

Anil Kumar Khare and Ors Vs State of U.P Thru Secy Madhyamik Shiksha Parishad Lko and Ors

Court: ALLAHABAD HIGH COURT

Date of Decision: July 5, 2017

Acts Referred: [Code of Civil Procedure, 1908](#), [Order 6Rule17](#) -

Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982, Section 33-C(3)(a), Section 33-C(3)(a), Section 33-C(3)(b)

Hon'ble Judges: Amreshwar Pratap Sahi, Vivek Chaudhary

Bench: Single Bench

Advocate: Krishna Madhav Shukla, O.P.M Tripathi, Phool Chandra Verma, Om Prakash Mani Tripathi, K.M. Shukla

Final Decision: Allowed

Judgement

1. The above two appeals and a writ petition relate to the dispute of a common cause namely promotion on the post of Lecturer in Economics in

Hindu Inter College, Rudauli, District-Faizabad, (here in-after referred to as the "Institution). The post is being contested by the two appellants

before us who were appointed as Assistant Teachers in the L.T. grade in the Institution.

2. Before we narrate the background of the facts, it would be appropriate to mention that the parties have been litigating in the matter since 2003.

From this point of view we find it appropriate to dispose of all the three matters finally as in our opinion and in view of the findings recorded here-

in-after it would be now futile to remit the matter for any decision on the issue of seniority before the Educational Authorities. Learned counsel for

the parties have advanced their submissions accordingly.

3. The undisputed facts are that the claim is of promotion on the post of Lecturer in Economics both by Anil Kumar Khare the appellant in Special

Appeal No.277 of 2017 and Sri Jagdish Chandra, who is the respondent therein and the appellant in Special Appeal No.309 of 2016 and the

petitioner in Writ Petition No.1491 (S/S) of 2017. The Institution is an Intermediate College, privately managed but aided by the State

Government and the conditions of employment are governed by the provisions of the U.P. Intermediate Education Act, 1921 and the Regulations

framed thereunder read with the provisions of the U.P. Secondary Education Services Selection Board Act, 1982 and the Rules and Regulations

framed thereunder.

4. Sri Jagdish Chandra claiming himself to be a Scheduled Caste candidate eligible for promotion on the post, sought the aforesaid relief on the

strength of reservation and since the said claim was not being considered, he filed Writ Petition No.5310 (S/S) of 2003 praying for a mandamus

that he may be extended the benefit of promotion as a Lecturer keeping in view the fact that he is of the reserved category. A copy of the writ

petition has been filed with the record of Special Appeal No.277 of 2017.

5. During the pendency of the writ petition, Sri Jagdish Chandra was extended the benefit of reservation and was actually promoted as Lecturer in

Economics in the year 2007. This is an undisputed fact. The promotion was not challenged and Sri Jagdish Chandra continued as Lecturer in

Economics. The writ petition that was still pending, came up for consideration on 06.07.2016. Sri Jagdish Chandra pressed the petition urging that

even though he had been promoted, the same should be given retrospective effect from 2003. A learned Single Judge of this Court after having

noticed the judgments of the Apex Court came to the conclusion that promotion to Sri Jagdish Chandra on the strength of reservation having been

declared invalid, as the statutory provisions in relation thereto has been declared ultra-virus by the Apex Court, refused to extend the benefit as

was being claimed by Sri Jagdish Chandra to give him promotion with retrospective effect since the year 2003 and further held that his very

promotion stands annulled in view of the judgment of the Apex Court.

6. Anil Kumar Khare the contesting party had filed an impleadment application in the said writ petition which was allowed and since there was now

a fresh claim for promotion to be considered, the learned Single Judge disposed of the writ petition on 06.07.2016 with a direction that the claim

of promotion shall be considered by the Competent Authority namely the Joint Director of Education in the light of the judgment of Hon"ble

Supreme Court and shall be done within a stipulated period.

7. It is undisputed that pursuant to the aforesaid directions the matter was decided by the Joint Director on 05.01.2017 wherein it was recorded

that Anil Kumar Khare was senior to Sri Jagdish Chandra as his date of appointment was prior to that of Sri Jagdish Chandra.

8. It will be appropriate to mention at this stage that so far as age is concerned, the date of birth of Sri Jagdish Chandra is 01.07.1961 and that of

Anil Kumar Khare is 05.07.1969. Thus, by age Sri Jagdish Chandra is senior to Anil Kumar Khare.

9. The said decision dated 05.01.2017 by the Joint Director has been challenged by Sri Jagdish Chandra in Writ Petition No.1491 (S/S) of 2017.

10. There is yet another fact in the chronology of events that deserves to be mentioned, namely, both the contesting parties had been appointed on

ad-hoc basis as Assistant Teachers in the L.T. Grade and they came to be substantively appointed in that grade by virtue of the regularization

order dated 01.03.2000. The regularization order categorically mentions the date of appointment of Sri Jagdish Chandra as 23.02.1993 and that

of Anil Kumar Khare as 10.02.1993. This date of initial appointment, according to Sri Jagdish Chandra, has been incorrectly mentioned inasmuch

as his appointment letter categorically mentions the date of appointment as 06.02.1993. According to him, 22.02.1993 is the date of his joining,

not the date of his appointment. The claim of seniority is dependent upon the date of substantive appointment. Promotion is based on seniority

subject to rejection of unfit.

11. A perusal of the records of the Writ Petition No.5310 (S/S) of 2003, nowhere indicates any dispute having been raised by Sri Jagdish

Chandra with regard to the date of appointment as mentioned in the regularization order dated 01.03.2000. The regularization order was part of

the record of the writ petition. The petitioner therein, namely, Sri Jagdish Chandra has nowhere indicated any grievance being raised about the

incorrect date of appointment having been mentioned in the regularization order, which is 22.02.1993. There does not appear to be any challenge

having been raised to such alleged incorrect recital before any authority or even in the writ petition that was filed in the year 2003. Thus, it is clear

that Sri Jagdish Chandra was treated as junior to Anil Kumar Khare as per the aforesaid date of appointment mentioned in the regularization order

dated 01.03.2000. Not only this, according to Anil Kumar Khare, the seniority list which was issued even prior to that regularization order in 1993

and again in 1998 mentioned the date of appointment of Sri Jagdish Chandra as 22.02.1993 and not 06.02.1993. It is also the contention of the

learned counsel for Anil Kumar Khare that no challenge was ever raised to the aforesaid alleged incorrect date of appointment mentioned in the

seniority list maintained in the Institution that has been circulated.

12. It is in this background that the writ petition was disposed of on 06.07.2016 where a recital was made in the judgment that it is not being

disputed by the learned counsel for the petitioner, namely, Sri Jagdish Chandra that Anil Kumar Khare, who is seeking promotion, is senior to him.

13. In the special appeal filed against the judgment dated 06.07.2016 being Special Appeal No.309 of 2016, the aforesaid aspect was raised and

the Division Bench hearing the matter had adjourned the appeal noticing the said fact with an observation in the order dated 08.03.2017 that if the

same was being pleaded as a mistake on the part of the counsel, then the same could not be a matter of challenge in appeal for which the

appellant's counsel sought time to take appropriate steps.

14. Thereafter, a review application was filed in the writ petition itself describing the said statement of the counsel recorded in the judgment dated

06.07.2016 as a mistake and also stating the facts relating to the correct date of appointment namely 06.02.1993.

15. Under the impugned order dated 19.05.2017 on the review application, the learned Single Judge has observed that the course open to Sri

Jagdish Chandra was to challenge the seniority list and unless the seniority is upturned, no further direction can be given for which opportunity was

given to approach the forum namely the Joint Director of Education, who was directed to decide the matter within six weeks of the date of order.

The contention with regard to seniority and its rule as contained in Section 33-C (3) (a) & (b) of U.P. Secondary Education Services Selection

Board Act, 1982 was also noticed. Thus, the issue of seniority in the feeder cadre was allowed to be assailed before the Joint Director of

Education keeping in view the contentions that had been raised by Sri Jagdish Chandra in the writ petition as also in the review application. The

delay in filing of the review application was also condoned by a separate order which has also been assailed in the appeal filed by Anil Kumar

Khare being Special Appeal No.277 of 2017.

16. In the aforesaid background Sri K.M. Shukla counsel for Anil Kumar Khare submits that firstly there was no ground for review available

inasmuch as there was no error apparent on the face of record so as to maintain the review application. He further submits that the observations of

the learned Single Judge that the Division Bench in appeal had issued a direction to entertain the review application is also incorrect inasmuch as

there is no such observation made by the Division Bench in the order dated 08.03.2017. It is next contented that an absolutely new plea relating to

the incorrect date of appointment has been taken which was not even pleaded in the writ petition and, therefore, the same also could not have been

entertained as a ground for review. The review application was also barred by time. Sri Shukla then urges that so far as the issue of seniority is

concerned, the same was not even subject matter of dispute in the original writ petition nor there was any relief claimed to that effect, and

therefore, the learned Single Judge travelled beyond the scope of writ petition to extend a benefit to the contesting party of allowing him to reopen

the issue of seniority which was not permissible in law through an order on a review application. As a collateral argument to the said issue of

seniority, he further submits that seniority which stood long since 1993 could not have been allowed to be reopened, for which, reliance has been

placed on the Full Bench judgment in the case of Smt. S.K. Chaudhari v. Manager, Committee of Management, Vidyawati Darbari Girls Inter

College, Lookerganj, Allahabad & others reported in (1991) 1 UPLBEC 250. The said ratio is sought to be supported on the strength of the

Apex Court decision in the case of Shiba Shankar Mahapatra and others v. State of Orissa and others reported in (2010) 12 SCC 471.

17. On the issue of the review application being not maintainable, learned counsel has cited the decision in the case of Chandra Bhushan Pandey v.

Sri Narain Singh, Minister of Horticulture Department, Lucknow and others reported in (2012) 1 UPLBEC 130 and that of Prabhakar Shukla and

another v. State of U.P. & others reported in (2017) 1 UPLBEC 512.

18. Summarizing his submissions Sri Shukla submits that Special Appeal No.277 of 2017 be allowed and the judgment and order under appeal be

set aside. He further submits that the Special Appeal No.309 of 2016 as well as the writ petition filed by the contesting party being Writ Petition

No.1491 (S/S) of 2017 be also dismissed.

19. Replying to the aforesaid submissions of the learned counsel Sri O.P.M. Tripathi for Sri Jagdish Chandra submits that the seniority of Assistant

Teachers which is stated to be allegedly maintained is on the strength of a non-existing, incorrect fact namely the date of appointment of Sri Jagdish

Chandra having been wrongly recorded as 22.02.1993, which ought to be 06.02.1993. He submits that the letter of appointment on the post of

Assistant Teacher dated 06.02.1993 has nowhere been disputed and consequently any document maintained on the strength of an erroneous fact

should be ignored and any seniority claimed on the strength of such incorrect date should also be rejected.

20. Sri Tripathi then contends that if the rules referred to hereinabove are construed in correct perspective, then in that event seniority has to be

counted from the date of substantive appointment which can be the date of regularization i.e. 01.03.2000 and if that is so, then both the parties

having been regularized on the post of Assistant Teachers in the L.T. grade by the same order, Sri Jagdish Chandra being senior in age, he is

admittedly senior. This seniority cannot be ignored and any list maintained contrary to the said status of the date of birth of the parties is clearly

against the provisions aforesaid. He therefore, contends even otherwise Sri Jagdish Chandra is entitled to be treated as senior and extended the

benefit of promotion on the post in question.

21. He then contends that so far as the issue of questioning seniority is concerned, the said situation had not arisen inasmuch as Sri Jagdish

Chandra had filed Writ Petition No.5310 (S/S) of 2003 on the strength of promotion by way of reservation as per the law applicable at that point

of time. Consequently, the issue of seniority was absolutely meaningless and even otherwise the same was irrelevant for the promotion of Sri

Jagdish Chandra who was entitled to be promoted on the strength of the reservation rule prevalent at that time. It is for this reason that the seniority

matter was not required to be questioned at all as Sri Jagdish Chandra was entitled to the said benefit without even touching the issue of seniority.

It is only after the judgment of the learned Single Judge dated 06.07.2016 that the issue of seniority has arisen and, therefore, this issue can now be

raised at this stage as well. He, therefore, submits that the Full Bench decision as relied upon by the learned counsel for the other side would not be

a legal impediment keeping in view the aforesaid background and facts of the case.

22. Sri Tripathi also submits that so far as Anil Kumar Khare is concerned, he never contested the issue relating to the promotion of Sri Jagdish

Chandra and it was only by way of impleadment that he for the first time intervened himself in the dispute that came to be decided on 06.07.2016.

In substance, the contention is that it is after only the judgment of the Apex Court that was noticed by the learned Single Judge that this legal

position took another turn whereby the benefits that had accrued to Sri Jagdish Chandra were sought to be withdrawn, namely promotion on the

strength of reservation.

23. Thus, the issue of seniority thereafter became relevant and, as such, can now be raised and accordingly the learned Single Judge was justified

in passing the order on the review application filed by the applicant. He further submits that while passing orders on 08.03.2017 the Division Bench

has not created any impediment and had rather observed that it will be open for the appellant to take appropriate steps and the only remedy

available was to seek a review on the ground that a mistaken statement had been given by the counsel, which according to him, can be a ground of

review before the learned Single Judge. He also submits that in the background of the correct position of facts which have been indicated above,

the same also amounted to an error which deserves to be corrected as the judgment of the learned Single Judge had not proceeded on the basis of

correct facts.

24. We have considered the aforesaid submissions raised. The undisputed position is that Sri Jagdish Chandra is admittedly elder in age to Anil

Kumar Khare. If the rule of substantive appointment is applied, in that event, Sri Jagdish Chandra would stand to gain he being senior in age.

25. However, what appears in this case is that the date of appointment of Sri Jagdish Chandra as Assistant Teacher continued to be maintained as

22.02.1993 which also stood entered in the regularization order as well as also in the seniority lists that were circulated even prior to regularization.

Sri Tripathi is correct in his submission that the date of appointment is 06.02.1993 and none of the parties have been able to refute the same, but

the fact remains that the date of joining of Sri Jagdish Chandra which is 22.02.1993 was taken to be and was entered as the date of appointment

throughout. It is on the strength of that date that seniority came to be maintained and Sri Jagdish Chandra did not claim any benefit of seniority in

relation to his promotion which was claimed only the strength of reservation. This fact is clearly evident from the narration of the facts in the Writ

Petition No.5310 (S/S) of 2003. Accordingly, so far as the issue of incorrect date of appointment is concerned, the same was never raised by Sri

Jagdish Chandra at any stage of the proceedings including the writ petition filed by him in the year 2003. Seniority was also never questioned. The

same is now sought to be raised in the present set of proceedings.

26. What we find is that the issue of seniority has a direct bearing on the rules as applicable, namely, Section 33-C (3) (a) & (b) of U.P.

Secondary Education Services Selection Board Act, 1982 which refer to the date and order of appointment. Had Sri Jagdish Chandra raised this

dispute at the appropriate moment, including the dispute of correct date of appointment, in that event it is quite possible that Sri Jagdish Chandra

could have succeeded in his claim relating to his position in seniority on the strength of such facts, but the fact remains that he did not choose to do

so from the year 1993 till the year 2003 and even thereafter in the writ petition that came to be decided on 06.07.2016. Consequently, the recital

in the order of the Joint Director of Education dated 05.01.2017 about the factum of Anil Kumar Khare being senior to Sri Jagdish Chandra

remained un rebutted and has now been challenged for the first time in Writ Petition No.1491 (S/S) of 2017 and raised in Special Appeal No.309

of 2017.

27. It is clear that the issue of laches as urged by Sri K.M. Shukla counsel for Anil Kumar Khare has to be considered in the light of Full Bench

judgment in the case of Smt. S.K. Chaudhari (supra). A perusal of the said judgment and ratio thereof would leave no doubt that a long standing

seniority if remains unquestioned for a very long time it cannot be opened at the stage of a future claim after a lapse of seventeen years. In the

instant case also the seniority as Assistant Teacher in the L.T. grade that was being maintained since 1993 onwards was never subjected to any

challenge or appeal before any authority by Sri Jagdish Chandra as is evident from the facts that have been brought on record. In such

circumstances, this issue remained unquestioned as late as 2016. Consequently, the matter not having been assailed for the past twenty three years,

we find ourselves unable to cross the hurdle of the ratio of the Full Bench decision in order to extend any benefit to Sri Jagdish Chandra on the

strength of the facts that have emerged in the present set of circumstances. The issue of seniority, in our opinion, now cannot be permitted to be

reopened at this stage once maintained for the last 23 years as indicated above.

28. Having said so, we find that the learned Single Judge in the original judgment 06.07.2016 as well as in the review order dated 19.05.2017 has

arrived at a conclusion that unless the seniority list is challenged by Sri Jagdish Chandra the question of any claim of any promotion cannot be gone

into. However, while doing so the learned Single Judge has observed that in case any such plea is raised before the Competent Authority, then the

same shall not be dismissed on the ground of limitation or delay.

29. Considering the peculiar facts of the present case, we cannot agree with the said observations inasmuch as the Full Bench decision clearly seals

the fate of Sri Jagdish Chandra and the arguments advanced by Sri Tripathi do not in anyway convince us to take a different view on the said issue

of laches. The learned Single Judge was not justified in making an observation that the Authorities concerned shall be at liberty to take a decision

bereft of either the issue of delay or laches or limitation in the position. A long standing seniority could not have been permitted to be reopened on

the facts of the present case.

30. The issue of review as urged before us does not make out a case to hold that the review application could not have been entertained. A

mistake of counsel has also been acknowledged to be a ground for review on principles as enshrined under Order 6, Rule 17 C.P.C. read with

High Court Rules. Reference may be had to the judgment in the case of Mst. Jamna Kuer v. Lal Bahadur reported in AIR 1950 Federal Court

131. However, on the facts of the present case, the statement made by the counsel before the learned Single Judge on the basis whereof the

judgment was delivered on 06.07.2016, was a statement as per the facts existing. The erroneous fact of the date of appointment had not been

canvassed before the learned Single Judge as has been now placed and demonstrated before this Court. This is not an error apparent on the face

of record in the judgment dated 06.07.2016 but it can be termed as an error in the service record of the appellant. It is the correction of that error

which was being sought. The Apex Court in the case of Cholan Roadways Limited v. G. Thirugnanasambandam reported in (2005) 3 SCC 241

has held that under Article 226 of the Constitution an error on fact can also be corrected by the High Court though in limited circumstances. We

are not inclined to correct that error at this stage being raised after a lapse of 23 years. It is on account for such laches that correction is not

permissible which obviously has a bearing on the issue of long standing seniority as indicated above. Consequently, the direction of the learned

Single Judge to review the seniority after a lapse of 23 years cannot be upheld.

31. We, therefore, set aside the impugned judgment dated 19.05.2017 passed on the Review Application No.33839 of 2017 with regard to the

reopening of the issue of seniority and allow Special Appeal No.277 of 2017. Special Appeal No.309 of 2016 is dismissed.

32. Consequently for all the reasons aforesaid, the appeals stand disposed of and the writ petition filed questioning the order of Joint Director of

Education dated 05.01.2017 also fails and is hereby dismissed.

33. It shall be open for the Joint Director of Education to pass appropriate orders in accordance with law keeping in view the observations made

hereinabove.

34. All the three matters stand disposed off accordingly.

Appeals Disposed off.