

(2020) 03 J&K CK 0051

In the Jammu And Kashmir High Court

Case No : SWP No. 1665 Of 2017, IA No. 1 Of 2017, Civil Miscellaneous No. 2594 Of 2019

Soneeta Kumari Lidoo

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 19-03-2020

Acts Referred:

Citation : (2020) 03 J&K CK 0051

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Parimoksh Seth, Aseem Sawhney

Final Decision : Disposed Off

Judgement

Sanjeev Kumar, J

1. Jammu and Kashmir Service Selection Board vide its Notification No.02 of 1986 dated 21.06.1986, invited applications for the posts of Teachers in District Cadre Kupwara. The petitioner along with other eligible candidates participated in the selection process. The petitioner did not find her name amongst the selected candidates. The petitioner joined by 31 others unsuccessful candidates filed SWP No. 718/1988 titled Rajinder Kumar and others v. State and others. The petition was ultimately pressed only by the petitioner and two other candidates, namely, Rajinder Kumar and Girja Kumari. In the aforesaid writ petition, a challenge was thrown to the selection of private respondents 7 to 20 therein on various grounds. The writ petition was allowed by a bench of this Court vide its judgment dated 10.03.1999. The petitioner along with aforementioned two petitioners were held entitled to the appointment as teachers in District Cadre Kupwara subject to verification of the fact that at the relevant point of time viz. the date of submission of the application forms for the post, the petitioners were possessing the qualification of graduation. The Court also made it clear that their appointments shall take effect prospectively. The Jammu and Kashmir Service Selection Board did not accept the judgment of the learned Single Bench and

assailed the same before the Division Bench of this Court in LPASW No. 38/2002. Appeal as against the petitioner herein and one Rajinder Kumar was dismissed by the Division Bench vide its judgment dated 11.10.2004. After the dismissal of the LPA, the Jammu and Kashmir Service Selection Board vide its communication dated 14.12.2004 recommended the candidature of the petitioner and one Rajinder Kumar for the post of teachers, district cadre Kupwara. The recommendations were acted upon by the respondent No.2, who vide his Order No.215-DSEK of 2005 dated 08.02.2005 issued the appointment order of the petitioner as Teacher. The petitioner accepted the appointment, but, once again knocked the doors of this Court by the medium of SWP No. 1795/2008. Rajinder Kumar too joined the petitioner. The petitioner claimed retrospective benefit of her appointment on the analogy of and on the strength of judgment passed by the Division Bench of this Court in LPA(SW) No. 44/1998 titled Dolly Kumari v. State of J&K and others. A bench of this Court disposed of the writ petition vide its order dated 26.08.2013 with a direction to the respondents to accord consideration to the case of the petitioner in the light of the averments made in the writ petition, the documents attached thereto, rules governing the field and the aforementioned judgment provided he was similarly situated as the petitioner(s)/appellant(s) in the said petition/appeal. In compliance to the judgment dated 26.08.2013, the matter was considered by the respondent No.2 and drawing similarity with the case of Dolly Kumari accorded sanction to the grant of retrospective effect notionally without any monetary benefits w.e.f. 02.04.1988 to the petitioner. This was done by the respondent No.2 vide his order No.103-DSEK of 2016 dated 08.10.2016.

2. The petitioner, thus, got the benefit of promotion from retrospective date though notionally, which was even beyond the relief granted by this Court in her writ petition, i.e., SWP No.718/1988 decided on 10.03.1999. The petitioner ought to have rejoiced the benevolence of the respondent No.2, but, as the greed would have it, she once again approached this Court and this time seeking the effects of the order dated 08.10.2016 by way of re-fixation of her salary and payment of arrears etc. It is in the backdrop of the aforementioned facts, the petitioner has filed the instant petition seeking inter alia a direction to the respondents to grant her monetary benefits, which would accrue to her on account of her appointment retrospectively w.e.f. 02.04.1988. The sum and substance of the argument urged by the petitioner in support of her claim is that once the respondent No.2 in compliance to the judgment passed in SWP No. 1795/2008 granted the retrospective effect to her appointment w.e.f. 02.04.1988, the effects of such retrospective promotion, which would automatically accrue, cannot be denied. The petitioner is entitled to re-fixation of her salary by taking her to be appointed, though notionally, w.e.f. 02.04.1988. It is claimed that the petitioner would not only be entitled to reckon her seniority from the aforementioned date, but, taking her appointment to be w.e.f. 02.04.1988, the petitioner would also be entitled to the re-fixation of her salary at par with the appointees of April, 1988.

3. The respondents have opposed the writ petition contending inter alia that during the pendency of this writ petition, the case of the petitioner was re-examined in the light of the representation made by her, but, the same was barred by limitation in terms of Rule 2.43 of the J&K Financial Code and, therefore, found not tenable in law. Accordingly, vide Order dated 800-DSEK of 2017 dated 10.07.2017 passed by the respondent No.2, the claim of the petitioner for retrospective effect with monetary benefits was rejected. Mr. Aseem Sawhney, learned AAG appearing for the respondents submits that the petitioner is not entitled to any relief as prayed for in this writ petition. Referring to the judgment passed in the case of the petitioner in SWP No.718/1988 dated 11.03.1999, learned counsel argues that the petitioner was entitled to appointment as teacher only prospectively and, therefore, order dated 08.10.2016 passed by the respondent No.2 giving the appointment to the petitioner retrospectively w.e.f. 02.04.1988 is bad in law and contravenes the judgment passed in the case of the petitioner. He submits that the petitioner is not entitled to any relief beyond what was granted in her favour in her writ petition, i.e. SWP No. 718/1988 disposed of by a Single Bench of this Court vide its judgment dated 10.03.1999 and upheld by the Division Bench of this Court in LPA(SW) No.38/2002 decided on 11.10.2004. He, therefore, urges that the petitioner is entitled to appointment w.e.f. 08.02.2005 when the order of appointment in her favour was issued by the respondent No.2 in compliance to the judgment passed in her case.

4. Heard learned counsel for the parties and perused the record.

5. It is true and I am in agreement with the learned Additional Advocate General that the petitioner in terms of order dated 10.03.1999 passed in SWP No. 718/1988 was entitled to appointment prospectively, i.e., the date of actual appointment. This judgment was passed on 10.03.1999. The Service Selection Board challenged the said judgment in LPASW No.38/2002. It is submitted that during the pendency of the Letters Patent Appeal, there was stay by the Division Bench with regard to the implementation of the judgment of Single Bench. From 10.03.1999 and till belated LPA was filed in the year 2002, there was no stay of the judgment, yet, the same was not implemented by the respondents. The LPA filed by Service Selection Board ultimately failed and the same was dismissed on 11.10.2004. It is only after the dismissal of the LPA filed by Service Selection Board, the judgment of the learned Single Bench was implemented on 08.02.2005 and the petitioner was given appointment as teacher prospectively. In compliance to the order issued by the respondent No.2, the petitioner joined, but, immediately racked up another controversy claiming retrospective effect on the analogy of Dolly Kumari's case (supra). This Court did not determine any issue raised in the subsequent petition, i.e., SWP No. 1795/2008, but, left it to the respondents to consider the case of the petitioner in the light of the averments made in the writ petition and documents appended thereto and also taking note of the judgment in the case of Dolly Kumari's case passed by the Division Bench of this Court. The respondent No.2 could have well declined to

give retrospective effect to the appointment of the petitioner on the ground that this Court while allowing the writ petition of the petitioner vide its judgment dated 10.03.1999 had specifically provided that the appointment of the petitioner would take effect prospectively. The respondent No.2, however, drew analogy of Dolly Kumari's case and granted retrospective benefit of appointment to the petitioner w.e.f. 02.04.1988, but, providing unequivocally that this retrospective effect would be notional and without any monetary benefits. Riding on the benevolence showered by respondent No.2, the petitioner claims that she may not be entitled to monetary benefits like the salary for the period w.e.f. 02.04.1988 to 08.02.2005, but, she is surely entitled to re-fixation of her salary so as to bring her salary in February, 2005 at par with her counterparts, who were selected and appointed in April, 1988.

6. In these circumstances and in the given factual matrix, this Court may have to determine whether the petitioner on being granted the retrospective effect to her appointment w.e.f. 02.04.1988, though notionally and without any monetary benefits, is entitled to seek the effects of such retrospective appointment. The determination of this question, in the given facts and circumstances, has become little ticklish. In the face of the judgment passed by the Single Bench dated 10.03.1999 in SWP No.718/1988, the appointment of the petitioner, for all purposes, would take effect prospectively. As is rightly contended by Mr. Sawhney, learned AAG that the respondent No.2 could not have applied the analogy of Dolly Kumari's case and given retrospective appointment to the petitioner w.e.f. 02.04.1988, may be, on notional basis and without any monetary benefits. It is equally true that the order dated 08.10.2016 passed by the respondent No.2 is beyond the relief granted by this Court to the petitioner. Be that as it may, the respondent No.2 in his wisdom, has gone beyond the scope of relief granted to the petitioner in her case and drawn and adopted the analogy of Dolly Kumari's case, not realising that the Court had only directed the respondent No.2 to consider and take an appropriate decision and no mandamus had been issued to necessarily follow the judgment rendered in the case of Dolly Kumari's case by the Division Bench of this Court. It can also be not denied that once the respondent No.2, may be of its own, chose to grant the benefit to the appointment of the petitioner w.e.f. 02.04.1988, the effects of such retrospective appointment could not be denied. As rightly projected by the petitioner, she may not be entitled to any salary for the period w.e.f. 02.04.1988 to 08.02.2005 when she was actually appointed, but, she would definitely be entitled to re-fixation of her salary if she is deemed to have been appointed w.e.f. 02.04.1988. It could be, in terms of the seniority, to be reckoned from 02.04.1988 and/or re-fixation of her salary in the month of February, 2005. With a view to better appreciate the point in issue; it is necessary to gauge antecedent facts leading to the issuance of order dated 08.02.2005. In the penultimate paragraph of the order, the Chief Education Officer while conveying his NOC to retrospective appointment of the petitioner has categorically observed that the said benefit could only be given notionally as per Rule 2.43 of J&K Financial Code Volume-I.

Rule 2.43 of the J&K Financial Code reads as under:-

"2.43: The reopening of old cases should be deprecated as a fundamental principle. Where, however, such cases are opened as a special case as for instance in relation to the re-fixation of initial pay in time-scale the arrears should not be allowed."

7. Though Rule 2.43 of the J&K Financial Code reproduced above, may not apply *stricto sensu* to the case on hand, but, it clearly manifests the intention of respondent No.2 behind granting retrospective effect to the appointment of the petitioner. Reading order dated 08.02.2005 in its entirety, it is clearly borne out that the petitioner was given retrospective effect to her promotion w.e.f. 02.04.1988 notionally and without any monetary benefits, that is, without re-fixation of her salary. If order dated 08.02.2005 is understood in the aforesaid manner, it would also be in consonance with the judgment passed in petitioner's case.

8. For the foregoing reasons, while this Court does not find the petitioner entitled to re-fixation of her salary, which in any case is nothing but a monetary benefit arising out of retrospective effect being given to the appointment of the petitioner from 02.04.1988, yet, this Court is inclined to mould the relief and hold the petitioner entitled to her appointment as Teacher w.e.f. 10.05.1999, i.e., after the expiry of limitation for filing the appeal against the judgment dated 10.03.1999. The delay in complying with the judgment dated 10.03.1999 on account of pendency of LPA, which was ultimately found to be devoid of any merit and dismissed, cannot act to the prejudice of the petitioner. As noted above, there was no stay from 1999 till 2002 when appeal was filed, yet, the respondents chose not to implement the judgment. The belated appeal preferred was also ultimately dismissed having no merit. The plea of the respondents that since the operation of the judgment remained suspended during the pendency of the appeal, cannot come to the rescue of the respondents, for, it is well accepted legal maxim "*actus curiae neminem gravabit*", which means that the act of the Court prejudices none. It is equally well settled that interim stay obtained by the party during the pendency of the writ, suit or proceedings is always at the peril of the party applying for such stay. And in case writ, suit or proceedings are ultimately found to be without merit and dismissed, no benefit can be claimed by the party on the basis of interim directions, which might have operated during the pendency of such writ, suit or proceeding.

9. In the light of the preceding analysis, this petition is disposed of by directing the respondents to treat the petitioner as having been appointed w.e.f. 10.05.1999 as Teacher with all consequential benefits, except the arrears of salary from 10.05.1999 to 08.02.2005. She shall, however, be entitled to re-fixation of her salary w.e.f. 08.02.2005 at par with the teachers appointed in the year 1999 and consequential arrears, including seniority w.e.f. 10.05.1999. As a consequence, order of respondent No.2 issued vide No 1403-DSEK of 2016 dated 08.10.2016 is held to be nullity in law and is quashed *ab initio*.

10. Disposed of as above along with connected CM(s).