[A.F.R.]

[Reserved]

Court No. - 5

Case :- SERVICE SINGLE No. - 33425 of 2019

Petitioner :- Anurag Mehrotra
Respondent :- State Of U.P.Thru Addl.Chief Secy.Finance Deptt. Lko & Ors.
Counsel for Petitioner :- Anurag Mehrotra(In Person
Counsel for Respondent :- C.S.C.,Deepak Seth

Hon'ble Vivek Chaudhary,J.

1. Petitioner has filed present writ petition challenging the order dated 13.11.2019 by which the representation of petitioner is rejected by respondent no.2 and further prayer for grant of bonus under the Incentive Bonus Scheme as per Rule 12(1) of General Provident Fund (U.P.), Rules, 1985 (hereinafter referred to as 'G.P.F. Rules of 1985'). Petitioner is also claiming interest on delayed payment of dearness allowances which have been deposited by the respondents deliberately with delay in his provident fund account with a further a prayer that respondents 2, 4 and 5 be directed to calculate the interest on the payment made by respondent no. 2 in his provident fund account for the month of November, 1994, December, 1994, October, 1997, March, 2001 and March, 2009 on his deposit amount. The main grievance of the petitioner is that he is denied payment of incentive bonus under Rule 12(1) of G.P.F. Rules of 1985.

2. I have heard petitioner in person and learned Standing Counsel for the State at length.

3. Submission of petitioner is that the G.P.F. Rules of 1985 were framed and brought into operation in exercise of power under Article 309 of Constitution of India. The same was notified on 29.10.1985. Petitioner submits that the impugned order dated 13.11.2019 does not give any reason for denying benefits of Rule 12(1) of G.P.F. Rules of 1985 to the petitioner under which he is entitled for bonus. He further submits that even in the counter affidavit no reason is given for denying the said benefit to the him.

4. During course of argument learned Standing Counsel placed before this Court a Government Order dated 05.07.1986 which provides payment of interest at the rate of 12% per annum on the amount deposited in the general fund for the year 1986-87. Clause 2 of the said government order further provides that w.e.f. 01.04.1988 no incentive bonus shall be separately payable. Further reliance is placed upon Rule 11(1) of the G.P.F. Rules of 1985.

5. For convenience it would be appropriate to quote Rule 11(1) and 12(1) of the G.P.F. Rules of 1985 and Government Order dated 05.07.1986 which reads:-

General Provident Fund (U.P.) Rules, 1985

11. Interest.- (1) Subject to the provisions of sub-rule (5) Government shall pay to the credit of the account of a subscriber interest at such rate as may be determined for each year by the Government of India.

12. Incentive Bonus Scheme.- (1) A subscriber who does not withdraw any money from the amount standing to his credit in the Fund by way of advance under Rule 13 or withdrawn under Rule 16 during the preceding three years, shall be entitled to a bonus at the rate of 1 per cent on the entire balance at his credit on the last day of the year.

उत्तर प्रदेश सरकार

वित्त (सामान्य) अनुभाग-- 4

संख्या-4 जी० आई० -28/दस-86-59-81

लखनऊ, दिनांक 5 जुलाई 1986

जनरल प्रोवीडेन्ड फंड (उ०प्र०) रूल्स 1985 के नियम 11 (1) तथा कन्ट्रीब्यूटी प्रोवीडेन्ड फंड (उ०प्र०) रूल्स, के नियम (11) (1) मे नियम 9 के प्राविधानों के अनुसार राज्यपाल महोदय घोषित करते हैं कि जनरल प्रोवीडेन्ड फंड (उ०प्र०), कन्ट्रीब्यूटी प्रोवीडेन्ड फंड (उ०प्र०) तथा उत्तर प्रदेश कन्ट्रीब्यूटी प्रोवीडेन्ड फंड पेंशन इनश्योरेंस फंड ने अभिदाताओं (सब्सक्राइबर्स) द्वारा वित्तीय वर्ष 1986-87 में जमा की गयी तथा उनके नाम अवशेष पर ब्याज की दर सभी खातों में जमा कुल राशि पर 12 प्रतिशत (बारह प्रतिशत) प्रति वर्ष होगी। यह हर पहली अप्रैल, 1986 से प्रारम्भ होने वाले वित्तीय वर्ष के दौरान लागू होगी।

2. 1 अप्रैल, 1988 से आरम्भ होने वाले वित्तीय वर्ष में तथा बाद के वर्षों में कोई प्रोत्साहन बोनस अलग से देय नहीं होगा। जिन मामलों में वर्ष के दौरान अन्तिम निष्कासन (फाइनल या नान रिफंडेबुल) लिया जायेगा, उसमे ली गयी धनराशि के एक प्रतिशत के बराबर निकटतन रुपये तक पूर्णांकित राशि, अविदाता के खाते में जमा की जाने वाली ब्याज को राशि में से घटा दी जायेगी।

3-ब्याज की गणना हेतु एक सदयोगणक (रेडीरेकनर) संलग्न है।

भवदीय

सचिव

जे०पी० सिंह

7. Petitioner submits that G.P.F. Rules of 1985 are framed in exercise of power under Article 309 of the Constitution of India and any change in the same can be made only by exercising power under Article 309 of the Constitution of India. Rules framed under Article 309 of the Constitution of India cannot be modified or changed in exercise of executive powers by the State Government. In support of his case, petitioner relies upon the following judgments:-

> **(i)** ***A.K. Bhatnagar and Others Vs. Union of India and Others; '(1991) 1 SCC 544';***
>
> ***(ii) K. Kuppusamy and Another Vs. State of T.N. and Others; '(1998) 8 SCC 469';***
>
> **(iii)** ***B.N. Nagarajan and others etc. Vs. State of Karnataka and Others etc.; 'AIR 1979 SC 1676: (1979) 4 SCC 507'*** .

8. Article 162 and Article 309 of the Constitution of India read as under:-

> ***"162. Extent of executive power of State****-Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.*
>
> *Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof.*
>
> ***309. Recruitment and conditions of service of persons serving the Union or a State-*** *Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:*
>
> *Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor [***] of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in*

that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

9. A perusal of Article 309 of the Constitution of India shows that under the same, the Governor of a State or such person as he may direct in case of services and posts in connection with the affairs of the State can frame rules regulating the recruitment and the conditions of service of persons appointed and the same shall be effective until provision in that behalf is made by or under an Act of a appropriate legislature. Therefore, any rule framed under Article 309 can only be replaced by an Act of an appropriate legislature. It cannot be replaced by an executive order under Article 162 of the Constitution of India. The law in this regard is well settled by the Supreme Court as well as by this Court in number of cases. Suffice would be refer to judgment passed in case of ***'Union of India Vs. S.S. Soma Sundaram Vishwanath'*** reported in ***[AIR 1988 SC 2255]*** in which the Supreme Court held:-

"It is well settled that the norms regarding recruitment and promotion of the officer belong to the Civil Service can be laid down either by a law made by the appropriate Legislature or by the rules made under the proviso to Article 309 of the Constitution of India or by means of executive instructions issued in Article 73 of the Constitution of India in the case of Civil Services in the Government of India and under Article 162 of the Constitution of India in the case of Civil Services in the State Governments, ***if there is a conflict between the executive Instructions and the rules made under the proviso to Article 309 of the Constitution of India the rule made under the proviso to Article 309 of the Constitution of India prevail and if there is a conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate Legislature, the latter prevails." (emphasis added)***

10. Similarly in case of ***'Paluru Ram Krishnaiah Vs. Union of India'*** reported in ***[AIR 1990 SC 166],*** comparing rules framed under Article 309 and executive instructions, the Court held:-

"It is thus apparent that an executive instruction could make a provision only with regard to matter which was not covered by the Rules and that such executive instruction could not override any provision of the Rule."

11. Both the aforesaid judgments are also considered by Division Bench of this Court in case of ***'State of U.P. and Others Vs. Smt. Shakuntla Shukla'*** reported in ***[1999 ACJ 1295]***. Reaffirming the same, the Division Bench held:-

> *".....Executive instructions operating in a field cease to be operative as soon as the field is covered by any statutory rules or rules made under the proviso to Article 309 of the Constitution....."*

12. Further in paragraph-3 of the judgment passed in case of ***'K. Kuppusamy and Another Vs. State of T.N. and Others'*** reported in ***[(1998) 8 SCC 469],*** the Court held:-

> *"3. The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies. Even today the amendment has not been effected. As and when it is effected ordinarily it would be prospective in nature unless expressly or by necessary implication found to be retrospective. The Tribunal was, therefore, wrong in ignoring the rule."*

13. In paragraph-25 of the judgment passed in case of ***'B.N. Nagarajan and others etc. Vs. State of Karnataka and Others etc'*** reported in ***[AIR 1979 SC 1676: (1979) 4 SCC 507],*** the Court held:-

> *"25.……………...In other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under Article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government, as already stated, cannot override rules framed under Article 309 of the Constitution."*
> ***(emphasis added)***

14. From the above it is settled that the State Government cannot issue executive instructions with regard to the field already occupied by the G.P.F. Rules of 1985 issued under Article 309 of the Constitution of India. It also cannot modify the said rules by an executive order. The G.P.F. Rules of 1985 provides for 1% bonus. There is no power left in the State Government to withdraw or repeal the said bonus in exercise of its executive power. The same can only be withdrawn or modified in exercise of power under Article 309 of the Constitution of India. The Government Order dated 05.07.1986 is not issued in exercise of power under Article 309 but is issued in exercise of its executive power. Rule 11(1) of the G.P.F. Rules of 1985 only empowers the State Government the subscribed interest at such rate as may be determined for each year by Government of India. In exercise of power under Rule 11(1) of G.P.F. Rules of 1985 the State Government cannot withdraw the incentive bonus required to be given under Rule 12 of the G.P.F. Rules of 1985. Therefore, the Government Order dated 05.07.1986 to the extent it withdraws the benefit of bonus required to be paid under Rule 12 of the G.P.F. Rules, 1985 is declared to be ultra-vires and is set aside.

15. In view thereof, the impugned order dated 13.11.2019 cannot stand and is set aside.

16. Respondents are directed to calculate and pay bonus to the petitioner as per Rule 12(1) of G.P.F. Rules of 1985 along with permissible interest thereon within a period of two months from today. Respondents are also directed to decide the claim of petitioner with regard to delayed payment of interest on his dearness allowances and provident fund account within the aforesaid period of two months.

17. With the aforesaid, present writ petition is ***allowed.***

Order Date :-24.12.2021
Arti/-

(Vivek Chaudhary,J.)