

(2010) 08 AHC CK 0368

Allahabad High Court

Case No: None

Mirza Athar Beg and
Hardwar Singh

APPELLANT

Vs

State of U.P. and
Others

RESPONDENT

Date of Decision: Aug. 25, 2010

Acts Referred:

- Constitution of India, 1950 - Article 19, 19(1), 19(5), 31(1)
- Road Transport Corporations Act, 1950 - Section 45
- Uttar Pradesh Reorganisation Act, 2000 - Section 54
- Uttar Pradesh Roadways Organization (Abolition of Posts and Absorption of the Employees) Rules, 1982 - Rule 4
- Uttar Pradesh State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981 - Regulation 39

Citation: (2010) 08 AHC CK 0368

Hon'ble Judges: S.S. Chauhan, J

Bench: Single Bench

Final Decision: Allowed

Judgement

S.S. Chauhan, J.

Since the common question of facts and law are involved in these petitions, therefore, they are being taken up together and decided by a common judgment.

2. The petitioners have filed these petitions with a prayer of mandamus commanding the opposite parties to pay the pension and other pensionary benefits to the petitioners with interest at the rate of 18% and further opposite party No. 3 be commanded to send the pension papers of the petitioners to the Director Pension, Pension Directorate, Lucknow.

3. The facts in short are that Mirza Athar, petitioner of Writ Petition No. 7728 (SS) of 1996 was appointed on the post of Conductor in the erstwhile U.P. Government Roadways on 1.11.1951. The petitioner thereafter was promoted on the post of Junior Clerk in the office of the Assistant General Manager, Charbagh, Lucknow on 7.9.1958. The services of the petitioner were regularised against the existing permanent post vide office order dated 3.3.1961. The petitioner was thereafter promoted on the post of Senior Clerk in the office of the Assistant Regional Manager on 8.4.1986. The petitioner retired from service on attaining the age of superannuation while working as Senior Clerk on 31.10.1991. After his retirement the petitioner was denied pension.

4. Similarly, Hardwar Singh Rathore, petitioner of Writ Petition No. 3720 (SS) of 2002 was appointed on the post of Assistant Traffic Inspector in the erstwhile U.P. Government Roadways in the month of October, 1966 and was posted at Gonda Depot. On 1.6.1972 the U.P. State Road Transport Corporation (for short "the Corporation") was established and after establishment of the Corporation the persons, who were working in the Roadways, were transferred to the services of the Corporation. Thereafter the petitioner started working and discharging his duties on the post of Assistant Traffic Inspector in the Corporation in Lucknow Region. The petitioner thereafter was promoted on the post of Traffic Inspector on 5.5.1978. On 29.9.1987 the Deputy General Manager, Madhya Zone issued an order that persons, who are working on the post of Traffic Inspector, Grade-I now are being posted on the post of Junior Station In-charge as in view of the order dated 5.5.1978 the post of Traffic Inspector, Grade-I and Junior Station In-charge are equivalent post of the same cadre and further the said order provides that name of the persons mentioned in the order dated 29.9.1987 are treated to be senior of the persons, who are promoted to the post of Junior Station In-charge on 5.5.1978 in the seniority list of Junior Station In-charge (Class-III) in the Corporation. The petitioner retired from service on attaining the age of superannuation while working as Junior Station In-charge on 31.7.1992. After his retirement the petitioner was denied pension. Hence these writ petitions.

5. Submission of learned Counsel for the petitioners is that the petitioners were all along holding the pensionable post and, therefore, they could not be denied pension and even after the creation of the Corporation in June, 1972 the petitioners became the employees of the Corporation by virtue of the absorption rules framed by the Corporation and even according to the Uttar Pradesh State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981 (for short "the Service Regulations, 1981") the petitioners shall be deemed to be employees of the Corporation. He has placed reliance upon Regulation 39 of the Service Regulations, 1981 and has submitted that relying upon Regulation 39 the Uttarakhand High Court has taken a view in the case of Prem Singh v. State of U.P. and Ors. decided on 1.11.2003 that a person would be entitled for pension after his absorption in the service rules of the Corporation. He has further submitted that the case of Harbansh Pathak v. State of Uttar Pradesh and Ors. Writ Petition No. 1226 of 1987 has been distinguished in the case of Managing Director, U.P.S.R.T.C. v. S.M. Fazil

and three Ors. Writ Petition No. 544 of 2000 and reliance of the said case law by the counsel for the opposite parties is no longer a good law. The amended provisions of Articles 350 and 370 of the Civil Service Regulations were not taken into consideration and the Government Order dated 28.10.1960 itself indicated the date from which it was to apply i.e. 1.11.1960 and on both the counts learned Counsel submits that the case of the petitioners cannot be turned down in regard to the payment of pension. He has also submitted that the petitioners are ready to return the amount received as Contributory Provident Fund and claim to be entitled for pension.

6. Sri Mahesh Chandra, learned Counsel for the Corporation, on the other hand, has placed reliance upon a judgment of Harbansh Pathak (supra) and has submitted that the petitioners have become the members of the Contributory Provident Fund scheme and they have also withdrawn the said amount and, therefore, they cannot turn around to claim the benefit of pension and in Harbansh Panthk's case the said proposition has been considered by this Court. It is also submitted that the petitioners were holding a non-pensionable post and classified by the Government Order dated 28.10.1960.

7. I have heard learned Counsel for the parties and perused the record.

8. If submission of learned Counsel for the petitioners on the first count is taken into consideration, then it goes to indicate that Regulation 39, which was relied upon in Prem Singh's case of Uttarakhand High Court has not been considered in any of the decisions of this Court. The said judgment has also received assent from the apex Court and the SLP filed by the Uttarakhand Government was dismissed and the person concerned was paid pension. While relying upon Regulation 39 the Court observed as under:

As will appear from sub Clause 2 of Regulation 39, it provides the benefits of Provident Fund, Gratuity, Group Insurance and other benefits to an employee who was in the services of the State Government in the erstwhile U.P. Government Roadways Department.

So far as the G.O. dated 5th July 1972 is concerned, the said Annexure has been filed as Annexure 8 page 47. Clause 1 and 2 of the G.O. provides that the petitioner will be treated on deputation. Relevant paragraph one is quoted below:

1. Under the provision contained in Para 1(1)(a) of the above G.O. services of all the permanent and temporary employees who were in the service of State Roadways the Constitution of the State Road Transport Corporation shall be considered on deputation with the Corporation. For this deputation no period has so far been decided.

So far as the pensionary benefits are concerned, Clause 2 deals with the leave and retirement benefits as they have continued in the Government service. Relevant Clause 2 is also quoted below:

2. State Road Transport Corporation has not yet framed Rules on conditions of service of its officers and staff under it u/s 45 of Road Transport Corporation Act. Therefore, except Article 1(1) (a) of the above G.O. dated 7th June, 1972, all other articles shall be taken as deleted. However, whenever Rules on the conditions of Services are framed by the Corporation the same would contain as assurance of the Government that the condition of service of the officers/staff under the corporation shall in no case be inferior to those available under U.P. State Road Transport Corporation before their absorption and their service tenure under the Govt. shall be taken into account in respect of their entitlement of their seniority, promotion, pay fixation, leave and retirement benefits in the same manner as in the case when they would have continued in the Govt. Service.

Counsel for the petitioner has also referred Section 54 of the U.P. Reorganization Act, 2000 with regard to the pension, which reads as under:

Pensions: The liability of the existing State of Uttar Pradesh in respect of the pensions shall pass to, or be apportioned between, the successor States of Uttar Pradesh and Uttaranchal in accordance with the provisions contained in the Eighth Schedule of this Act.

Schedule 8 of the Section 54 also provides as under:

1. Subject to the adjustments mentioned in paragraph 3, each of the successor States shall, in respect of pensions granted before the appointed day by the existing State of Uttar Pradesh, pay the pensions drawn in its treasuries.

4. The liability of the existing State of Uttar Pradesh in respect of pensions granted before the appointed day and drawn in any area outside the territories of the existing State shall be the liability of the State of Uttar Pradesh subject to adjustments to be made in accordance with paragraph 3 as if such pensions had been drawn in any treasury in the State of Uttar Pradesh under paragraph 1.

The counsel for the petitioner has also argued that the entire liability is of the State of U.P. as he was a confirmed employee there. He has also referred the decision of [Jawahar Lal Sazawal and Others Vs. State of Jammu and Kashmir and Others](#), Jawahar Lal Sazawal and Ors. v. State of J&K and Ors.. He has referred paragraph 17, the same is quoted below:

On the merits we may start by reaffirming the statement of the law laid down by this Court in Roshan Lal Tandon v. Union of India that:

Once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government.

It is settled law that pension and gratuity are the legal rights of the pensioner and it is no more bounty to be described by the Govt. to its employees on their retirement as held by the Apex Court in (1998) 1 SCC 429. The observations are quoted below:

Pension and gratuity are no longer any bounty to be distributed by the Government to their employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be vested with penalty of interest at the current market rate till actual payment.

Usually the delay occurs by reason of non-production of the L.P.C. (last pay certificate) and the N.L.C. (no liability certificate) from the concerned Departments but both these documents pertain to matters, records whereof would be with the concerned Government Departments. Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement.

Relying upon the decisions of the Apex Court, in [Deokinandan Prasad Vs. The State of Bihar and Others](#), [Madan Mohan Pathak and Another Vs. Union of India \(UOI\) and Others](#), [State of Madhya Pradesh and Others Vs. Shardul Singh](#), Poonamal v. Union of India reported in AIR 1985 S.C. 1396 ; [D.S. Nakara and Others Vs. Union of India \(UOI\)](#), [Salabuddin Mohamed Yunus Vs. State of Andhra Pradesh](#), [State of Uttar Pradesh Vs. Brahm Datt Sharma and Another](#), it has been held in Sushila Bhatnagar (Smt.) v. State of U.P. reported in (1998) 3 U.P.L.B.E.C. 2214 , that the retirement benefits are not a bounty payable on the sweet will and pleasure of the Govt., but it is a right of the person to receive it under Article 31(1) of the Constitution of India as well as it is a property covered under Article 19(1)(f) of the Constitution of India. The observations are quoted below:

5. Retirement benefits is not a bounty payable on the sweet-will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a Government servant. The right of the person to receive pension is property under Article 31(1) and by a mere executive order the State had no power to with-hold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by Sub-article (5) of Article 19. Therefore, denial of right to receive pension affects the fundamental right of the person under Article 19(1)(f) and 31(1) of the Constitution. It was so held in the case of [Deokinandan Prasad Vs. The State of Bihar and Others](#), In the

case of [Madan Mohan Pathak and Another Vs. Union of India \(UOI\) and Others](#), the Apex Court had held that property in Articles 19, 31(2) must have the same connotation and since these are constitutional provisions intended to secure a fundamental right they must receive the widest interpretation and must be held to refer to property of every kind. Property within the meaning of Articles 19(1)(f) and 31(2) comprises every form of property, tangible or intangible, including debts and choses-in-action such as unpaid accumulation of wages, pension and cash grants. Grant of payment of retirement benefits are part of the conditions of service which has been so in the case of [State of Madhya Pradesh and Others Vs. Shardul Singh](#). That the expression "conditions of service" is an expression of wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc. In the case of [Poonamal and Others Vs. Union of India and Others](#), it was observed by the Apex Court that pension is not merely a statutory right. It is the fulfillment of a constitutional promise in as much as it partakes the character of public assistance in case of unemployment, old age, disablement or similar other cases of undeserved want. Relevant Rules merely make effective the constitutional mandate. Pension is a right not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and any one entitled to the pension under the rules can claim it as a matter of right. In the case of [D.S. Nakara and Others Vs. Union of India \(UOI\)](#), the Apex Court had laid down that pension is neither a bounty nor a matter of grace depending upon the sweet-will of the employer, nor an ex-gratia payment. It is a payment for the past service rendered. It is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. Pension as a retirement benefit is in consonance with an furtherance of the goals of the Constitution. The most practical reason for pension is the inability to provide for oneself due to old age. It creates a vested right and is governed by the statutory rules. In the case of [Salabuddin Mohamed Yunus Vs. State of Andhra Pradesh](#), it was held that right to receive pension is a fundamental right which can be curtailed only in the manner provided in the Constitution. It was further held that pension is property within the meaning of Article 31(1) of the Constitution and that it is also a right under Article 19(1)(f) which could not be restricted even as provided under Clause (5) of Article 19 and that clause has no application to the right to receive pension. Pension is not a bounty but a right earned by a Government servant on the basis of length of service, is also so recognised in the case of [State of Uttar Pradesh Vs. Brahm Datt Sharma and Another](#).

9. The Court further considered the legal rights of the pensioner that it is no more bounty to be distributed by the Government to its employees on their retirement. The Court placed reliance upon the judgment of the apex Court in the case reported in (1998) 1 SCC 429.

10. The effect of Regulation 39 was considered and it was found by the Court that if the petitioner was to be an employee of the Corporation then he would be entitled for pension on account of the provisions contained therein. Similar is the case of the petitioners and, therefore, the petitioners are entitled for the benefit of Regulation 39 and are entitled for pension.

11. The next point, which has been argued by the learned Counsel for the petitioners is that the Government Order dated 28.10.1960 cannot be given retrospective application in view of the fact that in the Government Order itself it has been provided that it will take effect from 1.11.1960. The amended Articles 350 and 370 were not given retrospective effect and the effect of the aforesaid Articles were taken into consideration in S.M. Fazil's case. In S.M. Fazil's case the claimant was holding a non-pensionable post and his services were not counted for a certain period as he was holding a non -pensionable period i.e. 19.4.1949 to 1.4.1956. Then a claim petition was filed, which was allowed by the Public Services Tribunal. Thereafter, a writ petition was filed by the Corporation, which was dismissed. This Court while dealing with the amended portion of the Articles 350 and 370 of the Civil Services Regulations held as under:

The amended Article 350 of the Civil Service Regulations declares all establishments whether temporary or permanent as pensionable establishment but the government was given power to rule otherwise. This amendment was given retrospective effect in words "substituted Articles shall be deemed always to have been so substituted" prior to the amendment of this Article 350 of the Civil Service Regulations. According to the earlier position the nature of the posts whether pensionable or not was governed by the service rules only. In the case of U.P. Government Roadways, which was a department of the government established in 1947, no service rules for any post of any grade, sanctioned in Government Roadways were framed. Therefore, it was not possible at that time to decide whether the post sanctioned by the government in the Government Roadways was pensionable or not due to the absence of the service rules. The Government was regulating the service conditions of every post only by its executive orders. It was only on 28th October, 1960 when the Government for the first time took a decision to declare certain posts of certain level in the Government Roadways Department as pensionable and others as non-pensionable. The G.O. dated 28.10.60 classifies, inter alia, the posts of and above Junior Station In-charge of the traffic side as pensionable and lower posts were declared non-pensionable. Consequently, the post of Assistant Traffic Inspector being lower than the post of Junior Station In-charge was treated as non-pensionable and the opposite parties accordingly discounted the services rendered by the petitioner on the post of Assistant Traffic Inspector. In my opinion, this G.O. of 28th October, 1960 could not apply retrospectively as there is no such indication in the entire government order. On the other hand, the order itself indicated that it would come into operation with effect from 1.11.1960. The employees who were permanent on the post of Assistant Traffic Inspector were also members of the G.P.F. instead of C.P.F. The employees of the pensionable establishment were also members of the G.P.F.

In view of the retrospective amendment of Articles 350 and 370 of the Civil Service Regulations the services rendered even in temporary establishment as Assistant Traffic Inspector became pensionable and the Government could not later on change the nature of the establishment from pensionary one to non-pensionable to the disadvantage of the employees who got vested right to the pensionable post. Under Article 370(1) the continuous service of a temporary capacity or on temporary post followed without interruption by confirmation was countable towards qualifying services for pension and gratuity. The claimant-petitioner was confirmed after rendering continuous service from 19.4.49 to 4.11.56 without any interruption. Therefore, in view of the amended Article 350 of the Civil Service Regulations, read with Article 370(1) the services of the claimant were legally countable as continuous service in pensionable establishment right from the date of his joining as Assistant Traffic Inspector on 19.4.49. Consequently, the order dt. 22.12.92 being contrary to the legal position as enunciated above is not sustainable.

12. The Division Bench of this Court while considering the effect of Harbansh Pathak's case came to the conclusion that the retrospective amendment in respect of Articles 350 and 370 of Civil Services Regulations and the Government Order dated 28.10.1960 did not arise at all for consideration and was not considered in the said judgment.

13. The petitioners, who claim themselves to be identically situated take shelter of the aforesaid two decisions and claim to be entitled for the pension.

14. Since the judgment of Harbansh Pathak's case, which has been heavily relied upon by the counsel for the opposite parties has been distinguished in S.M. Fazil's case, which is a judgment of a Division Bench of this Court at a later period, the same would be binding upon this Court and I do not find to take a different view in this regard. The aforesaid case has also received assent from the apex Court.

15. Reliance placed by the counsel for the petitioners on the case of Shri Narain Pandey v. State of Uttar Pradesh and Ors. Writ Petition No. 3224 (SS) of 2006 also comes to the rescue of the petitioners. Relying upon Regulation 39 in the said judgment the claim of pension of the petitioner was allowed. In addition to it, the learned Single Judge of this Court also considered the impact of the Rule 4 of the U.P. State Roadways Organisation (Abolition of Post and Absorption of the Employees) Rules, 1982 and came to the conclusion that the incumbent shall be deemed to be absorbed in the services of the Corporation. The case of [V.K. Ramamurthy Vs. Union of India](#), was distinguished in the aforesaid case, which is sought to be relied upon by the counsel for the Corporation.

16. Considering the entire facts and circumstances of the case and also the law propounded in the aforesaid cases, I am of the view that the petitioners are entitled for pension.

17. Both the writ petitions are accordingly allowed. A writ in the nature of mandamus is issued commanding the opposite parties to accord pension to the petitioners with the

condition that the Contributory Provident Fund, which has been received by the petitioners, would be returned back by them on the demand of the Corporation.