

(2020) 01 OHC CK 0014

In the Orissa High Court

Case No : Writ petition (C) No. 17444 Of 2015

Biresh Chandra Giri

APPELLANT

Vs

State Of Orissa

RESPONDENT

Date of Decision : 24-01-2020

Acts Referred:

Orissa Service Code, 1939 — Section 71(a)

Orissa Servic Code Pension Rules, 1992 — Rule 71, 71(a)

Citation : (2020) 01 OHC CK 0014

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Advocate : P.K. Nanda, S. Panigrahi, D. Mund, G.P. Dutta

Final Decision : Disposed Of

Judgement

Biswanath Rath, J

1. This Writ Petition has been filed seeking direction to the opposite party no.2- the Odisha State Police Housing and Welfare Corporation Limited to extend the petitioner the benefit extended under the provision of Section 71(a) of the Orissa Service Code as amended on 25.07.2014 taking into account the notification dated 2.08.2014 and the resolution of the Board dated 22.09.2014 vide Annexure-5 and thereby setting aside the restrictions in the impugned orders vide Annexures-5B & 5C.

2. Short background involved in this case is that the Odisha State Police Housing and Welfare Corporation Ltd. hereinafter in short be called as "the Corporation" a public sector undertaking of Government of Odisha is constituted with a purpose to build Police building, keeping in view the enhancement of the Police efficiency and also to see improvement in the Police community. The Corporation is also undertaking construction of buildings of other Organizations of the State, its undertaking in the State of Odisha and also the buildings of the Judicial Department. Initially the Corporation was being manned by persons under

deputation from Government and other Corporation. But after sometime certain posts created for the Corporation by the Board of Directors was being approved by the Government in its Home Department and as such it is since approval of posts by the Government continuing almost with all its permanent employees. Petitioner had successfully cleared a recruitment process for the post of probationary Accountant and as a consequence he was posted as probationary Accountant on 10.07.1982 in the scale of pay of RS.320-550 with usual allowances. On completion of probation period successfully service of the petitioner was confirmed by the Office order vide office order No.135/OPHWC dated 11.2.1983. While the petitioner was continuing in such post he was communicated about his superannuation on his attaining the age of 58 years w.e.f. 30.09.2015 (Annexure-1). Petitioner challenging his superannuation contended that the Government of Odisha by its resolution dated 28.06.2014 took a general decision in terms of Central Government resolution by modifying the age of superannuation of the employees under the State from 58 years to 60 years. It is further claimed that pursuant to such resolution necessary modification was made by amending the provision at Section 71(a) of the Orissa Service Code as well as the Orissa Service Code Pension Rules, 1992 which was published in the Gazette on 25.07.2014 by the order vide Annexure-2. In the above circumstance, the Government of Odisha allowed the enhancement of age of retirement of the employees under Public Sector Undertakings of the State from 58 years to 60 years being published in Extra Ordinary Odisha Gazette on 18.08.2014 (Annexure-3). It is on such notification the petitioner claimed that large number of PSUs have increased the age of superannuation of its employees with approval of the Government of Odisha within short time thereafter and such employees have all been benefited with the continuance in service till 60 years of age. The petitioner alleged that in spite of such development involving several Public Sector Corporations there was no enhancement of the age of retirement in the Odisha State Police Housing and Welfare Corporation Ltd. However in its 122nd meeting held on 22.09.2014 the Board of Directors of the Corporation considered the case of enhancement of age of retirement of its employees from 58 years to 60 years in the line with Government in Public Enterprises Department Resolution No.1775/PE dated 2.08.2014. This resolution was submitted to the Government with a request to concur the proposal on 24.11.2014. However the proposal of the Corporation received the approval of the Government almost one year after i.e. on 23.11.2015 allowing enhancement of the age of retirement from 58 years to 60 years. On receipt of approval of the Government of Odisha the Odisha State Police Housing and Welfare Corporation Ltd. issued an Office order bearing No.11442/OPHWC dated 30.11.2015 enhancing the age of retirement on superannuation of the employees of its Corporation from 58 years to 60 years but however, it would be coming into force from 23.11.2015 only. The approval as well as the communication of the Corporation are available at Annexures-5B & 5C.

3. Shri Nanda, learned counsel for the petitioner drawing the attention of this Court to the above development and taking this Court to the resolution of the Board of Directors dated 22.09.2014 having support of the Government in the Public Enterprise Department resolution dated 2.08.2014 contended that once the resolution got approval of the Government, the resolution adopted by the Corporation on a subsequent date becomes immaterial. Shri Nanda, learned counsel for the petitioner contended that once the Government has adopted a resolution to its employees, it has a direct application to the employees of the Corporation may be with the concurrence of the State Government and once it got the concurrence/ approval of the Government, the approvals would have been relegated back to the original date of implication of such benefit in respect of the Government Employees since 28.06.2014 or in the worse from the date of its publication in the Extra Ordinary Gazette dated 18.08.2014. Shri Nanda, learned counsel for the petitioner further referring to the resolution of the Board, the Resolution of the Government contended that the approval of the Government in such matters becomes a routine and under no circumstance such benefit involving the Corporation could have been postponed as has been done in the case at hand. Shri Nanda, learned counsel for the petitioner further for postponing the date of benefit involving the employees of the Corporation to 23.11.2015 and for the application of same benefit to other Corporation since August, 2014 submitted that the same not only amounts to discriminating similar set of employees under different establishments but also creating a class amongst similar employees under different employments. Shri Nanda, learned counsel for the petitioner further taking this Court to the decision in the case of Premalata Panda Versus State of Odisha & another as reported in 2015(II) OLR 214 sought for extension of the benefit as granted therein to the case of the petitioner and thus requested for granting the relief as has been sought for by the petitioner. Shri Nanda also drawing the attention of this Court to the decision in the case of S. Krishna Sradha Versus State of Andhra Pradesh and Ors. as reported in 2017 STPL 3175 SC submitted that this decision has also application to the case of the petitioner. Shri Nanda, learned counsel for the petitioner at this stage taking this Court to the interim protection granted by this Court involving the Writ Petition at hand through the order dated 19.12.2016 and drawing the attention of this Court to the illegal retirement of the petitioner at the age of 58 years contended that for the protection granted to the petitioner through the interim order the petitioner should be deemed to be continuing in service till 60 years and also entitled to all consequential benefits.

4. The State- opposite party no.1 did not file any counter affidavit to this case, however there is a counter affidavit by the opposite party no.2 contesting the claim of the petitioner.

5. Shri Dutta, learned counsel for the opposite party no.2 contended that the Corporation being an independent body and undertaking its exercise through the Governing Body of the Corporation, Government guidelines or decisions applicable to the Government servants have no direct application to the

employees of the Corporation and it is only after evaluation and scrutinization the Government issues the guidelines to be followed by the Public Sector Undertakings by way of independent notification.

Shri Dutta, learned counsel thus taking this Court to the date of approval of the Board resolution by the State and making it effective from the date of approval by the State contended that the Corporation is simply working out the direction of the State Government and it has no role involving the allegation made herein. For the petitioner superannuated since 30.09.2015 on attaining the age of 58 years and the approval of the Government came through its communication dated 23.11.2015 Shri Dutta, learned counsel for the Corporation contended that as the superannuation of the petitioner taken place prior to 23.11.2015, he is not entitled to the benefits of approval of the Government in the matter of enhancement of age of superannuation. Shri Dutta, learned counsel however did not dispute to the fact of application of such benefit to the employees of the Government Odisha since 2014 and application of the same also to the employees of several similarly situated Corporations also since 2014. Shri Dutta, learned counsel for the opposite party no.2 however objected to the applicability of the decisions cited by the petitioner to the case at hand on the premises that the factual aspect involved in the decisions cited stands wholly different to the factual aspects involving the case at hand. Shri Dutta, learned counsel accordingly prayed this Court for dismissal of the Writ Petition on the premises of having no merit.

6. Shri Mund, learned Additional Government Advocate however while supporting the stand taken by the opposite party no.2 simply contended that the provision meant for the State Government employees are not directly extended to the Corporation employees, it is however extended only after the Corporation adopts the same by way of resolution and sent it to Government for approval and when the Government approves it. Shri Mund, learned Additional Government Advocate however did not answer on the allegation of unnecessary delay of one year at the end of State in approving the resolution of the Board.

7. Looking to the background involved in this case Shri Dutta, learned counsel for the opposite party no.2 contended that even though the Board of the Corporation took its decision by resolution dated 22.09.2014 and sent the same to the Government on 24.11.2014 for necessary approval but the approval of the Government came only on 23.11.2015 almost after one year. Based on the communication of the approval of the Government, the Board of the Corporation again sat and took a decision to apply such benefit to its employees but from the date of concurrence of the State Government since 23.11.2015 and the document at Annexure-5C is an outcome of development through the order vide Annexure-5B.

8. Considering the rival contentions of the parties, this Court finds, admittedly the petitioner is not a Government Employee but is an employee of the Public

Sector Corporation. It is also the admitted fact that benefits those have been granted to the Government Employees are also extended to the employees of the Corporation, but however with approval/concurrence of the State Government. There is no denial to the claim of the petitioner that the benefit of enhancement of age of superannuation extended to the Government employees have been extended to the employees in several other Corporations long back and that there is delayed approval of the same in the case of this particular Corporation.

The resolution dated 28th June, 2014 adopted in the matter of enhancement of age of retirement on superannuation of the State Government Employees reads as follows:

"Government after careful consideration have decided to enhance the retirement age of State Government employees on superannuation from 58 (fifty-eight) years to 60 (sixty) years. This will take immediate effect.

The relevant provisions under Rule 71 of the Odisha Service Code as well as provisions in relevant rule of the O.C.S. (Pension) Rules, 1992 in this connection shall be deemed to have been modified to the above extent. Necessary amendments to the above rules shall be issued in due course."

Pursuant to above development there is amendment of the Rule 71(a) of the Orissa Service Code as well as the Orissa Service Code Pension Rules, 1992 and following the above adoption the Government of Odisha in the department of Public Enterprises passed the resolution dated 2nd of August, 2014 which reads as follows:

"Consequent upon enhancement of age of superannuation of the State Government employees from 58 years to 60 years, similar enhancement of age of retirement on superannuation of the employees of the State Public Sector Undertakings was under active consideration of the Government of Odisha.

Keeping in view the demands of various Service Associations of the State Public Sector Undertakings as well as significant improvement in average life expectancy in recent years, State Government have been pleased to allow enhancement of age of retirement on superannuation of the employees of the State Public Sector Undertakings from 58 (fifty-eight) years to 60 (sixty) years subject to fulfillment of the following conditions by the respective Public Sector Undertakings:-

1. The Public Sector Undertaking must justify its need to retain the present experienced manpower for utilization of their services in achievement of the objectives of the Corporation.
2. The entity does not have compelling reasons to reduce cost by downsizing manpower.
3. The P.S.U. must not have defaulted in payment of salary, statutory dues of the

employees such as Provident Fund and E.S.I. etc. in past three years.

4. The P.S.U. must not have availed any additional budgetary support during the last three years for payment of salary and other employees dues (excepting the usual leave of budgetary support availed by the P.S.U., if any).

5. The P.S.U. must not have defaulted in payment of loan to any financial institution or State Government. The P.S.U. must be up to date in payment of guarantee fee/ royalty/ dividend to the State Government, whichever is applicable.

6. The entity is and will be able to discharge the salary burden out of its own resources and not depend on additional budgetary grant (excepting any usual budgetary allocation).

The P.S.U. shall prepare a detailed proposal which should be approved by the Board of Directors of the P.S.U. concerned.

The proposal approved by Board shall be concurred by the Administrative Department. The Administrative Department shall obtain appropriate Government approval before giving effect to the enhancement proposal.

This has been concurred in by Finance Department and approved by Hon'ble Chief Minister (orders have been taken in P.E. Department File No. Cor.-I-45/2014)."

9. Looking to the aforesaid resolution it is observed that in the event there is impediment under the conditions imposed hereinabove the Public Sector undertaking is required to prepare a detail proposal to be approved by the Board of Directors of the PSUs concerned and the proposal approved by the Board shall be concurred by the Administrative Department in the State. In such event, the Administrative Department shall obtain approval from appropriate Department of the Government before giving effect to the enhancement proposal. It be stated here that this resolution of the Government has already got concurrence of the Finance Department and has been approved by the Hon'ble Chief Minister.

10. It is, at this stage of the matter, this Court finds, even though there was no impediment in working out the Government Resolution yet on placement of a proposal for enhancement of age of superannuation the Board of Directors in its 122nd meeting held on 22.09.2014 has adopted as follows:

"RESOLVED THAT the retirement age of the employees of the Corporation excluding Class-IV (Group-D) be enhanced from 58 (fifty eight) years to 60 (sixty) years in line with the Government in Public Enterprises Department Resolution No.1775/PE, dt.02.08.2014 and the age of retirement of all employees of the Corporation henceforth enhanced from existing 58 years to 60 years subject to approval of the Govt."

It is further decided a proposal shall be submitted to the Govt. in Home

Department for necessary concurrence and appropriate Govt. approval in this regard before implementation of the same."

11. It be again observed here that the Board of this particular PSU has already resolved to enhance the age of retirement of the employees of the Corporation from 58 years to 60 years in the light of Government resolution dated 2.08.2014 since 22.09.2014 and sent such resolution to Government for its approval/ concurrence immediately thereafter. For the opinion of this Court that the approval of this nature is a mere formality and Government in its appropriate Department should have approved the same in all promptitude, it is not understood, why the Government took one year for according approval of the proposal of the Corporation. This Court here again takes note of the communication of the Government in its Home Department dated 23.11.2015 under Annexure-5B which reads as follows:

"In pursuance of Resolution No.1775/PE dated 02.08.2014 of Department of Public Enterprises, I am directed to say that Government have been pleased to allow enhancement of the age of retirement on superannuation of the employees, excluding Class-IV (Group-D) employees, of the Odisha State Police Housing and Welfare Corporation Ltd., Bhubaneswar from 58 (fifty eight) years to 60 (sixty) years.

This will come into force with immediate effect."

12. For the opinion of this Court that once the Board of the Corporation resolved to adopt the decision of the Government in the matter of enhancement of age of superannuation dated 2.08.2014 and if such resolution of the Board was required to be approved by the Government, such resolution ought to have been accepted as it is and the same should also have come into force at least with effect from the resolution of the Board dated 22.09.2014. In the circumstance and since this Court finds, putting a condition that approval of the Government shall come into force with effect from the date of issue of Annexure-5B and as per consideration in Annexure-5C i.e. from 23.11.2015, not only becomes bad for being contrary to the resolution of the Board, this Court keeping in view that such benefit was not only already extended to Government employees but also extended to employees in several other State Public Sector Undertakings, observes, the delayed action of the Government resulted in a discriminatory attitude in the matter of adoption of age of superannuation involving similarly situated persons in different Corporation in the same State Administration. In the circumstance, this Court while maintaining the rest part of the Government communication dated 23.11.2015 vide Annexure- 5B, declares the observation that the approval will come into force with immediate effect becomes bad and as a consequence holding the communication vide Annexure-5C as bad, this Court directs, the decision of the Board shall be given effect to from the date of the resolution dated 22.09.2014. Taking into account the age of superannuation of the petitioner dated 30.09.2015 at the age of 58 for no fault of him and for the observation of this Court made hereinabove this Court observes, had the

resolution of the Board been approved by the Government immediately the petitioner would not have been superannuated on 30.09.2015 and would have continued at least till he attained the age of 60 years. This Court also finds surprise that when the Government accepted such resolution of different Public Sector Undertakings much earlier, there was no reason to keep the resolution of the Board of this PSU sent on 24.11.2014 and approved it only on 23.11.2015 after almost one year. As the approval of the Government being a routine one, this Court here observes, the Government in its appropriate Department should hence forth remain careful while taking decision in such matters and giving approval on such issues within a reasonable time. This Court here finds, the petitioner has been made to suffer for no laches on his part but suffered for the laches on the part of the Government in giving due importance to such resolutions by granting approval after inordinate delay.

13. Taking into account the decision of the Hon'ble apex Court vide 2017 STPL 3175 SC this Court finds, considering the laches on the part of the Government in taking such decision much later the date of requirement the Hon'ble apex Court in para-32 of the said judgment has observed as follows:

"32. The three words that have been proclaimed in the said judgment, namely, *nunc pro tunc*, is basically in the realm of doctrine of relation back and it is applied because of the fault of the Court, the litigant should not suffer. At this juncture, we are obliged to say that when the courts have gone to the extent of saying that for the fault of the Court, the litigant should not suffer, it is unimaginable that for the fault of the administrators or the counseling body or for some kind of evil designer, grant of compensation should be regarded as the lone remedy. We think not; as we are reminded of what Justianian had said "Justice is the constant and perpetual wish to render to everyone, his due". Needless, "his due" only can mean "due in law in praesenti."

Taking into account the decision of this Court sought to be applied to the case of the petitioner, this Court finds, considering a case in similar situation involving a Development Authority in the State a Single Bench of this Court in the case of Premalata Panda Versus State of Odisha & another as reported in 2015(II) OLR 214 in para-16 has been pleased to grant the required benefits in favour of such type of employees.

14. For the observation of this Court made hereinabove and keeping in view the interim protection granted in favour of the petitioner, this Court while interfering with the communication of the Government vide Annexure-5B in part as indicated hereinabove and setting aside the communication of this particular PSU vide Annexure-5C, thereby directing to apply the resolution of the Board from the date it was passed, also sets aside the order of superannuation involving the petitioner vide Annexure-1. Petitioner since approached this Court by filing this Writ Petition on 23.09.2015 prior to attaining the age of superannuation at 58 years on 30.09.2015 would be deemed to be continuing in service till attaining

the age of 60 years and entitled to salary and other benefits all through. In such view of the matter, pension of the petitioner shall also be calculated taking into account that the petitioner was superannuated on attaining the age of 60 years. Since the petitioner has already attained the extended age of superannuation i.e. 60 years by the time of disposal of the Writ Petition, the entire arrear salary treating the petitioner to have been continuing till the age of 60 years and pension considering that the petitioner has worked till attaining the age of 60, be calculated and released in favour of the petitioner with interest @7% per annum all through. The entire exercise shall be completed within a period of six weeks from the date of communication of a copy of this judgment.

15. The Writ Petition succeeds to the extent indicated hereinabove. However there is no order as to cost.