

ORISSA HIGH COURT: CUTTACK.
W.P.(C) Nos. 15433 & 15856 of 2012
and W.P.(C) No. 1471 of 2013

In the matter of application under Articles 226 and 227 of the Constitution of India

In W.P.(C) No. 15433 of 2012

Shri Anand Dash and seven others Petitioners

-Versus-

State of Orissa and others Opp. Parties

For Petitioners : M/s. Dr. B.R. Sarangi
& S.N. Jena

For opp. parties : Government Advocate

In W.P.(C) No. 15856 of 2012

Shri Himansu Sekhar Dash and three others Petitioners

-Versus-

State of Orissa and others Opp. Parties

For Petitioners : M/s. Additya N. Das,
N. Sarkar, E.A. Das
& S.S. Pradhan

For opp. parties : Government Advocate

In W.P.(C) No. 1471 of 2013

Shri Padma Charan Dash Petitioner

-Versus-

State of Orissa and others Opp. Parties

For Petitioner : M/s. Sourya S. Das,
K. Behera, S. Modi,
S.S. Pradhan, M. Patnaik
& P.K. Ghosh

For opp. parties : Government Advocate

Decided on 24.04.2013

PRESENT :

**THE HONOURABLE SHRI JUSTICE M.M. DAS
A N D
THE HONOURABLE SHRI JUSTICE B.K. MISHRA**

M. M. DAS, J. These three writ petitions have been filed by the petitioners, who are stenographers working in the establishment of the Orissa High Court. As the facts involved in all the three writ petitions are same, they were heard together and disposed of by this common judgment.

2. Before advertng to the facts of the case, it would be profitable to refer to the General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Services (Pension) Rules, 1992. On 1.4.1938, in exercise of powers conferred under Section 241 of the Government of India Act, 1935, the Governor of Orissa was pleased to make a Rule for services of the crown under the Rule making control of the Government of Orissa named as "General Provident Fund (Orissa) Rules, 1938. Rule 4 of the said Rules reads as follows:

"Rule 4- All temporary Government servants after a continuous service of one year, and all permanent Government servants shall subscribe to the Fund;

Provided that no such Government servant as has been required or permitted to subscribe to a Contributory Provident Fund shall be eligible to join or continue as a subscriber to the fund, while he retains his right to subscribe to the Contributory Provident Fund."

3. On 1.4.1992, in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa was pleased to frame a Rule to regulate the grant of pension, gratuity and

other retiral benefits to the persons on retirement from service in connection with the affairs of the State of Orissa called “Orissa Civil Services (Pension) Rules, 1992”. Rule 3 of the said Rules reads as follows:

“3. Application – (1) Save as otherwise provided in these rules, these rules shall apply to Government servants, appointed in posts and services in connection with the affairs of the State which are borne on pensionable establishment, but shall not apply to-

- (a) Persons in casual and daily rated employment;
 - (b) Persons paid from contingencies;
 - (c) Persons entitled to the benefits of Contributory Provident Fund;
 - (d) Members of the All India Services;
 - (e) Persons employed on contract except when the contract provides otherwise;
 - (f) Persons whose terms and conditions of service are regulated by or under the provisions of the Constitution or any other law for the time being in force.
- (2) A Government servant who is transferred permanently to a service or post to which these rules apply from a service or post to which these rules do not apply shall become subject to these rules;

Provided that it shall be open to him, within six months of the date of issue of the order of his permanent transfer, or if he is on leave on the said date, then, within six months of his return from leave, whichever is later, to opt to be governed by the Pension Rules to which he was subject immediately before the date of his transfer. The option shall be exercised in writing and communicated to the authority making such order of transfer.

- (3) The option once exercised, shall be final.”

4. Coming to the facts of these cases, it is revealed that an advertisement was issued inviting applications from eligible candidates to fill up 20 numbers of posts of Junior Stenographers in the establishment of the Orissa High Court, Cuttack in the regular scale of pay of Rs. 4000-100-6000/- following Rule-9 of the Orissa High Court

(Appointment of Staff) Rules, 1963. After receiving the forms, admit cards were issued calling upon the eligible candidates to appear in the Stenography Test to be conducted on 11.12.2004 and 12.12.2004 at 10.00 A.M. in the Orissa High Court for recruitment to the said posts. The petitioners along with other eligible candidates appeared in the recruitment examination. Thereafter, the successful candidates in the said examination were called upon to appear in the "Computer Test" so as to find out their suitability for being selected for appointment as Junior Stenographers in the establishment of the Orissa High Court. On 16.3.2005, on the basis of the marks secured, a final merit list was prepared following Rule 9 of the Orissa High Court (Appointment of Staff) Rules, 1963 and finally, Office Order was issued appointing 15 persons which includes all the petitioners, calling upon them to join in the new assignment on 2.4.2005 (F.N.). As per the said Office Order, all the petitioners joined in the establishment of the Orissa High Court in the regular pay scale as mentioned above. On 17.9.2005, an amendment to Rule 3 of the OCS (Pension) Rules, 1992 was brought in by incorporating sub-rule (4) after sub-rule (3) of Rule 3. The new sub-rule (4) is quoted herein below:

"(4) Notwithstanding any thing contained in these rules, all persons appointed under the Government of Orissa with effect from 1st day of January, 2005 shall not be eligible for Pension as defined under sub-rule (1) of Rule 3 of the said Rules but shall be covered by the defined contribution Pension Scheme as specified below:

- (i) The monthly contribution would be 10% of the salary and Dearness allowance to be paid by the employee and the Government would also provide a matching contribution. The contribution so made would be deposited in a non-withdrawable pension tier-1 account. Such funds will be invested by pension fund managers as approved by Pension Fund Regulatory and Development Authority

(PFRDA) under different categories of scheme which would be a mix of debt and equity. The fund managers would give out easily understood information about the performance of different investment schemes so that individual Government employee would be able to make informed choices about which scheme to choose.

- (ii) In addition to the above provision, each individual may also have a voluntary tier-II withdrawable account at his option. This option is provided as General Provident Fund will be withdrawn for employees recruited to the State Government Service with effect from 1st January, 2005. Government will make no contribution into this account. In tier-II system, the individual may subscribe 10% of his salary and these assets would be managed through exactly the above procedure. However, the employee would be free to withdraw part of all of second tier of his money at any time. This withdrawable account does not constitute pension investment and would attract no special tax treatment.
- (iii) At the time of retirement, Government servant will receive the lump sum amount of 60% deposited in pension tier-I account as pension wealth and it is mandatory to the Government servant to invest remaining 40% of his pension wealth to purchase an annuity from an Insurance Regulatory and Development Agency-regulated life insurance company. The annuity shall provide for pension for the life time of the employee and his dependent parents and his spouse at the time of retirement. The individual would receive lump-sum of the remaining pension wealth, which he would be free to utilize in any manner. Individuals would have the flexibility to leave the pension system prior to age of 58 years or 60 years as the case may be. In such case, the mandatory annuitisation would be 80% of the pension wealth.”

5. On 31.8.2007, a notification was issued by the Government of Odisha amending General Provident Fund (Orissa) Rules, 1938 which was called as “General Provident Fund (Orissa) Amendment Rules, 2007 by adding a proviso after the proviso to Rule 4 which reads as follows:

“Provided further that these rules shall not apply to Government Servants appointed on or after the 1st January, 2005 to services and posts in connection with the affairs of the State, either temporarily or permanently.”

6. It may be noted that by amending the aforesaid Rule 3 of the OCS (Pension) Rules, 1992 and subsequently adding another proviso to Rule 4 of the GPF (Orissa) Rules, 1938 rights which have been accrued and vested with the petitioners under the old Rules were taken away with effect from 1.1.2005. The petitioners have alleged that on 2.2.2008, a similarly situated person, namely, one Jayanta Kumar Prusty, who has been appointed as an O.A.S. Officer in the year, 2006 and joined in the Collectorate, Cuttack as T.R.O. on 12.5.2006 was brought into the old OCS (Pension) Rules, 1992 and GPF (Orissa) Rules, 1938 by opening of his GPF Account. The Government of Odisha in its Finance Department issued an instruction on 25.3.2010 directing for refund of GPF deposit in case of employees under the coverage of New Restructured Defined Contribution Pension Scheme, 2005. The Government of Odisha in its Labour and Employment Department issued a clarification vide letter no. Emp-II-89/09/4189/LE dated 21.5.2010 extending the benefits of Old Pension Rules and GPF Rules in case of 13 regularly recruited OES Officers, though they have been appointed on 14.2.2005 and joined the Government service much after the cut-off date. In the said clarification letter, it is specifically mentioned that even if the existing provisions of OCS (Pension) Rules, 1992 and GPF (Orissa) Rules, 1938 are not applicable in case of such employees who have been appointed and joined in the establishment of the Government on or after the cut-off date i.e. 1.1.2005, but after careful consideration, the Government has decided that 13 Orissa Employment Service Officers directly recruited in the OCS Examination, 2000, allotted in Labour and

Employment Department by G.A. Department vide its letter no. 28369(e) dated 1.11.2004 and appointed vide Department Letter No. 1526 dated 14.2.2005, who have joined after the cut-off date i.e. on 1.1.2005 have been exempted from the purview of the above New Pension Scheme and they have been allowed to be covered under the old OCS (Pension) Rules, 1992. The said letter also got concurrence of the Finance Department vide U.O.R. No. 7/CS-III dated 5.1.2010.

7. Facts reveal that the petitioners submitted representations to bring their services under the pensionable establishment i.e. under the OCS (Pension) Rules, 1992 and to deduct their GPF amount under the GPF (Orissa) Rules, 1938 specifically mentioning that their vested and accrued rights cannot be taken away retrospectively by giving effect to the 'New Pension Scheme' from 1.1.2005, as their recruitment process was started in the year, 2004 and they have been appointed on 16.3.2005 and joined on 2.4.2005 and by that time, the old rules, i.e. Orissa Civil Services (Pension) Rules, 1992 and General Provident Fund (Orissa) Rules, 1938, were governing the field and the New Pension Scheme has taken its birth only on 17.9.2005 by which time the petitioners have already served the Government for about six months under the Old Pension Rules and GPF Rules. It was further stated in the representations that they cannot be discriminated as similarly situated persons have been extended the benefits. The representations filed on 22.12.2011 were forwarded by the Registry of this Court to the competent authority, i.e. the Government of Odisha, for consideration. Upon considering the grievance of the petitioners, the decision on the said representations was communicated on

19.7.2012 stating that the Finance Department opined that “for all purpose, the date of effect of New Pension Scheme (NPS) and revised Provident Fund Rules is 1.1.2005 as per Finance Department Notification No. 44451 dated 17.9.2005 and No. 36049 dated 31.8.2007 may please be adhered to. In case of refund of deposit in GPF account, it shall be governed under Finance Department Memo No. 12750 dated 25.3.2010. The communication of the Government with regard to the decision on their representations was intimated to the petitioners by the Registry of this Court vide letter dated 21.8.2012 under Annexure-11 to the writ petition. Being aggrieved by the said decision, the petitioners have approached this Court in the present writ petitions.

8. In the counter affidavit filed by the opposite party no. 2, it has been stated that similar principles have been followed by various State Governments by amending respective Pension Rules or framing New Pension Rules. It is further stated in the counter affidavit that in the budget for 2001-2002, the Government of India had announced that the New Pension Scheme based on defined contributions will be introduced to those who enter into the Central Government Services including the All India Services. The Government of India had constituted a High Power Committee to go into pension reform with specific reference for recommending a contribution scheme. Basing on the recommendation of the said Committee, the Government of India has introduced a New Pension Scheme in place of the existing Non-contributory Defined Benefit Pension Scheme primarily guided by the long term fiscal interest of the State with effect from 1.1.2004. The

Government of Odisha on consideration of the same decided to adopt a Scheme for the new entrants into Government services under pensionable establishment with effect from 1.1.2005. Examples of various autonomous bodies including the employees of Universities, Urban Local Bodies, Aided Educational Institutions and Public Sector Undertakings have been cited, inter alia, stating that the State Government has taken a decision for application of the New Pension Scheme for all kinds of employees with effect from 1.1.2005 irrespective of prevailing pension rules applicable for the employees of such establishments. It is, therefore, contended that to amend various Pension Rules or Retirement Benefit Rules or Statutes after introduction of the scheme cannot be deemed to be with retrospective effect. The amendments to the said Rules/Statutes are not violative of constitutional provisions on the plea that such amendments deprive a class of employees from the benefits they would be granted, if the amendments are given effect to, retrospectively. The policy decision of the Government in amending the Scheme with effect from 1.1.2005 has been, therefore, defended in the counter affidavit. With regard to GPF, it has been stated in the counter affidavit that the provisions of GPF will not be applicable in respect of employees governed under the New Pension Scheme. If in any case, GPF Account has been opened, the accumulated sum is refundable with interest accrued thereon for which a circular has been issued on 25.3.2010. Though a separate counter affidavit has been filed by the opposite parties 3 and 4, nothing has been substantially stated therein. However, though discrimination was specifically alleged in the additional affidavit, no counter affidavit

has been filed denying the said assertions made in the additional affidavit.

9. On analyzing the above facts, it is clear that by the dates, when the petitioners were appointed vide Office Order dated 16.3.2005 and consequently joined their new assignments on 2.4.2005, the amended rules were not incorporated. Admittedly, the amendment to the General Provident Fund (Orissa) Rules, 1938 was introduced by notification dated 31.8.2007 and the amendment to the Orissa Civil Service (Pension) Rules, 1992 by incorporating sub-rule (4) after sub-rule (3) in Rule 3 was brought into by notification dated 17.9.2005. It is, therefore, an admitted case that the petitioners by the dates when the amendments were brought into the rules by notifications, were continuing in their services. It is, therefore, to be examined as to whether the amendments brought into the above rules can be made applicable from an earlier date or retrospectively i.e. from 1.1.2005. The further question to be dealt with is as to whether the opposite parties-State by allowing some of its employees to be governed by the Old Pension Rules have discriminated the petitioners thereby violating Articles 14 and 16 of the Constitution.

10. In the Constitution Bench, decision in the case of ***Chairman, Railway Board and others v. C. R. Rangadhamaiah and others***, A.I.R. 1997 SC 3828, the Hon'ble Supreme Court was considering the amendment brought into Rule – 2544 of the Indian Railway Establishment Code, Vol. II (Fifth Reprint) which was given retrospective effect. The said Rule was amended by Notification No. G.S.R. 1143 (E) with effect from 1st January, 1973 and by Notification

No. G.S.R. 1144 (E), the amendment was made with effect from 1st April, 1979. The Hon'ble Supreme Court in paragraph – 20 of the said judgment held as follows:-

“20. It can, therefore, be said that a rule which operates *in futuro* so as to govern future rights of those already in service cannot be assailed on the ground of retrospectivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively”.

Again in paragraph 24 of the said judgment in the case of Chairman, Railway Board and others (supra), it was held thus :-

“24. In many of these decisions the expressions “vested rights” or “accrued rights” have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (AIR 1967 SC 1889) (supra); B.S. Yadav (AIR 1981 SC 561) (supra) and Raman Lal Keshav Lal Soni (AIR 1984 SC 161) (supra)”.

11. Ultimately, it was held by the apex Court that the impugned amendments in so far as they have been given retrospective operation are violative of the rights guaranteed under Articles 14 & 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments have the effect of reducing the amount of pension that has become payable to the employees, who had already retired from service on the date of issuance of the notifications

as per the provisions contained in Rule 2544 that were in force at the time of their retirement.

12. The aforesaid Constitution Bench decision, therefore, has emphasized with regard to the right of an employee, which has accrued in his favour on the date he retired and such right cannot be taken away by amending the Rules retrospectively prior to his retirement.

13. In the case of ***State of Madhya Pradesh and others v. Yogendra Shrivastava***, (2010) 12 SCC 538, the Hon'ble Supreme Court was considering the amendment brought to Madhya Pradesh Employees' State Insurance Service (Gazetted) Recruitment Rules, 1981 by Notification dated 20.05.2003 giving it a retrospective effect from 14.10.1982. By the said amendment, the earlier provision in the Rule prescribing payment of None Practising Allowance @ 25% of pay was amended to the effect that "NPA at such rates as may be fixed by the State Government from time to time by the orders issued in this behalf" in place of words "NPA @ 25% of the pay" wherever they occurred in the Rules.

14. On considering the said question, the Hon'ble Supreme Court, in paragraph – 15 of the said judgment in the case of State of Madhya Pradesh (supra) held as follows :-

15. It is no doubt true that Rules made under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing Rules cannot be taken away by amending the Rules with retrospective effect. (See *N.C. Singhal v. Armed Forces Medical Services* ; *K.C. Arora v. State of Haryana* and *T.R. Kapur v. State of Haryana*). Therefore, it has to be held that while the amendment, even if it is to be considered as otherwise valid, cannot affect the rights and benefits which had accrued to the employees under the unamended rules. The right to NPA @ 25% of the pay having accrued to the respondents under

the unamended Rules, it follows that respondent employees will be entitled to the non-practising allowance @ 25% of their pay up to 20-5-2003.”

15. In a large number of cases, the Hon'ble apex Court has categorically laid down that the right of an employee, which accrued in his favour on the date of appointment, cannot be taken away by the amending provisions of the Rules concerning the service with retrospective effect. An employee, while entering into service, is subjected to the condition of service as on the date, when he joins. Any right given to such employee under the provision of any Act or Rules governing the employment, if taken away by amending such Rules with retrospective effect, the same would be violative of Articles 14 & 16 of the Constitution and it would amount to an arbitrary and unreasonable action.

16. In the case at hand, as already stated above, all the petitioners joined in their due assignments on 02.04.2005 by which date, the amended Rules were not existing. The said amended Rules, which were introduced by Notification dated 31.08.2007 and 17.09.2005, could not have been given retrospective effect by stating that they will come into operation from 01.01.2005, which is prior to the date, when the petitioners joined in their new assignments.

17. We are, therefore, of the considered view that the said amendments brought to the General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Service (Pension) Rules, 1992 will not apply to the petitioners, who will be governed by the said Rules as it existed on the date of their joining in service prior to the amendments brought into those Rules.

We also find that the opposite parties–State have discriminated the petitioners by allowing the benefits under the old Pension Rules and General Provident Fund (Orissa) Rules in the case of 13 regularly recruited OES officers, though they have been appointed on 14.02.2005 and joined in the Government service much after 01.01.2005. The said action on the part of the State also amounts to discrimination and violates Articles 14 & 16 of the Constitution of India.

18. We, therefore, quash the impugned orders by which the representations of the petitioners were rejected arbitrarily inasmuch as without assigning any reason in support of such rejection and direct that the petitioners will be governed by the provisions of the old General Provident Fund (Orissa) Rules, 1938 and the Orissa Civil Service (Pension) Rules, 1992 as it stood prior to the amendments brought into the same and will be entitled to all the benefits, which were provided thereunder prior to such amendments.

These writ petitions accordingly stand allowed. No costs.

B.K.Misra, J. I agree.

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M.M. Das, J.

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B.K. Misra, J.

*Orissa High Court, Cuttack.
April 24th, 2013/Bks/Kkb.*