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Neutral Citation No.-2023:AHC-LKO:66800

Reserved

Case :- WRIT - A No. - 1471 of 2022

Petitioner :- Braj Kishor Gupta

Respondent :- State Of U.P.Thru. Addl. Chief Secy.Vocational Edu.
Skill Development Lko. And Another

Counsel for Petitioner :- Abhishek Dwivedi,Pradeep Chandola

Counsel for Respondent :- C.S.C.

Hon'ble Manish Mathur,J.

1. Heard Mr. Pradeep Chandola and Mr. Abhishek Dwivedi, learned counsels for petitioner and learned State Counsel appearing on behalf of opposite parties.

2. Petition has been filed seeking a direction to opposite parties for grant of all post retiral dues to petitioner such as pension, commutation of pension, gratuity etc alongwith arrears of pension with effect from date of superannuation on 31.12.2015 with consequential benefits.

3. Earlier this petition was allowed by means of judgment and order dated 30.08.2022 which was challenged in Special Appeal Defective No.314 of 2022. The said special appeal was allowed by means of judgment and order dated 22.02.2023 in parity with judgment and order dated 10.02.2023 passed in a similar matter in Special Appeal Defective No.60 of 2023, State of U.P & Anr. versus Smt. Hemlata Mishra. Vide aforesaid orders passed in said Special Appeals, the dispute was remanded for reconsideration by the learned Single Judge to decide a fresh with regard to two questions;

(I) Whether petitioner was qualified and therefore eligible for being regularized and,

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(II) Whether petitioner or her husband were not entitled to relief in lieu of U. P. Qualifying Service for Pension and Validation Act, 2021 (U.P. Act No.1 of 2021).

3(A). It is in pursuance of directions issued that this petition is being reheard after remand regarding the aforesaid two questions.

4. It has been submitted in the petition that petitioner after completing training from Government Industrial Training Institute, Lucknow enrolled himself with the employment exchange whereafter in pursuance of advertisement and interview, petitioner was appointed on the post of Instructor (Radio Mechanic) on ad hoc basis in the pay-scale of Rs.300-8-324-9-360-E.B.-10-440-E.B.-12-500 vide appointment letter dated 20.02.1981. It has further been submitted that at the time of ad hoc appointment of petitioner, there were no Service Rules in the department and appointment was governed by the Government Order dated 28.05.1975.

5. It has been submitted that subsequent to petitioner's appointment, an exercise for regularization of 65 such ad hoc Instructors was conducted in pursuance of order issued by Government dated 06.04.1983, whereafter vide order dated 27.04.1983, a Selection Committee was constituted and gave its recommendation for regularization of 53 persons with further recommendation that remaining 11 persons who did not possess three years requisite experience as on the date of consideration should be granted relaxation by the State Government. Petitioner was one of the 11 such persons whose name was recommended for relaxation. The name of one person was rejected. Despite such recommendations having been made, no orders were passed by the State Government for according such relaxation although petitioner

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continued in service and was granted various service benefits such as promotional pay-scale from time to time.

6. In pursuance of recommendation by the Selection Committee, the Director vide letter dated 01.08.1983 forwarded the recommendations indicating that 11 ad hoc Instructors including petitioner were otherwise qualified for the post but could not be regularized only on account of the fact that they did not possess three years requisite experience as on the date of consideration for regularization.

7. Aggrieved by non consideration of his case for regularization, petitioner filed Writ Petition No.8522 (SS) of 2009 which was withdrawn with liberty to file a fresh whereafter Writ Petition No.8860 (SS) of 2010 was filed and was allowed by means of judgment and order dated 04.07.2013 granting benefit to petitioner in parity with judgment and order passed in the case of a similarly situated employee, Suresh Chand Shukla versus State of U.P. & Ors., Writ Petition No.3425 (SS) of 2010.

8. The said judgment was challenged in special appeal which was allowed but during pendency of aforesaid litigation, petitioner superannuated on 31.12.2015 whereafter only General Provident Fund was paid to him due to which present petition has been filed since petitioner superannuated without regularization.

9. It has been submitted by learned counsel for petitioner that once petitioner had completed 34 years of service with the department, such service can certainly not be said to be ad hoc or temporary in nature. It has also been submitted that the petitioner has all along performed the same duties and functions as were being

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performed by the duly selected, regular Instructors. It has also been submitted that during the course of his employment, petitioner's services were found more than satisfactory for which Selection Grade was granted to him not once but twice, although the same was subsequently withdrawn on the ground that petitioner was ineligible for the same having been appointed only in ad hoc capacity.

10. Learned counsel for petitioner has relied upon various judgments of not only this court but also Hon'ble the Supreme Court to demonstrate that petitioner is entitled for post-retiral benefits although he rendered services only in ad hoc capacity.

11. It has been submitted that one ***Ashok Kumar Dixit*** who was similarly placed as the petitioner since his name was also recommended for relaxation alongwith the petitioner, filed Writ Petition No.4319 (SS) of 2010 which was allowed by means of judgment and order dated 29.04.2020. The said judgment was thereafter upheld in Special Appeal No. 280 of 2020 where against Special Leave Petition (C) No.19758 of 2021 was also rejected vide order dated 11.12.2021. It is submitted that it was in pursuance of judgment passed in the case of ***Ashok Kumar Dixit*** that earlier this petition was allowed granting the same benefits but matter has thereafter been remitted for decision a fresh on the two points indicated herein above.

12. As per counter affidavit and supplementary counter affidavit filed on behalf of opposite parties, it has been stated that at the time of petitioner's appointment, no service rules regulating services on the post of Instructor had been framed and the essential qualifications for appointment were prescribed in the Government Order 28.05.1975, which prescribed the following conditions :-

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- (i) Candidate must have cleared High School or equivalent,*
- (ii) Diploma in Craftsmanship or Certificate recognized in N.C.V.T. profession,*
- (iii) Three years' working/practical experience or three years' experience in Teaching after passing the Diploma/a Certificate Examination,*
- (iv) Efficiency/capability of work organization and to maintain discipline,*
- (v) Working knowledge in Hindi,*
- (vi) should be between 21 to 30 years of age.*

13. It has been stated by opposite parties that since petitioner did not possess three years' working/practical experience at the time of ad hoc appointment, his services could not be regularized. It has been stated that due to the fact that petitioner rendered only ad hoc service with the department, he is not entitled to pensionary benefits. Even Selection Grades granted to petitioner were not permissible under the relevant Rules due to which corrective action has been taken.

With Regard to Question No.I

14. With regard to the first question regarding eligibility and qualification of petitioner to be regularized in service, it is evident that the case of **Ashok Kumar Dixit** (supra) is clearly applicable in the facts and circumstances of the case inasmuch as in the said case also, regularization of said person was recommended while noticing that he did not have three years working/practical experience or three years experience in teaching after passing the diploma/ A certificate examination in terms of Government Order dated 28.05.1975. In both cases viz Ashok Kumar Dixit and petitioner, the order of

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recommendation dated 01.08.1983 clearly states that except for said working experience, the said two persons were otherwise qualified to hold the post of Instructor but since the exercise for regularization was conducted within a period of three years from the date of appointment, they naturally did not fulfill the said condition.

15. Learned State Counsel appearing on behalf of opposite parties has rebutted the submissions advanced by learned counsel for petitioner with the submission that there was no question of regularization of services of petitioner in view of fact that he did not fulfill the essential qualifications required for appointment on the post of Instructor. It has further been stated that since petitioner did not render substantive service on the post, he is disentitled for grant of pensionary benefits.

16. In view of the fact that the present dispute now pertains only to entitlement of petitioner for post-retiral benefits, the petition is being adjudicated with regard to the same ignoring the earlier claim of petitioner for regularization in service.

17. The question regarding entitlement of ad hoc/ temporary/ daily wage persons employed by the government has already been decided by a catena of judgments of not only this Court but also Hon'ble the Supreme Court as well.

18. A Division Bench of this Court in ***Hari Shankar Asopa versus State of U.P. and another*** reported in ***1989 (1) UPLBEC 501*** considered the said question regarding entitlement of temporary government servants appointed against substantive post. Upon considering Regulations 465 and 465A of Civil Service Regulations

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read with Financial Hand Book Volume-II Part 2 to 4 it made the following observations:-

"16. The requirement of employment being substantive and permanent, which is one of the three basis constituents of 'qualifying service', envisaged in Articles 465 and 465-A has ceased to be sine qua non for earning a retiring pension by service under the Government of Uttar Pradesh after 7th June, 1975 with effect from which date the Uttar Pradesh Fundamental Rule 56 (amendment and Validation) Act, 1975 U.P. Act No. 24 of 1975), amending Rule 56 of the Rules and rescinding Articles 465 and 465-A of the Regulations, has been enforced. Now the source for attaining the right to retiring pension in R. 56....."

Clause (e) of Rule 56 unequivocally recognises, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation or who is prematurely retired or who retires voluntarily. To be precise, every Government servant (whether permanent or temporary) who retires under Cl. (a) or Cl. (b). or who is required to retire, or who is allowed to. Retire under Cl. (c) of R. 56, becomes entitled for a retiring pension, provided, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

19. In ***Shakuntala @ Brahma Devi (Smt.) Versus Director of Pension 2002(3) UPLBEC 2521***, the learned Single Judge of this Court was called upon to consider whether a temporary government servant rendering 34 years of service upon being compulsory retired is entitled to pensionary benefit. While deciding the issue this Court noticed the Government Order dated 1 July 1989 which provided that government servants not rendering ten years of regular service are not entitled for pensionary benefits. The Court taking note of the provisions of Articles 361, 424, 465 of the Civil Service Regulations and Fundamental Rule 56 observed as follows:

"10.....By Government order dated 1.7.1989, it was provided that temporary Government servants who have

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rendered ten years regular service are also entitled for the retirement benefits. The aforesaid Government order was issued with intent to extend the pensionary benefits to temporary Government servants, which is clear from the first paragraph of the Government order. Paragraph 2 of the Government order further provides that those temporary Government servants who have completed minimum ten years regular service on the date of retirement/superannuation or who have been declared invalid by the appointing authority will be entitled to the superannuation/invalid pension, gratuity, family pension as admissible to a permanent employee. Paragraph 3 further provides that this provision will also be applicable in those cases where permission has been granted for voluntary retirement in accordance with the fundamental Rule 56. The Government order does not specifically provide that the persons who are compulsorily retired will not be given the benefit.....

11..... Thus, the intendment of Rule 56 (e) is to provide retirement pension to every Government servant who retires or is required to retire under Rule 56. Thus the intendment of statutory Rule 56 (e) is to extend benefit of retiring pension to both category of persons, i.e., persons compulsory retired or persons voluntarily retired. From the above intendment of rule, it is clear that no distinction or discrimination has been maintained with regard to payment of retiring pension to persons voluntarily retired or compulsorily retired. Thus, by Government order dated 1.7.1989 the temporary Government servant compulsorily retired cannot be excluded from benefits of retiring pension. When the statutory Rule, i.e., 56 (e) does not maintain any distinction with regard to payment of retiring pension to persons compulsorily retired and voluntarily retired, no such classification can be created by a Government order, which is an executive order. The object of the Government order as noted above was to extend pensionary benefits to temporary Government servants who have rendered ten years regular service. Thus, the persons compulsorily retired cannot be excluded from the pensionary benefits and if it is accepted that the Government order dated 1.7.1989 creates such classification, then the said classification

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will be arbitrary and unreasonable. It is thus held that the benefit of Government order dated 1.7.1989, is also available to the temporary Government servants who are compulsorily retired. There is no rational basis for any such classification nor there can be any valid object for such classification."

20. The Court upon perusal of the Government order dated 1 July 1989 was of the opinion that the Government order refers to "regular service" and not "substantive service". The Court explained what was meant of regular service. Relevant portion of the order reads thus:

"12.....The words 'DAS VARSH KI NIYAMIT SEWA PURN KAR LI HO' 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 word "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 servants. The temporary Government servant cannot be said to have substantive or regular service. Thus, the word "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 word "regular service" has been used to denote and specify the nature of service rendered. The emphasis is that service should be "regular". While defining the word 'regular', the Apex Court in Mrs. Raj Kanta v. Financial Commissioner, Punjab and another, AIR 1980 SC 1464, has held in paragraph 10 as under:

"To begin with, the word "regular" is derived from the word "regula" which means 'rule' and its first and

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legitimate signification, according to Webster, is conformable to a rule, or agreeable to an established rule, law, or principle, to a prescribed mode. In Words and Phrases (Vol. 36A P. 241) the word "regular" has been defined as 'steady or uniform in course, practice or occurrence, etc., and implies conformity to a rule, standard, or pattern'. It is further stated in the said Book that 'regular' means steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational variation. The word 'regular' means in a regular manner, methodically, in due order. Similarly, Webster's New World "Dictionary defines 'regular' as 'consistent or habitual in action', not changing, uniform, conforming to a standard or to a generally accepted rule or mode of conduct'."

13. From the above passage of the Apex Court's judgment, it is clear that service of a temporary employee should be in regular manner, methodically, in due order.

14. Government order dated 1.7.1989 meant ten years of temporary Government servant should be regular in nature meaning thereby that if the temporary Government servant has performed his duties irregularly, i.e, with gaps of years, his service may not be treated to be regular."

21. In ***Yashwant Hari Katakhar v. Union of India and ors.*** reported in ***1996 (7) SCC 113***, it was held that an employee who has served more than 20 years is entitled to pension and denial of retiring pension to the petitioner on the ground of not being permanent on any post clearly is violative of Clause (e) of Fundamental Rules, 56. The department cannot keep a person temporary or on daily wages indefinitely.

22. In ***A.P. Srivastava v. Union of India and Ors.*** reported in ***(1995) 3 UPLBEC 1842*** (Supplement), the Supreme Court has clearly taken a view that in case of a temporary employee who has rendered 20 years of service is entitled to pension. In the expression

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'substantive capacity' the emphasis imparted by the adjective 'substantive' is that a thing is substantive if it is essential part of the constituent or relating to what is essential. Therefore, when a post is vacant, however, designated in officilase, the capacity in which the person holds the post has to be ascertained by the State. The substantive capacity refers to capacity in which person holds the post and not necessarily to the nature and character of the post. Thus, a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for a long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation.

23. A three Judge Bench of the Supreme Court in ***Prem Singh vs. State of Uttar Pradesh & Ors*** reported in **2019(10)SCC 516** was considering the question, as to whether Rule 3(8) of the U.P. Retirement Benefits Rules, 1961 and Regulation 370 of the Civil Services Regulation of Uttar Pradesh should be struck down having regard to the fact that the Supreme Court had upheld the pari materia provision enacted in the State of Punjab which excluded computation of the period of work-charged services from qualifying service for pension.

24. The appellant before the Supreme Court was a work-charged employee having put in more than three decades of service, pension was declined as the appellant had not put in 10 years of regular service after regularization. The question posed was whether after regularization employees are entitled to count their past service. The Court made the following observations:

"29. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had

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been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

30. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work- charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.

31. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment

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or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

32. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

33. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying

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service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

34. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

*35. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court in Secretary, State of Karnataka and others vs. Uma Devi, 2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. **It would not be proper to relegate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one.** However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. **They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.***

36. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

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25. The Division Bench accordingly held that a person appointed temporarily against a substantive vacancy is entitled to post-retiral benefits in view of Rule 56 of the Fundamental Rules.

26. Subsequently, another Division Bench of this Court in ***Board of Revenue and others versus Prasad Narain Upadhyay*** reported in ***2006 (1) ESC 611 (All)*** has held that if a person is appointed as a Seasonal Collection Amin on temporary basis and continues as such till the date of retirement, he would be entitled to retiral benefits and pension if he has worked for more than 10 years in view of Fundamental Rule 56. Relevant paragraphs of the aforesaid judgment are as follows:-

"12. The term "qualifying service" is defined in Section 1 Chapter 16 of Article 361 of the Civil Service Regulations, which provides that 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.

(C) The service must be paid by government."

"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 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

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over the Civil Service Regulations, if they are inconsistent. Conditions-B (Supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is in operative."

"15. In this view of the matter, the contention of the appellants that since the petitioner-respondent was not a permanent confirmed employee and hence not entitled for pension, is clearly mis-conceived and is rejected."

27. The aforesaid judgments were thereafter quoted with approval in another Division Bench decision of this Court in ***State of U.P. and others versus Mahendra Chaubey*** reported in **2018 (9) ADJ 829** which reads as follows:-

"12. Clause (e) of Fundamental Rule 56 confers right upon a person retiring under Fundamental Rule 56 that 'a retiring pension' shall be payable, and in respect of other retiral benefits, it says that same shall be available in accordance with and subject to the provisions of relevant rules to every Government Servant who retires or is required / allowed to retire under Fundamental Rule 56. Article 370 of CSR stipulates that 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 period of temporary or officiating service in non pensionable establishment or work charge establishment or period of service in a post paid from contingencies. Therefore, temporary service followed without interruption, would qualify for pension under Article 370 of CSR."

28. A learned Single Judge of this Court in a recent decision i.e. ***Vimal Kumar Shukla versus State of U.P. and others, Writ A No. 60332 of 2016***, rendered on 17.9.2019 after considering the aforesaid judgments held as under:-

"The principle that emerges from the spectrum of the decisions is that a temporary employee appointed on the regular

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establishment of the Government is entitled to pension under Fundamental Rule 56. The nomenclature viz. ad hoc, temporary, daily wage/work charge is of no relevance. The incumbent must have rendered continuous regular service which certainly does mean substantive service."

29. Upon applicability of the aforesaid judgments, it is undisputed that the petitioner was appointed in the year 1980 on ad hoc basis and subsequently superannuated in 2018 after rendering continuous services in ad hoc capacity. It is an admitted case that the petitioner continued in such capacity without any break, from the initial date of appointment till the date of attaining the age of superannuation. It is a relevant fact that petitioner's case for regularization was referred to the State Government time and again by the Director as well as Principal. While rejecting petitioner's claim for regularization, the only ground taken by opposite parties was that he lacked three years' experience as on the date of appointment. The opposite parties have totally lost sight of the fact that subsequently when the petitioner's case was considered for regularization, he had admittedly completed more than three years of required experience. As such adherence to the aforesaid condition relating it back to the date of initial appointment was not only arbitrary but unreasonable particularly since petitioner fulfilled all other essential qualifications required for appointment on the post.

30. The issue whether a daily wage employee is entitled for grant of pensionary benefits upon superannuation has been adjudicated by Hon'ble the Supreme Court in **Prem Ram versus Managing Director, Uttarakhand Pw Works & Construction Nigam Dehradun and others in Civil Appeal No. 4474 of 2015** in the following terms:-

"9. If that be so, there is no denying the fact that the persons who were junior to the appellant, having been engaged much

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later than him, steal a march over him in terms of regularization in service while the appellant remained embroiled in litigation over what was eventually found to be an illegal termination of his service. It is true that the appellant has already superannuated. That does not, however, make any difference. What is important is that the appellant had been appointed as early as in the year 1988 and had by the time the decision of this Court in Umadevi's (3) case (supra) pronounced, already completed more than 10 years service. Government has formulated rules for regularization of such daily-wagers, no matter the same are the subject matter of a challenge before the High Court. What is noteworthy is that neither the State Government nor the Jal Nigam has resented the idea of regularization of those who have served for over a decade. The rules providing for regularization are a sufficient enough indication of that fact. We do not, therefore, see any impediment in directing regularization of the service of the appellant on the analogy of his juniors with effect from the date his juniors were regularized and for the release of all retiral benefits in his favour on that basis by treating him to be in continuous service till the date of his superannuation. We make it clear that this direction will not entitle the appellant to claim any amount towards arrears of salary based on such regularization."

31. In view of aforesaid judgments, it is clear that ad hoc/temporary/ daily wage employees rendering long years of service and were permitted to superannuate without regularization/confirmation in service are entitled to post retiral benefits.

32. Having considered the aforesaid facts and as has been noticed herein above, it is the case of opposite parties that petitioner although was duly qualified for holding the post of Instructor but could not be regularized only on account of the fact that he had not completed three years of working/practical experience as on the date of consideration for regularization. In the considered opinion of this Court, the non consideration for regularization of petitioner on that

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ground is based only on the fortuitous circumstance that exercise for regularization was conducted within a period of three years from date of ad hoc appointment of petitioner. Had the aforesaid exercise been conducted subsequently, even the said condition would have been fulfilled by petitioner. Such a fortuitous circumstance cannot be made the ground for rejection of petitioner's claim for regularization particularly in view of the fact that at the time of petitioner's superannuation in 2015, he had already rendered 34 years of service.

33. It is relevant to notice that the case of Ashok Kumar Dixit was also allowed on the same basis and premise and since the said judgment has attained finality having been upheld in Special Appeal as well as in Special Leave Petition, it would thus have a binding precedent in the present case as well since there is nothing stated in the counter affidavit to take a contrary stand and particularly since the said Ashok Kumar Dixit and the petitioner are similarly placed. In view of aforesaid, it is held that petitioner despite having superannuated without regularization would definitely be entitled to service benefits such as post retiral benefits.

With Regard to Question No.II

34. Regarding the said question, it is also discernable that the case of *Ashok Kumar Dixit* (supra) was allowed inter alia considering the case of **Prem Singh versus State of Uttar Pradesh and Ors.** reported in (2019)10 SCC 516 in the light of U. P. Retirement Benefit Rules, 1961 and Regulation No.370 of Civil Service Regulations as applicable in the State of U.P. but subsequently due to advent of the Validation Act, 2021, the question which arises is whether in such changed circumstances, petitioner would be entitled for grant of relief regarding pensionary benefits or not?

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35. The Division Bench in Special Appeal Defective No.314 of 2022 while following the judgment rendered by Division Bench in the case of **Smt. Hemlata Mishra** has also remanded the matter for consideration on the said point.

36. For determination of said question, the relevant provisions of the Validation Act of 2021 are required to be considered and for which purpose, the provisions of Act are as follows:-

"उत्तर प्रदेश असाधारण गजट, 5 मार्च, 2021

No. 386 (2)/LXXIX-V-1-21-1-ka-39-20

Dated Lucknow, March 5, 2021

IN pursuance of the provisions of clause (3) of Article 348 of the Constitution of India, the Governor is pleased to order the publication of the following English translation of the Uttar Pradesh Pension Hetu Aharkari Seva Tatha Vidhimanyakaran Adhiniyam, 2021 (Uttar Pradesh Adhiniyam Sankhya 1 of 2021) as passed by the Uttar Pradesh Legislature and assented to by the Governor on March 4, 2021. The Vitt (Samanya) Anubhag-3 is administratively concerned with the said Adhiniyam.

*THE UTTAR PRADESH QUALIFYING SERVICE FOR
PENSION AND VALIDATION ACT, 2021*

(U.P. Act no. 1 of 2021)

(As passed by the Uttar Pradesh Legislature)

AN

ACT

to provide for qualifying service for pension and to validate certain actions taken in this behalf and for matters connected therewith or incidental thereto.

IT IS HEREBY enacted in the Seventy-second Year of the Republic of India as follows-

21.

1. (1) *This Act may be called the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021.*

(2) *It shall extend to the whole of the State of Uttar Pradesh.*

(3) *It shall be deemed to have come into force on April 1, 1961. (Short title, extent and commencement)*

2. *Notwithstanding anything contained in any rule, regulation or Government order for the purposes of entitlement of pension to an officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post. (Qualifying Service for Pension)*

3. *Notwithstanding any Judgement, decree or order of any Court, anything done or purporting to have been done and any action taken or purporting to have been taken under or in relation to sub-rule (8) of rule 3 of the Uttar Pradesh Retirement Benefit Rules, 1961 before the commencement of this Act, shall be deemed to be and always to have been done or taken under the provisions of this Act and to be and always to have been valid as if the provisions of this Act were in force at all material times with effect from April 1, 1961. (Validation)*

4. *Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act. (Overriding effect)*

U.P. Ordinance no. 19 of 2020

5. (1) *The Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020 is hereby repealed. (Repeal and saving)*

(2) Notwithstanding such repeal, anything done or any action taken under the provisions of the principal Act as amended by the Ordinance referred to in sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act as if the provisions of this Act were in force at all material times.

STATEMENT OF OBJECTS AND REASONS

Pension and gratuity admissible to a retired Government servant are determined in relation to the length of qualifying service of the Government servant. Although the term "Qualifying Service" is described in the Uttar Pradesh Civil Service Regulation and the Uttar Pradesh Retirement Benefit Rules, 1961, however the definition of the said term is open to subjective interpretation which leads to administrative difficulties.

It has, therefore, been decided to make a law defining the term "Qualifying Service" and to validate such definition with effect from April 1, 1961 which is the date of commencement of the Uttar Pradesh Retirement Benefit Rules, 1961.

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, the Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020 (U.P. Ordinance No.19 of 2020) was promulgated by the Governor on October 21, 2020.

This Bill is introduced to replace the aforesaid Ordinance.

By order,

ATUL SRIVASTAVA,

Pramukh Sachiv"

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37. Upon consideration of the aforesaid Act, it is evident that under Section 2, the term 'qualifying service' has been defined as service rendered by an officer appointed on a temporary or permanent post in accordance with provisions of the Service Rules prescribed by the Government for the post.

38. In the present case, it has been admitted by opposite parties that at the time of petitioner's induction into service on ad hoc basis, there were no Service Rules prescribed by the Government for the post and the terms and conditions of service were in fact governed by Government Order dated 28.05.1975 whereby six conditions as indicated herein above were prescribed.

39. In the present case, it is also admitted that petitioner was appointed on ad hoc basis with the petitioner being qualified in terms of educational qualifications required for the post of Instructor. However he was not found eligible since he had not completed three years working/ practical experience as on the date of consideration for regularization.

40. Since admittedly there were no Service Rules prescribed by the Government for appointment on the post of Instructor when petitioner was appointed on the said post, the said Government Order dated 28.05.1975 would be determining factor. As has already been held in answer to question no.1, that the circumstance of holding the regularization exercise prior to completion of three years service by petitioner being only a fortuitous circumstance, cannot come in the way of grant of service benefits to petitioner. It is but evident that petitioner would come within the scope of Section 2 of the Validation Act of 2021 particularly since there were no other Service Rules prescribed by the Government.

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41. A similar controversy with regard to services spent on temporary basis being counted for purposes of qualifying service for pension has also been adjudicated upon by Division Bench of this Court in Special Appeal No.152 of 2021 State of U.P & Ors versus Bhanu Pratap in the following:

"It is informed that this Ordinance has been enacted by U.P. Act No.1 of 2021 on 05.03.2021 as the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021.

It is clear from the perusal of Section 2 of the Act of 2021 that it would have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Careful reading thereof, however, reveals that "Qualifying Service" has been defined to mean the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

Admittedly, the petitioner was appointed on 10.05.1989 as work charge employee at Azamgarh. His services were however regularised on 15.6.2011. The regularisation of service was against the permanent post and it is not that his initial appointment was not in accordance to service Rules.

In light of the aforesaid, period spent in service may be on temporary basis while working as a work charge employee, proceeded with regularization, benefit of past services cannot be denied."

42. The said judgment has been upheld in Special Leave Petition (C) No.10381 of 2022 vide order dated 11.07.2022.

43. In a recent judgment in the case of **State of Gujarat & Ors. versus Talsibhai Dhanjibhai Patel reported in 2022 LiveLaw (SC) 187**. It has been held that once State has continued to take service from an employee even on an ad hoc basis for 30 years, State cannot be permitted to take benefit of its own wrong and no error

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was found in judgment of High Court directing payment of pensionary benefit to the employee who retired after rendering more than 30 years of service as ad hoc without regularization.

44. Upon applicability of aforesaid judgments in the present facts and circumstances of the case also, petitioner does not come within exception of Section 2 of Validation Act of 2021 and therefore would be entitled for grant of pensionary benefits. Question No.II is also answered accordingly in favour of petitioner.

45. Resultantly, petition succeeds and is allowed by issuance of a writ in the nature of Mandamus directing opposite parties to pay post retiral benefits including pension gratuity etc. to petitioner with effect from the date of his superannuation on 31.12.2015 ignoring any orders of the Department of State Government to the contrary, if any.

46. Orders pertaining to and actual payment of same shall be made within a period of six months from the date a copy of this order is produced before the opposite parties. The period of ad hoc service of petitioner shall be calculated for the purposes of qualifying service. The petitioner shall also be entitled to the same Selection Grade pay-scale under Assured Career Progression issued from time to time by Government Orders and the post-retiral benefits shall be computed after fixing the salary on revised pay-scales under the Assured Career Progression Schemes. It is made clear that petitioner shall not be entitled to arrears of salary.

47. Writ petition stands **allowed**. Parties to bear their own costs.

Order Date :- 12.10.2023

Subodh/-