(2016) 02 OHC CK 0050

In the Orissa High Court

Case No : W.P.(C) No. 12494 of 2012

Brajendra Ku. Jena APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Citation : (2016) LIC 2122

Hon'ble Judges : S.N. Prasad, J.

Bench : Single Bench

Advocate : K.K. Swain, P.N. Mohanty and R.P. Das, for the Appellant; Buddhiman Rout, Standing Counsel for School & Mass Education Deptt., for the Respondent

Final Decision : Dismissed

Judgement

S.N. Prasad, J.—1. The petitioner has approached this Court for quashing the order dated 16.05.2012 passed by the Controller of Accounts, Orissa, Bhubaneswar under Annexure-3 with a direction to release the pensionary benefit in his favour.

2. Brief facts of the case of the petitioner as has been pleaded in the writ petition is that the petitioner has started his service as a Non Government Aided Primary School Teacher w.e.f. 25.07.1960 and after rendering more than 17 years of service tendered his resignation from the post on 16.10.1976 which was accepted by the District Inspector of Schools, Kendrapara Education District, Kendrapara.

3. The petitioner since has rendered more than 17 years of service hence as per the provision of (Triple Benefit) Rules, 1966 read with Orissa Aided Educational Institution Employees Retirement Benefit Rules, 1981, a teacher who has completed more than 10 years of service will be entitled to get benefit of pension but in spite of this fact he has not been paid the pensionary benefit.

4. It is the case of the petitioner that the competent authority has sanctioned

final pension of the petitioner and sent it before the Controller of Accounts vide letter dated 31.12.2011 but the Controller of Accounts has rejected the benefit vide communication dated 16.05.2012 which is without any jurisdiction as because, since in view of the provision as contained in Rule-14 of the Orissa Non-Government Primary School Teachers Contributory Provident Fund, Insurance, Pension (Triple Benefit) Rules, 1966 (hereinafter referred as "Rules 1966"), the competent authority is the District Inspector of Schools as per the definition of the competent authority in the Rules 1966 hence the Controller of Accounts has got no jurisdiction to turn down the decision taken by the competent authority.

5. Learned counsel for the petitioner has contended that in absence of any specific provision regarding forfeiture of past service in case of resignation, the past service cannot be said to be forfeited automatically and in this regard reliance has been placed upon the judgment of Hon''ble Supreme Court rendered in the case of Union of India and others, vrs. Lieutenant Cornel P.S. Bhargava reported in , AIR 1997 SC 565 and in the case of Madhukar vrs. State of Maharashtra and others reported in , AIR 2014 SC 2206.

6. Opposite party No. 4 has filed counter affidavit, inter alia stating therein that the Controller of Accounts has been assigned with the work of authorisation of pension/family pensionary benefits to the retired/family of deceased employee of Aided Educational institutions, taken over M.E. Schools/High Schools and Primary School teachers of the State.

The Government has formulated pension rules namely the "Orissa Aided Educational Institutions Employees Retirement Benefit Rules, 1981 (herein after referred to as "Rules 1981") for payment of pensionary benefits to the retired employees of Aided Educational Institutions effective from 1.4.1982 and as such the provision of Rules, 1981 is applicable to such employees who have retired on or after 1.4.1982.

The Government, in Education Department has formulated a separate pension rules namely Orissa Aided Educational Institutions (Non-Government Fully Aided Primary School Teachers) Retirement Benefit Rules, 1986 (herein after referred to as Rules 1986) by which the benefit of pension and gratuity at par with counterpart in Government service for the Primary School teachers who were earlier covered under the Rules 1981 and retired on or after 1.4.1982.

7. It has been contended that the petitioner has tendered resignation which was accepted, hence in view of the provision as contained in Rule 4 of the Rule 1981 or Rule 1986, the petitioner is not said to be covered. Moreover as per the provision of Rule-34(1) of the Orissa Civil Services (Pension) Rules 1992, resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority entails forfeiture of past service.

8. Learned counsel for the petitioner in response has submitted that the forfeiture of pension will depends upon specific provision applicable to one or the other Government employee and what has been stated by opposite party No. 4

in the counter affidavit placing reliance upon the Rule-34(1) of Orissa Civil Services (Pension) Rules, 1992, the same is not applicable to the petitioner being a member of Non-Government Primary School.

9. It has further been contended that the provision of Rules 1981 will not be applicable as because the petitioner has been ceased to be in service w.e.f. 16.10.1977 since his resignation was accepted by the competent authority.

In response thereof, learned counsel for School and Mass Education Department has submitted that since the petitioner has tendered his resignation which was accepted w.e.f. 16.10.1977 hence the provision of the Rules 1966 will be applicable which contains specific provision as contained in Rule 11(a) which speaks about forfeiture of past service if occasioned by resignation.

Learned counsel for the petitioner while giving response to this has submitted that provision of Rule 11(a) is to be read with the provision of Rule 10 (a) of the Rules 1966 which provides regarding the method of computing the length of qualifying service.

10. Heard learned counsel for the parties and perused the documents on record.

The fact which is not in dispute that the petitioner has got his service and after putting 17 years of service has tendered his resignation which was accepted w.e.f. 16.10.1977. Since the petitioner has been ceased to be in service w.e.f. 16.10.1977 hence there is no dispute about the fact that the Rule 1981 or the Rule 1986, will not be applicable in the case of the petitioner.

11. Considering the date of acceptance of resignation i.e., w.e.f. 16.10.1977, the provision of Rules 1966 will be applicable. Hence, the petitioner will held to be covered by the provision of Rule 1966.

12. It is the case of the petitioner that he has put in 17 years of service hence as per the decision of the competent authority i.e., D.I. of Schools, he is entitled to give the benefit of pension under the Triple Benefit of pension Scheme and the Controller of Accounts has got no authority to reject the claim.

13. It has been contended that in absence of specific provision regarding forfeiture of past service, the service rendered by the petitioner for a period of 17 years cannot automatically be forfeited and the provision of Rule 34(1) of O.C.S. Pension Rules 1992 will not be applicable as because the petitioner was not under the service of the State Government.

14. There is no dispute about the fact that pension is to be governed under a specific rule. There is also no dispute about the fact that the petitioner will be covered under the Rules 1966, hence the provision of Rule 34(1) of OCS (Pension) Rules, 1992 will not be applicable since the petitioner was not a State Government employee.

15. The contention raised by opposite party No. 4 in the counter affidavit that the provision of Rules 1981 or Rules 1986 will be applicable and by which the

petitioner cannot be held to be entitled for getting the benefit of pension but these provisions of Rules 1981 or 1986 will not be applicable for the reason that the petitioner has ceased to be in service before coming into effect of the provision of Rules 1981 and 1986 and it is settled that no rule can be given its effect retrospectively, unless provided. Hence, the petitioner is said to be covered under the provision of Rules 1966.

In the light of this, it is required to see the relevant provision of Rule 10(a) and 11(a) of the Rules 1966 which needs to be referred being reproduced:--

"Rule 10(a) In computing the length of qualifying service all previous continuous service whether temporary, officiating or permanent either in one or more than one aided institution shall, subject to the provisions of Rule 5, be taken into account. Service rendered prior to attainment of the age of 18 years shall not be reckoned as qualifying service.

Rule 11(a) Periods of breaks in service on account of retrenchment or for similar reason beyond the control of the persons concerned will not be treated as interruption of involving forfeiture of past service. All these cases; however will be decided on their own merits, but in case of breaks occasioned by resignation, past service will not be taken into account."

16. From perusal of Rule 10(a), it is evident that the provision has been made for computing the length of qualifying service all previous continuous service whether temporary, officiating or permanent either in one or more than one aided institution shall, subject to the provisions of Rule 5, be taken into account. Service rendered prior to attainment of the age of 18 years shall not be reckoned as qualifying service.

17. The Provision of Rule 11(a) speaks that periods of breaks in service on account of retrenchment or for similar reason beyond the control of the persons concerned will not be treated as interruption of involving forfeiture of past service. All these cases; however will be decided on their own merits, but in case of breaks occasioned by resignation, past service will not be taken into account.

18. Learned counsel for the petitioner has contended that provision of Rule 11(a) shall be read along with provision of Rule 10(a) and if it will be read together, the petitioner has a case, but I find no force in this argument because of the reason that provision of Rule 10(a) provides for computing the length of qualifying service whether temporary, officiating or permanent either in one or more than one aided institution shall, subject to the provisions of Rule 5, be taken into account.

19. Rule 11(a) speaks regarding period of breaks in service on account of retrenchment or for similar reason beyond the control of the persons concerned, thus it speaks regarding the nature and reason of break in service.

Provision of Rule 11(a) speaks that the period of break in service on account of retrenchment or for similar reason beyond the control of the persons concerned will not be treated as interruption of involving forfeiture of past service but with the exception that in case of breaks occasioned by resignation, past service will not be taken into account and undisputedly resignation by any employee cannot be said to be beyond the control of persons concerned and as such break due to resignation cannot be directed to be treated for counting the past service for the benefit of pension as per provision of Rule 11(a).

20. Thus, in the light of specific provision having been provided under Rules 1966, the petitioner since has tendered his resignation after putting 17 years of service which is break in service occasioned by resignation, hence the past service will not be taken into account for the purpose of benefit of pension under the Triple Benefit by virtue of Rules 1966.

21. There is no dispute about the fact that the competent authority in exercise of power provided under Rule 14 of the Rules 1966 has sanctioned the benefit of pension and sent it before the Accountant General for its final approval and the Controller of Accounts after taking into consideration the statutory provision, has not approved the same, however in the order while refusing to give the benefit of pension, Rules 1981 has been referred but it is settled that on account of quoting wrong provision of rule in the order, benefit cannot be derived and since there is specific provision in the Rules 1966 as contained in Rule 11(a), the service has been rendered for a period of 17 years cannot said be counted for the purpose of pensionary benefit since the past service will be said to be forfeited on account of resignation.

22. The reliance placed upon by the learned counsel for the petitioner in the judgment rendered by Hon''ble Supreme Court in the case of Union of India and others, vrs. Lieutenant Cornel P.S. Bhargava reported in , AIR 1997 SC 565 and in the case of Madhukar vrs. State of Maharashtra and others reported in , AIR 2014 SC 2206. In these two cases, the facts and circumstances were totally different and there was no specific provision regarding forfeiture of the past service as provided under the statute, but in this case there is specific provision to that effect under rule 11(a) of Rules 1966. Hence, the ratio laid down therein will not be applicable in the facts and circumstances of this case.

In view thereof, I find no infirmity in the impugned order.

Accordingly, the writ petition is dismissed being devoid of merits.

