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Court No. - 6

Case :- WRIT - A No. - 18309 of 2006

Petitioner :- Dr. Indra Pratap Singh

Respondent :- B.H.U. Varanasi Thru Registrar And Others

Counsel for Petitioner :- Vivek Kumar Singh

Counsel for Respondent :- A.K. Nigam A.S.G.I., H.P.Singh, K.S.Chauhan, Kuldeep Singh Chauhan, Ritvik Upadhyay, S.C.

Hon'ble Saurabh Shyam Shamshery,J.

1. The petitioner was appointed by Executive Council of Banaras Hindu University as 'Demonstrator' in the Department of Basic Principles, Institute of Medical Sciences, Banaras Hindu University, Varanasi by an order dated 19.11.1968 for a time period of 3 years, which got over on 18.11.1971.
2. Petitioner thereafter was appointed as a temporary Lecturer on 26.08.1974 in the Department of Basic Principles, Institute of Medical Sciences, Banaras Hindu University and his service was extended upto 31.03.1980 by an order dated 06/07.08.1980. It appears that no further extension was granted to petitioner, however, he had worked till 18.07.1980 but paid salary only upto 31.03.1980.
3. Thereafter petitioner participated in a selection process conducted by another University i.e. Nagpur University (without proper channel) and he was duly selected by its selection committee for the post of Reader in Sanskrit Sanhit Siddhanta (Basic Principles) at Sri Ayurvedic Mahavidyalaya, Nagpur an affiliated College and he joined on 21.07.1980 and served till 20.09.1982.
4. Thereafter petitioner appeared before a Selection Committee of Banaras Hindu University and was selected on the post of 'Lecturer' at

Department of Basic Principles, Institute of Medical Sciences, Banaras Hindu University, against the substantive post on 22.09.1982.

5. While working as ‘Lecturer’ petitioner was granted financial benefit such as by giving fourteen increments, his last drawn salary was protected.

6. A dispute arose when, petitioner claim consideration for promotion on the post of Reader under ‘Merit Promotion Scheme’ and since it was denied that he had not completed 8 years of continuous service since his appointment as ‘Lecturer’ in Banaras Hindu University was on 22.09.1982, therefore, he has filed a Writ Petition No. 3396 of 1985.

7. A Single Bench of this Court considered the sole issue for determination in said writ petition that whether the petitioner has completed 8 years of continuous service in the cadre as required under the scheme and in this regard Clause (a) of Para 2 of “Merit Promotion Scheme” was considered and for reference said part of the scheme is mentioned hereinafter.

“2(a). Teacher in the University departments engaged in advance teaching and research and whose contribution and achievements are such as to merit recognition must be considered for merit promotion in the first instance after completing eight years of continuous service in their respective cadre of which atleast four years should be in the institution where he/she is being considered for such assessment and merit promotion.”

8. A Co-ordinate Bench allowed Writ Petition No. 3396 of 1985 by a judgment dated 22.12.1987 and directed that petitioner be considered for promotion under “Merit Promotion Scheme” on the post of Reader. Relevant part of the judgement is reproduced hereinafter:-

“9. The petitioner who had worked in the University from 26-8-1974 till 31-3-1980 and has again joined on the same post on 22-9-1982 cannot be legally deprived of his chances of promotion to the post of Reader' for the only reason at he was fortunate to have worked on the post of Reader during the period from 21-7-1980 to

20-9-1982 in Shri Ayurved College. He cannot be punished for having worked on the post to which he wants to be promoted long before he could have otherwise become eligible for promotion had he not left the University it will be really unfortunate to think of the situation in which a person is deprived of his chances or the promotion to the post on which he had already worked for some time in the past for that very reason.

10. The petitioner had appeared before the Selection Committee under the interim order of this Court. However, recommendation of the Selection Committee has not so far been considered by the Executive Council for want of suitable directions by this Court. In view of our conclusion that the petitioner was eligible for being considered for promotion on the relevant date the recommendation of the Selection Committee had to be placed for consideration before the Executive Council. In case the petitioner has been selected for promotion by the Selection Committee and its recommendation is approved by the Executive Council he will be entitled for promotion to the post of Reader with effect from the same date from which other teachers of the University interviewed for first round of promotion were appointed.

11. In the result, the writ petition succeeds and is allowed. The orders of the University rejecting applications of the petitioner for condoning break in service and for being considered for merit promotion are quashed. The University is directed to place the recommendation of the Selection Committee before the Executive Council in its next meeting. It is further directed to appoint the petitioner on the post of Reader in the Department of Basic Principles in the institute of Medical Sciences of the University, if he has been selected for promotion by the Selection Committee and its recommendation is approved by the Executive Council with effect from the same date from which other teachers of the University interviewed for first round of promotion were appointed. We direct the parties to bear their own costs.”

9. The aforesaid judgement was challenged by Banaras Hindu University before Supreme Court by way of filing Civil Appeal No. 1626 of 1989, which was dismissed vide judgement dated 24.01.1992, reported in 1992 Suppl(2) SCC 2 and relevant part thereof is mentioned hereinafter:-

“9. We agree with the learned counsel for the respondent that the expression "eight years of continuous service" para 2 (a) of the scheme should be understood in a reasonable manner having regard to the underlying aim and object. Para 2 (a) itself expressly recognizes that the eight years' service may be in more than one institution, the only requirement being a minimum of four years service in the institution where he is being considered for promotion under the scheme. In case of shift from one university to other or from one institution to the other it can reasonably be presumed that there is bound to be some interval. The interval may be of a day, a week or a month. What is relevant is not the length of the interval or break, as it may be called, but its nature. We do not mean to say that length of such interval is totally irrelevant, what we mean however, is that one must take into consideration the reason for which break of the circumstances in which such break has occurred Another factor to be taken into consideration in understanding and construing the said expression is the object underlying the said requirement. According to us, the object is to ensure eight years' teaching experience. It is true that there is a break of three months 20 days in the respondent's service and teaching experience. We also take note of the fact that it was not the vacation time for academic institutions. But this circumstance must be weighed against a counter-veiling circumstance in favour of the respondent viz., his re-appointment on a permanent basis in the very same department in the University in the year 1982. As stated above, he served as a temporary lecturer from 26.8.1974 till 31.3.1980. From 1.4.1980 to 20.7.1980 he remained without a job. On 21.7.1980 he was appointed as a Reader in the Nagpur University in the very same subject where he served till 20.9.1982. On 22.9.1982 he was appointed as a permanent lecturer in this very University and in the same category and subject. On this occasion, he was granted a good number of increments. The University says that these increments were granted with a view to protect his late pay drawn by him in the Nagpur University while the respondent says that it was granted not only for the said purpose but also in the light of his past service in this University. It is true that he was not given seniority since 26.8.1974. Even as the question is whether the gap of three months 20 days is such a long gap as not to merit condonation or for that matter to be termed as a break in service for purposes of para 2 (a) of the scheme.”

“16. The respondent has brought to our notice several instances where the University has condoned breaks of two however, think

it necessary to examine these cases except two One Dr. L.K. Pandey was a teacher in the Department of Ob. and Gyn in the institute of Medical Sciences of this University. He was appointed temporarily on 26.5.1973 and resigned on 5.2.1975. He was said to be out of job between 5.2.1975 and 27.04.1975 (for a period of two months 22 days). He was reappointed as a lecturer in this University on temporary basis on 28.4.1975. and on a permanent basis on 16.10.1979. The respondent's case is that the University has condoned the said gap of two months 22 days in his case and if so there is no reason why the gap of three months 20 days in the case of respondent should not be condoned. The University has, however, explained in its counter affidavit that no such condonation was made in his case and that his service was counted only from 28.4.1975. But if his service is counted from 28.4. 1975 only, it is significant to notice, he does not complete eight years service by 15.1.1983 which was the last day of applying vide University proceeding dated 11/21 December, 1982. The other case is for Dr. A.M. Tripathi who was a teacher in the department of paediatrics in the Institute of Medical Sciences of this University He was appointed temporarily on 11.5.1974. According to the respondent, he resigned on 12.8.1975 and was out of job till 24.8.1975 when he went to Kabul. According to him he served at Kabul in a non-teaching capacity from 25.8.1975 to 8.4.1976 and he was reappointed as a lecturer in this University on temporary basis on 9.4.1976 and made permanent on 9.2.1979 The respondent says that the entire gap between 12.8.1975 to 8.4 1976 was condoned by the University for considering his case under the scheme. The appellant's case, however, is different. According to the appellant-University, he was sent to Kabul on deputation and that the break in his service occurring prior to his going to Kabul has never been condoned. We find that in the rejoinder affidavit of the University filed in this court, there is a certain mix-up of the relevant dates in the case of these two teachers. Be that as it may, its case appears to be that services of these two teachers were counted only from the date of their re employment. Then the following significant statement occurs in the rejoinder-affidavit filed in this court:

It is true that by 15.1.1983 he had not completed 8 years of continuous service in the same cadre. However, in the meanwhile the vice chancellor as also the Executive Council decided that eligibility period of candidature for appointment to teaching posts under Merit Promotion Scheme be counted as on the date of interview, as per

existing practice for regular appointments in view of the fact that the Executive Council treats posts in both categories on a par with each other. Accordingly since Dr. Tripathi had completed 8 years of continuous service in the same cadre by the date of interview on 23.6.1983, he was eligible and was selected by the statutory Selection Committee. Applying the very same principle which was approved by the Executive Council, Dr. L.K. Pandey became eligible and was selected"

17. In our opinion, the above statement in the rejoinder affidavit filed by the University is very revealing. It shows that even though the said two teachers had not completed eight years service by the prescribed date i.e. 15.1.1983, the Vice Chancellor and the Executive Council decided to extend the eligibility period till the date of interview so as to make them eligible for consideration. We are not suggesting any malafides or any unreasonable conduct to the University. All that we are saying is that the University has been passing appropriate orders wherever the justice of a case demands. In our opinion, the same treatment ought to have been extended to the respondent, in all the circumstances of the case.

For the above reasons, the appeal fails, and is accordingly dismissed."

10. In pursuance of above judgements, the petitioner was granted promotion by University under "Merit Promotion Scheme" with retrospective effect i.e. from 1983.

11. The petitioner reached to the age of superannuation on 31.08.2004 and was granted pension benefit as Reader upto 30.06.2004.

12. After retirement pension was fixed, however, University had excluded the period when petitioner had worked as "Demonstrator and Lecturer" in University between 19.11.1968 to 31.03.1980 (about 9 years) and also the period when he had worked as 'Reader' in other University from 21.07.1980 to 20.09.1982 (about 2 years) as such 11 years of service was not included for calculating his pensionary benefits.

13. The representation to include said period of 11 years for calculating pension remain undecided, therefore, present writ petition was filed in the year 2016 seeking following reliefs:-

“(i) issue a writ, order or direction in the nature of MANDAMUS directing the respondent nos. 1 and 2 the Banaras Hindu University to re-fix the pension of the petitioner after including the service-rendered by him in the University for about 9 years ie. during the period between 19.11.1968 and 31.3.1980 and the period (about two years) he worked in Shri Ayurved College, Nagpur, an affiliated college of Nagpur University i.e. from 21.7.1980 to 20.9.1982.

(ii) issue a writ, order, or direction in the nature of mandamus commanding the respondent University to pay the arrear of pension along with interest from 31.8.2003 after re-fixation of the pension of the petitioner taking into account of past services rendered by the petitioner from 19.11.1968 and further direct the respondent University to permit the petitioner to sell 40 % of the pension after re-fixation from 3.8.2003.

(iii) issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper

(iv) award cost of the petition to the petitioner”

14. Shri B.P. Singh, learned Senior Advocate assisted by Shri Raunak Tiwari, learned counsel for petitioner has mainly rest his arguments on the reasons and findings given in a judgement passed in earlier round of litigation (1992 Suppl(2) SCC 2) so far as interpretation of “continuous service” and consideration of the petitioner’s earlier service in Nagpur University and Banaras Hindu University for 8 years as regular, for consideration for promotion under “Merit Promotion Scheme”. Learned Senior Advocate has strenuously argued that on same interpretation his entire earlier service of 11 years be calculated for fixation of pension and other retiral benefits.

15. Learned Senior Advocate also refer conduct of Respondent-University that petitioner was single out, whereas similar benefit was granted to other employees. Learned Senior Advocate referred example

cited in the above referred judgement passed by the Supreme Court (1992 Suppl(2) SCC 2).

16. Learned Senior Advocate submitted that in the present case Central Civil Service Pension Rules, 1972 will not be applicable and instead Central Universities Retirement Benefit Rules, 1967 will be applicable and he also referred certain provisions of it. Learned Senior Advocate has also referred instances of discrimination mentioned in a supplementary affidavit filed by petitioner as well as rejoinder to supplementary counter affidavit. Paras 8, 9 and 10 of writ petition as well as relevant paras 3 and 4 of supplementary affidavit and para 6 of rejoinder to supplementary counter affidavit, are reproduced hereinafter:

Paras 8, 9 and 10 of Writ Petition

“8. That since the aforesaid period of service was on probation and the petitioner was not confirmed, hence according to page 87 (2.3) of B.H.U. Calender, the lien on the post of temporary Lecturer in B.H.U. would continue. The said para 2.3 of page 87 provides as follows:-

“During his probation on higher grade he shall hold a lien on his post in the lower grade. Appointment in the higher grade on probation or after confirmation shall not affect his privileges as regards leave nor it will affect the continuity of his service.”

9. That it is further stated that there is an administrative order dated 29.05.1981 of the Rector of the Banaras Hindu University who was exercising the powers of the Vice Chancellor to the following effect:-

“That the period of break be condoned in those cases where they have been substantively appointed on permanent basis on the recommendation of the statutory selection committee, by treating the period of break as leave on loss of pay. Break in service of University teachers of I.M.S. have been condoned on the above basis”

The said order was approved by the Executive Council of the University. For the sake of convenience true copy of the order dated of the Rector dated 29.05.1981 is enclosed herewith and marked as Annexure – V to this writ petition.

10. That the petitioner was again selected by the Statutory Selection Committee of the Banaras Hindu University and on its recommendation, as approved by the Executive Council, he was appointed as Lecturer in the Banaras Hindu University, Varanasi on 22.09.1982 in permanent basis. Since then he has been working as such in the Department of Principles of Institute of Medical Sciences of the University.”

Paras 3 and 4 of Supplementary Affidavit

“3- That the petitioner’s experience as a Demonstrator has not been counted while calculating his pension. However, in the similar facts and circumstances of the case, the University has counted the service of Dr.L.D. Dwivedi, who retired as Reader from the University. Dr. L.D. Dwivedi had worked as a Demonstrator in the Department of Basic Principles w.e.f. 19.11.1968 to 7.10.1971. This period was counted for the pensionary benefits. Photostat copy of the order dated 09.05.1998, which has been issued by the Assistant Registrar under the RTI Act to one Mr. Asheesh Kumar Mishra is being annexed herewith and is marked to this Affidavit as Annexure -SA-1.

4- That one Dr. A.M. Tripathi, who was a Professor in the Department of Paediatrics, had resigned from the University and he got the employment in Afganistan. He was re-appointed in the University and for pensionary benefits, his entire service prior to the resignation has also been taken into consideration and the break in his service was condoned. Photostat copy of the resignation of Dr. A.M. Tripathi dated 09.08.1975 and the letter/information dated 31.05.2008 furnished by the University under the RTI Act are being annexed herewith and are marked to this Affidavit as Annexure SA 2 and 3.”

Para 6 of Supplementary Rejoinder Affidavit

“6. That the contents of paragraph No. 8 of the supplementary counter affidavit are again misleading. Dr. A.M. Tripathi has been promoted from Lecturer to Reader with effect from January 1983. For this promotion, as per the UGC guidelines, he was required to complete 8 years continuous service on 15.01.1983. He resigned from Banaras Hindu University for serving outside the B.H.U i.e. at Afganistan. He again joined as temporary lecturer in Banaras Hindu University. This proves that the breaks-in-service caused through resignation and service outside the Banaras Hindu University at Afganistan have been condoned without asking for capitalized value for the rendered outside B.H.U This has been

done applying the order of the Rector dated 29.05.1981 i.e. much before the introduction of merit promotion scheme. The breaks have been condoned only for the pensionary benefits.

Similarly, in number of cases the respondent university has condoned the break-in-service of different nature and duration applying the Rector's order dated 29.05.1981 but only for the petitioner's case, they are relying Government of India Rules. This contention of the petitioner is evident from the stand of the university in writ petition No. 3396 of 1985. For the sake of convenience paras 7 & 9 of the counter affidavit of respondent University in writ petition No. 3396 of 1985 are quoted hereunder:-

"7. That in reply to the contents of paragraph 6 of the supplementary affidavit, it is stated that Dr A.M. Tripathi joined as Lecturer on 11.5.1974 on temporary basis in the Department of Paediatric, I.M.S. He resigned w.e.f 24.8.1975 to take up an assignment under the government of Afganisthan on deputation from Government of India. He worked there from 25.8.1975 to 8.4.1976 as a lecturer in the grade of Rs.700-1600. Dr. A.M. Tripathi joined again in the Department of Paediatrics with effect from 9.4.1976 and continued as a temporary lecturer in the University since then.

(i) As Dr. A.M. Tripathi was continuing in the cadre of lecturer in the grade of Rs.700-1600 right from 11.5.1974 when he joined as temporary lecturer in Banaras Hindu University and was also in the same cadre while on deputation and he continued after his joining on 9.4.1976 as temporary lecturer in the University and his application for condonation of break in service of the University on account of temporary tenure was duly considered and condoned. The period of breaks considered by the University and condoned comprised of seven days break in between two temporary appointments, which is reproduced below"-

1 From 9.3.1977 to 15.3.1977

2 From 16.2.1978 to 22.2.1978

3. From 23.1.1979 to 29.01.1979

ii) It would thus appear that Dr Tripathi continues in service of the respondent University in the lecturers' grade since 11.5.1974.

(iii) The break in his service was condoned vide order dated 29.5.1981 by the then Rector discharging the duties and functions of the Vice Chancellor and was much before the introduction of

the Merit Promotion Scheme in November 1982. The candidature of Dr Tripathi for promotion under the Merit Promotion Scheme was considered on the basis of 8 years continuous service in the cadre of Lecturer in the past. Dr. Tripathi was appointed on regular basis on probation under Executive Council Resolution dated 14.2.79 and joined on 9.2.1979. Thus, in the case of Dr A.M. Tripathi he continuously worked in the cadre of Lecturer carrying out a scale of Rs.700-00 all though since 11.5.1974. Dr. A.M. Tripathi consequently fulfilled the requisite eligibility criteria as provided under the guidelines of the Merit Promotion Scheme and was rightly considered by the respondent University for promotion on the post of Reader under the Scheme.

The power to condone the delay vested the Vice Chancellor and as such it was for the petitioner to have approached the University for the same.”

17. Learned Senior Advocate has placed reliance on the judgments passed by Supreme Court in **Indian Ex-Services League and others vs. Union of India**, (1991)2 SCC 104; **Prem Singh vs. State of Uttar Pradesh and others**, (2019)10 SCC 516; and, **State of Rajasthan and others vs. O.P. Gupta**, (2022)18 SCC 382 as well as this Court’s judgment in **Dr. Indra Pratap Singh vs. B.H.U. Varanasi through Registrar and others**, 2023:AHC:175175.

18. Per Contra, Sri V.K. Upadhyay, learned Senior Advocate assisted by Sri Ritvik Upadhyay, learned counsel for Respondent-University has referred following paragraphs of counter affidavit:

“11-That the contents of paragraph no 9 of the writ petition are denied as incorrect In reply it is submitted that in the year of 1984 petitioner applied for continuity of service by condoning all the break in various spell of service as mentioned in the preceding paragraphs for the period of 1974 1982 and same was rejected by the University in view of the relevant Rules of the Government of India. The Relevant Rules of Government of India regarding condonation of interruption of service are quoted below :-

(a) In absence of contrary a specific indication to the in the service book, an interruption between two spells of Civil service rendered and paid out of Defense service Estimates or Railway

Estimates shall be treated as automatically condoned and the pre interruption service treated as qualifying service.

(b) Nothing in clause (a) shall apply interruption caused by resignation, dismissal to or removal from service or for participation in a strike.

(c) The period of interruption referred to in clause (a) shall not count as qualifying service.

It is further submitted that as per Government of India Rules mentioned above petitioner worked on the post of temporary Reader at Ayurveda College Nagpur during break of service i.e. 21.07.1980 to 20.09.1982 and case of the petitioner is not covered under the order passed by Rector dated 29.05.1981 of the University (already filed as Annexure no. - V to the writ petition) and rightly period of break of service was not condoned by the University.”

“15- That in reply to the contents of paragraph no. 13, 14 & 15 of the writ petition it is submitted that writ petition no. 3396 of 1985 was filed by the petitioner by promotion on the post of Reader under the merit promotion scheme. As per judgment of this Hon’ble Court and Supreme Court of India period of temporary service rendered by the petitioner were counted for proposes of promotion under merit promotion scheme and not for the purposes of pensionery benefit.”

“18- That in reply to the contents of paragraph no. 18 & 19 of the writ petition it is submitted that the vide letters dated 3/4.09.2004, 25.01.2005 (already filed as Annexure no. -X and XI to the writ petition) petitioner request for condonation of break in service and counting the period 21.07.1980- 20.09.1982 for pensionery benefit was rightly turned down by the University in view of the fact petitioner worked on the post of demonstrator was a tenure post for three years which may not be counted for pensionery benefit as per Rules in this behalf.

It is pertinent to mention here that so far question of condonation of break in service is concerned it is submitted that as per Resolution of Executive Council ECR no 17 dated 20/21.03.1999 which read as under:

"Resolved that the case of pay fixation and break in service etc. be disposed of as per Government of India Rules"

It is further stated that period of break in service was not condoned by the University as per Government Rules. Only one break (i.e. last break) in service can be considered for condonation. In view of the fact that during last break in service of the University i.e. from 01.04.1980 to, 21.09.1982 petitioner worked as Reader at Sri Ayurvedic College Nagpur.”

“20. That in reply to the contents of paragraph no. 21 of the writ petition it is submitted that in term of the Order passed by this Hon’ble Court as well as Hon’ble Supreme Court the temporary services rendered by the petitioner were counted only for the purposes of promotion on the post of Reader under the Merit Promotion Scheme and not for the pensionary benefit. It is pertinent to mention here that petitioner applied in the University on the post of Lecturer not through proper channel without seeking prior permission from Sri Ayurvedic Mahavidyalaya, Nagpur where he lastly worked.”

19. Learned Senior Advocate referred Rules 13, 26, 27 and 28 of the Central Civil Service Pension Rules, 1972, which are reproduced hereinafter:-

“13. Commencement of qualifying service.- Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:

Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post:

Provided further that-

(a) in the case of a Government servant in a Group 'D' service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th April, 1950, service rendered before attaining the age of sixteen years shall not count for any purpose, and

(b) in the case of a Government servant not covered by Clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.”

“26. Forfeiture of service or resignation.- (1) Resignation from a service or a post, unless it is allowed to be withdrawn in the

public interest by the appointing authority, entails forfeiture of past service.

(2) A registration shall entail forfeiture of past service if it has been submitted to take up with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies.

(3) Interruption in service in a case falling under sub-rule (2), due to the appointments being at different stations not exceeding the joining time permissible under the rules of transfer, shall be covered by grant of leave of any kind due to the Government servant on the date of relief or by formal condonation to the extent to which the period is not covered by leave due to him.

(4) The appointing authority may permit a person to withdraw his resignation in the public interest on the following conditions, namely:-

(i) that the resignation was tendered by the Government servant for some compelling reasons which did not involve any reflection in his integrity, efficiency or conduct and the request for withdrawal of the resignation has been made as a result of a material change in the circumstances which originally compelled him to tender the resignation;

(ii) that during the period intervening between the date on which the resignation became effective and the date from which the request for withdrawal was made, the conduct of the person concerned was in no way improper:

(iii) that the period of absence from duty between the date on which the resignation became effective and the date on which the person is allowed to resume duty as a result of permission to withdraw the resignation is not more than ninety days:

(iv) that the post, which was vacated by the Government servant on the acceptance of his resignation or any other comparable post, is available.

(5) Request for withdrawal of a resignation shall not be accepted by the appointing authority where a Government servant resigns his service or post with a view to taking up an appointment in or under a private commercial company or in or under a corporation or company wholly or substantially owned or controlled by the Government or in or under a body controlled or financed by the Government.

(6) When an order is passed by the appointing authority allowing a person to withdraw his resignation and to resume duty, the order shall be deemed to include the condonation of interruption in service but the period of interruption shall not count as qualifying service.

(7) A resignation submitted for the purpose of Rule 37 shall not entail forfeiture of past service under the Government.

27. Effect of interruption in service- *(1) An interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:-*

(a) authorised leave of absence,

(b) unauthorised absence in continuation of authorised leave of absence so long as the post of absence is not filled substantively

(c) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension,

(d) transfer to non-qualifying service in an establishment under the control of the Government if such transfer has been ordered by competent authority in the public interest;

(e) joining time while on transfer from one post to another.

(2) Notwithstanding anything contained in sub-rule (1), the appointing authority may, by order, commute retrospectively the periods of absence without leave as extraordinary leave.

28. Condonation of interruption in service.- *(a) In the absence of a specific indication to the contrary in the service book, an interruption between (a) In two spells of civil service rendered by a Government servant under Government including civil service rendered and paid out of Defence Services Estimates or Railway Estimates shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.*

(b) Nothing in Clause (a) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(c) The period of interruption referred to in Clause (d) shall not count as qualifying service."

20. Learned Senior Advocate referred a judgment passed by Supreme Court in **Director General, CSIR v. K. Narayanaswami (Dr)**, (1995) 3 SCC 124 and relevant paragraphs thereof are reproduced hereinafter:-

“7. There are two reasons for our disagreement. The first is that Rule 28 as quoted above was substituted by notification of even number dated 19-5-1980. Prior to that, Rule 28 was in the following language:

“28. Condonation of interruption in service.— (1) The appointing authority may, by order, condone interruptions in the service of a government servant:

Provided that—

(i) the interruptions have been caused by reasons beyond the control of the government servant;

(ii) the total service excluding one or more interruptions, if any, is not less than five years' duration; and

(iii) the interruption, including two or more interruptions, if any, does not exceed one year.

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

8. If the aforesaid rule were to determine the question of condonation, specific order of the appointing authority was a prerequisite. Admittedly, there is no such order. Secondly, even if the substituted rule were to apply because of the superannuation of the respondent in 1992, by which date substituted rule had come into force, we are of the view that rule cannot override what has been mentioned in the aforesaid proviso to Rule 13. This is for the reason that any contrary view would make the proviso altogether otiose. It is a settled rule of interpretation that where two provisions operate in one field, both have to be allowed to have their play, unless such operation would result in patent inconsistency or absurdity. If Rule 28 were to be confined to the interruption between two substantive appointments, as is the contention on behalf of the appellant, we are of the view that both the aforesaid provisions can co-exist, and harmoniously. Rule 13 being on the subject of ‘commencement’ of qualifying service, the same has first to commence, which, in case the incumbent be in temporary service first would not if there be interruption between temporary service and substantive appointment, because of what

has been mentioned in the first proviso. Where the qualifying service has commenced, Rule 28 would take care of interruption; and the period of interruption would then stand condoned in the absence of a specific indication to the contrary in the service-book. This is the field of operation of these two rules, according to us, as the same would permit, in such a case, both the provisions to co-exist.”

21. Learned Senior Advocate also refers Clause 43 of Statute of Banaras Hindu University and for reference the same is reproduced hereinafter:

“43. Every employee of the University appointed permanently or on probation to a substantive post on or before 31-3-1964, unless he opts for the "Central Universities-Retirement Benefit Rules 1967 as may be approved by the Central Government, shall as a condition of his service subscribe to the provident fund eight and one-third percent of his salary, such subscription shall be deducted from his salary every month, fraction of a rupee of the salary being omitted. An employee joining University on or after 1-4-64 shall be governed by the Central Universities Retirement Benefit Rules 1967 as approved by the Central Government provided that any amendments to the Central Government Rules relating to General Provident Fund, Contributory Provident Fund, Pension, Gratuity, etc. shall be deemed to be the amendments of the relevant provisions of the Central Universities Retirement Benefit Rules 1967 with effect from the date such amendments are brought into force by the Central Government.”

22. Referring to above provision he submits that procedure to determine pension would be only in terms of Central Civil Service Pension Rules, 1972 and that Rule 26 of it would squarely apply in the facts and circumstances of present case. He also referred some part of supplementary counter affidavit that allegation of petitioner that he was singled out is unsustainable. Relevant paragraphs no. 4, 5, 6, 7, 8 and 9 thereof are mentioned hereinafter:

“4- That the contents of paragraph no. 3 of the Supplementary affidavit filed by the petitioner, in the aforesaid writ petition are denied as incorrect. In reply it is submitted that the case of the petitioner and that of Dr. L.D. Dwivedi under reference in the

paragraph, are not similar in nature. The petitioner has already requested for condonation of break in service. It has already stated in the Counter affidavit filed by the answering respondent University before this Hon'ble Court that as per Government of India Rules only one break (last break in service can be considered for condonation) In view of the fact that during last break in service of the University i.e. from 01.04.1980 to 21.09.1982, petitioner worked as Reader at Sri Ayurvedic College Nagpur. As such this Period of service may not be treated as break in service as he was under employment as Sri Ayurvedic College, Nagpur.

5- That in the case of Dr.L.D. Dwivedi there is no break in service. The service details of Dr. L.D. Dwivedi are given as under:-

(i) Demonstrator, Department of Basic Principles I.M.S., BHU	19.11.1968 to 07.10.1971
(ii) Assistant Research Officer/ Research Officer (Ayurveda) at Central Council for Research in Ayurvedic & Sidha, New Delhi	08.10.1971 to 31.03.1980
(iii) Lecturer & Reader, Department of Basic Principles, I.M.S, B.H.U	01.04.1980 to 24.10.1986 (Lecturer) 25.10.1986 to 28.02.1994 (Reader)

6- That Dr. L.D. Dwivedi vide his letter dated 19.03.1993 had requested for counting of past service rendered by him as Assistant Research Officer / Research Officer, from 08.10.1971 to 31.03.1980 as Assistant Research Officer at Central Council for Research in Ayurveda & Sidha, New Delhi for pensionary benefits. The Director, CCRAS, vide office letter No. AB/14-P-256/25188-91, dated 21.12.1993 was requested to transfer the lump sump amount of pro-rata retirement benefits along with service record during the service period of service of Dr. L. D. Dwivedi rendered by him at there and it was informed to the University that Dr Dwivedi had served as Assistant Research Officer / Research Officer (Ayurveda) w. e. f 08.10.1971 to 31.03.1980 and the pension scheme was Introduced w. e. f. 01.04.1982. As such the Council had paid the final payment of

Contributory Provident Fund to Dr. L. D. Dwivedi. Later on the request of Dr. Dwivedi for counting of past services rendered by him at CCRAS for pensionary benefits had been accepted and vide letter No. AB/14-P-256/1995-97, dated 09.09.1994, he was requested to deposit the amount of CCRAS contribution to Contributory Provident Fund, plus interest thereon from 20.04.1993 (the date of its payment to him by CCRAS) to 19.04.1994 (the date of deposit by him in the BHU) Accordingly Dr. Dwivedi deposited the aforesaid amount of Rs. 3939/- vide Challan no. 4023 dated 19.09.1994. A true photo Copy of the latter dated 09.09.1994 and challan no. 4023 dated 19.09.1994 are being filed here with and marked as Annexure No. C A- No.-1 & 2, to this supplementary Counter affidavit.

7-That the request of Dr. L. D. Dwivedi for counting of past services rendered by him as Demonstrator in the IMS, BHU, from 19.11.1968 to 07.10.1971 was also accepted by the university for pensionary benefits.

8- That in reply to the contents of paragraph No. 4 of the supplementary affidavit filed by the Petitioner in the aforesaid writ petition, it is submitted that Dr. A. M. Tripathi was engaged from 11.05.1974 in the University on temporary basis and time to time he was engaged on the same capacity as a Lecturer. He joined as Lecturer in the University w. e. f. 09.04.1976 on temporary basis. In the following period his service was break:

(1) 09.03.1977 to 15.03.1977

(ii) 16.02.1978 to 22.02.1978

(iii) 23.01.1979 to 29.01.1979

On his representation dated 20.05.1981, requesting for condonation of mandatory breaks in service the above period had been treated as leave on loss of pay as a special case.

9-That the contents of paragraph no. 5 of the supplementary affidavit filed by the petitioner are not admitted hence denied. In reply it is submitted that, as already stated in the preceding paragraphs of this supplementary Counter affidavit as well as Counter affidavit filed by the University before this Hon'ble Court, that the case of the petitioner is not similar to Dr. L. D. Dwivedi and Dr. A. M. Tripathi. That in the case of the petitioner there was break in University service rendered by the petitioner for the period of 01.04.1980 to 21.09.1982, and during break in service petitioner worked on the post of temporary Reader from 21.07.1980 to 20.09.1982 at Sri Ayurveda Mahavidyalaya,

Nagpur affiliated to Nagpur Vidyapith. In the Year of 1984 petitioner applied for continuity of service by condoning the breaks in various spell of service for the period of 1974 to 1982 and same was rejected by the University in view of the relevant Rules of the Government of India.”

23. Learned Senior Advocate also referred following part of Ordinance with regard to application of Government of India Rules:

“(G) Application of Government of India Rules:

Wherever the University ordinances regarding terms and conditions of Service are silent or incomplete, University employees will be governed by rules applicable to comparable Central Government Employees, e.g. Classification and appeal Rules, conduct Rules and Fundamental Rules etc.”

24. Learned Senior Advocate also referred an Office Memorandum dated 22.01.1993 of Government of India on subject “Condonation of resignation for purpose of pay fixation”, i.e., when a resignation could be treated as “technical resignation” and relevant part of it is mentioned hereinafter:

“i) The Govt. servant at the time of joining should intimate the details of such application immediately on their joining.

ii) The Govt. servant at the time of resignation should specifically make a request, indicating the dates that he is resigning to take up another appointment under the Govt./Govt. Organization for which he applied before joining the Govt. service and that his resignation may be treated a ‘technical resignation’.

iii) The authority accepting the resignation should satisfy itself that had the employee been in service on the date of application for the post mentioned by the employee, his application would have been forwarded proper channel.”

25. In rejoinder, learned Senior Advocate appearing for petitioner has reiterated that Central Universities Retirement Benefit Rules, 1967 would only be applicable and he also referred relevant paragraphs of writ petition, rejoinder affidavit and supplementary affidavit as well as that in present facts and circumstances, break could be condoned.

26. Heard learned counsel for parties and perused the material available on record.

27. The first issue for consideration is that whether the judgment passed in earlier round of litigation by this Court and as upheld by Supreme Court in 1992 Suppl(2) SCC 2 would be applicable in the facts of present case, i.e., for the purpose of counting the earlier service of about 11 years or whether the said judgment was limited to consideration of Clause (a) of Para 2 of “Merit Promotion Scheme”. It is the case of petitioner that the reasoning given in aforesaid judgment would be applicable in the present facts and circumstances of case, however, per contra, the stand of Banaras Hindu University is contrary.

28. In earlier round of litigation it is not under much dispute that the only issue before this Court as well as Supreme Court was to consider 8 years of continuous service for the purpose of consideration under “Merit Promotion Scheme” and specifically in a situation where an employee has worked in two institutions as it was specifically contemplated in aforesaid paragraphs.

29. In above background, this Court as well as Supreme Court has given benefit of four years of service in other institution as well as four years of service in same institution and, therefore, interpreted the words “continuous service” in that regard as well as a short break between said two services was condoned. For the purpose of said clause, the specific issue was that even a person who has served in more than one institution could still be considered for promotion under “Merit Promotion Scheme”, i.e., a beneficial scheme.

30. So far as the issue, whether the said interpretation of “continuous service” would also be applicable for the purpose of calculating service for re-fixation of pension is concerned, it was neither the issue under consideration in that case nor any reference directly or indirectly was made. Therefore, it is very difficult to accept the submission of learned

Senior Advocate appearing for petitioner that the findings returned therein would completely applicable in the facts and circumstances of present case, i.e., for calculating entire earlier service of 11 years for the purpose of re-fixation of pension, as it would require interpretation of other provisions governing the field for fixation of pension.

31. It is not under much dispute that petitioner was appointed after serving for about two years in Nagpur University, in a fresh selection process on 22.09.1982 at Banaras Hindu University and on retirement his pension was determined taking his service from said date.

32. Banaras Hindu University has its own Statutes as well as there are two rules applicable in present case, i.e., Central Civil Service Pension Rules, 1972 and Central Universities Retirement Benefit Rules, 1967. Now Court has to consider, how they interplay for the purpose of calculation of qualifying service for pension, condonation of break and effect of working in other institution etc.

33. The Central Universities Retirement Benefit Rules, 1967 are applicable to an University established or incorporated by or under a Central Act and there is no dispute that Banaras Hindu University is a Central University in terms of said definition, therefore, the provisions of these Rules are applicable to employees (teaching and non-teaching) of said University. At this stage, it would also be relevant to mention that Central Civil Service Pension Rules, 1972 are also applicable and only dispute, if any, would come, when they are contrary to each other.

34. Learned Senior Advocate appearing for petitioner has placed reliance on following rules of Central Universities Retirement Benefit Rules, 1967 which are similar to Central Civil Service Pension Rules, 1972:

“2.9 ‘Qualifying Service’ means service rendered as a member of the staff of the University in a substantive capacity including periods spent on probation. All service rendered to the University

on a fulltime basis in a temporary or officiating capacity followed without interruption by confirmation in the same or another post shall count as qualifying service except in respect of periods of service paid from “Contingencies”.

Note:1 *An employee may add to his service qualifying for superannuation pension but not for any other class of pension:*

The actual period not exceeding one fourth of the full length of his service or the actual period by which his age at the time of recruitment exceeds twenty five years or a period of five years whichever is least, if the post is one:-

- (a) for which postgraduate research or specialist qualifications, or experience in scientific, technological or professional field is essential, and*
- (b) to which candidates of more than twenty five years of age are normally recruited.*

Provided that this concession shall not be admissible to any such employee unless his qualifying service at the time he quits University service is not less than ten years.

The decision to grant this concession shall be taken by the Executive Council at the time of recruitment of the employee.

NOTE:2 *The powers of condonation of break in service will ordinarily rest with the Executive Council of the University. The condonation of break in service can be done under the following circumstances:-*

- (1) The interruptions should have been caused by reasons beyond the control of the employee concerned.*
- (2) Service preceding the interruption should not be less than of five years duration and in cases where there are two or more interruptions, the total service, pensionary benefits in respect of which will be lost if the interruptions are not condoned should not be less than five years;*
- (3) The interruption should not be of more than one year's duration. In cases where there are two or more interruptions the total of the period of all the interruptions that are condoned should not exceed one year.*

Provided that, in exceptional cases the Executive Council shall recommend to the Visitor for condonation of the break in service for a period exceeding one year; in case of an employee who has put in ten years qualifying service preceding the interruption or

the first of the interruptions of the service, when there are more than one; if such condonation is considered necessary in the interest of the University. The period of break even though condoned by the Executive Council, shall not count as qualifying service.”

“2.19 “Employee” means member of the staff (both academic and non-academic) of the University.”

“5. (i) Transfer of Employees of one Central University to the other.

As a general policy, when an employee of one Central University gets transferred to any other Central University and the latter decides to absorb him permanently, the absorption should be made with the consent of the parent University provided the transfer is judge to decide whether the transfer is in public interest or not.

“Employees joining a University after leaving the service of another Central University shall, in the event of their permanent absorption in the new University, be allowed retirement benefits in respect of their previous service rendered under the old University provided that there is no break in the service, excepting for the admissible transit time to join the new post, and the service rendered is qualifying. They will however, not be allowed to change over from scheme in Appendix ‘A’ to that in Appendix ‘B’ or vice-versa.”

“NOTE:- For the purpose of these rules resignation of an appointment in a University to take up with proper permission another appointment in another University is not a resignation of service.”

35. As referred above, “qualifying service” means, service rendered as a member of the staff of University in a substantive capacity including periods spent on probation. In the present case, petitioner’s service after he was duly appointed in Banaras Hindu University on 22.09.1982 till his retirement, was calculated.

36. The Court also takes note that Note 2 of Rule 2.9 that power of condonation of break in service is with Executive Council of University and said Note also provides circumstances under which a break can be

condoned. The most relevant being the interruption should have been caused by reason beyond the control of employee concerned.

37. In the present case interruption in service when petitioner joined at Nagpur University cannot be considered an interruption caused by reason beyond the control of petitioner as he has participated in selection process on his own will. It is undisputed that Executive Council of University has not condoned the break. Therefore, the case of petitioner would also not fall within the other circumstances of interruption mentioned in said Note 2 of Rule 2.9 of Central Universities Retirement Benefit Rules, 1967.

38. Now the Court takes note of relevant provisions of Central Civil Service Pension Rules, 1972 on which heavy reliance was placed by learned Senior Advocate appearing for University.

39. Rule 13 provides commencement of qualifying service, i.e., qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. Therefore, the definition of “qualifying service” in both Rules appears to be similar.

40. Court also takes note of proviso to said Rule 13 that officiating of temporary service is followed without interruption by substantive appointment in the same or another service or post will also included in “qualifying service”. However, the case of petitioner would not fall within the said proviso also since it does not have any connection of prior service of another University.

41. So far as interruption in service is concerned, the relevant rule would be Rules 27 and 28 of Central Civil Service Pension Rules, 1972. Rule 27 provides effect of interruption in service that except the cases prescribed therein, interruption in service of a Government servant would entail forfeiture and undisputedly case of petitioner would not fall within any of the exception since it is not a case of transfer, rather petitioner,

after his three years tenure was over at Banaras Hindu University, has participated in a fresh selection process conducted by Nagpur University where he was selected, therefore, it would not be a case of transfer. Similarly as subsequently on a fresh appointment he had joined Banaras Hindu University, therefore, it would also not a case of transfer.

42. Rule 28 of Central Civil Service Pension Rules, 1972 provides condonation of interruption in service. It provides that an interruption between two spells of civil service rendered by a Government servant under Government including civil service rendered and paid out of Defence Services Estimates or Railway Estimates shall be treated as automatically condoned. However, the case of petitioner would also not fall within the ambit of said condonation since petitioner has worked in another University.

43. At this stage, Court also takes note of Rule 26 of Central Civil Service Pension Rules, 1972 which provides forfeiture of service or resignation that it would entail forfeiture of past service and petitioner has not shown that he applied through proper channel in Nagpur University and since the earlier service as temporary was only extended upto 31.03.1980, therefore, it would not be a case that petitioner after resignation has participated in a fresh selection process at Nagpur University.

44. In aforesaid circumstances, the judgments relied by learned Senior Advocate for University in **Director General, CSIR v. K. Narayanaswami (supra)** and **Dr. Rajesh Kumar Sharma vs. Union of India and others (Writ-A No. 2315 of 2019)**, decided on 14.02.2019 would be relevant and following paragraphs of it are referred hereinafter:

Director General, CSIR v. K. Narayanaswami (supra):

“8. If the aforesaid Rule were to determine the question of condonation, specific order of the appointing authority was a pre-requisite. Admittedly, there is no such order. Secondly, even if the

substituted Rule were to apply because of the superannuation of the respondent in 1992, by which date substituted Rule had come into force, we are of the view that Rule cannot override what has been mentioned in the aforesaid proviso to Rule 13. This is for the reason that any contrary view would make the proviso altogether otiose. It is a settled rule of interpretation that where two provisions operate on one field, both have to be allowed to have their play, unless such operation would result in patent inconsistency or absurdity. If Rule 28 were to be confined to the interruption between two substantive appointments, as is the contention on behalf of the appellant, we are of the view that both the aforesaid provisions can co-exist, and harmoniously. Rule 13 being on the subject of 'commencement' of qualifying service, the same has first to commence, which, in case the incumbent be in temporary service first would not if there be interruption between temporary service and substantive appointment, because of what has been mentioned in the first proviso. Where the qualifying service has commenced, Rule 28 would take care of interruption; and the period of interruption would then stand condoned in the absence of a specific indication to the contrary in the service book. This is the field of operation of these two Rules, according to us, as the same would permit, in such a case, both the provisions to co-exist."

Dr. Rajesh Kumar Sharma (supra):

"However, against the subsequent advertisement no.7/2014-15 pursuant to which petitioner has been selected neither the application was made through proper channel, nor any No Objection Certificate was issued to him by Govind Ballabh Pant Institute of Himalayan Environment and Development. This letter is not in issue. The recital of facts therein, as per which petitioner had not applied against post code 3889 through proper channel, is also not disputed. In view of the office memorandum dated 8.4.2016 the resignation of petitioner from the previous employer would not be covered within the definition of 'technical resignation', and therefore, benefit of pay protection would not be available to the petitioner."

45. In aforesaid circumstances, the only argument of learned Senior Advocate for petitioner left for consideration is, whether petitioner was subject to arbitrariness and reliance placed on **State of Rajasthan and others vs. O.P. Gupta (supra)** is applicable or not.

46. The allegation of arbitrariness would not have any bearing on present case since, as referred above, all other arguments on merit have been rejected and it is well settled that there is no negative parity and benefit, if any granted to other employees contrary to law, would not entitle petitioner to get same benefit. Otherwise, also explanation given by Banaras Hindu University makes their case different. Accordingly, argument of arbitrariness is also rejected.

47. Now the Court takes note of a judgment relied on by learned Senior Advocate for petitioner passed in **State of Rajasthan and others vs. O.P. Gupta (supra)** wherein question of prior permission was presumed since in the given circumstances it could not be ascertained or objected after more than two and half decades, whereas in the present case petitioner has not asserted that he has participated in selection process at Nagpur University with prior permission. Therefore, the facts of present case, being distinguishable, therefore, the judgment in **State of Rajasthan and others vs. O.P. Gupta (supra)** will also not helpful for the petitioner.

48. In aforesaid circumstances, the Court is of the view that all arguments raised by learned Senior Advocate for petitioner has no legal basis, whereas arguments raised by learned Senior Advocate for Banaras Hindu University has substance. Therefore, the prayer made in this writ petition to re-fix pension of petitioner by including his 11 years of prior service, being without any legal basis, is hereby rejected.

49. The writ petition is accordingly dismissed.

50. No order as to costs.

Order Date :- 18.04.2025

AK

(Saurabh Shyam Shamschery, J.)