IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWPOA No. 195 of 2019.

Reserved on: 18.12.2019

Decided on: 26.12.2019.

Smt. Sheela Devi …Petitioner

Versus

State of H.P. and others ..Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Chander Bhusan Barowalia, Judge.

Whether approved for reporting ?[1] Yes.

For the Petitioner : **Mr. A.K. Gupta and Ms. Babita, Advocates.**

For the Respondents : **Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Addl. A.G., Mr. Bhupinder Thakur, Mr. Narinder Thakur, Ms. Svaneel Jaswal and Ms. Divya Sood, Deputy Advocate Generals.**

Tarlok Singh Chauhan, Judge

Whether the services of an employee appointed on contractual basis in temporary capacity can be counted towards qualifying service for the grant of pension after his services have

[1] *Whether reporters of Local Papers may be allowed to see the Judgment ? Yes*

been regularised is moot question that is required to be determined in this petition.

However, before doing so, certain minimal facts need to be noticed.

2. The late husband of the petitioner was appointed as Ayurvedic doctor on contract basis in temporary capacity in the year 1999, however, his services were thereafter regularised in the year 2009 and he shortly thereafter expired on 23.01.2011. The request made by the applicant for release of pension has been turned down by the respondents vide order dated 18.6.2018 on the ground that the services rendered by the husband of the applicant on contract basis cannot be counted for pensionary benefits under CCS (Pension) Rules, 1972 (for short 'Pension Rules') as the same are applicable only to regular government employees appointed in the pensionable establishments in the Government departments on or before 14.05.2003. The Government employees appointed in non-pensionable establishments are covered under the Contributory Provident Fund Rules, 1962. In terms of rule 2 of the Pension Rules, these rules are applicable to the Government employees appointed substantively to civil services and posts in Government

departments which are borne on pensionable establishments appointed on or before 14.05.2003. Further, as per rule 2 (g) of the Pension Rules, these Rules are not applicable to the persons employed on contract except when the contract provides otherwise.

3. We have heard learned counsel for the parties and have gone through the records of the case carefully.

4. Rule 17 of the Central Civil Services (Pension)Rules, 1972 reads as under:

> *17. Counting of service on contract –*
>
> *"(1) A person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either:-*
>
> *(a) to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service ; or*
>
> *(b) to agree to refund to the Government the monetary benefits referred to in Clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.*
>
> *(2) The option under sub-rule (1) shall be communicated to the Head of Office under intimation to the Accounts Officer*

within a period of three months from the date of issue of the order of permanent transfer to pensionable service, or if the Government servant is on leave on that day, within three months of his return from leave, whichever is later.

(3). If no communication is received by the Head of Office within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."

5. It is clear from the plain language employed in rule 17 of the Central Civil Services (Pension) Rules, 1972 that if a person is initially engaged by the Government on contract for a specified period and is subsequently appointed to the same or another post in a substantiative capacity in a pensionable establishment without interruption of duty, he may opt either to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service or to agree to refund to the Government the monetary benefit referred to in clause or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.

6. We may at this stage refer to a decision rendered by learned Single Judge of this Court in ***Paras Ram*** vs. ***State of***

Himachal Pradesh and another, Latest HLJ 2009 (HP) 887, wherein it was laid down that if adhoc service is followed by regular service in the same post, the said service can be counted for the purpose of increments.

7. Further a Division Bench of this Court in LPA No. 36 of 2010 titled ***Sita Ram*** vs***. State of H.P. and others,*** decided on 15.7.2010 after placing reliance in ***Paras Ram***'s case (supra) held that "*It is also settled principle of law that any service that is counted for the purpose of increment, will count for pension also. To that extent the appellant is justified in making submission that period may be treated as qualifying service for the purpose of pension also.*"

8. A co-ordinate Bench of this Court (Coram: Mr. Justice Rajiv Sharma, J. and Mr. Justice Sureshwar Thakur, J.) while dealing with an identical issue in ***CWP No. 5400 of 2014*** titled ***Veena Devi*** *Vs.* ***Himachal Pradesh State Electricity Board and another,*** decided on 21.11.2014 and after interpreting the provisions of Rule 17, directed the respondents therein to count the services of the petitioner therein on contract basis as Clerk/Typist with effect from 16.11.1988 to 21.3.2009 for the purpose of qualifying service for pensionary benefits.

9. Likewise, the same Bench issued similar directions in ***CWP No. 8953 of 2013*** titled ***Joga Singh and others*** vs. ***State of H.P. and others*** and connected matter, decided on 15.6.2015 by directing the period of service rendered on contract basis as qualifying service for the purpose of pension under the Pension Rules.

10. Another Co-ordinate Bench of this Court {Coram: Hon'ble Mr. Justice Surya Kant, Chief Justice (as his Lordship then was) and Hon'ble Mr. Justice Ajay Mohan Goel, J.} in CWP No. 2384 of 2018 titled ***State of Himachal Pradesh and others*** vs. ***Matwar Singh and another***, decided on 18.12.2018, held that work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Therefore, the executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/ struck down, in light of the decisions rendered in CWP No. 6167 of 2012, titled ***Sukru Ram*** vs***. State of H.P. and others***, decided on 6th March, 2013 and a Full Bench of Punjab and Haryana High Court in ***Kesar Chand*** vs. ***State of Punjab through the Secretary PWD (B&R)***

Chandigarh and others, (1988) 94 (2) PLR 223, the relevant para-3 of the judgment reads as under:

> *"3. It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/ struck down, in light of view taken by this Court in CWP No. 6167 of 2012, titled* ***Sukru Ram vs. State of H.P. and others****, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in* ***Kesar Chand vs. State of Punjab through the Secretary PWD (B&R) Chandigarh and others****, (1988) 94 (2) PLR 223, also dealt with an identical issue where Rule 3.17 (ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."*

11. As regards the counting of work period rendered on work charged basis followed by regular appointment, the issue is otherwise no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Punjab State Electricity Board*** vs. ***Narata Singh AIR 2010 SC 1467***, ***Habib Khan*** vs. ***The State of Uttarakhand (Civil Appeal No. 10806 of 2017)*** decided on

23.8.2017 and recent decision rendered by three Judges of the Hon'ble Supreme Court in ***Prem Singh*** vs***. State of Uttar Pradesh and others AIR 2019 SC 4390.***

12. It is by now settled law that the work-charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits and even adhoc service in terms of ***Paras Ram's*** case (supra) followed by regular service in the same post has to be counted for the purpose of increments and in turn for pension as held by the Division Bench of this Court in LPA No. 36 of 2010 titled ***Sita Ram's*** case (supra), can the benefit be denied to the employees appointed on contract basis followed by regular appointment.

12. Even though the issue in question is squarely covered by the judgments rendered by this Court in ***Veena Devi*** and ***Joga Singh*** cases (supra). However, we may at this stage make note of an unreported decision of the Division Bench of the Punjab and Haryana High Court in ***Rai Singh and another*** vs***. Kurukshetra University, Kurukshetra, C.W.P. No.2246 of 2008***, decided on August 18, 2008 wherein the Court after taking into consideration the Full Bench judgment in ***Kesar Chand*** case (supra) held that

once the employees have been regularised and are now held entitled to pension by counting adhoc service, exclusion of service "on contract basis" will be discriminatory. It was further held that appointment on contract basis is a type of adhoc service. Mere fact that nominal breaks are given or lesser pay is given or increments are not given, is no ground to treat the said service differently. Beneficial provision for pension having been extended to adhoc employees, denial of the said benefit to employees working on contract basis, who also stand on same footing as employees appointed on adhoc basis cannot be held to be having any rational basis and the judgment in ***Kesar Chand*** (supra) is fully applicable. It shall be apposite to refer to the necessary observations as contained in paras 4 to 8 of the judgment, which read as under:

> *"4. Learned counsel for the petitioners relies upon a Full Bench judgment of this Court in Kesar Chand v. State of Punjab and others, 1988 (2) PLR 223, wherein validity of Rule 3.17 (ii) of the Punjab Civil Services Rules, Volume II was considered, which provided for temporary or officiating service followed by regularization to be counted as qualifying service but excluded period of service in work charge establishment. It was held that if temporary or officiating service was to be counted*

towards qualifying service, it was illogical that period of service in a work charge establishment was not counted.

6. As held in Kesar Chand (supra), pension is not a bounty and is for the service rendered. It is a social welfare measure to meet hardship in the old age. The employees can certainly be classified on rational basis for the purpose of grant or denial of pension. A cut off date can also be fixed unless the same is arbitrary or discriminatory. In absence of valid classification, discriminatory treatment is not permissible.

7. Once the employees have been regularised and are held entitled to pension by counting adhoc service, exclusion of service "on contract basis" will be discriminatory. Appointment on contract basis is a type of adhoc service. Mere fact that nominal breaks are given or lesser pay is given or increments are not given, is no ground to treat the said service differently. Beneficial provision for pension having been extended to adhoc employees, denial of the said benefit to employees working on contract basis, who also stand on same footing as employees appointed on adhoc basis cannot be held to be having any rational basis. Judgment of this Court in Kesar Chand (supra) is fully applicable.

8. Accordingly, we allow this writ petition and declare that the contractual employees who have rendered continuous service (ignoring nominal breaks) followed by regularization in a pensionable establishment, will be entitled to be treated at par with adhoc employees in such establishment, for counting their qualifying service for pension."

13. Adverting to the facts of the case, we have no difficulty in concluding that even though the appointment of the husband of the petitioner was contractual but that was in no manner qualitative different from the regular employees and once there was need for doctors in the State as is evident from the fact that the services of the husband of the petitioner ultimately stood regularised, then it was unfair on the part of the State Government to take work from the employee on contract basis. They ought to have resorted to an appointment on regular basis.

14. The taking of work on contractual basis for long amounts to adopting the exploitative device. Later on, though the services of the husband of the petitioner as observed above, were regularised. However, the period spent by him on contractual basis, has not been counted towards the qualifying service. Thus, the respondents have not only deprived the deceased husband of the petitioner from the due emoluments during the period he served on less salary on contractual basis but he was also deprived of counting of the period for pensionary benefits.

15. The State has been benefitted by the services rendered by the deceased husband of the petitioner in the heydays of his life on less salary on contractual basis. Therefore, there is no rhyme or reason not to count the contract period in case it has been rendered before regularization. If same is denied, it would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service.

16. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. As it would rather be unjust, illegal, impermissible to make the aforesaid classification under the Pension Rules and to make Rule valid and non-discriminatory, the same will have to be read down and it has to be held that services rendered even prior to regularisation in the capacity of work-charged employees, contract employees, contingency paid fund employees or non-pensionable establishment shall be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

17. In taking this view, we are fortified by the judgment rendered in ***Prem Singh's*** case (supra), more particularly observations made in paras 28 to 34 of the judgment, which read as under:

> *"**28.** The submission has been urged on behalf of the State of Uttar Pradesh to differentiate the case between work-charged employees and regular employees on the ground that due procedure is not followed for appointment of work charged employees, they do not have that much work pressure, they are unequal and cannot be treated equally, work- charged employees form a totally different class, their work is materially and qualitatively different, there cannot be any clubbing of the services of the work-charged employees with the regular service and vice versa, if a work-charged employee is treated as in the regular service it will dilute the basic concept of giving incentive and reward to a permanent and responsible regular employee.*
>
> ***29.** We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees*

had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In Narain Dutt Sharma & Ors. v. State of Uttar Pradesh & Ors. (CA No. 2019 @ SLP (C) No.5775 of 2018) the appellants were allowed to cross efficiency bar, after '8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak w.e.f 15.9.1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs.200- 320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs.205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/ appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.

***30**. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work- charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the*

period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.

***31**. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.*

***32.** The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust,*

impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

***33**. As it would be unjust, illegal and impermissible to make aforesaid classification to make the Rule 3(8) valid and non discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non- pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.*

***34**. In view of the note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook."*

18. It would be clearly evident from the aforesaid judgment of the Hon'ble Supreme Court that the services rendered prior to regularisation in any capacity be it work-charged

employees, contingency paid fund employees or non-pensionable establishment has to be counted towards qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

19. Once that be so, obviously no discrimination can be made qua the employees, who rendered services prior to regularisation in the capacity of contractual employees and were regularised only because they had put in the requisite number of years of service on contractual basis like their counterparts who had rendered services in the capacity of work charged employees, contingency paid fund employees or non-pensionable establishment, of course, for that matter even on adhoc basis.

20. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and the services rendered by the husband of the petitioner on contract basis prior to his regularisation shall be treated as qualifying service for grant of pension. The arrears of pension shall be confined to last three years only before the date of filing of the petition i.e. 3.12.2018. The admissible benefits be paid accordingly within three months from today.

21. The petition is disposed of in the aforesaid terms, so also the pending application(s) if any, leaving the parties to bear their own costs.

22. To come up for compliance on **31.3.2020.**

(Tarlok Singh Chauhan)
Judge

(Chander Bhusan Barowalia)
Judge

26th December, 2019.
(GR)