

IN THE HIGH COURT OF JHARKHAND AT RANCHI

L.P.A. No. 407 of 2023

Shristidhar Mahato, aged about 70 years, son of Late Baidyanath Mahato, resident of Patel Nagar, Road no. 15, near Laxmi Apartment, P.O. & P.S-Hatia, Town and District-Ranchi.

... **Writ Petitioner/Appellant
Versus**

- 1.The State of Jharkhand
- 2.The Principal Secretary, Department of Personnel, Administrative Reforms and Rajbhasha, Government of Jharkhand, having office at Project Bhawan, Dhurwa, P.O. & P.S. – Dhurwa, District-Ranchi.
- 3.The Principal Secretary, Finance Department, Government of Jharkhand, having office at Project Bhawan, Dhurwa, P.O. & P.S. – Dhurwa, District-Ranchi.

... **Respondents/Respondents**

**CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE NAVNEET KUMAR**

For the Appellant : Mr. Manoj Tandon, Advocate.
For the Respondents : Mr. Jai Prakash, AAG-IA.

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**C.A.V. on 07/11/2023 Pronounced on 01/12/2023
Per Sujit Narayan Prasad, J.:**

1. The instant appeal, under clause 10 of the Letters Patent, is directed against judgment/order dated 15.06.2023 passed by learned Single Judge in W.P. (S) No. 7335 of 2016, whereby and whereunder the writ petition has been dismissed declining to interfere with impugned order dated 24.08.2016 by which the representation submitted by the petitioner, in pursuance to order passed in W.P. (S) No. 5307 of 2014, has been rejected.

2. Brief facts of the case, as per the pleading made in the writ petition, read as under:

3. The petitioner was appointed as State Information Commissioner vide letter no. 3899 dated 26.07.2006 along with five others. Accordingly, the petitioner joined as State Information Commissioner on 30.07.2006 and started to discharge his duties and after expiry of tenure of five years demitted his office on 31.07.2011.

4. After demitting the office on 31.07.2011, the petitioner submitted representation before the concerned respondent for the retiral benefits but it did not evoke any response as such he moved before this Court by filing writ petition being W.P. (S) No. 5307 of 2014, which was disposed of vide order dated 16.03.2016 directing the concerned respondent to take an informed decision in the matter of claim of post retiral and other terminal benefits of the petitioner in accordance with law within a period of twelve weeks.

5. In terms of direction passed by this Court in W.P. (S) No. 5307 of 2014, the petitioner approached the respondents-authorities and submitted a detailed representation but the respondents-authorities did not dispose of the representation of the petitioner and

sat over the matter, as such the petitioner filed contempt case being Contempt Case (Civil) No. 476 of 2016. However, during pendency of the contempt petition the representation of the petitioner was decided vide order dated 24.08.2016 whereby the claim of the petitioner was rejected stating that since the service condition of the State Information Commissioner is equivalent to that of Chief Secretary of the State and after introduction of new Pension Scheme w.e.f. 01.01.2004 there is no provision for pension to the said post.

6. Aggrieved thereof, the petitioner again approached this Court by filing W.P. (S) No.7335 of 2016 which was dismissed vide order dated 15.06.2023, against which, the instant *intra-court* appeal has been filed by the appellant-writ petitioner.

7. Learned counsel for the writ petitioner-appellant has assailed the impugned order passed by learned Single Judge on the following grounds:

- I.** That the statute requires for framing out a rule in view of provision of Section 16(5) of the Right to Information Act, 2005 (in short 'Act, 2005') but still the State Government has not formulated the rule by making provision for

pensionary benefit to be given to the holder of the post of State Information Commissioner.

- II.** That the writ petitioner was appointed and completed his tenure as per the condition of appointment but the pensionary benefit has not been given which is absolutely illegal and arbitrary.
- III.** That the writ petitioner although has filed a writ petition being W.P.(S) No. 5307 of 2014 on earlier occasion which was disposed vide order dated 16.03.2016 giving liberty to the writ petitioner to file representation for consideration of his claim but the respondent-authority while considering the claim has rejected the representation of the petitioner vide order dated 24.08.2016 on the ground that the writ petitioner was never in service which is said to be pensionable service hence the condition as stipulated under Section 16(5) of the Act, 2005 prior to its amendment will be applicable wherein specific provision has been made that the pensionary benefit is to be given to Chief Information Commissioner or State Information Commissioner who if at the time of appointment to the said post was in the pensionable service

but herein the writ petitioner was never in the pensionable service rather he was appointed directly as State Information Commissioner hence in view of un-amended provision of Section 16(5) of the Act, 2005 which has been amended by virtue of Act, 2019 w.e.f. 24.10.2019 the claim of the writ petitioner has been rejected but while taking such decision the authority concerned has not appreciated this fact that identically placed Chief Information Commissioner namely Hon'ble Mr. Justice Hari Shankar Prasad, former Judge of this Court has been extended with the benefit of pension after completion of tenure of State Chief Information Commissioner, hence the authority while rejecting the claim of the writ petitioner has discriminated the writ petitioner but the aforesaid fact has not been appreciated by the learned Single Judge. Hence, the order passed by learned Single Judge suffers from error.

IV. That when the mandate requires for framing out a rule as per Section 16(5) of the Act, 2005 it is incumbent upon the State Government to frame out a rule governing the issue of pension of State Information Commissioner but still the

rule has not been framed which fact has not been appreciated by learned Single Judge in right prospective by negating the said claim and refusing to direct the State Government on the ground that since the same pertains to policy decision hence the High Court in exercise of power conferred under Article 226 of the Constitution of India is not required to pass any mandamus directing the State to frame out a rule rather it is the prerogative of the State to frame out a rule. The aforesaid finding of the learned Single Judge is not justified since the Statute mandates for framing out of rule hence the rule is required to be framed by the State Government.

8. Learned counsel for the appellant based upon the aforesaid ground has submitted that since the learned Single Judge has not appreciated these aspects of the matter hence the order passed by learned Single Judge suffers from an error and as such is not sustainable in the eyes of law.

9. Per contra, Mr. Jai Prakash, learned A.A.G-IA, appearing for the respondents-State has defended the order passed by learned Single Judge by taking the following grounds:

- I. That the learned Single Judge has well appreciated the factual aspect more particularly based upon the un-amended provision which was prior to 24.10.2019 wherein provision has been made that the benefit of pension is to be given to incumbent of the post of either the State Chief Information Commissioner or the State Information Commissioner who prior to the date of appointment if in the pensionable service. As per the aforesaid provision the incumbent of the holder of the post of pension has been made entitled for pensionary benefit but herein in the instant case the writ petitioner has never served prior to appointment as State Information Commissioner in pensionable service hence in view of provision of Act, 2005 [Un-amended] the writ petitioner is not entitled for the pensionary benefit reason being that he was appointed as State Information Commissioner the day when the provision of Act, 2005 was applicable and subsequently amended provision has come w.e.f. 24.10.2019 i.e., on repealment of aforesaid provision.
- II. Learned AAG -IA by responding to the claim of the writ petitioner that the rule is required to be

formulated in view of provision of Section 16(5) has submitted that it has not been disputed, as per the statutory command, that the rule is to be formulated but the question herein is that the writ petitioner is relying upon the provision of Section 16(5) of the Act, 2019 i.e., amended rule which has come into being w.e.f. 24.10.2019 by virtue of Act 24 of 2019 and by that the petitioner was retired from service.

III. Further, the question herein will be that even if the rule will be framed the writ petitioner will not be in a position to get the pensionary benefit in the light of applicable rule which was applicable prior to 24.10.2019 since the writ petitioner was appointed on 30.07.2006 and completed his tenure on 31.07.2011 which was during the subsistence period of un-amended rule. As such even if the rule had been framed the writ petitioner would not have got any benefit for entitlement of pension.

IV. So far as argument advanced on behalf of the appellant that the learned Single Judge has erred in not issuing order/command for making out the rule is concerned, it is a policy decision which is under the exclusive domain of the State

which according to learned State counsel cannot be said to be unjustified reason being that since it is the policy decision which is exclusive domain of the State and even if it will be framed the petitioner in no way is going to be benefited due to the fact that any rule if formulated will have prospective application and not retrospective application.

V. Further on the day when the writ petitioner was appointed and completed his tenure rule was already there.

10. The learned AAG-IA based upon the said ground has submitted that the order passed by learned Single Judge suffers from no error hence the impugned order requires no interference by this Court.

11. We have heard learned counsel for the parties, perused the documents available on record as also finding recorded by learned Single Judge.

12. The undisputed facts in this case is that the petitioner was appointed as State Information Commissioner on 26.07.2006 where he gave his joining on 30.07.2006 and after completion of five years tenure demitted his office on 31.07.2011. After demitting the office, the petitioner submitted

representation before the concerned respondent for grant of retiral benefits but it did not evoke any response as such he moved before this Court by filing writ petition being W.P. (S) No. 5307 of 2014, which was disposed of vide order dated 16.03.2016 directing the concerned respondent to take an informed decision in the matter of claim of post retiral and other terminal benefits of the petitioner in accordance with law within a period of twelve weeks. In terms thereof, the petitioner submitted a detailed representation before the respondents-authorities which was decided vide order dated 24.08.2016 whereby the claim of the petitioner was rejected stating *inter alia* that since the service condition of the State Information Commissioner is equivalent to that of Chief Secretary of the State and w.e.f. 01.01.2004 new Pension Scheme has been introduced where there is no provision of pension and General Provident Fund.

13. Being aggrieved with order dated 24.08.2016 passed by the respondents-authorities, the petitioner again approached this Court by filing writ petition being W.P. (S) No.7335 of 2016 which was dismissed vide order dated 15.06.2023, against which, the instant *intra-court* appeal has been filed.

14. This Court on consideration of the argument advanced by learned counsel for the parties, framed following issues to be answered:

- I.** *Whether the State is duty bound to formulate the rule governing the issue of pension as per the mandate of Section 16(5) of the Act, 2005?*
- II.** *Whether the writ petitioner can be deprived from the benefit of pension merely because he was not appointed in any pensionable service the day when he was appointed as State Information Commissioner?*
- III.** *Whether the finding recorded by the learned Single Judge to the effect that framing out of rule is exclusive domain of the State and there cannot be any direction by the High Court in exercise of power conferred under Article 226 of the Constitution of India by issuing command upon the State to frame out a policy decision can be said to be a correct finding?*

15. Since all the issues are inter-linked therefore the same are being taken up together to be answered.

16. But before discussing the aforesaid issues the relevant provision of the Act, 2005 needs to be referred herein i.e., Section 16(5) of the Act, 2005 (amended), which reads as under:

Term of office and conditions of service.

(1) *The State Chief Information Commissioner shall hold office [for such term as may be prescribed by the Central Government] and shall not be eligible for reappointment:*

Provided that no State Chief Information Commissioner shall hold office as such after he has attained the age of sixty-five years.

(2) *Every State Information Commissioner shall hold office [for such term as may be prescribed by the Central Government] or till he attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as such State Information Commissioner:*

Provided that every State Information Commissioner shall, on vacating his office under this subsection, be eligible for appointment as the State Chief Information Commissioner in the manner specified in sub-section (3) of section 15:

Provided further that where the State Information Commissioner is appointed as the State Chief Information Commissioner, his term of office shall not be more than five years in aggregate as the State Information Commissioner and the State Chief Information Commissioner.

(3) *The State Chief Information Commissioner or a State Information Commissioner, shall before he enters upon his office make and subscribe before the Governor or some other person appointed by him in that behalf, an oath or affirmation according to the form set out for the purpose in the First Schedule.*

(4) *The State Chief Information Commissioner or a State Information Commissioner may, at any time, by writing under his hand addressed to the Governor, resign from his office:*

Provided that the State Chief Information Commissioner or a State Information Commissioner may be removed in the manner specified under section 17.

[(5) The salaries and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall be such as may be prescribed by the Central Government:

Provided that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment:

Provided further that the State Chief Information Commissioner and the State Information Commissioners appointed before the commencement of the Right to Information (Amendment) Act, 2019 shall continue to be governed by the provisions of this Act and the rules made there under as if the Right to Information (Amendment) Act, 2019 had not come into force.]

(6) The State Government shall provide the State Chief Information Commissioner and the State Information Commissioners with such officers and employees as may be necessary for the efficient performance of their functions under this Act, and the salaries and allowances payable to and the terms and conditions of service of the officers and other employees appointed for the purpose of this Act shall be such as may be prescribed.

17. It is evident from the aforesaid provision that the substituted provision as under Section 16(5) of the Act, 2005 has been brought to the statutory provision w.e.f. 24.10.2019 substituted by Act, 2019 and prior to its substitution as under sub-section (5) following provisions was there:

“The salaries and allowances payable to and other terms and conditions of service of—

(a) the State Chief Information Commissioner shall be the same as that of an Election Commissioner;

(b) the State Information Commissioner shall be the same as that of the Chief Secretary to the State Government.”

Provided that if the State Chief Information Commissioner or a State Information Commissioner, at the time of his appointment is, in receipt of a pension, other than a disability or wound pension, in respect of any previous service under the Government of India or under the Government of a State, his salary in respect of the service as the State Chief Information Commissioner or a State Information Commissioner shall be reduced by the amount of that pension including any portion of pension which was commuted and pension equivalent of other forms of retirement benefits excluding pension equivalent of retirement gratuity:

Provided further that where the State Chief Information Commissioner or a State Information Commissioner if, at the time of his appointment is, in receipt of retirement benefits in respect of any previous service rendered in a Corporation established by or under any Central Act or State Act or a Government company owned or controlled by the Central Government or the State Government, his salary in respect of the service as the State Chief Information Commissioner or the State Information Commissioner shall be reduced by the amount of pension equivalent to the retirement benefits:

Provided also that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment.”

18. It has further been referred therein that provided that if the State Chief Information Commissioner or a State Information Commissioner, at the time of his

appointment is, in receipt of a pension, other than disability or wound pension, in respect of any previous service under the Government of India or under the Government of a State, his salary in respect to the service as the State Chief Information Commissioner or a State Information Commissioner shall be reduced by the amount of that pension including any portion of pension which was commuted and pension equivalent to other forms of retirement benefits excluding pension equivalent of retirement gratuity.

19. It is thus evident that the two conditions regarding the terms and conditions of service both of State Chief Information Commissioner and State Information Commissioner was subject to the condition that the holder of the post of State Chief Information Commissioner or the State Information Commissioner must be in the appointment where he was incumbent of the said post, as the case may be in receipt of pension; meaning thereby the very condition for entitlement of the pension is to depend upon the appointment of the holder of the post of State Chief Information Commissioner and State Information Commissioner if they were in the pensionable service so as to determine the benefit of

pension as per the condition stipulated in the aforesaid proviso as referred hereinabove.

20. The aforesaid provision was amended and inserted in the statute book w.e.f. 24.10.2019 whereby and whereunder a new provision has been made to the effect that the salary and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner and the State Information Commissioner shall be such as may be provided by the Central Government provided that salaries, allowances and other condition of service of the State Chief Information Commissioner and the State Information Commissioner shall not be varied to their disadvantage after their appointment. Provided further that State Chief Information Commissioner and the State Information Commissioner appointed before commencement of the RTI (amendment) Act, 2019 shall continue to be governed by the provision of this Act and rules made thereunder as if the RTI Act, 2019 had not come into force.

21. Therefore, it is evident by virtue of the amended provision that prior to coming into effect of amended Act and now is existing in the statute book all the service condition will be said to be governed by the

provision of this Act and the rules made thereunder as if RTI Act had not come into force meaning thereby on or after 24.10.2019 the provision as was there in sub-section (5) will be said to be superseded and the service condition will be governed by substituting amended provision as available now under sub-section (5) of Section 16 wherein there is no stipulation regarding issue of pension so far as the incumbents who have been appointed directly to the post of either State Chief Information Commissioner or the State Information Commissioner is concerned.

22. Learned counsel for the appellant has also taken aid of Section 27 of the Act, 2005, which confers power to make rule upon the appropriate government. The argument has been advanced that when there is specific provision under Section 27 then why the State Government is not formulating the rules governing the pension. Therefore, this Court deems it fit and proper to refer Section 27 of the Act, which reads as under:

27. Power to make rules by appropriate Government:- (1) *The appropriate Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act. (2) In particular, and without prejudice to the*

generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the cost of the medium or print cost price of the materials to be disseminated under sub-section (4) of section 4;

(b) the fee payable under sub-section (1) of section 6;

(c) the fee payable under sub-sections (1) and (5) of section 7;

(d) the salaries and allowances payable to and the terms and conditions of service of the officers and other employees under sub-section (6) of section 13 and Power to make rules by appropriate Government SEC.1 THE 21 Repeal sub-section (6) of section 16;

(e) the procedure to be adopted by the Central Information Commission or State Information Commission, as the case may be, in deciding the appeals under sub-section (10) of section 19; and

(f) any other matter which is required to be, or may be, prescribed

23. It is evident from the aforesaid provision more particularly from the provision as contained under Section 27 (2) (d) wherein the stipulation has been made that the salaries and allowances payable to and the terms and conditions of service of the officers and other employees under sub-section (6) of section 13 and power to make rules by appropriate Government sub-section (6) of section 16.

24. Therefore, so far as the argument advanced on behalf of writ petitioner-appellant regarding the implication of Section 27 of the Act, 2005 is concerned, we are of the considered view based upon

the principle of '*occupied field*' that since the relevant provision was already there hence Section 27 in which there was no amendment is to be read together with the un-amended provision of Section 16(5) wherein specific condition is there for holding an incumbent of the post of State Information Commissioner for the benefit of pension, the petitioner is not entitled for pension.

25. Further argument has been advanced that since the post of State Information Commissioner is held to be at par with the post of Chief Secretary of the State as such similar benefit including pension is to be extended to the holder of the post of State Information Commissioner but according to our considered view based upon the provision of Section 27 read with un-amended provision of Section 16(5) it is only confined to the salary and allowances.

26. The authority by taking into consideration the fact that the holder of the post of State Information Commissioner has been given the benefit as per the terms and conditions of the Chief Secretary but that does not mean that merely because the post of Chief Secretary is pensionable hence the incumbent will be entitled for the pensionable service it is for the reason that the Chief Secretary the day when entered into

service was in the pensionable service but the writ petitioner when entered into service it was not pensionable particularly since there was already a rule under un-amended Section 16(5) governing the issue of pension and as such it is not available for the writ petitioner to claim parity with the Chief Secretary so far as claim of pensionary benefit is concerned.

27. Further the issue has been raised that why the State Government is not formulating the rule. There is no dispute about the fact that when the statutory requirement is to formulate the rule by the appropriate government it is incumbent upon the appropriate government to make out the rule but here in the given facts of the case a question will be that even if the rule will be framed whether the writ petitioner will be benefitted by formulating such rule.

28. According to our considered view, based upon the facts of the instant case, even if the rule be framed by the State Government as of now the writ petitioner will not be held entitled for pension for the reason that when the writ petitioner started to discharge his duty on 30.07.2006 and demitted his office on 31.07.2011 i.e, the day when the writ petitioner was appointed and demitted his office there was no existence of the rule as now existed under

Section 16(5) rather the other provision was there prior to 24.10.2019 wherein the provision has been made for fixing the pension based upon the appointment of either the State Chief Information Commissioner or the State Information Commissioner at the time of appointment to such posts and in receipt of pension other than disability of wound pension.

29. Therefore, this Court is of the view that if there was already existence of the rule for fixing the pension of the post of the State Information Commissioner prior to 24.10.2019 when the writ petitioner was appointed and demitted his office then there is no question of seeking a direction for formulating a new rule on the principle of '*occupied field*'.

30. Law is well settled that if the rule is already available there cannot be any direction to frame a rule on the principle of '*occupied field*' as has been held by Hon'ble Apex Court in the case of ***Chandra Prakash Tiwari & Ors v. Shakuntala Shukla & Ors*** [(2002) 6 SCC 127] wherein at paragraph 14 it has been held as under:

"14. *It is in this context as well the decision of this Court in A.B. Krishna v. State of Karnataka [(1998) 3 SCC 495 :*

1998 SCC (L&S) 906] wherein this Court upon reference to Maxwell's Interpretation of Statutes (11th Edn., p. 168) as also oft-cited decision pertaining to the maxim in *Seward v. Vera Cruz* [(1884) 10 AC 59 : (1881-85) All ER Rep 216 : 52 LT 474 (HL)] stated as below : (SCC pp. 499-500, paras 9-13)

“9. It is no doubt true that the rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, the Governor, under Article 309 and the Government under Section 39), but the two jurisdictions are different. **As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, rules can be made under the law so made by the legislature and not under Article 309. It has also to be noticed that rules made in exercise of the rule-making power given under an Act constitute delegated or subordinate legislation, but the rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of ‘occupied field’, the rules under Article 309 cannot supersede the rules made by the legislature.**

10. So far as the question of implied supersession of the rules made under Section 39 of the Act by the General Recruitment Rules, as amended in 1977, is concerned, it may be pointed out that the basic principle, as set out in Maxwell's Interpretation of Statutes (11th Edn., p. 168) is that:

‘A general later law does not abrogate an earlier special one by mere implication. *Generalia specialibus non derogant*, or, in other words, “where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so”.

In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided by the special Act.'

11. This principle was reiterated in Vera Cruz case (*Seward v. Vera Cruz* [(1884) 10 AC 59 : (1881-85) All ER Rep 216 : 52 LT 474 (HL)] as under:

'[W]here there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation ... that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.'

12. Vera Cruz case [(1884) 10 AC 59 : (1881-85) All ER Rep 216 : 52 LT 474 (HL)] was followed in *Eileen Louise Nicolle v. John Winter Nicolle* [(1922) 1 AC 284] as under:

'It is no doubt a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases of which the particular law is but one.'

13. To the above effect, is also the decision of this Court in *Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey* [AIR 1966 SC 1931 : 1966 BLJR 997] in which it was indicated that an earlier special law cannot be held to have been abrogated by mere implication. That being so, the argument regarding implied supersession has to be rejected for both the reasons set out above."

31. Herein it is admitted fact that the field was already occupied prior to 24.10.2019 and it is only after 24.10.2019 a new rule has been inserted in statute book for governing the salary and other terms and conditions of service of State Chief Information Commissioner or the State Information

Commissioner. As such when the rule was already available governing the field to decide the claim of pension there is no question to issue command upon the State to formulate new rule in supersession to the rule already existing at that time and if such direction will be issued by the High Court in exercise of power conferred under Article 226 of the Constitution of India, the same will be nothing but exceeding its jurisdiction on the principle of '*occupied field*'.

32. Further question will be that the writ petitioner at the time when appointed was well knowing about the fact that he is not in the service said to be pensionable so as to govern the pensionary benefit rather he, after demitting the office after completing tenure of five years for the first time, has made such claim, which according to our considered view cannot be said to be sustainable on the ground that once the writ petitioner has accepted the offer of appointment based upon the statutory provision as was existed even there was the same rule when he demitted the office he cannot insist upon for direction to frame out a new rule holding him entitled for pensionary benefit for the reason that if any appointment is being made the same is to be governed by the existing rule as was in vogue at the time when appointment was made or

even the day when the concerned incumbent had demitted the office.

33. So far as the argument advanced on behalf of writ petitioner that the finding recorded by learned Single Judge that there cannot be any direction for formulating rule since it is very restricted power conferred under Article 226 of the constitution of India, we find no error in the said finding reason being that rule was already there when petitioner was demitting the office and as such on the principle of '*occupied filed*' there was no need to pass any direction from the High Court in exercise of power conferred under Article 226 of the Constitution of India to have a substituted rule for the purpose of giving benefit to the writ petitioner so far as claim of pension is concerned.

34. The argument has also been advanced that other States have also formulated the rule and as such here also i.e., in the State of Jharkhand the rule ought to have been framed.

35. The law is well settled that if a State has formulated a rule there cannot be a command by the High Court based upon the said action of the another State to come out with the same rule since it is the absolute prerogative of the State Government to come

out with particular rule and if the State is not coming forward then it is upon the State to take such decision and there cannot be a direction upon the State under Article 226 of the Constitution since making rule/framing police is absolute domain of the State Government, as has been held by Hon'ble Apex Court in the case of **Asok Pande v. Supreme Court of India through its Registrar & Ors [(2018) 5 SCC 341]**, wherein at paragraph 11 it has been held as under:

*“11. In view of this binding elucidation of the authority of the Chief Justice of India, the relief which the petitioner seeks is manifestly misconceived. **For one thing, it is a well-settled principle that no mandamus can issue to direct a body or authority which is vested with a rule-making power to make rules or to make them in a particular manner.** The Supreme Court has been authorised under Article 145 to frame rules of procedure. A mandamus of the nature sought cannot be issued. Similarly, the petitioner is not entitled to seek a direction that Benches of this Court should be constituted in a particular manner or, as he seeks, that there should be separate divisions of this Court. The former lies exclusively in the domain of the prerogative powers of the Chief Justice.”*

36. The law is well settled so far as interference by the Court sitting under Article 226 of the Constitution of India in the affairs of the State in the policy decision is concerned.

37. It is settled position of law that the policy decision of the State Government is least to be interfered by the High Court in exercise of its power under Article 226 of the Constitution of India unless it is arbitrary and suffers from malice or any other vice.

38. In the judgment rendered by Hon'ble Apex Court in ***K.Nagaraj and Others v. State of Andhra Pradesh and Another [(1985) 1 SCC 523]*** wherein the issue was regarding reduction of the age of retirement from 58 to 55 years, the Hon'ble Apex Court has been pleased to hold that the same was taken by virtue of policy decision in order to provide employment opportunity to the younger sections of the society and the need to open up promotional opportunities to employees at the lower levels early in their career and since it is based upon reasonable consideration, it was declined to be interfered with.

39. In the case of ***State of Jharkhand and Others v. Ashok Kumar Dangi and Others [(2011) 13 SCC 383]***, the Hon'ble Apex Court has been pleased to hold at paragraph 17 which reads as under:-

“17.The High Court has found that the Government of Jharkhand, till date, had not framed any policy regarding the number of posts to be filled by physical trained candidates. How many posts of primary school teachers

*be filled up by physical trained candidates, in our opinion, is essentially a question of policy for the State to decide. In framing of the policy, various inputs are required and it is neither desirable nor advisable for a court of law to direct or summarise the Government to adopt a particular policy which it deems fit or proper. **It is well settled that the State Government must have liberty and freedom in framing policy. Further, it also cannot be denied that the courts are ill-equipped to deal with competing claims and conflicting interests.** Often, the courts do not have the satisfactory and effective means to decide which alternative, out of the many competing ones, is the best in the circumstances of the case.”*

40. Thus, it has been laid down that the State Government must have liberty and freedom in framing policy.

41. Further the Hon'ble Apex in the case of **Census Commissioner and Others v. R. Krishnamurthy [(2015) 2 SCC 796]**, has been pleased to hold at paragraph 25 as under :-

*“**25.**Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue notification regarding the manner in which the census has to be carried out and the Central Government has issued notifications, and the competent authority has issued directions. It is not within the domain of the court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres*

applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the executive. If a policy decision or a notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.”

42. Further there is no question of framing a rule since rule was already available and as such on the principle of ‘*occupied field*’ there was no need to make out a rule and hence there is no need to issue command by the High Court in exercise of power conferred under Article 226 of the Constitution of India.

43. All the issues are answered accordingly.

44. This Court, on the basis of aforesaid discussion and entirety of facts and circumstances, has considered the order passed by learned Single Judge and found therefrom that the learned Single Judge has appreciated all legal issues along with the facts and hence not interfered with the impugned order,

which according to our considered view cannot be said to suffer from any error.

45. Accordingly, the instant appeal fails and is dismissed.

46. Pending Interlocutory Application, if any, stands dismissed.

I Agree

(Sujit Narayan Prasad, J.)

(Navneet Kumar, J.)

(Navneet Kumar, J.)

Jharkhand High Court, Ranchi
Alankar/ **A.F.R.**