

(2017) 04 OHC CK 0027

In the Orissa High Court

Case No : 14183 of 2012

All Orissa (Urban Local Bodies) Government Secondary
School Teachers Association & another

APPELLANT

Vs

State of Orissa & others

RESPONDENT

Date of Decision : 25-04-2017

Acts Referred:

Constitution of India, Article 14, Article 16 -
Orissa Municipal Rules, 1953, — Rule 433, Rule 215(c)

Citation : (2017) 04 OHC CK 0027

Hon'ble Judges : D.P. Choudhury

Bench : SINGLE BENCH

Advocate : V. Narasingh, S. Das, S. Devi

Judgement

1. Challenge has been made to the inaction of the opposite parties by not granting service and pensionary benefits at par with Government teachers to the petitioner and similarly situated persons. FACTS

2. The conspectus of the case of the petitioners is that the petitioner No.2 is a retired High School Teacher from the School of Urban Local Bodies. Be it stated that on 26.9.1989 the State Government passed a resolution declaring Non Government Primary School Teachers of the State as Government employees with effect from 5.9.1989 and such benefit was also available to the Primary School Teachers in N.A.C./Municipal areas in the State. Vide Notification No.496 dated 18.4.1990 the Orissa Aided Educational Institutions (Non- Government Fully Aided Primary School Teachers) Retirement Benefit Rules, 1986 was amended stating that the Non- Government Fully Aided Primary School Teachers either working in the Panchayat Samiti constituted under the Orissa Panchayat Samiti Act, 1959 or a Municipality or Notified Area Council constituted under the Orissa Municipal Act, 1950 are governed by the said Retirement Benefit Rules, 1986.

3. In Rule 215 (c) of the Orissa Municipal Rules, 1953 it has been stated that "School under public management" means that recognized School which is managed by the Department, or by any Local Authority or by any special persons or committees appointed and action taken on behalf of the State Government. So, the teachers under the Urban Local Bodies both working and retired should be treated at par with their counterparts in the State Government. Similarly Rule 433 of the said Municipal Rules states that Municipal employees shall be subject to the same rules of conduct as applied to Government servant. It is alleged, inter alia, that in order to give all benefits to the Government employees a Cabinet decision was taken on 5.2.2004 that the teachers of 65 Lower Secondary (M.E.) and 82 Secondary Schools of Urban Local Bodies are declared as Government employees retrospectively with effect from 1.8.2002. After the Cabinet took a decision, the Government vide letter No.4036 dated 20.2.2004 in Housing and Urban Development Department clarified that the Government after careful consideration have been pleased to transfer the Management of 82 Secondary Schools of all Urban Local Bodies to the School and Mass Education Department and to declare the teaching and nonteaching staff of those Schools as Government servants with effect from 1.8.2002.

4. Again on 28.2.2004 a resolution of the Housing & Urban Development Department was duly published in the official gazette that 82 Secondary Schools of Urban Local Bodies under the State Government shall be transferred to the administrative control of the School and Mass Education Department and declared the teaching and non-teaching staff of those Schools as Government employees with effect from the date issuance of the resolution but not from the date of the decision was taken by the Cabinet. Be it stated that when the Cabinet has taken decision to give effect the pensionary benefit with effect from 1.8.2002 retrospectively but the resolution was issued to give effect to such benefit prospectively, i.e., from the date of issuance of the notification. Since the Municipality Rule and the teachers actually working in the Urban Local Bodies have performed the same duties as performed by the teachers in the Government Schools, any sort of inaction to give the equal benefits of State Government School teachers to the petitioner and similarly situated persons not only smack of law but also violating Articles 14 and 16 of the Constitution of India. So, writ is filed to direct the opposite parties to fix up the revised scale of pay of teachers of Urban Local Bodies including petitioner with effect from 1.8.2002 but not from 28.2.2004 and consequently the notification giving benefit prospectively should be declared illegal.

5. Contrasting the contents of the writ petition opposite party No.3 filed counter affidavit stating that the writ petition is not maintainable because the Schools have been taken over by the Government and the petitioner should have approached the Odisha Administrative Tribunal at first instead of approaching this Court. The case of this opposite party No.3 is that vide resolution dated 28.2.2004 the Housing and Urban Development Department transferred 65 Lower Secondary (M.E.) and 82 Secondary (High) Schools of Urban Local Bodies

along with teaching and non-teaching staff to the administrative control of the School and Mass Education Department for betterment. It was decided therein that the service conditions of transferred employees such as pension, leave salary, other retiral benefits, G.P.F., H.R.A., promotion, transfer and age of superannuation etc. would be applicable to them as applicable to the teaching and non-teaching staff of School & Mass Education Department. So, the School & Mass Education Department issued resolution No.22605 dated 26.9.2013 authorizing sanction of pensionary benefits in favour of the employees of Primary Schools, Lower Secondary (UP) Schools and Secondary (High) Schools of Urban Local Bodies (in short "ULBs") by extending such benefit to such teachers who retired on or after 28.2.2004. Accordingly the employees of such transferred ULB institutions were allowed pensionary benefits under the Orissa Municipal Employees' (Pension) Rules, 1989 till the transfer took place but thereafter such benefit was made available under the O.C.S. (Pension) Rules, 1992. Although the Cabinet has taken decision to extend the benefit of the teachers of Urban Local Bodies with effect from 1.8.2002 but the resolution being given effect from 28.2.2004, teachers of ULBs shall not be entitled to pension or pensionary benefits from 1.8.2002 or after 1.8.2002 but they are only entitled to the benefit from 28.2.2004. Since State has not taken any decision from which date such Cabinet decision would apply, it cannot be said that the benefit has been extended with effect from 1.8.2002.

6. Be it stated that the Odisha Aided Educational Institutions Employees Retirement Benefit Rules came into force with effect from 1.4.1982 and a separate Rule, namely, the Odisha Aided Educational Institutions Non-Government Fully Aided Primary School Teacher Retirement Benefit Rules, 1986 came into force with effect from 1.4.1986. So, the Fully Aided Primary School Teachers under the State Government are entitled to their pension as per the above Rules but not under the OCS (Pension) Rules although the rate of pension is equal. As the teaching and non-teaching staff of Urban Local Bodies came to the control of School and Mass Education Department (in short "S & ME Department") only on 28.2.2004, the said Department has expressed inability to fix up pension of ULB teachers retired prior to 28.2.2004 in accordance with the OCS (Pension) Rules, 1992.

7. A rejoinder is filed by the petitioner to the counter filed by the opposite party No.3. It is stated in the rejoinder that the Association of the petitioner is a registered Association being registered in 1976-77. Since the Cabinet decision is sacrosanct the State Government cannot set at not by a resolution changing the effective date arbitrarily from 1.8.2002 to 28.2.2004 as the entire assets and liabilities have been taken over by the S & ME Department along with teaching and non-teaching staff and also the additional budgetary provision has been made to meet the consequence, the S & ME Department should bear the expenditure of paying pension and other benefits to the teachers taken over from ULBs at par with Government servants. SUBMISSIONS

8. Mr. V. Narasingh, learned counsel for the petitioner submitted that the Cabinet decision is prescribed under the Rules of Business of State Government duly made by His Excellency the Governor. When Rules of Business prescribe the date of taking over teaching and non-teaching staff of ULBs retrospectively, the Department has no power to issue notification to make it effective from the date of issuance of the notification. He submitted that according to Article 166, the Rules of Business has been framed by His Excellency the Governor of Orissa and accordingly the service condition of Primary Schools, Lower Secondary Schools and Secondary Schools of ULBs have been transferred to S & ME Department and thereby to declare them as Government servants with effect from 1.8.2002 as per the decision of the Cabinet dated 5.2.2004.

9. Learned counsel for the petitioner has further submitted that accordingly a letter has been issued on 20.2.2004. But suddenly another Gazette Notification was issued on 28.2.2004 stating that the teaching and non-teaching staff of Schools under the ULBs would be treated as Government employees only with effect from the date of issuance of the resolution which is illegal and improper. He further submitted that such resolution also made it clear that the teaching and non-teaching staff shall be paid revised scale of pay as admissible to the employees of ULB with effect from 1.8.2002 till the date of transfer and when the Cabinet has taken the decision to count them as Government servant employees, any direction by the resolution to pay the salary of the teachers of ULBs through such resolution is not only contrary to the Cabinet decision but also contrary to the Notification of the Housing and Urban Development Department issued on 20.2.2004.

10. Mr. Narasingh further contended that since the teachers from the ULBs and teachers from the Government High Schools are all Government employees with effect from 1.8.2002, any discrimination for payment of salary and extending service conditions including pensionary benefits as per ULB standard with effect from 1.8.2002 to 28.2.2004 is sheer discrimination and violating Articles 14 and 16 of the Constitution. He, therefore, submitted to direct for implementation of the resolution dated 28.2.2004 not from the date of issuance but from the date as decided by the Cabinet.

11. Learned Additional Government Advocate submitted that the decision of the Cabinet may be policy making one but it is paving way for the State Government to take statutory action. When the State Government has issued notification that is binding on all being issued in the name of His Excellency the Governor. He submitted that unless otherwise the notification is retrospective, the same notification only would construe prospectively. He further submitted that since the State has taken decision to implement the decision of the Cabinet with regard to the relief claimed in this writ petition, there is no mistake committed by the State but in view of the concurrence availed from the Finance Department which is also the requirement in the facts and circumstances of this case, the said notification is only applicable from the date of issuance of the notification,

i.e., 28.2.2004.

12. Learned Additional Government Advocate further submitted that even if the petitioner and similarly situated employees are governed by the ULBs, their scale of pay being revised as same as teachers receiving in the Government Schools, there is no discrimination between the petitioner and Government School Teachers. He further submitted that since the Government treated the petitioner and similarly situated persons as Government employees with effect from 28.2.2004, the writ petition is filed challenging the same is only maintainable before the State Administrative Tribunal but not before this Court. So, he submitted to reject the writ petition.

13. Main point for consideration:- (i) Whether the notification dated 28.2.2004 issued by the Housing & Urban Development Department is illegal and improper?

DISCUSSION

14. It is not in dispute that the petitioner was a retired teacher having retired from School under the Urban Local Bodies. It is also not in dispute that the Cabinet took a decision to extend the benefit of State Government service including pensionary benefits to the teachers of Urban Local Bodies. It is admitted fact that the State Government issued notification on 28.2.2004 to make the decision of the Cabinet applicable prospectively and not retrospectively.

15. Article 166 of the Constitution of India speaks about conduct of the business of the Government of a State and they state as follows: "166. Conduct of business of the Government of a State.- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

16. In terms of the above constitutional mandate, the Rules of Business has been framed by His Excellency the Governor of Orissa on 14.12.1956. Sub-Rule 4-A thereof states that there shall be a Committee of the Council of Ministers to be called the Cabinet which shall consist of the Ministers. According to such provision, all matters referred to the Second Schedule shall ordinarily be considered at a meeting of the Cabinet. Basically the Cabinet is a Policy Body of the State Government and it directs under different subject to issue different directives to carry on business of the State Government. Under these Rules of

Business His Excellency the Governor on the advice of the Chief Minister allot the business of the Government by assigning one or more Departments to the charge of a Minister or of a Minister of State. According to Sub-Rule 10 of the Rules of Business previous consultation with the Finance Department should be done by the concerned Department wherever the matter relates to the finances of the State.

17. In the instant case, learned counsel for the petitioner submitted that the Cabinet has taken a decision on 5.2.2004 to consider the teaching and non-teaching staff of the ULBs as Government servant with effect from 1.8.2002. But the Gazette notification was issued by the H & U.D. Department by issuing the resolution dated 28.2.2004 to treat the teaching and nonteaching staff as Government servant with effect from that date. Annexure-2 series show that the Principal Secretary to Government in H & U.D. Department placed a proposal before the Cabinet to declare the teachers of ULBs as Government employees retrospectively with effect from 1.8.2002 at para-9 of its memorandum. In para 10 the Principal Secretary has requested the Cabinet to take decision on following issues: "xxx xxx xxx

(ii) The teachers of the aforesaid schools be declared as Government employees and conferred upon similar service benefits vis-a-vis the teachers of Government managed schools.

xxx xxx xxx"

So, in this para-10 it has been requested by the Principal Secretary to Cabinet to declare the teachers of the ULBs as Government servant without any request to declare same with retrospective effect, i.e., from 1.8.2002. The decision of the Cabinet taken is also placed hereunder:

"Transfer of left out Primary Schools of six ULBs, Lower Secondary and Secondary Schools of ULBs to the School & Mass Education Department and declaring the teaching and Non-teaching Staff of these Schools as Government servants. Approved."

18. From the aforesaid decision, it appears that the Cabinet took decision to declare the teachers of said Schools under ULBs and non-teaching staff thereof as Government servant but did not mention that they were treated as such with effect from 1.8.2002. There is distinction between background note, actual request made and decision taken. So, it is the Cabinet decision that the petitioner and other similarly situated teachers of the ULBs shall be taken as Government servant without mentioning the date from which they will be treated as such.

19. Vide Annexure-1 the petitioner placed the letter of the Director of Municipal Administration to the authorities of N.A.C./Municipalities that the State Government has been pleased to transfer the Management of 72 Primary Schools of 6 left out Urban Local Bodies, 65 Lower Secondary Schools and 82 Secondary

Schools of all Urban Local Bodies to the School & Mass Education Department and to declare the teaching and non-teaching staff of these schools as Government servants with effect from 1.8.2002 as per the decision of the Cabinet. But subsequently Annexure-3 shows that the teaching and nonteaching staff of the ULBs are treated as Government servant from the date of issuance of the resolution. When there is no Cabinet decision and the resolution was issued giving effect from the date of issue of same, the clarificatory letter of H & U.D. Department vide Annexure-1 having no statutory force cannot be taken as superseding Annexure-2 or Annexure-3.

20. Annexure-3 shows that on 28.2.2004 the H & U.D. Department issued resolution to treat the teaching and nonteaching staff of the ULBs by extending all benefits of such resolution but not retrospectively. When the Cabinet decision does not speak from which date the petitioner and similarly situated teachers were to be treated as Government employees, the resolution issued in pursuance of the Cabinet decision that they should be treated as Government servant from the date of issue of resolution cannot be said to be incorrect or illegal. So, the contention of the learned counsel for the petitioner in this regard is untenable. Rather, in the same resolution it has been said that the teaching and non-teaching staff of ULBs would be paid revised scale of pay as admissible to the employees of ULBs with effect from 1.8.2002 till the date of transfer dated 28.2.2004 is correct and it is also stated that the revised scale of pay of the staff under the ULBs and State Government are of same. In such circumstances, the petitioner is found to have not established that the resolution issued is not in consonance with the Cabinet decision and for that the Court is of the view that the notification dated 28.2.2004 issued by the H & U.D. Department is legal and proper. Issue No.1 is answered accordingly. **CONCLUSION**

21. Prayer has been made to declare Annexure-3 to be illegal and fix up the pay of the teachers of ULBs including the petitioners with effect from 1.8.2002 at par with Government servants in pursuance of letter dated 20.2.2004. Since Annexure-3 is found to be correct and legal and Annexure-1 was not issued in consonance with the Cabinet decision taken, the prayer in the writ petition cannot be acceded to. On the other hand, the Court does not find any merit in the writ petition and accordingly the same is dismissed.