2023 INSC 690

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4951 of 2023

Asma Shaw **.....Appellant**

Versus

The Islamia College of Science & Commerce Srinagar Kashmir & Ors. **.....Respondents**

J U D G M E N T

Abhay S. Oka, J.

FACTS

1. On the basis of an advertisement published by the 6th respondent – the University of Kashmir, the appellant applied for the post of Lecturer in the Academic Staff College of the 6th respondent. The 6th respondent appointed the appellant to the said post on tenure basis from 08th September 2001. The 1st respondent-College which is a college fully aided by the State Government published an advertisement inviting applications for various posts including the post of Lecturer in English. The appellant applied as an in-

service candidate and her application was forwarded by the Academic Staff College of the 6th respondent to the 1st respondent. Accordingly, the appellant was appointed as a Lecturer in English on a regular temporary basis with the 1st respondent college w.e.f. 16th June 2005. The appellant was initially appointed by the 6th respondent in the pay scale of Rs.8000-275-13500. The 1st respondent appointed the appellant in the same pay scale. However, her pay admissible on the date of her appointment with the 1st respondent was not protected. Therefore, the appellant made a representation to the 1st respondent to grant pay protection. On 02nd January 2012, the College Executive Committee of the 1st respondent took a decision not to grant pay protection to the appellant on the ground that the appellant was holding a tenure post of a limited duration with the Academic Staff College of the 6th respondent. The case of the appellant was again considered by the College Executive Committee of the first respondent on 28th October 2014 and the same decision was taken which was communicated to the appellant by a letter dated 26th November 2014.

2. Being aggrieved by the said decision, the appellant preferred a writ petition in the High Court of Jammu & Kashmir. By judgment dated 24th September 2018, learned Single Judge allowed the petition and

directed the 1st respondent to grant benefit of pay protection to the appellant and to pay the consequential arrears. By the impugned judgment dated 25th February 2022, a Division Bench of the High Court interfered and dismissed the writ petition filed by the appellant.

SUBMISSIONS

3. The learned counsel appearing for the appellant submitted that the appointment of the appellant was not on a tenure post but it was on a regular post. The initial appointment of the appellant was on a tenure basis and as per the Guidelines for Academic Staff Colleges issued by the University Grants Commission, after assessment of the performance of the appellant, the tenure of the appellant was extendable up to the age of 62 years. Learned counsel pointed out that as provided in the advertisement published by the 6th respondent, the appellant was granted the benefit of Government Provident Fund-cum-Pension-cum-Gratuity. He submitted that in terms of Article 77-D of the Jammu & Kashmir Civil Service Regulations (for short, 'the Regulations') the appellant was entitled to the benefit of pay protection as she was not covered by an exception carved out in the form of third proviso to Article 77-D. He would, therefore, submit that the Division Bench has committed an error by holding that

the post to which the appellant was appointed by the 6th respondent was a temporary or ad-hoc post.

4. Learned counsel appearing for the 1st respondent while supporting the view taken by the Division Bench urged that the appointment of the appellant was not on a permanent basis but was for a fixed tenure. Therefore, the third proviso to Article 77-D was applicable. He submitted that in any event, Article 77-D was not applicable to the appellant as she was no longer in the employment of the 6th respondent-University. He urged that the appointment made by the 1st respondent of the appellant to the post of Lecturer was a fresh appointment and, therefore, there was no question of fixing her pay by protecting the pay which she was lastly drawing while working with the 6th respondent. His submission is that the view taken by the Division Bench was the correct view.

OUR VIEW

5. We have carefully considered the submissions and perused the pleadings and the documents on record. Though the learned counsel appearing for the 1st respondent tried to submit that the Regulations were not applicable to the appellant, such a stand was not taken either in the counter affidavit filed before the High Court or in the counter affidavit filed before this Court. In fact, in the counter affidavit filed by the

Principal of the 1st respondent, a specific stand has been taken that the appellant is disentitled to any pay protection as she does not meet the requirements of Article 77-D of the Regulations. In clause (a) of paragraph 6 of the counter affidavit filed by the 2nd respondent, it is stated thus :

> "6. … … …
>
> (a) **The Petitioner herein is not entitled to any pay protection inasmuch as her case does not meet the requirements of Article 77-D of the Jammu and Kashmir Civil Service Regulations, 1956, as is applicable to the employees of the College, of holding a post on substantive capacity.** The Petitioner was admittedly working on tenure basis in the University of Kashmir for a limited period. A bare reading of the order dated 08.09.2001 appointing the Petitioner as Lecturer in the University makes it clear that the said appointment was on tenure basis. The said post being on tenure basis cannot be termed 'a post on substantive capacity'. As such, her previous service in the University cannot be counted towards her seniority and other service benefits."
>
> (emphasis added)

Thus, the stand of the 1st and 2nd respondents was that the staff of the 1st respondent was governed by Article 77-D. But, the case of the appellant falls in the

exception carved out by the third proviso to Article 77-D. Thus, it was never in dispute that the said Regulations were applicable to the appellant while serving with the Academic Staff College of the 6th respondent and continued to apply even after she took up employment with the 1st respondent.

6. Article 77-D deals with the fixation of pay in cases of direct recruits. Article 77-D starts with a *non obstante* clause which provides that notwithstanding anything contained in the Regulations, the provisions of Article 77-D shall govern the pay of a government servant who is appointed to another service/cadre or department on direct recruitment basis. It provides that such a person shall draw pay at the minimum of the time scale. However, under the 1st proviso, it is laid down that where a government servant was immediately before such appointment holding a post in substantive capacity and was drawing pay equal to or more than the time scale of the service, his pay at the time of subsequent appointment to the new post shall be regularized. In short, in such a case, the pay drawn by the government servant at the time of his appointment to another service remains protected. The third proviso is the exception to the rule contained in the main part of Article 77-D. The 1st and 2nd respondents are relying upon the said proviso. It reads

thus :

> "Provided also that the benefit of this rule shall not be available to a person who at the time of his appointment to the new service/post was holding a post on adhoc basis or was working against a leave/suspension or any other short term vacancy."

Thus, the only question for consideration is whether the appellant was holding a post in Academic Staff College on ad-hoc basis or was working against a leave/suspension or any other short-term vacancy. For the reasons which we have set out hereafter, the said question will have to be answered in favour of the appellant.

7. We have perused the advertisement published by the 6th respondent for inviting applications to various posts (total 42). The post at serial no.2 is of Lecturer in the Academic Staff College for which the appellant had applied. There are three columns in the portion of the said advertisement which describes the posts. The 1st column is of Department/Institute; the 2nd column contains the description of the posts and the 3rd column contains the number of posts. As against some of the posts, it is specifically mentioned that either the post was temporary or was a 'plan post'. Against some of the posts, it is mentioned that the same was temporary but was likely to become permanent. What is

important is that against the post held by the appellant, there is no remark that either it was a temporary post or a plan post. What is written in the bracket against the said post is "tenure basis". Thus, the post was not ad hoc or temporary or plan post. The post was permanent on which appointment was to be made on tenure basis.

8. Clause III of the advertisement provides that the substantive posts shall carry G.P. Fund-cum-Pension-cum-Gratuity or C.P. Fund benefits at the option of the appointee. The appellant was granted the benefit of G.P. Fund which is another indication that her post was substantive.

9. There is a difference between a tenure post and an appointment made on a regular post on a tenure basis. The advertisement mentions that the post is not a tenure post but the appointment to that post will be made on a tenure basis. The reason for this is the Guidelines for Academic Staff Colleges framed by the University Grants Commission. The Guidelines provided that the appointment to the post of director, reader and lecturer will be on a tenure basis for a period of five years. There is a provision for continuation of appointment on these posts on assessment of the incumbent concerned by a committee having the same constitution as for their appointment,

subject to the condition that the incumbent on these posts will retire at the age of 62 years or as per prevailing norms of the university. Accordingly, in the order of appointment issued by the 6th respondent, it is specifically mentioned that the appellant was appointed as a Lecturer in the Academic Staff College in the pay scale of Rs.8000-275-13500 on tenure basis. In fact, the qualifications for the post of reader/lecturer in Academic Staff Colleges clearly lay down that the appointment to the post of director, reader and lecturer will be on tenure basis for a period of five years with a provision for continuation on these posts on assessment of the incumbent concerned subject to the condition that incumbent will retire after completing the age of 62 years.

10. Therefore, the appointment of the appellant with the Academic Staff College of the 6th respondent was not against a short-term vacancy. The appellant was not holding the post of Lecturer in Academic Staff College on ad-hoc basis and was not working against leave/suspension vacancy. Therefore, the exception carved out by the third proviso to Article 77-D will not apply as the appointment of the appellant was on a substantive post on a tenure basis with a provision to continue the same till the age of 62 years.

11. The advertisement published by the 1st respondent on 11th June 2004 specifically permitted in-service candidates to apply by sending their applications through the respective appointing authorities. Accordingly, by a letter dated 22nd June 2004, the Assistant Registrar of the 6th respondent-University forwarded the application of the appellant to the 2nd respondent. It is specifically stated in the said letter that the appellant was working on a tenure basis. Accordingly, by the order dated 16th June 2005, the appellant was appointed on the establishment of the 1st respondent on probation for a period of two years. Thus, this is a case of a government servant taking employment in another service or cadre.

12. At this stage, it may be noted that as provided in the Constitution of the 1st respondent College, the same is completely financed by J&K Government for both plan and non-plan accounts. In the Introductory Note to the Constitution, it is mentioned that the 1st respondent was established at the instance of the then Prime Minister of Jammu & Kashmir. Moreover, the Constitution provides that the Governing Body shall carry out the business and affairs of the College of which 70% must be members nominated by the State Government. In fact, it is provided that the Hon'ble Chief Minister of Jammu & Kashmir will be the

Chairman of the Body. That is how the Government has all pervasive control over the 1st respondent. That is the reason why while filing the pleadings, the 1st and 2nd respondents have proceeded on the footing that Article 77-D was applicable to those government servants who were appointed to a post in 1st respondent-College.

13. The entire approach of the Division Bench was erroneous when it came to the conclusion that the appellant was not appointed on a substantive basis and, therefore, she does not satisfy the criteria laid down by Article 77-D. The Division Bench has completely ignored that the only exception carved out to Article 77-D was in respect of a government servant holding a post on ad-hoc basis or working against leave/suspension or any other short-term vacancy. Hence, the case of the appellant was not covered by the said exception carved out to the third proviso by Article 77-D.

14. Therefore, the impugned decision of the Division Bench cannot be sustained and the decision of the learned Single Judge which directs that pay protection should be given to the appellant, needs to be restored.

15. Accordingly, by setting aside the impugned judgment and order dated 25th February 2022 passed in LPASW No.184 of 2018 we restore the judgment dated

24th September 2018 rendered by the learned Single Judge of the Jammu & Kashmir and Ladakh High Court in Writ Petition (SWP No.1735 of 2015). We direct the 1st and 2nd respondents to pass a formal order giving the benefit of pay protection to the appellant. The order shall be passed within a period of one month from today. Within a period of three months from today, arrears payable to the appellant on account of fixation of pay as aforesaid shall be paid to her.

16. The appeal is accordingly allowed with no order as to costs.

.....J.
[ABHAY S. OKA]

.....J.
[PRASHANT KUMAR MISHRA]

New Delhi
Dated : August 08, 2023.