

Court No. - 36

Case :- WRIT - A No. - 12070 of 2022

Petitioner :- Nand Lal

Respondent :- State Of UP And 4 Others

Counsel for Petitioner :- Anil Kumar Yadav

Counsel for Respondent :- CSC

with

Case :- WRIT - A No. - 9918 of 2022

Petitioner :- Brij Mohan Yadav

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- R. K. Singh Kaosik

Counsel for Respondent :- C.S.C.,Chandan Kumar

with

Case :- WRIT - A No. - 10817 of 2022

Petitioner :- Chandra Pal Singh

Respondent :- State Of U.P. And 6 Others

Counsel for Petitioner :- Rajesh Kumar,Archana Singh

Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 11023 of 2021

Petitioner :- Santosh Mittal

Respondent :- Deputy Director Of Education (Secondary) And 3 Others

Counsel for Petitioner :- Indra Raj Singh,Adarsh Singh,Deo Prakash Singh

Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 968 of 2022

Petitioner :- Anita Rani

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Mahendra Singh

Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 2742 of 2022

Petitioner :- Vinod Kumar Kudesiya

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Yogendra Kumar Srivastava,Himanshi Srivastava

Counsel for Respondent :- C.S.C.,Anita Srivastava

with

Case :- WRIT - A No. - 7914 of 2022
Petitioner :- Virendra Pratap Singh
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Seemant Singh
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 12045 of 2022
Petitioner :- Sarvesh Kumar Pandey And Another
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Hritudhwaj Pratap Sahi,Sankalp Narain
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 12122 of 2022
Petitioner :- Ram Shankar Rai
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Anil Kumar Yadav
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 12816 of 2022
Petitioner :- Jaipal Singh
Respondent :- Deputy Director Of Education (Secondary) And 3 Others
Counsel for Petitioner :- Indra Raj Singh,Adarsh Singh
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 13642 of 2022
Petitioner :- Anita Rani
Respondent :- Deputy Director Of Education And 3 Others
Counsel for Petitioner :- Adarsh Singh,Indra Raj Singh
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 14100 of 2022
Petitioner :- Sadhana Saxena
Respondent :- Director Of Higher Education And 2 Others
Counsel for Petitioner :- Adarsh Singh,Indra Raj Singh
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 14333 of 2022
Petitioner :- Shambhu Nath Prasad
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Siddharth Khare,Sr. Advocate
Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 14396 of 2022

Petitioner :- Basant Lal

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Anil Kumar Yadav

Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 14913 of 2022

Petitioner :- Subhash Chand Saini

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Pragyanshu Pandey, Nipun Singh

Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 5362 of 2020

Petitioner :- Ajayvir Singh

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Raghwendra Prasad Mishra, Deo Prakash Singh

Counsel for Respondent :- C.S.C.

with

Case :- WRIT - A No. - 1328 of 2021

Petitioner :- Bhanu Prakash Dubey

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Vikas Mani Srivastava, Deo Prakash Singh, Indra Raj Singh, Ravindra Kumar Srivastava, Vinit Kumar Srivastava

Counsel for Respondent :- C.S.C.

and

Case :- WRIT - A No. - 12600 of 2022

Petitioner :- Chandrabhan Yadav

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Awadhesh Kumar Malviya

Counsel for Respondent :- C.S.C.

Hon'ble Saumitra Dayal Singh, J.

1. Largely, the issue involved in this batch of writ petitions is one. Accordingly, with the consent of parties, all writ petitions have been heard together. All counsel were heard on the facts narrated in the lead case – *Writ A No. 12070 of 2022 (Nand Lal vs. State of U.P. & 4 Ors.)*.

2. Heard Sri Adarsh Singh, Sri Sankalp Narain, Sri Siddharth Khare, Sri R.K.Singh Kaosik, Sri Y.K. Srivastava, Sri Pragyanshu Pandey, Sri Deo Prakash, Sri Mahendra Singh, Sri Rajnish Kumar Srivastava, Sri Anil Yadav, Sri Seemant Singh and Sri Rajesh Kumar learned counsel for the petitioners; Shri Neeraj Tripathi, learned Additional Advocate

General along with Shri J.N. Maurya, learned Chief Standing Counsel, Shri Shashank Shekhar Singh, learned Additional Chief Standing Counsel and Shri Chandan Kumar, learned Standing Counsel for the State-respondents.

3. Material facts involved in **Writ- A No. 12070 of 2022** are described below.

4. In the year 1994, two vacancies arose on the post of ad hoc teachers at the institution, Adarsh Inter College Maharajganj - one occasioned by the death (in harness) and the other upon promotion. Vide its first resolution dated 1.5.1994, the Committee of Management of that institution resolved to fill up those posts. It was backed by a second resolution dated 15.1.1994 constituting a Selection Committee. In compliance thereof, the petitioner along with one Ram Shankar Rai were appointed Assistant Teacher(s), on 19.6.1994. The Committee of Management of the said institution then sought financial approval from the District Inspector of Schools, Maharajganj. It was granted on 22.10.1994. It is also not in dispute; the present petitioner continued to function and discharge his duties as Assistant Teacher at the above-described institution. Upon amendment made to the **Uttar Pradesh Secondary Education Services Selection Board Act 1982 (hereinafter referred to as the Act)** being U.P. Act no.7 of 2016, section 33G was introduced in the Act. It was enforced with effect from 22.03.2016. In compliance thereof, a Divisional Level Committee was constituted. Vide its Resolution dated 22.8.2016, the said Committee resolved to regularize the petitioner Nand Lal with effect from 22.03.2016 i.e., by operation of law, arising from the enforcement of Section 33G of the Act, from that date. It is also not in dispute, the petitioner continued to work till 31.02.2021 when he attained the age of superannuation. All salary dues have been computed and paid out to the petitioner, accordingly.

5. The dispute that arises is - upon his retirement, the petitioner claims payment of retiral dues including (the bone of contention),

pension. That claim has been declined. The petitioner is aggrieved by the impugned order dated 27.6.2022 passed by Deputy Director of Education, Gorakhpur, rejecting his claim for payment of pension.

6. Similar fact situation obtains in the other cases. In some cases, despite a positive direction earlier issued by this Court - to grant the benefit of retiral dues in terms of still earlier decision of this Court in **Sunita Sharma vs. State of U.P. & 5 Ors., Writ- A No. 25431 of 2018** decided on 20.12.2018, presently, by further order passed by respondent authorities, that claim has been declined. In still others, no orders have been passed. Thus, the petitioners claim a positive mandamus upon the respondents to pay up the retiral dues, including pension.

7. In Writ – A No. 14333 of 2022, the earlier writ petition filed by the petitioner Shambhu Nath Prasad being **Writ-A No. 5951 of 2022 (Shambhu Nath Prasad vs. State of U.P. & 5 Ors.)** was disposed of by order dated 11.4.2022 in terms of another order dated 17.9.2021 in **Ali Hussain Vs. State of U.P. and Others, Writ-A No. 8214 of 2020, decided on 17.9.2021.**

8. In such facts, Shri Adarsh Singh, learned counsel for the petitioner has referred to the order of this Court in **Sunita Sharma (supra)**. Upon due consideration of the provisions of the **U.P. State Aided Educational Institutions Employees Contributory Funds Insurance and Pension Rules, 1964** (hereinafter referred to as the 'Applicable Rules') as distinct from the **Uttar Pradesh Retirement Benefit Rules, 1961** (hereinafter referred to as the 'Government Employees Rules'), it was reasoned, the Rules applicable to the petitioners in this batch of petitions would be the 'Applicable Rules' and not the 'Government Employees Rules'. In the hierarchy of laws, the 'Applicable Rules' must be placed higher to the Government Order dated 18.10.1997. Therefore, the Rules were fully enforceable, in its face. Relevant to our purpose, it was finally concluded, in that decision:

“Learned counsel for the petitioner places reliance upon the provisions contained under Rule 19(b) of the Rules of 1964, which is reproduced hereafter:-

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.

Rule 3 of 1964 Rules clearly provides that these Rules shall apply to permanent employees serving in the State aided educational institution of the category specified thereunder, be it run by a local body or a private management, if it is recognized by the competent authority for the purposes of extending of grant-in-aid. It is not in issue that the provisions of Rules of 1964 are attracted in the facts of the present case, inasmuch as the Institution is a recognized Institution, wherein salary is being extended to teaching and non-teaching staff by the State by virtue of the provisions contained in the Act of 1971. On the date of his retirement, petitioner was a permanent employee serving in aided educational institution, which is recognized by a competent authority for the purposes of aid. Rule 19(b) of the Act would clearly come to the rescue of the petitioner, inasmuch as it clearly provides that continuous temporary or officiating service followed without interruption by confirmation in the same or another post, shall also count as qualifying service. Petitioner's engagement from 1996 till 2016, when she was regularized, would be treated as continuous temporary service followed without interruption by confirmation on same post. The adhoc continuance followed with regularisation, therefore would be covered within the ambit and scope of Rule 19-B of the 1964 rules, and therefore, such period would have to be counted towards qualifying service for the purposes of payment of pension etc.

Learned Standing Counsel has not placed any provision whereunder the Rules of 1964 have either been rescinded, modified or substituted by any other provision and the Rules of 1964 therefore continues to remain in force.

So far as the Government Order relied upon by learned Standing Counsel is concerned, it is settled that in hierarchy of laws a statutory Rule would stand at a higher pedestal than a Government instructions. Once the statutory Rules of 1964 remains in force and is attracted in the facts of the present case, the provisions of the Rules cannot be by passed merely by relying upon a Government instructions. The defence set up by the respondents, therefore to non suit the petitioner cannot be sustained. It appears that though U.P. Retirement Benefits Rules, 1961 and other like provisions were amended w.e.f. 1.4.2005, but no such amendment has been incorporated in the Rules of 1964. As a consequence, the benefits admissible under the Rules of 1964 would continue to be applicable upon teachers, who are covered thereunder.

The view, which this Court proposes to take, is also supported by a judgment of the Division Bench in Special Appeal (Defective) No. 678 of 2013 State of U.P. through its Secretary Secondary Education vs. Mangali Prasad Verma and two others, wherein the benefit under the Rules of 1964 have been made applicable upon the respondents therein. Relevant portion of the judgment of the Division Bench is reproduced thereafter:-

"We may, however, clarify that the Government Order dated 28.1.2004 which was so heavily relied upon by the State Government does not alter the legal position in any manner inasmuch as, the applicability of Rules 1964 is not depended upon any declaration being made by the Governor or by the State Government. If a teacher was working in an aided institution prior to the date of his retirement provisions of rules 1964 become applicable by operation of law. The manner of counting the qualifying service stands explained under the Government Order dated 26.7.2001.

We may also clarify that the teachers and employees of institutions which are brought on the grant-in-aid for the first time on or subsequent to 1.4.2005 would be covered by the new scheme enforced on 1.4.2005 and this judgment will have no application in their case.

We may notice that similar view has taken by the Division Bench of this Court in the case of State of U.P. And 6 Ors Vs. Shir Krishna Prasad Yadav and 13 Ors being Special No.228 of 2016 decided on 24.5.2017.

In view of the aforesaid, we find no illegality in the judgment and order of the learned Single Judge, it is accordingly, affirmed. The Appeal is Dismissed."

In view of the discussions aforesaid, it is clear that petitioner is entitled to pensionary benefits under the Rules of 1964 and for such purposes the adhoc continuance from 1996-2016 followed with regularization would have to be counted towards qualifying service for sanction and fixation of pension. A mandamus is issued accordingly to the respondents for grant of pensionary benefits to the petitioner. Necessary order in that regard could be passed by the competent authority within a period of three months. All consequential benefits would also be extended to the petitioner within a further period of two months thereafter."

9. Then, it has been shown, the said decision was challenged in an intra- Court appeal, before a division bench in **Special Defective No. 181 of 2020 (State of U.P. Through The Secretary Secondary Education Department, Governmentt of U.P. & 4 Ors. vs. Sunita Sharma & Anr.)**. Upon dealing with the same objections, as have been presently raised, the division bench ruled as below:

"In appeal, the argument advanced by learned counsel for the appellant is that the respondent-petitioner was working in an adhoc capacity and, therefore, her service does not fall within the category of temporary or officiating service and as such Rule 19 (b) is having no application. We do not find any merit with the arguments advanced. As already stated the appointment was given to the petitioner against a permanent vacancy with assertion in the order of appointment as "adhoc". However, the appointment though said to be on ad-hoc basis but that continued for two decades and ultimately resulted into regularization in service. The appointment, as such, was not a stop gap arrangement but in temporary capacity. The same falls under the categories given in Rule 19(b) of 1964 for the purpose of computing qualifying service."

10. The fact that the petitioner in that case had earlier worked in *ad hoc* capacity, was found to be of no consequence to the applicability of Rule 19(b) of the 'Applicable Rules'. Since the appointment had been made against a permanent vacancy, the mere mention of word '*ad hoc*', was found to be no legal consequence.

11. Referring to another division bench decision of this Court in intra court appeal in **Special Appeal Defective No. 158 of 2021 (State of U.P. & 2 Ors. Vs. Satya Prakash Singh & Anr.)**, it has been next asserted, no

reliance may be placed on **U.P. Qualifying Service for Pension and Validation Act 2021** (hereinafter referred to as the '**Qualifying Service Act**'). It would not apply in the present case since the initial appointment of the petitioner was against a sanctioned post and it was not contrary to the law. In fact, it was in accordance with the law. That decision is stated to have attained finality upon dismissal of the **Special Leave to Appeal No. 13644 of 2021 (State of U.P. & 2 Ors. Vs. Satya Prakash Singh & Anr.)**, by the Supreme Court, vide order dated 22.7.2022.

12. Adopting the submission so advanced, Sri Sankalp Narain learned counsel for the petitioner in *Writ - A No. 12045 of 2022* would submit, all petitioners were appointed under U.P. Secondary Education Services Commission (Removal of Difficulties) Order. That fact itself established - appointments were made wholly in accordance with law. In fact, these appointments had become necessary at the relevant time, as educational institutions were short staffed in teaching faculty owing to factors that then existed. Only to tide over that crisis, appointments were made against permission granted by the statutory authorities. Further, those appointments were made wholly in accordance with law, after following due procedure. All petitioners continued to work for decades. No defect was ever alleged or discovered in their initial appointment. In such circumstances giving effect to the provisions of Section 33G, their services came to be regularised w.e.f. 22.3.2016.

13. Moreover, it has been strenuously urged, a wholly artificial dispute is being raised belatedly, after availing the services rendered by the petitioners. All throughout, the petitioners were paid full salary in the pay scale admissible to regularly appointed teachers, together with all increments, promotions etc. In absence of any enabling law, action taken by the respondents is wholly discriminatory. Referring to the 'Applicable Rules', he would submit, the same is a complete Code, amongst others, as to entitlement and payment of pension. Chapter-V of the 'Applicable Rules' provides for eligibility to pension. It also defines 'qualifying service' necessary for the payment of pension. It recognises and includes

temporary or officiating services followed without interruption by confirmation in the same or other post.

14. Thus, according to him, it is too late in the day and impermissible in law for the respondent authorities to relook the status of the petitioners, through a different pane. Once the petitioners acquired the status of a regular employee, wholly in accordance with law, the continuous services rendered by them prior to their regularisation cannot be dissected or ignored for the purpose of their eligibility to pension. Since the 'Applicable Rules' are complete, the facts of the case do not permit invocation of Rule 34 thereof. That rule would apply to a case of an employee or person whose case may not have been specifically provided for or covered under the 'Applicable Rules'.

15. Last, he has placed reliance on another decision of a learned single-judge of this Court in **Kamaluddin Vs. State of U.P. and Others, Writ – A No. 17042 of 2021**, decided on 06.12.2021 - to invoke the general principle - even if the 'Government Employees Rules' were to be looked into, the supervening circumstance of the petitioners having worked for a long duration of time would entitle them to pensionary dues as was held by the Supreme Court in the case of **Prem Singh Vs. State of U.P. (2019) 10 SCC 516**, which principle was also applied and followed by a division bench of this Court in **Kaushal Kishore Chaubey and Others Vs. State of U.P. and Others, Writ-A No. 5817 of 2020**.

16. Sri Siddharth Khare learned counsel for the petitioner appearing in *Writ-A No. 14333 of 2022* would also adopt the submissions noted above. He would further submit; the rejection order is based on a complete non-application of mind. Relying strongly on another decision of a learned Single Judge of this Court in **Dr. Sushma Chandel Vs. State of U.P. and Others, 2021 (ILR) 9 Ald 1276** as followed in **Ali Hussain (supra)**, it has been urged, objections being now raised had been specifically dealt with and answered against the State. Those judgments were never tested in appeal. They have long attained finality. The effect of the 'Qualifying Service Act' was also specifically considered in **Dr.**

Sushma Chandel (supra). It was held, the same could not obstruct eligibility to pension under the 'Applicable Rules'. In addition, he would submit, the 'Qualifying Service Act' would apply to a case where qualifying service may have been rendered on a temporary or a permanent post at a government establishment. Therefore, the status of the employee at an educational institution would not be covered thereunder.

17. Sri Kaosik, Sri Y.K. Srivastava, Sri Pragyanshu Pandey, Sri Deo Prakash, Sri Mahendra Singh, Sri Rajnish Kumar Srivastava, Sri Anil Yadav, Sri Seemant Singh, and Sri Rajesh Kumar learned counsel for the petitioners have adopted the submissions noted above.

18. Opposing the writ petition, Shri. Neeraj Tripathi learned Additional Advocate General would submit, there can be no doubt, the petitioners were appointed under the Removal of Difficulties Order. However, it has not been considered in any of the earlier decisions (relied by learned counsel for the petitioners), that those petitioners came to be appointed against short-term vacancies that existed for a period of six months or till the employee in whose circumstance such vacancy had arisen, failed to report back to duty. Till that time had expired, the permanent-appointed employee retained his lien over the post occupied by the petitioners. Without examining that issue, an omnibus Mandamus may not be issued for payment of retiral dues. In short, he would submit, individual facts merit consideration before the claim for payment of pension or retiral dues may be allowed. Then, referring to the 'Applicable Rules', it has been submitted, those are applicable only to "permanent employees serving at State aided educational institutions". Relying on Rule 5(g) of the 'Applicable Rules', it has been urged, none of the petitioners became eligible to pension till the time they became permanent employees. Since that date fell beyond the cut-off date i.e., 01.04.2005 when the New Pension Scheme came into force, the petitioners cannot claim retiral dues under the 'Applicable Rules'.

19. Also, under Rule 19(a) of the 'Applicable Rules', service rendered would not count for pension unless the employee had held a substantive post on a permanent establishment on 31.03.2005. Since the petitioners came to first hold that post beyond the cut-off date 01.04.2005, they never became eligible to pension under the 'Applicable Rules'.

20. To bolster his submission, the learned A.A.G. has referred to Rule 34 of the 'Applicable Rules', that provides - matters of pension/family pension not specifically covered under the 'Applicable Rules' would be governed by Rules and corresponding procedure laid down in law with respect to State Government employees. Therefore, in his submission, it has completely escaped the attention of the Court (in the earlier decisions referred to learned counsel for the petitioners), that a statutory intervention had been made upon publication of Notification No. Sa-3-379/Ten-2005-301(9)/2003 dated 28 March 2005 whereby w.e.f. 01 April 2005 it was clearly provided, a New Contributory Pension Scheme would mandatorily apply to employees of the State Government and of the State aided private educational institutions etc.

21. Corresponding to that change of policy, statutory intervention followed. First through Ordinance No. 19/20 and later through 'Qualifying Service Act', the term 'qualifying service' was given the meaning - services rendered against appointment on a temporary or permanent post, in accordance with the provisions of the service rules prescribed by the government.

22. To actualise that purpose, the 'Government Employees Rules' were amended vide Notification No. 3-469 dated 07.4.2005. By that, it was specifically provided, the 'Government Employees Rules' shall not apply to employees entering service and post on or after 01.04.2005. The learned A.A.G. has now relied on the language of Section 33G of the Act. It is his submission that the date of regularisation is the relevant date on which the petitioners may claim to be born in the cadre. That date (22.03.2016) being well beyond the cut-off date i.e., 31.03.2005, the petitioners can never claim entitlement to payment of pension under the

unamended laws. The appointments granted to the petitioners - post 01.04.2005, were the first substantive appointment granted, that too subject to successful completion of probation.

23. Thus, it has been the submission of learned A.A.G. - by virtue of Rule 34 of the 'Applicable Rules' read with the Government Notification dated 28.03.2005, the amended 'Government Employees Rules' and the 'Qualifying Service Act', the petitioners' claim to pension under the 'Applicable Rules' stood overridden by a non obstante clause employed by the legislature in Section 2 of the 'Qualifying Service Act' read with Rule 34 of the 'Applicable Rules'.

24. Further, the learned A.A.G. has relied on another decision of a learned single judge of this Court in **Satyesh Kumar Mishra And Others Vs. State of U.P. And Others, 2016(6) ADJ 808 (LB)**. Therein, persons who had joined as Assistant Teacher after the cut-off date 01.04.2005, were held ineligible to pension under the 'Applicable Rules'. In reaching that conclusion, the learned single-Judge had considered the effect of Government Notification No. Sa-3-379/Ten-2005-301(9)/2003 dated 28 March 2005. Decisions to similar effect of other learned single-Judge bench of this Court have also been referred to.

25. Last, in the alternative, it has been submitted a clear cleavage of opinion has arisen. The matter may, therefore, be referred to a larger bench.

26. Having heard learned counsel for the parties and having perused, in the first place, the provision of Section 33G of the Act to the extent it merits notice, reads as below:

“Section 33-G. Regularisation of certain more appointments against the short term vacancies - Any teacher, other than the Principal or the Head Master, who -

(a) was appointed by promotion or by direct recruitment in the lecturer's grade or trained graduate grade on or after August 7, 1993 but not later than January 25, 1999 against a short term vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) order, 1981 as amended from time to time, and such vacancy was subsequently converted into a substantive vacancy;

(b) was appointed by promotion or by direct recruitment on or after August 7, 1993, but not later than December 30, 2000 on adhoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(e) Has been found suitable for appointment in a substantive capacity by the selection committee referred to in clause (a) of sub-section (2) of Section 33-C in accordance with the procedure prescribed under clause (b) of the said sub-section;

Shall be given substantive appointments by the Management.

(6) The services of the adhoc teachers and the teachers who have been appointed against short term vacancies shall be regularised from the date of commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment Act), 2016.”

27. The date of enforcement of Section 33G (6) of the Act is 22.03.2016. Also, there is no dispute to the eligibility of any of the petitioners - to regularization from that date. In any case, the stage to examine that issue is long past. It is an undisputed fact; each petitioner was regularized and has completed his term of service - upon attaining the age of the superannuation. No petitioner was terminated from service or offered like punishment.

28. Thus, an automatic consequence arose in law upon regularization offered under Section 33G of the Act. The petitioners earned the legal status of a permanent employee with effect from 22.03.2016, being the date of enforcement of Section 33G of the Act. That substantive right got conferred long back could not be and it has not been altered, till date.

29. Therefore, it is to be seen – which law was in force on that date, and/or is in force today, *qua* the eligibility to pension claimed by the petitioners. The date of the petitioners being born in the cadre would be relevant, if a different law is found to exist (as may govern the claim for pension and retiral dues), should the date of regularization be treated to be the date on which the petitioners were born in the cadre. It is so because, if the law i.e., the 'Applicable Rules' continued to be enforceable on 22.03.2016, despite other laws relied upon by the learned A.A.G., including Government Notification dated 28.03.2005 as has been given effect to by the 'Qualifying Service Act' as also by amending the 'Government Employees Rules', that issue would remain an academic

issue. Therefore, it is the other aspect of the submission advanced by the learned Additional Advocate General that merits consideration, first.

30. There can be no dispute to the applicability of the fundamental principle. It is unambiguous - in the hierarchy of laws, at the top of the ladder is perched the Constitutional law. Sitting at the next lower step and therefore subservient to it is the law enacted by the principal legislature, followed on the next lower step, by law made by a delegate of the principal legislature. Only in the absence of enacted law or a field lying unoccupied, any notification issued by the executive in exercise of power referable to Article 309 or like provision of the Constitution of India, would come to full life. At the first/lowest step (and therefore subservient to all laws sitting above), sit executive orders including Government Orders, that may sometimes cause the effect of law, subject primarily to absence of any contrary law existing at any higher step of the ladder.

31. The 'Applicable Rules' (of 1964) and the 'Government Employees Rules' (of 1964) were both notified in exercise of Article 309 of the Constitution of India. In absence of any other law made on the subject, either by the principal legislature or its delegate, both sets of Rules noted above were fully enforceable. Then, by virtue of Rule 2 of the 'Government Employees Rules', they applied to officers under the rule making power of the Governor. Rules 2 & 3 of those Rules (unamended) read as below:

“2. Application.- (1) These rules shall apply to all officers under the rule making power of the Governor, other than those who retired before the date of the coming into force of these rules.

Provided firstly, that [a person who was an officer]" on the date immediately preceding the date of commencement of these rules shall have the option to elect for the existing pension rules applicable to him, in which case he will not be eligible for any of the benefits granted under these rules except as provided in Rule 11. The option shall be exercised within a period of [six months] from the date of notification of these rules in the official Gazette. The option once exercised shall be final.”

3. Definition.- *In these rules unless there is anything repugnant in the subject or context-*

(6) “Officer” means a Government Servant (whether belonging to superior or inferior service) who holds a lien on a permanent pensionable post under the Government or would have held a lien on such a post had his lien not been suspended.”

32. On the other hand, Rule 3 of the 'Applicable Rules', apply to permanent employees serving in State-aided educational institutions, of specified categories. Rule 3 and 4 of that set of Rules reads as below:

“3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a Private management and recognised by a competent authority as such for purposes of payment of grant-in-aid;

- (1) Primary Schools;*
- (2) Junior High Schools;*
- (3) Higher Secondary Schools;*
- (4) Degree Colleges;*
- (5) Training Colleges.*

4. (a) These rules are intended to the employees of the State aided educational institutions, three types of service benefits, viz., Contributory Provident Fund, Insurance and Pension (Triple Benefit Scheme). The quantum of the benefits and the conditions by which they are governed are described in the succeeding Chapters:

(b) An employee already in permanent service on the date of enforcement of these rules shall be given an option to elect these new rules or to continue to be governed by the existing rules applicable to him.

(c) No employees shall be allowed option to choose only a part of the scheme except as otherwise specifically provided for in these rules.

(d) Option once exercise shall be final.”

33. Then, Rule 5(g) of the 'Applicable Rules' reads as below:

“5(g) ‘Employee’ means a permanently employed person borne on the whole-time teaching or non-teaching establishment of an aided institution, excluding (a) the inferior staff and (b) the ministerial staff of institutions maintained by a Local Body.”

No doubt under the ‘Applicable Rules’ an employee means a permanent employee only, yet, it cannot be denied - on the date of retirement, each petitioner was a permanent employee upon regularization granted under section 33G of the Act, w.e.f. 22.3.2016.

34. Then, Rules 17, 19 and 21 of the ‘Applicable Rules’ read as below:

“17. An employee shall be eligible for pension on-

- (i) retirement on attaining the age of superannuation or on the expiry of extension granted beyond the superannuation age.*
- (ii) voluntary retirement.....*
- (iii) retirement before the age of superannuation under a medical certificate.....*
- (iv) discharge due to abolition of post or closure.....*

Note-

19. (a) Service will not count for pension unless the employee holds a substantive post on a permanent establishment.

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.”

21. An employee shall be eligible for superannuation/retiring/ invalid pension only after completing 10 years of qualifying service at 1/20 of his average emoluments of the past three years for every completed years of service subject to.....”

35. Thus, under the ‘Applicable Rules’ specific to the claim of pension, employees (such as the petitioners), could gain eligibility to receive pension, on attaining the age of superannuation by virtue of Rule 17, subject to satisfaction of Rules 19 and 21 of the 'Applicable Rules'. Thus (i) the concerned employee should have held a substantive post on a permanent establishment, on the date of his retirement. Then, relevant to the present facts - (ii) such employee must have retired after attaining the age of superannuation and (iii) he must have performed 10 years continuous service on the date of his superannuation.

36. To the first condition noted above, there can be no dispute. Even a days’ length of substantive post held before retirement, preceded by fulfilment of condition of ‘qualifying service’ (as defined under the ‘Applicable Rules’), would entitle a retired employee to pension under

those Rules. Also, as to the second condition (noted above), there is no dispute.

37. So far as the third eligibility condition is concerned, *per se*, the two sets of Rules noticed above, namely the ‘Applicable Rules’ and the ‘Government Employees Rules’ operate on two different and mutually exclusive sets of persons/employees. Teachers at State-aided educational institutions, not being ‘officers’ as defined under Rule 3(6) of the ‘Government Employees Rules’, were never covered under that set of Rules. Hence, on its own force, the amendment made to Rule 2 of the latter Rules whereby sub-Rule 3 was added, **never** became applicable to teachers at State-aided educational institutions, they being persons governed by the ‘Applicable Rules’. In absence of any amendment to the ‘Applicable Rules’, their eligibility and entitlement to pension arising those Rules remained preserved and unaltered.

38. As to the concept of ‘qualifying service’ that may fructify the eligibility (established by the employee) to an entitlement to receive pensionary relief, Rule 19(a) of the ‘Applicable Rules’ read with Rule 21 thereof prescribe ten years’ continuous service. It is this eligibility issue that Rule 19(b) addresses in the context of the present petitioners. It includes therein continuous temporary or officiating service, followed without interruption, by confirmation, as the ‘qualifying service’. That condition stood satisfied, in case of each petitioner. There is no dispute to that fact either.

39. Seen in that light, Rule 19(b), only furnishes a clarification that perhaps became necessary - upon the language employed by Rule 19(a) read with Rule 21 of the Rules. Therefore, Rule 19(b) enables, substantive post held even for one day preceded with continuous service rendered as may add up to ten years in all, to be eligibility to be earned by a retired employee - to avail pensionary benefits under the ‘Applicable Rules’.

40. The policy statement contained in the Government Order dated 28.03.2005 referred to by the learned Additional Advocate General is

clearly not the law. Sitting at the lowest step of the law, it never enjoyed any status as may have ever allowed it to be read in preference over the enacted law. Both 'Government Employees Rules' and the 'Applicable Rules' were pre-existing laws, made under Article 309 of the Constitution of India. In neither case, there existed any legislation either by the principal legislature or its delegate. Hence, they were and continue to be the binding law. In **Ajay Kumar Das Vs State of Orissa (2011) 11 SCC 136**, the Supreme Court held:

“14. Neither the Circular dated 18-6-1982 nor the subsequent Circular dated 19-3-1983 modifying the earlier Circular dated 18-6-1982 can override the statutory provision contained in Rule 74(b) of the Code if it results in reduction of pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars”.

41. Then, the 'Government Employees Rules' were amended by issuance of Notification No. 3-469 dated 07.04.2005, however, no such amendment was made to the 'Applicable Rules'. For ready reference, the text of the said Notification dated 07.04.2005, reads as below:

"नवीन पेंशन योजना संशोधित 1 अप्रैल 2005 से प्रभावी

उत्तर प्रदेश सरकार वित्त (सामान्य) अनुभाग-3

संख्या सा-3-469/दस-2005-301 (9)--03

लखनऊ: दिनांक : 07 अप्रैल 2005

अधिसूचना / प्रकीर्ण

संविधान के अनुच्छेद 309 के परन्तुक द्वारा प्रदत्त शक्ति का प्रयोग करके राज्यपाल उत्तर प्रदेश रिटायरमेंट बेनिफिट्स रूल्स, 1961 को संशोधित करने की दृष्टि से निम्नलिखित नियमावली बनाते हैं।

उत्तर प्रदेश रिटायरमेंट बेनिफिट्स (संशोधन) रूल्स, 2005

1. संक्षिप्त नाम और प्रारम्भ- (1) यह नियमावली उत्तर प्रदेश रिटायरमेंट बेनिफिट्स (संशोधन) रूल्स, 2005 कही जायेगा

(2) यह 1 अप्रैल, 2005 को प्रवृत्त हुआ समझा जायेगी।

2. नियम 2 का संशोधन- उत्तर प्रदेश रिटायरमेंट बेनिफिट्स रूल्स, 1961 में नियम 2 में, वर्तमान उपनियम (2) के पश्चात् निम्नलिखित नया उपनियम बढ़ा दिया जायेगा. अर्थात्

(3) यह नियमावली राज्य के कार्य कलाप के सम्बन्ध में पेंशनी स्थापन सेवाओं और पदों पर, चाहे वे अस्थायी हों या स्थायी हों, 1 अप्रैल, 2005 को या उसके पश्चात् प्रवेश करने वाले कर्मचारियों पर लागू नहीं होगी।"

42. Clearly, while issuing that notification and amending the law made under Article 309 of the Constitution of India, no amendment was made to the 'Applicable Rules'. Amendment made was confined to Rule 2 of the 'Government Employees Rules'. Hence, there can be no quarrel to the proposition - law whether framed under Article 309 or in exercise of the legislative powers by the principal legislature or its delegate is a species of statutory law. Not amended, it continued to operate with full force. Since the 'Applicable Rules' were not amended, no benefit may be had by placing reliance on or referring to the Government Notification dated 07.04.2005, that amended the 'Government Employees Rules'. It left the 'Applicable Rules' untouched.

43. Next, it is true - the government of the day did express a change of administrative policy - by issuance of notification dated 28 March 2005, to modify the Old Pension Scheme with respect to State-aided educational institutions, also. However, that expression of changed policy remained from being actualised, legislatively. Therefore, it is merely an unfulfilled policy aspiration of the executive. Being contrary to the pre-existing legislative law – namely, the 'Applicable Rules' framed under Article 309 of the Constitution of India; it must yield to the same. Consequently, that policy expression made by the executive authority, contrary to the legislative action, causes no legal effect. In **State of Karnataka Vs Umadevi [3] (2006) 4 SCC 1**, the Supreme Court observed:

“6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959

was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognised that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed”.

44. Insofar as the 'Qualifying Service Act' is concerned, it reads as below:

“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 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 Number 19 of 2020) was promulgated by the Governor on October 21, 2020.

This bill is introduced to replace the aforesaid Ordinance

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.

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.

3. Notwithstanding any Judgement, decree or order of any Court, anything done or purporting to have been done and may 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 Ordinance were in force at all material times with effect from April 1, 1961.

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."

45. The 'Qualifying Service Act' also does not create any obstacle in the path of the petitioners to claim pension as they are not 'officers' under that law. Though that Act does not define the word 'officer' used therein, yet, section 3 read in the context of the Object and Reasons clause thereto, leave no room to doubt that that enactment was made strictly with reference to the 'Government Service Rules'. Keeping in mind the definition of the term 'Officer' contained in Rule 5(g) of the 'Government Employees Rules' (noted above), it only includes a government servant who may hold a lien on a permanent pensionable post under the Government. It may be applied to other government employees – by way of the only permissible extension, thereto and no further.

46. Petitioners being teachers working at the State-aided educational institutions and not State-owned institutions, they could never be described as 'Officers' of the State Government. Therefore, there did not ever exist any master-servant relationship between them and the State Government as may ever allow them to be described as 'officers' of the State government, even in any loose sense of that term. For these reasons, the ratio in **Satyesh Kumar Mishra and ors. Vs State of U.P. and Ors (supra)** is wholly distinguished.

47. Since the petitioners remained appointed under section 33 G of the Act, read with the 'Applicable Rules' which Rules were never amended, they are seen to have never ventured out of the umbrella protection of the 'Applicable Rules'. They have remained fully insulated from the wrath of section 2 of the 'Qualifying Service Act'. Therefore, the petitioners never became the sacrificial offering contemplated under Rule 34 of the 'Applicable Rules', as may have visited them the sufferance of the amended 'Government Employees Rules'.

48. If any clarification was ever necessary, the same is contained in the above amendments, itself. The 'Qualifying Service Act' is a creature of the State legislature. Also, both sets of Rules namely, the 'Government Employees Rules' and the 'Applicable Rules' are rules framed under Article 309 of the Constitution of India. The State having chosen to amend only the law pertaining to government servants including the set of Rules applicable to them, without making any parallel effort to amend the other set of Rules applicable to teachers at State-aided educational institutions, it is impossible to conceive – the petitioners' rights to pension have been altered. In fact, the exact opposite is true.

49. In view of the above, denial of the claim made by the petitioners' is found to be contrary to law. The impugned orders are set aside. A positive direction is issued to the Deputy Director Secondary Education, Uttar Pradesh (as impleaded in individual cases) to complete all formalities and compute the pension payable to each respective petitioner and to ensure its timely payment. For that purpose, period of two months is granted to the said respondent to compute the individual pension amount payable to individual petitioners, after including the *ad hoc* service rendered by each petitioner, before regularisation of his service in the 'qualifying service' rendered for the purpose of the 'Applicable Rules'. The pension together with its dues so computed may be paid out within a further period of one month. Failing that, the petitioner concerned shall be entitled to interest @ of 8% from today till the date of actual payment.

50. With the above directions, the writ petitions stand **allowed**. No order as to costs.

51. The Court may record its appreciation for the spirited submissions advanced by the younger members of the Bar. Unless the younger bar takes up the mantle in time, the critical interests of institution may remain unserved.

Order Date :- 30.9.2022
Prakhar/Faraz