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

% ***Date of Order: 24th May, 2019***

\+ LPA 369/2019 & CM APPL. 25149/2019, 25151/2019

JAMIA MILLIA ISLAMIA ..... Appellant
Through: Ms.Zeba Khair and Mr.Afzal S. Shah, Advocates

versus

DR. FAQEER MOHAMMAD ..... Respondent
Through: Mr.Chandra Shekhar and Mr.Prashant Shekhar, Advocates

**CORAM:**
**HON'BLE MR. JUSTICE G.S.SISTANI**
**HON'BLE MS. JUSTICE JYOTI SINGH**

**G.S. SISTANI, J.** ***(ORAL)***

**Caveat No.563/2019**

1. Since Mr.Chandra Shekhar, learned counsel for the caveator has entered appearance, the caveat stands discharged.

**CM APPL. 25150/2019 (Exemption)**

2. Exemption is allowed, subject to all just exceptions.
3. The application stands disposed of.

**LPA 369/2019 & CM APPLs. 25149/2019 (additional documents), 25151/2019 (stay)**

4. The appellant is aggrieved by the judgment passed by a learned Single Judge dated 23.04.2019 arising out of a writ petition filed by the

respondent wherein the direction was sought to apply General Provident Fund-cum-Gratuity Scheme, which was in operation on 18.12.2003, the date when the respondent accepted the offer of appointment and when according to the respondent his right stood crystalized.

5. With consent of the parties, we dispose of this appeal at the admission stage itself.

6. The respondent was part of the guest faculty with the department of Chemistry from 16.09.2002 till the academic session of 2003-2004. During his engagement as guest faculty, the respondent applied for the post of Lecturer in the Department of Chemistry in response to an advertisement published by the appellant herein. The respondent appeared before the Selection Committee on 15.10.2003, and he was recommended for the appointment along with other candidates. The Executive Council of the University approved the recommendation of the selection committee in its meeting held on 25.11.2003. An offer letter was issued to the respondent on 16.12.2003. The respondent accepted the offer by a communication dated 18.12.2003 which led to issuance of an appointment letter dated 23.12.2003 calling upon the respondent to report for duty on 06.01.2004. The respondent accepted the appointment letter and informed the appellant herein by a letter dated 24.12.2003 that he would join his duties on 06.01.2004. It is also the case of the respondent that post his appointment, the appellant asked him to submit his nomination for provident fund under the old scheme and P.F. A/C No.G-2818 as well as I.D.No.FM 2087 was given. It is also an admitted fact that the respondent submitted his nomination on 21.09.2004 for the provident fund scheme on the prescribed format

provided by the University. The University also deducted the amount from the petitioner's salary in terms of the old provision, upto August, 2009. It is also admitted that the Government of India introduced the New Pension Scheme in the budget of the year 2003-04, which was to take effect from 01.01.2004. The University notified the NPS on 15.9.2004. However, it was only on 3.8.2009 that the University issued a circular asking individual subscriber who joined the University on or after 1.1.2004 to submit their application for the New Pension Scheme.

7. A representation made by the respondent for being considered under the old pension scheme was rejected, which has led to the filing of a writ petition, which was allowed and hence the present appeal has been filed.

8. Learned counsel appearing for the appellant submits that it is not in dispute that the respondent joined the services of the college on 06.01.2004 and thus, his rights stand crystalized on the said date, by which time the New Pension Scheme had come into force and thus, the scheme would apply to the respondent and the respondent cannot take benefit of the old scheme, merely because in the letter of appointment it had been mentioned that he would be governed by the GF fund-cum-gratuity scheme. It is further submitted, relying on the old pension scheme that qualifying service of a Government servant commences from the date he takes charge of the post, to which he is first appointed either substantively or in officiating or temporary capacity. Rule 13 of Old Pension Rules reads as under:

> "13. **Commencement of qualifying service**:
> Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date

he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:

Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post:"

9. Learned counsel for the appellant submits that the respondent is estopped from raising a plea, that he would be governed by the Old Pension Scheme, inasmuch as, he had joined the service of the appellant on $6^{th}$ January, 2004 and the delay in issuing appointment letter or the date of joining was never questioned by him or challenged in any Court. If the respondent was aggrieved by the fact that his advertisement had been issued much earlier, but the actual joining got delayed, it was well within his right to challenge the same and seek a relief of giving retrospective effect to his appointment. Having not done so, he cannot take the benefit of Old Pension Scheme by an indirect method of questioning the delay in joining.

10. Ms.Khair has also placed reliance on condition no.11 of the New Pension Scheme (NPS) in support of his contention that service of an employee shall be deemed to commence from the working day on which an employee reports for duty. Condition no.11 is reproduced below:

"11. Commencement of service: Except otherwise provided by or under these Regulations, "service" of an employee shall be deemed to commence from the working day on which an employee reports for duty in an appointment covered by these Regulations at the place and time intimated to him by the appointing authority."

11. Learned counsel submits that the judgment sought to be relied upon by

the learned Single Judge would not apply to the facts of the present case.

12. Mr.Chander Shekhar, counsel appearing for the respondent submits that the issues sought to be urged by the learned counsel for the appellant are no longer res integra. He relies on the decisions rendered in ***Avinash Singh vs. UOI*** decided on 26.05.2011 in W.P.(C) 5400/2010; ***Inspector Rajender Singh and others vs. UOI and others*** in W.P.(C) 2810/2016 decided on 27.03.2017 and ***Mr.Sanjay Kumar Thakur and others vs. NDMC and others*** 236 (2017) DLT 163 DB. Learned counsel further submits that there is no infirmity in the judgment passed by the learned Single Judge as the case of the respondent is fully covered by the decisions aforementioned in and relied upon paragraphs 13 & 14 passed by the learned Single Judge. SLP filed against ***Inspector Rajender Singh*** (*supra*) stands dismissed.

13. We have heard learned counsels for the parties.

14. In the case of ***Inspector Rajender Singh*** (*supra*), the Division Bench has observed as under:

> "17. Had the petitioners and others, who opted for the Border Security Force, known that by opting for the Border Security Force, they would have been denied the benefit of the Old Pension Scheme, they would perhaps have not opted for the Border Security Force.
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> 18. In our view, basic terms and conditions of service, such as the right to receive pension upon superannuation, as applicable at the time of notification of the posts, cannot later be altered to the prejudice of the incumbents to the post, after commencement of the selection process.
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> 19. One Parmanand and 24 others filed a writ petition being WP(C) No.3834/2013. The said writ petition was disposed of by a judgment and order dated 12.05.2015 of a Division

> Bench of this Court. Relying on an earlier judgment of this Court dated 26.05.2011 in WP(C) No. 5400/2010 (Avinash Singh Vs. Union of India and Others) and in WP(C) No. 327/2012 (Navin Kumar Jha Vs. Union of India and Others), the Division Bench allowed the writ petition and directed that the petitioners, who had joined service after 01.01.2004 be given the benefit of the Old Pension Scheme."

15. The reading of the aforesaid judgments leaves no room for doubt that what is relevant is the date of the advertisement for appointment and the terms and conditions set out in offer of appointment.

16. In the letter of offer of appointment of the respondent, condition Nos.13 and 14 read as under:

> "13. You will be governed by the ***G. P. Fund cum Gratuity Scheme*** for which you may indicate the rate of your subscription in accordance with the provision of the above scheme.
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> 14. If you accept the appointment ***on the above terms and conditions*** you are requested to intimate your acceptance to the undersigned through proper channel immediately and report your duty on ***06.01.2004 positively***. Otherwise your appointment will be deemed cancelled and the offer of appointment/appointment letter will be given to the next candidate on the panel."

17. A perusal of the said letter clearly shows that in paras 13 & 14, it is clearly mentioned that the respondent would be governed by the GPF-cum-Pension-cum-Gratuity Scheme and he was also required to indicate the rate of subscription in accordance with the provisions of the said Scheme. After intimating the terms and conditions of his appointment, he was called upon to convey his acceptance. Looking at the Pension Scheme, which was applicable to him and assured by the fact that his

post retirement life was secured with pension, the respondent had accepted the appointment. It is, thus, not open for the appellant to contend that the respondent will be governed by the New Pension Scheme. In fact, the appellant was itself of the view, after the appointment of the respondent, that it would be the Old Pension Scheme which will govern his case, since they had called upon the respondent to submit his nomination as per the Old Scheme. A Provident Fund account was opened and account number was given to him and upto August, 2009, deductions were being made towards this account under the Old Pension Scheme.

18. We have already noted above that it is the date of advertisement and the *'offer of appointment'* which would be crucial in determining the terms and conditions, since the date of joining is only a fortuitous circumstance. As an illustration, two employees can be selected together under a common advertisement and a common selection process, but for some reason, one may join early and the other may join later. Can it be then said that a fortuitous circumstance of joining will determine the terms and conditions of employment of these two employees? Answer to this is obviously a 'No'. In fact, we are fortified in our view by a judgment of a Co-ordinate Bench of this Court in the case of ***Avinash Singh (supra)*** wherein this Court, while dealing with almost a similar situation, had clearly held that the date of joining is only fortuitous. Relying on this judgment, another Co-ordinate Bench of this Court, while dealing with the applicability of the New Pension Scheme viz. the Old Pension Scheme, has held that the date of joining will not determine the applicability of this Scheme. The Bench has

observed that the New Pension Scheme was applicable from 01.01.2004, while the advertisement was prior and the selection process had started earlier, and only because the joining took place later, i.e. after 01.01.2004, the employees cannot be deprived of the benefits of the Old Pension Scheme. This judgment in the case of *Parma Nand Yadav & Ors. V. Union of India & Ors.*, in W.P.(C) No.3834/2013 decided on 12th February, 2015, had been subsequently followed in various cases by other Division Benches of this Court. The rationale of this finding is, that when a person applies for job, it is the advertisement coupled with the *'offer of appointment'* which indicates the terms and conditions under which an employee would have to work and what would be his entitlements. Most important, amongst the terms, are the post retirement benefits that one looks at, as this is the security which a person looks for in a Government job. If the advertisement indicates that the employee would be entitled to a secured future and pension would be granted and he opts for the job, would it be fair to deprive him of those terms and conditions of his job, only because by the time he physically joins, a scheme has undergone a change? Apart from the unfairness attached to this, in service jurisprudence, it cannot be accepted that the terms and conditions on which a person is employed can be changed to his detriment, only on the ground that a new Scheme/Rule has come prior to his date of joining. Obviously if the respondent would have known that he will not get pension after retirement under the Old Pension Scheme, he may not even have opted for this job. We, thus, find no reason to take a different view from the one taken by the other Co-ordinate Benches of this Court.

19. We agree with the view taken by the learned Single Judge. There is no merit in the present appeal and the same is hereby dismissed.

20. The respondent had submitted his acceptance on 18th December, 2003 and the appointment letter was issued on 23rd December, 2003. He would, thus, be governed by the Pension Scheme which was in force on the date of his appointment, which was the GPF-cum- Gratuity Scheme (the Old Scheme).

21. NPS was applicable from 1.1.2004 and the respondent cannot be covered under this Scheme. Accordingly, the retiral benefits of the respondent will be disbursed as per the Old Pension Scheme, within a period of six weeks from the date of receipt of a copy of this order by the appellants.

22. All pending applications are dismissed in view of the dismissal of the appeal.

**G.S. SISTANI, J**

**JYOTI SINGH, J**

**MAY 24, 2019**
ssc/rb/s