

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 36009 of 2021

Rabindra Kumar Jena ***Petitioner***
Mr. Sidheswar Mallik, Advocate
-versus-
State of Odisha and others ... ***Opposite Parties***
Mr. P.C. Das, ASC

W.P.(C) No. 34511 of 2020

Ranjit Mahanta ***Petitioner***
Mr. Sidheswar Mallik, Advocate
-versus-
State of Odisha and others ... ***Opposite Parties***
Mr. P.C. Das, ASC

W.P.(C) No. 27425 of 2021

Bijaya Kumar Patro ***Petitioner***
Mr. Sidheswar Mallik, Advocate
-versus-
State of Odisha and others ... ***Opposite Parties***
Mr. P.C. Das, ASC

W.P.(C) No. 4607 of 2022

Bailochan Sahoo ***Petitioner***
Mr. Sidheswar Mallik, Advocate
-versus-
State of Odisha and others ... ***Opposite Parties***
Mr. P.C. Das, ASC

W.P.(C) No. 5686 of 2022

Basanti Behera

....

Petitioner

Mr. Sidheswar Mallik, Advocate

-versus-

State of Odisha and others

....

Opposite Parties

Mr. P.C. Das, ASC

CORAM:

JUSTICE A.K.MOHAPATRA

ORDER

Date of hearing: 10.11.2022

Date of Order : 07.12.2022

Order No.

05. 1. These matters are taken up through Hybrid Arrangement (Virtual/Physical Mode).
2. Since similar issues are involved in all the writ petitions, they are heard together and disposed of by this common order.
3. Heard Mr. Sidheswar Mallik, learned counsel for the Petitioner and Mr. P.C. Das, learned Additional Standing Counsel appearing for the State-Opposite Parties in all the writ petitions. Perused the record.
4. These writ petitions have been filed by the Petitioners seeking a direction to the Opposite Parties to grant pension, gratuity and other post retiral benefits as due and admissible to them by counting their entire period of service including the service period as NMR for the purpose of pension with a further direction to the

Opposite Parties to pay unutilized leave salary by counting the entire period of service from the date of initial joining.

5. However, for the sake of brevity of facts, W.P.(C) No.36009 of 2021 (Rabindra Kumar Jena v. State of Odisha and others) is taken up for consideration.

On perusal of the said writ petition, the factual matrix of the case, as culled out, is that the Petitioner was initially was appointed as NMR Wireman on 13.11.1981. Thereafter, he was brought over to the regular establishment w.e.f. 30.10.2009. Finally, he has retired from service w.e.f. 30.06.2021 on attaining the age of superannuation. Therefore, the Petitioner has retired from service as regular employee after putting in a continuous and uninterrupted service for 39 years and out of which, 10 years 5 months was in regular pensionable establishment.

6. Mr. S. Mallik, learned counsel for the Petitioners submits that although the Petitioners have retired w.e.f. 30.06.2021, but they have not been given pensionary benefits till date by the Opposite Parties. The pension papers pertaining to the Petitioners which were submitted before the authorities have been returned on the ground that since the petitioners have been appointed after 2005, they are not entitled to any pensionary benefit under the old pension Rules.

7. It is contended by the learned counsel for the Petitioners that position of law is no more res integra as has been laid down by the judgment delivered by Hon'ble the Apex Court as well as this Court to the effect that the period of service rendered as NMR shall be taken into consideration while calculating the pensionary benefits which is due and admissible to an employee who worked under a work charge establishment. Therefore, applying the aforesaid principle to the facts of the Petitioners case, who have rendered 39 years of continuous service starting from 13.11.1981 upto 30.06.2021, the Petitioners are entitled to pensionary benefits. In the aforesaid context, learned counsel for the Petitioners also relied upon the decisions rendered by this Court in ***State of Odisha v. Abhaya Ch. Dash*** (W.P.(C) No.1473 of 2014 decided on 7.3.2014 by a Division Bench), ***Abhaya Charan Mohanty v. State of Odisha & Ors.*** (WPC (OAC) No.3494 of 2013 decided on 14.07.2021) and ***Chandra Nandi v. State of Orissa and others, reported in 2014 (I) OLR – 734*** decided by a Division Bench of this Court, which was eventually carried in appeal to the Hon'ble Apex Court at the instance of the State and the Hon'ble Supreme Court has dismissed the appeal and upheld the decision rendered by this Court in the case of *Chandra Nandi* (supra).

8. It is also contended by the learned counsel for the Petitioners that in the case of employees, who are similarly placed with the Petitioners and had earlier approached the Odisha Administrative Tribunal. Pursuant to the order passed by the Odisha Administrative Tribunal, some of the similarly placed persons have been extended with the benefit of pension vide Officer Order Nos.4098 dated 27.8.2021 and 3384 of 26.8.2021. It is further contended by the learned counsel for the Petitioners that the Petitioners are similarly situated with the persons who have been extended the benefit of pension by the State Government. Therefore, the conduct of the Opposite Parties in denying the pensionary benefits to the Petitioners is violative of the principle of natural justice as well as Article 14 of the Constitution of India. In such view of the matter, learned counsel for the Petitioner prays that the conduct of the Opposite Parties in refusing to accept the pension papers of the Petitioners is illegal and further prays for a direction to the authorities to consider the case of the Petitioners in the light of the judgment referred to hereinabove and to sanction the pension and disburse the same in favour of the Petitioners within a stipulated period of time.

9. Learned counsel for the State, on the other hand, submits that since the Petitioners were brought over to the regular

establishment after the OCS (Pension) Rules, 1992 was amended in the year 2005, therefore, they are not entitled to pensionary benefits under the old pension rules. As such, no fault could be found with the Opposite Parties in returning the pension papers of the present Petitioners.

10. In reply to the aforesaid contention raised by the learned counsel for the State, learned counsel for the Petitioners submits that the Petitioners were appointed much prior to the amendment of the OCS (Pension) Rules, 1992 in the year 2005. Therefore, they shall be governed by old pension rules and the amended rule of the year 2005 has no applicability to the facts of the present case. It is further contended by Mr. Mallik that in view of the settled position of law, while calculating the pensionary benefits, the Opposite Parties are under a legal obligation to take into consideration the period of service rendered by the Petitioners as NMR Wireman w.e.f. 13.11.1981 and, as such, they have rendered continuous and uninterrupted service of 39 years which makes the Petitioners eligible to get the pensionary benefits as due and admissible to them.

11. Further, taking into consideration the period as NMR employee for the purpose of calculation of pensionary benefits, learned counsel for the Petitioners relied upon the judgment in the

case of *Prem Singh v. State of Uttar Pradesh and Others*, reported in (2019) 10 SCC 516 wherein the Hon'ble Supreme Court had an occasion to consider the eligibility of work charged employees to get pensionary benefits. In the context of sanction of pensionary benefits to work charged employees, the Hon'ble Supreme Court has observed that some of the employees, who have not been regularized in spite of the fact that they have rendered the services for 30 years or more, furthermore some of them have been superannuated and since they have worked in the work-charged establishment and not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of the Hon'ble Supreme Court in *State of Karnataka v. Umadevi*, reported in (2006) 4 SCC 1.

12. Moreover, in the case of *Umadevi* (supra), the Hon'ble Supreme Court has held that the employees, who have rendered more than ten years of service, were directed to be treated as regular employees subject to the rider that they shall not be entitled to any dues in respect of difference in wages had they been continued in service regularly before attaining the age of superannuation. Further, in the said judgment, it was made clear that they shall be entitled to receive the pension as if they have retired from the regular

establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for the purpose of calculation of pensionary benefits.

13. Learned counsel for the Petitioners further contends that this Court, while considering the cases of similarly situated work charged employees, on a number of occasions, has come to a conclusion that the employees who have been working on NMR basis for a considerable period of time, particularly more than 10 years and were subsequently brought over to the regular establishment shall be considered for the purpose of grant of pensionary benefits. It has also been held that in the event, it is found that the services rendered in the regular establishment fall short of the qualifying service period, the same shall be adjusted with the period of service already rendered as NMR or any other mode of ad hoc employment. Therefore, taking into consideration the long period of service of the present Petitioners, it is further contended by the learned counsel for the Petitioners that the Petitioners are lawfully entitled to get the pensionary benefits, moreso since similar benefits have already been extended to other similarly situated persons in the State of Odisha.

14. To decide the issue involved in the present case, i.e. with regard to applicability of OCS Pension Rules, 1992, the factual background of the present case is required to be re-visited at this stage. The petitioner was initially appointed as NMR, Wireman on 13.11.1981 and was posted against the regular vacant post under GED No-III, Sambalpur. Thereafter, the petitioner was brought over to regular establishment vide Order No.6175 dated 31.10.2009. As such, the petitioner has put in service for a total period of 39 years out of which, 10 years and five months in regular pensionable establishment. Thereafter, he took retirement from service w.e.f. 30.06.2021, i.e., on attaining the age of superannuation. After retirement although the petitioner submitted his pension papers, the same was returned on the ground that the petitioner is not eligible to get pension as he was appointed in regular service in the year 2009 i.e. after the amendment to the OCS Pension Rules in the year 2005 by virtue of notification dated 17.09.2005. So far the eligibility of the petitioner to get pensionary benefits is concerned, the same has to be determined by referring to various provisions of OCS Pension Rules, 1992. In such view of the matter, the ineligibility as alleged by the learned State Counsel for consideration vide notification dated 17.09.2005 a new sub-rule(2) Rule-3 of the OCS Pension Rules, 1992 was added and the same was to come into effect from

01.01.2005 for better appreciation newly added sub-rule (2) of Rule-3 has been quoted herein below:-

“(2) A Government servant who is transferred permanently to a service or post to which these rules apply from a service or post to which these rules do not apply shall become subject to these rules: Provided that it shall be open to him, within six months of the date of issue of the order of his permanent transfer, or if he is on leave on the said date, then, within six months of his return from leave, whichever is later, to opt to be governed by the pension rules to which he was subject immediately before the date of his transfer. The option shall be exercised in writing and communicated to the authority making such order of transfer.

(3) The option, once exercised, shall be final.

(4) Notwithstanding anything contained in these rules, all persons appointed under the Government of Odisha with effect from 1st day of January, 2005 shall not be eligible for pension as defined under sub rule (1) of rule 3 of the said rules but shall be covered by the defined contribution pension scheme as specified below: (Vide Finance Department Notification No.44451/F., dtd.17.09.2005 and Finance Department Circular No-Pen40/2005-16950(255)/F., dated 02.04.2007).

(i) The monthly contribution would be 10% of the salary and Dearness Allowance to be paid by the employee and the

Government would also provide a matching contribution. The contribution so made would be deposited in a non withdrawable pension tier-I account. Such funds will be invested by pension fund managers as approved by Pension fund Regulatory and Development Authority (PFRDA) under different categories of scheme which would be a mix of debt and equity. The fund managers would give out easily understood information about the performance of different investment schemes so that the individual Government employee would be able to make informed choices about which scheme to choose.

(ii) In addition to the above provision, each individual may also have a voluntary tier-II withdrawable account at his option. This option is provided as General Provident Fund will be withdrawn for employees recruited to the State Government Service with effect from 1st January, 2005. Government will make no contribution into this account. In tier –II system, the individual may subscribe 10% of his salary and these assets would be managed through exactly the above procedure. However, the employee would be free to withdraw part or all of second tier of his money at any time. This withdrawable account does not constitute pension investment and would attract no special tax treatment.

(iii) At the time of retirement, Government servant will receive the lump sum amount of 60% deposited in pension

tier-I account as pension wealth and it is mandatory to the Government servant to invest remaining 40% of his pension wealth to purchase as annuity from an Insurance Regulatory and Development Authority regulated life insurance company. The annuity shall provide for pension for the life time of the employee and his dependent parents and his spouse at the time of retirement. The individual would receive lump sum of the remaining pension wealth, which he would be free to utilise in any manner. Individuals would have the flexibility to leave the pension system prior to age of 58 years or 60 years as the case may be. In such case the mandatory annuitisation would be 80% of the pension wealth. Provided that above provision shall not apply to the persons who are appointed under job contract and work charged establishments prior to 01.01.2005 and brought over to the regular establishment on or after 01.01.2005. (Vide Finance Department Notification No.24142/F., dtd.04.09.2015)”

“4. Protection of Privilege

Nothing in these rules shall operate to deprive any Government servant of any right or privilege to which he is entitled;

(a) by or under any law for the time being in force; or

(b) by terms of any agreement subsisting between such person and the Governor at the commencement of these rules;

or

(c) to confer on him any right or privilege in respect of any matter for which specific provision is made by the terms of any agreement between such person and the Governor.”

In view of the aforesaid Sub-rule(4) all persons appointed under the Government of Odisha from 01.01.2005 shall not be allowed for pension under Rule-3(ii) of the aforesaid Rules, who shall be covered by defined contribution pension scheme as specified in the said sub-rule.

15. Learned counsel for the State has taken a plea that the petitioner was regularized w.e.f. 30.10.2009, therefore, in view of sub-rule(4) of Rule-3, he is not entitled to pension under the OCS Pension Rules, 1992. In such view of the matter, learned counsel for the State supports the action of the Government in returning the pension papers of the petitioner.

16. Learned counsel for the petitioner, on the other hand, submits that rule 10 of the OCS Pension Rules, 1992 provides that subject to provisions of these rules, qualifying service of the Government employee shall commence from the date he takes charge of the post to which he is first appointed either substantively or in officiating or temporary capacity. Further referring to Rule-12 of the Rules, 1992, it is contended that the same also provides that notwithstanding anything contained in the provisions of Clauses (1)

and (2) of Rule-11, Government may, in the case of service paid from the consolidated fund of the State (a) declared that any class of service shall qualifying for pension (b) in individual cases, and subject to such conditions as they may think fit to be imposed in each case and allow service rendered by a Government servant to counted for pension.

17. Further referring to Rule 18(3) of the Rules, 1992, it is submitted by learned counsel for the petitioner that Sub-rule(3) of Rule 18 provides that a person who is initially appointed by the Government in work charged establishment for a period of five years or more is subsequently appointed to the same or another posts in a temporary or substantive capacity in a pensionable establishment without interruption of duty the period of service so rendered in work charged establishment shall qualify for pension under the rules, 1992. Moreover, attention of this Court was also drawn to that provision 18(4) whereunder the Government may, by general or special order; prescribe any class of service or posts, which were previously born under work charged establishment or paid from contingencies to be pensionable. Rule 20 stipulates that the service as an apprentice shall qualify for pension, if such service is followed by regular appointment to Government service. He further submits that in the present case the petitioners although appointed on NMR

basis but subsequently, they were regularized without any break in service. Therefore, in view of the provisions in the OCS Pension Rules, 1992, the petitioner is entitled to get pension and other post retirement benefits by counting the entire service period as qualifying service period.

18. On a careful analysis of facts, this Court is convinced that the petitioner was initially appointed in the work charged establishment and that the nature of work he was performing was regular and perennial in nature. After working for almost three decades without any break and interpretation that too for a paltry amount, the service of the petitioner was regularized only w.e.f. 31.10.2009. This conduct definitely attracts the penal provision for exploitation of work force.

19. On a plain reading of Rule-18 of the 1992 Rules, it appears that in Sub-rule(2) of Rule-18 the period of service in the work charged establishment excluded for the purpose of counting the qualifying period for pensionary benefits. In Sub-rule(3) of Rule-18, it has been provided that notwithstanding anything contained in clause(2) of Sub-rule(2) of Rule-18 a person who is initially appointed by the Government in a work charged establishment for a period of five years or more and he is subsequently appointed to the same or another post in temporary or a substantive capacity in a

pensionable establishment without interruption of duty, the period of service so rendered in work charged establishment shall qualify for the pensionary benefit under this rule.

20. In view of the provisions contained in Sub-rule(3) of Rule-18 the entire work charged period of service rendered by the petitioner shall be counted while calculating the pensionary benefits payable to the petitioners. There is no ambiguity in the said provision and the same stand in absolute clear terms. Therefore, any argument that Rule 18(3) stands in the way and debars persons like the petitioner to get pensionary benefits would be illegal and fallacious.

21. The next question that falls for consideration is whether the new Special Rule(4) to the Pension Rules 1992 which was amended in the year 2005 by virtue of Notification Dated 17.09.2005 creates an embargo for the petitioner to get pension under of OCS Pension Rules, 1992. The embargo newly introduced by Special Rule 4 to the Rules, 1992 in the year 2005 provides that all persons appointed under the Government of Odisha with effect from 1st day of January, 2005 shall not be eligible for pension as defined to Sub-rule(1) of Rule-3 of the Rules, 1992. In new Sub-rule(4) the word that has been used as “appointed” and the cut-off date is 01.01.2005. At this juncture, this Court requires to examine as to whether the word

“appointed” used in Sub-rule(4) would be restricted in its application only to regular appointment/recruitments against the sanctioned post after 01.01.2005. The word “appointment” or “appointed” has not been defined in the Rules, 1992. However, the definition clause under 1992 provides that the words which have not been defined in the said Rules, shall ordinarily have the same meaning as has been provided under the Odisha Service Code. Under the Odisha Service Code appointment has been categorized in several categories further there exists no straight jacket definition of the word appointment in Odisha Service Code. Therefore, in absence of any specific definition of the word in the Rules, the same would be interpreted in its common parlance and the way it is understood generally. Further, this Court cannot interpret a particular word so as to restrict its meaning, which is not there in the rule book such an approach would amount re-casting or rewriting the rules. Under such circumstances, this Court would obviously adopt the golden rule of interpretation and give the word its common meaning and the way its ordinarily understood i.e. without any categorization or classification. Therefore, the embargo which was imposed by introducing new Sub-rule(4) is general in nature and applies to all appointments irrespective of all the classification category, nature etc. made after

01.01.2005. And such appointments made after 1.1.2005 shall be governed by the new rule appended to Sub-rule(4) of the Rule, 1992.

22. Considering the fact that the petitioner was initially appointed by the Government although in a work charged establishment and allowed to continue in service uninterruptedly for a period of three decades and it is only w.e.f. 31.10.2009, the service of the Petitioners were regularized, in such factual background, this Court is of the considered view that the embargo imposed by introduction of new Sub-rule(4) would not be applicable to the facts of the present case. Even otherwise also learned counsel for the State does not dispute the fact that the petitioner was appointed by the Government prior to 2005 although on ad hoc basis. However, it was submitted that he was appointed in a work charge establishment in the year 1981 and, therefore, they are not entitled to be coerced under the Pension Rules, 1992.

23. Furthermore, considering the fact that the petitioner has rendered more than 39 years of continuous service coupled with the fact that he was initially appointed by the Government in the year 1981 in the work charged establishment, this Court is bound to give a liberal interpretation to the rules and would like to remove the obstacles which stand in the way of the petitioner in getting the pensionary benefits after working uninterruptedly for a period of

almost four decades. This view is supported by a judgment of Hon'ble Supreme Court in the case of *V. Sukumaran vrs. State of Kerala and another*; reported in (2020) 8 SCC 106, which was delivered by relying upon two other judgments of Hon'ble Supreme Court in case of *V. Lakra vrs. Union of India* reported in AIR 1983 SC 130 and *Deokinandan Prasad vrs. State of Bihar* ; reported in *AIR 1971 SC 1409* holding that the pension provisions must be given a liberal consideration as social welfare measure.

24. *In Prem Singh vrs. State of U.P. and others* ; reported in (2019) 10 SCC 516, it was observed that appointment of work charged employee not made for a particular project work and the nature of work was regular and perennial in nature on a monthly salary where employees were required to cross-efficiency bar and were also subjected to transfer like regular employees, as such, their services were not qualitatively different from regular employees and hence the Hon'ble Supreme Court further held that it would be unfair on the part of the State Government to take work from them for periods depriving them of their due emolument, during period they works on less salary in work charged establishment and also declining to count that period as qualifying service for pensionary benefits which amounts to adopting exploitative device and it was further held that in the said case the service rendered in work

charged establishment directed to be treated as qualifying service for grant of pension. In the aforesaid reported cases, the Hon'ble Supreme Court also directed to count service rendered in work charged establishment for the purpose of pensionary benefits by going to the extent of reading down Rule-3(8) of U.P. retirement benefit Rules and striking down para-6.6.9 and regulation of Civil Service Regulation of U.P.

25. In the case at hand, the services rendered by the Petitioners in work charge establishment also qualifies for the purpose of calculating their pensionary benefits under Rule 18(3) of the Rules, 1992. Additionally, the newly added Sub-rule(4) which applied to the appointments made after 01.01.2005 will have no application to the case of the Petitioners, who were admittedly appointed in the work charge establishment on 13.11.1981 and subsequently retired from service w.e.f. 30.06.2021. Moreover, in absence of any rule specifying any particular category of appointment in the newly added Sub-rule(4) to Rule-3, it cannot be said that the petitioners were not appointed prior to the cut-off date i.e. 01.01.2005. Therefore, by taking into consideration, the initial date of appointment i.e. 13.11.1981 as NMR Wiremen although on NMR basis, it cannot be said that the petitioners were appointed prior to 01.01.2005 and, as such, the embargo Rule-3(4) would be attracted

to the facts of the petitioners case. Moreover, similarly situated employees, who were initially engaged in work charged establishment and were subsequently regularized have also been extended with pensionary benefits under the OCS Pension Rules, 1992. In this context, learned counsel for the petitioners has also filed several office orders under Annexure-11 series to the writ petition.

26. Therefore, this Court directs the Opposite Parties to consider the case of the Petitioners for pensionary benefits by permitting the Petitioners to submit the pension papers afresh and in that event, if the pension papers, in proper form, are submitted before the authority concerned within a period of one month from today, the authority concerned shall do well to consider the same and grant pensionary benefits as due and admissible to the Petitioners within a period of two months thereafter, if there are no other legal impediment.

27. In view of the order passed hereinabove, W.P.(C) Nos.36009 of 2021, 34511 of 2020, 27425 of 2021 and 4607 of 2022 stand disposed of and the remedies are to be worked out in terms of the direction given in this case.

28. So far W.P.(C) No.5686 of 2022 is concerned, although the above order analyzed the facts of W.P.(C) No.36009 of 2021 similar to the facts of the W.P.(C) No.5686 of 2022, however, further direction is required to be given in view of the fact that the claim of the Petitioner has been rejected by the impugned order under Annexure-6. Therefore, the impugned order under Annexure-6 to W.P.(C) No.5686 of 2022 is hereby set aside and the authorities are directed to consider the case of the Petitioner afresh in the light of the order passed hereinabove.

29. With the aforesaid observations/directions, the above noted writ petitions stand disposed of.

(A.K. Mohapatra)
Judge

Debasis/Jagabandhu