(2004) 05 OHC CK 0018

In the Orissa High Court

Case No : O.J.C. No''s. 3891 of 2000, 5118, 6981, 16981 of 2001, 291, 868, 1518, 2039, 2096, 2957 and 3276 of 2002, W.P. (C) No''s. 315, 466, 819, 1709, 2072, 3324, 4113, 4200, 5234, 5764, 5881, 6088, 6301, 6354, 6378, 6671, 6743 and 7042 of 2002, 552, 770, 910, 10

Subarna Dibya and Others — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 10-05-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Orissa Aided Educational Institutions Employees Retirement Benefits Rules, 1981 — Rule 8(1), 8(2)
Orissa Education Act, 1969 — Section 27

Citation : (2005) 1 OLR 168

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

Bench : Single Bench

Advocate : B.N. Panda-2, K.K. Kar. D.K. Sahu, D.R. Ray, S. Jee, D.N. Lenka, S.B. Jena, B.B. Mohanty, B.R. Barik, J.N. Mohanty, P.K. Mohapatra, J. Gupta, J.S. Misra, P.K. Padhi, B.D. Satpathy, P.K. Routray, S. Ratho, S.N. Sahu, R.C. Das, S.K. Das, D.K. Panda, J.R. Dash, P.K. Misra, B. Jena, N. Lenka, J.N. Mohanty, G.K. Nanda, S. Mallik. B.B.N. Dwibedi, S. Mohanty, B.B. Roy, U.K. Misra, S.K. Nayak-3, M.S. Sahu, K.K. Sahu, S.S. Patnaik, B.D. Patnaik, C.R. Patnaik, P.K. Panda, A. Parida, S.N. Sahoo, R.B. Mohapatra, S.K. Purohit and K.K. Swain, for the Appellant; D.P. Sarangi, Senior Standing Counsel, for the Respondent

Judgement

A.S. Naidu, J.—These Writ Petitions involve common question of law and were, therefore, heard together and are being disposed of by this common judgment.

2. In all these Writ Petitions filed under Articles 226 and 227 of the Constitution of India, the petitioners seek to challenge the Notification issued by the Government of Orissa, Department of School & Mass Education dated 18th October, 2001. By the said Notification, the Government in exercise of power conferred u/s 27 of the Orissa Education Act sought to amend the Orissa Aided Educational Institutions Employees'' Retirement Benefit Rules, 1981 by

introduction of the Orissa Aided Educational Institutions Employees'' Retirement Benefit (Amendment) Rules, 2001 (hereinafter referred to as the ''2001 Amendment Rules''). The Amendment Rules came into force on the 1st day of September, 1988.

3. The moot question that needs to be answered in the present Writ Petitions is as to whether the family of a primary school/high school teacher who was serving in an aided educational institution would be entitled to receive ''family pension'' irrespective of the date of retirement arid/or death of the said employee.

4. Before embarking upon examination of the points involved, it would be prudent to refer to the relevant Rules dealing with the retirement benefits of the employees more particularly primary school teachers of the Aided Educational Institutions.

5. In the year 1966 for the first time the Orissa Non-Government Primary School Teachers'' Contributory Provident Fund, Insurance, Pension (Triple Benefit) Rules, 1966 was introduced. The said Rules came into effect retrospectively with effect from 1.4.1964 and were commonly known as ''the Triple Benefit Rules''. Under these Rules, teachers of Non-Govt. Recognised Primary Schools were admitted to the triple retirement benefits, viz. provident fund, insurance and pension, with effect from 1.4.1964.

6. In the year 1981, the Orissa Aided Educational Institutions Employees'' Retirement Benefit Rules, 1981 (hereinafter called ''the 1981 Rules'') were introduced. The said Rules were made applicable with effect from 1.4.19.82. By virtue of the 1981 Rules the concept of payment of pension to teaching and non-teaching staff of all recognized Non-Government Colleges, High Schools, Senior Basic Schools, M.E. Schools, Primary Schools including Sanskrit Tolls and Junior Basic Schools was introduced, for the first time.

7. Another set of Rules, called ''the Orissa Aided Educational Institutions (Non-Govt. Fully Aided Primary School Teachers) Retirement Rules, 1986 was introduced by Government with effect from 1.4.1985 (hereinafter referred to as ''the 1986 Rules). In consonance with Rule 3 of the 1986 Rules, Non-Govt. Primary School Teachers became eligible to receive pension. With the introduction of the 1986 Rules, applicability of the 1981 Rules to the Non-Govt. Primary School Teachers/ Employees ceased with effect from 1.4.1985. It is pertinent to mention here that there was no provision for family pension in any of these Rules.

Rule 3 as well as Rule 8 of the 1986 Rules which are relevant for the purpose are quoted hereinbelow :-

"3. Application of the rules - (1) These rules shall apply to the teachers of all non-Government Primary Schools fully aided by Government in the Education and Youth Services Department, directly or, through Panchayat Samitis constituted under the Orissa Panchayat Samiti Act, 1959.

(2) The Orissa Aided Educational Institutions'' Employees'' Retirement Benefit Rules, 1981 will cease to apply to the persons specified in Sub-rule (1) with effect from the 1st day of April, 1985.

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8. An employee shall be eligible for pension, gratuity and death-cum-retirement gratuity at the rates admissible to his counterpart in State Government service."

8. In the year 1989 an amendment was made to the 1981 Rules, vide Notification of the Government dated 5.12.1989. The said amendment came into effect retrospectively from 1.9.1988. In consonance with this amendment the family of an employee became entitled to ''family pension'' as extended to the family of his/her counterpart in Government institutions. But then, the concept of family pension was not made applicable to the family of teachers/ employees of aided educational institutions who retired or died before 1.9.1988.

9. By an amendment introduced, vide Notification of Govt. dated 5.12.1989, facility of family pension was extended to Non-Govt. Primary School Teachers with effect from 1.9.1988. But then this benefit was also not extended to the family of primary school teachers who retired or died before 1.9.1988.

While matter stood thus, on 23rd March, 1998 another Notification was issued by Government framing the Rules, called ''the Orissa Aided Educational Institutions (Non-Govt. Fully Aided Primary School Teachers) Retirement Benefit (Amendment) Rules, 1998. By the said Rules, Rules 8(1) and 8(2) of the 1986 Rules were substituted as follows

"8.1 An employee shall be eligible for pension, gratuity or death-cum-retirement gratuity and T.I. at the rate admissible to his counterpart in the State Govt. Service.

8.2 The family of an employee including the employee who retired or died on or before the commencement of these Rules, shall be entitled to get family pension and T.I. as admissible to the family of his counterpart in the State Govt. service."

Thereafter on 18th October, 2001 another amendment was brought about to the 1981 Rules. By the said amendment, Rule 8(2)(b) was substituted as follows :-

"8(2)(b). 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."

The said rule as stated above is sought to be quashed in these Writ Petitions.

10. Before embarking upon examination of the points involved in the matter, it would be profitable to notice the ratio of some of the earlier judgments of this Court in which the claim for family pension of the retired Primary School Teachers of Aided Educational Institutions/Members of their family was dealt with.

In the case of Trinath Bhuyan and seven Ors. v. State of Orissa, OJC Nos. 1781-1790 of 1989, this Court held that fixation of ''1.4.1985'' as the cut-off date for getting the benefit of pension under the 1986 Rules was not arbitrary. The said judgment was reviewed in Civil Review Nos. 73, 76-78 and 81-84 of 1992. Hansaria, C.J. (as he then was) (speaking for the Bench) while allowing the Review Applications, relying upon the decision of the Supreme Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), observed that so far as pension was concerned, no vertical division of pensioners with reference to specified date was permissible in the absence of rational basis. According to the said decision, if Government felt the necessity of liberalizing the pension scheme and made pension payable to Government Primary School Teachers and even to those who were serving in Non-Govt. Primary Schools, there was no justification for making available pension to those who would retire after 1.4.1985. According to this Court, the said restriction would bring into play whole hug Nakra''s decision because the cut-off date ''1.4.1985'' had to be regarded as arbitrary and violative of Article 14 of the Constitution of India.

11. The next judgment of this Court was in the case of Bhimasen Prusty and Others Vs. State of Orissa and Others, The said case had been filed by some of the Non-Govt. Primary School Teachers who had retired prior to 1.9.1988 for grant of family pension to their survivors after their death. They were denied the benefit of family pension on the plea that family pension was admissible only with effect from 1.9.1988 and as per the Orissa Aided Educational Institutions (Non-Govt. Fully Aided Primary School Teachers) Retirement Benefit (Amendment) Rules, 1989, the petitioners were not entitled to the same. A Division Bench of this Court relying upon the judgments of the Supreme Court in the case of State Government Pensioners'' Association and Others Vs. State of Andhra Pradesh, as well as in the case of D.S. Nakra (supra) observed as follows :

"The cause shown to treat 1.9.1988 as the cut-off date can hardly be taken as an intelligible dividing line. Law is well settled that between the homogeneous clause artificial discrimination cannot be made in the matter of grant of pensionary rights and that once any revised scheme of pension is introduced it becomes equally applicable to all existing pensioners. So far as gratuity is concerned, it being an one time payment, the quantum of it payable by any particular date or revision of it is not retrospectively applicable to the existing pensioners. Hence, whenever there is an introduction or revision in the family pension scheme, it becomes applicable to all the existing pensioners, and there cannot be any reason to confine the right to get the family pension to only families of teachers retired after 1.9.1988. Hence the amendment to the rule in Annexure-3 has to be interpreted that way and held as having not introduced any such discrimination......"

In the last paragraph, this Court while allowing the Writ applications quashed the Notification of Government dated 5.12.1989. It is apt to mention here that only in consonance with the 1989 Notification, the concept of family pension was introduced so far as retired primary school teachers were concerned for the first time. But then the said Notification having been quashed by the aforesaid judgment, the concept of ''family pension'' so far as primary school teachers were concerned was brought to a fluid state.

The next case which needs to be noticed is Raghunath Misra and two Ors. v. State of Orissa, OJC Nos. 6242. 6244, 6344 and 6346 of 1994 decided by this Court on 9.12.1994. In all those cases also the common grievance of the petitioners was non-sanction of family pension under the Orissa Aided Educational Institutions (Non-Govt. Fully Aided Primary School Teachers) Retirement Benefit Rules, 1986. The stand of the Government in the said cases was that as the Rules came into force from 1.9.1988, the teachers who had superannuated prior to that date were not entitled to the relief sought. Justice G.B. Patnaik (as he then was) speaking for the Bench, held as follows :

"...... But this stand cannot be accepted in view of the decision of this Court in Civil Review No. 73/92 arising out of OJC No. 1781 81. In the said Review application, primary school teacher who had retired before the relevant Rules coming into force had challenged the cut-off dates for grant of T.I. and family pension and ultimately this Court in the Civil Review application held that the benefit of the pension mentioned in 1986 Rules should be available to the petitioner also even though he had retired prior to the Rules coming into force. Against the aforesaid judgment of this Court, the State of Orissa had moved the Supreme Court in SLP but their Lordships of the Supreme Court dismissed the Special Leave Petition. In that view of the matter, the judgment of this Court in Civil Review No. 73/92 governed the filed and consequently the petitioner in each of the writ applications would be entitled to the benefit of pension mentioned in the Retirement Benefit Rules of 1986...".

This Court accordingly allowed the Writ applications holding that the Writ petitioners were entitled to the benefit of the 1986 Rules with effect from 1.9.1988, the date on which the Rules were brought into force.

The next important case which needs to be noticed is the case of Sankareswar Nanda and Anr. v. State of Orissa 1988 (I) OLR 172.

The petitioners who were primary school teachers prayed for direction in the said case for sanction of Temporary Increase on their original pension and family pension to the members of their family. A Division Bench of this Court allowed the prayer and directed to grant Temporary Increase on pension with effect from 1.4.1985 and also to make necessary endorsement in the Pension Payment Order declaring their eligibility to receive family pension together with Temporary Increase thereon when it would fall due.

It is apt to mention here that Temporary Increase on pension though introduced in the year 1985 is made available to all pensioners irrespective of their date of retirement.

Relying upon the judgment supra, a number of cases were disposed of by this Court directing payment of family pension to the family members of the retired primary school teachers.

12. Learned counsel for the petitioners in the present cases also relying upon the judgments referred to above forcefully submitted that the family members of the retired primary school teachers are entitled to family pension and that while issuing the Notification dated 18th October, 2001 the State Government has not kept in mind the ratio of the decisions of this Court and there is an attempt to overreach the direction issued by this Court in the earlier cases, and to take away the impact of the judicial decision in the case of Bhimsen Prusty (supra) and other cases. In support of such contention, learned counsel for petitioners relies upon the decision of the Supreme Court in the case of S.R. Bhagwat and others, Vs. State of Mysore, .

In the said decision it was held as follows :

"It is now well settled by a catena of decisions of this Court that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance overrules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned with the entire subject sought to be covered by such an enactment having retrospective effect. We may only refer to two of these judgments."

The said argument is strongly repudiated by Mr. Sarangi, learned Senior Standing Counsel for the School and Mass Education Department. According to Mr. Sarangi no pension scheme was existing so far as Non-Govt. Primary School Teachers were concerned prior to 1.4.1964. The Triple Benefit Scheme was introduced in the year 1964. The said Scheme continued till 1981 Rules were introduced which came into force from 1.4.1982. By the 1981 Rules, pension was introduced for the first time. In the year 1989 only family pension was introduced for the first time retrospectively from 1.9.1988. The said Rule, however, was quashed by this Court in Bhimsen Prusty''s case (supra) and virtually thereafter there was no rule for sanction of family pension. This fact was not brought to the notice of this Court in course of hearing of the earlier cases.

13. On 5th of December, 1989 the Orissa Aided Educational Institutions (Non-Govt. Fully Aided Primary School Teachers) Retirement Benefit (Amendment) Rules, 1989 was introduced which came into force from 1st day of September, 1988. In consonance with the said Rules, an employee was eligible for pension, gratuity, death-cum-retirement gratuity at the rate admissible to his counterpart in the State Govt. Service and in the event of his death his family was eligible for family pension as admissible to the family of his counterpart in the State Govt. Service.

14. Mr. Sarangi, further submitted that the eligibility to receive family pension so far as retired primary school teachers were concerned was once again introduced

by the Notification dated 23rd March, 1998. By the said Notification Rule 8 of the 1986 Rules was substituted as follows :-

"8(1) An employee shall be eligible for pension, gratuity or death-cum-retirement gratuity and T.I. at the rate admissible to his counter-part in State Government Service.

(2) The family of an employee including the employee who retired or died on or before the commencement of these rules, shall be entitled to get family pension and T.I. as admissible to the family of his counter-part in the State Government Service."

According to Mr. Sarangi, the words, "who retired or died on or before the commencement of these Rules" appearing in Rule 8(2) created certain ambiguity, inasmuch as taking advantage of the said Rules, the family members of some of the primary school teachers claimed family pension though their predecessor, i.e. the primary school teacher, himself was not receiving any pension after his retirement till his death, having not been eligible for the same. It is submitted that to clarify the said ambiguity the 2001 Notification was issued.

15. Referring to the 2001 Notification, Mr. Sarangi forcefully submitted that in fact the impugned Notification was issued in consonance with the observation made and in the light of the direction issued by this Court in the earlier Writ applications and the submission that to take away the effect of the said judgments this Notification has been issued is not correct. He also submitted that in accordance with the 2001 Notification the family members of a primary school teacher who was covered under the pension scheme shall only be eligible to receive family pension. According to him, under no stretch of imagination an employee who was not eligible to receive pension or was not covered under any pension scheme or was not receiving pension can claim that his family should receive family pension after his death. According to him, the 2001 Notification rather clarified the ambiguity, if any, and thus the same was in consonance with law and was issued in the light of the decisions of this Court and any submission to the contrary is not sustainable.

16. Heard the learned counsel for the parties patiently, noticed the submissions carefully, perused the materials meticulously and considered the matter diligently. It is well settled rule of interpretation that the Court while interpreting a rule should as far as possible avoid the construction which attributes irrationality and the Court must obviously prefer a construction which renders a statutory provision constitutionally valid, viable and operative rather than that which makes it void and inoperative. The amendment to the 1981 Rules introduced by the impugned Notification dated 18th October, 2001 substituting Rule 8(2)(b) clearly stipulates :-

"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."

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 negatived. 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.

21. In the light of the discussions made above, I dispose of these Writ Petitions directing the petitioners to file applications in the prescribed forms enclosing all the relevant documents in support of their claim for family pension before the concerned authorities who will scrutinise the same in the light of the decision of

this Court and the direction issued in the preceding paragraph vis-a-vis the 2001 Amendment Rules and take appropriate decision with regard to playability of family pension to the family concerned. It is needless to say that pension being not a bounty, but is a right of an employee, the authorities shall take all steps as expeditious as possible in disposing of the representation/application filed by the petitioners.

22. With the aforesaid direction/observation all the Writ Petitions are disposed of.

