IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 9312 of 2018

An application under Articles 226 & 227 of Constitution of India.

AFR **Dr. Kartik Kumar Das** ...... **Petitioner**

-Versus-

State of Odisha & another .... **Opp. Parties**

Advocate(s) appeared in this case:-

For Petitioner	:	Mr. Manas Ranjan Panda, Advocate.
For Opp. Parties	:	Mr. T.K. Praharaj, Standing Counsel.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
7th September, 2022

SASHIKANTA MISHRA, J.

The short point arising for determination in the present writ application is, whether it is permissible to withhold the pension of the Lecturer of a non-Government Aided Educational Institution on the ground of pendency of criminal proceeding against him.

2. The facts of the case are that the petitioner joined as a Lecturer in Economics on 11.8.1977 in the DAV College at Koraput. He served thereafter at several places. While serving as Principal in Surajmal Saha College at Puri, the Vigilance Department instituted a case against him and another Lecturer vide Bhubaneswar Vigilance P.S. Case number 47 of 2012 dated 30.06.2012 under Section 13(2) read with 13(1)(d) of the P.C. Act and Sections 467/468/471/420/120-B of IPC on the allegation of showing undue official favor to the Lecturers appointed by the Management to get grant-in-aid from the Government. The petitioner was subsequently transferred to Konark Bhagabati Mahavidyalaya at Konark where he joined as Reader in Economics on 14.08.2013 and on 18.11.2013, he remained in-charge of Principal of the said College till the date of his retirement upon attaining the age of superannuation i.e., on 31.01.2015. It is stated that neither any departmental proceeding was instituted against him nor charge-sheet was submitted by the Vigilance Department. The final pension and other retirement benefits of the petitioner were not sanctioned/disbursed in his favour for

which he sought for information under the RTI Act and came to know that because of pendency of the vigilance case, his pension has not been finalized. He submitted representation on 27.03.2018 to the Director of Higher Education, Odisha which was forwarded to the Additional Chief Secretary to Government in Higher Education Department for appropriate action. It is stated that no action has been taken in the matter even till date as a result of which, the petitioner is undergoing severe hardship. On the above grievance therefore, the petitioner has approached this Court in the present writ application seeking the following relief:

> *"It is therefore prayed that in the interest of justice this Hon'be Court may be graciously pleased to admit this writ Petition, issue notice to the Opp.Parties for show cause and after hearing of the counsels be pleased to issue writ of mandamus directing Opp.Parties, to grant/disburse the final pension, and other retirement benefits to the Petitioner within a stipulated period;*
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> *And pass any other order/orders direction/directions as may be deem fit and proper."*

3. A counter affidavit has been filed on behalf of opposite party Nos. 1 and 2. It is admitted that pension of the petitioner has not been finalized because of the pendency of the vigilance case against him in the Court of

Special Judge Vigilance, Bhubaneswar. Further, reference has been made to the provision under Rule 66 (1) and (2) of OCS (Pension) Rules, 1992 (for short, Pension Rules, 1992) which confers power on the Government to pay provisional pension to a retired Government employee if departmental or judicial proceedings are pending against him on the date of his retirement

4. The petitioner has filed rejoinder to the counter. It is stated that the Pension Rules, 1992 is not applicable to the petitioner as he is a teaching staff of a recognized non-Government College. For the employees of such Colleges, the Odisha Aided Educational Institution Employees Retirement Benefit Rules, 1981 (for short, 1981 Rules) is applicable. There is no provision in the 1981 Rules to withhold the pension or gratuity and other retirement benefits on the ground of pendency of a criminal case against a retired employee.

5. Heard Mr. M.R. Panda, learned counsel appearing for the petitioner and Mr. T.K. Praharaj, learned Standing Counsel for the State.

6. Mr. MR Panda would contend that Rule-3 of 1981 Rules provides that the said Rules shall apply to the teaching and non-teaching staff of all recognized Non-Government Colleges. Therefore, the provisions of the Pension Rules, 1992 are not applicable. There is no dispute that the petitioner spent his entire service career in Aided Educational Institutions and therefore, the 1981 Rules applies to his case. There is no provision in the 1981 Rules to withhold pension or any other retirement benefit of a retired employee on the ground of pendency of criminal proceeding against him. Therefore, according to Mr. Panda, the action of the opposite party authorities in not disbursing full pension to him is illegal. In support of his contention, Mr. Panda has relied upon the decision of the Supreme Court in the case of ***State of Jharkhand and others vs. Jitendra Kumar Srivastava and another*** reported in AIR 2013 SCC 3383.

7. Mr. T.K. Praharaj on the other hand, has referred to an administrative order issued by the Government in the erstwhile Education and Youth Services Department on 21st

March 1983. Paragraph 18 of the said order makes the Pension Rules of 1977 applicable to employees of Non-Government Aided Educational Institutions. Mr Praharaj further refers to Rule 66 (1) and (2) of the Pension Rules, 1992 to justify withholding of full pension to the petitioner on the ground of pendency of the vigilance case against him.

8. The facts of the case are undisputed to the extent that the petitioner retired as a Reader in Economics from the Konark Bhagabati Mahavidyalaya, Konark, which is an Aided Educational Institution within the meaning of Section 3 of the Odisha Education Act, 1969. Rule-3 of the 1981 Rules deals with application of the said Rules and reads as under:

> *"These rule shall also apply to the teaching and non-teaching staff of all recognized non-Government Colleges, High Schools, Senior Basic Schools and M.E. Shools which come under the direct payment system and all non-Government Primary Schools including Sanskrit Tols and Junior Basic Schools fully aided by Government in the Education & Youth Services Department directly or through Panchayat Samitis constituted under the Orissa Panchayat Samiti Act, 1959 or through a Notified Area Council or Municipality constituted under the Orissa Municipal Act, 1950:*
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> *Provided that Government may, by general or special order as may be issued in that behalf, specify any other educational institution or category or institutions and the staff working therein to whom the rules shall apply.*

9. Thus ordinarily, the provisions of the 1981 Rules would apply to the teaching and non-teaching staff of aided educational institutions. There is however a catch. The 1981 Rules has no provision dealing with the situation where a retired employee has a disciplinary or criminal proceeding pending against him as on the date of his retirement. Similar provision is available in the Pension Rules, 1992 in the form of Rule 66 which, reads as follows:-

> ***66. Grant of provisional pension where departmental or judicial proceeding is pending***-
> *(1) Where departmental or judicial proceedings are pending in respect of a Government servant on the date of his retirement, referred to in, he shall be paid a provisional pension not exceeding the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant ; or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.*
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> *(2) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon:- Provided that where departmental proceedings have been instituted under rule 16 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 for imposing any of the penalties specified in clause (i), (ii) and (iii-A) of rule 13 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.*
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> *(3) The provisional pension shall be authorized during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial*

proceedings, final orders are passed by the competent authority.

(4) The authority competent to sanction pension shall be the authority competent to sanction provisional pension.

(5) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period.

10. Now the question is, can the Pension Rules, 1992 have any application particularly having regard to the provision under Rule 3 of the 1981 Rules? Learned Standing Counsel appearing for the state has referred to an administrative order/executive instruction issued by the Government on 21.03.1983. The said order/instruction contains the following introduction:

"GOVERNMENT OF ORISSA
Education and Youth Services Department
No. XIVE/OTE. 81/83 11931 (2) EYS-
Dated, Bhubaneswar, the 21st March, 1983

From

Shri S.K. Mohapatra
Secretary to Government.

To

The Director of Public Instruction (HE) Orissa
The Director of Public Instruction (Schools), Orissa

Sub: Executive Instruction on the Orissa Aided Educational Institution' Employees' Retirement Benefit Rules, 1981.

Sir,

I am directed to say that the Orissa Aided Educational Institution's Employees' Retirement Benefit Rules, 1981 were

made by the State Government in the exercise of the power conferred by Sub-section (1) Section 27 of the Orissa Education Act, 1969 read which Sub-section (1) of Section 10 of the said Act. These rules came into force with effect from 1.4.1982 wide S.R.O. No. 118/82 published in OG.E.No.234 dated 20.2.1982. In exercise of the powers conferred by Sub-rule(1) of Rule 10 of the said rules, the Director of the Treasury and Inspection, Orissa has also been authorised to verify the order of sanction of pension/gratuity and death-cum-retirement gratuity and after due verification, issue necessary payment order in favour of the employees concerned for payment of pension/ gratuity under the aforesaid rules. Since the said rules do not provide for the detailed procedure and forms regarding submission of pension papers and sanction and payment of retirement benefits, Government have been pleased to prescribe the following procedure in the matter.
xx xx xx"

Thus, the executive instruction as above is intended to fill in the gap left in the 1981 Rules. Paragraph 18 of the said instructions reads as follows:

> *"18. For items not specifically provided in these instructions the provision out-lined in Orissa Pension Rules, 1977 so far as the same are not inconsistent with the provision of Orissa Aided Educational Institutions' Employees' Retirement Benefit Rules shall be applicable.*
>
> *It is requested that the above instructions may please be strictly adhered to."*

11. Undisputedly, Odisha Pension Rules, 1977 is no longer in force having been repealed upon commencement of the Pension Rules, 1992. Rule 116 of the Pension Rules 1992 is relevant and is quoted here under:

> ***116. Repeal and Saving-*** *(1) On the commencement of these rules, the Orissa Pension Rules, 1977, and*

orders including Office Memorandum issued thereunder and in force immediately before such commencement shall cease to operate.

(2) Notwithstanding such cessation-

(a) (i) every nomination for the payment of death/retirement gratuity including every form regarding the details of family of a Government servant for the purpose of family pension, which a Government servant had made or given under the so repealed rules; and

(ii) executive instructions issued in the form of Office Memorandum or Resolutions indicating the general procedure meant for expeditious disposal of pension cases which are not inconsistent with these rules, shall be deemed to have been made given or issued, (as) the case may be, under the corresponding provisions of these rules;

(b) any nomination for the payment of death / retirement gratuity any form regarding the details of family of a Government servant for the purpose of family pension or any formal application for the sanction of pension, required to be made or given by a Government servant under the old rules but not made or given before the commencement of these rules, shall be made or given after such commencement in accordance with the provisions of these rules;

(c) any case which pertains to the sanction of pension to a Government servant who had retired before the commencement of these rules and is pending before such commencement shall be disposed of in accordance with the provisions of the old rules as if these rules had not been made;

(d) any case which pertains to the sanction of death/retirement gratuity and family pension to the family of a deceased Government servant or of a deceased pensioner and is pending before the commencement of these rules shall be disposed of in accordance with the provisions of the old rules as if these rules had not been made;

(e) subject to the provisions of clauses (c) and (d) anything done or any action taken un old rules so

ceased shall be deemed to have been done or taken under the corresponding provisions of these rules."

12. Therefore, upon coming into force of the Pension Rules, 1992, the reference to the Pension Rules, 1977 in paragraph 18 of the executive instruction referred above has to be read as a reference to the Pension Rules, 1992 in view of the specific provision under Rule 116(2)(a)(ii) thereof. Consequently, the Executive Instruction shall also be deemed to have been issued under the Pension Rules, 1992.

13. Coming to the case law relied upon by Mr. Panda, it is seen that in the case of ***Jitendra Kumar Srivastava*** (Supra), the Apex Court was dealing with a case governed under the Bihar Pension Rules, 1950. Rule 43(b) of the said Rules provides for withholding of pension and other retirement benefits of a retired government servant only when the criminal or departmental proceeding has concluded with the finding of guilt. The Apex Court noted that the said Rule did not permit the government to withhold pension during pendency of the proceedings. In fact, the Apex Court itself framed the question for determination in the said case as under:

> *"Crisp and short question which arises for consideration in these cases is as to whether, in the absence of any provision in the Pension Rules, the state Government can withhold a part of pension and/or gratuity during the pendency of the departmental/criminal proceedings?"*
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> *(Emphasis supplied)*

14. Obviously, the cited case can be easily distinguished from the facts of the present case because unlike the Bihar Pension Rules, 1950, the Odisha Pension Rules, 1992, as already referred to earlier, contains a specific provision conferring power on the State Government to pay provisional pension during pendency of departmental or criminal proceedings.

15. Another question that briefly engages the attention of this court is whether the executive instruction has any sanctity or statutory force. In the case of ***State of UP vs. CM Nigam*** reported in ***(1977) 4 SCC 345*** it was held that the executive instructions operate when there are no rules or when there are gaps in the rules and they are meant for supplementing the rules and therefore they should be considered to be enforceable. In the case of ***Jitendra Kumar Srivastava (Supra)*** also, it was held that the administrative instructions can supplement the

statutory rules by taking care of those situations where the statutory rules are silent. As has already been discussed herein before, there is no provision in the 1981 Rules to deal with the cases of retired employees against whom departmental/criminal proceedings are pending as on the date of the retirement. This is obviously a gap left in the 1981 Rules. Therefore, taking recourse to the executive instruction of 21st March 1983, the provision under Rule 66 of the Pension Rules, 1992 has to be applied. Otherwise an anomalous situation would arise namely, a retired government employee against whom a criminal proceeding is pending on the date of his retirement would be entitled to only provisional pension whereas, a similarly placed retired employee of an Aided Educational Institution would be entitled to full pension. An absurd proposition, obviously.

16. For the foregoing reasons therefore, this Court finds no infirmity much less illegality in the action of the opposite party authorities in not sanctioning full pension to the petitioner. To such extent therefore, the relief claimed in the writ petition, that is, for a direction to the authorities to

disburse full pension to the petitioner, cannot be granted. Nonetheless, it is directed that the petitioner shall be paid provisional pension strictly as per the provisions of Rule 66 (1) and (2) of the Pension Rules, 1992.

17. The writ application is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 7th September, 2022/A.K. Rana, P.A.