

ORISSA HIGH COURT : CUTTACK

ORIGINAL JURISDICTION CASE NO. 5361 OF 2000

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

Dr. Biswanath Panda Petitioner

-Versus-

Vice-Chancellor, Berhampur University
Bhanjabihar and others Opp. Parties

For Petitioner : M/s. Manoj Mishra, P.K.Das,
B.Mishra & S.Senapati.

For Opp. Parties : Addl. Government Advocate
(For O.P. No. 3)

M/s. B.S.Mishra-2,
M.R.Mishra, A.P.Dhirsamanta &
A.R.Mishra.
(For O.Ps 1 and 2)

Decided on 24.7.2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J. The petitioner, in this writ petition, prays for a direction to the Berhampur University to pay his pension and retiral benefits, which according to him, have not been paid, even after lapse of one year from the date of superannuation. According to the petitioner, he started his teaching career as a Commerce Teacher in Khalikote Collegiate Higher Secondary School on 18.07.1961 and was teaching Post Matric Class, i.e., Class-12. He continued in the said

service till 30.06.1967. Thereafter, he was selected as an Assistant Librarian in Berhampur University and joined in the said post on 22.04.1968. He was promoted to the post of Librarian, which according to him, is equivalent to the cadre of Professor and was superannuated on 31.05.1999, while working in the said post.

2. The grievance of the petitioner is that even though he retired on 31.05.1999, he has been deprived of his pension and retiral benefits till the date of filing of the writ petition without any justifiable reasons. The petitioner has referred to several communications made by the Registrar of the University to all concerned about the date of retirement of the petitioner and to intimate regarding the dues, if any, outstanding against the petitioner, the petitioner's letter requesting all the sections of the University for issue of no-due certificate for processing his pension papers and the representations made by him. He has also referred to the Circular issued by the Registrar of the University dated 05.10.1999 that despite issuance of notification as to superannuation of an employee before six months, the concerned sections are not intimating the dues outstanding against the retiring employees for which delay is caused for finalization of their retirement benefits and, therefore, if any section of the University is unable to intimate the outstanding dues of the retiring employees prior to their retirement, it would be presumed that nothing is outstanding against such retiring employees and terminal

benefits will be finalized. The petitioner has further referred to the circular of the Government of Orissa issued way back on 30.12.1990 basing on a judgment of this Court laying down detailed guidelines for payment of early pension, which also provides time stipulation for payment of pension and that the pensioner will be entitled to get interest at the rate of 18% per annum for the period of delay, which will be recovered from the person responsible for such delay. The moot question that the petitioner has raised is as to whether the petitioner's past service under Khallikote Collegiate High School from 10.07.1961 to 01.07.1967 should be counted as qualifying service for the purpose of calculating pensionary benefits. In support of the contention that the past service should be taken into account, the petitioner has relied upon Statute No.260 of the Orissa Universities First Statute, 1990, the extract of which has been annexed to the writ petition as Annexure-8.

3. In the counter affidavit filed by the University, it has been stated that as the petitioner did not hand over the detailed charges, no further steps could be taken for grant of pension and other retiral benefits even though the petitioner was requested time and again to comply the shortcomings and hand over the detailed charges. A sum of Rs.4,950/- was outstanding against the petitioner, which, he had taken as advance and a generator which was with the petitioner was not accounted for. It is further stated that as the

petitioner did not comply with the shortcomings and the matter was delayed, the University granted provisional pension in favour of the petitioner by order dated 08.07.2000. The said order has been annexed as Annexure-A/1 series. With regard to calculation of past service of the petitioner, it has been stated in the counter affidavit that the petitioner had never brought the said fact to the notice of the University earlier. Further, the said High School was a private school, which cannot be construed to be an institution of Higher Education or Research and the petitioner also did not produce any document showing that he was teaching in Class-XII. The University, however, decided that the past service of the petitioner cannot be counted as qualifying service for the purpose of computation of pension and other retiral benefits. In the last paragraph of the counter affidavit, it has been stated that the amount of Rs.4,950/- has been adjusted in the meantime but an amount of Rs.35,133.41 is lying with the petitioner towards the surcharge as has been found from the audit report.

4. The petitioner filed a rejoinder affidavit stating, inter alia, that he filed a representation giving intimation to the University with regard to his six years past teaching experience in K.C. Higher Secondary School, before retirement and that he was teaching in the Higher Secondary Branch of the School which was fully aided by the State Government. The Higher Secondary Branch had classes up-to 12th Class which is equivalent to 1st year class of a college which

comes under Higher Education. The surcharge amount as stated in the counter affidavit is not yet finally established and decided to be realized from anybody (pro-in-charge Library/Librarian/Asst. Librarian/others) from 1979 and the petitioner has been protesting in his several written compliances that the said audit report is baseless and superfluous. Again an affidavit was filed by the petitioner on 20.07.2004, inter alia, stating that "now the petitioner's claim is limited to two aspects, besides claiming interest for the delay in payment of the pension. One is the computation of period for pension from 18.07.1961 to 30.06.1967, i.e., services rendered by petitioner in K.C. Higher Secondary Class, i.e., 12th Class as per Rule-260 of Statutes. Secondly, the amount of Rs.4,950/- deducted by University from pensionary dues is illegal and petitioner is entitled to get back the said amount.

5. By order dated 04.01.2005, this Court directed the learned counsel for the opposite party no.3-State of Orissa represented through its Commissioner-cum-Secretary, Government of Orissa, Higher Secondary Education Department to obtain instruction as to whether K.C. Higher Secondary School was getting any aid from the Government during the period from July 1961 to June 1967. The Commissioner-cum-Secretary filed an affidavit on 17.10.2006 stating that on an inquiry from the Headmaster of the said School, it was reported by him that he has no records available which would show

that the said institution was receiving aid from the Government during the period in question but it was disclosed that the School was recognized by the State Government and was covered under grant-in-aid fold much after the period in question. However, the Commissioner-cum-Secretary further stated that in view of the stipulation in Clause-260 of Orissa Universities First Statute, 1990, prima facie, it appears that the past service rendered by the petitioner, if any, in K.C. High School cannot be counted as qualifying period of service for the purpose of pension and gratuity. The petitioner annexing the Gazette Notification dated 26th July, 1963 as Annexure-17 filed an affidavit on 07.09.2008 in support of his contention that the K.C. Higher Secondary School was aided by the Government. A counter to the said affidavit has been filed by the University stating that the said School became aided with effect from on 01.04.1974 and from the Service Book at Annexure-8 of the petition, it appears that the School, in question, was not probably Higher Secondary School, but a High School only, even though in the opening page of the Service Book, it has been mentioned as a Higher Secondary School. It is further stated that the petitioner even while joining in the University services, did not intimate the University regarding his past service in the K.C. High School and never claimed for counting his past service while he was in service of the University. Moreover, on the date when he joined in the University he was not in

service under the said School as his services were terminated from the School with effect from 30.06.1967 and he was appointed in the University on 19.04.1968 and joined on 22.04.1968.

5. Mr. Manoj Mishra, learned counsel for the petitioner vehemently argued that while the petitioner was working as a Teacher in K.C. Higher Secondary School, as the said Higher Secondary Scheme was abolished, the service of the petitioner came to an end on 30.06.1967. The petitioner comes under Clause - (f) of Statute 260 as he was working as Commerce Teacher in K.C. Higher Secondary School from 18.07.1961 to 30.06.1967, which is a recognized institution. The said School was an aided institution, as it appears from the Gazette Notification in Annexure-17. According to Mr. Mishra the conditions of qualifying service have been specified in Rule -II of the O.C.S. Pension Rules, 1992 and the petitioner fulfils both the conditions in Clauses-1 and 3 of the said Rules but does not fulfil the condition as in Clause-2, since there was no pension scheme then and the pension rule first came into operation in 1981 as Orissa Aided Educational Institutions' Employees Retirement Benefit Rules, 1981.

6. With regard to the surcharge proceeding, Mr. Mishra submitted that the University has deducted an amount of Rs.4,950/- from the pensionary benefits of the petitioner for the reason that a surcharge proceeding has been initiated against the petitioner for a

sum of Rs.35,133.41. This Court directed on 31.01.2007 to the Government to file an affidavit as to whether any surcharge proceeding has been initiated against the petitioner. In the affidavit filed by the State, it has been stated that the surcharge notice has been served on the petitioner and compliance to the surcharge notice has been submitted by the petitioner, which has been forwarded to the Finance Department for necessary action. Though the University has also sent reminders to the Finance Department, no reply has yet been received from the said Department. The surcharge proceeding is of the year 1987 pending for last 22 years and no decision thereon has been taken.

7. Mr. B.S. Mishra, learned counsel for the University, on the contrary, submitted that had the petitioner intimated the University either prior to or while joining in the University services regarding his past service and claimed pensionary benefits for the said period of past service, it might have so happened that the University would not have appointed the petitioner. Mr. B.S. Mishra further submitted that since the petitioner's past service came to an end on 30.06.1967 and the petitioner was not in service, while he was appointed by the University, the said period of past service is not liable to be calculated towards the qualifying service of the petitioner. According to Mr. B.S. Mishra, the K.C. Higher Secondary School is not an aided educational institution as per section 3 (b) of the Orissa

Education Act, 1969, when the petitioner was serving in the said School. He further submitted that the petitioner's service in the said School cannot be treated to be qualifying service, as it does not satisfy the prime requirement of Clause-260 of the Statute and the petitioner having admitted that he was under a schematic post, which was abolished, his service in the said School by no stretch of imagination, can be considered to be qualifying service. He also contended that Clause-260 of the Statute under which the petitioner claims benefit was not enforced, when the petitioner was appointed by the University. With regard to the Gazette Notification at Annexure-17, Mr. B.S. Mishra submitted that the said Notification notified the list of Schools which were permitted to present students in the Board Examination and the said Notification was issued by the Board of Secondary Education, which is not the competent authority to sanction grant-in-aid. The Notification also discloses that the same was a programme of Examination and, therefore, mentioning the School to be receiving grant-in-aid cannot be taken in support of the plea of the petitioner that the School was within the grant-in-aid fold, when the petitioner was serving there. With regard to the surcharge proceeding, it has been fairly stated by Mr. Mishra that the same is pending adjudication and unless the said surcharge proceeding is finally decided, the University cannot realize the amount deducted

from the petitioner's pensionary benefits, which ultimately may be recoverable from the petitioner.

8. Statute - 260 of the Orissa Universities First Statutes, 1990 (hereinafter referred to as "the Statute") reads as follows:-

"260. The period of qualifying service rendered by an employee under any of the following institutions shall count for the purpose of gratuity and pension:-

- (a) State Government
- (b) Any Indian University
- (c) Any college affiliated to any University of the State and aided by the State Government
- (d) Board of Secondary Education, Orissa
- (e) Council of Higher Secondary Education Orissa.
- (f) Any recognized institution of higher education and/or research aided by the State/Central Government:

Provided that in case of an employee previously governed under the Pension Scheme of the above institutions, the former employer or the employee shall pay to the University the amount equivalent to pension and gratuity payable for the period of service rendered under such employer.

Provided further that in case of an employee previously governed by the contributory Provident Fund Scheme, the concerned former employer or the employee shall pay to the University the subscription of the employee along with the employer's contribution and interest thereon up to the date of payment which shall be deposited in his account as opening balance if the employee opts to continue under the Contributory Provident Fund Scheme. In case the employee opts to be governed by the Pension Scheme, the employee's subscription along with the interest thereon shall be deposited in his General Provident Fund Account and the employer's contribution along with the interest

thereon shall be credited to the Pension Fund of the University.

Provided also that in case of an employee previously governed under the General Provident Fund Scheme, the former employer shall pay to the University the General Provident Fund accumulation of the employee and interest thereon up to the date of payment which shall be deposited in his account as opening balance:

Provided further that if an employee has already received provident Fund accumulation and retirement benefits such as Pension/Gratuity for his past services under any of the aforesaid institutions, he may, at his request, be allowed to count such past service when followed by service qualifying for pension under these Statutes as a part of such service, provided he deposits with the University such amounts representing the Provident Fund Gratuity and/or Pension as the case may be, in suitable instalments as may be allowed by the University”.

The petitioner has claimed that his case is covered under Clause (f) of the Statute 260. As is seen from the pleadings of the parties including the affidavit filed by the State that there is no material produced before this Court to support the contention of the petitioner that K.C. Higher Secondary School was a recognized institution of Higher Education or research aided by the State or Central Government. Even accepting the case of the petitioner that he rendered past service in the said school, the period of past service of the petitioner cannot be taken into account for calculating his pension. No fault can be found with the decision of the University in

not calculating the said past service of the petitioner towards qualifying service for calculation of pension.

9. However, with regard to the surcharge proceeding stated to be pending at the Government level, as it is seen that the said proceeding is of the year 1987 and for last 22 years, there is no further development in the said surcharge proceeding, presumption arises that the said proceeding has been dropped. Even assuming that after issuance of notice in the said surcharge proceeding to the petitioner and after submission of his reply, the matter has not been proceeded with any further, the long delay is justiciable to quash the said surcharge proceeding. This Court, therefore, in the interest of justice and equity, quashes the said surcharge proceeding. The action of the authorities of the University in not calculating the entitlement of the petitioner towards pension and other retiral benefits finally, but granting him a provisional pension, only on the ground that a surcharge proceeding is pending, is an arbitrary action as unless a decision was taken in the surcharge proceeding for recovery of the amount, the University authorities could not have awaited the result of such surcharge proceeding for calculating the pension of the petitioner finally.

10. As it is an admitted case that the petitioner has been granted provisional pension due to pendency of the surcharge proceeding and the said proceeding stands quashed, it has become

appropriate for the University authorities to calculate the pensionary benefits of the petitioner finally and pay the same to him. This Court, therefore, directs the concerned authorities of the University to calculate the entitlement of the petitioner towards pensionary benefits without being influenced by the surcharge proceeding, which was initiated against him and has been quashed as aforesaid, and make payment of such pensionary benefits/entitlement of the petitioner to him within a period of two months from the date of communication of this order. The arrear amount, to which the petitioner would be found entitled to on his pensionary benefits being finally calculated, will also be paid to him within a period of two months from the date of communication of this order and in these circumstances, the said arrear amount shall carry an interest at the rate of 10% per annum and the interest amount will be paid along with the arrears.

11. With the aforesaid directions, the writ petition is disposed of, but in the circumstances, without cost.

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M. M. Das, J.
