

(2015) 11 OHC CK 0013

In the Orissa High Court

Case No : W.P.(C) Nos. 1038, 2418, 2448, 2449, 2453, 2454, 2472, 2473, 2474, 3704, 3705, 4729, 4730, 9341, 9342, 14718, 14719, 14725, 14726 and 14727 of 2007

Pranab Kumar Sahu and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 30-11-2015

Acts Referred:

Orissa Education Act, 1969 — Section 3(b), 7-C

Citation : (2015) 11 OHC CK 0013

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

Bench : Single Bench

Final Decision : Allowed

Judgement

S.N. Prasad, J.—Heard learned counsel for the petitioners and Mr. Buddhiman Rout, learned counsel for the School and Mass Education Department.

2. In all writ petitions common question is involved hence all writ petitions are being disposed of by common order.

3. The petitioners have approached this Court challenging Clause-9 of the letter No. 7482 dated 30.03.2005 by which one percent of the grant sanctioned has been directed to be held back to meet the cost of audit.

4. Case of the petitioners is that they have been appointed as Teaching/non-Teaching Staff in Aided Educational Institutions and the Institutions have been acquired status of Aided Educational Institutions w.e.f. 1.06.1994 within the meaning of Section 3(b) of the Orissa Education Act, 1969.

5. Services of the petitioners have been approved by the Inspector of schools and they have started getting their monthly salary as per Rule-9(1) of the Orissa Education (Recruitment and Condition of Service of teachers and Members of Staff of Aided Educational Institution) Rules, 1974 (hereinafter referred to as "Rules 1974") which provides that every employee of an Aided Educational RJ

Institution shall draw the same pay, dearness allowance and subsistence allowance in case of suspension as is admissible to counterpart in the Government Educational Institutions under the relevant rules applicable to him and shall ordinarily be paid in the month following....to which the claim relates directly by Government or by any Officer or by any Agency authorized by Government.

6. The State Government taking into consideration the provision of Rule-9(1) of the Rules, 1974 issued a Resolution on 15.10.1999 decided to allow revised scales of pay admissible to the teaching and non-teaching staff of Aided Non-Government Educational Institutions w.e.f. 1.1.1996. Accordingly, the State Government disbursed the revised salary from the month of February, 2005 in favour of the petitioners as well as the staff of other Aided Educational Institutions.

7. While the petitioners were getting their monthly salary under the direct payment scheme, letter has been issued under the signature of Assistant Finance Advisor-sum-Under Secretary to Government issued a letter dated 30.03.2005 addressed to the Director, Secondary Education, Orissa, Bhubaneswar directing him to be held back one percent of the grant sanctioned to meet the cost of audit apart from other decision as contained therein.

8. Case of the petitioners is that when the legislation provided that the teaching and non-teaching staff of the Aided Educational Institutions is to be given at par treatment with the counterpart in the Government Educational Institutions as provided under Rule-9(1) of the Rules, 1974, the Assistant Finance Advisor-sum-Under Secretary to Government has got no jurisdiction to direct the Director, Secondary Education to held back one percent of the grant sanctioned to meet the cost of audit.

9. It has further been contended that when the Government has sanctioned the amount for making full payment of grant-in-aid in the revised scale under Orissa Revised Scales of Pay Rules, 1998 to the employees of 609 Non-Government High School of 19 circles then the authorities should have followed the direction of the Government in its letter and spirit. But the Assistant Finance Advisor-sum-Under Secretary to Government issued direction to the Director, Secondary Education, Orissa, Bhubaneswar to held back one percent of the grant sanctioned to meet the cost of audit, is without any authority of law.

10. It has further been contended that the Assistant Finance Advisor-sum-Under Secretary to Government cannot held back one percent of the grant sanctioned to meet out the audit expense which is exclusively work to be performed by the Government and if the work is to be performed regarding audit the expenditure cannot be taken from the salary of the employee like the petitioners.

11. This Court vide order dated 12.02.2007 has issued notice to the opposite parties and directed the learned counsel for the School and Mass Education Department to file counter affidavit vide subsequent order dated 17.04.2007 and

19.06.2007.

12. Learned counsel for the School and Mass Education Department has submitted that in spite of repeated communication no para-wise comments has yet been received however he has submitted that in some cases para-wise comments has been received but in spite of the same opposite parties have not turned up to swear the affidavit as such prayer has been made for further time for filing counter affidavit but the same has been objected by the learned counsel for the petitioners on the ground that they are not getting full grant-in-aid as per the direction of the State Government by which it has been directed for full payment in the revised scale under ORSP rules, 1998 and thereby the statutory provision as contained in Rule-9(1) of the Rules, 1974 is being violated.

13. In view of the fact, that the matter is of the year 2007 and the authority has not chosen to file counter affidavit hence the matters are being disposed on the basis of material available on record.

14. Learned counsel for the School and Mass Education Department has argued the case on the basis of material available on record and has submitted that there is no infirmity in the decision taken by the Assistant Finance Advisor-sum-Under Secretary to Government dated 30.03.2005 by which it has been directed to held back one percent of the grant sanctioned to meet the cost of audit because of the reason that the same has got concurrence of the Finance Department and also due to the reason that if excess amount would be paid to one or the other teaching and non-teaching staff an audit is to be conducted and for that decision has been taken to held back one percent of the grant sanctioned in order not to put any pressure upon the State ex-chequer.

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

16. On perusal of the communication dated 30.03.2005 the thing which is evident is that the Government has sanctioned an amount of Rs. 5,22,89,824/- (Rupees Five crores twenty two lakhs eighty nine thousand, eight hundred and twenty four) only for payment of full grant-in-aid in the revised scale under ORSP Rules, 1998 to the employees of 609 Non-Government High Schools of 19 circles who are in receipt of grant-in-aid in the pre-revised scale of pay for the month of February 2005, subject to certain conditions.

17. It is further contended that the benefit of revision in pay scale in pursuance to the ORSP Rules, 1998 has been given in pursuance to the direction passed by this Court in W.P.(C) No. 5345 of 2004 in the case of Dipti Roy and others v. State of Orissa and others which has been affirmed by Hon'ble Supreme Court wherein direction has been given regarding implementation of the benefit of revision in pay scale by virtue of recommendation of 5th Pay Revision Commission by its adoption by the State Government under ORSP Rules, 1998, meaning thereby benefit of revision in pay scale has been directed to be given in favour of the teaching and non-teaching staff, which also suggests that this Court is directed to give the benefit of revision in pay scale and to meet out the said

expense, Government has come out with the decision dated 30.03.2005 sanctioning an amount of Rs. 5,22,89,824/- (Rupees five crores twenty two lakhs eighty nine thousand, eight hundred and twenty four) only for payment of full grant-in-aid in the revised scale under ORSP Rules, 1998.

18. On perusal of Section 3(b) of the Orissa Education Act, 1969 it is evident which contains the definition of "Aided Educational Institution" which speaks as follows:--

"3(b) Aided Educational Institution means private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid."

19. Further from perusal of the Rule-9(1) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 which speaks as follows:--

"Rule 9(1) Every employee of an Aided Educational Institution shall draw the same pay, dearness allowances and subsistence allowance in case of suspension as is admissible to counterpart in the Government Educational Institutions under the relevant rules applicable to him and shall ordinarily be paid in the month following the month to which the claim relates directly by Government or by any Officer or by any Agency authorized by Government."

20. From perusal of Section-3(b) of the Orissa Education Act, 1969 there is no dispute that the petitioners are teaching and non-teaching staff of the aided educational institutions because Government has already taken decision to provide the benefit of full grant-in-aid in view of ORSP Rules, 1998.

21. From perusal of the Rule-9(1) of the Rules, 1974 it is the decision of the Government by way of revision in pay scale that the employees i.e., the teaching and non-teaching staff of the aided educational institutions shall be treated at par with the regular government employee.

22. Taking into consideration, these statutory provision, the petitioners have also been directed to be given the benefit of full grant-in-aid in view of adoption of 5th Pay Revision Commission, by virtue of ORSP Rules, 1998 and when initially it was not implemented action of the Government has been challenged in W.P.(C) No. 5345 of 2004 in which direction has been passed by this Court to give the benefit of ORSP Rules, 1998 which suggests that there is no denial of the fact that the petitioner who are teaching and non-teaching staff of the aided educational institutions has given similar treatment to that of teaching and non-teaching staff of the Government schools.

23. Communication dated 30.03.2005 has been issued in compliance with the order passed in W.P.(C) No. 5345 of 2004 in the case of Dipti Roy and others v. State of Orissa and others which has been affirmed by Hon"ble Supreme Court in Civil Appeal No. 2685 of 2007 disposed of on 18.08.2010 as informed by the

learned counsel for the petitioners at Bar.

24. Now, the only question which has been raised is regarding decision of the Assistant Finance Advisor-sum-Under Secretary to Government to held back one percent of the grant sanctioned to meet the cost of audit.

25. Regarding this it has been urged by the learned counsel for the petitioner that the Assistant Finance Advisor-sum-Under Secretary to Government has got no jurisdiction to insert any other conditions in the decision dated 30.03.2005 even though there is a concurrence of the Finance Department because of the reason that the petitioners have been given the benefit of revision in pay scale under ORSP Rules, 1998 and in view thereof, the Government of Orissa has released sanctioned amount for payment of full grant-in-aid hence it has been submitted by taking back one percent from the salary is an arbitrary exercise of the authorities concerned on the grounds which are as follows:--

"(i) The Assistant Finance Advisor-sum-Under Secretary to Government has got no jurisdiction to insert any other conditions in the decision taken by the State Government.

(ii) Decision of the Assistant Finance Advisor-sum-Under Secretary to Government is contrary to the statutory provision of Rule-9(1) of the Rules, 1974.

(iii) In order to meet the expense of the Government there cannot be any decision by the Assistant Finance Advisor to deduct some part of the salary to meet out the audit expense.

(iv) The decision to held back one percent for audit purpose will be said to be contrary to the order passed by High Court in W.P.(C) No. 5345 of 2004."

26. So far as point (i) is concerned, State Government has taken decision regarding disbursement of full grant-in-aid in pursuance to the revision in pay scale adopted under ORSP Rules, 1998 to the employees of 609 Non Government High Schools of 19 circles which itself suggests that the Government has taken decision to give full grant-in-aid in the revised pay scale.

27. Such decision of the Assistant Finance Advisor has got no jurisdiction to add any other conditions to take out some part of money from the grant-in-aid because in the decision of the Government that too after its implementation by the order passed by this Court in W.P.(C) No. 5345 of 2004 which has been affirmed by Hon"ble Supreme Court, the Assistant Finance Advisor-cum-Under Secretary has inserted this condition, which is without authority of law for the following reasons:--

"(a) The State Government has promulgated Rules, 1974 incorporating Rule 9(1) to treat at par the teaching and non-teaching staff of Aided Educational Institutions with the staff of Government Institutions and by adding this condition in letter dated 30.03.2005 will be said to be contrary to statutory provision, because by holding back one percent from salary will create

discrimination in between teaching and non-teaching staff of Government School and aided educational institutions.

(b) An individual has got no authority to make any alteration/modification/addition if it touches the very intent of statutory provision, rather it is the domain of only Law making agency.

(c) The decision of Government in view of provision of Rule 9(1) of Rules, 1974 has been implemented by virtue of the order of this Court passed in W.P.(C) No. 5345 of 2004 and in consequence thereof, decision has come vide letter dated 30.03.2005, but one extra condition of back one percent has been added, which amounts to overreaching the order passed by this Court, that too when the order of this Court has been affirmed by Hon"ble Supreme Court."

28. So far as point (ii) is concerned, in order to examine this aspect of the matter, it is relevant to go through the Rule-9(1) of the Rules, 1974 as quoted hereinabove which provides that teaching and non-teaching staff of the Aided Educational Institutions will be treated at par with the regular Government employee. When there is no decision of the Government to deduct any part of salary from teaching and non-teaching staff of the aided educational institutions and regular government employee and if there is decision to deduct one percent from the salary of teaching and non-teaching staff of aided educational institutions, the same is in the teeth of the Rule-9(1) of the Rules, 1974 because of the reason that by such decision the petitioners who are teaching and non-teaching staff of the aided educational institutions have been discriminated by giving lesser salary than the teaching and non-teaching staff of the Government Schools.

29. So far as point (iii) is concerned, Government can take any action regarding audit and for that there cannot be any direction to deduct some part of money from the salary of the employees without any authority of law. Hence, on that ground the conditions inserted in clause-9 of the communication dated 30.03.2005 cannot be said to be a decision with application of mind.

30. So far as point (iv) is concerned, the letter dated 30.03.2005 has been passed after the order having been passed in the case of Smt. Dipti Roy etc. Vs. State of Orissa, and in compliance of the said order the Government has taken decision to sanction the amount for payment of full grant-in-aid in favour of teaching and non-teaching staff of aided educational institutions.

31. When the Government has taken decision to make payment of full grant-in-aid in favour of the employees of aided educational institutions in the light of statutory provision as contained in Rule-9(1) of the Rules, 1974 and in pursuance to the direction passed by this Court in the case of Dipti Roy (supra) which has also attained its finality after having affirmed by the Hon"ble Supreme Court, can a individual functionary of the State Government holding a post of Under Secretary insert a condition which is detrimental to the interest of the employees?

32. In order to answer this issue it is relevant to quote certain paragraph of the judgment passed by this Court in the case of Smt. Dipti Roy etc. Vs. State of Orissa, wherein it has been taken note by Hon"ble Court at paragraph-19 which is being quoted herein below for ready reference:--

"19. In consonance with Section 7-C of the Education Act, 1969, the State Government is duty bound, of course within the limits of its economic capacity, to set apart a sum of money annually for giving "grant-in-aid" to Private Educational Institutions in the State. For complying with the said mandatory requirement and in order to streamline the modalities for extending the benefits of "grant-in-aid", Orissa Educational (Payment of Grant-in-Aid to the High Schools and Upper Primary Schools) Order, 1994 was framed. In consonance with the provisions of the aforesaid 1994 Order the Government after taking into consideration all the pros and cons agreed to provide grant-in-aid to several Private Educational Institutions existing within the State. Such decision was taken consciously and keeping in mind the mandates of Section 7-C of the Education Act read with Grant-in-Aid Order, 1994 and the economic capacity of the State. After deciding to provide "grant-in-aid" covering the salary cost of teaching and non-teaching staff of different Private Aided Educational Institutions it is no more open to the Government to back out at this stage in absence of legislation. As has been stated earlier the salary cost of teaching and non-teaching staff of private educational Institutions has to be same as that of their counterpart working in the Government Educational Institutions. Legislature in its wisdom having stipulated such a condition in Rule 9 of the 1974 Rules, the State Government cannot act contrary to the same. After agreeing to pay the salary components in consonance with Rule 9 of the 1974 Rules vis-?-vis the Grant-in-Aid Order, the State Government is legally liable to make provisions for payment of salary to the employees working in Private Aided Educational Institutions at par with their counterpart in Government Educational Institutions."

33. After taking into consideration, the statutory provision as contained in Rule-9(1) of the Rules 1974, direction has been passed by this Court to extend the benefit to release full grant-in-aid covering the salary cost of teaching and non-teaching staff of different private aided educational institutions in pursuance to Government Resolution dated 15.10.1999. In pursuance thereof, the Government has come out with the decision to make payment full grant-in-aid and the Under Secretary has accordingly communicated the decision of the Government to the Director, Secondary Education for its implementation but with a condition to be held back one percent for the audit purpose.

34. When this Court has directed for making payment of salary in favour of teaching and non-teaching employees of the aided educational institutions and for that the amount has also been sanctioned, making any addition/alteration upon the decision of the Government will be said to be contrary to the direction passed by this Court and will amount to overreaching the same because of the finality having been attained by Hon"ble Supreme Court hence that part of the

decision as contained column-9 of the letter dated 30.03.2005 will be said to be contrary to the direction passed by this Court in the case of Dipti Roy (supra).

35. In view of clear cut stipulation in the letter dated 30.03.2005 at column-a to the effect that the "pay of the employees of the grantee institutions shall be fixed in the revised scale of pay w.e.f. 01.01.1996 notionally in accordance with provisions contained in S & M.E. Department Resolution No. 28933-V (S & M)-E-34/98-SME dated 15.10.1999 subject to the outcome of the Misc. Case No. 3916/2005 filed before the Hon"ble High Court by the S & ME Department arising out of W.P.(C) No. 5345 of 2004 filed by Dipti Roy and others."

36. This specific condition inserted in the said letter itself suggests that the letter has been issued in compliance and for enforcement of Government Resolution dated 15.10.1999 which has been directed by this Court by passing an order in W.P.(C) No. 5345 of 2004 which has also been affirmed by the Hon"ble Supreme Court, but inserting a condition at Column-9 will be said to be sitting over the order passed by this Court in the case of Dipti Roy (supra) which not only an individual but State has got no power if the judgment has attained its finality upto the Hon"ble Apex Court.

37. So far as reference having been made in the communication dated 30.03.2005 that this has been concurred by the Finance Department in their UOR No. 375-SSI, same has got relevance when the State Government has taken decision to make payment of full grant-in-aid by adoption of ORSP rules, 1998 that too by the order passed in W.P.(C) No. 5345 of 2004, confirmed by Hon"ble Supreme Court. Hence it is the arbitrary decision of the Assistant Finance Advisor-cum-Under Secretary.

38. In view of the foregoing reasons, conditions inserted in Clause-9 of the communication dated 30.03.2005 cannot be held to legal and sustainable hence the same is hereby quashed.

39. Accordingly, the authorities are directed to refund all deducted amount within eight weeks from the date of receipt of certified copy of this order and to pay sanctioned grant-in-aid as directed by the State Government in pursuance to the decision taken in the letter dated 30.03.2015.

40. Accordingly, all writ petitions are allowed.