

ORISSA HIGH COURT: CUTTACK

W.P(C) NO. 5201 OF 2016

In the matter of an application under Articles 226 & 227
of the Constitution of India.

AFR

State of Odisha & Ors.

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Petitioners

-Versus-

Brajabanshi Panda
& Anr.

.....

Opp. Parties

For Petitioners : Mr. S. Jena,
Standing Counsel, S&ME Deptt.

For Opp. Parties : Mr. S.D. Das, Sr. Advocate
along with M/s. M.M. Swain,
S. Biswal, H.K. Behera and
H. Mohanty, Advocates
(O.P.1)

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MISS JUSTICE SAVITRI RATHO**

DECIDED ON : 25.04.2022

DR. B.R. SARANGI, J. The State of Odisha and its
functionaries have filed this writ petition seeking to
quash the order dated 03.11.2015 passed in O.A.
No.1265 of 2010, by which the Orissa Administrative
Tribunal, Bhubaneswar held that the order dated

10.08.1010 under Annexure-8 to the said O.A. treating the period of absence of opposite party no.1 as unauthorized and not counting it as qualifying service under Rule-23(2) of the OCS (Pension) Rules, 1992 is not sustainable under law, as the period has not been decided as unauthorized absence by following due procedure as per Rule-72(2) of Orissa Service Code by initiating a departmental proceeding, and directed the petitioners to calculate her salary and pay the arrears after regularizing the service period of opposite party no.1 as per order, with all consequential financial and retiral benefits.

2. The factual matrix of the case, in brief, is that opposite party no.1 was appointed as Trained Graduate Teacher (Jr. SES Cadre) on 11.12.1970. While working as Assistant Teacher in Government Girls' High School, Jagatsinghpur, she was transferred to Government Girls High School, Pattamundai under Kendrapara Education District on 28.03.1980. Pursuant thereto, she joined in the new place of posting on

10.05.1980. The school in question remained closed on 11.05.1980 due to summer vacation. After re-opening of the school in June, 1980, she could not join in service due to her illness. After recovery from illness, i.e. after 13 years from her absence from service, she requested the then Inspector of Schools, Khurda Circle, Khurda on 12.03.1993 to give her posting as Assistant Teacher. Since no decision was taken, she approached the Orissa Administrative Tribunal, Bhubaneswar by filing O.A. No.2878 of 1994 with a prayer to give her posting as Assistant Teacher and the tribunal, vide order dated 20.09.1995, disposed of the said O.A. directing the petitioners to issue letter of posting within a month and regularize the period from 28.03.1980, i.e. the date of relieve from the previous posting till the date of her joining in accordance with rules. In compliance thereof, as per letter dated 30.11.1995 of the then Inspector of Schools, Khurda Circle, Khurda, opposite party no.1 was allowed to join in Govt. Girl's High School, Pattamundai on 11.12.1995 and her service from 12.03.1993 to 10.12.1995 was regularized. On

28.02.2005, she retired from service on attaining the age of superannuation.

2.1 On 29.07.2006, the Inspector of Schools, Khurda Circle, Khurda, who had no authority under law, wrongly regularized the period of unauthorized absence of opposite party no.1 from 11.05.1980 to 11.03.1993 by sanctioning extra-ordinary leave (without pay) on medical ground. As a consequence thereof, the Accountant General (A & E), Odisha on 27.08.2007 sought clarification from the Finance Department regarding the leave sanctioned by the Inspector of Schools, Khurda Circle, Khurda in favour of opposite party no.1. On 25.09.2007, opposite party no.1 made a grievance before the State Government claiming regularization of her service and extension of revised pension. On 11.10.2007, the Finance Department clarified that the regularization made by the Inspector of Schools, Khurda Circle, Khurda in favour of opposite party no.1, which was beyond five years, was not justified as per Rule-72(1) of the Orissa Service Code.

Therefore, opposite party no.1 again approached the tribunal by filing O.A. No.1101 of 2008 seeking regularization of her leave period and calculation of pension from the period from 11.05.1980 to 11.03.1993 and the tribunal, vide order dated 19.08.2008, disposed of the said O.A. at the stage of admission with a direction to the State Government to consider the claim of opposite party no.1 for regularization of leave period and for revision of pension within three months. Pursuant thereto, the State Government consulted the Finance Department and on 10.08.2010 considered the claim of opposite party no.1 and decided to treat the period from 11.05.1980 to 11.03.1993 as unauthorized absence and that the said period cannot be counted towards qualifying service for the purpose of pension, as per Rule-23(2) of OCS (Pension) Rules, 1992. Against that order, opposite party no.1 again approached the tribunal by filing O.A No.1265 of 2010 and the tribunal, while disposing of the said O.A., vide order dated 03.11.2015, quashed the order dated 10.08.2010 passed by the Government and directed to calculate her

salary and pay the arrears after regularizing her service, with all consequential benefits. Hence this writ petition.

3. Mr. S. Jena, learned Standing Counsel for School and Mass Education Department appearing for the State-petitioners vehemently urged before this Court that the Inspector of Schools, Khurda Circle, Khurda had no jurisdiction to regularize the period of absence from 11.05.1980 to 11.03.1993 of opposite party no.1 by sanctioning extraordinary leave (without pay) on medical ground. He further contended that as opposite party no.1 remained absent for a period of 13 years, as per Rule-72(1) of the Orissa Service Code, the State Government is the competent authority to regularize the said period. Therefore, the order so passed by the Inspector of Schools, Khurda Circle, Khurda regularizing the service of opposite party no.1 is absolutely without jurisdiction and contrary to the provisions of law. It is contended that the tribunal, while passing the order impugned, has not taken into consideration the said aspect. It is also contended that

pursuant to order dated 19.08.2008 passed by the tribunal in O.A. No.1101 of 2008, the Government of Odisha in the Finance Department, vide order dated 10.08.2010, treated the period of absence from 11.05.1980 to 11.03.1993 as unauthorized absence and did not count the said period as qualifying service for the purpose of pension as per Rule-23(2) of OCS (Pension) Rules, 1992. It is further contended that the order dated 03.11.2015 passed by the tribunal in O.A. No.1265 of 2010 quashing the order dated 10.08.2010 passed by the Government refusing to regularize the service of opposite party no.1 for the period from 11.05.1980 to 11.03.1993 and issuing direction to the petitioners to calculate her salary and pay the arrears after regularizing the service period with all consequential financial and retiral benefits, cannot sustain in the eye of law. Therefore, the said order is liable to be set aside. To substantiate his contention, he has relied upon the judgment of the apex Court in **State of Odisha v. Ganesh Chandra Sahoo**, (2020) 2 SCC 588.

4. Mr. S.D. Das, learned Senior Counsel appearing along with Mr. H. Mohanty, learned counsel for opposite party no.1 vehemently contended that the undisputed fact is that opposite party no.1 had remained absent from 11.05.1980 to 11.03.1993, but on her grievance, the said period was regularized, vide order dated 29.07.2006, passed by the Inspector of Schools, Khurda Circle, Khurda by sanctioning extraordinary leave (without pay) on medical ground. Therefore, in compliance of the order dated 19.09.2008 passed by the tribunal in O.A. No.1101 of 2008, the order dated 10.08.2010 passed by the Government treating the absence period from 11.05.1980 to 11.03.1993 as unauthorized absence and not counting the said period as qualifying service for the purpose of pension as per Rule-23(2) of the OCS (Pension) Rules, 1992 cannot have any justification, in view of the order dated 29.07.2006 passed by the Inspector of Schools, Khurda Circle, Khurda. It is further contended that on attaining the age of superannuation, opposite party no.1 has already retired from service on 28.02.2005 and by

this time she has reached 72 years of age. Therefore, if the order dated 03.11.2015 passed by the tribunal in O.A. No.1265 of 2010 is complied with, she will be entitled to get more financial benefit for her sustenance. Thus, he contended that the order so passed by the tribunal is justified, which does not warrant interference of this Court at this stage.

5. This Court heard Mr. S. Jena, learned Standing Counsel for School and Mass Education Department appearing for the State-petitioners and Mr. S.D. Das, learned Senior Counsel appearing along with Mr. H. Mohanty, learned counsel for opposite party no.1 by hybrid mode. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, Rule-72 and Rule 79(b) of the Orissa Service Code, as well as Rule 23(2) of the OCS (Pension) Rules, 1992 are quoted below:-

**“Rule-72: REMOVAL OF GOVERNMENT SERVANT
AFTER REMAINING LEAVE FOR A CONTINUOUS
PERIOD EXCEEDING FIVE YEARS.**

(1) No Government servant shall be granted leave of any kind for a continuous period exceeding five years.

(2) Where a Government servant does not resume duty after remaining on leave for a continuous for five years , or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine , be removed from service after following the procedure laid down in the Odisha Civil Services (Classifications, Control and Appeal) Rules, 1962.”

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**“Rule-79: CONDITION ON WHICH SERVICE COUNTS
FOR INCREMENTS IN A TIME-SCALE.**

The following provisions prescribe the conditions on which service counts for increments in a time scale.

(a) All duty in a post on time-scale counts for increments in that time- scale:

Provided that for the purpose of arriving at the date of next increment in that time- scale, the total of all such period as do not count for increment in that time-scale shall be added to the normal date of increment.

(b) (1) the following periods count for increments in the time-scale of a post on which the Government servant concerned holds a lien as in the time –scale of the post of posts, if any , on which he would hold a lien had his lien not been suspended-

- (i) Service in another post, other than a post carrying less pay referred to in Clause (a) of Rule 54 whether in a substantive or officiating capacity;
- (ii) Service and deputation
- (iii) Foreign service; and
- (iv) Leave other than extraordinary leave.

(2) All leave other than extraordinary leave and the period of deputation out of India shall count for increment in the time scale applicable to a post in which Government servant was officiating at the time he proceeded on leave or deputation out of India and would have continued to officiate but for is proceeding on leave or deputation out of India:

Provided that the state Government may direct, subject to such conditions as may be specified, that extraordinary leave taken on account of illness or for any reason beyond the Government servant’s control, or for prosecuting higher scientific

and technical students may be allowed to count for increments under Clause (1) or (2)."

"Rule -23(2): Period of unauthorized leave of absence or joining time for which no joining time pay and allowances are admissible do not count for pension."

7. A bare perusal of the aforementioned provisions would go to show that Rule-72(1) of Orissa Service Code puts a restriction on grant of leave of any kind to a government servant for a continuous period exceeding 5 years. As per Rule-72 (2), if the Government servant does not resume duty, after remaining on leave for a continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall, unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Odisha Civil Services (Classifications, Control and Appeal) Rules, 1962.

8. In the present case, even though opposite party no.1 had remained absent for a period of 13 years, admittedly, she was not removed from service by following OCS (CCA) Rules, 1962. Therefore, if opposite party no.1 was absent for a period of 13 years, which is more than five years, in that case, the Government is the appropriate authority, only in exceptional circumstances of the case, to pass order with regard to such period of absence. As opposite party no.1 was absent for a period of 13 years, the same can be treated as unauthorized absence and cannot be counted as qualifying service for the purpose of pension as per OCS (Pension) Rules, 1992. Much emphasis was laid by learned counsel for opposite party no.1 on the letter dated 29.07.2006 issued by the Inspector of Schools, Khurda Circle, Khurda, by which he has regularized the period of unauthorized absence of opposite party no.1 from 11.05.1980 to 11.03.1993 by sanctioning extraordinary leave (without pay) on medical ground, but the same is without jurisdiction, as he has no competence to pass such order, rather, it is within the

domain of the Government take necessary steps for condonation by assigning reasons. Thereby, the order so passed by the Inspector of Schools, Khurda Circle, Khurda on 29.07.2006 cannot sustain in the eye of law. As a consequence thereof, in compliance of the order dated 19.08.2008 passed by the tribunal in O.A. No.1101 of 2008, the order dated 10.08.2010 passed by the State Government refusing to regularize the above period of absence for the purpose of pension, cannot be said to be illegal. Rather, the same has been passed in consonance with the provisions of Rule-23(2) of OCS (Pension) Rules, 1992 treating the said period from 11.05.1980 to 11.03.1993 as unauthorized absence and not to be counted as qualifying service for the purpose of pension. Thereby, the tribunal has failed to appreciate the provision of law, as discussed above, and on arriving at an erroneous finding has quashed the order dated 10.08.2010 passed by the Government refusing to grant benefit to opposite party no.1.

9. In **Ganesh Chandra Sahoo** (supra), the apex Court taking into account the submission of the respondent therein that for an employee suffering from mental ailment, his situation should be treated as an exceptional case under Rule-72 of the Orissa Service Code, which deals with leave for government servant remaining absent for over five years. But the said Rule-72 clearly indicates that no leave of any kind is admissible for the period exceeding five years unless the Government determines the case to be one of exceptional circumstances. Therefore, the apex Court, while considering such provision, held that the situation there is not one of exceptional circumstances, and that in fact, the veracity of the self-serving medical certificate to justify the seven years absence, was correctly doubted by the tribunal.

10. Applying the said principle to the present context, it is evident that opposite party no.1 had not provided any materials to indicate, as to why she remained absent from 11.05.1980 to 11.03.1993, save

and except indicating the medical ground, which was not substantiated properly. Since the Inspector of Schools, Khurda Circle, Khurda has no jurisdiction to regularize such a long period of absence, therefore, the letter dated 29.07.2006 issued by him is without jurisdiction. As such, the period of absence attracts the provision under Rule-72(2) of the Orissa Service Code. That apart, Rule 23(2) of OCS (Pension) Rules, 1992 makes it very clear that the period of unauthorized absence cannot be counted as qualifying service for the purpose of pension. Thereby, the tribunal has committed gross error apparent on the face of order in not considering the provision of law, as discussed above, and on a wrong premises has quashed the order dated 10.08.2010 passed by the State Government and directed the petitioners to calculate the salary and pay the arrears after regularizing the service period of opposite party no.1 with all consequential financial and retiral benefits.

11. In that view of the matter, the order dated 03.11.2015 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1265 of 2010 cannot sustain in the eye of law. Accordingly, the same is liable to be quashed and is hereby quashed. Since opposite party no.1 has retired from service with effect from 28.02.2005 on attaining the age of superannuation, the petitioners are directed to compute the services for extension of financial benefit, as due and admissible in accordance with law and pay the same to her as expeditiously as possible, preferably within a period of four months from the date of production/communication of this judgment.

12. The writ petition is accordingly allowed. However, there shall be no order as to cost.

(DR. B.R. SARANGI)
JUDGE

SAVITRI RATHO,J. I agree.

(SAVITRI RATHO)
JUDGE