

ORISSA HIGH COURT: CUTTACK

WPC (OAC) No. 4521 of 2015

(An application under Articles 226 and 227 of the
Constitution of India)

AFR Kishore Chandra Barik Petitioner

-Versus-

State of Odisha & others Opp. Parties

Advocate(s) appeared in this case :-

For Petitioner	:	M/s. Sanjib Mohanty, B. Biswal and S.C. Mohanty, Advocate
For Opp. Parties	:	Mr. H.K. Panigrahi, Addl. Standing Counsel for the State

**CORAM
JUSTICE SASHIKANTA MISHRA**

**ORDER
4th May, 2022**

SASHIKANTA MISHRA, J. The short point for determination in
this case is whether the period of service rendered as an
NMR employee under the Govt. of Odisha can be counted

towards qualifying service for pensionary benefit.

2. The brief facts of the case are that the petitioner was initially engaged as an NMR employee as Typist on 24.05.1980 as per order of the Superintending Engineer PH Circle. In the year 1998, as per the scheme framed by the Government, the petitioner's service was regularized and he was absorbed as a peon on 23.05.1998 in the regular establishment. The petitioner continued as such till he attained the age of superannuation and retired from Govt. Service. After his retirement, the Executive Engineer requested the Chief Engineer PH, Urban, Odisha to condone the upper age limit of the petitioner by granting post facto approval exercising power under Rule 52 of the Odisha Service Code for sanction of pensionary benefit to him. The Chief Engineer PH, Urban also requested the Government for approval of the condonation of upper age limit of the petitioner. It is stated that such approval being granted, the concerned authority sanctioned pension in favour of the petitioner by preparing the pension papers as per office order dated 30.07.2014, but the petitioner was

paid only minimum pension. In other words, the period of service rendered by the petitioner under the regular establishment had only been counted for pension and pensionary benefit but the service rendered as NMR employee had not been taken into account. The petitioner was granted minimum pension though he had rendered 32 years of service, which includes 18 years as NMR Typist and 14 years 1 month 7 days as a Peon in regular establishment. As such, the petitioner submitted a grievance to opposite party no.6 on 02.03.2015, which was forwarded to opposite party no.1. However, the opposite party no.1 rejected the grievance of the petitioner on the ground that such proposal had already been rejected by the Finance Department as it does not conform to Rule-18(6) of the Orissa Civil Services (Pension) Rules, 1992 (in short, the "Rules, 1992"). The petitioner thereafter sent a pleader's notice to the opposite party no.1 but the same was also rejected. According to the petitioner, the work-charged employees, who have rendered five years continuous service, are to be regularized in the vacant

post. In the case at hand, though posts were lying vacant, the concerned authority did not take any step for regularization of service of the petitioner after five years service in the work charged establishment. The petitioner claims that he should have been regularized w.e.f. 1985. It is further stated that one Brundaban Behera, who was working as an NMR, was granted full pension by the Government even though his services were not regularized. It is further stated that when the job contract and work charged employees are given similar benefits, the service rendered by the petitioner under NMR establishment should also have been counted for the purpose of pension and pensionary benefit treating the same as qualifying service. In some cases, as per order passed by the erstwhile Odisha Administrative Tribunal, and confirmed by the Hon'ble Supreme Court, the entire period of job contract service rendered by the employees have been counted for the purpose of pension and pensionary benefit and therefore, on the same analogy the petitioner's service rendered as NMR employee should also

have been counted. On such facts the petitioner filed the Original Application before the erstwhile Odisha Administrative Tribunal which has since been transferred to this Court and registered as the present writ application. The petitioner prays for setting aside the orders dated 18.03.2015 (Annexure-7) and 09.07.2015 (Annexure-8) and to direct the opposite parties to count the NMR service period of the petitioner from 24.05.1980 to 22.05.1998 as qualifying service towards pension and pensionary benefits and to pay the same within a stipulated period.

3. A counter has been filed on behalf of opposite parties no. 1 to 5. While admitting the facts relating to engagement of the petitioner initially in the NMR establishment and subsequently his regularization as a Peon, it is stated that the petitioner was never absorbed under the work charged establishment, but was absorbed under regular establishment as night watchman-cum-sweeper and subsequently as peon since 23.05.1998. It is further stated that the petitioner's grievance was rejected

as the same has no merit because it does not conform to Rule 18(6) of the Rules, 1992 with due concurrence of the Finance Department.

A rejoinder affidavit has been filed by the petitioner mainly stating that reference to Rule 18(6) of the Rules, 1992 by the opposite parties is misconceived because the same relates only to job contract employees who have been subsequently brought over to the regular establishment. It is further stated that the petitioner was working as an NMR employee under the Govt. of Odisha in Housing and Urban Development Department, which is a pensionable establishment. It is further claimed that the petitioner's case is squarely covered by the ratio of the decision of the apex Court in the case of **V. Sukumaran vs. State of Kerala and another** reported in (2020) 8 SCC 106.

4. Heard Mr. Sanjib Mohanty, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

5. It is strenuously argued by Mr. Mohanty that reliance on Rule 18(6) of the Rules, 1992 by the opposite parties while rejecting the claim of the petitioner is entirely misconceived and erroneous because a bare reading of the said rule would show that the same applies only to job contract employees who have subsequently been brought over to the regular establishment. The case of the petitioner stands on an entirely different footing. Mr. Mohanty has referred to the decision of the apex Court in **V. Sukumaran** (supra), where it was held that the pensionary provisions must be given a liberal construction as a social welfare measure. Mr. Mohanty has further drawn attention of the Court to the observation made by the apex Court in the aforesaid decision that pension is a right vested in a government servant and is not a bounty payable at the will and pleasure of the Govt. It is argued by Sri Mohanty on such basis that the decision of the opposite party authorities in rejecting his claim for counting the entire period of service rendered as an NMR employee as qualifying service for the purpose of pension

and pensionary benefits cannot be sustained in the eye of law.

6. Mr. H.K. Panigrahi, on the other hand has fairly admitted that even though Sub-Rule (6) of Rule-18 of the Rules, 1992, strictly speaking, does not apply to NMR employees but to job contract employees who have been brought over to the regular establishment, yet fact remains that the NMR service not being in a pensionable establishment, the petitioner is not entitled to full pension as per Sub-Rule (1) and (2) of Rule 18 of the Rules, 1992. Therefore, according to Mr. Panigrahi notwithstanding the fact that reference to Rule-18(6) was erroneously made, still the petitioner will not be entitled to full pension.

7. As is evident from the forgoing narration, the basic facts involved in the case are not in dispute inasmuch as, the petitioner was initially engaged as NMR worker and was subsequently taken over to the regular establishment. It is also not disputed that the petitioner rendered a total service of 32 years, out of which he rendered service as an NMR employee for 18 years and the

(6) Notwithstanding anything contained in clause (i) & (iii) of sub-rule (2), a person who is initially appointed in a job contract establishment and is subsequently brought over to the post created under regular / pensionable establishment, so much of his job contract service period shall be added to the period of his qualifying service in regular establishment and would render him eligible for pensionary benefits. (Vide Finance Department Notification No.45865/F., dt.01.09.2001)”)

From a bare reading of the Sub-Rule (6) it is evident that the same is applicable to only those employees who had been initially appointed in a job contract establishment and subsequently brought over to a post created under regular/pensionable establishment. On the other hand, the petitioner, as already stated, joined as an NMR employee and was brought to the regular establishment. Therefore, Rule-18(6) clearly has no application to the facts of the present case. It is not understood as to on what basis the Finance Department as well as the Housing and Urban Development Department relied upon the said rule to reject the petitioner's grievance. Be that as it may, the question is, if the petitioner's grievance is otherwise valid or legally tenable. To answer the above question, it would be apposite to refer to Rule-18 of the Rules, 1992. Sub-rules (1) and (2) whereof read as follows

“18. Conditions subject to which service qualifies-

(1) Service does not qualify for pension unless it is rendered in a pensionable establishment /post.

(2) The entire continuous temporary or officiating service under Government without interruption in the same post or any other post, shall count for the purpose of pension in respect of all categories of Government servants except in the following cases, namely :-

- “(i) Period of service in a non-pensionable establishment;*
- (ii) Period of service in the work-charged establishment;*
- (iii) Period of service paid from contingencies;*
- (iv) Where the employee concerned resigns and is not again appointed to service under Government or is removed/dismissed from public service;*
- (v) A probationer who is discharged from service for failure to pass the prescribed test or examination;*
- (vi) Re-employed. pensioner, Government servants engaged on contract and Government servants not in whole time employment of Government;*
- (vii) Service paid from Local Fund or Trust Fund;*
- (viii) Service in an office paid by fees whether levied by law or under authority of the Government or by Commission; and*
- (ix) Service paid out of the grant in accordance with Law or Custom.”*

It is stated at the bar that the NMR establishment is not a pensionable establishment and that NMR employees are paid from contingencies. It is submitted by Mr. Panigrahi that no separate head for payment of wages exists for NMR employees. Therefore, in view of the specific provision under sub-rule (1) and sub-rule (2), the petitioner is not entitled to be granted full

pension except the service rendered under the regular establishment.

8. After giving my anxious consideration, to the rival contentions advanced before me and on a careful perusal of the relevant Rules referred above, I am left with no doubt that there is no provision for counting the service rendered under NMR establishment towards qualifying service for pension and pensionary benefits.

9. Mr. Mohanty has relied upon the decision of the Hon'ble Supreme Court of India in the case of **V. Sukumaran (supra)**. A reading of the said decision reveals that the Hon'ble Court have referred to Rule-13 of the Kerala Service Rules which provides for counting fifty percent of the service in work establishment when such employees are absorbed in regular establishment. Basing upon such Rule, the apex Court allowed the prayer of the petitioner to count his past service under the non-pensionable establishment for the purpose of pensionary benefit.

10. Coming back to the Rule prevailing in the State of Odisha, i.e., Rule-18 of the Rules, 1992 it is seen that Sub-Rule (4) provides a sort of exception to the prohibition under Sub-Rules (1) and (2), specifically to Sub-Rule (1). Sub-Rule (4) reads as under:

“18. Conditions subject to which service qualifies-

xx xx xx

(4) Notwithstanding anything contained in sub-rule (1) Government, may, by general or special order, prescribe any class of service or post which were previously born under work-charged establishment or paid from contingencies to be pensionable.”

11. Thus, from the conspectus of the analysis made hereinbefore, it becomes evident that notwithstanding the prohibition of the statute for grant of pension to persons engaged in non-pensionable establishments or paid from contingencies, power is conferred on the Government to also make such services pensionable.

12. As things stand, the petitioner's claim of counting his past service rendered as an NMR employee as qualifying service for pension and pensionary benefits cannot be allowed within the four corners of Rule-18.

Since the NMR employees are paid from contingencies and in any case, belong to a non-pensionable establishment, it is always open to the Govt. to make such service pensionable by taking recourse to sub-rule (4) of Rule-18 quoted above by passing a general or special order. It is submitted by Mr. Mohanty that several similarly placed employees have been conferred with similar benefits as per orders passed by the Tribunal and confirmed by this Court as well as the apex Court. Therefore, depriving the petitioner from such benefits would undoubtedly cause hardship to him.

13. Having considered the above contention, this Court is also of the view that the depriving the petitioner from his desired relief would cause undue hardship to him. Even otherwise, an employee who has rendered more than three decades of unblemished service to the government, would be placed in a difficult position financially if he is deprived of full pension. However, it is well-settled that no direction can be issued by any Court to the authority *de hors* the statutory provisions. As

discussed hereinbefore, the rules do not permit counting of service rendered under the NMR establishment as qualifying service for pension and pensionary benefits. Therefore, such a direction as desired by the petitioner in the present writ application cannot be issued. It is open to the Government to consider the case of the petitioner in terms of sub-rule (4) of Rule-18 by passing a special order. Even otherwise, Rule 114 of the OCS (Pension) Rules, 1992 confers ample power on the government to relax any provision of the Rules which causes undue hardship in any particular case. Therefore, save and except for directing the Government to consider the possibility of taking a decision viz-a-viz the petitioner as per sub-rule (4) of Rule-18 or by relaxing the provisions under Rule-18 as such by exercising power under Rule-114 of the Rules, 1992, no order granting the desired relief to the petitioner can be passed by the Court.

14. In the result, the writ petition is disposed of by directing the Government in the appropriate department to take a decision viz-à-viz the petitioner as per sub-rule

(4) of Rule-18 or to consider the possibility of relaxing the provision under Rule-18(1) and (2) of OCS(Pension) Rules, 1992 by exercising power under Section 114 of the said Rules so as to grant the desired relief to the petitioner. Either way, the decision shall be taken within a period of two months from the date of communication of this order or on production of certified copy thereof by the petitioner and the same shall be communicated to him within a period of fifteen days thereafter.

15. The writ petition is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 4th May, 2022/ A.K. Rana