

(2024) 03 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : ?Latters Patent Appeal No. 46 Of 2024

University Of Kashmir And Others

APPELLANT

Vs

Saif-Ud-Din Mir

RESPONDENT

Date of Decision : 26-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2024) 03 J&K CK 0026

Hon'ble Judges : N. Kotiswar Singh, CJ; Wasim Sadiq Nargal, J

Bench : Division Bench

Advocate : Asif Maqbool, Shakir Haqani

Final Decision : Dismissed

Judgement

Wasim Sadiq Nargal, J

1. The present appeal has been preferred by the Appellants-University of Kashmir against the judgement dated 1st February, 2023 passed by the Learned Single Judge in writ petition being WP(C) No. 1851/2020 titled "Saif-ud-din Mir vs University of Kashmir and Ors."

2. Before we advert to the grounds of challenge urged by the learned counsel for the appellants, we deem it proper to take note of few facts, which are material to the determination of this appeal.

3. The Appellant-University of Kashmir wherein the respondent (writ petitioner) has been working as Assistant Registrar, advertised vacant positions of Deputy Registrars/Deputy Controllers of Examination vide advertisement notice/s dated 24.10.2003, 18.2.2005 and 25.6.2007 for filling up the same in the internal quota and the respondent (writ petitioner) being eligible thereof, applied and consequently was called for interview scheduled on 13.10.2008, however, the interview was not conducted and resultantly the posts were not filled up pursuant to the aforesaid advertisement notice/s.

4. The respondent herein along with one co-employee namely Mohammad Yasin Malik came to be appointed against the post of Deputy Registrar/Deputy Controller of Examination against the available post (internal quota) while working as Assistant Registrar/Assistant Controller of Examinations in the University in their own pay and grade for a period of six months in the first instance subject to the payment of charge allowances as admissible under rules in terms of order No. F(Promotion-DRs) Adm/KU/07 dated 14.12.2007.
5. The Appellant-University in terms of Order No. F(Promotion-Dy. Reg) Gen-Adm/KU/09 dated 29.01.2009 accorded sanction to the temporary promotion of the respondent against the post of Deputy Registrar in the pay scale of Rs. 12000-18300 w.e.f. 29.01.2009.
6. The respondent prior to the issuance of the order dated 29.01.2009 is stated to have submitted a representation before the University along with his above-named co-employee for their regular promotion against the post of Deputy Registrar/Deputy Controller of Examinations with a regular scale of pay of Rs. 12000-18300 as also having agitated the issue through Kashmir University Officers' Association before the University.
7. A further representation is also stated to have been submitted by the respondent in this regard separately before the Controller of Examinations on 10.01.2009 requesting therein for consideration of his case for placement in the pay scale of Deputy Registrar/Deputy Controller of Examination w.e.f., 14.12.2007 on account of his ensuing superannuation on 31.01.2009.
8. The writ petitioner got superannuated on 31.01.2009 and the appellant-University, however, did not accord consideration to his case for placement in the grade of Rs. 12000-18300 w.e.f., 14.12.2007 i.e. when the writ petitioner came to be appointed against the post of Deputy Controller of Examinations in his own pay and grade along with his above named co-employee.
9. After the superannuation of the writ petitioner, his above named co-employee was also promoted as Deputy Registrar in terms of Order dated 27.05.2009, however, the charge allowances drawn by him while working as acting Deputy Registrar/Deputy Controller of Examinations in terms of order dated 14.12.2007 were directed to be recovered from the arrears payable to him, aggrieved whereof, he filed SWP no. 592/2011 before this Court which came to be disposed of on 16.09.2013 and while allowing the same, the order under challenge in the petition whereunder charge allowances drawn by him were directed to be recovered w.e.f. 14.12.2007 came to be quashed.
10. The Appellant-University complied with the judgment (supra) dated 16.09.2013 earned by the above-named co-employee of the respondent, whereby, the promotion against the post of Deputy Registrar/Deputy Controller of Examinations came to be given effect w.e.f., 14.12.2007 and consequently, the arrears of pay released in his favour.

11. The respondent herein though, prior to his retirement had also sought effect to his promotion as Deputy Registrar/Deputy Controller of Examinations from the Appellant-University w.e.f., 14.12.2007 instead of 29.01.2009 and had sought the same relief while submitting representations even after his retirement continued to seek the extension of said benefit from the Appellant-University after coming to know about the grant of said benefit to his above named co-employee pursuant to the directions by this Court passed in SWP No. 592/2011 (supra), which the Appellant-University did not consider resulting into filing of the writ petition by the petitioner afresh before the writ Court which was registered as WP(C) 1851/2020 against which, the present appeal has been preferred by the Appellant-University.

12. The petitioner before the learned writ Court under the cover and shade of the aforesaid facts has sought quashment of order dated 29.01.2009 to the extent of releasing the grade of the post in his favour w.e.f. 29.01.2009 instead of 14.12.2007 as well as release all of the arrears thereof while fixing and drawing his retiral benefits accordingly.

13. The Appellant-University contested the writ petition by filing detailed objections. It was specific stand of the Appellant-University before the learned writ Court that the petition is grossly misconceived and that the writ petitioner was not entitled to any of the reliefs claimed. It was also the specific stand of the appellants that the writ petitioner has projected a cause after ten years and has thrown challenge to the impugned order in the year 2020 and that the petition as such suffers from vice of laches as the delay has not been explained. It was being further stated in the objections that the petitioner has sought implementation of judgment earned by his co-employee which judgment is in personam and not a judgment in rem and, as such, the petitioner cannot claim any benefit thereof under the said judgment.

14. Upon hearing the learned counsel for the parties at length, the learned writ Court disposed of the writ petition so filed by the petitioner with a direction to the appellant-University to grant the benefits of pay and grade attached to the post of Deputy Registrar/ Deputy Controller to the respondent herein w.e.f. 14-01-2007 instead of 29-01-2009 and release all arrears thereof in favour of the respondent besides fixing and drawing his retiral benefits, accordingly.

15. Being aggrieved, the Appellant-University has challenged the judgment passed by the learned Single Judge inter alia among others on the following grounds:

a. That the case of the writ petitioner was neither identical nor could have been based on parity as the said co-employee namely Mr. Mohammad Yaseen Malik , was promoted as Deputy Registrar on 27-05-2009 i.e. after the superannuation of the writ petitioner. It is urged that the learned Writ Court while passing the impugned judgment has erred in law while granting the relief to the Respondent basing it on a benefit having been granted to a co-employee much later in point

of time. Even otherwise the order dated 29.01.2009, issued by the Appellants granting promotion to the Respondent was temporary in nature. Furthermore, the same was subject to charge allowances as admissible under rules w.e.f. 29.01.2009 which is indicative of a fact that the placement was not substantive but as an in-charge arrangement.

b. That the order dated 29.01.2009 was never challenged by the petitioner before the Court till the time writ petition bearing WP(C) No.1851/2020 came to be filed by him. It was only upon a judgment which had attained finality passed on 16.09.2013, that the appellant-University granted the benefit to the said co-employee and accordingly on the directions of the then Vice-Chancellor, the promotion was made effective from 14.12.2007 i.e. the date when the charge against the post was taken.

c. That the further ground of challenge to the impugned judgment is that there is no justification/reasoning given by the learned Writ Court regarding the aspect of delay/laches. It is the specific case of the appellant that the order which was impugned in the writ petition was issued on 29.01.2009, the same was accepted by the Respondent and it was only in the year 2020 that the same was challenged by way of filing a Writ Petition.

d. That the petitioner was a fence-sitter and should be excluded from the benefit of any judgement, as he was duty bound to remain vigilant and approach the Court in time for seeking redressal of his grievance, but no such steps were taken by the petitioner and hence cannot under any circumstance claim the benefit given to the said co-employee in terms of the judgment dated 16.09.2013.

e. Further ground urged in the memo of appeal is that it is settled position of law which has culminated and fructified in a basic rule of judicial interpretation that "Fence Sitters" should be excluded from the benefit of any judgment passed by the Hon'ble Courts.

f. That the learned writ Court has not exercised the jurisdiction vested in a judicious manner, the judgment has been passed without properly appreciating the facts of the case and the law governing the subject of delay and laches.

16. Heard the learned counsel for the parties at length and perused the material on record.

17. Learned counsel appearing on behalf of the appellant-University has submitted that the petitioner/respondent herein has gladly and voluntarily accepted the order dated 29.01.2009 but thereafter slept over the matter and did not throw challenge to the order dated 29.01.2009 till filing of the writ petition in 2020 and thus, at this stage, the petitioner cannot turn around and seek the benefit on the basis of the judgment passed by this Court in SWP No. 592/2011 mentioned (supra).

18. The learned counsel further submits that the respondent herein cannot seek

analogy of the co-employee/ petitioner in SWP No. 592/2011 (supra), who was promoted to the post of Deputy Registrar on 27-05-2009 i.e. after the retirement of the respondent, so according to the appellants, the benefit could not have been extended to the respondent who is not similarly situated.

19. The Appellants have further stated that with regard to the promotion of his co-employee Mohammad Yaseen Malik from the post of Assistant Registrar to the Deputy Registrar, the same was done in terms of order dated 27-05-2009 subject to ratification by the Syndicate. It was further provided that the order was issued in continuation of the office order No. F (promotion- DRS) Adm/KU/07 dated 14-12-2007 and without prejudice to the seniority of others.

20. However, on the other hand, the learned counsel appearing for the respondent herein strongly objected the grounds of challenge in the present appeal and submits that the respondent herein was never a fence-sitter and had already filed a representation well within time and prior to his superannuation i.e. on 10.01.2009.

21. We have gone through the entire record of the writ Court which bears testimony to the fact that the petitioner/respondent herein upon being appointed as Deputy Registrar/Controller of Examination by the Appellant-University on acting basis against an available post in terms of order dated 14 th December, 2007, has sought his promotion against the post in question with grade and the matter was taken up with the officials of the Kashmir University Officers' Association on 18.01.2009 and even recommendation has also been made on one such representation which has been filed by the respondent to the Controller of Examination on 14.01.2009 i.e. prior to the retirement of the respondent on 30.01.2009, which recommendation is reproduced as under:

"The Vice Chancellor may kindly peruse the application of the applicant Mr. Saif Ud Din Mir (Dy. Controller) and consider his request of placement in the pay scale of Deputy Registrar/Deputy Controller of Examination w.e.f. 14.12.2007 from the date he was appointed as acting Deputy Registrar/Deputy Controller of Examination."

22. The record further reveals that the respondent did not sleep over the matter and filed yet another representation on 29.01.2009, which was followed by another representation dated 02.05.2018, whereby he has sought extension of the benefit as has been extended in favour of similarly situated co-employee, namely, Mohammad Yasin Malik, while making reference to his earlier representation before the Appellant-University. Thus, the ground urged by the Appellant-University that the respondent herein was a fence sitter, does not hold good and is contrary to the record as the respondent herein was vigilant in pursuing his case by filing representations from time to time and even prior to his retirement.

23. The ground urged by the Appellant-University that the case of the respondent herein was not identical with his co-employee, namely, Mohammad

Yasin Malik, on the ground that he was promoted as Deputy Registrar after the superannuation of the respondent herein loses its significance in the light of the fact that both the respondent herein and his co-employee were similarly situated and the benefit which has been extended to said Mohammad Yasin Malik by no stretch of imagination could have been denied to the petitioner. If the University-Syndicate has taken a decision in respect of Mohammad Yasin Malik on 29.07.2009, then what prevented the University-Syndicate to take a similar decision in favour of the respondent is not forthcoming from the record when both the respondent herein and Mohammad Yasin Malik were similarly situated.

24. The stand of the Appellant-University that order dated 29.01.2009 granting promotion to the respondent was temporary in nature and was subject to charge allowance as admissible under rules w.e.f. 29.01.2009 which was indicative of the fact that placement was not substantive but merely by way of charge arrangement and thus the benefit could not have been extended to the petitioner/respondent herein, cannot sustain the test of law on the touchstone of equality clause.

25. Once, the respondent herein and his co-employee (Mohammad Yasin Malik) were beneficiary of the same order of promotion who has subsequently been regularized, then the benefit which has been extended to Mohammad Yasin Malik as Deputy Registrar/Deputy Controller w.e.f. 14.12.2007 cannot be denied to the respondent herein being similarly situated and has to be treated equally by applying same yardstick on the basis of parity. The appellant-University slept over the matter and thus, for any inaction on part of the appellant, the respondent can in no way be penalized.

26. The learned counsel appearing for the respondent further submits that the appellants have singled out the respondent for hostile treatment without any just basis as both the writ petitioner and Mohammad Yaseen Malik together constituted one single class and therefore were required to be treated in the same and identical manner.

27. The learned counsel further submits that failure of the Appellants to apply the judgement passed in SWP No. 592/2011 to the case of the petitioner (respondent herein) and the order to release the pay scale of 12000-420-18300 (Old) Rs. 15600-39100 (New) to the petitioner w.e.f. 29.01.2009 is based on complete non-application of mind and mechanical exercise of power and thus is illegal and unconstitutional.

28. Thus, it does not lie in the mouth of the appellants to agitate that the case of the respondent herein is not identical to that of Mohammad Yasin Malik, who was promoted as Deputy Registrar on the same date when the respondent came to be promoted by virtue of a common order dated 14.12.2007.

29. Once, the said benefit of retrospective promotion has been accorded to a co-employee who was similarly situated, then the ground urged by the appellants that since the placement of the respondent was not substantive and by way of

charge allowance, loses its significance and the respondent herein by no stretch of imagination could be discriminated.

30. By applying different yardstick and treating him stepmotherly, merely on the ground that the respondent herein did not approach this Court, when he was in active service, cannot be deprived of the fruits of the said judgment, wherein, benefit was extended to a similarly situated employee by accepting and implementing the said judgment, more particularly when the respondent has filed representation(s) prior to his retirement and his case was recommended by the University authorities as well.

31. Once, the judgment has been accepted in case of Mohammad Yasin Malik, then the appellant-University by no stretch of imagination can apply a different yardstick insofar as the case of the respondent herein is concerned, being similarly situated.

32. We draw support from the judgment passed by the Hon'ble Apex court in case titled as *State of Karnataka v. C. Lalitha* reported as (2006) 2 SCC 747, wherein the Hon'ble Apex Court has held as under:

"29. Service jurisprudence evolved by this Court from time-to-time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

33. We are again fortified by the view taken by the Hon'ble Supreme Court in case titled as *State of Uttar Pradesh and Others v. Arvind Kumar Srivastava and Others* reported as (2015) 1 SCC 347 has observed as follows:

"22.1. The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not

challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim. 22.3. However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like scheme of regularization and the like. On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said SWP 2126/2018 11 judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

34. The petitioner was alive to his denial of promotion and this was precisely the reason that he filed detailed representations before the Appellant-University well within time, when he was in active service and recommendation was also made in his favour prior to his retirement.

35. It is not the case of the Appellant-University that it was only after judgment was passed in favour of a co-employee that the respondent/writ petitioner projected his case for grant of similar relief but on the other hand, the petitioner has filed a detailed representation well in time, when he was in active service but due to inaction on part of the Appellant-University to take a decision on the said representation inspite of the recommendation, cannot be a stumbling block for according similar relief to the writ petitioner on the touchstone of equality clause. The writ petitioner can in no way be penalized for any inaction on part of the University authorities to decide his representation well in time on the analogy of his co-employee.

36. Thus, the ground urged in the present appeal by the appellant-University that the promotion to the respondent/writ petitioner was on charge allowance and temporarily basis, is not sustainable in the eye of law, more particularly when the benefit of retrospective promotion from the date the co-employee was officiating, was given. The delay and laches in the instant case cannot come in the way of the respondent as it was recurring cause and there is no fault on the part of the petitioner/respondent herein which could come in his way for seeking similar benefit as he has approached the Appellant-University well within time.

37. We are in agreement with the finding recorded by the learned writ Court that the appellant University has acted in the matter unfairly, unreasonably and

arbitrarily, having subjected the respondent herein to hostile discrimination vis-à-vis his co-employee which per se is affront to the concept of equality, enshrined in the Constitution.

38. Viewed from any angle, we do not find any legal infirmity in the judgment passed by the learned Single Bench and the same is accordingly upheld. This appeal is, therefore, found to be without any merit and the same is accordingly dismissed. However, no order as to costs.