BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :12.04.2024

CORAM

**THE HONOURABLE MS JUSTICE R.N.MANJULA**

**W.P.(MD)No.9050 of 2024**
**and**
**W.M.P(MD)No.8252 of 2024**

Nagasundaram.J .. Petitioner

Vs.

1. The State of Tamil Nadu,
Rep by its Secretary to Government,
Higher Education Department,
Secretariat,
Chennai.

2. The Registrar,
Madurai Kamaraj University,
Madurai.

3. The Director,
Department of Local Fund Audit,
No.171, Officers Building,
Veterinary Hospital Campus,
IV Floor, Nandanam,
Chennai. .. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records pertaining to the order passed by the 2nd respondent in his proceedings in Ref.Emp.No. A1677/MKU/Show Cause Notice / Reply / 2024 dated 25.03.2024 and quash the same

For Petitioner : Mr. V.Panneer Selvam

For Respondents : Mr.T.Amjadkhan
Government Advocate
for R1

: Mr.T.Cibi Cakarborthy
for R2

**ORDER**

By consent of both the parties, this Writ Petition is taken up for final disposal at the admission stage itself.

2. Heard Mr.V.Panneer Selvam, learned counsel appearing for the petitioner, Mr.T.Amjadkhan, learned Government Advocate appearing for the first respondent and Mr.T.Cibi Chakraborthy, learned counsel appearing for the second respondent.

**3**. The writ petitioner, who has served as Senior Deputy Registrar at the time of retirement during the year 2015, had filed this Writ Petition challenging the order of the second respondent University revising his pension pursuant to the Government Order issued in G.O.(D).No.282, Higher Education (H2) Department, dated 13.10.2022.

**4.** The revision was on the premise that in the Government side, there is no equivalent posts available to that of the Senior Deputy Registrar, which was held by the petitioner in the second respondent University; due to paucity of funds, certain budgetary measurements were taken by revising the provisional pension given to the petitioner; this is in view of the fact that he held post equivalent for which available in the Government with the less pay.

**5**. Mr.V.Panneer Selvam, learned counsel appearing for the petitioner submitted that the Government Order in G.O.(D).No.282, Higher Education (H2) Department, dated 13.10.2022, cannot be issued superseding the statutory provisions and further the executive instructions cannot take away the rights of the petitioner which have been granted to him in accordance with the statutory entitlement. It is further submitted that even for any reason, the Government Order can be enforceable only with a prospective effect and cannot be operated retrospectively by affecting the pension already accorded in favour of the petitioner. Reliance was placed on the judgments of the Hon'ble Supreme Court of India held in the case of ***State of Jharkhand vs. Jitendra Kumar*** reported in ***(2013) 12 SCC 210*** and ***State of Madhya Pradesh and others vs. Yogendra Shrivastava*** reported in ***(2010) 12 SCC 538***.

**6**. However, Mr.T.Cibi Chakraborthy, the learned counsel appearing for the second respondent submitted that the Government Order has been approved by the Syndicate which is the supreme body of the University and the implementation has been done only in accordance with law and according to the statutory requirement. It is further submitted that prior to revision, notice has been issued to the petitioner and he has made his submissions and after considering his submissions, the impugned order has been passed; however, no recovery has been made and the revision of pension has been effected. Hence, the petitioner cannot attack the same.

**7**. In G.O.(D).No.282, Higher Education (H2) Department, dated 13.10.2022, certain decisions have been taken pursuant to the suggestions and undertaking given by the University to the Government. One of the proposals so sent to the Government was to revise the provisional pension on the revised pay certified by the Local Fund Audit Department wherever applicable. For the sake of clarity, the above part of the Government Order is extracted hereunder:

"*5.(v) The provisional pension shall be revised* *based on the revised pay certified by the Local Fund Audit Department where ever applicable. The number of persons drawing provisional pension due to non settlement of audit paras should be reduced immediately starting from the earliest ones to the recent ones."*

**8**. Even according to the second respondent University, the proposal was given only to the revised provisional pension and not the regular pension which has been granted to the petitioner. Admittedly, the petitioner was not given with any provisional pension and whatever that has been accorded to him was subsequent to his retirement and the regular pension for which he is entitled to.

**9**. It is trite law that the Government Order cannot be superseded by any statutory provisions which are governing the service conditions of the employees. So far as this petitioner is concerned, he had retired from service and the relation between the petitioner and the second respondent University as that of employee and employer had ceased to exist. It is not the argument of the respondent that the post, by name, Senior Deputy Registrar was not in existence at the time of his employment. Only because that post is available, the petitioner was rightly placed in that post on his promotion and he was allowed to retire as how he has been designated. In this regard, it is worthwhile to refer to the judgment of the Hon'ble Supreme Court of India in the case of ***State of Jharkhand vs. Jitendra Kumar*** reported in ***(2013) 12 SCC 210***, wherein, it has been held that the right to receive pension is recognised as a right in “property” and the executive instructions cannot have a statutory character and hence those executive instructions cannot be called as law. In the words of the Hon'ble Supreme Court of India it is given as under:

> “*16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in “property”. Article 300-A of the Constitution of*

*India reads as under:*

> *"**300-A. Persons not to be deprived of property save by authority of law.-** No person shall be deprived of his property save by authority of law".*
>
> *Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.*

*17. It hardly needs to be emphasised that the executive instructions are not having statutory character and therefore, cannot be termed as "law"within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are* *concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different.*

*18. We, accordingly, find that there is no merit in the instant appeals as the impugned order of the High Court is without blemish. Accordingly, these appeals are dismissed with costs quantified at Rs.10,000/- each."*

**10**. With regard to the date of implementation of any of the Statutory Rules leaving alone the executive instructions, it has been categorically held that such Rules can operate only with prospective effect and not retrospectively. In the said judgment, it has been held as under:

"*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 vs. Armed Forces Medical Services; K.C.Arora vs. State of Haryana and T.R.Kapur vs. 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 the respondent employees will be entitled to non-practising allowance @ 25% of their pay upto 20-05-2003."*

**11**. The petitioner, who was working as a Senior Deputy Registrar was not subjected to any disciplinary proceedings and while allowing him to retire no conditions were imposed in view of any pending or contemplated disciplinary action. As stated already, the pensionary benefits sanctioned to the petitioner are only in accordance with the Rules. Hence, the respondents have got no authority to recall the order which was given already and to revise the same pursuant to the subsequent to a Government Order.

**12**. The learned Counsel appearing for the petitioner submitted that the order issued for recovery of the pension already granted would amount to enforcing the Government Order with prospective effect and the argument of retrospective implementation does not arise.

**13**. The reduction of pension has been made only because the post by name Senior Deputy Registrar in the idea of the Government is luxurious and for which no equal post is available with Government side. So, a policy decision is taken at the Government side to re-designate the posts of Deputy Registrar to Superintendent. Such re-designation has been made with effect from the year 2008 and only in consequence thereof, the pension already sanctioned to the petitioner has been revised through the impugned order.

**14.** No re-designation can be impacted on those persons who are no more in service. In other words if any re-designation exercise is done in respect of retired individuals that is possible only by setting the clock backwards in time. So, the attempt to implement the Government Order against the petitioner in a retrospective manner is glaring.

**15.** Coming to the next point of issuing executive instruction not supported by statutes and enactments, after having made elaborate discussion, it is held in the case of the ***Madras University Staff Association, represented by its President, University of Madras, Chennai-5 vs. State of Tamil Nadu, represented by the Secretary to Government, Higher Education Department, Fort St.George, Chennai-9 and another,*** that it is ultravires to issue instructions contrary to the enactment of the legislature and concluded as under:-

*"32. In view of my elaborate discussions in the foregoing paragraphs, I would sum up the conclusions in the following terms:*

*(i) As the law has been made by the State legislature conferring the power of regulation of service conditions of non-teaching staff of the universities on Syndicate, the executive is not empowered to pass the impugned order in regard to that matter in exercise of his executive power under Article 162 of the Constitution nor can he exercise such power with reference to that matter through the officers subordinate to him.*

*(ii) A law having occupied the field, it is not open for the State, in exercise of its executive power, to prescribe the same field, by an executive order.*

*(iii) Executive power of the State cannot be repugnant to the enactment of the legislature.*

*(iv) Executive order of the State can be issued only when the statutes or enactments are*

*having gaps and do not cover the area by the existing Rules.*

*(v) Mere funding of the State to the Universities does not confer any privilege on the State to issue executive orders, so as to interfere with the administration of the Universities.*

*(vi) Executive order (i.e) the impugned order of the First respondent in G.O.Ms.No.402, Higher Education (H2) Department, dated 13.12.2006 is inoperative and it is, accordingly declared ultra vires to the provisions of the Acts."*

**16.** In the case in hand, the entitlement of the petitioner to get pension in accordance with the provisions of pension has been reduced and modified through an administrative order which is thoroughly illegal. In reality, the petitioner's services with the respondent University had ended and thereafter the post held by the petitioner can not be re-designated as against him. In other words the petitioner is no more holding the post of Senior Deputy Registrar in order to get it re-designated. Such an action would amount to doing something on a thing which does not exist. Hence in all possibilities and realities of rule of law, the respondents do not have authority to pass the impugned order. As the impugned notice is against the spirit and scope of the statutory protection given to the petitioner, it is illegal and liable to be set aside.

**17.** The conditions of service of this petitioner and the Government servants were not claimed to be equal and the petitioner is governed by the Rules and Regulation of the University. Each time when the Government Orders are passed with regard to any of the service benefits or service conditions, it is the Syndicate of the University which has to take a call and pass a Resolution whether such orders or scheme is applicable to the University and whether the University is going to implement it or not ?

**18.** At the time when this petitioner was working as a Deputy Registrar, the University has not chosen to take any decision to equate the service conditions of the persons who were working as Deputy Registrar in the University to the Superintendent working in the Government Departments. If the respondent University takes such a decision, that can be implemented prospectively and the petitioner cannot recast it back to the days, when the petitioner who already retired from service had worked in the capacity of Deputy Registrar and revise his pension.

**19.** Accordingly, the Writ Petition is **allowed** and the impugned order passed by the second respondent vide proceedings in Ref.Emp.No. A1677/MKU/Show Cause Notice / Reply / 2024 dated 25.03.2024, is quashed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

**12.04.2024**

NCC :yes/no
Index :yes/no
Internet:yes/no
PJL

To

1. The State of Tamil Nadu,
Rep by its Secretary to Government,
Higher Education Department,
Secretariat,
Chennai.

2. The Registrar,
Madurai Kamaraj University,
Madurai.

3. The Director,
Department of Local Fund Audit,
No.171, Officers Building,
Veterinary Hospital Campus,
IV Floor, Nandanam,
Chennai.

**R.N.MANJULA, J.**

PJL

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