is entitled to the seniority in the grade of Assistant Master, Government Higher Secondary Schools, U. P. in the Special Subordinate Educational Service grade of Rs. 120-300 and is entitled to seniority in this cadre as if he had been confirmed in that grade on 1-3-1942",

The statement of counsel is not recorded in the proceedings and is to be gathered from my learned brother's judgment. He observed that what was conceded was what the respondent was entitled to and that he should not have been treated on 22-5-1946 as a new entrant and should have been allowed seniority "commensurate with his confirmation in an equivalent grade on

1-3-1942 or the date of his first appointment in the grade, i.e. 1-3-1941 as the rules may permit." He pointed out that the S.S.E.S. consists of several cadres, such as cadre of Lecturers of Government Training Colleges, cadre of Assistant Masters of Government Intermediate Colleges and cadre of Assistant Masters of Government Higher Secondary Schools. The respondent belongs to the last cadre. My learned brother allowed the writ petition with the direction that his seniority shall be calculated in the post-1931 scale of Rs. 120-10-300

"as if he had been confirmed in the cadre of Assistant Masters, Government Higher Secondary Schools, U. P. in the Special Subordinate Educational Service grade of Rs. 120-300 on 1-3-1942 or had been appointed to it substantively on 1-3-1941."

3. The special appeal was filed from my learned brother's judgment. It came up for hearing before my brothers Raghubar Dayal and B. Upadhyaya, who differed from each other about the orders to be passed in the special appeal. Raghubar Dayal, J. was of the view that the special appeal should be allowed and the respondent's petition be dismissed, while B. Upadhyaya J. was of the opinion that it should be dismissed with costs.

4. I agree with my brother Raghubar Dayal that the special appeal should be allowed. By the writ or direction asked for by the respondent, the rights of several Assistant Masters, Government Higher Secondary Schools, would be affected and it could not be issued without giving an opportunity to them to be heard. Whatever might have been the position when those responsible for fixing the seniority of the respondent or preparing the gradation list of members of the cadre of Assistant Masters fixed the seniority or prepared the gradation list, the position before my learned brother was different. The former might have fixed the seniority or prepared the gradation list without giving an opportunity to the respondent to be heard, but it was not open to my learned brother to issue a writ or direction affecting the rights of Assistant Masters, without giving them an opportunity to be heard. They would be bound by the order affecting their rights and it would be a violation of a principle of natural justice to pass an order adversely against but without hearing them. All those Assistant Masters over whom the respondent claims seniority should have been impleaded as opposite-parties to the petition and only after hearing them could a writ or direction be issued, making the respondent senior to them. It is immaterial how they had got the seniority over the respondent, whether legally or illegally and whether in a lawful manner or not; once they had got the right it could not be taken away by a Court without their being heard. (5) The respondent would, if at all be entitled only to a writ of mandamus. Mandamus is issued only to command the performance of a duty imposed by law. The respondent has not pointed out any law under which his seniority in the cadre was to be fixed with reference to the date of his appointment, or the date of his confirmation, as Supervisor, Agricultural Schools. The very fact that Nigam, J. himself could not decide whether his seniority depended upon the date of his appointment or the date of

his confirmation shows, that there are no rules governing the question and that it was a matter of discretion. It was for the respondent to show the rules, if any existed, and I do not understand how the opposite-parties could be required to fix the respondent's seniority "as the rules may permit" without any rules being referred to or brought to their notice. The opposite-parties were not bound by any provision having the force of law to treat him as senior to those Assistant Masters who were appointed after 1-3-1941 or were confirmed after 1-3-1942. If the matter was not covered by rules, it was at the discretion of the opposite-parties and no mandamus could lie to compel them to exercise it in a particular manner. It is not given to this Court to regulate the discretion of others by the issue of directions and writs; evidently if the discretion rests in an authority it cannot be exercised by this Court. Consequently this Court had no jurisdiction to issue a mandamus or direction calling upon the opposite-parties to fix the respondent's seniority in a certain manner simply because that manner appeared to it to be the best.

6. There is no foundation for the respondent's claim that the inclusion of the post of supervisor in the cadre of Assistant Masters should be given retrospective effect. It was for the Government to decide whether it should be given retrospective effect or not. The order issued by them has not been produced in Court, but it is not claimed by the respondent that it was expressed to be retrospective or that it contained any provision implying that it should be given retrospective operation. Like a statute, an order is presumed to be prospective and the Government order was prospective. Since the respondent became a member of the cadre of Assistant Masters on 22-5-1946 for the first time, he was very rightly placed, in the order of seniority, just after the Assistant Master last to be confirmed in the cadre, before 22-5-1946.

If the respondent was not a member of the cadre prior to 22-5-1946, I do not understand how he could claim to be senior to the Assistant Masters who were confirmed in the cadre before that date. What he was before his post was included in the cadre, was wholly immaterial; he might have been appointed as Supervisor, and he might have been confirmed as Supervisor, long ago, but his claim to a particular seniority in the cadre of Assistant Masters was not derived from the office of Supervisor held by him; on the other hand it was derived solely from the inclusion of the Supervisor's post in the cadre. The date of the inclusion was material but not what had happened previously. The respondent was appointed on 1-3-1941 and confirmed on 1-3-1942 as a Supervisor, when the post was not in the cadre; he was not appointed to a post in the cadre on 1-3-1941 and was not confirmed in a post in the cadre on 1-3-1942, and I am unable to understand any principle on the basis of which he could claim seniority in the cadre, as if he had been appointed to a post in the cadre on 1-3-1941 or confirmed in the post on 1-3-1942. There is no question of the respondent's having been confirmed in an "equivalent" grade on 1-3-1942; there was no justification for saying that the grade that included the post of Supervisor, Agricultural Schools, was a grade equivalent to that of Assistant Masters.

Merely because the scale of pay for Supervisor, Agricultural Schools, happened to be the same as that of Assistant Master, it could not be said that the two posts were of equivalent grades and that appointment and confirmation in one post was to have the same effect as appointment and confirmation in the other post, regardless of the question of cadres. Even if the post of Supervisor carried a higher scale of pay than the scale of Assistant Masters, the respondent, on his post being Included in the cadre of Assistant Masters, could not claim any seniority over the Assistant Masters. Seniority is a question of comparison; a person is senior to somebody. Such a comparison can exist only in respect of incumbents in the same post or in the same grade or in the same cadre; but there can be no comparison between an incumbent of a post in one cadre and an incumbent of a post in another cadre. The respondent on the date of his appointment as Supervisor, when the post did not form part of the cadre of Assistant Masters, could not claim to be senior to any Assistant Master appointed after 1-3-1941. Similarly on the date of his confirmation on 1-3-1942, when again the post did not form part of the cadre, he could not claim to be senior to Assistant Masters who were confirmed after that date.

7. There is no force in the respondent's contention that fixing his seniority in the cadre below the last Assistant Master confirmed before 22-5-1946, amounted to his being confirmed twice. He was certainly not confirmed twice. If the inclusion of the post of Supervisor, on which he was confirmed on 1-3-1942, itself amounted to his being confirmed again on 22-5-1946, I do not see any reason why it should be held to be illegal. It could be said that on 1-3-1942 he was confirmed as Supervisor and on 22-5-1946 he was confirmed as a member of the cadre of Assistant Masters. A person may not be confirmed in the same post twice but he can certainly be confirmed twice in different posts or in different cadres.

8. I also agree with Raghubar Dayal, J. that the matter in respect to which a writ or direction was sought by the respondent, is of pre-Constitution period. The respondent's seniority in the cadre must have been fixed shortly after 22-5-1946 and if he was aggrieved he was aggrieved then and not subsequently and it is well established that the Constitution being not retrospective no writ or direction can be issued in respect of an order passed or action taken before the enforcement of the Constitution. Whatever was the seniority fixed, before the Constitution came into force, could not be interfered with by this Court through a writ or direction. There is no force in the contention" of the respondent that he was reverted after the enforcement of the Constitution because the order of reversion is not the order against which a writ or direction is sought. The reversion might have been based upon the seniority but if the seniority could not be challenged in this Court, the order of reversion also could not be challenged.

9. Article 311 does not come into the picture at all. The respondent has not been punished by being made junior to the Assistant Masters who were appointed after 1-3-1941 or were confirmed after 1-3-1942. Article 311 does not govern

fixation of seniority in a grade or in a cadre at all. His reversion from an officiating post, not entailing any penal consequences, does not amount to punishment within the meaning of Article 311.

10. My brother B. Upadhya observed that the opposite parties in their counter-affidavit admitted that the respondent on appointment as Supervisor was placed in the grade of Rs. 120-300 "which was the grade of an Assistant Master in the Special Subordinate Educational Service". There was no such admission at all; what was admitted was that the grade of Supervisor was Rs. 120-300 and that the grade of Assistant Masters in the S.S.E.S. also was of Rs. 120.300. Merely because the scales of pay of the two grades were similar it could not be said that they formed but one grade or that the respondent on appointment as Supervisor became a member of the S.S.E.S. It was open to the Government to fix any grade for the post of Supervisor and the mere accident that it happened to be the same, as that of Assistant Masters, did not mean that it was the same grade. The respondent, therefore, could not be said to be a member of the cadre of Assistant Masters merely because he was on the same scale of pay as Assistant Masters.

My learned brother observed at another place that on his promotion as Supervisor in the grade of Rs. 120-300 in 1940, he became a member of the S.S.E.S. because that was the Service next higher than that of trained graduate teachers. I find no justification for this observation; there is nothing on the record to show that a trained graduate teacher on being promoted would invariably become a member of the S.S.E.S. There is nothing to show that Supervisor, Agricultural Schools, was a member of the S.S.E.S. He would not become a member of the S.S.E.S. simply because he was on the same time-scale of pay as a Deputy inspector of Schools of the S. S. E.S. The emphasis placed by my learned brother on the scale of pay and not on the nature of the post is not justified. He seems to have been influenced by the fact that In the list of Assistant Masters prepared by the Education Department the date of appointment in the S.S.E.S. of the respondent is shown as 1-2-1940; this entry appears to be a mistake. In the column of date of substantive appointment in the S.S.E.S. the date given is 22-5-1946; that entry is quite correct.

It seems that because the respondent on account of being confirmed as Supervisor was shown in the S.S.E.S., he was shown as having been appointed in the S.S.E.S. on 1-2-1940, on which date he was appointed as Supervisor. Whatever may be the explanation for the entry, the respondent cannot claim any right on its basis. An entry in a gradation list is no authority at all. With great respect to my learned brother I cannot agree that the respondent must be treated as having become a member of the S.S.E.S. with effect from 1-2-1940 or that the inclusion of the post of Supervisor in the cadre of Assistant Masters could not have the effect of making him a member of the S.S.E.S. only with effect from 22-5-1946. My learned brother is not right in saying that he was already "in that service and certainly in that grade;" he was not in the S.S.E.S.

prior to 22-5-1945 and was not in the grade of Assistant Masters. There is nothing on the record to support his finding that the post of Supervisor was borne on a cadre which was one of the cadres forming the S.S.E.S. As I pointed out earlier, the post of Supervisor was a special isolated post, not borne on any cadre prior to 22-5-1946. By the order of 22-5-1946 the post was for the first time included in a cadre and it is not correct to say that on that date two cadres were amalgamated.

11. My answers to the two questions are as follows: (1) No. (2) The respondent's seniority should be determined neither on the basis of the date of his substantive appointment as Supervisor nor on the basis of the date of his confirmation in that post, but on the basis of the date on which the post was included in the cadre of Assistant Masters of Government Intermediate Colleges, in the Special grade of the Subordinate Educational Service, that date being taken to be the date on which he was confirmed in the cadre.

12. Return the record with these answers to the Bench concerned.

(The matter finally came before a Bench of Gurtu and Upadhyaya, JJ. who accordingly allowed the appeal and dismissed the Writ Petition filed by Shri Sudershan Deo. The parties were ordered to bear their own costs throughout.)