

ORISSA HIGH COURT: CUTTACK

WPC (OAC) No.2276 OF 2012

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

Judhistir Padhy **Petitioner**

-Versus-

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

Advocate(s) appeared in this case:-

For Petitioner : M/s. Subrat Mishra,
R.K. Pradhan & G.C. Mohanty,
Advocate

For Opp. Parties : Mr. H.K. Panigrahi,
Additional Standing Counsel

CORAM
JUSTICE SASHIKANTA MISHRA

JUDGMENT
19th April, 2022

SASHIKANTA MISHRA, J. The sole point that arises for consideration in this case is whether a job contract worker, whose services have been brought over to the regular establishment, is entitled to pension by taking into

account the entire period of service rendered by him in the job contract establishment.

2. The facts of the case are that the petitioner was engaged as General Mohorior Grade-I in job contract establishment under the control of Deputy Director, Consolidation, Berhampur (opposite party no.4) on 27.09.1997. After rendering service for 28 years 6 months and 7 days as such he was brought over to the regular establishment on 04.04.2006 and appointed as Junior Clerk in the office of Sub-Collector, Bhanjanagar. The petitioner retired from Government Service on 31.05.2012 upon attaining the age of superannuation. Though he was granted provisional pension, the same was calculated considering the period of service in the regular establishment only, i.e. from 04.04.2006 till 31.05.2012. His entire service in the job contract establishment was not taken into consideration. Challenging such erroneous calculation of pension, the petitioner had filed the O.A. before the erstwhile Odisha Administrative Tribunal which, on transfer is registered as the present writ

petition, seeking direction to the opposite parties to count the past service rendered in the job contract establishment for 28 years 6 months and 6 days as qualifying service along with other pensionary benefits and gratuity.

3. A counter affidavit has been filed by opposite party no.1, wherein reference has been made to the judgment of a Division Bench of this Court rendered on 24.03.1992 in OJC No. 2147 of 1991, wherein it was held that in order to calculate the pensionary benefit of such employees, so much of their earlier service period shall be reckoned so as to make them eligible for pension. Further reference has been made to another judgment rendered by another Division Bench of this Court on 07.02.2019 in W.P.(C) No. 11503 of 2003, wherein the principle laid down in the aforesaid earlier judgment was reiterated. Some other judgments of the erstwhile Odisha Administrative Tribunal passed in O.A. No. 390 (C)/2008 and batch, O.A. No. 174(C) of 2006 and O.A. No. 1828/2004 and batch have been referred to. It is also stated that the relief sought for by the petitioner is

contrary to the provisions of OCS (Pension) Rules, 1992.

Separate counter affidavit has been filed by opposite party no.5 referring to the Finance Department Memorandum No.49296 dated 12.12.1997 to justify the action of adding only four years of service of the petitioner under the job contract establishment to six years of regular service rendered by him to make him eligible to get minimum pension.

4. A rejoinder has been filed by the petitioner in response to the counter affidavit filed by opposite party no.1. In the said rejoinder, the petitioner has referred to the order of the Odisha Administrative Tribunal passed on 21.10.1994 in T.A. No. 11 of 1993, wherein the concerned authority was directed to count the past service rendered in job contract establishment towards pension and pensionary benefits. The said judgment was challenged before the apex Court in S.L.P.(C) No. 13916 of 1995 by the State but the same was dismissed vide order dated 17.07.1995. It is therefore, stated that the judgment passed by the Division Bench of this Court in the year

1992 no longer holds good. The petitioner has also referred to an order of the learned Tribunal in O.A. No. 3020 (C) of 2003 passed on 04.01.2004, wherein similar direction was issued. The said order was challenged by the State before this Court in W.P.(C) No. 14244 of 2006, which was dismissed vide order dated 09.04.2014. The state further challenged the said order before the Apex Court in S.L.P.(C) CC No. 12573 of 2015 but the same was also dismissed vide order dated 13.07.2015 on merit as well as on the ground of limitation. It is stated that the State has since implemented the order passed by the Tribunal as affirmed by this Court as well as the Apex Court.

5. Heard Mr. S. Mishra, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

6. Reiterating the facts stated in the writ petition as well as the rejoinder, it is submitted by Mr. Mishra that the highest Court of the land having affirmed the order passed by the Tribunal as well as this Court, nothing

further remains to be adjudicated. Mr. Mishra has also relied upon the order dated 07.03.2022 passed by a Division Bench of this Court in W.P.(C) No. 3443 of 2019, wherein taking note of the dismissal of the appeals filed by the State before the Apex Court (SLP(C) No. 13916/1995 and SLP(C) No. 12573 of 2015) against the orders passed by the Tribunal (in T.A. No. 11 of 1993 and O.A. No. 3020 (C) of 2003) as well as this Court (in W.P.(C) No.14244 of 2006), the aforementioned cases were disposed of directing the authorities to extend all such benefits in favour of the petitioner therein in terms of such directions. Mr. Mishra has also relied upon two judgments passed by a coordinate Bench of this Court in WPC(OAC) No. 1867 of 2007 and WPC(OAC) No. 607 of 2009. On such basis it is argued by Mr. Mishra that the State has no option but to follow the directions contained in the judgment passed by the Tribunal in T.A. No. 11 of 1993 and O.A. No. 3020(C) of 2003 as affirmed by this Court and the Apex Court.

7. Per contra, Mr. H.K. Panigrahi, learned State Counsel has emphatically argued that the decisions cited

by the petitioner do not apply to the case at hand because the effect of the provision under Sub-Rule(6) of Rule-18 of OCS(Pension) Rules, 1992 has not been taken into consideration therein. According to Mr. Panigrahi, there being a specific statutory rule governing the case of job contract employees who are specifically brought over to the regular establishment, the same shall govern the field and any decision rendered without reference to the said rule should be held as *per incuriam*.

8. As has already been narrated, both parties have relied upon several decisions in support of their respective stands and in addition, the State has referred to the statutory rule. It would therefore be in the fitness of things to examine the decisions so as to consider the applicability thereof to the case at hand.

As it appears, the first decision is the one rendered by a Division Bench of this Court in the case of **Settlement Class-IV Job Contract Employees Union, Balasore- Mayurbhanj District vs. State of Orissa and others**, (OJC No. 2147 of 1991) reported in 1992 SCC

OnLine Ori 296. A reading of the said decision reveals that the petitioner-Union had moved this Court seeking regularization of services of its members, who were job contract workers employed in connection with Survey and Settlement work. While allowing the prayer for regularization, the Division Bench held as follows in respect of their pensionary benefits;

“This apart, for the purpose of calculating the pensionary benefit, so much of their earlier service period shall be reckoned, even if there had been breaks in their employment, so as to make them eligible for pension.”

Then came the judgment passed by the learned Tribunal on 21.10.1994 in T.A. No. 11 of 1993 by referring to Rule- 23 of the Odisha Pension Rules wherein it was held that the same does not prohibit counting of past services rendered in the job contract establishment and that as provided under Sub-Rule (3) of Rule-23, the Government has ample power notwithstanding the restrictions contained in Sub-Rule(1) of Rule-23 to order the periods rendered under work charged establishment or the periods in which an employee is paid from the contingences for counting towards pension and

pensionary benefits. Accordingly, the Tribunal granted necessary relief to the applicants before it. The said order was carried in appeal by the State to the Apex Court in SLP(C) No. 13916 of 1995 but the same was dismissed.

Further, the learned Tribunal in a later order rendered on 14.01.2004 in the case of **Nityananda Biswal vs. State of Orissa & others** (O.A. No. 3020(C) of 2003) by relying upon its earlier judgment in T.A. No. 11 of 1993 held that the period of engagement in the job contract establishment should be taken into account as qualifying service. The said judgment was challenged by the State before this Court in W.P.(C) No. 14244 of 2006, which came to be dismissed vide order dated 09.04.2014 passed by a Division Bench by referring to the judgment of the Tribunal passed in T.A. No. 11 of 1993, which was confirmed by the Hon'ble Supreme Court in SLP(C) No. 13916 of 1995.

9. Much later, a Division Bench of this Court in W.P.(C) No. 11503 of 2003 held as follows:

"In our considered opinion, the earlier judgment, which is well-reasoned, holds the field as the

subsequent decision in W.P.(C) No. 14244 of 2005 had not referred to the same. Opposite parties will be given benefits only on the basis of earlier Division Bench judgment in OJC No. 2147 of 1991 decided on 24.03.1992, thereby the past period of service of the opposite parties, which is required only to make them eligible for pension, shall be taken into consideration.”

The other judgments cited by the parties such as WPC(OAC) No.3443 of 2019 (Division Bench) and WPC(OAC) No. 1576 of 2007 (Single Bench) and WPC(OAC) No. 607 of 2009 (Single Bench) also referred to the order of the Tribunal in T.A. No. 11/1993, which was confirmed by dismissal of the SLP filed against it by the Apex Court as also the order in O.A. No. 3020 (C) of 2003 as confirmed by this Court in W.P.(C) No. 14244 of 2006 and by the Apex Court in SLP(C) No. 12573 of 2015.

10. From the above narration, it becomes evident that there are conflicting Division Bench judgments of this Court on the issue at hand. While the judgment passed in OJC No. 2147 of 1991 and W.P.(C) No.11503 of 2003 lay down that only so much of the service rendered under job contract establishment shall be reckoned as would be necessary for qualifying service for pension, the other Division Bench judgments have referred to the order of the

Tribunal passed in T.A. No. 11/1993 and O.A. No. 3020 (C) of 2003, both of which have since been confirmed by the apex Court. It therefore becomes imperative to examine the order passed in T.A. No. 11 of 1993 and O.A. No. 3020(C) of 2003 because the same form the foundation of all the other subsequent judgments referred to hereinbefore.

11. In so far as the T.A. No. 11 of 1993 is concerned, the same was filed by one Bhagaban Pattanayak, who was appointed as an Amin on 01.12.1955 in Ganjam-Koraput Major Settlement in the job contract establishment. He continued as such till 27.08.1964 when he was brought under the regular establishment. He retired from Government Service on 31.08.1988 on reaching the age of superannuation. He approached the learned Tribunal with the grievance that the period under job contract establishment should be taken into account for the purpose of pension and other pensionary benefits. Learned Tribunal on a reference to Rule 23 of the Orissa Pension Rules, held that there is no mention therein about a job

contract employee being subsequently brought to the regular establishment. It was further held that if an incumbent is appointed in the job contract establishment and retired from service as such, he being paid from contingencies, the period of such service shall not qualify for pension. As such, the learned Tribunal held that for those job contract employees who have been brought over to the regular establishment, the pension rules does not prohibit counting of past services rendered in the job contract establishment. Thereafter relying upon Sub-Rule(3) of Rule 23, learned Tribunal held that there is ample power of the Government notwithstanding the restrictions made in Rule 23(1) to order the periods rendered under the work charged establishment or the periods in which an employee is paid from the contingencies from being counted towards pension and pensionary benefits. Learned Tribunal though referred to the decision of this Court in OJC No. 2147 of 1991, yet directed the authorities to count the past services rendered by the petitioner in job contract establishment

towards pension and pensionary benefits. As already stated, the aforesaid judgment of the Tribunal was challenged by the State before the Hon'ble Supreme Court in SLP (C) No. 13916 of 1995, but the same was dismissed vide order dated 17.07.1995.

In so far as the order passed in O.A. No. 3020(C) of 2003 is concerned, learned Tribunal allowed the prayer of the petitioner entirely relying upon its earlier order passed in T.A. No. 11 of 1993. The said order, as already stated, was also challenged by the State before this Court in W.P.(C) No. 14244 of 2006, which was dismissed vide order dated 09.04.2014 and thereafter before the Hon'ble Supreme Court in Special Leave to Appeal (C) CC No. 12573 of 2015, which was also dismissed vide order dated 13.07.2015 on the grounds of delay as well as on merits.

12. What is relevant to note is that in T.A. No. 11/1993, learned Tribunal relied upon Rule-23 of the extant Rules that is, Odisha Pension Rules 1977 (in short, the 1977 Rules). Of course by the time of passing of the order that is, 12.04.1994 the 1977 Rules had already been

repealed upon coming into force of the new Rules that is, Odisha Civil Services (Pension) Rules, 1992 (in short, the 1992 Rules) w.e.f. 01.04.1992. Rule 116(1) of the 1992 Rules is relevant in this regard, and is therefore quoted herein below:

“116. Repeal and Saving – (1) *On the commencement of these Rules, the Odisha 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) *xxx*

(b) *xxx*

(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;”*

As already stated, the applicant in TA No. 11 of 1993 was an employee who retired from government service on 31.08.1988 that is, prior to coming into force of the 1992 Rules and therefore his claim for pension was governed under the 1977 Rules, which the learned Tribunal appears to have relied upon.

In so far as the order passed by the Tribunal in OA NO. 3020 (c) of 2003 is concerned, it is not forthcoming from the order passed therein as to when the

concerned employee had retired. Nevertheless, the Tribunal passed the order entirely relying upon the order passed in TA No. 11 of 1993.

At this stage, it must be pointed out that in the case at hand, the petitioner retired from government service on 31.05.2012 and hence, his case is to be considered as per the 1992 Rules.

13. It is also relevant to note that originally there was no provision in the 1992 Rules specifically governing the case of a job-contract employee who had been subsequently brought over to the regular establishment. However, an amendment was effected on 01.09.2001 to the said Rules, whereby, sub-rule-(6) was inserted in Rule-18 vide notification no. 45865/F dated 01.09.2001. sub-rule (6) reads as follows:

“18. Conditions subject to which service qualifies-

Xx

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(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 as would render him eligible for pensionary benefits.”

Thus, a specific provision was enacted to govern the cases of such employees. From the language employed in sub-rule (6) it is evident that the decision of this Court in OJC No. 2147 of 1991 was followed in toto by the Government. In fact, the very words used by this Court in the aforesaid decision appear to have been employed in the amended sub-rule.

Such being the factual position, it is evident that the order passed by the Tribunal in TA No. 11 of 1993 and followed in OA No. 3020 (c) of 2003 can have no application whatsoever to the case at hand.

All the other judgments of this Court referred to hereinbefore passed subsequently have referred to the order of the Tribunal in T.A. No. 11 of 1993 and O.A. No. 3020(C) of 2003 as confirmed by the apex Court, but as stated above, the petitioner in the instant case being governed by the provisions of the 1992 Rules, the said judgments cannot be applied to the case at hand as it would be *de hors* sub-rule (6) of Rule-18 as quoted

hereinbefore.

14. To sum up, it is stated at the cost of repetition that what the Division Bench of this Court in OJC No. 2147 of 1991 had held way back on 24.03.1992 was crystallized as sub-rule (6) of Rule-18 on and from 01.09.2001. This Court therefore, is of the humble view that the judgments passed by this court in W.P.(C) No. 14244 of 2006, WPC(OAC) No. 3443 of 2019, WPC (OAC) No. 1567 of 2007 and WPC(OAC) No. 307 of 2009, relied upon by the petitioner, cannot be applied to the case at hand as the same were passed referring to the orders of the Tribunal passed in TA 11 of 1993 and OA 3020 (c) of 2003 as confirmed by the Apex Court but not with reference to sub-rule (6) of Rule 18 of the 1992 Rules, which squarely applies to the facts of the present case.

It is thus seen that as per the sub-rule (6) of Rule-18 only so much of the job contract service period shall be added to the period of qualifying service in regular establishment as would render the employee eligible for pension. Resultantly, the claim of the petitioner for

counting the entire period of service in the job contract establishment towards pension and pensionary benefits, strictly speaking, has no legs to stand having regard to the provision under sub-rule(6) of Rule-18 of the 1992 Rules.

13. A strict interpretation of the statutory provision as it exists leaves little scope for the Court to grant the desired relief to the petitioner. It is the settled position of law that no direction can be issued by the Court to the authority to do something contrary to law. Reference in this regard may be had to the decision of the Apex Court in the case of **Hope Textiles Ltd. vs. Union of India**, reported in (1995) Supp.(3) SCC 119. Undoubtedly, the relevant provision is valid and hence, holds the field.

However, fact remains that basing on the judgments referred to hereinbefore, all of which have been implemented by the Government as stated at the bar notwithstanding the relevant provision, several similarly placed employees have been granted the benefit in that their past service rendered under the job contract establishment has been counted towards qualifying

service for pension along with the period under regular pensionable establishment.

The fact that the judgments referred to hereinbefore were rendered without reference to the sub-rule (6) of Rule 18 of the 1992 Rules do not appear to have been agitated by the Government before this Court or the apex Court at any point of time. As a result, a peculiar position has emerged in that several employees have been granted the benefit of counting of their entire past services while others like the petitioner, who stand on similar footing, are deprived of such benefit. Undoubtedly, this would cause great hardship to such employees. While this Court is fully conscious of the legal position that no direction can be issued *de hors* the statutory provision, yet fact remains that the statute also confers upon the Government wide powers to undo any hardship caused by any of its provisions, namely, the power of relaxation of the provisions under certain circumstances. The 1992 Rules contains a provision to such effect, i.e. Rule 114, which reads as follows:

“114.Power to Relax - Where the Governor is satisfied that the operation of any of the provisions of these rules causes undue hardship in any particular case, he may, by order, for reasons to be recorded in writing, dispense with or relax the requirements of the said provision to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner.

Provided that no such order of relaxation shall be made except with the prior consultation of the Finance Department.”

14. In view of the fact that several employees have been given the benefit, depriving the petitioner therefrom would certainly cause undue hardship to him. This is therefore, a fit case where the Government may consider relaxing the provisions i.e., sub-rule(6) of Rule 18 to grant the desired relief to the petitioner.

The Government may also consider the fact that the number of job contract employees who are subsequently brought over to the regular establishment is fixed and finite and therefore, there may not be any recurring drain on the exchequer if similar relief is granted to all such employees without any discrimination.

15. In the result, while not acceding to the request of the petitioner as made in the writ petition, however, this Court deems it proper to direct the Government to

consider the possibility of relaxing the provision under sub-rule (6) of Rule 18 of 1992 Rules by exercising power under Rule 114 of the said rules so as to grant the desired relief to the petitioner. The decision in such regard should be taken within a period of three months from the date of communication of this order or on production of certified copy thereof by the petitioner and such decision be communicated to the petitioner.

16. The writ petition is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 19th April, 2022/ A.K. Rana

