(2018) 02 AHC CK 0003

In the Allahabad High Court

Case No : 1709 of 2013

Narendra Narian Mishra APPELLANT

Vs

State Of U.P. Thru Secry. And Others RESPONDENT

Date of Decision : 13-02-2018

Acts Referred:

Citation : (2018) 02 AHC CK 0003

Hon'ble Judges : Amreshwar Pratap Sahi, Rajeev Misra

Bench : Division Bench

Advocate : S.K.Yadav, Sunil Kumar Mishra, Vikas Budhwar

Final Decision : Allowed

Judgement

1. Challenge in this special appeal is to the judgement and order dated 1.10.2013, passed by the learned Single Judge, whereby, the writ petition filed by the petitioner-appellant has been dismissed. The petitioner-appellant''s grievance is that his past services after absorption as a government servant are not being counted for grant of pensionary benefits upon retirement.

2. We have heard Mr. Vikas Budhwar along with Mr. S.K. Mishra, learned counsel for the petitioner-appellant and Raghvendra Dwivedi, the learned Standing Counsel representing the respondents. On the matter being taken up today, learned Standing counsel filed a supplementary counter affidavit which is taken on the record.

3. After having gone through the record, we specifically asked the learned Standing Counsel as to whether the cost of Rs. 10,000/- as earlier directed to be paid by the State repondents, has been deposited or not. We drew the attention of the learned Standing Counsel to the orders dated 24.11.2017, 9.1.2018, 16.1.2018 and 29.1.2018. Learned Standing Counsel accordingly prayed that the matter be taken after lunch so that he may verify the position. The learned Standing Counsel has produced the photo copy of the bank draft of Rs. 10,000/- payable to the Registrar General which is said to have been deposited today itself

vide tender dated 13.2.2018. Accordingly, we have proceeded with the hearing of the appeal.

4. The petitioner-appellant filed C.M.W.P. No. 64558 of 2010 for the following relief:- "It is, therefore most respectfully prayed that this Hon''ble Court may graciously be pleased to:

a. issue a writ, order or directio in the nature of certiorari quashing the order dated 30.11.2007 passed by the Respondent No.2.

b. Issue a writ, order or direction in the nature of mandamus directing the Respondents to count the service from 14.9.1972 to 26.3.1996 rendered in the Bundelkhand Vikas Nigam, Jhanis may be counted for the purpose of pension

c. Issue any other writ, order or direction, which this Hon''ble Court may deem thing fit and proper under the facts and circumstances of the case.

d. Award cost of the petition to the petitioner."

5. The case of the petitioner-appellant as set out in the writ petition is to the effect that the petitioner-appellant was appointed on the post of supervisor in Bundelkhand Vikas Nigam, Jhansi on 14.9.1972. While the petitioner-appellant was in service, the State Government took a decision to wind up nine Divisional Development Corporations (Vikas Nigams). Accordingly, a Government Order dated 11.11.1993 was issued, whereby, nine Divisional Development Corporation including the Bundelkhand Vikas Nigam, Jhansi were directed to be closed. Subsequent to the aforesaid Government Order dated 11.11.1993, the petitioner-appellant who continued in the services of the Bundelkhand Vikas Nigam, Jhansi upto 26.3.1996 was appointed on the post of Collection Amin, Tehsil Charkhari, District Jhansi. A perusal of the appointment letter dated 26.3.1996 will go to show that the appointment of the petitioner-appellant was in terms of the Government Order dated 11.111.1993 itself. As such, the petitioner-appellant was absorbed on the post of Collection Amin on account of his becoming a retrenched employee of the Bundelkhand Vikas Nigam, Jhansi. The petitioner-appellant further complied with the formalities so that there is no obstacle in the payment of pension to the petitioner-appellant. Having completed the requisite formality as directed by the superior officers which is evident from the averments made in paragraphs 10 to 14 of the writ petition, the petitioner appellant submitted letter dated 3.12.2005 and 12.1.2006 to the effect that the services rendered by him in the erstwhile Bundelkhand Vikas Nigam, Jhansi be counted for calculating his pension. This prayer made by the petitioner-appellant came to be rejected by means of an order dated 30.11.2007, passed by the respondent No. 2 The Deputy Secretary, Department of Revenue, Government of Uttar Pradesh, Lucknow. Thus feeling aggrieved by the order dated 30.11.2007, the petitioner-appellant filed the above mentioned writ petition.

6. A perusal of the impugned order dated 30.11.2007 will go to show that the only reason assigned for rejected the claim of the petitioner-appellant for not

counting his past services for the purposes of pension is the past services of the petitioner in the corporation are not liable to be counted. When the writ petition came up before the learned Single Judge, a counter affidavit was called for. A detailed counter affidavit was filed by the State respondents. The plea taken in the counter affidavit was to the effect that the Government Order dated 11.11.1993 was subsequently modified by the Government Order dated 9.7.1998. The Government Order dated 9.7.1998 was counted vide G.O. dated 28.12.2001, whereby, the word "Corporation" occurring in the Government Order dated 10.7.1998 was substituted by the words "autonomous bodies". Thus it was pleaded that on account of the aforesaid, the Government Order dated 9.7.1998 which provides the method and methodology regarding the claim of benefit to certain class of employee as a Government Servant, shall not be applicable to the petitionerappellant, as the petitioner-appellant, as the petitioner-appellant was previously working in a corporation and not an autonomous body.

7. Placing reliance on the aforesaid facts, the learned Single Judge dismissed the writ petition filed by the petitioner-appellant vide judgement and order dated 1.10.2013.

8. When the present special appeal came up for admission, a Division Bench of this Court of which one of us (Hon''ble A.P. Sahi,J) was a member, after taking into consideration the arguments raised, passed a detailed order dated 24.11.2017, which is extracted herein below:- "Heard Sri Vikas Budhwar, learned counsel for the appellant and learned Standing Counsel for the State. This appeal arises out of the judgment of the learned Single Judge whereby the claim of the appellant for counting his services rendered in the Bundelkhand Development Corporation, Jhansi (Jhansi Development Corporation) for the purpose of post retiral benefit and other benefits has been refused. The learned Single Judge has upheld the order dated 13.9.2007 passed by the State Government rejecting the claim of the appellant. It is undisputed that the appellant questioned the correctness of the said order on several grounds including the ground that such benefit was available to the appellant in terms of Clause 5 of the Government order dated 11.11.1993. A copy of such order is Annexure-1 to the counter affidavit. Said clause clearly provides that upon absorption, the relevant rules pertaining to Government Servants would apply to such absorbed employees including that of pensionary benefits. The appellant''s claim having been turned down gave rise to the filing of Writ Petition No. 64558 of 2010 wherein a prayer was made for quashing of the said order. It was further prayed that Clause 5 of the Government Order dated 11.11.1993 clearly covers the claim of the appellant. A counter affidavit has been filed on behalf of the State and in para-4 thereof the State narrated facts about issuance of the Government order and acknowledging the content of Clause 5 referred to hereinabove. The State Government, however, referred two other Government Orders dated 10.7.1998 and 28.12.2001 whereby clarifications were issued that such pensionary benefits would not be available to the erstwhile employees of the Corporation. Counsel for the appellant contends that neither the Government order of 1998 nor of 2001 in

anyway supersede, rescind or modify clause 5 of the Government Order dated 11.11.1993, in asmuch as, there is no reference of the said Government Order in the subsequent Government Orders of 1998 or 2001. It is further submitted that the said Government orders of 1998 and 2001 have been distinguished by the learned Single Judge in the judgment rendered in Writ Petition No. 46080 of 2012, Gaya Kumar Katiyar Vs. State of UP decided on 7.2.2017. He has further submitted that apart from this a Division Bench of this Court at Lucknow in Writ Petition (S/B) No. 65 of 2011, Keshav Ram Pandey Vs. State of UP through Secretary Agriculture Education Deptt, vide judgment dated 26.4.2013 held that the Government Order dated 11.11.1993 extends such benefits and, therefore, non inclusion of the service rendered in the corporation is unlawful. The writ petition was allowed and the order passed therein was quashed with a direction to include such services. It has further been pointed out that the said judgment was taken in appeal in SLP NO. 12911 of 2014, State of UP Vs. Keshav Ram Pandey before the Apex Court and a three Judges Bench vide order dated 12.9.2014 dismissed the SLP, the ratio whereof deserves to be applied on the facts of the present case. Learned Standing Counsel has opposed the appeal and has urged that the learned Single Judge while dismissing the writ petition has arrived at the correct conclusion inasmuch as the Government Orders of 1998 and 2001 clarify the non applicability of counting of such services for pensionary benefits and there is no error in the judgment of the learned Single Judge. We have prima facie considered the aforesaid submissions raised and we find that the State Government has nowhere explained as to why the provisions of Clause 5 of the Government Order dated 11.11.1993 will not continue to bind the State Government for extending such benefits in the light of the submissions that have been raised on behalf of the appellant. In the present appeal as well, a counter affidavit has been filed on behalf of the State Government wherein the Government Order dated 11.11.1993 has been referred to in paragraph-4 thereof but no explanation is coming forth about the submissions raised on behalf of the appellant. We also prima faice find that so far as the judgment of the learned Single Judge in the case of Gaya Kumar Katiyar (Supra) is concerned, the same may not come to the aid of the appellant as distinguishing feature appears to have been recorded ignoring the second part of paragraph 1 of the Government order dated 10.7.1998, which categorically has been made applicable in respect of employees of State Government undertakings having been absorbed in State Government services directly. Thus the said judgment may not come to aid of the appellant, but the fact remains that Clause 5 of the Government Order dated 11.11.1993 having not been been modified or repealed by the Government orders of 1998 and 2001, the State Government has to give explanation on the said issue. We, therefore, direct the learned Standing Counsel to call upon the respondent no. 1 to give a categorical reply of the aforesaid submissions raised by filing an appropriate supplementary counter affidavit in this appeal. Learned Standing Counsel shall also inform the court of any other decisions taken either by this Court or by the Apex Court with regard to the issue presently involved by the next date fixed. Learned Standing Counsel prays for three weeks time to file a supplementary counter affidavit. Time prayed for is granted. List after expiry of three weeks. A copy of this order be supplied to the learned Standing Counsel on payment usual charges within a week."

9. Thereafter, the special appeal was taken up on 9.1.2018, and as on that date, the learned Standing Counsel did not file the supplementary counter affidavit as directed vide earlier order dated 24.11.2017, a cost of Rs. 10,000/- was imposed and the matter was posted for 16.1.2018. The order dated 9.1.2018 is reproduced herein below:- "This appeal was heard by a Division Bench upon being nominated to one of us (Hon. A.P. Sahi, J.) and an order was passed on 24.11.2017 on having noted all the arguments advanced. The learned Standing Counsel was granted three weeks'' time to file a supplementary affidavit in order to answer the query raised by the Court in the said order. Sri Dixit, learned Additional Chief Standing Counsel states that the letter for a reply from the State was dispatched by the Office of learned Standing Counsel on 01.12.2017, but none of the respondents have sent any instructions so as to respond to the order dated 24.11.2017. We direct the respondents as a last measure to respond to the order dated 24.11.2017 by Tuesday next i.e. 16.1.2018. The respondents, if, fail to send their instructions or give a reply, then, the appeal shall proceed and the respondents shall deposit a costs of Rs. 10,000/- before this Court. In the event the reply is filed, the costs would not be deposited. Let a copy of this order be given to the learned Additional Chief Standing Counsel today for being communicated to all the three respondents."

10. On the next date, the learned Standing Counsel again expressed his inability for non compliance of the order dated 9.1.2018 and prayed for accommodation. Accordingly, the court passed the following order on 16.1.2018:- It is stated by the learned Additional Chief Standing counsel that the Under Secretary of Government of Uttar Pradesh has made a request to the learned Chief Standing Counsel seeking further one month''s time in order to study the interplay of the government orders referred to in the order dated 24.11.2017 and further one month''s time has been sought for filing a reply. The District Magistrate, Jhansi has despatched a letter entrusting the pairvi of the case to one Sri Sunil Kumar, Nayab Tehsildar, District Jhansi who has attended the Chief Standing Counsel''s office. The order dated 24.11.2017 had been dispatched by the learned Chief Standing Counsel''s office and after having noticed the same and on 9th January, 2018, we had passed a clear order that if the affidavit is not filed by 16.01.2018 a cost of Rs. 10,000/- shall be deposited before this Court but the cost need not be deposited, if the reply is filed. No compliance has been made by filing a reply. The concerned under Secretary shall issue necessary instructions for deposit the cost of Rs. 10,000/- by the next date fixed and also file a reply. In the event of any failure notice of contempt may be issued against Sri Sunil Kumar the under Secretary as well as other officials for non compliance. List after ten days i.e. 29.01.2018. Sri Vikas Budhwar has further invited the attention of the Court to a recent Division Bench judgment dated 12th December, 2017 in Kanta Prasad Kannaujiya Vs. State of U.P. & 2 others writ petition no.

58438 of 2015 where according to him a similar relief has been granted by this Court. Sri Dixit, learned Additional Chief Standing Counsel while filing the affidavit on behalf of the respondent shall also respond to the same. Copy of the order shall be provided today to the learned Standing Counsel for compliance."

11. Thereafter, the matter was taken up on 29.1.2018 and the Court passed a strong order deprecating the tendency on the part of the State respondents in not filing the supplementary counter affidavit nor depositing the cost of Rs. 10,000/- as earlier directed vide order dated 9.1.2018. We feel appropriate to reproduce the the order dated 29.1.2018: "In response to the order dated 16.01.2018 the Principal Secretary Government of U.P., Sri Suresh Chandra has sent a communication on 28th January, 2018 to the Chief Standing Counsel directing the District Magistrate, Jhansi to get the cost of Rs.10,000/- deposited in Court. It is informed by Sri V.C. Dixit, learned Additional Chief Standing Counsel that the said cost is in the process of being deposited today itself through Sri Vijay Bahadur Singh Additional District Magistrate, Finance and Revenue Department, Jhansi. The said letter also makes a request for further fifteen days time in order to get the situation clarified from the Finance Department as according to the information already received, the Government order dated 11.11.1993 is still in force, and therefore in order to ascertain the correct status of the impact of the Government order dated 10th July, 1998 and 28th December, 2001 the opinion of the Finance Department would be necessary. Having considered the said request made by the Principal Secretary, we direct that the matter shall come up again on 13th February, 2018 by which date the entire exercise be completed and the affidavit be filed or else this Court will have to proceed to summon the officials or call upon the Chief Secretary to take action in the matter. The learned Standing Counsel shall produce the receipt of deposit of the cost on the next date fixed."

12. Learned Standing Counsel drew the attention of the Court to the Supplementary Counter affidavit filed today and particularly, invited the attention of the Court to paragraphs 7 and 8 of the said supplementary counter affidavit. On the basis of the same, it was submitted before us that the petitioner-appellant having worked in the corporation, the services rendered by him in the corporation i.e. Bundelkhand Vikas Nigam, Jhansi are not liable to be counted for the purpose of pension. Further placing reliance upon Clause 5 of the Government Order dated 11.11.1993, it was submitted that the Rules and Regulations applicable to the State Government employees which also includes the Rules relating to the payment of G.P.F., Leave and Pension shall become applicable upon such absorbed employees only from the date of absorption. As the petitionerappellant does not fulfil the eligibility criteria for the payment of pension from the date of his absorption, the grievance raised by the petitioner that the services rendered by him in the corporation be counted for the payment of pension, is wholly misconceived.

13. Learned counsel for the petitioner-appellant Mr. Vikas Budhwar, in opposition

to the submissions made by the learned Standing Counsel, has submitted before us that the petitionerappellant was initially appointed in the Bundelkhand Vikas Nigam, Jhansi on 4.9.1972 and worked there till 26.3.1996. Thereafter, the petitioner-appellant was absorbed and appointed as a Collection Amin vide appointment letter dated 18.3.1996 in terms of the G.O. dated 11.11.1993. Ultimately, the petitioner appellant superannuated on 30.11.1998 after having put in a total of 26 years 2 months and 16 days of service. The Government Order dated 11.11.1993 is specific in nature and it relates only to the employees of nine named Divisional Development Corporations (Mandaliya Vikas Nigam) including the Bundelkhand Vikas Nigam, Jhansi where the petitionerappellant was previously working. He further submits that Clause 5 of the aforesaid Government Order clearly provides that upon the employees of such development corporations having absorbed as State Government employees, the Rules applicable to the State Government employees shall become applicable to them, which does not mean that the Rules shall become applicable from the date of absorption. To the contrary, the effect of Clause 5 of the Government Order dated 11.11.1993 will be that after the passing of order of absorption, the retrenched employees shall stand governed by the Rules applicable to the State Government employees. Elaborating his arguments, he further submits that the impugned order dated 30.11.2007, passed by the respondent No. 2 the Deputy Secretary, Department of Revenue, Government of U.P., Lucknow, contains only a bald conclusion and is devoid of any reason. On what ground the services rendered by the petitionerappellant in Bundelkhand Vikas Nigam, Jhansi are not liable to counted for the purpose of pension, is conspicuous by its absence. He relied upon the judgement of the Apex Court in the case of Mahindra Singh Gill V. Chief Election Commissioner, AIR 1987 SC 851, in support of the proposition that the validity of an order is to be judged on the basis of the reasons contained in the order itself and not on the basis of the reasons contained in the affidavit filed before the Court.

14. We could have allowed the present appeal on the aforesaid short ground and remanded the matter to the respondent No. 2 for consideration, afresh. However, looking into the nature of the controversy, and the averment contained in paragraphs 11 of the short counter affidavit filed today, we have proceeded to examine the case of the petitioner-appellant, on merits. It will be apt to reproduce paragraph 11 of the short counter affidavit filed today for ready reference. "That however, further clarification if any required by the Hon''ble Court may be clarified as per desire of Hon''ble Court."

15. After having heard the learned counsel for the parties at length, the undisputed facts which emerge from the record are that the petitioner-appellant was a regular employee of the Bundelkhand Vikas Nigam, Jhansi. He was appointed on the post of supervisor on 14.9.1972 and continued to work with the corporation till 29.3.1996. During the course of employment of the petitioner-appellant, a decision was taken by the State Government to close nine Divisional Development Corporations (Mandaliya Vikas Nigam). Accordingly, the State

Government issued the G.O. dated 11.11.1993 whereby, the named nine Divisional Development Corporations (Mandaliya Vikas Nigam) including the Bundelkhand Vikas Nigam, Jhansi where the petitioner appellant was previously working were directed to be closed and a complete procedure with regard to placement of the employees of these corporations and the benefits available to them were provided for. Accordingly, the petitioner-appellant was appointed as a Collection Amin in terms of the Government Order dated 11.11.1993. Clause 5 of the aforesaid Government Order clearly provides that the employees after they have been absorbed in the services of the State Government, the Rules applicable to State Government employees regarding G.P.F., Leave and Pension shall automatically become applicable to such employees. Clause 5 of the aforesaid G.O. dated 11.11.1993 cannot be restricted to mean that the Rules applicable to the State Government employees shall become applicable to the employees appointed under the G.O dated 11.11.1993 from the date of absorption and appointment under the G.O. dated 11.11.1993. To the contrary, the the purpose behind Clause 5 of the aforesaid G.O. being a beneficent piece of legislation will be to grant benefit to such employees who have been appointed under the G.O. dated 11.11.1993 treating them to be Government employees from the date of their initial appointment. This view which we are taking is also reflected from the object as well as Clause 5 of the Government Order dated 11.11.1993 itself.

16. The Government Order dated 11.11.1993 being specific as its applicability is confined only to the employees of the nine named Divisional Development Corporations will continue to hold the field unless the same is reviewed, rescinded, recalled or modified specifically. There being no other Government Order dealing with the G.O. dated 11.11.1993, the same continues to hold the field and does not stand altered or modified with the issuance of the G.O. dated 10.7.1998 as corrected vide G.O. dated 28.12.2001. The Government Order dated 10.7.1998, in the opinion of the Court, will not be applicable to the case of the petitioner-appellant, as per the condition contained in Clause 2 of the Government Order itself. The aforesaid Government Order deals with such class of employees who have come on transfer, direct recruitment and deputation from autonomous organizations to the State Government or vice versa. Admittedly, the petitioner-appellant has been appointed upon absorption in terms of the G.O. dated 11.11.1993 on account of the closure of the Bundelkhand Vikas Nigam, Jhansi. Therefore, the G.O. dated 10.7.1998 will not be applicable to the case of the petitioner-appellant as it relates to the employees of autonomous bodies and not of corporation. Furthermore, the aforesaid Government Order no where modifies the Government Order dated 11.11.1993, as such, the same shall continue to hold the field. The learned Single Judge while dismissing the writ petition filed by the petitionerappellant completely overlooked the aforesaid facts and the legal consequences emerging out of the same issues which clearly supported the case of the petitioner-appellant.

17. During the course of hearing, learned counsel for the petitionerappellant

drew the attention of the Court to the Division Bench judgement of this Court dated 12.12.2017, in Writ A No. 58438 of 2015 (Kanta Prasad Kannoujiya Vs. State of U.P. and 2 Others) wherein, in similar circumstances, the writ petition was entertained and was allowed. The relevant portion of the aforesaid judgement is reproduced herein below:- "In view of the aforesaid facts and circumstances of the case, we are of the opinion that notwithstanding the rescinding of the absorption Rules, 1991 and the issuance of the Government Orders dated 10.7.1998 and 28.12.2001, the Government Order dated 11.11.1993 stands intact and unmodified entitling the petitioner for the benefit of pension like any other government servant and that for the purpose of computing his qualifying services, the services rendered by him in erstwhile Allahabad Mandal Vikas Nigam Ltd. has to be added to his services in Deen Dayal Upadhyay Rajya Gramya Vikas Sansthan, Lucknow.

Accordingly, the impugned order 9.9.2015 is quashed and the respondent no. 1 is directed to add the services rendered by the petitioner in the Allahabad Mandal Vikas Nigam Ltd. from 15.7.1977 till 6.3.2005 in the service rendered by him in Deen Dayal Upadhyay Rajya Gramya Vikas Sansthan, Lucknow and to determine the pension payable to the petitioner accordingly within a period of three months. The writ petition is allowed."

18. We have carefully gone through the aforesaid judgement and find that the aforesaid judgement is squarely applicable in the facts and circumstances of the present case.

19. There is another aspect of the matter which needs to be considered by us. The State Government has framed the U.P. Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991. Rule 3 of the aforesaid Rules speaks of absorption. The Government Order dated 11.11.1993 under which the petitioner-appellant was appointed also refer to the Rules of 1991. Therefore, the meaning of the term ''Absorption'' and the effect of absorption shall be the same under the aforesaid Rules/G.O. The word ''absorption'' means to take in. On absorption an employee becomes part and parcel of the department absorbing him and partakes the same colour and character of the existing employees of the department, vide Kartar Singh Vs. State of Punjab, as reported in AIR 1990 Punj & Har 1, 17 (FB). Therefore, the effect upon absorption will be that an employee shall be entitled to all the benefits as if he was an employee of the department in which he has been absorbed. A similar controversy with regard to the employees of the U.P. State Cement Corporation came to be considered by the Apex Court in the case of Sunil Kumar Verma and Others Vs. State of U.P. and Others, as reported in 2016(1) SCC 397. Paragraph 23 of the aforesaid judgement which is relevant for the controversy, in hand, is reproduced herein below:- "In view of the aforesaid analysis, we find no reason that the appellants herein should not reap the benefits of absorption and, accordingly, it is directed that they shall be absorbed by the State Government as per their seniority and be given the benefit of

increments, within eight weeks hence. Needless to say, they will be entitled to their seniority as per the prevalent rules. If anyone has been retired from service, he shall get the retiral benefits inclusive of pension."

20. Thus, in view of the aforesaid discussions, the present special appeal is liable to succeed. Accordingly, the same is allowed. The impugned order dated 30.11.2007, passed by the Respondent No. 2 (Annexure -9) to the writ petition is quashed. Consequently, the impugned judgement and order dated 1.10.2013, passed by the learned Single Judge, is set aside. The respondents are directed to add the services rendered by the petitioner in Bundelkhand Vikas Nigam, Jhansi for the purpose of calculating his pension and other post retiral benefits. Such exercise shall be completed within a period of two months from the date of production of certified copy of this order before the respondent No.2 who shall inform the petitioner-appellant of the same by registered speed post. The consequential payment shall be paid within a further period of two months, thereafter. With the aforesaid direction the special appeal stands allowed.