

(2015) 04 OHC CK 0043
In the Orissa High Court
Case No : WP(C) No. 16851 of 2013

Muturimani Nayak

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 21-04-2015

Acts Referred:

Orissa Education Act, 1969 — Section 27

Citation : (2015) 120 CLT 501 : (2015) 2 OLR 166

Hon'ble Judges : Akshaya Kumar Rath, J

Bench : Single Bench

Advocate : R.R. Jethi, for the Appellant; S.N. Mohapatra, SC, Advocates for the Respondent

Final Decision : Allowed

Judgement

Dr. Akshaya Kumar Rath, J.—The lackadaisical attitude exhibited by the opposite parties in not granting family pension and rejecting the representation of the petitioner on jejune grounds, compels the petitioner to approach the portals of this Court as a last resort.

2. Shorn of unnecessary details, the short facts of the case of the petitioner are that her husband Judhistira Nayak was a primary school teacher. He died on 17.7.1984 while in service leaving behind the petitioner, his sons and daughters and a concubine. In consonance with Rule 8(b)(2) of the Orissa Pension Rules as amended by notification dated 18.10.2001, the family of the pensioner is eligible to receive pension. Several representations filed by the petitioner ended in fiasco. Thereafter, she filed a writ petition being WP(C) No. 3601 of 2003 before this Court. By order dated 24.3.2004, the said writ petition was disposed of granting liberty to the petitioner to file a representation before the District Inspector of Schools, Basta, opposite party No. 3, within two weeks enclosing all the documents. It was observed that if the opposite party No. 3 is satisfied that the petitioner entitled to get family pension, necessary order will be passed in favour of the petitioner for sanction of family pension. After disposal of the writ

petition, the petitioner submitted a representation before opposite party No. 3 and file necessary documents. Thereafter, opposite party No. 3 by letter dated 4.9.2001 submitted the pension papers to the Controller of Accounts, Orissa, Bhubaneswar, opposite party No. 4. But then the opposite party No. 4 by letter dated 27.3.2002 returned the service book of the husband of the petitioner for its re-submission after examining the issue. Thereafter, the opposite party No. 3 sent a copy of the said letter dated 19.7.2002 to the Block Development Officer, Baliapal requesting him to dispose of the same in the light of the Government G.O dated 18.10.2001. On 7.10.2002, the Block Development Officer, Baliapal sent a letter to the opposite party No. 3 stating therein that as the husband of the petitioner expired while working as primary school teacher on 17.7.1984, the entitlement of family pension to the deceased wife be determined in the light of the Government of Orissa in the School and Mass Education Department notification dated 18.10.2001. The service book of the husband of the petitioner was returned for compliance and re-submission. Further case of the petitioner is that till date opposite parties have not granted family pension to the petitioner.

3. Pursuant to issue of notice, a counter affidavit has been filed by the opposite party No. 3. It is stated that the opposite party No. 3 verified the records as per the direction of this Court dated 24.3.2004 passed in WP(C) No. 3601 of 2003. After examination of the record, it was found that the husband of the petitioner died on 27.7.1984 while continuing as an assistant teacher in a non-government aided educational institution. The Government in the Department of School and Mass Education introduced the Orissa Aided Educational Institutions' Employees' Retirement Benefit Rules, 1981 (hereinafter referred to as "the Rules, 1981") by way of a notification dated 18.10.2001 thereby amending Rule 8(2)(b). The said Rule provides that the family of a pensioner or the family of an employee who died on or after the 1st September, 1988 shall be entitled to get family pension as admissible to the family of his counterpart in the State Government Service. In view of the amendment brought to the Rules, 1981, the petitioner is not entitled to get any pensionary benefits. It is further stated that the Government in the Department of School and Mass Education challenged the judgment of this Court in Subarna Dibya and Others Vs. State of Orissa and Others, (2005) 1 OLR 168 in SLP Nos. 5993-6054/2005 before the Supreme Court. The Supreme Court by order dated 13.7.2005 stayed the order passed by this Court.

4. Heard learned counsel for the petitioner and learned Standing Counsel for the School and Mass Education Department for the opposite parties.

5. The subject-matter of dispute is no more res integra. In Subarna Dibya (supra), an identical question came up for consideration before this Court. The notification dated 18.10.2001 issued by the Government in the Department of School and Mass Education Department was impugned in the said writ petition. By the said notification, the Government of Orissa in exercise of its power conferred under Section 27 of the Orissa Education Act, 1969 sought to amend the Orissa Aided Educational Institutions' Employees' Retirement Benefit Rules,

1981 by introduction of Orissa Aided Educational Institutions Employees Retirement Benefit (Amendment) Rules, 2001, which came into force on 1.9.1988.

6. The issue before this Court was as to whether family of a Primary/High School Teacher who was serving in an aided educational institution would be entitled to get family pension irrespective of the date of retirement and/or death of the said employee.

7. In an elaborate judgment, the learned Single Judge in Subarna Dibya (*supra*) held as follows;

"xxx xxx xxx

Thus, there are two categories of persons who are entitled or eligible to receive family pension. The first category is the family of a pensioner and the second category is the family of an employee, who died on or after 1st of September, 1988. Any person, who satisfies either of the above two criteria would be eligible to receive family pension. The word "pensioner" used in the aforesaid Rule shall mean a primary school teacher of an aided educational institution who was receiving pension and shall also include one who was otherwise eligible to receive pension, but for some reason or other pension was not paid to him. In other words, "pensioner" shall also bring within its ambit an employee who was entitled and/or in consonance with the Rules was eligible to be covered under the pension scheme. According to the 2001 Amended Rules, the family members of such employees shall be entitled to receive family pension. I, therefore, find no ambiguity in the aforesaid Amended Rules.

17. It is an undisputed fact that all Non-Govt. Primary School Teachers who are covered under pension scheme are granted supernumerary pension. In view of this clear position, according to the Amendment Notification of 2001, the family members of all such employees would be eligible to receive family pension irrespective of the fact whether the employee concerned in fact was receiving pension or not.

18. The only other question, which needs to be answered, is as to whether the family members of an employee who died in harness would be eligible to receive family pension or not. In such eventuality, the decision will differ from case to case. It is needless to say that in consonance with the Orissa Pension Rules and other provisions the family of an employee who dies in harness would be entitled to pension or proportionate pension as would be admissible taking into consideration the number of years of service rendered by him and other eventualities. Rule 8 of the 1986 Rules stipulates that an employee shall be eligible for pension, gratuity or death-cum-retirement gratuity as the case may be in certain eventualities; one of the same being retirement before superannuation on medical ground or permanent incapacity for further service. If an employee is entitled to pension having retired prematurely on being permanently incapacitated, there can be no reason to extend the benefit of

family pension to an employee who dies in harness. In such cases, the authorities shall first decide as to whether the employee was eligible to receive proportionate pension in consonance with the Rules and if it is found that, in fact, the employee was entitled to receive pension, take a decision with regard to extending the benefit of family pension to the family of such employee, who was otherwise eligible to receive pension if he would have superannuated in usual course, but unfortunately died in harness in the light of Rule 4(3) of the 1986 Rules.

19. The question as to who amongst the retired primary school teachers of aided educational institutions are entitled to receive pension has already been answered by this Court in several decisions, some of which are referred to above. In the Civil Review of Trinath Bhuyan and others (supra), the plea of the State Government that only those primary school teachers who retired after introduction of the 1986 Rules would be eligible to receive pension, was negated. A Division Bench of this Court clearly held that the benefit of pension mentioned in the 1986 Rules would be made available even to the primary school teachers who retired prior to that date, but from the date of judgment. In the case of Raghunath Mishra (supra), this Court held that the primary school teachers (who were petitioners in the said case and had retired prior to coming into force of the 1986 Rules) would be entitled to the benefit of the Orissa Aided Educational Institutions (Non-Government Fully Aided Primary School Teachers) Retirement Rules, 1986 and the benefit would be available prospectively with effect from 1st September, 1988, the date when the Rules came into force. It is apt to mention here that the State Government moved the Supreme Court against the said decision, but lost. This Court has also repeatedly held in several other decisions that the benefit of pension shall be made available to primary school teachers irrespective of their date of retirement with effect from the date on which the 1986 Rules came into force. The eligibility to pension and the date from which it is payable is thus no more *res integra*. It would be evident, from the interpretation of the judgments referred to supra vis-a-vis the existing Rules that a retired primary school teacher who was surviving on the date on which the 1986 Rules came into force irrespective of his date of retirement, would be entitled to receive pension prospectively and can be nomenclatured as a "pensioner". Thus a harmonious interpretation of the Rules would lead to a conclusion that the family of a primary school teacher who had retired and expired prior to introduction of the pension scheme, shall not be entitled to receive pension not being the "family of a pensioner". It is therefore held that the family of a primary school teacher, who was a pensioner, shall be entitled to receive family pension in consonance with the 2001 Rules.

20. All the members of teaching and non-teaching staff of recognised non-government high schools which came under the direct payment system are governed by the Orissa Aided Educational Institutions' Employees' Retirement Benefit Rules, 1981, which came into force with effect from 1.4.1982. Sub-rule (2) of Rule-8 of the said Rules stipulates that an employee shall be eligible for

pension if the period of his qualifying service up to the date of his retirement is 10 years or more. The rate of pension was also stipulated in the said Rule. Without entering into the arena of controversy, it would suffice to hold that the family of a member of teaching and non-teaching staff of an aided educational high school, who was otherwise eligible to receive pension, shall receive family pension in consonance with amended Rules.

xxx xxx xxx"

8. The said judgment was challenged by the Commissioner-cum-Secretary to Government, School and Mass Education Department before the apex Court in Special Leave to Appeal (C) No. 14265/2005. On 19.2.2015, the said Special Leave to Appeal was dismissed. Thus the judgment in Subarna Dibya (supra) has attained finality. It is too late in the day for the Government to take the plea that the petitioner is not entitled to get any family pension.

9. In view of the authoritative pronouncement of this Court in Subarna Dibya (supra) and the discussions made in the preceding paragraphs, this Court disposes of this writ petition with a direction to the opposite parties to take a decision with regard to the payability of the family pension to the petitioner within a period of six months from today keeping in view the settled position of law that the pension is not a bounty but a right of an employee.

The writ petition is allowed.