Dr. Madan Gopal Pandey And Others vs State Of U.P.And Others on 16 August, 2018

Author: Manoj Misra

Bench: Manoj Misra

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 33

Case :- WRIT - A No. - 51865 of 2012

Petitioner :- Dr. Madan Gopal Pandey And Others

Respondent :- State Of U.P. and Others

Counsel for Petitioner :- Manish Kumar Nigam; Pawan Kumar Srivastava

Counsel for Respondent :- C.S.C.

Hon'ble Manoj Misra,J.

Hon'ble Ved Prakash Vaish,J.

Rejoinder-affidavit has been filed today, which is taken on record. As parties have exchanged their affidavits with the consent of the learned counsel for the parties the matter is being decided finally.

We have heard learned counsel for the petitioners; the learned Standing Counsel for the respondents; and have perused the record.

A brief narration of facts would be useful to understand the controversy at hand. On 08.11.1975 the Director (Ayurvedic and Unani Medicine), U.P., Lucknow issued appointment letter thereby

appointing the petitioners, along with others, on ad hoc basis, as Medical Officer in Subordinate (Gazetted) Medical Services (Ayurvedic and Unani), U.P. Pursuant to their appointment, the petitioners continued uninterruptedly in service and were posted at different hospitals. Ultimately, under the order of the Director (Ayurvedic and Unani Services), Govt. of U.P., Lucknow, dated 02.02.1982, their services were regularized under the U.P. Regularisation of Ad Hoc Appointments (On Posts Within the Purview of the Public Service Commission) Rules 1979 (in short Rules, 1979). Thereafter, upon attaining the age of superannuation, the petitioner no.1 retired from the post of Medical Officer, Rajkiya Ayurvedic Chikitsalaya, Dei, Deoria on 31.07.2006; the petitioner no.2 retired from the post of Medical Officer, Kurawal, Gorakhpur on 31.01.2006; and the petitioner no.3 retired from the post of Regional Ayurvedic and Unani Adhikari, Gorakhpur on 31.01.2006. On their retirement, pension payment orders were issued. As per Pension Payment Order dated 10.11.2006, the petitioner no.1 was awarded gratuity of Rs. 3,50,000/- and monthly pension of Rs. 5,471/- after adjustment of the commuted pension. The pension and gratuity of the petitioner no.1 was calculated by counting his service from the date of his initial ad hoc appointment as Medical Officer. Similarly, pension and gratuity of the petitioner nos.2 and 3 was fixed by counting their service from the date of their initial ad hoc appointment. Thereafter, pursuant to recommendation of the 6th Pay Commission, vide order dated 18.09.2009, pension of the petitioner no.1 was revised upwards. In this revised Pension Payment Order, dated 18.09.2009, also, the qualifying service of the petitioner no.1 was counted from the date of his initial ad hoc appointment. Similarly, pursuant to recommendation of the 6th Pay Commission, revised pension was made available to the petitioner nos. 2 and 3 by counting their qualifying service from the date of their initial ad hoc appointment. Later, on 13.07.2012, a revised pension payment order was issued by which, though the petitioner no.1 was shown entitled to full pension, the gratuity that was paid earlier to the petitioner no.1 was revised downwards by calculating the qualifying service from the date of the order of his regularisation in service and not from the date of his initial ad hoc appointment. Consequently, the revised Pension Payment Order required for recovery /adjustment of the excess payment made to the petitioner no.1 from his pension. Likewise, by separate orders dated 13.08.2012, the gratuity that was already paid to the petitioner nos.2 and 3 was revised downwards by calculating their qualifying service from the date of regularisation and not from the date of their initial ad hoc appointment and similar recovery/ adjustment was directed as in the case of the petitioner no.1. Pursuant to such revision, a sum of Rs. 96,603/- was directed to be recovered /adjusted/ deducted from the amount payable to the petitioner no.1 and Rs. 1,02,810/- from each of the other two petitioners.

Assailing the orders dated 13.07.2012 and 13.08.2012 to the extent they seek for recovery/ adjustment of the alleged excess gratuity paid to the petitioners, the present petition has been filed.

The case of the petitioners is that Death-cum-Retirement Benefit Rules, 1961 (in short Rules, 1961) are applicable to the petitioners where under the gratuity in question has been computed and paid to the petitioners. Rule 5 (1) of Rules, 1961 provides: an officer may, on retirement, be paid an additional gratuity, the amount of which shall, subject to a maximum of 16-1/2 times the emoluments, be an amount equal to one-fourth of the emoluments multiplied by the total number of completed six monthly periods of qualifying service. Qualifying service is defined in Rule 3(8) of the Rules, 1961 as follows:-

> "Qualifying Services" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulations:
>
> Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruptions by confirmation in the same or any other post shall qualify except--
>
> (i) periods of temporary or officiating service in non- pensionable establishment;
>
> (ii) periods of service in work charged establishment; and
>
> (iii) periods of service in a post paid from contingencies, shall also count as qualifying service."

NOTE- If service rendered for a non-pensionable establishment, work charged establishment or in a post paid from contingencies falls between two periods of temporary service and permanent service in a pensionable establishment or between periods of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service."

It is the case of the petitioners, that Rule 3(8) of Rules, 1961 is pari materia Article 370 of the Civil Service Regulations, which is as follows:

> "370. Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruptions by confirmation in the same or any other post shall qualify except--
>
> (i) periods of temporary or officiating service in non- pensionable establishment;
>
> (ii) periods of service in work charged establishment; and
>
> (iii) periods of service in a post paid from contingencies.

Note- If service rendered for a non-pensionable establishment, work charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between periods of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service."

Relying on the aforesaid provisions, the learned counsel for the petitioners has urged that all the petitioners were appointed on a substantive post in a permanent establishment under the Government therefore there temporary/ officiating service rendered uninterruptedly since the date of their initial ad hoc appointment be counted, as they were subsequently confirmed, towards qualifying service. It has been urged that earlier the qualifying service was rightly computed by including the temporary / officiating service rendered by the petitioners as ad hoc appointee. In support of his contention the learned counsel for the petitioners invited attention of the Court to

paragraphs 3 and 24 of the writ petition in which it has been specifically stated that the petitioners were appointed on ad hoc basis on a substantive post in a permanent establishment. Attention of the Court was also invited to paragraphs 4 and 5 of the writ petition wherein it has been stated that the petitioners had been continuously working since the date of their initial ad hoc appointment without any break in service till their regularization and even thereafter. It has been submitted that there is no specific denial to the averments made in paragraphs 3, 4, 5 and 24 of the writ petition and therefore it is admitted to the respondents that the petitioners were appointed on a substantive post in a permanent establishment and had rendered uninterrupted service since the date of their initial appointment till their confirmation and, thereafter, till superannuation.

In support of their case, the learned counsel for the petitioners has placed reliance on a Division Bench decision of this Court dated 01.03.2012 rendered in Writ A No. 61974 of 2011 (Dr. Amrendra Narain Srivastava v. State of U.P. and others), where, in similar circumstances, after examining the provisions of Rule 3(8) of the Rules, 1961 as well as Articles 368 and 369 of the Civil Service Regulations, the Court had taken the view that qualifying service would include temporary service rendered by an ad hoc appointee except when it is in connection with: (a) a non-pensionable establishment; or (b) a work-charged establishment; or (c) on a post paid from contingencies.

In response to the submissions of the learned counsel for the petitioners, the learned Standing Counsel placed reliance on Articles 361 and 368 of the Civil Service Regulations which provides as follows:-

> "Article 361- The service of an officer does not qualify for pension unless it conforms to the following three conditions-
>
> a) the service must be under Government,
>
> b) the employment must be substantive and permanent and
>
> c) the service must be paid by Government.

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

Placing reliance on the aforesaid provisions it has been urged that service must be substantive and permanent before any benefit of such service could be provided. Learned Standing Counsel further submitted that though continuous temporary or officiating service may be counted as per Article 370 of Civil Service Regulations or Rule 3(8) of the Rules, 1961 but ad hoc service cannot be counted. It has been submitted that since admittedly the petitioners were appointed on ad hoc basis, they cannot be treated at par with temporary or officiating government servants. It has thus been submitted that the respondents were justified in counting the qualifying service only from the date of regularisation and not from the date of initial ad hoc appointment.

Before we proceed to address the rival submissions, it would be appropriate to observe that on perusal of the pleadings of the parties, we find that the plea taken by the petitioners in the writ petition that they were appointed ad hoc on a substantive post in a permanent establishment of the Government has not been rebutted. It has also not been rebutted that the petitioners had continued in service uninterruptedly since their initial ad hoc appointment till attaining the age of superannuation and, in between, they were regularised under the Rules, 1979. Further, there is no plea of the respondents that the service rendered by the petitioners right from their initial ad hoc appointment till attainment of the age of superannuation was in any of the three excepted categories of service as referred to in the proviso to Rule 3(8) of the Rules, 1961.

The question that arises for our consideration in this petition is whether continuous service as an ad hoc appointee followed, without interruption, by regularisation, rendered on a substantive post in a permanent establishment can be counted towards qualifying service, as defined by Rule 3(8) of the Rules, 1961, for the purpose of computation of gratuity payable under the Rules, 1961. To answer the aforesaid question, two incidental questions arise for our consideration. The first would be as to what would be the true import of the words "service does not qualify unless the officer holds a substantive office in a permanent establishment" as used in Article 368 of the Civil Service Regulations; and the second would be whether the phrase "temporary or officiating service" as used in Rule 3(8) of the Rules, 1961, which is pari materia Article 370 of the Civil Service Regulations, would include service rendered as an ad hoc appointee.

Addressing the first question first, it would be apposite to notice the stand of the state-respondent. The contention of the learned standing counsel on behalf of state-respondents is that a conjoint reading of Articles 361 and 368 of the Civil Service Regulations along with Rule 3(8) of the Rules, 1961 would suggest that the appointment should be substantive, and not ad hoc, to enable counting of service rendered as such as part of qualifying service. The above submission of the learned standing counsel is unacceptable because it fails to notice that Article 368 of the Civil Service Regulations speaks of holder of a substantive office in a permanent establishment and not about substantive appointment of its holder. In service jurisprudence, an office is ordinarily understood as a position of duty, trust, or authority. Often the term office/ post/ vacancy, in service jurisprudence, is used interchangeably depending on the context in which it is used. Substantive appointment can only be on a substantive post/ vacancy /office after due selection by any of the methods of recruitment prescribed by the rules/ law. However, holder of a substantive office need not be substantively appointed inasmuch as in a given situation there may be an ad hoc or officiating or temporary arrangement/ appointment on a substantive post/ office. Accordingly, we are of the considered view that Article 368 of the Civil Service Regulations can not be understood as to have excluded consideration of service rendered by an ad hoc appointee on a substantive post /office in a permanent establishment. What it does is that it declares that the service rendered by the holder of an office would not qualify unless the service is in connection with a substantive office in a permanent establishment. The aforesaid position stands fortified when we read Article 368 along with Article 370 of the Civil Service Regulations, which is pari materia Rule 3(8) of the Rules, 1961.

In so far as Article 361 of the Civil Service Regulations is concerned it relates to eligibility for pension, of which there is no dispute here. Otherwise also, Rule 3(8) of the Rules, 1961, with which

we are concerned, does not refer to it.

Now, the question that falls for our consideration is whether the phrase "temporary or officiating service" as used in Rule 3(8) of the Rules, 1961 would include service rendered as an ad hoc appointee.

Before we address the said question it would be apposite to examine the true import of the phrase "temporary or officiating service" as used in Rule 3(8) of Rules, 1961 and Article 370 of the Civil Service Regulations. In order to understand the true import of the aforesaid phrase it would be useful for us to first examine as to how the term "ad hoc", "temporary" and "officiating" have been understood by courts in the context of service jurisprudence.

In Parshotam Lal Dhingra v. Union of India, 1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544, a constitution bench comprising five-judges of the apex court had dealt with various types of appointment that could be made on a permanent post as also the nature of a substantive appointment, appointment on probation and officiating appointment. It was held/ observed as follows:

> "The appointment of a government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post. This "lien" is defined in Fundamental Rule Section 3, Chapter II Rule 9(13) as the title of a government servant to hold substantively a permanent post, including a tenure post, to which he has been appointed substantively. The Government cannot terminate his service unless it is entitled to do so (1) by virtue of a special term of the contract of employment, e.g., by giving the requisite notice provided by the contract, or (2) by the rules governing the conditions of his service, e.g., on attainment of the age of superannuation prescribed by the rules, or on the fulfilment of the conditions for compulsory retirement or, subject to certain safeguards, on the abolition of the post or on being found guilty, after a proper enquiry on notice to him, of misconduct, negligence, inefficiency or any other disqualification. An appointment to a permanent post in government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. The period of probation may in some cases be for a fixed period, e.g., for six months or for one year or it may be expressed simply as "on probation" without any specification of any period. Such an employment on probation, under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by a notice. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively holding the post from leave in the former case or on a substantive appointment being made to

> that permanent post in the latter case or on the service of a notice of termination as agreed upon or as may be reasonable under the ordinary law. It is, therefore, quite clear that appointment to a permanent post in a government service, either on probation or on an officiating basis, is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. In short, in the case of an appointment to a permanent post in a government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. Likewise an appointment to a temporary post in a government service may be substantive or on probation or on an officiating basis. Here also, in the absence of any special stipulation or any specific service rule, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period. In such a case the servant so appointed acquires a right to his tenure for that period which cannot be put an end to unless there is a special contract entitling the employer to do so on giving the requisite notice or the person so appointed is, on enquiry held on due notice to the servant and after giving him a reasonable opportunity to defend himself, found guilty of misconduct, negligence, inefficiency or any other disqualification and is by way of punishment dismissed or removed from service or reduced in rank. The substantive appointment to a temporary post, under the rules, used to give the servant so appointed certain benefits regarding pay and leave, but was otherwise on the same footing as appointment to a temporary post on probation or on an officiating basis, that is to say, terminable by notice except where under the rules promulgated in 1949 to which reference will hereafter be made, his service had ripened into what is called a quasi-permanent service."

(Emphasis Supplied) Another constitution bench of the apex court comprising five- judges in Rudra Kumar Sain v. Union of India, (2000) 8 SCC 25, had the occasion to examine the meaning of the terms "ad hoc", "stop-gap" and "fortuitous" used in service jurisprudence. It was held/ observed as follows:

> "16. The three terms "ad hoc", "stopgap" and "fortuitous" are in frequent use in service jurisprudence. In the absence of definition of these terms in the Rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters. The meaning given to the expression "fortuitous" in Stroud's Judicial Dictionary is "accident or fortuitous casualty". This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. But an appointment made either under Rule 16 or 17 of the Recruitment Rules, after due consultation with the High Court and the appointee

possesses the prescribed qualification for such appointment provided in Rule 7 and continues as such for a fairly long period, then the same cannot be held to be "fortuitous". In Black's Law Dictionary, the expression "fortuitous" means "occurring by chance", "a fortuitous event may be highly unfortunate". It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression "ad hoc" in Black's Law Dictionary, means "something which is formed for a particular purpose". The expression "stopgap" as per Oxford Dictionary, means "a temporary way of dealing with a problem or satisfying a need".

17. In Oxford Dictionary, the word "ad hoc" means for a particular purpose; specially. In the same dictionary, the word "fortuitous" means happening by accident or chance rather than design.

18. In P. Ramanatha Aiyar's Law Lexicon (2nd Edn.) the word "ad hoc" is described as: "For particular purpose. Made, established, acting or concerned with a particular (sic) and or purpose." The meaning of word "fortuitous event" is given as "an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God".

19. The meaning to be assigned to these terms while interpreting provisions of a service rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a "stopgap" arrangement and appointment in the post as "ad hoc" appointment. It is not possible to lay down any strait-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stopgap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the questions of inter se seniority of officers in the cadre.

20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc".....".

(Emphasis supplied) In P. Ramanatha Aiyar's treatise Advanced Law Lexicon (4th Edition) the phrase "Ad Hoc Appointment" is described as temporary appointment made without selection of the candidate by any of the methods of recruitment provided under the relevant service rules or any orders of the Government where no service rules exist and otherwise than on the recommendations of the Commission if the post is in its purview. The treatise goes on to state that ad hoc appointment is made as a stop-gap arrangement to carry on the governmental work before the regular selection is made. "Officiating appointment" has been described in the aforesaid treatise as an appointment, not made substantively, which is temporary until further arrangements are made for filling the post permanently. "Officiating service" has been described therein as service rendered as a non-permanent holder.

Having taken notice of the constitution bench decisions of the apex court as well as the meaning of the terms "officiating" and "ad hoc" in the context of appointment, we find that there is a common thread in both types of appointment which is that both appointments are temporary made to serve a purpose. The discernible difference between the two is that in a case of officiating appointment, ordinarily, a post exists from before whereas in a case of ad hoc appointment it is not necessary that a post may exist from before because an ad hoc appointment may be made by way of an arrangement to serve a purpose/ exigency that may have arisen.

However, what remains to be examined is whether the phrase "continuous temporary or officiating service under the Government followed without interruption by confirmation", as used in Rule 3(8) of Rules, 1961, on a substantive post in a permanent establishment, as envisaged by Article 368 of the Civil Service Regulations, would include continuous service rendered by an ad hoc appointee on a substantive post in a permanent establishment, under the Government, followed without interruption by regularisation.

Before examining the said issue, it would be appropriate to observe that award of gratuity to retired government servant is a social welfare measure hence provisions relating to it come across as a social welfare legislation. It is well settled that liberal construction of a social welfare legislation is to be adopted to achieve the object of the legislation. The object of counting continuous temporary or officiating service of an employee, under the Government, followed without interruption by his confirmation, in computing qualifying service for availing/computing gratuity is to ensure that all such employees, who are rendering temporary or officiating service, are given benefit of their full length of service regardless of its nature. It is important to notice that neither Rule 3(8) of the Rules, 1961 nor Article 370 of the Civil Service Regulations use the phrase "temporary service" or "officiating service" rendered as a "temporary government servant" or "officiating government servant". The use of the word "temporary service" or "officiating service" is therefore suggestive of the legislative intent to include all kinds of temporary or officiating service, except those which are excepted, namely, (i) temporary or officiating service in non- pensionable establishment; (ii) periods of service in work charged establishment; and (iii) periods of service in a post paid from contingencies. In the aforesaid contextual background, could it be said that service rendered by an ad hoc appointee in a permanent establishment is in any way different from temporary service. The answer to it is an obvious no. The service rendered by an ad hoc appointee is by all means a temporary service until his regularisation. Therefore, the period of continuous temporary service

rendered by him as an ad hoc appointee on a substantive post in a permanent establishment under the government followed without interruption by regularisation is eligible to be counted towards qualifying service as defined by the Rule 3(8) of the Rules, 1961. We, accordingly, hold that service rendered by an ad hoc government servant on a substantive post in a permanent establishment is nothing but temporary service of the nature contemplated by Rule 3(8) of the Rules, 1961 and would be countable towards qualifying service if it is continuous and is followed without interruption by regularisation/confirmation provided it is not in any one of the three excepted categories i.e. (i) temporary or officiating service in non- pensionable establishment; (ii) periods of service in work charged establishment; and (iii) periods of service in a post paid from contingencies.

As, in the instant case, it is not disputed that the petitioners were appointed on ad hoc basis on a substantive post in a permanent establishment and, after rendering continuous uninterrupted service, were regularised, and thereafter they superannuated as any other permanent confirmed government employee, their period of service rendered in the capacity of such an ad hoc government employee is also to be included while calculating their qualifying service as per Rule 3(8) of the Rules, 1961 for the purpose of computing gratuity. The impugned order dated 13.07.2012 as well as dated 13.08.2012 to the extent it revises the gratuity payable to the petitioners downwards by counting the qualifying service only from the date of regularisation and not from the date of initial ad hoc appointment is based on wrong interpretation of the provisions of Rule 3(8) of the Rules, 1961 read with Article 368 of the Civil Service Regulations and are, therefore, liable to be set aside to that extent. Accordingly, we allow the writ petition. The orders dated 13.07.2012 and 13.08.2012 to the extent it re-calculates the amount of gratuity payable to the petitioners by counting the qualifying service from the date of their regularisation in service and not from the date of their initial ad hoc appointment are hereby quashed.

The respondents are directed to compute the gratuity payable to the petitioners by counting their qualifying service from the date of their initial ad hoc appointment and not from the date of their regularisation and pay gratuity accordingly, if not paid already, within a period of eight weeks from the date a certified copy of this order is served upon the Director, Pensions, Govt. of U.P., Lucknow, along with interest @ 6% per annum chargeable from the date the gratuity became payable under the law. In case, any gratuity already paid earlier has been deducted pursuant to the impugned orders, the same shall be refunded to the petitioners, within the same period as directed above, along with interest @ 6% chargeable from the date of such deduction. There is no order as to costs.

Order Date :- 16.8.2018

Sunil Kr Tiwari

(V.P. Vaish, J.) (Manoj Misra, J.)