Hon'ble Justice Tarun Agarwala

Reference – Writ Petition No. 284 of 2004 (S/B)

Our opinion is being sent for your consideration and approval.

(Dharam Veer, J.) (Prafulla C. Pant, J.)
08.10.2010

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition No. 284 of 2004 (S/B)

Madan Mohan Chaudhary
S/o late Sri A.N. Chaudhary
Presently posted as Driller Grade –I
In Test and Control Division (Irrigation)
Joshiyara, District Uttarkashi.

...……. Petitioner

Versus

1. State of Uttaranchal
through Secretary Irrigation Department
Uttaranchal Shashan, Dehradun.

2. State of U.P.
through Principal Secretary
Irrigation Department, U.P. Shashan, Lucknow.
3. Chief Engineer (Head of the Department)
Irrigation, Uttaranchal, Dehradun.
4. Engineer-in-Chief, Irrigation, U.P. Lucknow.
5. Executive Engineer,
Test and Control Division (Irrigation),
Joshiyara, District Uttarkashi.

...……. Respondents

Mr. Manoj Tiwari, Sr. Advocate, assisted by Mr. Alok Mehra, Advocate, present for the writ petitioner.
Mr. S.N. Babulkar, Advocate General, along with Mr. B.D. Upadhyay, Addl. Advocate General, present for the State of Uttarakhand / respondents No. 1, 3 and 5.
Mrs. Bina Pande, Standing Counsel for the State of U.P., present for respondents No. 2 and 4.

Per: Hon. Prafulla C. Pant, J. (**on behalf of Hon'ble Prafulla C. Pant, J. and Hon'ble Dharam Veer, J.)**

A Division Bench of this court, in Writ Petition No. 284 (S/B) of 2004, Madan Mohan Chaudhary Vs. State of Uttarakhand and others, has referred following question to the Larger Bench, constituted by Hon'ble the Chief Justice:-

> Whether, the Government Order dated 1st July 1989, referred in the judgment of the Division Bench (in Special Appeal No. 225 of 2008, State of U.P. and another Vs. Pitamber Dutt Sanwal, arisen out of Writ Petition No. 843

(S/S) of 2003) applies to work-charge employees, or not?

2) Brief facts of the case in Writ Petition No. 843 (S/S) of 2003, Pitamber Dutt Sanwal Vs. State of U.P. and another, decided on 24.07.2008 by this court, were that the writ petitioner of said case was appointed as Driver on work-charge basis on 04.10.1977, in Jamrani Bandh Project under Irrigation Department of State of Uttar Pradesh. He rendered his service as such till 27.05.1995, where after he was regularized and brought under regular establishment. He retired on attaining age of superannuation on 31.05.2000. He filed Writ Petition No. 843 (S/S) of 2003, directing respondent No. 2 Executive Engineer, Ban Sagar Nahar, Nirman Khand –6, Mirzapur to pay amount of provident fund, insurance, pension and other pensionary benefits with interest. Learned Single Judge of this court vide his judgment and order dated 24.07.2008, following the judgment and order dated 03.03.2006, passed in Special Appeal No. 93 of 2004, State of U.P., through Engineer-In-Chief, Public Works Department, Lucknow and another Vs. Anand Singh, allowed the writ petition and directed the respondent No. 2 of said writ petition to release the pensionary benefits. Aggrieved by said judgment and order dated 24.07.2008, State of U.P., and Executive Engineer of Irrigation Department of said State filed Special Appeal No. 225 of 2008. A Division Bench of this court

decided said appeal vide its order dated 27.04.2010, whereby it dismissed the appeal holding that Government Order dated 01.07.1989, issued by State of U.P., shall be applicable to the writ petitioner of said case (Pitamber Dutt Sanwal), as he stood to have rendered ten years service on temporary basis. The contention of the appellants that only the period from 27.05.1995 (date of regularization) to 31.05.2000 (date of superannuation) was the period to be considered as regular service (which was less than ten years) was not accepted by the Division Bench of this court. When said judgment and order dated 27.04.2010, passed in Special Appeal No. 225 of 2008, was referred by present writ petitioner Madan Mohan Chaudhary in Writ Petition No. 284 (S/B) of 2004 before the Division Bench, the Division Bench hearing the writ petition felt that it was not in a position to follow the aforesaid judgment, and referred the matter to the larger bench for answering the question, quoted above.

3) Since, the answer to the question involves interpretation of the Government Order dated 1st July 1989, we think it just and proper to quote the Government Order. The same reads as under:

"उत्तर प्रदेश सरकार

वित्त (सामान्य) अनुभाग–3

सं0 : सा0–3–1152/दस–915/89

लखनऊ : दिनांक 1 जुलाई, 1989

कार्यालय ज्ञाप

विषय : अस्थायी सरकारी सेवकों की सेवा निवृत्ति /मृत्यु पर पेन्शनरी लाभों की अनुमन्यता।

महोदय,

उपर्युक्त विषय पर अधोहस्ताक्षरी को यह कहने का निर्देश हुआ है कि सिविल सर्विस रेगुलेशन्स के अनुच्छेद 368 की व्यवस्था के अनुसार राज्य सरकार के अर्न्तगत की गयी सेवा पेंशन हेतु तब तक अर्ह नही मानी जाती है जब तक कि सरकारी सेवक किसी पद पर स्थायी न हो गया हो। सरकारी सेवकों के यथा समय स्थायीकरण किये जाने हेतु शासन के विद्यमान आदेशों के बावजूद कुछ मामलों में प्रक्रिया सम्बन्धी अपेक्षायें पूरी न हो पाने के कारण सम्बन्धित कर्मचारी स्थायी हुए बिना ही अधिवर्षता पर सेवा निवृत्त हो जाते है जिससे उन्हे पेन्शनीय लाभ, अनुमन्य नहीं हो पाते है।

2– उपरोक्तानुसार अस्थायी रहते हुए सेवा निवृत्त हो जाने के कारण सरकारी सेवकों को होने वाली कठिनाइयों को दूर किये जाने का प्रश्न काफी समय से शासन के विचाराधीन रहा है और सम्यक विचारोपरान्त राज्यपाल महोदय ने सहर्ष यह आदेश प्रदान किये है कि ऐसे सरकारी सेवकों को जिन्होनें कम से कम 10 वर्ष की नियमित सेवा पूर्ण कर ली हों, अधिवर्षता पर सेवा निवृत्त होने अथवा सक्षम चिकित्सा प्राधिकारी द्वारा आगे सेवा करने हेतु पूर्णतया अक्षम घोषित कर दिये जाने पर अधिवर्षता/अशक्तता पेंशन सेवा निवृत्ति ग्रेच्युटी तथा पारिवारिक पेंशन उसी प्रकार स्वयं उन्ही दरो पर देय होगी जैसी कि स्थायी कर्मचारियों को उन्ही परिस्थितियों में संगत नियमों के अन्तर्गत अनुमन्य होती है।

3– यह व्यवस्था उन मामलों में भी लागू होगी जहां अस्थायी रहते हुए 20 वर्ष की सेवा पूर्ण करने अथवा 45 वर्ष की आयु पूर्ण करने, जो भी पहले हो के उपरान्त मूल नियम 56 के अन्तर्गत स्वेच्छया सेवा निवृत्त होने की अनुमति प्रदान की गयी हो।

4– यह आदेश 1–6–89 से लागू माने जायेंगे। उक्त दिनांक से पूर्व अस्थायी रहते हुए अधिवर्षता/अशक्तता पर अथवा स्वेच्छया सेवा, निवृत्त हो चुके ऐसे कर्मचारियों के मामलों में जो उक्त दिनांक को जीवित हो, संगत व्यवस्थाओं के अन्तर्गत मिल चुकी ग्रेच्युटी, यदि कोई

हो, का कोई पुनरीक्षण नहीं किया जायेगा। जिन, मामलों में संयत नियमों के अन्तर्गत, कोई ग्रेच्युटी अनुमन्य नही थी उनमें इस कार्यालय ज्ञाप के अन्तर्गत कोई ग्रेच्युटी अनुमन्य नहीं होगी। ऐसे सरकारी सेवकों को जो अस्थायी रहते हुए दिनांक : 1–6–89 से सेवा निवृत्त हो चुके थे और जिन्हें उसके कारण कोई पेंशन अनुमन्य नहीं हुई थी, दिनांक 1–6–89 से सेवा निवृत्ति के पूर्व सेता की अन्तिम दस मास की औसत परिलब्धियों (दिनांक 1–1–86 के पूर्व सेवा निवृत्त कर्मचारियों के मामले में औसत परिलब्धियों का आशय उस वेतन से है जो उन्हें मूल वेतन 9(21) के अन्तर्गत मिल रहा था तथा 1–1–86 अथवा उसके उपरान्त के मामलों में परिलब्धियों का आशय उस वेतन से है जो मूल नियम 9(21)(1) में परिभाषित है) के 50% की दर से उस दशा में पेशन अनुमन्य होगी जब सेवा निवृत्ति के पूर्व उन्होनें 33 वर्ष की अर्हकारी सेवा पूर्ण कर ली हो। यदि अर्हकारी सेवा 33 वर्ष से कम रही हो तो पेंशन उसी अनुपात में कम हो जायेगी। इस प्रकार आगणित ऐसे कर्मचारियों की पेंशनों को जो दिनांक 1–1–86 के पूर्व सेवा निवृत्त हो चुके थे वित्त विभाग द्वारा निर्गत शासनादेश संख्याः सा–4–1120/दस–87–301/1987 दिनांक 28–7–87 के रेडिरिकनरी भाग–1 एवं भाग–2 जैसी स्थिति हो के अनुसार 608 मूल्य सूचकांक के बराबर मंहगाई राहत का लाभ देते हुए पुनरीक्षित कर दिया जायेगा और दिनांक 1–6–89 से पुनरीक्षित धनराशि का लाभ दिया जायेगा।

5– इस कार्यालय ज्ञाप के अन्तर्गत पेंशन का किसी ऐसे कर्मचारी को राशिकरण अनुमन्य नहीं होगा जो 31–5–1974 अथवा उसके पूर्व सेवा निवृत्त हुआ हो। यदि इस कार्यालय ज्ञाप के अन्तर्गत किसी ऐसे कर्मचारी को पेंशन दी जाये जो 31–5–1974 के उपरान्त सेवा निवृत्त हुआ हो तो उसे 1–6–89 के उपरान्त अगली जन्मतिथि के समय उसकी पेंशन से कम की गयी धनराशि उसकी वास्तविक सेवा निवृत्त के दिनांक के 15 वर्ष के बाद रेस्टोर कर दी जोयेगी।

6– दिनांक 1–6–1989 अथवा उसके बाद सेवा निवृत्ति/मृत्यु के जिन मामलों में उपर्युक्त व्यवस्था का लाभ दिया जायेगा, उनमें कार्मिक अनुभाग–1 के शासनादेश संख्या 19–8–1980 कार्मिक–1 दिनांक 29–4–80 के अन्तर्गत आनुतोषिक लाभ नहीं होगा।

ह0/
विजय कृष्ण सक्सेना
प्रमुख सचिव।"

4) The language of Para 1 of the Government Order quoted above, makes it clear that the Government Order is being issued to clarify Article 368 of Civil Service Regulations. For the purposes of this case we are particularly concerned what has been contained in Para 2 of the Government Order quoted above, which provides that on completion of minimum of ten years regular service, on superannuation, a temporary employee would be entitled to pensionary benefits including gratuity, family pension etc. as payable to a permanent employee.

5) Before further discussion we think it just and proper to quote here Article 358(a) of the Civil Service Regulations (for short CSR), which reads as under:

"358. (a) Except for Compensation gratuity, an officer's service does not in the case of Superior and Inferior services qualify till he has completed twenty years of service."

Article 361 of CSR provides as under:

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

First – The service must be under Government.

*Second – **The employment must be substantive and permanent**.*

Third – The service must be paid by Government

[These three conditions are fully explained in the following Section.]"

The condition indicated in Article 361 of the CSR has been explained in the following Articles.

Articles 362 to 367 elucidates the condition No. 1 of Article 361 of the CSR. Similarly, Article 368 to 384 of the CSR elucidates the second condition of Articles 361 and Articles 385 to 394 relates to condition No. 3 of Article 361 of the CSR.

Next relevant provision is contained in Article 368 of CSR. The same reads as under:-

"*368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.*"

Now we come to other relevant Articles of CSR. Article 370 of CSR reads as under:

"*370. Continuous temporary or officiating service under the Government of Uttar Pradesh*

followed without interruption by confirmation in the same or any other post shall qualify except –

i) periods of temporary or officiating service in a non-pensionable establishment,

ii) periods of service in a work-charged establishment, and

iii) *periods of service in a post paid from contingencies.*"

As such, Clause (ii) of Article 370 of CSR clearly provides that no period of service rendered in work-charge establishment is to be counted towards service to qualify the period of service for the purpose of pensionary benefits.

A perusal of Article 361 read with Article 368 and 370 of the CSR clearly indicates that the service does not qualify unless the officer holds a substantive office on a permanent establishment and that the period of service in a workcharged establishment will not qualify service for the purpose of pension. The underlying reason is that a workcharged employee is not holding a substantive post on a permanent establishment.

Another relevant Article of CSR is Article 465. This Article reads as under:

"*465(1). A retiring pension is granted to a government servant who is permitted to retire after completing qualifying service for twenty-five years or on attaining the age of fifty years.*

(2) A retiring pension is also granted to a government servant who is required by Government to retire after completing twenty-five years or more of qualifying service."

Article 465 applies to those who are seeking voluntary retirement or compulsory retirement, and similar provision is contained in Fundamental Rule 56.

6) The next relevant Article of CSR is Article 468, which reads as under:

"*468. The amount of pension that may be granted is determined by length of service. In calculating the length of qualifying service, fractions of a half year equal to three months and above shall be treated as a completed one-half year and reckoned as qualifying service.*"

Clause (b) of Article 474 of CSR, requires ten years service for calculation of the superannuation pensions. The said provision if read with Article 368 of CSR, means twenty years of service in a permanent establishment.

7) Learned counsel for the writ petitioner / respondent placed reliance on ***Writ Petition (C) No. 500 of 2000, Prabhu Narain and others Vs. State of U.P. and others, decided on 13.03.2003 (2003 LNI 607 SC)*** decided by the Apex court. Having gone through the judgment of said writ petition filed before the Apex court under Article 32 of the Constitution of India, we do not find anything which helps the writ petitioner / respondent in answering the question referred to this Bench. Rather, in the last sentence in Para 5, the Apex court has observed – "If the petitioners had any grievance for non-regularisation of their services, as already observed, it was / is open for them to claim the appropriate relief, but, one thing is clear that unless petitioners' services are regularised in the first place, we find it difficult as to how they can claim pension."

8) The genesis of receiving a pension is indicated in Article 361 of the CSR. One such condition is that the employment must be substantive and permanent which is reiterated in Article 368 of the CSR. Article 370(ii) excludes periods of service spent in a workcharged establishment for the purpose of calculating the qualifying service.

The Government Order dated 01.07.1989 talks about temporary employees in a Government Service retiring without being made permanent, and are therefore not getting pensionary benefits in view of

Article 368 of the CSR, which requires an employee to hold a permanent post. Para 2 of the aforesaid G.O. indicates that such Government employee, namely, temporary employees, who have worked for a minimum period of 10 years in a regular service, would be given pensionary benefits in the same manner as given to a permanent employee. A temporary employee, even though temporary is working on a substantive post, though not permanent. In this light, the Government thought fit to include temporary employees for the purpose of receiving pensionary benefits. A workcharged employee is not working on a substantive post and is specifically excluded under clause (ii) of Article 370 of the CSR. Consequently, the period rendered in a workcharged establishment cannot be included for claiming pension. Sub Rule (8) of Rule 3 of the U.P. Retirement Benefit Rules, 1961, supports this view. Said sub Rule defines qualifying service with the note that if a person serves in a pensionable job, then in work-charge establishment, and again there after in regular service, such interruption would not be disqualification. Similar provision is contained in Article 422 of the CSR.

9) On behalf of the writ petitioner / respondent reference is made to Rule 2 of Temporary

Government Servant (Termination of Service) Rules 1975, which defines ‘temporary service’. According to said Rule 2, ‘temporary service’ means officiating or substantive service on a temporary post or officiating service on a permanent post under the Uttar Pradesh Government. These Rules of 1975, are not applicable to the work-charged employees. Clause (d) of Rule 4 of Temporary Government Servant (Termination of Service) Rules 1975, provides that these rules are not applicable to the employees serving in a work-charge establishment. In our opinion, service rendered in work-charge establishment, before regularization is not a temporary service for the purposes of regular service. It is relevant to mention here that without there being a post, a person cannot hold it either as a temporary employee or permanent employee. In Para 4 of ***State of Himachal Pradesh Vs. Suresh Kumer (1996) 8 Supreme Court Cases 562***, it is observed by the Apex court that work-charge employees perform the duties of transitory and urgent nature so long as the work exists (in a particular project). In our opinion, only because a work-charge employee was engaged in one after another projects does not make his services regular without there being a permanent post.

10) In ***State of Mysore Vs. S. V. Narayanappa, A.I.R. 1967 S.C. 1071 : (1967) 1 SCR 128***, the Apex

court has held that the word ‘Regular’ or ‘Regularization’ does not mean ‘permanence’. Even after regularization, confirmation may be needed in the service. This view was again reiterated by the Apex court in ***B.N. Nagrajan Vs. State of Karnataka, A.I.R. 1979 S.C. 1676 : (1979) 4 S.C.C. 507***. That being so, in our opinion, word ‘NIYAMIT’ (regular) used in the Government Order dated 01.07.1989 only refers to the temporary employees in regular service, yet to be confirmed.

11) Para 669 of Financial Hand Book, Volume VI, provides that members of workcharged establishment are not entitled to pension except the conditions mentioned therein like in the case of getting injured in the accidents etc.

12) In our considered opinion, the Government Order dated 01.07.1989 recognizes only status of a temporary employee on regular post as that of a confirmed employee, for the purposes of pensionary benefits, as is apparent from Para 1 of the Government Order quoted above, in which it is mentioned that many temporary government employees get retired without their services getting confirmed, and they get deprived of pension due to non-confirmation on account of condition mentioned

in Article 368 of CSR. To remove the difficulty of such temporary employees they are treated as a confirmed employees by the Government for the purposes of pension. The Government Order nowhere says that it is applicable to workcharged employees who are neither temporary government servants, nor permanent employees. The Government Order dated 1st July 1989, nowhere interferes with Clause (ii) of Article 370 of CSR, quoted above.

13) For the reasons as discussed above, we answer the question referred by the Division Bench, in negative, and the view taken by the Division Bench of this court in Special Appeal No. 225 of 2010, State of U.P. and another Vs. Pitamber Dutt Sanwal (arisen out of Writ Petition No. 843 (S/S) of 2003), in our opinion, is not based on correct interpretation of law.

(Prafulla C. Pant, J.)

08.10.2010

I agree.

(Tarun Agarwala, J.)

06.01.2011