
(2009) 07 AHC CK 0109
In the Allahabad High Court

State of U.P. and Others

APPELLANT

Vs

Dukh Haran Singh

RESPONDENT

Date of Decision : 21-07-2009

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2010) 10 AWC 1882

Hon'ble Judges : C.K. Prasad, C.J.; P.C. Verma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

C.K. Prasad, C.J.—This Special Appeal at the instance of respondent-appellants under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 arises out of a judgment and order dated 22.08.2008 passed by a learned Single Judge in Writ Petition No. 1378 (S/S) of 2008 whereby while allowing the writ petition, he has directed for payment of pensionary benefits to the petitioner.

2. Bereft of unnecessary details, short facts giving rise to the present appeal are that the writ petitioner-respondent, hereinafter referred to as the "writ petitioner", was initially appointed as Collection Amin (Taquabi Amin) on 15.05.1972. Thereafter, the State Government took a decision to abolish the scheme under which the petitioner was appointed. Accordingly, a Government Order was issued to terminate the services of 14000 Collection Amins including the writ petitioner. Thereafter, a certificate was issued on 28.08.1975 by the District Agricultural Officer, Sultanpur certifying that the employment of the writ petitioner had been terminated with the abolition of post by the State Government by a Government Order and the writ petitioner had been treated as retrenched employee. Challenge made to the aforesaid decision of retrenchment before this Court in Writ Petition No. 2077 of 1975 failed. Thereafter, the State Government took a policy decision to absorb the retrenched Collection Amins in different phases in different Government Departments of the State. Ultimately, by order dated 20.03.1983, writ petitioner was appointed as part-time Tubewell

Operator in the Tubewell Section of the Irrigation Department at Sultanpur on a fixed pay of Rs. 200/- per month and thereafter a decision was taken by notification dated 20.02.1992 to pay honorarium at the rate of Rs. 550/- per month. Shri Suresh Chandra Tiwari and others, who were also appointed as part-time Tubewell Operators, filed Writ Petition No. 3558 (S/S) of 1992 (Suresh Chandra Tiwari and Ors. v. State of U.P. and Ors.) before this Court for issuance of a writ in the nature of mandamus commanding the State Government to pay to them the regular scale of pay, which was admissible and being paid to the full-time Tubewell Operators and also for quashing the notification dated 20.02.1992 by which honorarium at the rate of Rs. 550/- was fixed.

3. It is relevant here to state that some of the part-time Tubewell Operators approached the Labour Court in regard to the issue of wages and the Labour Court decided that part-time Tubewell Operators shall also be entitled to the regular scale of pay of a Tubewell Operator. Aggrieved by the aforesaid order of the Labour Court, Engineer-in-Chief, Irrigation Department, U.P. and others filed Writ Petition No. 1502 (S/S) of 1992 (Engineer-in-Chief, Irrigation Department, U.P. and Ors. v. Makrand Singh and Ors.) before this Court. The Writ petition filed by Suresh Chandra Tiwari and others, besides the writ petitions of several other part-time Tubewell Operators and the aforesaid Writ Petition No. 1502 (S/S) of 1992 came up for consideration before this Court on 18th March, 1994. The learned Judge by order dated 18th May 1994, allowed all the writ petitions except Writ Petition No. 1502 (S/S) of 1992 and quashed the notification by which honorarium at the rate of Rs. 550/- per month was fixed and further directed that part-time Tubewell Operators shall be entitled to the same emoluments, i.e. the same scale of pay which other regularly appointed Tubewell Operators are being paid. While doing so, this Court observed as follows:

What we have found in the earlier part of the judgment, is that the tubewell operators and erstwhile part-time tubewell operators, now called as tubewell assistants perform same nature of duties. It is though provided that duty hours of the tubewell assistants are from 9.30 A.M. to 12 noon, but it is only on paper while in fact they have to work whenever electricity is available during any time of the day and it has also been found that they work much more than two and a half hours, in respect of which in different writ petitions, the petitioners have placed material to indicate that they work for more than two and a half hours. The condition that their services are not transferable is of no consequence, nor the fact that their mode of recruitment is different. There is no denial of the fact that tubewell operators getting higher emoluments are still there very much in service, whereas for the same work the petitioners are being paid less. The plea that it is uneconomical to pay them full wages is not a valid ground and in favour of some of the petitioners, orders passed for payment of wages to them under the Minimum Wages Act have been upheld by the High Court. It is highly improper to change the nomenclature of the part-time tubewell operators to that of tubewell assistants without their being anyone to whom they could render the assistance and there being no change in the nature of their work, it was not done

with bona fide intentions. In view of the above, the petitions deserve to be allowed.

4. The writ petitioner as also few other Tubewell Operators filed another writ petition, i.e. Writ Petition No. 4632 (S/S) of 1995 (Raj Marhi and Ors. v. The State of U.P. and Ors.) before this Court, inter-alia, praying for grant of regular scale of pay of the post of Tube-well Operator. A learned Judge of this Court by order dated 15.11.1995 disposed of the said writ petition, inter-alia, observing as follows:

In view of the above, petition is disposed of finally with the direction that the petitioners shall make a representation within a week from today with a certified copy of this order before Secretary Irrigation Department who shall examine whether the petitioners are similarly placed like the petitioners of Writ Petition No. 3558 (S/S) of 1992 decided on 18.05.1994. In case Secretary finds that the petitioners are covered by the said decision the benefit of the said decision shall also be extended to the petitioners.

5. It is relevant here to state that the writ petitioner herein figured as petitioner No. 2 in the aforesaid petition.

6. The order of the Labour Court as affirmed by this Court in the writ petition and orders passed on other similar writ petitions by this Court directing for payment of salary to part-time Tubewell Operators equal to salary paid to the regular Tube-well Operators, were challenged before the Supreme Court in SLP (2) No. 16219 of 1994 and other analogous cases and the Supreme Court by order dated 22.03.1995 dismissed all the Special Leave Petitions. While doing so, the Supreme Court observed as follows:

On the basis of the evidence led before the Labour Court, the said court came to the conclusion that the duties, qualifications and hours of working of the part-time Tube well operators and the regularly working Tube well operator were identical. On the basis of the the principle of equal pay for equal work the Labour Court directed that the part time Tube well Operators be paid the same salary (prospectively) as was being drawn by the regular Tube well operator. The High Court reappraised the evidence and the material before it and concurred with the Labour Court. We see no ground to interfere with the concurrent findings of the two courts below. These Special Leave Petitions are dismissed.

7. The Governor of the State in exercise of power conferred under Article 309 of the Constitution of India, framed Rules, namely, Uttar Pradesh Irrigation Department (Regularisation of Part-time Tubewell Operators) Rules, 1996 (hereinafter referred to as the "Rules 1996"). Rule 4 thereof, inter-alia, provided for regularisation of services of Part-time Tubewell Operators and in the light thereof, writ petitioner was appointed as Tube-well Operator in the pay scale of Rs. 950-1,500 by Office Memo dated 25.09.1997. On attaining the age of superannuation, he retired from service on 31.11.2005 and thereafter, filed Writ Petition No. 7024 (S/S) of 2007 (Dukh Haran Singh v. State of U.P. and Ors.)

before this Court seeking several relief including relief for payment of post-retiral dues. This Court vide order dated 31.10.2007 disposed of the said writ petition with a direction to the Competent Authority to decide the claim of the writ petitioner by a speaking order. The order dated 31.10.2007 of this Court in the aforesaid case is quoted below:

The submission of the learned Counsel for the petitioner is that petitioner has retired from service on 30.11.2005 while serving on the post of Tubewell Operator. According to petitioner's counsel petitioner is entitled for arrears of pay from the date of his appointment i.e. 20.3.1983. Petitioner has also claimed seniority from the date of his initial appointment i.e. 15.5.1972.

Petitioner has already submitted a representation to ventilate his grievance to the competent authority.

Accordingly, competent authority is directed to look into the matter and decide the representation of the petitioner in accordance with law by passing a speaking and reasoned order expeditiously and preferably within a period of tow months from the date of receipt of a certified copy of this order and communicate the decision to the petitioner.

Opposite parties are directed to consider the petitioner case also for payment of post retiral dues within said period.

Subject to above, writ petition is disposed of finally.

8. In the light of the aforesaid order, the claim of the writ petitioner was considered and it was found that services rendered by the writ petitioner before 25.09.1997 shall not qualify for grant of pensionary benefits and the writ petitioner, having not continuously served for 10 years, shall not be entitled for post-retiral dues. Accordingly, the representation of the petitioner was rejected by order dated 27.12.2007.

9. Writ petitioner challenged the aforesaid order, which has given rise to the impugned judgment, inter-alia, claiming that he had served as Tubewell Operator for almost 32 years and, hence, entitled for grant of pensionary benefits. The aforesaid submission found favour with the learned Judge and the learned Judge issued a writ in the nature of mandamus commanding the authorities to pay to the writ petitioner pensionary benefits. While doing so, the learned Judge observed as follows:

...In the present case, the petitioner served almost for 32 years of service on the post of Tubewell Operator. The services rendered by the petitioner for 32 years cannot be brushed aside for the purpose of payment of regular pension. More so, the petitioner being the retrenched employee, was absorbed in the Tubewell Operator. The writ petition deserved to be allowed.

Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the order dated 27.12.2007 contained in Annexure No. 1 to the writ

petition. A writ in the nature of mandamus is issued commanding the respondents to pay the pensionary benefits to the petitioner in accordance with the Rules keeping in view the observations made herein above.

10. State of U.P. and its functionaries, aggrieved by the aforesaid order dated 22.08.2008, have preferred this appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952.

11. Mrs. Sangeeta Chandra, Additional Chief Standing Counsel appearing on behalf of the appellants, submits that the services rendered by the writ petitioner prior to his regularisation on 25.09.1997 do not qualify for pension and he having retired on 30.11.2005 not rendered continuous service for 10 years, shall not be entitled for retiral benefits. She submits that the findings arrived at by the learned Judge that the writ petitioner had rendered service for 32 years is erroneous in law, as his employment prior to his regularisation in service was neither substantive nor permanent in nature and merely the fact that part-time Tubewell Operators were directed to be paid the salary equal to that of the regular Tubewell Operators shall not render his employment as substantive and permanent. She points out that reliance of the learned Judge in the case of Babu Singh v. State of U.P. and Ors. (2007) 1 UPLBEC 53 is absolutely misconceived, as the question in the aforesaid case was as to whether the pensionary benefits shall be available to only permanent employees and whether a temporary employee shall be entitled for the same or not. She further points out that prior to his regularisation, writ petitioner was not even a temporary employee and, as such, the period of service rendered by him prior to that does not qualify to count for pension.

12. Despite service of notice on the writ petitioner, nobody has chosen to appear on his behalf and, in my opinion, as the decision on the issue shall have bearing on a large number of cases, I requested Mr. S.K. Kalia, Senior Advocate to appear as Amicus Curiae, to which he consented unhesitatingly and rendered assistance.

13. Mr. Kalia takes an extreme stand that the service rendered by the writ petitioner as Collection Amin from 15.05.1972 is fit to be counted as qualifying service for the reason that the service of the writ petitioner was ultimately regularised by order dated 25.09.1997. Mr. Kalia, alternatively submits that the writ petitioner, who was appointed as Part-time Tubewell Operator by order dated 20.03.1983 performed the same function as that of a Tubewell Operator and it has been found to be so by this Court in its order dated 18.05.1994 passed in Writ Petition No. 3558 (S/S) of 1992 and hence there is no escape from the conclusion that the employment thereafter is of substantive nature. Accordingly, he contends that the services rendered by the writ petitioner after his appointment as a Part-time Tubewell Operator by order dated 20.03.1983 qualify him for grant of pension. He submits that services rendered by the writ petitioner after 20.03.1983 if counted for pension, he had put in required period of qualifying service for grant of pension.

14. In view of the rival submissions, questions, which fall for determination, are:

(1) Whether the services rendered by the writ petitioner from 15.05.1972 till his superannuation on 30.11.2005 qualify him for grant of pension?

(2) Whether the service rendered by the writ petitioner after appointment as Part-time Tubewell Operator on 20.03.1983 but getting regular scale of pay in the light of mandate of this Court, qualifies him for pension?

15. It is common ground that grant of pension to an employee, like the writ petitioner, is governed by the Civil Service Regulations (hereinafter referred to as the "Regulations").

16. The rival submissions necessitate me to consider the Regulations relating to grant of pension. Chapter XVI of the Regulations provides for condition of qualifying service. Regulation 361 provides for the services which qualify for pension, same reads as follows:

Conditions of qualifications

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 be paid by Government.

These three conditions are fully explained in the following Section.

17. Regulation 361 aforesaid is akin to Rule 3.12 of the Punjab Civil Services Rules, Vol. II Part-I. The Supreme Court had the occasion to consider the aforesaid provision in the case of State of Haryana and Ors. v. Shakuntla Devi 2008 AIR SCW 8180 and on review of its earlier judgments, the Supreme Court observed as follows:

28. With the aforementioned legal principles in mind, we may analyse the provisions of the scheme.

The scheme in terms of paragraph 3 is applicable to all regular employees in pensionable establishment, temporary or permanent who were in service. Thus, whether temporary or permanent, the employee must be regular employee which would mean employee appointed on a regular basis, i.e., in accordance with Rules. Only because services of ad hoc employees were continued, the same would not mean that thereby his status has been changed. It will bear repetition to state that status of an employee can change either by reason of a contract or by reason of a statute. Nothing has been shown to us that the concerned employees either under the contracts of service or under any statute or statutory rules became regular employees of the State.

If the scheme did not apply to the respondents, the provisions as to how the scheme would be administered are not of any significance.

18. While coming to the aforesaid conclusion, the Supreme Court in paragraph 24 of the said judgment observed as follows:

24. The very fact that a regularization scheme was framed by the State is a clear pointer to show that the concerned employees were not regularly employed. They had sought for regularization of their service and at least in one case, as noticed herein before, for one reason or the other, the said request was turned down. The validity thereof was not questioned. It attained finality.

In the case of Rama Devi, a contention was raised in the writ petition that the offer of appointment in law was not for a period of six months but for an indefinite period. Such a contention cannot be upheld. If the initial appointment was for a fixed period and the appointment could be terminated without any notice and without assigning any reason, such appointment cannot be said to be an appointment on a permanent post or a temporary sanctioned post. Unless and until the post itself is a permanent or a temporary one, the same would not answer the description of a substantive and permanent employment. In this case, it had been shown that the services of Karan Singh was being renewed for a period of six months on the expiry of the original or extended tenure.

19. A Division Bench of this Court had the occasion to consider the aforesaid Regulations in the case of Bansh Gopal v. State of U.P. and Ors. 2006 (6) ALJ 549, in which it has been held as follows:

15. In Board of Revenue's case (supra), the Division Bench took the view that respondent retired as temporary collection peon. It was held by the Division Bench that temporary collection peon who retired after rendering 37 years of service was entitled for pension and it was not necessary that his services should have been substantive and confirmed. The Division Bench took the view that the requirement under Regulation 361 of Civil Services Regulation that the employment must be substantive and permanent shall be deemed to be overridden by Fundamental Rule 56.

20. From a plain reading of the provisions of Regulation 361 of the Regulations and the aforesaid decision of the Supreme Court in the case of Shakuntla Devi (supra) and of this Court in the case of Bansh Gopal (supra), it is evident that besides fulfilling other conditions, only such service shall qualify for pension when it is of substantive and permanent nature. Needless to state that appointment on a temporary post can also be substantive in nature and qualify for grant of pension. However, appointment on ad hoc basis or as a part-time employment is neither a substantive nor permanent in nature. Grant of equal pay as that of regular employees on the principle of "equal pay for equal work" shall, in my opinion, also not make the employment substantive and permanent or temporary in nature.

21. Regulation 370 of the Regulations, which is also relevant for the purpose, provides as follows:

370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption 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.

22. Continuous temporary or officiating service followed by confirmation without any interruption, though qualify for pension but shall not embrace within itself part-time service or ad hoc service notwithstanding the fact that such part-time employees get the same scale of pay as that of the regular employees.

23. Bearing in mind the principles aforesaid, I proceed to consider the facts of the present case. Undisputedly, the writ petitioner as also 14000 Collection Amins were retrenched in 1975 and challenge made to such retrenchment had failed. However, later on, the State Government framed a scheme for absorption of retrenched Collection Amins in different phases and by order dated 20.03.1983 writ petitioner was appointed as a part-time Tubewell Operator on fixed honorarium. Thereafter, the Governor of the State in exercise of power conferred under Article 309 of the Constitution of India framed Rules 1996 and in the light thereof, the services of writ petitioner were regularised by order dated 25.09.1997. True it is that appointment of the writ petitioner as part-time Tubewell Operator by order dated 20.03.1983 was found to be camouflage and applying the principle of "equal pay for equal work", direction was given for payment of the same scale of pay as that of regular Tubewell Operators. But on this account, in my opinion, the service rendered by the writ petitioner as Collection Amin before retrenchment cannot be said to be substantive or permanent or temporary so as to qualify for pension. Further, his appointment as part-time Tubewell Operator by order dated 20.03.1983 till his regularisation in terms of the Rules, 1996 by order dated 25.09.1997 shall also not cover either as a substantive or permanent or temporary employment. Further, the service rendered prior to regularisation by order dated 29.09.1997 cannot be said to be continuous temporary or officiating service. Hence, in the face of the language of Regulations 361 and 370 of the Regulations, the services rendered prior to 25.09.1997 do not qualify for grant of pension.

24. In view of the aforesaid, the conclusion arrived at by the learned Judge that the writ petitioner had rendered continuous service for 32 years and was entitled for pension does not commend me.

25. It is relevant here to state that the learned Judge, while passing the impugned order, has heavily relied on a judgment of this Court in the case of Babu Singh (supra). As the decision of the learned Judge is founded on the

aforesaid decision, I deem it expedient to reproduce the same in extenso:

Service - Retiral benefits - Non-payment of - On the ground that the petitioner had not completed 10 years of minimum service after regularisation, though completed almost 28 years of service - Writ petition claiming grant of pension - Allowing the petition, respondents were directed to grant pension to the petitioner holding that under Fundamental Rule 56 it cannot be said that an employee shall be entitled to pension and other retiral benefits only after rendering permanent service as such these benefits are available to temporary employees as well.

26. A Division Bench of this Court has considered the right of a temporary employee to receive pension in the case of Board of Revenue and Ors. v. Prasidh Narain Upadhyay 2006 (1) ESC 611, in which it has been observed as follows:

13. 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 our 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 employee 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....

27. In my opinion, reliance of the learned Judge in the case of Babu Singh (supra) is absolutely misconceived. From the summary of the said judgment, reproduced above, it is evident that the question before the learned Judge was as to whether the service rendered as temporary employee would count for grant of pension and relying on Rule 56 of the Fundamental Rules, the Court came to the conclusion that service rendered as temporary employee shall also qualify for grant of pension.

28. Similarly, in the case of Prasidh Narain Upadhyay (supra), the Division Bench, on fact, found that the employee was a temporary employee and on that finding, he has right to receive pension. This would be evident from paragraph 5 of the judgment, which reads as follows:

...The appellants although submitted that the respondent was employed as Seasonal Collection Peon but the Hon"ble Single Judge on the basis of the perusal of the service book of the respondent has found that the employment of the petitioner-respondent has been mentioned as Collection Peon (Temporary) but subsequently in the service book it has been mentioned that he is working as Seasonal Collection Peon. The entry of initial appointment of the petitioner-respondent as temporary Collection Peon is not disputed. That being so, it is not possible to assume as to how the respondent has been shown as Seasonal Collection Peon in the subsequent part of the service book. The appellants could not explain this aspect even in the present appeal, although in para-7 of the affidavit they have admitted that in the 2nd column of the service book, a formal

entry "temporary" of the service of the respondent is mentioned....

29. Thus, neither in the case of Babu Singh nor in the case of Prasad Narain Upadhyay (*supra*), this Court, as a proposition of law, has held that seasonal employees shall be entitled to pension.

30. Here, in the present case, I have already observed that the service rendered by the writ petitioner prior to his regularisation by order dated 25.09.1997 does not qualify for grant of pension as in terms of Regulations 361 and 370 of the Regulations, services rendered prior to that are neither substantive, permanent nor temporary. In my opinion, the service rendered by the writ petitioner subsequent to his regularisation on 25.09.1997 only qualifies for pension and he having retired before rendering 10 years continuous service, is not entitled to get pension.

31. In view of the aforesaid, the conclusion arrived at by the learned Judge that the writ petitioner had rendered 32 years service and was entitled for pension cannot be sustained.

32. In the result, the appeal succeeds and is allowed. The judgment and order dated 22.08.2008 passed by the learned Judge in Writ Petition No. 1378 (S/S) of 2008 is set aside but without any order as to costs.