

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.26372 of 2022

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

.....

Santosh Kumar Barik

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner : M/s.B.R.Barik, S.K.Parida,
S.Patra & B.B.Pradhan.

For Opp. Parties : Addl. Standing Counsel
Mr. A.P.Das.

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing:13.10.2022 and Date of Judgment:19.10.2022

संक्षिप्त नमो

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. B.R.Barik, learned counsel for the Petitioner and Mr. A.P.Das, learned Addl. Standing Counsel for the State-Opposite Parties.
3. It is submitted that the petitioner's father since died while in service in the year 2019 the petitioner made his application in the year 2019 for his appointment under Rehabilitation Assistance Scheme. It is submitted that on receipt of the said application and after receipt of the distress certificate, though the claim of the petitioner was

considered at different level, but no final decision was taken. It is submitted that even though the petitioner is otherwise eligible for his appointment under the provisions of the Rehabilitation Assistance Scheme, but the same was not considered and kept pending.

4. It is submitted that instead of deciding the claim of the Petitioner in accordance with the relevant provision as prevalent at the time of death of the deceased employee, Petitioner was forced to make a fresh application pursuant to Annexure-8.

5. It is further submitted that without considering the claim as per the rule prevalent at the time of death of the deceased employee, Opposite Party No.2 considered the same in accordance with the Amended Rules, 2020 and rejected the application vide the impugned order dated 01.03.2021 under Annexure-10.

6. Learned counsel for the Petitioner submitted that even though the deceased Government employee died prior to coming into force of the Odisha Civil Services (Rehabilitation Assistance) Rules, 2020, which came into force on the date of its publication of the Odisha Gazette i.e. 27.02.2020, but the case of the Petitioner instead of being considered as per the rules prevalent at the time of the death of the deceased employee was considered as per the 2020 amended rules and rejected vide the impugned order.

7. It is submitted that since the deceased employee died prior to coming into force of the aforesaid amended rules, 2020, the said rules should not have been applied to the

case of the Petitioner and accordingly the claim should not have been rejected on that ground.

8. Learned counsel for the Petitioner first of all relied on the decision of the Hon'ble Apex Court reported in the case of **State of Madhya Pradesh vs. Ashish Awasthi** reported in **(2021) (II) OLR-1072**. In the said reported decision, the Hon'ble Apex Court in a clear and categorical term observed that the policy prevalent prior to the death of the deceased employee is only to be considered and not the subsequent policy. Similarly, learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court reported in the case of **Malayananda Sethi vrs. State of Orissa & Others** reported in 2022(II) OLR SC-1. In the said reported decision Hon'ble Apex Court held that the appellant therein shall be entitled for his appointment on compassionate ground as per the rules involved at the time of the death of the concerned employee.

9. It is also submitted that pursuant to the order passed by the Hon'ble Apex Court in the case of **Malayananda Sethi**, the appellant therein was provided with the appointment under the provisions of Rehabilitation Assistance Scheme in the Department of Excise Vide Office Order No.2647 dated 16.06.2022.

10. Learned counsel for the Petitioner also submitted that the Hon'ble Apex Court in another decision reported in the case of **The Secretary to Govt. Department of Education (Primary) & Others vs. Bheemesh Alias Bheemappa**, after taking into consideration the decisions of the Hon'ble Apex Court in the case of,

(i) Canara Bank vs. M.Mahesh Kumar (2015) 7 SCC 412.

(ii) Indian Bank vs. Promila and Another (2020) 2 SCC 729.

(iii) MGB Gramin Bank vs. Chakrawarti Singh (2014) 13 SCC 583.

(iv) N.C. Santosh vs. State of Karnataka and Others (2020) 7 SCC 617.

(v) State Bank of India vs. Jaspal Kaur (2007) 9 SCC 571.

(vi) State Bank of India vs. Raj Kumar (2010) 11 SCC 661.

(vii) State Bank of India vs. Sheo Shankar Tewari (2019) 5 SCC 600.

(viii) State of Madhya Pradesh vs. Amit Shrivastava (2020) 10 SCC 496.

held as follows in Paragraph-19 of the said judgment:-

“19. The important aspect about the conflict of opinion is that it revolves around two dates, namely, (i) date of death of the employee; and (ii) date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor. Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020. If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different

results, one in respect of the person who made the application before and another in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new / modified scheme. Therefore, we are of the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor”.

11. Learned counsel for the Petitioner also submitted that since in view of the provision contained in the amended rules, 2020 the right accrued in favour of the Petitioner for his appointment under the provision of Rehabilitation Assistance Scheme has been taken away, the said action of the State-Opposite Parties is contrary to the decision of the Hon’ble Apex Court reported in **AIR 2022 SC-1349**. Hon’ble Apex Court in the said reported decision in Paragraphs-48, 49, 54 and 55 held as follows:-

“48. In the instant case, the Bank pension scheme was introduced from 1st April 1989 and options were called from the employees and those who had given their option became member of the pension scheme and accordingly pension was continuously paid to them without fail and only in the year 2010, when the Bank failed in discharging its obligations, respondent employees approached the High Court by filing the writ petitions. The Bank later on withdrawn the scheme of pension by deleting clause 15(ii) by an amendment dated 11th March, 2014 which was introduced with effect from 1st April, 1989 and the employees who availed the benefit of pension under the scheme, indeed their rights stood vested and accrued to them and any amendment to the contrary, which has been made with retrospective operation to take away the right

accrued to the retired employee under the existing rule certainly is not only violative of Article 14 but also of Article 21 of the Constitution.

49. It may also be noticed that there is a distinction between the legitimate expectation and a vested/accrued right in favour of the employees. The rule which classifies such employee for promotional, seniority, age of retirement purposes undoubtedly operates on those who entered service before framing of the rules but it operates in future. In a sense, it governs the future right of seniority, promotion or age of retirement of those who are already in service.

54. So far as the submission made by learned counsel for the appellant about the financial distress of the appellant Bank to justify the impugned amendment to say that it may not be possible to continue the grant of pension any more is concerned, suffice to say, that the rule making authority was presumed to know repercussions of the particular piece of subordinate legislation and once the Bank took a conscious decision after taking permission from the Government of Punjab and Registrar, Co-operative, introduced the pension scheme with effect from 1st April 1989, it can be presumed that the competent authority was aware of the resources from where the funds are to be created for making payments to its retirees and merely because at a later point of time, it was unable to hold financial resources at its command to its retirees, would not be justified to withdraw the scheme retrospectively detrimental to the interests of the employees who not only became member of the scheme but received their pension regularly at least up to the year 2010 until the dispute arose between the parties and entered into litigation.

55. In our view, non-availability of financial resources would not be a defence available to the appellant Bank in taking away the vested rights accrued to the employees that too when it is for their socio-economic security. It is an assurance that in their old age, their periodical payment towards pension shall remain assured. The pension which is being paid to them is not a bounty and it is for the appellant to divert the resources from where the funds can be made available to fulfill the rights of the employees in protecting the vested rights accrued in their favour”.

12. It is also submitted that in view of the benefit extended in favour of the appellant, **Malayananda Sethy** basing on the judgment rendered in his case, the denial of such benefit in favour of the Petitioner relying on the

amended rules 2020 is contrary to the provision contained under Article -14 of the Constitution of India.

13. Learned counsel for the Petitioner in support of the aforesaid submission relied on the decision of the Hon'ble Apex Court reported in **2007 (II) ATT (SC)-81**. Hon'ble Apex Court in the said reported decision in Para-13 has held as follows:-

“13. It is now well-settled that a State is bound by the constitutional scheme to treat all persons equally in the matter of grant of public employment as envisaged under Articles 14 and 16 of the constitution of India”.

14. Learned counsel for the Petitioner also relied on another decision with regard to the concept of the equality reported in **AIR 2021 SC 5686**. Hon'ble Apex Court in Para-9.3 of the said reported judgment held as follows:-

“9.3 The concept of equality before the law and equal protection of the laws emerges from the fundamental right expressed in Article 14 of the Constitution. Equality is a definite concept. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is therefore to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear in just and rational relation to the object sought to be achieved. In a given case Article 14 of the Constitution may permit a valid classification. However, a classification to be followed must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another must have a reasonable nexus to the objects sought to be achieved. In the present case allotment of 200 Sq.Yards free of cost to 134 employees was to avoid undue hardship to the ex-employees and as a welfare measure. As observed hereinabove those 318 ex-employees who are denied the benefit of allotment of 200 Sq.Yards of plots free of cost are similarly placed persons with that of 134 employees who are allotted 200 Sq.Yards plots free of cost. There is no rationale justification in providing differential treatment to

one class of ex-employees similarly placed with another class of ex- employees who are allotted the plots”.

15. Learned counsel for the Petitioner also relied on another decision of the Hon’ble Apex Court reported in **AIR 2022 SC-73**. Hon’ble Apex Court in the said reported decision in Para-30 to 33 has held as follows:-

“30. We find that the appellant and Dr. P. Leela Krishnan were in fact similarly situated. Both these individuals were appointed as teaching faculty at the respondent University after practicing as advocates in various Courts of Kerala. They were both appointed before the proviso to Rule 25 (a) came into effect, i.e. before 12th February 1985 and retired after the said proviso came into force.

31. In the circumstances, we find no valid ground to sustain the application of the proviso in relation to the appellant, thereby denying the benefit of Rule 25(a), when the same was not applied in the case of Dr. P. Leela Krishnan, thereby allowing the benefit of Rule 25(a).

32. While we accept the settled position of law that the rule applicable in matters of determination of pension is that which exists at the time of retirement, we are unable to find any legal basis in the action of the respondent University of selectively allowing the benefit of Rule 25 (a). The law, as recognized by this Court in Deoki Nandan Prasad and Syed Yousuddin Ahmed (supra) unequivocally states that the pension payable to an employee on retirement shall be determined on the rules existing at the time of retirement. However, the law does not allow the employer to apply the rules differently in relation to persons who are similarly situated.

33. Therefore, we are of the view that if the respondent University sought to deny the benefit of Rule 25 (a), in light of the proviso which was subsequently inserted thereby limiting the benefit of the Rule, it ought to have done so uniformly. The proviso could have been made applicable in relation to all employees who retired from service of the respondent University following the introduction of the proviso, i.e. after 12th February 1985. However, the action of the respondent University of selectively applying the proviso to Rule 25(a) in relation to the appellant, while not applying the said proviso in relation to similarly situated persons, is arbitrary and therefore illegal. Such discrimination, which is not based on any reasonable classification, is violative of all canons of equality which are enshrined in the Constitution of India”.

16. Making all such submissions, learned counsel for the Petitioner submitted that in view of the admitted position that the deceased employee has died prior to coming into force of the amended rules, 2020, the rejection of his claim relying on the said amended rules is prima facie illegal and liable for interference of this Court.

17. Learned counsel for the State-Opposite Parties on the other hand submitted that in view of the provision contained in the amended rules, 2020, which provides for consideration of all pending cases as per the said rules, no illegality has been committed in considering the claim of the petitioner in accordance with the said rules and rejecting the same vide the impugned order.

18. Heard learned counsel for the Parties.

19. Perused the materials available on record. This Court after going through the same finds that the deceased employee has admittedly died prior to coming into force of the amended rules, 2020. Therefore, relying on the decision of the Hon'ble Apex Court reported in the case of **Malayananda Sethi vs. State of Orissa & Others** and the decision of the Hon'ble Apex Court as cited (supra), this Court is of the considered opinion that consideration of the claim of the Petitioner for his appointment under Rehabilitation Assistance Scheme relying on the amended rules 2020 is not only illegal but also violative of Article-14 of the Constitution of India. The said action of the Opposite Parties in rejecting the Petitioner's claim also amounts to discrimination. Therefore, as per the considered view of this Court, the impugned order rejecting the Petitioner's claim relying on the amended rules 2020 is not sustainable in the eye of law.

20. Hence, this Court is inclined to quash the impugned order dtd. 01.03.2021 under Annexure-10 and while quashing the same, this Court directs the Opposite Parties to consider the claim of the Petitioner as per the rules prevalent at the time of the death of the deceased employee. While directing so, this Court further observes that on such reconsideration as directed hereinabove, if the Petitioner is found eligible then necessary order of appointment be issued in his favour. This Court directs the Opposite Parties to complete the entire exercise within a period of two months from the date of receipt of this order.

21. With the aforesaid observations and directions, the Writ Petition stands disposed of. There shall be no order as to costs.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 19th of October, 2022/Subrat