

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment : 18.10.2010*

+ **R.S.A.No.78/2001 & C.M.Appl.199/2001**

S.L.DUTTA & ANR. Appellants

Through: None.

Versus

SURESH SRIVASTAVA Respondent

Through: Mr.Sanjeev Ralli & Mr.Sandeep
Anand, Advocates

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.(Oral)

1. None has appeared for the appellant. Matter is on board.
2. On the last date i.e. on 4.10.2010 counsel for the appellant had sought time to address arguments.
3. This second appeal has impugned the judgment and decree dated 19.03.2001 which had endorsed the findings of the trial judge dated 12.1.2000 whereby the suit of the plaintiff Ms.Suresh Srivastava had been decreed in her favour.
4. The factual matrix of the case is as follows:

The plaintiff Suresh Srivastava had filed a suit for declaration and mandatory injunction against the defendant where he had been employed as an Upper Divisional Clerk (UDC) with effect from 2.7.1967. The said school was receiving grant-in-aid from the Delhi Administration. The terms and conditions of the service of the plaintiff were regulated by the then Education Code, 1965 and

thereafter under the Delhi School Education Act, 1973 and the Rules framed there under. Plaintiff had rendered five years of satisfactory service in her capacity as a UDC. She had academically qualified and fulfilled the requirements for promotion to the post of Head Clerk. A representation was accordingly made to the Director of Education; plaintiff was found to be qualified and communication to this effect was sent to the school. The school management however failed to adhere to this decision of the Education Officer. In spite of repeated representations her promotion to the post of Head Clerk was denied. Suit was accordingly filed.

5. The trial judge had framed three issues. They inter alia read as follows:

1. Whether the plaintiff is entitled to the equitable relief of declaration, mandatory injunction and consequential relief as prayed for? OPP
2. Whether the suit of the plaintiff is barred by the principle of resjudicata in view of the similar facts having been agitated in appeal no.3/1982 decided on 16.4.1987 by the Education Tribunal, Delhi Admn., Delhi? OPD
3. Relief.

6. The trial judge had returned a finding in favour of the plaintiff. Suit of the plaintiff was decreed.

7. On 19.3.2001, vide the impugned judgment appeal was dismissed.

8. This is a second appeal. It was admitted on 12.8.2004. Matter is on board. Perusal of the record shows that the substantial question of law has yet to be formulated. None has appeared for the appellant. In the body of the appeal, the following substantial questions of law find mention. They inter alia read as follows:

- (a) Whether after the respondent had approached the Delhi Education Tribunal, as is provided under Section 8, 11 & 25 and other provisions of the Delhi School Education Act, 1973 and the

rules made there under, which are applicable to the employee of a school, the jurisdiction of the civil court is barred?

(b) Whether the suit of the respondent is barred on the principles of res judicata in view of the similar facts having been agitated by her in Appeal No.3/1982 decided on 16.4.1987 by the Delhi Education Tribunal, Delhi Admn., Delhi, as per provisions of Section 25 of the Delhi School Education Act, 1973 and the rules made there under?

(c) Whether a suit in which relief has sought against the individual i.e. now Ex-Principal or Ex-Manager without impleading management committee of the School as party in the suit is maintainable?

(d) Whether the trial court and 1st appellate were legally correct in decreeing the suit of the Respondent especially in the circumstances, when the suit filed by the respondent was hopelessly barred by time, as the relief claimed by the respondent herein in the suit was in relation to non-grant of alleged promotion w.e.f. 14.5.74 and alleged arrears from the said date, when the suit for the said suit was filed in the year 1984?

9. These questions have been answered by the trial judge.

10. On the question of res judicata while disposing of Issue No.2

it had been held as follows:

ISSUE NO.2

Whether the suit of the plaintiff is barred by the principle of resjudicata in view of the similar facts having been agitated in appeal no.3/1982 decided on 16.4.87 by the Education Tribunal, Delhi Admn., Delhi? OPD

Vide order dated 27.10.1984 the then Id. predecessor of this Court Sh.C.K.Chaturvedi Id. Sub Judge held that the present suit did not require any stay of the proceedings in view of the appeal no.3/1982 having been filed by the plaintiff before the Delhi School Education Tribunal. The said order dated 27.10.1984 clearly holds that the pendency of the said appeal will not operate as a bar to the present suit as the matter in dispute over here was of a civil nature and the Tribunal though a court for the purposes of Section 10 CPC but the matter pending before it was not the same as in the present suit. In these circumstances I thus do not wish to enter into any further discussion as the said order dated 27.10.1984 clearly clinches the issue in favour of the plaintiff and against the defendants. Accordingly the order dated 16.4.1987 passed by Delhi School Education Tribunal in the aforesaid appeal shall not operate as a res judicata to the trial of the present suit.

The aforesaid issue is accordingly decided in favour of the plaintiff and against the defendant.

11. The other questions have been dealt with while disposing of

Issue no.1. Relevant extract of which reads as follows:

“It is the admitted case of the parties that the disciplinary proceedings against the plaintiff was constituted only subsequent to the letter dated 26.9.1975 of the then Education Officer, namely, Smt. C. Grover and that the disciplinary proceedings commenced only in the year 1976. It is also the admitted case of the parties that the claim of plaintiff for promotion to the post of Head Clerk-cum- Assistant in the defendant school had become due in the year 1974 and more specifically on the basis of letter dated 14.5.1974 of the then

Education Officer, namely Shri V.P.Singh. It is also not the case of the defendant that any disciplinary proceedings were conducted against the plaintiff either prior to 1974 or even during 1974. The defendant school though submitted that the previous service record of the plaintiff, i.e. for the years prior to 1974 was not satisfactory in as much as the Annual Confidential Reports carried adverse entries but it failed to place on record even a single C.R. of any of the year prior to 1974. Whatever is ascertainable about the said C.Rs is only from the letter dated 14.5.1974 of Shri V.P. Singh the then Education Officer. However, the said letter, the authenticity of which has not been disputed by the defendants is self explanatory in nature. The Education Officer clearly held that as the adverse entries in the impugned C.Rs were not counter-signed by the Reviewing Officer as required under the rules so the said reports cannot be considered as adverse reports against the individual concerned under the eyes of law. He also stated about his having considered the extension of the probationary period of the plaintiff by one year before finding the plaintiff to be fit and eligible for promotion to the post of Head Clerk-cum-Assistant.

It is not the case of the defendants that even subsequently the said C.Rs were got counter-signed from the Reviewing Officer or as to what were the final remarks of the Reviewing Officer. Moreover, as per Rule 112 (14) of the Delhi School Education Rules 1973 the C.R of the employees working in a school except in the case of the head of the school shall be recorded by the head of the school under whom the employee is working and every such C.R. shall be reviewed by the Managing Committee. Sub Rule 6 further provides that every adverse entry in the C.R shall be communicated to the employee concerned by the Chairman of the Managing Committee and as per Sub Rule 7, the employee aggrieved from any adverse entry in his C.R. may within 30 days of the communication to him prefer an appeal against such entry to the Director. The Director may after giving an opportunity to the concerned employee and the Managing Committee makes such alteration in the entries in the C.R as he may think fit. Sub Rule 8 further provides that the C.R in respect of an employee except that of the head of the school shall be kept in the safe custody of the head of the school.

Thus from a bare reading of Rule 112 of the Delhi School Education Rules, 1973, it is clear that the Managing Committee was also an under obligation to communicate to the defendant the adverse entries having been made in her Annual C.R. The defendants have thus not only failed in placing on record the impugned C.Rs of the plaintiff, nor any record of communication of the adverse entries to the plaintiff having been made has been produced. Under these circumstances when it was the defendants only who could have produced the impugned C.Rs of the plaintiff, this court is left with no other option but to draw an adverse inference against the School Management U/S 114 of the Indian Evidence Act, 1872 that the said C.Rs of the plaintiff if produced would have gone against the case of the defendant.

Moreover, I may also state that the initiation of any disciplinary proceedings against the plaintiff in the year 1976 or the process having been started in the year 1975 could not have any bearing on the promotion of the plaintiff to the post of Head Clerk-cum-Assistant which had become due in the year 1974 itself. In the case law cited above, i.e. AIR 1991 SC 2011 (Supra) the Hon'ble Supreme Court clearly held that the promotion of an employee can not be withheld merely because some disciplinary/criminal proceedings are pending against the

employee. The employee was also found to be entitled to the grant of retrospective promotion and for fixation of his pay and for grant of arrears of his salary. Moreover in the other case cited by ld.counsel for the plaintiff, i.e. SLR 1994 (5) 34 P & H (Supra) the petitioner was held to be entitled to the arrears of pay and other consequential benefits from the due date of promotion notwithstanding the fact that he did not actually work on the promoted post. In another case Bir Singh and other v/s State of Haryana & Others SLR 1994(4) 424 (DB). In similar circumstances it was held that the petitioner was entitled to refixation and arrears of pay and that he should normally be deemed to have held and worked on higher post.

In view of my aforesaid discussion, it is thus clear that the plaintiff was found to be fit and eligible for promotion to the post of Head Clerk-cum-Assistant by the then Education Officer who was acting on behalf of the Director of Education i.e. the appropriate authority under the Delhi School Education Act, 1973. No doubt, the final decision was to be that of the Managing Committee of the school but the said decision could not have been taken on arbitrary or illegal grounds. It was not a matter of discretion to be exercised by the Managing Committee on the basis of their whims and fancies but on well-settled principles of law as described under the Delhi School Education Act 1973 and in consonance with the administrative directions of the office of Director of Education. The non-production of the impugned C.Rs of the plaintiff during the trial of the suit by the defendant has given a further severe blow to the case of the defendants. No presumption on the basis of conjectures and surmises can be drawn as regards the unsatisfactory service record of plaintiff. The plaintiff is thus found to have become entitled for promotion to the post of Head Clerk-cum-Assistant on 14.5.1974 upon having fulfilled the mandatory conditions as required vide letter dated 18.6.1973 of the Director of Education. Plaintiff is thus held to be entitled for promotion to the post of Head Clerk-cum-Assistant in the pay scale of Rs.425-700 w.e.f. 14.5.1974."

12. These findings were endorsed in the impugned judgment.

Section 8 is contained in Chapter IV of the Delhi School Education Act, 1973 and deals with "Terms and Conditions of Service of Employees of Recognized Private Schools". Section 8 (3) specifically postulates that any employee of a recognized private school who is dismissed, removed or reduced in rank may appeal against such order to the Tribunal. It does not deal with the issue of promotion which was the contention raised by the plaintiff. The question of limitation was also never raised before the two courts below and this is evident from the issues which had been framed before the trial court and the arguments addressed before the first appellate court. It is even otherwise a mixed question of law and

fact and cannot be raised at the second appeal stage. This court is not a third fact finding court.

13. No question of law much less any substantial question of law has arisen in this appeal. Appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

OCTOBER 18, 2010

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