

(2016) 10 AHC CK 0158
In the Allahabad High Court
Case No : C.M.W.P. No. 49126 of 2016

Pooran Singh Manral

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 06-10-2016

Acts Referred:

Uttar Pradesh Government Service (Retirement Benefits) Rules, 1961 — Rule 3(8)

Citation : (2017) 3 ADJ 706 : (2017) 3 ALLJ 52 : (2017) 121 ALR 88 : (2017) 153 FLR 411 : (2017) LIC 1525

Hon'ble Judges : Sudhir Agarwal and Dr. Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Kushmondeya Shahi and Achal Singh, Advocates, for the Petitioner;
C.S.C, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal and Dr. Kaushal Jayendra Thaker, JJ.—; Heard Sri Kushmondeya Shahi, learned counsel for petitioners and learned Standing Counsel for respondents.

2. Petitioners are seeking mandamus commanding respondents to count previous services of petitioners rendered in Uttar Pradesh State Brassware Corporation Ltd., Moradabad (hereinafter referred to as "UPSBCL") for purposes of pension and other retiral benefits.

3. Learned counsel for petitioners placed reliance judgment of Division Bench in "Hridayesh Dayal Srivastava v. State of U.P." Service Bench No. 410 of 2010 decided on 04.04.2012 and in some other matters.

4. However, we find no merit in the claim made by the petitioners. UPSBCL was a company incorporated under the provision of Companies Act, 1956 (hereinafter referred to as "Act 1956"), though owned by State of U.P.

5. The petitioner-1, Pooran Singh Manral, was appointed as Field Officer

(UPSBCL) on 12.06.1979 in the pay scale of Rs. 400-750 and then promoted as Assistant Procurement Officer on which post he continued till his retrenchment on 15.03.1994 and at the time of retrenchment he was working in the Pay Scale of Rs. 2000-3200.

6. Petitioner- 2 Hari Ram Verma was also appointed in UPSBCL as Sales Assistant Cum Show Room Incharge in the Pay Scale Rs. 350-700. Subsequently, he was promoted on the post of Senior Show Room Incharge in the Pay Scale of Rs. 1600-2660 and was retrenched from the said promoted post on 15.03.1994.

7. After retrenchment, petitioners were given opportunity of absorption on a post, under State Government, inasmuch as both petitioners were appointed as Assistant Consolidation Officer vide order dated 22.06.1995 in the pay scale of Rs. 1400-2300 on substantive basis initially on probation for two years, and subsequently confirmed. The names of petitioners in order dated 22.06.1995 (Annexure-3) to the writ petition are shown at serial numbers-9 and 14. Petitioners then promoted as Consolidation Officer vide order dated 22.07.1997 in the pay scale of Rs. 2000-3200 and on attaining age of superannuation under Fundamental Rule 56, they retired on 31.12.2009 and 31.08.2014, respectively. Pay protection has been made when pay was fixed on appointment in Government service. Service rendered by petitioners in UPSBCL has not been counted as "qualifying service" for the purpose of computation of pension and other retiral benefits and this is illegal and arbitrary.

8. It is contended that the aforesaid approach on the part of respondents is contrary to law laid down in Hridayesh Dayal Srivastava v. State of U.P. (supra) and several other judgments, rendered following it i.e. Raj Mani Singh & Another v. State of U.P. & Others Writ Petition No. (SS) 53 of 2014 decided on 08.04.2015, Dev Pratap Pandey v. State of U.P. and Others, Writ Petition No. (SS) 6264 of 2013 decided on 10.03.2014, State of U.P. v. Dev Pratap Pandey, Special Appeal (Defective No. 417 of 2014) decided on 22.07.2015 and Supreme Court order dated 22.07.2016 dismissing Special Leave Petition CC No. 22538-22539 of 2015 against Division Bench judgment in State of U.P. and Others v. Dev Pratap Pandey (supra).

9. Learned Standing Counsel on the contrary submitted that benefit of absorption and pay protection etc. was allowed to petitioners in terms of relevant rules applicable at the time of absorption but for "qualifying service" for pension and retiral benefits, provisions of Civil Service Regulations and U.P. Government Service (Retirement Benefits) Rules, 1961 (hereinafter referred to as "Rules, 1961") shall be applicable and unless there is a statutory provision entitling petitioners to count their service rendered in a Non-Government establishment i.e. a company (UPSBCL) which is not a department of Government, service rendered in such company cannot be said to "qualifying service" for the purpose of computation of pension and other retiral benefits.

10. We have to examine question, "whether services rendered by petitioners in

UPSBCL can be allowed to count as "qualifying service" for the purpose of pension and other retiral benefits."

11. Recruitment appointment and conditions of service on various posts in various departments of Government in State of Uttar Pradesh are governed by statutory Rules framed under proviso to Article 309 of Constitution of India. Since petitioners are not claiming appointment/absorption in a particular department and on a particular post, therefore, at this stage we are not referring to any particular law or particular set of Rules but would refer to relevant provisions as and when occasion arises in subsequent discussion.

12. Between 1985 to 1990, a number of undertakings/companies owned by State Government were closed on account of colossal losses, etc. A large number of employees were retrenched. In some matters, judicial orders were passed directing for absorption looking to general public interest and the fact that a large number of employees had rendered unemployed due to closure of such Government undertakings. In some matters, Court expressed doubts that in the teeth of statutory Rules governing recruitment and appointment of "retrenched employees" of companies or undertakings, not holding a civil post, whether can be directed to be appointed on a civil post or in Government service, governed by statutory Rules.

13. Faced with this situation, in exercise of power, under proviso to Article 309 of Constitution of India, Governor promulgated "The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991" (hereinafter referred to as "'Absorption Rules, 1991"), vide Notification dated 9th May, 1991. These Rules came into force immediately. Rules 2 and 3 thereof, read as under:-

"2. Unless there is anything repugnant in the subject or context, the expression-

(a) "appointing authority" in relation to any post for which an employee was retrenched means the authority empowered to make appointment to such post;

(b) "Public corporation" means a body corporate established or constituted by or under any Uttar Pradesh Act except a University or local authority constituted for the purpose of Local Self Government and includes a Government Company within the meaning of section 617 of the Companies Act, 1956 in which the State Government has prepondering interest;

(c) "retrenched employee" means a person who was appointed on a post under the Government or a public corporation on or before October 1, 1986 in accordance with the procedure laid down for recruitment to the post and was continuously working in any post under the Government or such corporation upto the date of his retrenchment due to reduction in, or winding up of, any establishment of the Government or the public corporation, as the case may be and in respect of whom a certificate of being a retrenched employee has been issued by his appointing authority.

(d) "service rules" means the rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive instructions issued by the Government, regulating the recruitment and conditions of service of persons appointed to the relevant service.

3. (1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force, the State Government may by notified order require the absorption of the retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees.

(2) The provisions contained in relevant service rules shall be deemed to have been modified to the extent of their inconsistency with the provisions made in the notified order referred to in sub-rule (1). (emphasis added)

14. Perusal of Absorption Rules, 1991 shows that State Government was empowered to issue a "notified order" requiring absorption of "retrenched employees" as defined under Rule 2 (c), in any post or services under Government. State Government in the said "notified order" is also empowered to prescribe procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employee. Rule 3(2) declares that provisions made in "notified order" shall prevail over service Rules of relevant post or cadre in which absorption is to be made and relevant service Rules shall be deemed to have been modified to that extent. The term "notified order" has been defined under Section 4(29A) of "The Uttar Pradesh General Clauses Act, 1904" (hereinafter referred to as U.P. Act, 1904), which reads as under:-

"4 (29-A). "notification" or "public notification" shall mean a notification published in the Gazette of the State, and the word "notified" shall be construed accordingly."

(emphasis added)

15. Notified order, therefore, when read in the light of Section 4(29-A) of U.P. Act, 1904, would mean an order which is published in Gazette of State. Said order, therefore, would partake nature of "statutory instrument" as defined under Section 4(42-B) of U.P. Act, 1904, which reads as under:-

"4(42-B). "statutory instrument" shall mean any notification, order, scheme, rule or bye-law issued under any enactment and having the force of law."

(emphasis added)

16. Absorption Rules, 1991, therefore, contemplates absorption pursuant to a "notified order" and not by mere administrative order issued in exercise of executive power under Article 166 of Constitution of India. We are not shown any such "notified order" issued in exercise of power under Rule 3(1) of Absorption

Rules, 1991 which may have effect of modifying existing service Rules of respective posts and services in which absorption may be made so as to have effect of modification thereof to the extent of otherwise provisions contained in a "notified order".

17. However there is a Government order which was issued after Absorption Rules, 1991 in relation to absorption of employees UPSBCL which is dated 27.05.1993. Copy thereof has been placed on record as Annexure-2 to the writ petition. Clause (5) thereof provides that statutory rules applicable to State Government employees in respect to provident fund, leave, pension etc. shall be automatically applicable to absorbed employees from the date of absorption. However, clause (6) specifically provides for protection of last pay at the time of absorption.

18. For ready reference we may notice here at that in all ten conditions have been stated in Government order dated 27.05.1993. Another order was issued on 21.05.1994 stating that said retrenched employees shall be given preference in future direct recruitment, made under the rules.

19. Before dealing with other aspects of the matter, we may find it appropriate to complete subsequent chronology and events, took place in respect to Absorption Rules, 1991.

20. The said Rules were rescinded by promulgating another set of Rules, vide Notification dated 8th April, 2003, i.e. ""The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Recession) Rules, 2003" (hereinafter referred to as ""Recession Rules, 2003"). Rule 3 of said Rules, reads as under:-

"3. (1) The Uttar Pradesh Absorption of Retrenched Employees of Government Rescission and Public Corporations in Government Service Rules, 1991 are hereby rescinded and as a consequence of such rescission.

(i) the right of a retrenched employee to be considered for absorption accrued under the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 but who has not been absorbed till the date of the commencement of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 shall stand terminated from such date.

(ii) the orders of the Government issued from time to time prescribing the norms of absorption for retrenched employees of a particular Government department or Public Corporation in Government Service and granting of consequential benefits including pay protection, shall stand abrogated from the date of the commencement of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003.

(2) Notwithstanding such rescission:-

(i) the benefit of pay protection granted to an absorbed retrenched employee prior to the date of the commencement of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 shall not be withdrawn.

(ii) a retrenched employee covered by The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 prior to the date of the commencement of The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003, but who has not been absorbed till such date shall be entitled to get relaxation in upper age limit for direct recruitment to such Group "C" and Group "D" posts which are out side the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous services in substantive capacity in the concerned Government Department or Public Corporation in completed years."

(emphasis added)

21. Recession Rules, 2003 declare rescission of Absorption Rules, 1991. Consequences of such rescission has been provided under Rule 3 (1), stating that right of a ""retrenched employee" accrued under Absorption Rules, 1991, but who has not been absorbed till 8th April, 2003, i.e. the date on which Recession Rules became effective, such accrued right of ""retrenched employee" shall stand terminated from the date of rescission i.e. 8th April, 2003.

22. Another consequence of Rescission Rules, 2003, stated in Rule 3(1)(ii) is that orders of Government, issued from time, to time prescribing norms for absorption of ""retrenched employees", shall stand abrogated from the date of enforcement of Rescission Rules, 2003 i.e. 8th April, 2003. Having said so, Rule framing authority has also saved certain benefits already granted. Rule 3 (ii) of Rescission Rules, 2003 provides following protections:-

(i) Benefit of pay protection already granted to an absorbed "retrenched employee" before enforcement of Rescission Rules, 2003, shall remain intact and such employee would continue to avail same and it shall not be withdrawn.

(ii) Retrenched employee covered by Absorption Rules, 1991 as it was upto the date of enforcement of Rescission Rules, 2003 who has not been absorbed till the date of rescission, shall be entitled to get relaxation in upper age limit for direct recruitment in Group "C" and "D" posts which are outside the purview of Uttar Pradesh Public Service Commission. This relaxation in upper age limit is confined to the extent such a "retrenched employee" has rendered continuous service in substantive capacity in public corporation in completed years or the Government department as the case may be.

23. Therefore, there are two types of protections which are saved in Rescission Rules, 2003. Firstly, pay protection already granted to those who are already absorbed. Secondly relaxation in the matter of upper age limit, to the extent one

has served in substantive capacity till the date of retrenchment in public corporation in completed years, for the purpose of direct recruitment under relevant Rules applicable to Group "C" and "D" posts which are outside purview of Uttar Pradesh Public Service Commission. No other benefit has been provided or saved and right, which may be claimed by "retrenched employee" governed by Absorption Rules, 1991, has been wiped out, with enforcement of Recession Rules, 2003. Aforesaid Rules, 2003 came into force on 8th April, 2003.

24. Due to different sets of litigation wherein several orders in different manners were issued, State Legislature intervened and issued U.P. Act No.26 of 2009 i.e. "Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act, 2009 (hereinafter referred to as "Recession Act, 2009"), published in Uttar Pradesh Gazette (extraordinary) dated 27th August, 2009. The statement of "Object and Reasons" of aforesaid Act says that retrenched employees of Government companies/undertakings sought their absorption against Group "B" posts which were within purview of Uttar Pradesh Public Service Commission and as per Government policy, absorption against such posts was not permitted and since situation became difficult, hence as a result thereof, Rules, 1991 were rescinded vide Rules, 2003. Still various Court cases have not left things very clear, therefore, State Legislature decided to promulgate Recession Act, 2009, to deal with the situation.

25. By Section 3 of Recession Act, 2009, Absorption Rules, 1991, have been rescinded and deemed to have been rescinded on 9th May, 1991 i.e. the date of enforcement of Absorption Rules, 1991. The consequences of said rescission and the extent of savings are also provided thereunder. Section 3 of Recession Act, 2009 reads as under:-

"3. Recession and savings.-(1) The Absorption Rules which was rescinded with effect from April 8, 2003 by the Rescission Rules shall be rescinded and be deemed to have been rescinded on May 9, 1991 and consequent upon such rescission:-

(a) the retrenched employees except those who were absorbed during the period from May 9, 1991 to April 8, 2003 shall have no claim with regard to their absorption under the said absorption rules or under any Government orders issued in regard thereto and their right regarding absorption accrued under the Absorption Rules shall be deemed terminated.

(b) the orders of the Government issued from time to time prescribing the norms of absorption for retrenched employees of a particular Government Department or Public Corporation in Government Service and granting of consequential benefits including pay protection shall stand revoked ab-initio.

(2) Notwithstanding such rescission,-

(a) the benefit of absorption provided to the retrenched employees absorbed

before April 8, 2003 under the provisions of the Absorption Rules, shall not be withdrawn.

(b) the benefit of pay protection granted to the retrenched employees absorbed prior to April 8, 2003 shall also be maintained.

(c) a retrenched employee covered by the Absorption Rules, but who has not been absorbed till April 8, 2003 shall be entitled to get relaxation in upper age limit for direct recruitment to such Group "C" and Group "D" posts which are outside the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous services in substantive capacity in the concerned Government Department or the Public Corporation in completed years."

(emphasis added)

26. By Section 4, Rules 2003 have been rescinded with effect from 8th April, 2003. Therefore, Recession Act, 2009 in fact has made entire slate clear which was initiated by Rules, 1991 and ended by Rules, 2003. Both the sets of Rules, from the date of their enforcement, have been rescinded by Rescission Act, 2009. In respect of Rules, 1991, there is a deeming clause, rescinding the same with effect from 9th May, 1991 but subject to some protection in Section 3.

27. Section 3(1)(a) of Recession Act, 2009 declares that except those retrenched employees, who were absorbed during 9th May, 1991 and 8th April, 2003, all "unabsorbed retrenched employees" shall have no claim with regard to their absorption under Absorption Rules, 1991 or under any Government Order issued in that regard and their right relating to absorption, accrued under Absorption Rules, 1991 shall be deemed terminated. Thus no protection has been made to a person not already absorbed till 8.4.2003. Section 3(1)(a) of Recession Act, 2009 bars any right of absorption to any retrenched employee governed by Absorption Rules, 1991, if not already absorbed. Now no such right survive.

28. Considering Recession Rule 2003, Absorption Rules 2009 and Recession Act, 2009, a Division Bench of this Court in Amal Kumar Ganguly v. State of U.P., Writ Petition No. 37146 of 1996 decided on 09.09.2016, after construing the aforesaid provisions, has observed that the only protection under the aforesaid Act is in respect to the pay protection and relaxation in upper age limit for direct recruitment of group C and D post.

29. In Hridayesh Dayal Srivastava (Supra), he was denied pay protection, though it was one of the conditions in Government order dated 11.11.1993 which provided for absorption of retrenched employees/officers of Auto Tractor Ltd. in U.P. Government Services. This fact is evident from the following extract of judgment:-

"The grievance of the petitioner is that in the year 1993 the Government of U.P. issued a G.O. No. 3/3/3/91-Karmik-2/93 on 11.11.1993 to absorb the retrenched employees/officers of ATL in U.P. Government Services with commitment that last pay drawn in ATL will be protected.

?...

After his absorption on the post of Junior Engineer, the petitioner's pay was fixed in the pay scale of Rs. 1400-3200/- and his pay was not protected which was the commitment of the Government in its G.O. Dated 11.11.1993."

(emphasis added)

30. With the aforesaid grievance, Hridayesh Dayal Srivastava filed a Writ Petition No. (S/B) 662 of 2002 and challenged order dated 25.07.2002, whereby his claim for protection of last pay drawn was rejected. Vide judgment dated 23.04.2008, writ petition was allowed, Court set aside order dated 25.07.2002, and directed State of U.P. to reconsider petitioner's case for revision of pay scale with all consequential benefits, keeping in view, directions, preferably within four months. Again thereafter his claim for protection of pay was rejected by order dated 24.10.2009 which was challenged in Writ Petition No. (S/S) 410 of 2010. Court considered only the question regarding protection of pay. In para- 19, 20 and 21 it said as under:-

"19. Therefore keeping in view the aforementioned legal position and the fact of the present case it is undisputed that the Board of Directors of ATL vide in its meeting dated 31.01.1990 had taken a decision to implement the report of the Equivalence Committee. Apart from it by the G.O. Dated 11.11.1993 the Government in para 6 of the said G.O. had made a commitment that the last salary drawn shall be protected.

20. The question which arises for consideration is whether the words "last salary drawn" is restricted to only the actual last salary drawn or it would include the salary which was actually due on the relevant date. There is no dispute to the fact that recommendations of the equivalence committee were adopted by the Board of Directors of ATL. Therefore the employer of the petitioner had accepted the revised pay scales. So in our considered view the "last salary drawn" shall include the salary to which employee was actually entitled or which was due to him in view of the decision of the Board of Director. In this case the employer had accepted the revised pay scales.

21. The matter of pay fixation of the petitioner was referred to the Finance Department and the Finance Department in its report dated 21.5.1997, which is Annexure no. 12, was of the opinion that the petitioner was drawing a basic pay of Rs. 1530. In the aforementioned report it was mentioned that had the salary of the petitioner was fixed in the revised pay scale then it would have come to Rs. 3187/- but the finance department recommended to fix the salary at Rs. 2300/-, which is the maximum of the pay scale of Rs. 1400-2300, in which petitioner was placed. But that by itself could not have been a ground to deny the said benefit to the petitioner. The difference of the pay scale and the actual pay to which he was entitled could have been sanctioned as personal pay to protect the last salary drawn, but that has not been done."

(emphasis added)

31. In view of above, writ petition was allowed with the following directions:-

"Accordingly, this writ petition deserves to be allowed and is allowed. The impugned order dated 24.10.2009 is hereby quashed. Writ of mandamus is issued to the respondents to act upon the report of the Finance Department (Annexure No. 12), in which the salary of the petitioner was fixed as Rs. 3187/- The different of the salary (i.e. Rs. 3187-2300 = Rs. 887) shall be paid to the petitioner as personal pay which shall be absorbed in future increments. His retiral dues shall be recalculated keeping in view the period during which he remained out of job. The petitioner shall also be entitled to interest @ 8% on the difference of the salary which shall be paid to him as personal pay. Petitioner is not entitled to any other relief. Since the petitioner has retired therefore he shall be entitled only to arrears. This entire exercise shall be completed by the respondents within 3 months from today."

32. Aforesaid judgment dated 04.04.2012 passed in Hridayesh Dayal Srivastava (supra) attained finality when Special Leave to Appeal (Civil)- CC 20655 of 2012, was dismissed by Supreme Court on 07.01.2013 but leaving "question of law open." The order passed by Supreme Court reads as under:-

"Delay condoned.

Special Leave petition is dismissed.

Question of law is kept open."

(emphasis added)

33. In Raj Mani Singh & another (supra), grievance of petitioners was that they were absorbed in 1995 and retired on attaining age of superannuation on 31.12.2011 and 31.03.2012 i.e. after rendering more than 10 years of qualifying service still no steps were taken for retiral benefits. Court said that once they were absorbed in Government service, they are entitled to all consequential benefits, admissible under Rules and accordingly order was passed.

34. In Dev Pratap Pandey (supra), dispute was with regard to benefit of "revised pay protection" while he was absorbed in Government service on 28.10.1994. But after retirement, when he was given pensionary benefits, the benefit of revised pay scale was not given. However, while disposing of writ petition, Court referred to Hridayesh Dayal Srivastava (supra) and said that it has been held therein that service rendered in Auto Tractors Ltd. Company has to be counted for giving pensionary and other retiral benefits though neither that was an issue nor decided in Hridayesh Dayal Srivastava (supra).

35. We have already discussed the judgment of Hridayesh Dayal Srivastava (supra) and shown that this issue was neither raised therein nor decided and it was wrongly cited and misread in the judgment dated 10.03.2014 in Dev Pratap Pandey (supra) passed by learned Single Judge. In the Special Appeal, Court, in

a short order dated 22.07.2015, has simply held that judgment of learned Single Judge since has followed Hridayesh Dayal Srivastava (supra), hence need no interference. The order passed by Division Bench in Special Appeal on 22.07.2015, reads as under:-

"Heard learned Additional Chief Standing Counsel and the counsel for the respondent.

This appeal has been filed challenging the judgement and order dated 10.3.2014, by means of which the learned Single Judge has proceeded to give direction to consider the retiral benefits taking into account the past services rendered by the respondent at A.T.L. for purposes of retiral benefits with 10% interest per annum from the date when the same was due to the respondent including pension expeditiously, preferably, within a period of three months.

Learned Single Judge was persuaded to pass the aforesaid order mainly on the ground that a Division Bench of this Court in Writ Petition No.410 (SB) of 2010, Hridayesh Dayal Srivastava v. State of U.P. and others, decided on 4.4.2012 has laid down the same proposition of law. The factual dispute between the parties is clear that respondent happens to be the retrenched employee of A.T.L. and Hridayesh Dayal Srivastava was also a retrenched employee of A.T.L. In the aforesaid circumstances, learned Single Judge has recorded the following finding:-

" Learned Standing Counsel opposed the aforesaid prayer, but admitted that the writ petition was decided in identical matter by division bench of this Court in the case of Hridayesh Dayal Srivastava v. State Government of U.P. in which it was held that service of A.T.L. has to be counted for giving pensionary and other retiral benefits.

Considered the submissions.

In view of the fact the petitioner is entitled for retiral dues calculating the period rendered by him in A.T.L., Pratapgarh and the period during which petitioner was retrenched due to closure of company. However, for the purpose of payment of salary and arrears for the period during which petitioner remained out of job will be excluded.

Hence the respondents are directed to consider the retiral benefit taking into account the service rendered by the petitioner at A.T.L. for purposes of retiral benefits with 10% interest P.A. from the date when the same was due to the petitioner including pension expeditiously, preferably within a period of three months after furnishing certified copy of this order.

However, for the purposes of payment of arrears and salary, the period during which petitioner remained out of job was to be excluded."

Learned Additional Chief Standing Counsel has submitted that the said judgment is not applicable in the case of respondent.

We have given our anxious consideration to the argument advanced on behalf of learned Additional Chief Standing Counsel and we find that as indicated above Hridayesh Dayal Srivastava was a retrenched employee of A.T.L. and, therefore, the argument of learned Additional Chief Standing Counsel on the face of it, is baseless and is rejected.

Counsel for the respondent, on the other hand, has submitted that Special Leave Petition filed against the judgement rendered by the Division Bench of this Court in the case Hridayesh Dayal Srivastava has already been dismissed by the apex Court.

We, therefore, do not find any illegality in the judgement and order passed by the learned Single Judge.

Appeal is devoid of merit. It is accordingly dismissed."

(emphasis added)

36. Here again when matter went to Supreme Court in Special Leave to Appeal CC No.(s) 22538-22539 of 2015, while dismissing appeal on 22.01.2016, Court left question of law open and its order reads as under:-

"Delay condoned.

The special leave petition is dismissed.

The question of law is kept open."

(emphasis added)

37. We, therefore, find that the issue, "whether under Government order permitting absorption pursuant to Absorption Rules, 1991 there was any promise to count earlier service rendered in the company wherefrom employee was retrenched, so as to count as "qualifying service" for the purpose of pension under the Rules applicable to Government Servant," was neither raised nor argued, nor decided in any other above authorities and there is no authenticated pronouncement on this aspect. In Hridayesh Dayal Srivastava (supra) the question of pay protection only was involved which was one of the promise in Government Order and that was decided, but in a subsequent judgment, this judgment has been followed as if it has already been said that service rendered in the company would also qualify for pensionary benefits, though in Hridayesh Dayal Srivastava (supra) no such issue was raised argued or decided.

38. It is not disputed by counsel for the parties that for the purpose of "qualifying service" for retiral benefits, Rules, 1961 read with Civil Service Regulations (hereinafter referred to as "CSR") shall apply. Rule 3 (8) of 1961 defines "qualifying service" as under:-

"Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

- (i) periods of temporary or officiating service in a non-pensionable establishment;
- (ii) periods of service in a work-charged establishment, and
- (iii) periods of service in a post, paid from contingencies, shall also count as qualifying service.

39. Articles 368 and 370 of CSR reads as under:-

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruptions by confirmation in the same or any other post shall qualify except--

- (i) periods of temporary or officiating service in non-pensionable establishment.
- (ii) periods of service in work-charged establishment; and
- (iii) periods of service in a post paid from contingencies,

40. Further Article 361 of CSR excludes service as not to qualify for pensionary benefits unless it satisfy certain conditions. It reads as under:-

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions :-

First ? The service must be under Government.

Second ? The employment must be substantive and permanent.

Third ? The service must paid by Government.

41. The aforesaid Rules, 1961 and CSR make it very clear that service rendered in a non-government establishment would not qualify for pension. When confronted, learned counsel for petitioners could not place any provision of law under which he may be entitled to count his service rendered in UPSBCL as "qualifying service" for the purpose of pension or other retiral benefits in Government service.

42. In view thereof, relief claimed by petitioners that their services rendered in UPSBCL should be treated as "qualifying service" for the purpose of pension and other retiral benefits cannot be accepted.

43 Writ petition lacks merit and is dismissed. No costs.