

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) No.3797 of 2012

In the matter of an application under Section 19 of the
Administrative Tribunal's Act, 1985.

.....

Kamalakanta Mallick

....

Petitioner

-versus-

State of Odisha & Ors.

....

Opposite Parties

For Petitioner : Ms. B.K. Pattnaik(Advocate)

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

PRESENT:

THE HON'BLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing: 06.12.2022 and Date of Order:16.12.2022

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Arrangement
(Virtual/Physical) Mode.

2. The present writ petition has been filed with the following prayer:-

*i) To direct the respondents to protect his pay against the post of
mate by modifying the order dtd.26.11.2008 and regularize his
service from the date of initial appointment.*

ii) To quash the order dtd.14.09.2012 under Annexure-10.

iii) To direct the respondents to treat the applicant in terms of OCS (Pension) Rules, 1992.

iv) And pass such other order/orders as may be deemed fit and proper for the interest of justice.”

3. Shorn of unnecessary details, the case of the present Petitioner is that on being declared as being permanently incapacitated the Petitioner as the son of the concerned employee though was appointed under the provision of Rehabilitation Assistance Scheme, but instead of appointing him as against a regular post, the Petitioner was appointed as a Mate in the Work Charged Establishment vide order dtd.29.03.1996 under Annexure-1. Since instead of appointing him as against a regular post the Petitioner was appointed in the Work Charged Establishment, the Petitioner after his joining in terms of order under Annexure-1 moved the Opp. Parties time and again for his appointment as against a regular post. After much persuasion and in consideration of the claim of the Petitioner, the Petitioner vide order dtd.25.11.2008 was appointed as a regular Junior Clerk under the Rehabilitation Assistance Scheme with usual D.A. and other allowances under Annexure-5. Since in the said order under Annexure-5 it was indicated that the service condition of the Petitioner will be covered under the contributory pension scheme in terms of the

Finance Department Office memorandum dtd.13.07.2006, the Petitioner after such appointment as a regular Junior Clerk moved the O.P. No. 4 under Annexure-6 with a prayer to recommend his case for allotment of GPF Account No. as per the prevalent old pension scheme in existence prior to 01.01.2005. The Petitioner also prayed for protection of his pay on his appointment as a regular Junior Clerk as his pay was fixed in a lower scale of pay vide order under Annexure-5. When both the requests of the Petitioner were rejected vide the impugned order dtd.14.09.2012 under Annexure-10, the present writ petition was filed with the prayer as mentioned hereinabove.

4. Ms. B.K. Pattnaik, learned counsel for the Petitioner vehemently contended that since on being declared as permanently incapacitated to render further service, the Petitioner as the son of the employee concerned was appointed under the provisions of Rehabilitation Assistance Scheme vide order dtd.29.03.1996 under Annexure-1, the Petitioner should not have been engaged in the Work Charged Establishment as there is no provision under the Rehabilitation Assistance Scheme for appointment of an employee in the Work Charged Establishment. Subsequent to such appointment in the Work Charged Establishment when the Petitioner as well as his mother

moved the Opp. Parties seeking his appointment against a regular post, though vide order dtd.25.11.2008 under Annexure-5, the Petitioner was appointed as a regular Junior Clerk under the Rehabilitation Assistance Scheme, but in the said order it was wrongly indicated that the Petitioner will be governed under the new Contributory Pension Scheme as per Finance Department Office Memorandum dtd.13.07.2006, which came into effect from 01.01.2005.

5. Learned counsel for the Petitioner further contended that since the Petitioner was initially appointed though illegally, in the Work Charged Establishment vide order dtd.29.03.1996 under Annexure-1, he should not be covered under the provisions of the new Contributory Pension Scheme, which came into force w.e.f.01.01.2005. Because of such stipulations as contained in the order under Annexure-5 the Petitioner was not permitted to make contribution towards GPF. Not only that by the time the Petitioner was appointed on regular basis vide order under Annexure-5, though the Petitioner was drawing salary in the pay band of Rs.4440/- - Rs.7440/- with grade pay of Rs.1300/- and drawing salary with pay of Rs.6400/- w.e.f.01.03.2008, but in the order under Annexure-5 the Petitioner's scale of pay was fixed in a lower scale of Rs.3050/- -Rs.4590/- with usual D.A. and

other allowances. The Petitioner after issuance of the order of appointment under Annexure-5, moved the Opp. Parties seeking protection of his pay as well as with a prayer to allow him to contribute under the GPF scheme instead of making contribution under the contributory pension scheme.

6. It is brought to the notice of this Court the Office Memorandum issued by the Finance Department in the year 2007 communicated vide Memo No. 16.05.2007 under Annexure-9, wherein it has been held as follows:-

“After careful consideration of the above aspects, it has now been clarified that the persons who are appointed under job contract and work charged establishment prior to 01.01.2005 and brought over the regular establishment on or after 01.01.2005 are not to come under the coverage of the O.C.S. (Pension) Amendment Rules, 2005 as notified in Finance Department Notification No. 44451/F, dt.17.09.2005. their cases would be governed in terms of OCS (Pension) Rules, 1992 and existing GPF (O) Rules would be applicable to them.”

7. It is contended that in view of the stipulations contained under Annexure-9 the Petitioner should not have been governed under the contributory pension scheme and instead his service condition is to be governed in terms of OCS (Pension) Rules, 1992 and existing GPF(O) Rules. But it is contended that without following the said Office Memorandum issued under Annexure-9, the claim of the Petitioner for

being covered under the GPF(O) Rules as well as for protection of his pay was illegally rejected vide order dtd.14.09.2012 under Anenxure-10. Since the said order has been passed contrary to the guidelines issued by the Finance Department under Anenxure-9 and without following the pay drawn by the Petitioner under Annexure-8, the same is not sustainable in the eye of law and requires interference of this Court.

8. Mr. A.P. Das, learned ASC on the other hand made his submission basing on the stand taken in the counter affidavit. It is contended that even though the father of the Petitioner, who was allowed to take retirement on the ground of permanent incapacitation while working as against a regular post of Patrol, but the Petitioner because of having no experience at the work site, he was appointed as a Mate under the Rehabilitation Assistance Scheme in the Work Charged Establishment. It is also contended that under the provisions of OCS (R.A.) Rules, 1990 any appointment is to be made either in Group – C or Group – D post and it is an one time affair.

9. However, taking into consideration the grievance raised by the Petitioner, the Petitioner was appointed on regular basis as against the post of Junior Clerk vide Order under Annexure-5. Since the Petitioner was appointed on regular basis as a special case vide order

dtd.25.11.2008 under Annexure-5 and by that time the new pension scheme w.e.f.01.01.2005 had come into operation in terms of Finance Department Office Memorandum dtd.13.07.2006, the prayer of the Petitioner to allow him to come under the provisions of Old Pension Rule & GPF (O) Rules was rightly rejected vide order under Annexure-10. It is also contended that on joining as against a post under the Rehabilitation Assistance Scheme the claim of eligible person of a deceased/permanently disabled Govt. employee ceases. Accordingly, it is contended that no illegality or irregularity has been made by the Opp. Parties in rejecting the claim of the Petitioner with regard to his claim for being covered under the Old Pension Rules & GPF (O) Rules as well as for protection of his pay.

10. Ms. Pattnaik, learned counsel for the Petitioner taking into account the submission made by the learned Addl. Standing Counsel made further submission basing on the pleadings made in the rejoinder affidavit. It is contended that at the time of initial appointment of the Petitioner vide order under Annexure-1, though 9 regular posts were vacant, but the Petitioner illegally was appointed in the Work Charged Establishment. Not only that in terms of the Finance Department Notification dtd.17.09.2005 Job Contract and Work Charged employees brought over to the regular establishment on or after

01.01.2005 were allowed to be governed in terms of OCS (Pension) Rules, 1992 and existing GPF (O) Rules. It is also contended that since at the time of his appointment to the post of Junior Clerk vide order under Annexure-5 the Petitioner was drawing his salary in the pay band of Rs.4440/- -Rs.7440/- with pay of Rs.6400/- as on 01.03.2008, the scale of pay allowed while appointing the Petitioner as a regular Junior Clerk in the scale pay of Rs.3050/- -Rs.4590/- is prima facie illegal and the prayer of the Petitioner for protection of his pay was a justified one. Ms. Pattnaik also contended that basing on the request made by the Opp. Party No. 4 vide his letter dtd.13.09.2013 under Annexure-11 series, the Petitioner in the meantime has been allotted with the GPF Account Number by the Accountant General, Odisha vide Account No. 68340 PW(O) and the Petitioner is making his contribution in the GPF Account. Accordingly, it is contended that since the Petitioner has been allowed to be covered under the GPF (O) Rules, the other prayer of the Petitioner for his coverage under OCS (Pension) Rules, 1992 as well as the protection of his pay is required to be allowed by this Court.

11. I have heard Ms. B.K. Pattnaik, learned counsel for the Petitioner and Mr. A.P. Das, learned Addl. Standing Counsel appearing for the

Opp. Parties. On the consent of the Parties the matter was finally heard at the stage of admission and disposed of by the present order.

12. This Court after going through the materials available on record finds that even though the Petitioner was appointed under the Rehabilitation Assistance Scheme after his father was declared as permanently incapacitated, but the Petitioner was appointed in that Work Charged Establishment instead of being appointed under regular establishment. In consideration of the prayer of the petitioner though the Petitioner was appointed as a regular Junior Clerk vide order under Annexure-5, but without taking into account his initial date of appointment as 29.01.1996, the Petitioner was wrongly directed to be covered under the new contributory pension scheme, which came into effect from 01.01.2005.

13. This Court further finds that as on the date of his regular appointment though the Petitioner was drawing the salary in the pay band of Rs.4440/- -Rs.7440/- with pay of Rs.6400/- w.e.f.01.03.2008, but in the order under Annexure-5 the Petitioner was allowed the scale pay of Rs.3050/- -Rs.4590/-. As per the considered view of this Court the said fixation of the scale pay in the scale pay of Rs.3050/- - Rs.4590/- is not in conformity with the scale, that was drawn by the Petitioner prior to his appointment on regular basis. Therefore, the

prayer of the Petitioner for protection of his pay is a genuine grievance and the Petitioner's pay should have been protected by allowing him the scale pay that is admissible to his case.

14. This Court further finds that in terms of the Finance Department resolution issued under Annexure-9 though the Petitioner was due to be governed under the OCS (Pension) Rules, 1992 and existing GPF(O) Rules, but while considering his claim and issuing the impugned order under Annexure-10 the said clarification issued by the Finance Department under Annexure-9 has not been taken into consideration. Therefore, as per the considered view of this Court the Petitioner is also required to be covered under the OCS (Pension) Rules, 1992 and existing GPF(O) Rules.

15. Taking into account the fact that the Petitioner has already been brought over under the GPF (O) Rules with allotment of GPF Account No. 68340 PW(O) as reflected under Annexure-11 series, this Court while disposing the writ petition, directs the O.P. Nos. 1 & 2 to allow the pay protection as prayed for by the Petitioner and for inclusion of the Petitioner under OCS (Pension) Rules, 1992.

16. In view of such finding of this Court, the impugned order passed by the Govt.-O.P. No. 1 under Annexure-10 is required to be quashed and the same is hereby quashed also. This Court accordingly directs

O.P. Nos. 1 & 2 to provide pay protection to the Petitioner and refix his pay taking into account the salary drawn at the time of his regular appointment to the post of Junior Clerk in the said post. After such pay fixation, the arrear differential salary as due and admissible till date be also sanctioned and disbursed in favour of the Petitioner. The entire exercise be completed within a period of three (3) months from the date of receipt of this order.

17. The writ petition is disposed of with the aforesaid observation and direction.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 16th of December, 2022/Sneha