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2023:PHHC: 009031

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

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Date of decision: 23.01.2024

LT. COL. (DR) VINOD KUMAR (RETD)

....PETITIONER

Vs.

UNION OF INDIA AND OTHERS

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: Mr. G.K. Sharma, Advocate
for the petitioner.

Ms. Monica Chawla, Central Govt. Counsel
for the respondents-Union of India.

JAGMOHAN BANSAL, J (ORAL)

1. Reply and Annexure R-1 to R-2 filed on behalf of respondents are taken on record. Registry is directed to tag the same at an appropriate place.
2. The petitioner through the instant petition under Articles 226/227 of the Constitution of India is seeking setting aside of clause No. 3 of circular/policy dated 03.01.2023 (Annexure P-6).
3. The petitioner from 2006 to 2020 served with Indian Army as Dental Officer. The petitioner retired from Army on 16.05.2020 without earning pension. The Ministry of Defence, Government of India in 2003 introduced Ex-serviceman Contributory Health Scheme (for short 'ECHS'). The aim and object of the Scheme is to provide easy medical services to Ex-servicemen and their dependents.
4. In terms of said scheme, a network of Polyclinics has been established across the country. The petitioner (w.e.f. 20.02.2021) came to be

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appointed with ECHS, Rewari as Dental Officer. The tenure of the service was till 06.08.2021. The petitioner on 07.08.2021 joined at ECHS, Gohana and his original period of contract was upto 08.08.2021. The said period was extended for two years i.e. till 09.08.2023. The petitioner got selected at ECHS, Rohtak and he submitted his resignation dated 08.12.2022 with authorities at Gohana. In the resignation letter, it was pointed out that notice may be considered as one month's prior notice for leaving Dental Officer Post. The petitioner on 10.01.2023 joined at ECHS, Rohtak. The period of contract of the petitioner was from 01.01.2023 to 31.03.2023. The petitioner vide communication dated 11.04.2023 requested the authorities at Rohtak to extend his period of contract. The respondents by notice of April' 2023 (Annexure P-11) called upon the petitioner to submit reason for submitting resignation before completion of contract period at ECHS, Gohana. In the said notice, policy circular dated 03.01.2023, was referred whereby ban of 12 months has been imposed on re-employment if an employee resigns. The claim of the petitioner came to be rejected vide communication dated 01.06.2023 on the ground that by resigning he has violated policy dated 03.01.2023.

5. Counsel for the petitioner submits that petitioner submitted resignation on 08.12.2022 and the policy imposing ban of 12 months in case of resignation came into force w.e.f. 03.01.2023. There was no occasion for petitioner to know of aforesaid policy when he submitted resignation at Gohana. The petitioner resigned at Gohana with an expectation to get job at Rohtak, which the petitioner got, however, respondents have denied extension on the sole ground that by resigning he has violated policy dated 03.06.2023. The petitioner has lost opportunity to work at Gohana as well as Rohtak.

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6. Counsel for respondent submits that petitioner had submitted resignation letter dated 08.12.2022, however, it was received in Polyclinic, Gohana on 13.12.2022 and further received by head office on 17.12.2022. The petitioner was required to give one month's advance notice and one month's period expired on 07.01.2023 and policy came into force on 03.01.2023, thus case of the petitioner was squarely covered by the said policy. The petitioner could not join another place without getting NOC.

7. I have heard learned counsels for the parties and with their able assistance perused the record.

8. It is conceded by respondent that petitioner has been declined extension on the sole ground that his case is covered by policy dated 03.01.2023 which provides that if an individual submits resignation, he will not be employed at any other Polyclinic across the country for a period of 12 months from the concluding day of the existing contract. The policy dated 03.01.2023, which is foundation of action of respondent came into force w.e.f. 03.01.2023. The Clause 3 of the policy which is relevant for the case in hand is reproduced hereunder:-

“3. If any contractual employee resigns purely due to unavoidable exigencies on personal reasons other than when he is involved or suspected to be involved in discipline/malpractice, the resignation of the contractual employee will be accepted and the individual will not be employed at any polyclinic across the country for a period of 12 months from the concluding day of the existing contract. Post completion of 12 month period, the individual may apply again for vacancy of contractual staff at any polyclinic across the country.”

9. The petitioner submitted his resignation on 08.12.2022. On the said date, the petitioner could not think of policy of 03.01.2023. The restriction of 12

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months contemplated by Clause 3 of the policy dated 03.01.2023 by any stretch of imagination could not be known to the petitioner. He on account of absence of any restriction submitted his resignation and joined new place of posting. The authorities at Rohtak permitted the petitioner to join on 10.01.2023 and the contract period started w.e.f. 01.01.2023. On these two dates, the authorities at Rohtak did not raise any objection which indicates that nobody was aware of policy dated 03.01.2023 and resignation was permissible.

10. On account of policy of 03.01.2023, the petitioner has been deprived of opportunity of re-employment. He resigned from earlier place of posting because, at that time, there was no restriction. The application of policy of 03.01.2023 to the petitioner amounts to retrospective amendment. It is settled proposition of law that no circular/instruction or delegated legislation can be retrospective in nature unless and until specifically permitted by law. An instruction, which is clarificatory in nature can be retrospective, however, an instruction, which creates liability or rights cannot be retrospective in nature. The Supreme Court in ***Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited (2015) 1 SCC 1***, has clarified the position with respect to retrospective effect of a legislation. The relevant extracts of the judgment read as under:-

“29. The obvious basis of the principle against retrospectivity is the principle of “fairness”, which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation

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or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

31. In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by outweighing factors.

32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as “declaratory statutes”. The circumstances under which provisions can be termed as “declaratory statutes” are explained by Justice G.P. Singh [Principles of Statutory Interpretation, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:

“Declaratory statutes

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies [W.F. Craies, Craies on Statute Law (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [Ed.: The reference is to Central Bank of India v. Workmen, AIR 1960 SC 12, para 29] : ‘For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common

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law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word “declared” as well as the word “enacted”.’ But the use of the words ‘it is declared’ is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is ‘to explain’ an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language ‘shall be deemed always to have meant’ is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law.”

11. The Supreme Court in ***DG of Foreign Trade Vs. Kanak Exports, (2016) 2 SCC 226*** has clarified that a delegated or subordinate legislation can only be prospective and not retrospective unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect.

The relevant extracts of judgment read as under:-

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“113. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this section confer powers upon the Central Government to “amend” the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospectively. This legal position is rightly discussed by the Bombay High Court in the impugned judgment in the following words: (Kanak Exports case [Kanak Exports v. Union of India, 2005 SCC OnLine Bom 1678] , SCC OnLine Bom paras 26-29)

“26. We are unable to accept the submissions of the learned Additional Solicitor General. The word ‘amend’ does not give power to make amendment retrospectively if it is used in relation to the power to make a piece of delegated legislation. The connotation of the word ‘amend’ when it is used for the exercise of power by a legislature cannot be pressed to construe the word ‘amend’ in relation to the power to make delegated legislation. In this regard the following observations of the Supreme Court in Accountant General v. Doraiswamy (1981) 4 SCC 93.

‘7. The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In B.S. Vadera v. Union of India [B.S. Vadera v. Union of India, AIR 1969 SC 118] , this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a law on the subject-matter of Article

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309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that “any rules so made shall have effect subject to the provisions of any such Act”. Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the 1974 Rules cannot have retrospective operation, and therefore sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on 27-7-1956 must be held ultra vires.’

27. The reliance placed on the power to regulate under Section 3 of the Act is equally misconceived. Section 5 gives express power to formulate the policy and to amend it. This is specific power. The power to regulate, therefore, cannot be read as a power to amend when a specific power to amend is given. If the power to regulate does not include the power to amend retrospectively such a power cannot be read into Section 3 of the Act.

28. Section 21 of the General Clauses Act on which reliance is placed by the learned Additional Solicitor General is also of no assistance to sustain the retrospective operation of the notification. Section 21 of the General Clauses Act embodies a rule of construction, nature and extent of application of which must inevitably be governed by the relevant provisions of the statute which confers power to issue the notification. The said power must be exercised within the limits prescribed by the provisions conferring the said power. (See Gopichand v. Delhi

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Admn. [Gopichand v. Delhi Admn., AIR 1959 SC 609 : 1959 Cri LJ 782] , Lachmi Narain v. Union of India [Lachmi Narain v. Union of India, (1976) 2 SCC 953 : 1976 SCC (Tax) 213] and State of Kerala v. K.G. Madhavan Pillai [State of Kerala v. K.G. Madhavan Pillai, (1988) 4 SCC 669] .) The ratio in H.C. Suman case [H.C. Suman v. Rehabilitation Ministry Employees' Coop. House Building Society Ltd., (1991) 4 SCC 485] also cannot be applied because in that case it was found that Section 88 of the Delhi Cooperative Societies Act, 1972 contained the power to exempt and if the provisions of Section 12 of the said Act were to be exempted the provisions which provided that bye-laws are effective from the date of registration. The notification issued under Section 88 would exempt it and Section 88 would contain the power to exempt retrospectively. Similarly, Section 14 of the General Clauses Act has no application as it merely provides that where any power is conferred on the Government, then that power can be exercised from time to time as occasion requires.

29. Under that Scheme the status-holder is eligible for benefits upon achieving the incremental growth of 25% of the FOB value of exports in the current year over the previous year. It, therefore, follows that no sooner the status-holder achieves 25% incremental growth, the status-holder would be entitled to the benefits under the Scheme. Immediately upon attaining the prescribed incremental growth, the status-holder becomes eligible to certificate for duty-free import and thereby a right vests in the exporter to receive the same.”

12. In the case in hand, the policy/circular dated 03.01.2023 neither impliedly nor specifically declares that it is retrospective in nature. In the absence of retrospective in nature, the policy dated 03.01.2023 could not be made applicable to the petitioner because he has resigned much prior to 03.01.2023.

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13. In the backdrop of above discussion and findings, it is hereby held that Clause 3 of the Policy dated 03.01.2023 is not applicable to the petitioner. The authorities shall consider application, if any, filed by the petitioner for the post of Dental Officer without invoking rigour of Clause 3 of the circular dated 03.01.2023

14. Disposed of in above terms.

23.01.2024
manoj

[JAGMOHAN BANSAL]
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No