
(2013) 07 AHC CK 0222

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8876 of 2013

Prem Singh Verma

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Government of India Act, 1935 — Section 241(2)(b)

Uttar Pradesh Intermediate Education Act, 1921 — Section 16E, 16E(11), 18

Citation : (2013) 7 ADJ 463 : (2014) 2 ALJ 466 : (2014) 1 UPLBEC 760

Hon'ble Judges : P.K.S. Baghel, J

Bench : Single Bench

Advocate : Siddharth Khare and Ashok Khare, for the Appellant;

Final Decision : Allowed

Judgement

P.K.S. Baghel, J.—By way of this writ petition the petitioner who was appointed as Assistant Teacher has challenged the order passed by the Joint Director dated 3.11.2012 whereby petitioner's representation for payment of post-retiral benefit has been rejected on the ground that petitioner was not a permanent teacher. Foundational facts in brief are that Karma Kshetra Inter College, Etawah is a recognized institution, wherein education is imparted upto the level of Intermediate. It receives aid out of State Fund. The provisions of the U.P. Intermediate Education Act, 1921, the Regulations framed thereunder, the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 (U.P. Act No. 5 of 1982) and the U.P. High Schools and Intermediate College (Payment of Salaries to Teachers and other Employees) Act, 1971 are applicable to the institution. The institution is administered by the respondent No. 6, the Committee of Management.

2. It is averred by the petitioner that a regular/permanent Assistant Teacher namely Gyan Shanker Verma was promoted on the post of Lecturer causing a short term vacancy. The petitioner was appointed against the said vacancy as ad hoc Assistant Teacher in L.T. Grade after following the procedure prescribed

under the law. After the appointment, the management sent the papers to the office of District Inspector of the Education for his approval.

3. The District Inspector of School having satisfied, accorded his approval, vide order dated 1.2.1995. The Copy of the said order is brought on the record as Annexure-1 to the writ petition. The petitioner joined his duties on the same day. He continuously worked in the Institution and drew his salary from the Salary Payment Account of the state. The Secondary Education Services Selection Board, for the some reasons, could not make selection against the post; therefore, he continued uninterruptedly. The petitioner reached his age of superannuation on 30.6.2012. He completed his 17 years 2 month service in the same status, i.e., on ad hoc basis. After his retirement the petitioner made a representation for his post retrial benefits including the pension. His repeated representation did not find favour from the authority concerned.

4. Petitioner in his evening of life, having lost all the hope, preferred a writ petition No. 41841 of 2012 (Prem Singh Verma v. State of U.P. and others) before this Court for direction upon the respondents to consider his cause, which was disposed of on 24.8.2012 with a direction upon the competent authority to consider the grievance of the petitioner. A copy of the said order has been brought on record as Annexure-3 to the writ petition.

5. Pursuant thereto, the Joint Director of Education has passed the impugned order on 3.11.2012 whereby Petitioner's representation had been rejected primarily on the ground that petitioner was a ad hoc/temporary employee and the pension is admissible only to the regular/permanent teacher.

6. A counter-affidavit has been filed on behalf the Sate functionaries. Their stand in the counter-affidavit is that the petitioner was admittedly ad hoc teacher and only a permanent teacher is entitled for the pension, therefore, the ground mentioned in the impugned order are justifiable and no interference is called for under the writ jurisdiction.

7. I have heard Sri Siddarth Khare, learned counsel for the petitioner and Sri A.K. Yadav, learned Standing Counsel.

8. Learned counsel for the petitioner Sri Siddarth Khare submits that the Petitioner has completed more than 17 years of continuous service, therefore, he is entitled for all the benefits which is admissible to a regular teacher. He has drawn the attention of the Court to Government order dated 1.7.1989, wherein it is provided that after ten years regular service if an employee reaches his age of superannuation is entitled for pension. He further submits that the said Government Order was filed before Joint Director alongwith his representation but the Joint Director has failed to advert to the issue. Only a passing reference to the said Government Order has been made by him in the impugned order. He placed reliance on the judgment of this Court passed in the case of Hans Raj Vs. State of U.P. and Others, and Ram Pratap Shukla Vs. State of U.P. and Others, .

9. Learned Standing Counsel Sri A.K. Yadav, has drawn the attention of the Court to Article 465A and Article 361 of the Civil Service Regulations wherein conditions have been laid down for qualifying service. He further urged that Article 361 of the Civil Service Regulations requires three conditions a) the service must be under Government, b) the employment must be substantive and permanent and c) the service must be paid by Government. Amplifying his submission he urged that in any event the petitioner does not fulfill the condition No. b) in as much as his appointment is indisputably made on ad hoc basis and it was not a permanent appointment.

10. Lastly Sri Yadav, contended that the ad hoc appointment is a stop gap arrangement and petitioner's appointment was only till the regular selection was made by the U.P. Secondary Education Board, therefore a stop gap appointment cannot be held to be a regular appointment.

11. I have considered the rival submissions of the learned counsel for the respective parties and perused the record.

12. The appointment of the petitioner was made on ad hoc basis. The institution where the petitioner was appointed as ad hoc teacher is governed by the U.P. Intermediate Education Act, 1921 (in short Act, 1921) and Act No. 5 of 1982. In the Act, 1921 the word ad hoc or temporary is not defined. Section 16E deals with the appointment of teachers in Intermediate Colleges; u/s 16E(11) the temporary appointment were permissible only against a temporary vacancy caused by grant of leave to a incumbent for a period not exceeding six months. Chapter II of the Regulations framed under the Act, 1921 deals with the appointment of Heads of the institution and teachers. Proviso to Regulation 2 sub-clause 1 also permit to make appointment against a temporary vacancy caused by grant of leave for a period not exceeding six months or by death, retirement or by suspension.

13. The State Government amended U.P. Intermediate Education Act, 1921 drastically by U.P. Secondary Education Laws (Amendment) Act, 1975 (U.P. Act No. 26 of 1975). The same difficulties arose due to said amendment and as such the State Government vide Notification dated 18th August, 1975 issued U.P. Secondary Education (Removal of Difficulties) Order, 1975 in respect of substantive or leave vacancy or any vacancy existing or occurring during the academic session of the head of the institution of teachers. For the first time the management was empowered to make ad hoc appointment in the manner provided under the said order. In quick succession the State Government in order to overcome further difficulties which arose, issued Removal of Difficulties Second, Third, Fourth, Fifth, Sixth and Seventh orders between the year 1975-1977. There is no need to go into details of those orders as it is not relevant for the issue involved in the present case. Suffice would be to say, that for the first time concept of ad hoc appointment was introduced under the U.P. Intermediate Education Act, 1921.

14. In the year 1981 the State Government established the U.P. Secondary Education Service Commission and Selection Board vide Ordinance No. 8 of 1981 which was promulgated on 10th July, 1981. The State Government in exercise of power u/s 33 of the said ordinance issued Removal of Difficulties Order, 1981 on 31 July, 1981 which was followed by (Removal of Difficulties) (Second) Order, 1982 on 11th September, 1981. Both these orders were issued laying procedure for appointment on ad hoc basis against the substantive vacancy and short term vacancies.

15. After the enforcement of the U.P. Secondary Education Services Selection Board Act, 1982, the committee of management was empowered to make the ad hoc appointment u/s 18 of the Act. The said section was amended by U.P. Act No. 1 of 1993 and U.P. Act No. 5 of 2001.

16. From the aforesaid statutory provisions it is evident that the ad hoc appointments were permissible by following statutory provisions which also requires approval of the District Inspector of Schools. The payment of salary of the ad hoc teachers appointed under the aforementioned statutory provisions are made by the State Fund/Salary Payment Account.

17. Concededly, the petitioner was a ad hoc teacher, his appointment was made against the short term vacancy with the approval of the District Inspector of Schools. He worked for more than 17 years and reached his age of superannuation on 30.6.2012. By the impugned order the petitioner's prayer for pension has been rejected only on the ground that he was not in regular service and the Government Order dated 1st July, 1989 has used the word "regular service" (Niyamit Sewa).

18. The Civil Service Regulation as applicable in Uttar Pradesh are intended to define the prerequisite conditions for grant of pension in the Government Service/ Civil Department. The Article 361 of Chapter XVI of the Civil Service Regulations provides conditions of qualifications for pension. Article 361 reads as under:

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

- a) the service must be under Government,
- b) the employment must be substantive and permanent and
- c) the service must be paid by Government.

19. Article 424 of Chapter XVIII of the Civil Service Regulations provides the following kinds of pension admissible to a Government servant (a) compensation pension (b) invalid pensions (c) superannuation pensions (d) retiring pensions.

20. The Civil Service Regulation as applicable in Uttar Pradesh is a pre-constitutional Rules. The U.P. Fundamental Rules which has been made u/s 241(2)(b) of the Government of India Act, 1935 came into force with effect from 1st April, 1942. Chapter 9 deals with the compulsory retirement. Fundamental

Rule 56 (e) provides for retiring of a Government servant. Clause (e) of Fundamental Rule 56 reads as under:

(e) A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules to every Government servant who retires or is required or allowed to retire under this rule:

Provided that where a Government servant who voluntarily retires or is allowed voluntarily to retire under this rule the appointing authority may allow him, for the purposes of pension and gratuity, if any, the benefit of additional service of five years or of such period as he would have served if he had continued till the ordinary date of his superannuation, whichever be less.

21. The short question which need determination in this case is whether the petitioner who was appointed on ad hoc basis and also superannuated in the same capacity without his regularisation can be held to work on a regular basis. The terms under "ad hoc" "stopgap" and "fortuitous" came to be considered by the Supreme Court in the case of Rudra Kumar Sain and Others Vs. Union of India and Others, . The Court found that a person who has a requisite qualification and who is appointed with the approval of the appropriate authority and if he is allowed to continue on the post for a considerable long time then such appointment cannot be held to be stopgap/fortuitous or purely ad hoc appointment. The Supreme Court observed as under:

In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc.

22. The Supreme Court in the case of Ramesh K. Sharma and Another Vs. Rajasthan Civil Services and Others, , considered the word "substantive basis" following the judgment of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, . The Court held that if an incumbent holds the post for indefinite period then it cannot be said to be ad hoc appointment. The Court held as under:

If an incumbent is appointed after due process of selection either to a temporary post or a permanent post and such appointment, not being either stopgap or fortuitous, could be held to be on substantive basis. But if the post itself is created only for a limited period to meet a particular contingency, and appointment thereto is made not through any process of selection but on a stopgap basis then such an appointment cannot be held to be on substantive basis. The expression "substantive basis" is used in the service jurisprudence in contradistinction with ad hoc or purely stopgap or fortuitous.

23. This Court in the case of Dr. Han Shanker Asopa v. State of U.P. and another, (1989) UPLBEC 501, considered the Article 361 and Clause (e) of Rule 56 of

Fundamental Rules as applied in Uttar Pradesh and the Civil Service Regulations. Dr. Hari Shanker Asopa was appointed on temporary basis on the post of lecturer in the department of Surgery at S.N. Medical College, Agra on 4th August, 1964. In the year 1969, he was appointed on a substantive post of Reader in Surgery at same College that appointment too was on temporary basis. The term of the appointment was one year or till the candidate selected by the U.P. Public Service Commission was available, whichever was earlier. After three years he was promoted to the post of Professor in Surgery in Jhansi Medical College. The said appointment was also temporary and it was for a period of one year or till the candidate regularly selected by the U.P. Public Service Commission was available or till the services of Dr. Asopa were needed, whichever was earlier. Dr. Asopa uninterruptedly continued for 18 years as a Lecturer, Reader and Professor on temporary basis. His request for voluntary retirement was allowed by the State Government in the year 1983 with a condition that no pension would be paid to him, as he was not permanent on any post of the Government Service. Dr. Asopa feeling aggrieved by the said order dated 21.2.1983 preferred a writ petition before this Court.

24. This Court interpreted the qualifying service envisaged under Article 465 and 465A of the U.P. Civil Service Regulations and came to hold that in view of the subsequent amendment in Rule 56 of the U.P. Fundamental Rules (Amendment Act Validation) Act, 1975 (U.P. Act No. 24 of 1975), a temporary Government servant is also entitled for the retiring pension notwithstanding the definition of qualifying service under Article 465 and 465 A. Paragraph 19 of the said judgment reads as under;

In the instant case, indisputably Dr. Asopa who allowed to retire under clause (c) of Rule 56 and the first and third conditions envisaged in Article 361 of the Regulations were satisfied. He, therefore, became qualified for a retiring pension notwithstanding the fact that he was not permanent on any of the posts held by him during the tenure of his continuous services of State Medical Colleges of Uttar Pradesh Government. Denial of retiring pension to Dr. Asopa on the ground of his not being permanent on any post of the Government service was clearly violative of clause (e) of Rule 56 of the Rules. Condition contained in paragraph 2 of the order, dated 21st February, 1983 (Annexure-10 to the writ petition), depriving Dr. Asopa of retiring pension cannot, therefore, be sustained. The contention of the learned Standing Counsel for the State of Uttar Pradesh that Dr. Asopa was not entitled to any pension lacks merit and has got to be rejected.

25. The said judgment of Dr. Asopa was followed by a Division Bench in the case of The Board of Revenue Vs. Prasad Narain Upadhyay (Late), and Rajendra Singh Vs. Accountant General, U.P., Lekha II and Others, . The Division Bench in this case also considered the Government Order dated 1st July, 1989 wherein the regular service was mentioned as one of the condition for the grant of pension. Relevant paragraphs are extracted hereunder below:

From perusal of the G.O., dated 1 July, 1989, Annexure 6 to the writ petition.

Government has already taken a policy-decision that Government servant, who has completed 10 years of regular service, on completing the age of superannuation is entitled to get retirement/inability pension in the similar situation and manner like permanent Government employees.

The regular Government servant means, a person working against a post carrying on a pay-scale. If a person is not working against any post or is not getting the pay-scale, he could not be said to be a person appointed and continuing regularly. Only regular employee, whether temporary or permanent, is entitled to get pension.

Regular appointment means the appointment made according to rule and procedure. If against a post, a person was appointed in accordance with rules in the procedure prescribed for Government servant, his appointment is regular appointment.

26. The Government Order dated 1st July, 1989 again came to be considered by this Court in the case of State of U.P. and Others Vs. Gaya Ram, . This Court has interpreted the word regular service and held as under:

Learned Standing Counsel Sri Ajay Bhanot has laid much emphasis on the words as used in the Government Order dated 1.7.1989. The submission of the learned Standing Counsel as that the petitioner was only temporary Government Servant hence he cannot be said to have rendered regular ten years service; hence he is not entitled for the benefit of Government Order dated 1.7.1989. The words used in the Government Order dated 1.7.1989, means completion of ten years regular service. Words "regular service" has not been defined in the Government Order. From a reading of the Government Order it is clear that the word "ten years regular service" has been referred to the service rendered and not to the status of employee, an employee substantively appointed and permanent is automatically entitled for pension. The Government Order dated 1.7.1989 does not contemplate ten years substantive service. The words "regular service" used in the Government Order is not anonymous to substantive service. Admittedly the benefit by Government Order is to be extended to temporary Government Servant. The temporary Government Servant cannot be said to have substantive or regular service. Thus, the words "regular service" used in the Government Order dated 1.7.1989 has not been used as specifying the capacity or status of its holder rather the words "regular service" has been used to denote and specify the nature of service rendered.

27. In the case of Hans Raj Vs. State of U.P. and Others, this Court had occasion to consider the provisions of U.P. State Aided Educational Institution Employees Provident Fund, Insurance and Pension Rules, 1964 also. Rule 43, 44 and 45 of the said Rule has been considered at length by this Court and also the Regulations 465 and 465A of the U.P. Civil Service Regulations. The Court held as under:

In the present case, so far as the condition Nos. A and C are concerned, they are

satisfied and the dispute is only with respect to condition No. B i.e., lack of permanent character of service. However, in out view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P. Act No. 24 of 1975 which allows retirement of a temporary employees also and provides in clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government Servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was made by an Act of Legislature, the provisions contained otherwise under Civil Service Regulations, which are pre-constitutional, would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Condition -B (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is in operative.

28. Sri A.K. Yadav, learned Standing Counsel has relied on the judgment of Deepa Ram Vs. State of U.P. and Others, . In the said case the petitioner was working as Seasonal Peon since the year 1981. His services were regularised on 29.11.1996 and he retired on attaining the age of superannuation on 31.12.2007. The petitioner therein claimed that services rendered by him as Seasonal Collection Peon since 20.11.1981 should be treated as a qualifying service for the purpose of pension and other retiral benefits. The Court refused to accept the said submission on the ground that the services rendered as Seasonal Collection Peon does not qualify for pension as the service is intermittent and cannot be equated with a temporary employee. Thus the said case has a distinguishing features.

29. The principle which can be discerned from the above mentioned judgment is that if ad hoc/stopgap/temporary employee having essential qualification and is appointed in terms of the statutory Rules and he continues for a long time and fulfills the qualifying service is entitled for pension and other retiral benefits.

30. Having regard to the facts and circumstances of the case I am of the view that petitioner is entitled for the post retiral benefits as his appointment was made in terms of the statutory Rules viz. Removal of Difficulties Order, 1981, against a short term vacancy with the approval of the appropriate authority/ District Inspector of Schools and he worked uninterruptedly for 17 long years.

31. For the aforesaid reasons the impugned order dated 3.11.2012 passed by the Joint Director needs to be set aside. Accordingly, it is set aside.

32. A direction is issued upon the concerned respondents to pay the post retiral benefits to the petitioner in accordance with law as expeditiously as possible preferably within three months from the date of communication of this order. It is made clear that if the payment is not made to the petitioner within the said period the petitioner shall be entitled for interest at the rate of 9% per annum on the delayed payment. The writ petition is allowed with cost which is quantified Rs. 2,000/-.