
Simi Dutta Vs State

S.W.P. No. 2614 of 1999

Court: Jammu & Kashmir High Court

Date of Decision: Feb. 12, 2001

Acts Referred:

Constitution of India, 1950 – Article 14, 16, 42, 43#Jammu and Kashmir Civil Service Rules, 1996 – Article 157A

Citation: (2001) 4 SCT 726

Hon'ble Judges: Arun Kumar Goel, J

Bench: Single Bench

Advocate: Neeru Goswami, B.S. Dutta, Advocates appearing for the Parties

Judgement

Arun Kumar Goel, J.

This writ petition has been filed seeking direction for quashing order No. GCET/99/1755 dated 25.9.1999

Annexure A to the writ petition, whereby she has declined maternity leave as per Leave Rules in vague. At the same time she had prayer for a

direction for the grant of maternity leave due to her. Facts in this case are by and largely admitted. Petitioner was selected and appointed as

Lecturer (ad hoc) in discipline of Computer Engineering vide order No. GCET/95/200510 dated 31.3.1995. This was issued by the Coordinator

and was confirmed by a Committee constituted by the State Government. It resulted in issuance of Govt. Order No. 1563HE of 1995 dated

19.11.1995. It is not in dispute that petitioner has continued in this post from time to time and is presently continuing in terms of orders in S.W.P.

No. 2209/98. Petitioner applied for grant of maternity leave. Needful was done by the Government vide Order No. EduCollWP/1155995 dated

30.7.1999. However, respondent No. 2 vide Letter No. GCET/99/1753 dated 25.9.1999 rejected her claim, as according to her under rules she

is not entitled to maternity leave.

2. This has resulted in filing of this writ petition. Petitioner earlier filed S.W.P. No. 2209/98. One of relief claimed in it was for the grant of

maternity leave. Since her claim has been rejected in this behalf hence this writ petition. Petitioner alleges that rejection of her claim is illegal and

ultra vires besides being fraught with extraneous considerations and actuated by oblique motives, therefore, it cannot be sustained. She further

alleges that once leave had been granted by the Government it could not have been cancelled by the principal who is a subordinate. In this

background she has prayed for grant of relief referred to hereinabove.

3. Respondents when put to notice have filed their objections. According to them petitioner was engaged on consolidated pay of Rs. 6000/ per

month from time to time to carry on teaching needs in the College till vacancy was filled in accordance with rules by the Public Service

Commission. Petitioner alongwith number of other persons were engaged to see that the academic arrangements are not hit because of want of

teachers. According to them engagement of persons like petitioner amongst others is based on principle of "No work no pay". Reliance in this

behalf is placed on documents marked Annexures A and B attached with their objections. Annexure A is a communication from the Government

dated 23.3.1998 which shows that no leave is admissible in case of Lecturers engaged on academic arrangements. This was on the subject, "leave

concessions to Lecturers engaged on temporary academic arrangements." Annexure B is a proforma of affidavit. According to

respondents petitioner had earlier approached the court in S.W.P. No. 2209/98 which stands finally disposed of. Same was dismissed, but at the

same time it was clarified that till regular selection is made and duly selected candidate as consequence thereof does not join against the post in

question services of the petitioner will not be dispensed with. At the same time it has also been observed in this judgment that petitioner will also be

entitled to her admissible salary and other benefits if any to which she is entitled under the service rules including maternity leave. Respondents

further say that petitioner was allowed to be away for maternity purposes but she is not entitled to any remuneration for such period as is allowed

to the Lecturers who are substantially appointed. Keeping in view the nature of her appointment Article 157A of C.S.R. is also inapplicable in case

of petitioner. Reliance is placed on behalf of the petitioner on this provision of law. According to respondents leave was neither sanctioned nor

rejected. However, petitioner was allowed to be away without remuneration as per necessity. Thus respondents have prayed for dismissal of the

writ petition.

4. When this matter was finally heard learned Counsel for the parties submitted that matter may be treated formally admitted and be disposed of

one way or the other at the admission stage as its pendency is not in the interest of either of them. It was further stated by Mrs. Goswami that

objections filed may be treated as counter. Accordingly this matter was finally heard and with the assistance of learned Counsel for the parties, writ

record was examined.

5. Before proceeding further, Article 157A of J&K C.S.R. 1996 which is relevant for this case needs to be extracted which is in the following

terms :

157A. A competent authority may grant to a female Government servant maternity leave on full pay for a period which may extend upto the end

of two months from the date of its commencement or to the end of one month from the date of confinement whichever be earlier.

Note 1. Maternity leave may also be granted in the case of miscarriage including abortion subject to the condition that

(a) leave does not exceed six weeks, and

(b) The application for leave is supported by a certificate from an authorised medical attendant.

Note 2. Such leave will not be debited against the leave earned otherwise.

Note 3. Temporary regular female servants paid from contingencies or engaged on daily or monthly wages system may be granted maternity leave

for three weeks during the period of confinement. No extra expenditure will, however, be admissible during such leave.

It has been urged by Shri Dutta learned Counsel appearing for petitioner that action of respondents in denying the benefit of maternity leave to his

client like other employees of the State Government is violative of Articles 14 and 15 of the Constitution of India as it denies the benefit of

beneficent provisions of law to a female like petitioner. In addition to this according to him action of respondents denying just and humane

conditions of work while she is in employment in the matter of maternity leave is also violative of Article 16. It also denies the right to have

adequate means of livelihood. All these pleas have been controverted by Mrs. Neeru Goswami learned Counsel for respondents. She submitted

that benefit of maternity leave with pay is available to a permanent female Government employee and her clients are justified in carving out

distinction between the regular employee female and ad hoc one as in the present case.

6. In the light of the aforesaid submission when a reference is made to Article 42 of the Constitution of India which is in the following terms, it is

clearly made out that State is to make provisions for securing just and humane conditions of work and for maternity relief.

42. Provision for just and humane conditions of work and maternity relief. The State shall make provision for securing just and humane conditions

of work and for maternity relief.

7. Article 43 of the Constitution of India is also relevant which is in the following terms :

43. Living wage, etc. for workers. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all

workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of

leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or

cooperative basis in rural areas.

8. Case of the petitioner needs to be examined in the light of both these Articles as well as provisions of Article 157A of the J&K C.S.R. (supra).

No doubt Article 42 of the Constitution of India is a part of directive principles of State policy, thus may not be enforceable like right conferred on

a citizen under the Chapter dealing with the fundamental rights. However, for purpose of ensuring that action of respondents is just and fair, these

Articles can always be invoked. Particularly in the light of what is required by Article 42 of the Constitution of India which speaks of providing for

securing just and humane condition of the work and for maternity relief. This will be a step in aid in achieving social justice. Reliance on social

justice has been attending (engaging ?) the attention of Supreme Court of India from time to time.

9. In *M/s. Crown Aluminium Works v. Their Workmen*, reported in AIR 1958 SC 30, it was observed that Constitution of India seeks to achieve

democratic, social welfare and secular and social and economic justice to its citizens.

10. In *J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. Badri Mali and others*, AIR 1964 SC 737, while dealing with the case under the

Industrial Law what was observed and is relevant for determination of this case was in the following terms :

19. Then Mr. Pathak was driven to contend that the ground of social justice given by the Labour Appellate Tribunal in support of its award is

really not sound in law, and he referred us to the observations made by this Court on some occasions that the considerations of social justice were

not only irrelevant but untenable"" vide *J.L. Iron and Steel Co. Ltd. Kanpur v. Iron and Steel Mazdoor Union, Kanpur*, 1955(2) SCR 1315 : AIR

1996 SC 231 and *Muir Mills Co. Ltd. v. Suti Mills Mazoor Union, Kanpur*, 1955(1) SCR 991 : AIR 1955 SC 170. In our opinion, the argument

that the considerations of social justice are irrelevant and untenable in dealing with industrial disputes, has to be rejected without any hesitation. The

development of industrial law during the last decade and several decisions of this court in dealing with industrial matters have emphasised the

relevance, validity and significance of the doctrine of social justice; vide *Messrs Crown Aluminium Works v. Their Workmen*, 1958 SCR 651 :

AIR 1958 SC 30 and *State of Mysore v. Workers of Gold Mines*, 1959 SCR 895 : AIR 1958 SC 923. Indeed the concept of social justice has

now become such an integral part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the

claims of social justice in dealing with industrial disputes. The concept of social justice is not narrow, or onesided, or pedantic, and is not confined

to industrial adjudication alone. Its sweep is comprehensive. It is founded on the basic ideal of socioeconomic equality and its aim is to arrest the

removal of socioeconomic disparities and inequalities; nevertheless in dealing with industrial matters, it does not adopt a doctrinaire approach and

refuses to yield blindly to abstract notions, but adopts a realistic and pragmatic approach. It, therefore, endeavours to resolve the competing claims

of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and

labour, and good relationship. The ultimate object of industrial adjudication is to help the growth and progress of national economy and it is with

that ultimate object in view that industrial disputes are settled by industrial adjudication on principles of fairplay and justice. That is the reason why

on several occasions industrial adjudication has thought it fit to make reasonable provision for leave in respect of the workmen who may not strictly

fall within the purview of the Factories Act or the Shops and Commercial Establishments Act. We are, therefore, satisfied that there is no

substance in the grievance made by Mr. Pathak that the Labour Appellate Tribunal should not have granted the demand of the respondents for

leave on grounds of fair play and social justice.

11. While dealing with case under the Industrial Disputes Act, 1947 and Maternity Benefit Act, 1961 what was observed in the contest (context ?)

of social justice by the Supreme Court of India in decision of Municipal Corporation of Delhi v. Female Workers (Muster Roll) and another,

2000(2) SCT 258 (SC) : AIR 2000 SC 1274 which has material bearing of this case and in the same judgment reliance was placed on the

Universal Declaration of Human Rights, adopted by the United Nation on 10th of December, 1948 which is in the following terms :

34. Delhi is the capital of India. No other City or Corporation would more conscious than the City of Delhi that India is a signatory to various

International covenants and treaties. The Universal Declaration of Human Rights adopted by the United Nations on 10th of December, 1948, set

in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of Conventions.

On 18th of December, 1979, the United Nations adopted the ""Convention on the Elimination of all forms of discrimination against women"". Article

11 of this Convention provides as under :

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a

basis of equality of men and women, the same rights, in particular :

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the

right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in

the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as

well as the right to paid leave.

(f) The right to protection of health and to satisfy in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work. States

parties shall take appropriate measures :

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals

on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work

responsibilities and participation in public life. In particular through promoting the establishment and development of a network of child care

facilities;

(d) To provide special protection to women during the pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge

and shall be revised, repealed or extended as necessary.

12. Great emphasis has been placed by Mrs. Goswami, learned Counsel for respondents on Note3 and Government instructions below Article

157A (supra). According to her petitioner was well aware at the time of her joining the Government service on fixed remuneration on ad hoc basis,

that she will not be entitled to benefit of maternity leave. At the same time she submitted that petitioner was free to be away during the time of her

maternity but she cannot be extended any benefit more than Note3 (supra).

13. In this behalf it is observed that Notes do not form part of the main provision itself nor do they control the main provision. Reason being that

main provision accorded some benefit to a person like petitioner in the nature of maternity leave. In case what was urged on behalf of respondents

is accepted on the basis of Note3, it will negate the main provision of Article 157A. It may also be observed here that as per rules of interpretation

Notes are neither in the nature of exception nor proviso to main provision. They can at best be taken to be as a step in aid for implementation of

the main provision and not in its derogation. In case argument urged in this behalf on behalf of learned Counsel for respondents is accepted it will

be taking away the purpose, intent and object sought to be achieved by the aforesaid Article 157A.

14. In the context of Articles 42 and 43 of the Constitution of India, it may be observed that State is required to make an endeavour to promote

the welfare of its subject as far as possible and effective social order, in which justice, social, economic and political shall inform all the institutions

of natural life. Article 38(2) of the Constitution of India requires the State to strive to minimise inequalities in income, and endeavour to eliminate

inequalities in status, facilities and opportunities.

15. In this behalf Article 14 of the Constitution of India is also of significance. Because it enjoins duty upon the State not to deny to any person

equality before law or equal protection of law within territory of India. Incidentally it may also be observed that denial of maternity leave to an ad

hoc employee like petitioner by the State Government cannot be justified on the principle of reasonable classification by carving out a class within

the class i.e. in case of females as such on this ground also action of respondents denying the benefits of maternity leave to the petitioner like other

female employees of the State Government cannot be justified for any reason whatsoever. As a consequence of this Court has no option but for

striking down Annexure A communication No. GCET/99/1755 dated 25.9.1999 with the writ petition and is ordered accordingly.

16. For taking this view some support can be had from the decision in the case of Rattan Lal and others v. State of Haryana and others, 1985(3)

SLR 548. In this case Supreme Court struck down the action of respondents denying the benefit of salary and allowances to ad hoc teachers

during summer vacations. At the same time it was also observed that they are also entitled to maternity and medical leave.

17. In Mrs. Savita Ahuja v. State of Haryana, 1988(1) SLR 735, Punjab and Haryana High Court, struck down the action of the State of denying

maternity leave benefit to its ad hoc employees as was available to its regular female employees. Being violative of Articles 14 and 16 on the basis

of sex.

18. In the face of aforesaid discussion this writ petition deserves to be allowed and it is ordered accordingly and as a result of it communication

No. GCET/99/1755 dated 25.9.1999 issued by respondent No. 2 denying the benefit of maternity leave to the petitioner is hereby quashed and

set aside and respondents are directed to accord the benefit of maternity leave to the petitioner like any other of their female employee without

creating distinction whether such employee is employed on regular basis or ad hoc basis like the case of the petitioner. No costs.