BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 26.04.2024

CORAM

THE HONOURABLE MS JUSTICE R.N.MANJULA

W.P.(MD)No.10260 of 2024
and
W.M.P.(MD).Nos.9229 & 9230 of 2024

A.Bose ... Petitioner

Vs.

1.The State of Tamil Nadu,
rep. by its Principal Secretary to Government,
Higher Education Department,
Secretariat,
St. George Fort, Chennai.

2.The Registrar,
Madurai Kamaraj University,
Madurai.

3.The Director,
Department of Local Fund Audit,
No.571, Officers Building,
Veterinary Hospital Campus,
4th Floor, Nandanam,
Chennai – 600 035. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records relating to the impugned order passed by the 2nd respondent vide his proceedings in Ref.Emp.No.A1801/MKU/Show Cause Notice/Reply/2024 dated 08.04.2024 and quash the same as illegal.

For Petitioner : Mr.S.Vanchinathan for
M/s.Ajmal Associates

For Respondents : Mr.M.Siddharthan for R1 and R3
Additional Government Pleader

Mr.Ashaiq Ismail for
Mr.T.Cibi Chakraboorthy for R2

O R D E R

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

2. Heard Mr.S.Vanchinathan, learned counsel for M/s.Ajmal Associates appearing for the petitioner, Mr.M.Siddharthan, learned Additional Government Pleader appearing for respondents 1 and 3 and Mr.Ashaiq Ismail, learned counsel for Mr.T.Cibichakrabarthy, learned counsel appearing for the second respondent.

3. The petitioner retired from service on 30.04.2020 after attaining superannuation. Even though there are no disciplinary proceedings pending against him, he has been given with only 90% of provisional pension and the remaining 10% of pension is withheld on the ground of Audit Objection. Till date, the retiral benefits withheld by the second respondent have not been released. Subsequent to the Local Fund Audit Report, the petitioner was issued with show cause notice on 02.03.2024 stating that his pay fixation was wrongly made in higher scale of pay instead of pay admissible to their posts as per the Tamil Nadu Government Ministerial Service. The petitioner has submitted respective reply before the second respondent University. Despite the same, the second respondent University has passed the impugned order stating that it is necessary to re-fix the petitioner's pay and pension on par with the Government scale of pay. Challenging the same, the petitioner has filed this writ petition.

4. This Court has already dealt with a similar issue in W.P.(MD).No. 10935 of 2024, dated 30.04.2024, wherein, it is held as follows:

> *7. Once an employee retires, there cannot be any employer-employee relationship between the individual and the respondent University. In such case, the third respondent University cannot assume power to revise and re-fix the salaries of the retired persons due to the pressure given by the Audit Body. This issue has already been dealt with by this Court in W.P.(MD)Nos.8537 to 8546 of 2024. The relevant portions in the above Judgment are extracted below.*

"8. 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 these petitioners are concerned, they had retired from service and the relation between the petitioners 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 posts, by names, Senior Deputy Registrar and Senior Superintendent, were not in existence at the time of their employment. Only because those posts are available, the petitioners are rightly placed in those posts on their promotion and they were allowed to retire as how they have 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. The words of the Hon'ble Supreme Court of India are 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."

9. 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 nonpractising allowance @ 25% of their pay upto 20-05-2003.""

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13. Coming to the next point of issuing executive instruction not supported by statutes and enactments. After having made elaborate discussion 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, it is held 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.

14. In the cases in hand, the entitlement of the *petitioners 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 petitioners' services with the respondent university had ended and thereafter the posts held by the petitioner can not be re-designated as against them. In other words the petitioners are no more holding the posts of Senior Deputy Registrar and Senior Superintendent 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 notices are against the spirit and scope of the statutory protection given to the petitioners, they are illegal and liable to be set aside."*

8. *In the case on hand also, the petitioners have all retired by superannuation and hence, the employer - employee relationship between the petitioners and the third respondent University had come to an end and hence, the third respondent University holds no Authority to re-fix the salary and the consequential benefits of the* *petitioners.*

9. *In the similar lines, the Administrative Staff Association of Manonmaniam Sundaranar University rep. by its General Secretary have also filed a writ petition in W.P.(MD)No.6635 of 2019 and this Court in paragraph no.8, had held as follows.*

"8.Section 27 of the Act will not empower the Government to issue a direction of this nature. The Director of Local Fund Audit had gone to the extent of stating that the university has been giving wrong promotions / increments. The job of the Local Fund Audit is to see if the expenditure incurred by the university is in consonance with the policy of the university. As per Section 27 of the Act, the Syndicate has the power to appoint the University Lectures, University staff and fix their emoluments. It is not for the Local Fund Audit to go into the justification of the promotions given by the university. The Government has gone entirely by the report of the Local Fund Audit. It clearly amounts to interference with the internal administration of the university. Section 27 of the Act has been misconstrued by the Government. The impugned communication is without jurisdiction. It

is quashed and the writ petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed."

10. *The above said Judgment will also be applicable to the facts of the present case because in the instant case also, the third respondent University has passed the impugned order based on the Audit Objection raised with regard to the wrong fixation of pay of the non-teaching staffs. As held in the above Judgment, only the Syndicate has the power to appoint the University staffs and fix their emoluments. The re-fixation of salary and consequential pensionary benefits post retirement retrospectively, in the opinion of this Court, is not in accordance with law and hence the impugned orders are liable to be set aside.*

11. *In the result,*

(i) The writ petition in W.P.(MD)No.9389 of 2024 is ***allowed*** *and the impugned order of the third respondent in Ref.Emp. No.A1773/ MKU/Show Cause Notice/Reply/2024 dated 08.04.2024 is quashed. The respondents are prohibited from revising the scale of pay and provisional pension of the petitioner by re-fixing*

his scale of pay on par with the scale of pay in the Departments of Government of Tamil Nadu.

*(ii) The writ petition in W.P.(MD)No.9391 of 2024 is **allowed** and the impugned order of the third respondent in Ref.Emp. No.A1821/ MKU/Show Cause Notice/Reply/2024 dated 08.04.2024 is quashed. The respondents are prohibited from revising the scale of pay and provisional pension of the petitioner by re-fixing his scale of pay on par with the scale of pay in the Departments of Government of Tamil Nadu.*

*(iii) The writ petition in W.P.(MD)No.9392 of 2024 is **allowed** and the impugned order of the third respondent in Ref.Emp. No.A1733/ MKU/Show Cause Notice/Reply/2024 dated 08.04.2024 is quashed. The respondents are prohibited from revising the scale of pay and provisional pension of the petitioner by re-fixing his scale of pay on par with the scale of pay in the Departments of Government of Tamil Nadu.*

*(iv) The writ petition in W.P.(MD)No.9393 of 2024 is **allowed** and the impugned order of the third respondent in Ref.Emp. No.A1782/ MKU/Show Cause Notice/Reply/2024 dated 08.04.2024 is quashed. The respondents are prohibited from revising the scale of pay and*

> *provisional pension of the petitioner by re-fixing his scale of pay on par with the scale of pay in the Departments of Government of Tamil Nadu.*
>
> *(v) Consequently, connected Miscellaneous Petitions are closed. No costs."*

5. In the light of the decision cited supra, this Writ Petition is **allowed** and the impugned order of the second respondent in Ref.Emp.No.A1801/MKU/Show Cause Notice/Reply/2024 dated 08.04.2024 is quashed. No costs. Consequently, connected miscellaneous petitions are closed.

26.04.2024

Index:yes/no
Internet:yes/no
Ncc : yes/no
TSG

To
1.The Principal Secretary to Government,
Higher Education Department,
Secretariat, St. George Fort,
Chennai.
2.The Registrar,
Madurai Kamaraj University, Madurai.
3.The Director,
Department of Local Fund Audit,
No.571, Officers Building,
Veterinary Hospital Campus,
4th Floor, Nandanam, Chennai – 600 035.

R.N.MANJULA, J.

TSG

W.P.(MD)No.10260 of 2024

26.04.2024