

(2012) 07 AHC CK 0044
In the Allahabad High Court
Case No : Second Appeal No. 1126 of 1982

Union of India

APPELLANT

Vs

Mrs. Shakuntala Ghai and Others

RESPONDENT

Date of Decision : 16-07-2012

Acts Referred:

Citation : (2013) 1 AWC 152 : (2012) 134 FLR 1050

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Advocate : Lalji Sinha and Satya Prakash Misra, for the Appellant; S. Chandra, Bharti Sapru and S.K. Mehrotra, for the Respondent

Final Decision : Allowed

Judgement

Sibghat Ullah Khan, J.—In this appeal arguments of learned Counsel for the appellants were heard and judgment was reserved on 20.12.2011. Thereafter by order dated 23.2.2012 matter was directed to be listed for hearing again in the next cause list. The said order is quoted below:

This appeal was finally heard on 20.12.2011 and judgment was reserved. However, due to inadvertence it was not verified on the said date that at the time of admission of this appeal on 6.9.1982 substantial question of law had not been framed.

Accordingly, it is directed that the appeal will be heard on the substantial questions of law Nos. 1 and 2 stated on page 8 of the memorandum of appeal.

List for hearing again in the next cause list.

Thereafter, on 4.5.2012 the following order was passed.

Case called out. No one appears for the respondents. Heard Shri Satya Prakash Mishra, learned Counsel for the appellant again. Learned Counsel has addressed the Court on substantial questions of law Nos. 1 and 2 stated in the memorandum of appeal. Judgment reserved.

List for delivery of judgment on 15.5.2012.

2. However, due to paucity of time judgment could not be delivered on 15.5.2012.

3. This is defendants' appeal arising out of O.S. No. 478 of 1975 filed by respondent No. 1 against appellant and respondents No. 2 to 4 in this Second Appeal. Plaintiff was a teacher and defendants respondents No. 2 to 4 were also teachers. Plaintiff sought a declaration that she was senior to defendants respondents No. 2 to 4. The suit was dismissed on 16.3.1979 by Munsif, Haveli, Varanasi. Against the said decree plaintiff filed Civil Appeal No. 177 of 1979. The appeal was allowed on 3.12.1981 hence this Second Appeal.

4. Substantial questions of law Nos. 1 and 2 stated on page 8 of the memorandum of appeal are quoted below:

1. Whether the Appellate Court below has correctly interpreted the rules 328 (5) and 328 (4) of Advance Correction Slip No. 70 to Indian Railways Establishment Manual?

2. Whether the appellate Court below can give cognizance of the officiating services for the purpose of assigning the seniority which have since been declared invalid by the Rule 328(2) of Advance Correction Slip No. 70 to Indian Railways Establishment Manual?

5. The case of the plaintiff was that Diesel Locomotive Works (DLW), Varanasi a Railway Establishment runs two schools one a High School and another a Primary School, that some posts for teachers were advertised in the news paper for both the schools and plaintiff applied for both the schools or both the sections of the same school and participated in the selection process of both and was declared selected for both; that plaintiff was appointed on 19.7.1965 in the High School and worked there till 24.8.1965 (36 days). It was further pleaded that w.e.f. 25.8.1965 plaintiff was asked to work in the primary school as at that time there was no vacancy available in the High School and that since 1966 a post became vacant in the High School hence by order of Personnel Officer DLW dated 25.6.1966 plaintiff was asked to work on the permanent post in the High School where she started working w.e.f. 1.7.1966. She claimed her seniority from 19.7.1965. Seniority list was prepared and published on 28.8.1974 in which plaintiff was shown junior to defendants respondents 2 to 4 giving rise to the filing of suit by her. Plaintiff further pleaded that in February 1974 another seniority list had been prepared in which plaintiff had been shown senior to defendant respondents 2 to 4 and that could not be changed subsequently on 28.8.1974.

6. Defendant No. 1 filed written statement and contended that plaintiff was selected for primary school as Assistant Teacher and she was not selected for the High School, however, from 19.7.1965 to 24.8.1965 (36 days) plaintiff was asked to officiate as teacher in the High School as the proper teacher was not available in the High School and after vacancy in June 1966 petitioner was appointed in

the High School section w.e.f. 1.7.1966 and that seniority was determined on the basis of advance correction slip No. 70 which had been declared to be valid by Allahabad High Court.

7. According to the plaintiff's case itself regular vacancy in High School section occurred in June 1966 hence she could not be given seniority w.e.f. 19.7.1965 on the basis that from the said date for 36 days (till 24.8.1965) she had worked on officiating basis in High School. Officiating//Ad hoc services which are not continuous can not be counted for the purposes of seniority. Plaintiff could not show that she was selected for High School in 1965. If the petitioner had continuously worked from 19.7.1965 till 1.7.1966 in the High School on officiating/ad hoc basis then she could raise some argument for taking that period into consideration for determining seniority. However, at the initial stage she worked only for 36 days and thereafter there was break of more than 10 months during which period she worked in the primary section hence she could not claim seniority w.e.f. 19.7.1965 in the High School. The lower Appellate Court also held that on the perusal of the appointment letter which was filed by both the parties it was established that the plaintiff was appointed as Assistant Teacher (in primary school) lower Appellate Court recorded categorical finding that--

appellant has failed in establishing the fact that she was selected for the post of Assistant Teacher in High School Section.

8. The lower Appellate Court placed reliance upon two authorities of the Supreme Court in S.B. Patwardhan and Another Vs. State of Maharashtra and Others, and AIR 1977 251 (SC) holding that officiating service must be taken into consideration for determining seniority.

9. Para 40(C) of N.K. Chauhan v. State of Gujarat is quoted below: "Seniority, normally, is measured by length of continuous, officiating service the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionality tests being satisfied"

10. Similarly in S.B. Patwardhan v. State of Maharashtra it has been held in para 51 that:

All other factors being equal continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority.

11. In view of the said authorities only if plaintiff appellant had worked continuously from 19.7.1965 till her regular appointment in June 1966, the said service could be taken into consideration.

12. In Indian Railway Establishment manual advance correction slip No. 70 supplied by learned Counsel for appellant Rule 328 was modified w.e.f. 4.12.1971. Rule 328(4) and (5) is quoted below:

(4) After staff are assigned positions in the seniority list as on 1.8.1961 or on a

subsequent date on which they had been appointed/transferred to the Diesel Locomotive Works, they shall be considered for promotion to the higher grades. These promotions shall be made annually with reference to the staff in position in the Diesel Locomotive Works as on 31st December, of the previous year, i.e. promotions shall be made in 1962 with reference to the staff in position on 31st December, 1961 as so on. In ordering these promotions, the quota for promotions wherever prescribed with reference to the total number of vacancies shall be filled up by promotions from amongst such staff who were working in Diesel Locomotive Works on the crucial date and who fulfill the prescribed qualifications.

In regard to the Accounts Department, promotions will be made in accordance with the rules prescribed in the India Railway Establishment Manual for that Department.

For purposes of ordering promotions including determination of the number of posts in each grade and their distribution tradewise and Division-wise, the decision of the Diesel Locomotive Works Administration shall be final.

(5) Staff will be required to put in a minimum of length of service in a particular grade before they can be considered eligible for promotion to the next higher grade; in respect of technical and non-ministerial staff including artisans, it shall be two years in each grade and in the case of ministerial staff 5 years in each grade. This requirement is in addition to any other conditions of eligibility that may be prescribed under the rules for such promotion.

13. There is nothing in the said rule which may help the plaintiff in any manner.

14. Accordingly, both the substantial questions of law are decided in favour of the appellant. Second appeal is allowed judgment and decree passed by the lower Appellate Court is set aside. Judgment and decree passed by the Trial Court dismissing the suit is restored. However, it is clarified that whatever benefits have been already reaped by the plaintiff respondent under the judgment and decree passed by the lower Appellate Court shall not be refundable.