
(2004) 11 OHC CK 0022
In the Orissa High Court

Smt. Dipti Roy etc.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 17-11-2004

Acts Referred:

Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 — Rule 9(1)
Orissa Education Act, 1969 — Section 3(b)

Citation : (2005) 104 FLR 1116 : (2004) 2 OLR 718

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.S. Naidu, J.—According to Justice Gajendaragadkar (as he then was) in the case of University of Delhi and Another Vs. Ram Nath, .

Education seeks to build up the personality of the people by assisting his physical, intellectual, moral and emotional development.

2. Supreme Court as long back as in 1993 in the case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., observed:

A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. The three Articles 45, 46 and 41 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, means: (a) every, child/citizen of this country has a right to free education until he completes the age of 14 years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of economic capacity of the State and its development.

3. The question which arises in the present case is as to whether the aforesaid Constitutional goal or right to free education can be achieved if the State fails to

pay salaries to the teachers engaged for imparting education at the Primary and High School levels and as to whether a teacher under-paid or in some cases not paid at all for months together can discharge his pious obligations of imparting education to the children who are the future citizens of the country.

4. In modern days, education is perhaps the most important concern of a State. Laws enacted for compulsory school attendance and a great expenditure set apart for education demonstrates the commitment of a State to achieve the goal sought to be achieved by the Constitution. Education today is a principal instrument in awakening a child's cultural value and helps in preparing him for his later professional training besides helping him to be a good citizen.

5. It was not possible for Government or local bodies to establish adequate number of educational institutions required to cater to the needs of the common populace. The State was therefore constrained to permit establishment of private educational institutions. In order to control the said educational institutions and also to assist them to maintain the standard of education, Government took a decision to give substantial aid to such private educational institutions and nomenclature them as "Aided Educational Institutions."

6. Section 3(b) of the Orissa Education Act, 1969 (hereinafter called "the Act") defines "Aided Educational Institution" as follows:

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.

Section 7-C(1) of the said Act defines Grant-in-aid:

The State Government shall within the limits of its economic capacity, set apart a sum of money annually for being given as grant-in-aid to private Educational Institution in the State.

7. In exercise of the powers conferred by Sub-section (4) of Section 7-C of the Act, the State Government framed a set of orders for regulating payment of grant-in-aid to Private Educational Institutions, being High Schools and Upper Primary Schools, namely, the Orissa Education (Payment of Grant-in-Aid to the High Schools and Upper Primary Schools) Order, 1994 (hereinafter called "the 1994 Order").

8. Order 2(1) of the said Order of 1994 catalogues the categories of Private Educational Institutions which would be considered eligible for receiving grant-in-aid under the said Order, namely, Upper Primary Schools imparting instructions or course prescribed by the State Government in Standards or Classes-VI and VII or Sanskrit Tolls and Madrasas imparting equivalent courses; High Schools imparting courses for High School Certificate Examination conducted by Board of Secondary Education, Orissa or institutions imparting Madhyama course under Sri Jagannath Sanskrit University, and Madrasas imparting equivalent course.

9. Order 5 protects the right of all Private Educational Institutions which were receiving grant-in-aid before commencement of the Orissa Education (Amendment) Act, 1994 and stipulates that those institutions would be continued to be paid such amount as grant-in-aid towards salaries for the posts of teaching and non-teaching, staff of such Educational institutions as was being paid to them subject to the condition that the grant-in-aid may be withdrawn or suspended if such institutions acquire any disqualification provided in Sub-section (1) of Section 7-D of the Orissa Education Act. Persons holding such posts are to continue to earn annual increments and are to be entitled to financial benefits as may be available to them from time to time.

(Emphasis supplied).

10. Order 11 deals with the Educational Institutions which are not eligible to receive grant-in-aid and/or the Educational Institutions which might be established after framing of the Order.

At this juncture it would be prudent to refer to Order 12 of the aforesaid 1994 Order which reads as follows:

The eligible High Schools coming under the category described in Order 11 shall be entitled to Grant-in-aid equivalent to 60 per cent of the admissible salary cost of the teaching and non-teaching staff of the institution as per the staffing pattern/yardstick prescribed by "the Government after four years of presentation of candidate in the Annual H.S.C. Examination conducted by the Board of Secondary Education, Orissa and at the rate equivalent to 100 per cent of the admissible salary cost of such staff three years after receipt of the minimum grant. High Schools located in educationally backward districts and Girls' High Schools will receive minimum grant-in-aid after one year of presentation of candidates in the aforesaid Examination and at the rate equivalent to 100 per cent of the admissible salary cost two years after receipt of such minimum grant. The criteria applicable to High Schools shall mutatis mutandis apply to Tols and Madrasas conducting corresponding courses.

(Emphasis supplied).

11. Order 14 stipulates that the salary cost includes the pay, dearness allowance and subsistence allowance in case of suspension.

12. Order 15 stipulates that grant-in-aid shall be admissible in respect of posts which are held by qualified teachers appointed in conformity with the procedure prescribed by the Government on the basis of approved staffing pattern/yardstick.

13. Order 16-A introduced by way of amendment prescribes the modality as to how grant-in-aid shall be released.

14. A cumulative reading of different paragraphs of the 1994 - Grant-in-Aid leads to an irresistible conclusion that all Non-Govt. Educational Institutions which

were brought under category A-1 of the list published in consonance with clause 4 of the Grant-in-Aid were eligible to receive grant-in-aid towards salary cost of approved posts, subject to the only restriction that so far as arrear grant-in-aid is concerned, the same shall be paid on availability of funds in the budget for the said purpose and shall be made in such manner and in such form, as the State Government may determine from time to time.

15. In order to maintain parity and standard of education intact, the Legislature in its wisdom amended the Orissa Education Rules, 1974 (hereinafter referred to as the 1974 Rules for the sake of brevity) and specifically stipulated that the salary of the teachers working in different private educational institutions shall be equivalent to that of their counter-parts working in Government Institutions. For better appreciation, it would be prudent to refer to Rule 9(1) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members" of Staff of Aided Educational Institutions) Rules, 1974 which reads as follows:

9. Drawn of pay and allowances by employees of Aided Institutions- (1) Every employee of an Aided Educational Institution shall draw the same pay, dearness allowance and subsistence allowance in case of suspension as is admissible to counter-part 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.

(Emphasis supplied).

16. It is pertinent to mention here that all the petitioners are members of teaching and non-teaching staff of Aided Educational Institutions and they were receiving salary cost in consonance with the provisions of the Orissa Education Act and the Rules framed thereunder. While matter stood thus, taking into consideration the recommendations of a Fitment Committee, and the demands of various service associations/organizations and all aspects of related issues including the scales of pay prevalent in the Central Government and many other States in the country, the State Government took a decision to revise the scales of pay of the State Government employees. The Finance Department of the Government issued a Resolution to this effect on 17th April, 1998 bearing number 18231-PCC(F)- 18/98 (Pt)-F dated 17th April, 1998 which was published in the Orissa Gazette Extraordinary dated 24th April, 1998. By virtue of the said Resolution the pay scales of the State Government employees including teachers in different Government schools were revised suitably.

17. Keeping the mandate of the Constitution in mind, the State Government also took a decision to take over management of the Private/Aided Primary Schools existing in the State, phase-wise, and the employees of the schools, management of which was taken over were treated to be Government employees and were allowed to draw pay in the scales admissible to their counter-parts in Government schools. While matter stood thus, the State Government considering

Rule 9(1) of the 1974 Rules issued a Resolution on 15th October, 1999 deciding to allow revised scales of pay admissible to the teaching and non-teaching staff in Government schools under, the Orissa Revised Scales of Pay Rules, 1998 to the employees of the Aided Non-Government Educational Institutions with effect from 1st January, 1996, i.e. the date from which the Orissa Revised Scales of Pay Rules, 1998 came into operation.

Para-11 of the Resolution provided the mode of payment of arrear dues, which may be quoted as under:

11. Notwithstanding anything contained in this Resolution the arrear dues to which an employee is entitled on account of revision of pay scales with effect from the first day of January, 1996 or any subsequent date from which revised pay is opted for till the end of 31st March, 1998 shall be credited to his/her Provident Fund Account and in respect of those who have no such Account new Accounts shall be opened immediately in relaxation of the relevant rules, where necessary, and thereafter, the dues shall be credited. In either case the credit of the arrear dues to Provident Fund Account shall have a lock-in period of five years counted from the month of actual drawal and credit of such arrear dues. As regards the mode of current dues from 1st April, 1993, fifty per cent (50%) pf the differential between existing pay and dearness allowances as on 1st January, 1996 or the date from which the revised pay is opted for and the revised pay on that date would also be impounded to the Provident Fund Account with a lock-in period of five years counting from 1st April, 1998.

Provided that in case of an employee who have in the meantime retired on or after 1st January, 1996 and may retire by 31st December, 1999 such additional dues arising out of pay fixation shall be paid in cash to such of the employees.

The said Resolution Bearing No. 28933/V (S & M) E-34/ 98-SME of the Government of Orissa, Department of School, & Mass Education was published in the Supplement to the Orissa Gazette dated 10th December, 1999. Para 2(1) of the said Resolution stipulates as follows:

2.(1) Save as otherwise provided in this Resolution, the revised scales of pay shall apply to the teaching and non-teaching staff in whole time employment of Aided Non-Govt. High Schools/Primary/Upper Primary Schools/Sanskrit Colleges and Tols/Senior & Junior Madrasas, who are in receipt of grants-in-aid.

(Emphasis supplied).

18. Similar Resolution was also issued by the Government of Orissa, Department of Higher Education, inter alia, revising scales of pay of teaching and non-teaching posts of different colleges and bringing the same at par with their counterparts working in Government Educational Institutions.

19. In consonance with the Resolution dated 15th October, 1999 the Director, Secondary Education, Orissa, Bhubaneswar by his letter No. ARF./8-99-VIII:43365/Dt.3.12.99 (Annexure-2) intimated the Inspectors of Schools of all

the Circles that they had been declared as Head of Office, as per Para 3(c) of the said Resolution in respect of Aided Non-Govt. High Schools, Sanskrit Schools and Madrasas and directed the said Inspectors to fix the pay of all the teaching and non-teaching staff of Non-Government Aided High Schools in consonance with the Revised Scales of Pay Rules, Government Resolution dated 5.10.1995 allowing the revised scales of pay with effect from 1.1.1996 and called upon the Inspectors of Schools to send the service books of the employees through their Auditors/Dealing Assistants. The members of the teaching and non-teaching staff were also called upon to exercise their option under the Orissa Revised Scales of Pay Rules, 1998 as to whether they wanted to be covered under the revised scales of pay with effect from 1st January, 1996. It is submitted that the petitioners exercised their option under Annexure-C to the Resolution and elected to come under the Revised Scales of Pay Rules with effect from 1st January, 1996 and in consonance with the said option their pay has been revised with effect from 1998. All these exercises, according to the learned Counsel for the petitioners were completed as long back as in the year 2000 and necessary documents were submitted before the Inspectors of Schools and the same after scrutiny were sent to the Director, Secondary Education, Orissa, Bhubaneswar who has been declared as the checking authority in respect of the employees of the Non-Government Aided Educational Institutions in consonance with Para-6 of the Government Resolution dated 15th October, 1999.

20. The grievance of the petitioners in the present writ petitions is that in spite of issuance of the Resolution dated 15th October, 1999 and compliance with all other paraphernalia in consonance with the said Resolution, the Government is maintaining stony silence in extending the benefit of Revised Scales of Pay to them as a result of which the members of the teaching and non-teaching staff of Aided Educational Institutions are subjected to insurmountable hardship and facing stringent financial difficulties. It is also submitted that the paltry amounts drawn by them towards salary is much less than that drawn by their counterparts in consonance with the Orissa Revised Scales of Pay Rules, 1998 and thus there is gross violation of the mandate stipulated in Rule 9(1) of the 1974 Rules.

21. Learned Counsel for the petitioners in course of hearing forcefully submitted that the Government having issued the Resolution dated 15th October, 1999 acted illegally and with material irregularity in not Implementing the same and it is a fit case where a Mandamus should be issued to the authorities to implement the provisions of the Resolution dated 15th October, 1999 and grant Revised Scales of Pay to the petitioners in consonance with the Orissa Revised Scales of Pay Rules, 1998 with effect: from 1st January, 1996 as stipulated in the Resolution and also to pay the arrears in consonance with Para-11 of the said Resolution.

22. On receiving notice, a counter-affidavit has been filed on behalf of the opposite parties. There is no dispute with regard to introduction of the Resolution dated 15th October, 1999 extending the benefits of Orissa Revised Scales of Pay

Rules, 1998 to teaching and non-teaching posts of Non-Government Aided Institutions. But then the claim of the petitioners is resisted on the ground that word "ordinarily" appearing in Rule 9 of 1974 Rules cannot be treated a "mandatorily". It is further submitted that in consonance with Section 7-C of the Orissa Education Act, 1969, grant-in-aid is to be made available to Private Educational Institutions in the State within the limits of its economic capacity and as such the Government, cannot be forced to pay grant-in-aid to the institution unless its financial conditions permit. The third contention resisting the grievance of the petitioners is that in consonance with Section 24-B of the Education Act, the present writ petitions are not maintainable.

23. Heard learned Counsel for the petitioners appearing in different case and Mr. Sarangi, learned Senior Standing Counsel appearing for the opposite parties, patiently. Perused the Annexures and other documents produced before this Court carefully and considered the submissions made by both the parties diligently.

24. Most of the factual aspects averred in the writ petitions stand unassailed. Admittedly, in consonance with Rule 9 of the 1974 Rules, the members of the teaching and non-teaching staff working in different Private Aided Educational Institutions are entitled to receive the same pay, dearness allowance and subsistence allowance, etc. as admissible to their counter-part in the Government Educational Institutions. This rule casts an onerous duty upon the Government to see that different standards are not maintained in payment of salary and other allowances between the teachers working in Government Institutions and Private Aided Institutions.

25. 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 benefit 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 slated earlier the salary cost of teaching and non-teaching staff of Private Educational Institutions has to be same as that of their counter-part working in the Government Educational Institutions Legislature in its wisdom having stipulated such a condition in Rule 9 of the 1979 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-a-vis the Grant-in-Aid Order, the State Government is legally liable to make provision for payment of salary to the employees working in Private Aided Educational Institutions at par with their counterpart in Government Educational Institutions.

26. The argument advanced by Mr. Sarangi that such claim is to be raised before the Educational Tribunal and not in writ petitions in consonance with Section 24-B of the Education Act appears to be misconceived. As has been state, earlier the Government decision to bring different Private Educational Institutions within the fold of grant-in-aid was taken long back. Admittedly, in consonance with the decisions the employees of Aided Educational Institutions including the petitioners are receiving their salary cost in the form of grant-in-aid in consonance with Section 7-C of the Education Act read with and the Grant-in-Aid Order. The decision whether to extend grant-in-aid to a Private Educational Institution and the disputes arising there from may come within the ambit of Section 24-B of the Education Act. But then in the present case the Government in its wisdom has already taken a decision to extend the benefits of grant-in-aid to Private Educational Institutions where the present petitioners are working. The only grievance of the petitioners is that while agreeing to extend the benefits of grant-in-aid and to bear the salary cost, the Government cannot violate the mandatory requirement of Rule 9 of the 1974 Rules. A conjoint reading of all the provisions reveals that Government being conscious of the said fact had extended the benefits of Revised Scales of Pay to the petitioners' institutions retrospectively with effect from 1st January, 1996 by Resolution dated 15th October, 1999. At this belated stage, the argument advanced by Mr. Sarangi that petitioners cannot claim revised scales of pay appears to be an after-thought. Government is legally bound to comply with the provisions of the Orissa Education Act, 1969, 1974 Rules, Grant-in-Aid Order as well as the Resolution issued on 15th October, 1999. After issuing the Resolution it is not open to the Government to adopt dilly dally tactics in implementing the same. It is apt to mention that the Resolution dated 15th October, 1999 is still in vogue and has not been revoked/suspended or cancelled. In fact in consonance with the said Resolution ancillary steps, i.e. appointment of a competent authority to fix up the pay and authorities to scrutinize the same in consonance with Para 3(C) and Para 6 of the Resolution respectively have been completed, the members of the teaching and non-teaching staff (petitioners) were called upon to exercise their option under the Orissa Revised Scales of Pay Rules, 1998 and after considering all options and other materials, fixation of their pay at the revised scales by the Inspectors of Schools has been made as would be evident from the documents annexed to different writ petitions. The dispute in the present case is with regard to payability of salary at the revised scales of pay and not sanction or disbursement of grant-in-aid. Admittedly, all the petitioners are covered by the grant-in-aid scheme and their salary components are met out of the grant-in-aid in consonance with the Grant-in-Aid Order. Thus, the argument that the present

writ petitions are not maintainable cannot be accepted. That apart such a plea has been earlier negated by this Court in a number of writ petitions.

27. While considering the submissions of Mr. Sarangi with regard to availability of funds vis-a-vis extending the benefits of revised scales of pay to the members of the teaching and non-teaching-staff of Primary Schools and High Schools another important fact which needs to be considered is that the Government has implemented the Resolution extending the benefit of Revised Scales of Pay Rules to the members of the teaching and non-teaching staff working in Private Aided Colleges. After revising scales of pay of the staff working in private aided colleges denuding the same to the staff of private aided schools appears to be unjust. It appears that Government has failed to maintain parity in the matter of granting financial benefits among the Private Aided Schools vis-a-vis Private Aided Colleges. The ground of such discrimination as it appears from the submission of Mr. Sarangi is paucity of funds. But then every child up to the age of fourteen years has a right to free education in consonance with the mandates of Articles 45 and 41 of the Constitution as well as the decision of the Supreme Court in the case of Unni Krishnan (supra) whereas such right of a child above fourteen years is circumscribed by the economic capacity of the State. This principle is, however, followed in reverse (sic) concerned, inasmuch as while revising the scales of pay of the staff working in Private Aided Colleges where students are above fourteen years, the State has taken a plea of paucity of funds in granting similar financial benefits so far as Private Aided Schools are concerned.

The stand taken by the State Government is thus contrary to the mandates of the Constitution. The State has an obligation to make funds available for imparting education at least up to High School level.

28. The only other submission of Mr. Sarangi with regard to the financial capacity of the State Government needs to be considered. In order to ascertain the correct position in course of hearing, the learned Counsel for the State was directed to produce the Government file dealing with fixation of pay of the employees of Aided Educational Institution of the State under Orissa Revised Scales of Pay Rules, 1998. The file reveals that after draft resolution was prepared by the Education Department the same was sent to the Finance Department on 23rd April, 1989, The recommendation reads as follows;

As per Rule 9(1) of the Orissa Education (Recruitment and Conditions of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974, every employee of an Aided Educational Institution shall draw the same pay, D.A. and subsistence allowance in case of suspension as is admissible to his counter-part 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.

Accordingly, School & Mass Education Department has endorsed a draft

Resolution for concurrence of Finance Deptt. stretching the benefit of revised pay to the teaching and non-teaching staff of Aided Educational Institutions as per the above rule. P.C. Cell may take a view on the draft Resolution and if necessary concur in the proposal.

29. It appears that the Finance Department after examining the Resolution concurred it subject to certain modification and corrections The notes dated 2.6.1999 read as follows;

Government decision revising the scales of pay of State Government employees was notified in F.D. Resolution dated 17.4.1998. In the said Resolution it was stipulated that the revised scales of pay will also be extended to the related categories of posts under Aided Educational Institutions and work-charged establishments. The Administrative Departments concerned will take steps, based on existing norms and guidelines, to issue necessary Govt. order in the matter with concurrence of Finance Department.

The file had passed through the Principal Secretary to Finance Department and finally me Minister, Finance and Law, who approved the decision. Thereafter, the Resolution dated 15th October, 1999 was issued. Thus, it would be evident from the file that the Finance Department took into consideration the economic capacity to the State Government before according concurrence to the Resolution dated 15th October, 1999. Therefore, the plea advanced by the Government regarding (sic) of funds and/or non-availability of funds and/or not being in a position to (sic) provision of funds in the Budget appears to be not only unreasonable but also (sic). 30. While arriving at such (sic) Schools/Upper Primary Schools and other schools is mandatory. The School teachers play an important role in building the nation. They definitely discharge pious duties with a crusade in their mind. They cannot be expected to discharge such pious and onerous duties while passing through financial stringencies. Surprisingly, this aspect was not kept in mind by the State.

31. In view of the discussions made above, I have no hesitation to hold that the petitioners are entitled to the benefits flowing out of the Resolution of the Government dated 15th October, 1999. The opposite party-authorities are directed to take steps to implement this Resolution and extend the benefits flowing therefrom within a period of six months hence.

32. The writ petitions are, accordingly, allowed. No costs.