

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on 12.12.2022
Pronounced on 04.02.2023

SWP No. 3004/2018

RuksanaJabeen

...Petitioner(s)/Appellant(s)

Through: Mr Q. R. Shamus, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

WP(C) No. 3801/2019

Saba Wani

...Petitioner(s)/Appellant(s)

Through: Mr. M. A. Wani, Adv.

Vs.

UT of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 3040/2018

Tahira Nabi

...Petitioner(s)/Appellant(s)

Through: Mr. Sheikh Manzoor, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2966/2018

Tawheeda Parveen and Anr.

...Petitioner(s)/Appellant(s)

Through: Mr. M. Y. Bhat, Sr. Adv. with Mr. Furqan Yaqub, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2946/2018

Mohammad Amin Lone and ors.

...Petitioner(s)/Appellant(s)

Through: Mr. Jahangir Iqbal Ganai, Sr. Adv. with Mr. Murfat Naseem,
Adv.

Vs.

State of JK and Ors. ...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2855/2018

Saima Shafi

...Petitioner(s)/Appellant(s)

Through: Mr. Aftab Ahmad, Adv.

Vs.

State of JK and Ors. ...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2853/2018

Mohammad Yousuf Khan and Ors.

...Petitioner(s)/Appellant(s)

Through: Mr. Mian Tufail, Adv.

Vs.

State of JK and Ors. ...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2838/2018

MeemaAkther

...Petitioner(s)/Appellant(s)

Through: Mr. Arif Sikander, Adv.

Vs.

State of JK &Ors. ...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2781/2018

Manzoor Ahmad Najar and Ors.

...Petitioner(s)/Appellant(s)

Through: Mr. Jahangir Iqbal Ganai, Sr. Adv. with Mr. Murfat Naseem, Adv.

Vs.

State of JK and Ors. ...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 2780/2018

Mukhtar Ahmad Lone

...Petitioner(s)/Appellant(s)

Through: Mr. Jahangir Iqbal Ganai, Sr. Adv. with Mr. Murfat Naseem, Adv.

Vs.

State of JK and Ors. ...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 858/2019

Rooma Yousuf

...Petitioner(s)/Appellant(s)

Through: Mr. Bhat Fayaz Ahmad, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 818/2019

Afroza Bashir

...Petitioner(s)/Appellant(s)

Through: Mr. Lone Altaf, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 852/2019

Ghulam NooraniKhatana and Ors.

...Petitioner(s)/Appellant(s)

Through: Mr. Mir Majid Bashir, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 771/2019

BilqueesKaunser and Anr.

...Petitioner(s)/Appellant(s)

Through: Mr. Mian Tufail, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 668/2019

ShaziaShafi and Ors.

...Petitioner(s)/Appellant(s)

Through: Mr. Saqib Amin Parray, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

WP(C) No. 594/2020

Khurshid Ahmad Itoo

...Petitioner(s)/Appellant(s)

Through: Mr. Saqib Amin Parray, Adv.

Vs.

UT of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

WP(C) No. 441/2020

Shamshada Akhter

...Petitioner(s)/Appellant(s)

Through: Mr. Gulzar Ahmad Bhat, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 246/2019

Arfan Ashraf Payar and Ors.

...Petitioner(s)/Appellant(s)

Through: Mr. Gulzar Ahmad Bhat, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 74/2019

Mohammad Sultan Lone

...Petitioner(s)/Appellant(s)

Through: Mr. Aamir Latoo, Adv.

Vs.

State of JK & Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 69/2019

Ishrat Naseem

...Petitioner(s)/Appellant(s)

Through: Mr. S. N. Ratanpuri, Adv.

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

SWP No. 10/2019

Mohammad ShafiPaswal and Anr.

...Petitioner(s)/Appellant(s)

Through: Mr. Jahangir Iqbal Ganai, Sr. Adv. with Mr. Murfat Naseem,
Adv

Vs.

State of JK and Ors.

...Respondent(s)

Through: Mr. Sheikh Mushtaq, AAG

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

HON'BLE MS. JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

JUDGMENT

1 In all these petitions clubbed together, Government Order No. 919-Edu of 2018 dated 16th November 2018 [hereinafter referred to as the “impugned order”] is under challenge. The impugned order as is apparent from its reading is passed by the Government pursuant to State Administrative Council decision No. 129/19/2018 dated 14th November 2018 to formally close Rehbar-E-Taleem (hereinafter referred to as “ReT”) Scheme as also providing for cancellation/withdrawal of all advertisement notices issued for making engagement of Rehbar-E-Taleem or the panels prepared where no engagement orders have been issued under the scheme.

2 Before we advert to the grounds of challenge urged by learned counsel appearing for the petitioners and the rebuttal by Mr. Sheikh Mushtaq, learned AAG appearing for the Union Territory of J&K, we find it apposite to allude to factual context in which the impugned order has come to be passed by the Government. With an objective to promote decentralized management

of elementary education with community participation and involvement; to ensure accountability and responsiveness through a strong back up and supervision through the community; and to operationalize effectively the schooling system at the grass root level, the Government of J&K promulgated a scheme known by the name of “Rehbar-E-Taleem” Scheme by issuing Government Order No. 396-Edu of 2000 dated 28th April 2000. ReT Scheme was conceptualized to put in place a system of decentralized management and elementary education through community participation and involvement. At the centre of the scheme was conceptualized a teaching guide to be named as ReT who was provided to be drawn from the local community so that his accountability would be immediate providing for constant interface and interaction with the community to secure universal enrolment and to check incidence of drop outs. It is in keeping with the objectives of the scheme, the job to select the ReT was entrusted to a village level community providing further that the candidate to be engaged as ReT should possess minimum qualification of 10+2 and must belong to the village where there is accessed deficiency of the staff. The scheme also provided that on satisfactory completion of five years service as ReT on honorarium basis, the candidate shall be eligible for appointment as General Line Teacher in the Education Department and would be so appointed subject to the village level community furnishing a certificate about his satisfactory performance and highlighting specific achievements of his/her overall conduct. Broadly speaking, this was in a nutshell, the scheme that was launched in the year 2000.

3. Under the ReT Scheme, the deficiency of teaching staff in various schools of the Union Territory of JK was met by appointing ReTs on honorarium basis. The selection of ReTs’ was made by restricting the zone of

selection to the village concerned where the deficiency was noticed and decided to be made up. In this way thousands of candidates throughout the Union Territory of J&K came to be engaged as ReTs and many of them, on completion of satisfactory service of five years as ReT were regularized and appointed as General Line Teachers. The Government having found that the objective of the ReT Scheme was accomplished, came up with Government Order No. 170-Edu of 2003 dated 24.11.2003 whereby the process of supplying the vacancies of teachers in the School through the medium of ReT Scheme was stopped forthwith and a direction was issued to follow the methodology of recruitment of ReT provided under the ReT Scheme for filling up the posts created under Sarv Shiksha Abhiyan (SSA) for new and upgraded primary schools and EGS Centres. Same scheme was directed to be adopted for recruitment of third teacher for innovative activities in the school. The Directors of School Education Jammu and Srinagar were directed to fill-up such posts on the pattern and through the medium of ReT Scheme promulgated in the year 2000. Several posts of teachers under SSA in New Primary Schools, Upgraded Primary Schools and EGS Centres including those of third Teachers were filled up through the medium of ReT Scheme.

4 In the year 2010, the Government vide Government Order No. 635 Edu of 2010 dated 4th August 2010 went to the extent of providing the filling up of regular vacancies of teachers in Socially and Educationally Backward Areas and in the area near Line of Actual Control on the pattern of ReT Scheme prospectively for a period of two years in the first instance. The Government order further provided that in case of habitations predominantly inhabited by SC/ST population, only the candidate belonging to these categories shall be considered for selection as ReT. This order was later on modified.

5 Pursuant to the aforesaid Government order, recruitment of ReTs in various Socially and Educationally Backward areas and in the areas near Line of Actual Control was also made. In many cases, disputes of various nature erupted in connection with recruitment of ReTs. There was dispute with regard to eligibility of the candidates to be considered vis-à-vis their qualification and place of residence. In many cases, engagement of ReTsmade by the respondents were challenged before this Court by way of several writ petitions. There are certain petitions where the dispute has reached the Court even before the select panels could be finalized. In some cases, the selections have been made but engagement orders were yet to be issued. In many cases, engagement orders have been issued and the candidates engaged have joined, but their engagements have been disputed and challenged by the non-selected aggrieved candidates. Some of the writ petitions have been disposed of one way or the other and appeals before the Division Bench are pending. While these different types of writ petitions were pending adjudication and in some cases even the successful writ petitioners had filed the contempt petition which too were pending, the Government issued the impugned order directing the closure of the ReT Scheme and also providing therein the impact, effect and the consequences of the closure of ReT Scheme. Before we proceed to examine the rival contentions, it is necessary to set out the impugned Government order herein below:-

Government of Jammu and Kashmir
School Education Department
Civil Secretariat Jammu

Subject: Formal closure of Rehbre-e-Taleem scheme and cancellation/withdrawal of all advertisement notices issued for engagement of ReTs or panels prepared where no engagement orders have been issued under Rehbar-e-Taleem Scheme.

Ref: State Administrative Council Decision No. 129/19/2018 dated 14.11.2018

**Government Order No: 919-Edu of 2018
Dated 16.11.2018**

Sanction is hereby accorded that:-

- i) *Formal closure of the Ret scheme and the Ret recruitment/engagement process notified vide Government Order No. 390-Edu of 2000 dated 28.04.2000 alongwith subsequent modifications/amendments. However, the existing ReTs already appointed under the scheme or on ReT pattern shall continue to be governed under the erstwhile scheme till their regularization or otherwise.*
- ii) *All advertisement notices for engagement of Rehbar-e-Taleem Teachers or panels prepared where no engagement orders have been issued shall and shall always be deemed to have been cancelled/withdrawn as ab-initio.*
- iii) *No fresh advertisement for recruitment/engagement under any ReT Scheme shall henceforth be issued.*

By order of the Government of Jammu and Kashmir.

6 From careful reading of the impugned Government order particularly what is highlighted in the “subject”, it is evident that the impugned Government order has been issued to formally close ReT Scheme. While the impugned Government order is on the face of it prospective in operation and would not affect or take away the vested and accrued rights under the ReT Scheme, yet it also formally spells out the consequences of the closure of ReT Scheme which, to put succinctly and precisely, are as under:-

- (a) *The ReT Scheme promulgated vide Government Order No. 396 Edu of 2000 dated 28th April 2000 along-with all subsequent notifications/amendments including those providing for supplying the vacancies of teachers on ReT pattern is closed forthwith i.e., w.e.f. 16th November 2018.*
- (b) *All the existing ReT's appointed under the ReT Scheme or on the ReT pattern shall continue to be governed under the closed scheme till their regularization or otherwise.*
- (c) *All advertisement notices issued for engagement of ReT's under the Schemes in vogue which are now closed by the*

impugned order shall always to be deemed to be cancelled/withdrawn as ab-initio.

(d) All panels prepared pursuant to the advertisement notices issued under the Scheme which have not fructified into issuance of formal engagement orders shall also deemed to have been cancelled/withdrawn ab-initio.

(e) There shall be no fresh advertisement for recruitment/engagement under any ReT Scheme/Schemes from the issuance of impugned Government order.

7 While we do not find any ambiguity or confusion in the Government order impugned in this petition, however, having regard to the submission made by learned counsel for the parties, we have examined the impugned order closely in the contextual background.

8. It is the stand of the Government that the ReT Scheme, which was launched in the year 2000, was, *inter alia*, aimed at meeting the requirement of teaching staff in the Primary and Middle Schools in the difficult, inaccessible and far-flung areas where there was deficiency of teaching staff. Subsequently, in the year 2002-03, a Centrally sponsored Scheme i.e Sarva Shiksha Abhiyan was introduced to provide appropriate teaching staff in the Schools wherever there was deficiency, more particularly, in the far-flung and inaccessible areas of Union Territory of Jammu and Kashmir. It is also urged on behalf of the respondents that the Government, after having found that the goal of providing sufficient teaching staff in various schools in UT of Jammu and Kashmir was sufficiently achieved and there existed a student-teacher ratio as 1:12 and 1:9 in Upper Primary Schools which was admittedly higher than the prescribed national norms, took a decision was in the State Administrative Council to close down the ReT Scheme. This is how the Government order impugned was issued providing for cancellation/withdrawal of all

Advertisement Notices for engagement of ReTs or the panels prepared where no engagement orders have been issued. It is also the stand of the Government that the Ret Scheme was launched to achieve certain objectives, but, while achieving those objectives, which were largely for the welfare of the students, also in some way, compromised with the merit. Through ReT Scheme, the Government has been able to make up the deficiency of teaching staff in various far-flung and inaccessible areas, but, at the same time, by restricting the consideration zone to village/habitation, there was obviously compromise with the merit. This, submits, the Government, has adversely affected the standard of education.

9 ReT Scheme was promulgated in the year 2000 to achieve a specific object. This objective, as per the respondents, was accomplished in the year 2003 itself. As we have noticed that though the scheme had a laudable object to be achieved by providing a system of decentralization management of elementary education with the community participation and involvement, and which system was designed to provide for interface and interaction of a teaching guide with the community to secure universal enrolment and to check the incidence of drop outs, yet we find no good reason or justification to extend the ReT Scheme beyond 24th November 2003. As is apparent from Government Order No. 1670 Edu of 2003 dated 24th November 2003, the objective underlying the ReT Scheme promulgated in the year 2000 was well accomplished by the end of the year 2003. It seems that Government found the ReT Scheme an alternative mode of recruitment to the post of Teachers and provided that the posts created under SSA for New Primary Schools/Upgraded Primary Schools, EGS Centres and those of third Teachers too should be filled up through the medium of ReT Scheme. The Government did not stop here and

through its sheer ingenuity extended the scheme for filling up the posts of General Line Regular Teachers in Socially and Educationally Backward Areas and areas near the Line of Actual Control. As noted above and is otherwise writ large from the reading of the Scheme, the zone of selection of ReTs who were to be ultimately regularized as General Line Teachers in the School Education was restricted to the “village” and in some cases to “habitation”. This drastically constricted the zone of consideration and resulted in compromising with the merit. Thankfully, the Government realized its folly and the contribution it had made to the falling standards of education. This made the Government to re-think and revisit the ReT Scheme. The impugned Government order is a result of this re-thinking and dawn of wisdom though belated. The impugned Government order whereby the closure of ReT Scheme has been directed is, on the face of it, prospective in nature and does not, in any manner, provide for interfering with, taking away or destroying the vested and accrued rights of the petitioners. The impugned Government order nowhere provides, rather it is very specific and categorical that the candidates already appointed under the ReT Scheme or on the pattern of ReT Scheme shall not be disturbed and would be governed by the erstwhile scheme/schemes till their regularization or otherwise.

10 Since mere placement of a candidate in the panel tentative or final does not confer any right upon such candidate to be selected and appointed, as such, we find nothing wrong in the impugned Government order providing for cancellation/withdrawal of all existing panel or panels of selection in existence on the date of issue of the impugned Government order. Since the ReT Scheme and the other Government orders providing for engagements on the pattern of ReT Scheme have been closed, no fresh

advertisement or engagement against any of the post earlier identified to be filled up under ReT pattern can be issued.

11 Viewed from the aforesaid angle, we find challenge to the Government order impugned totally baseless and misconceived. The scheme known as ReT was promulgated by way of an executive order and the scheme did not contain any promise much less a categorical and unequivocal promise that the scheme will remain in operation for all times to come, on the basis whereof, a candidate can claim to have entertained a legitimate expectation. As a matter of fact, the ReT Scheme promulgated in the year 2000 was virtually withdrawn in November 2003. The engagements made after November 2003 are only on the pattern of ReT Scheme, that too, against certain identified posts. The Government orders noticed above, whereby the ReT Scheme of 2000 was extended for supplying vacancies of Teachers under SSA and other Schemes too have been issued by the State in the exercise of executive power. We, therefore, see no reason as to why the Government which issued the Scheme cannot withdraw the same. None of the learned counsel appearing for the petitioners could demonstrate that the impugned Government order is in any manner violative of Article 14 and 16 of the Constitution or has the effect of depriving the petitioners of their right to livelihood otherwise than in accordance with law. We are aware that there is presumption in the Legislative and Executive acts against interfering with the vested and accrued rights of the citizens. While the legislative enactment may be made retrospective in operation and can interfere and take away inchoate rights and under some exceptional circumstances like larger public interest or remedy mischief may interfere with even vested and accrued rights of citizens. However, this is not true in a case of an executive order/executive

instructions. An executive order or instruction can under no circumstances, be retrospective nor can it interfere with or take away the vested or accrued rights of the persons affected by it. While the legal position in this regard is almost settled and the law well concretized, yet we ventured to examine the impugned order in the wake of vehement submissions made by learned counsel appearing for the petitioners. We, however, could not persuade ourselves to agree with learned counsel for the petitioners that the impugned order has the effect of interfering with or taking away the vested and accrued rights of the petitioners. That aside, the apprehension voiced by the learned counsel appearing for the petitioners, which is primarily based upon the stand taken by the respondents in their objections while opposing several writ petitions, needs to be addressed. It is the contention of learned counsel for the petitioners that the respondents are refusing to comply with the concluded judgments of this court rendered prior to the issuance of the impugned order. It is argued that in many cases, right to be engaged had accrued to the petitioners prior to the issuance of impugned Government order, but the formal order of engagement could not be issued due to pendency of litigation. They, therefore, urged this Court to at least clarify the true import, effect and impact of the impugned Government order on the litigation pending in this Court at various stages as also on the selection process initiated under the Scheme (now closed) which is held up due to litigation involving inter-se disputes between the candidates.

12 Having given thoughtful consideration to the rival contentions and for the reasons given hereinabove, we uphold the constitutional validity of the impugned Government order. However, with a view to analyse the arguments made by the learned counsel for the petitioners as to the true import, impact and effect of the impugned Government order on

pending litigation and the pending selections, we need to first understand; “vested rights” or “accrued rights”.

Vested or accrued rights

13. The vested or accrued right is a right particular to an individual and it needs to be sufficiently exercised. The threshold for declaring that someone has an accrued right is when an individual claiming such right, is actually capable of exercising it at the moment when it is repealed or is sought to be taken away. For a right to be considered “accrued or vested”, the right holder needs to have actually been able to exercise it at the time of its repeal or taking away. There is subtle distinction between an acquired or vested right and an accruing right. A right would be an acquired or vested right, if its holder can actually exercise or make use of it at the time of legislative change and correspondingly, it would only be considered an accruing right, if the ability to exercise the right will inevitably arise in future. The presumption of legislative intent is only against vested and accrued rights and not the accruing or vesting rights. The Union Parliament and the State Legislatures are well within their competence to legislate retrospectively and, by doing so, may take away the accruing or vesting rights i.e, the rights which are capable of being exercised in future, but there is strong presumption against the taking away or interfering with the vested and accrued rights. As is clarified by the Hon’ble Supreme Court in the judgment rendered in the case of BSNL Ltd. (supra), this power is not available to the Executive that would mean that the Executive cannot, by issuing orders or executive instructions with retrospectively effect, take away the vested and accrued rights

14. There is presumption of legislative intent against interference with vested rights and this presumption is founded on a very simple rationale: it is often unfair for new legislation to intrude upon rights that individuals have validly and legally acquired in the past(see **Upper Canada College v Smith, [(1920) 61 SCR 413]**). We must understand that this presumption of legislative intent against interference with vested and accrued rights is relevant while interpreting a repealing statute to analyze its effect on the vested or the accrued rights under the repealed legislation. However, insofar as executive action is concerned, it is trite law that the administrative/executive orders, in the absence of any legislative mandate, cannot be made applicable with retrospective effect. It is only the plenary powers of legislation vested in the Union Parliament and the State Legislatures to enact laws prospectively as well as retrospectively. By retrospective legislation, a law can be made by the Legislature to operate for a limited period prior to the date of its coming into force. This power of Union Parliament and State Legislatures is circumscribed by the restrictions contained in Part III of the Constitution of India, in particular, Articles 14, 16, 19 and 21. Any legislative enactment or statute, which has the effect of taking away or interfering with vested or accrued rights, may be struck down if found to be irrational, arbitrary and violative of Articles 14 and 16 of the Constitution. However, such power is not vested in the Executive. This is so well settled by the Hon'ble Supreme Court in the recent judgment in the case of **Bharat Sanchar Nigam Ltd., and others etc. vs. M/S Tata Communications Ltd. Etc., 2022 SCC Online SC 1280**. The legal position is summarized in paras(29) and (30) of the Judgment which, for reference, is set out below:

“29. It is a settled principle of law that it is the Union Parliament and State Legislatures that have plenary powers of legislation within the fields assigned to them, and subject to certain constitutional and judicially recognized restrictions, they can legislate prospectively as well as retrospectively. Competence to make a law for a past period on a subject depends upon present competence to legislate on that subject. By a retrospective legislation, the Legislature may make a law which is operative for a limited period prior to the date of its coming into force and is not operative either on that date or in future.

30. The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, we are of the view that applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment”.

(underlined by me)

15 While the position of law is clear that the vested or accrued rights cannot be taken away or interfered with even by retrospective legislation except under exceptional circumstances and that too, when taking away of the accrued and vested rights is not found violative of Articles 14 and 16 of the Constitution. However, in the case of Executive or Administrative orders, it is not permissible for the Executive to apply such executive orders or circulars with retrospective effect, that too, when such retrospective effect has the effect of taking away the accrued and vested rights. Such action of the Executive, besides being beyond its competence would also be hit by Articles 14 and 16 of the Constitution.

16. Having regard to the nature of controversy involved and

the language used by the respondents in the impugned Government Order, we need not delve deep into the concept and meaning of expressions “vested rights or accrued rights” except that the vested or accrued rights are particular to an individual or class of persons which are capable of being exercised at the time of their repeal.

Retrospective/retroactive legislation

17 The terms “retroactive and retrospective” are invariably used inter-changeably as if both mean and connote same concept. A retroactive statute is one that operates as of a time prior to its enactment, whereas the retrospective statute is one that operates for future only. It is essentially prospective, but it imposes new results in respect of a past event. In short, a retroactive statute operates backwards, whereas, a retrospective statute operates forwards, but looks backwards, in that, it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was, whereas retrospective statute changes the law from what it otherwise would be with respect to a prior event. (“**Statutes: Retroactive Retrospective Reflections**”); an article by **Elmer Driedger**.

18 At this stage, it would be equally profitable to refer to a Constitution Bench Judgement of the Hon’ble Supreme Court in **Chairman, Railway Board and others vs. C.R. Rangadhamaiah and others, (1997) 6 SCC 623**. The discussion on the subject made in the judgment (supra), in paragraphs (20) to (24), is relevant and, therefore, these paragraphs are reproduced hereunder:

“20. It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retrospectivity as being violative of Articles 14 and 16 of the

Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

21. In *B.S. Yadav & Ors. Etc. v. State of Haryana*, a Constitution Bench of this Court, while holding that the power exercised by the Governor under the Proviso to [Article 309](#) partakes the characteristics of the legislative, not executive, power and it is open to him to give retrospective operation to the rules made under that provision, has said that when the retrospective effect extends over a long period, the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules.

22. In *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.* decided by a Constitution Bench of the Court, the question was whether the status of ex-ministerial employees who had been allocated to the Panchayat service as Secretaries, Officers and Servants of Gram and Nagar Panchayats under the Gujarat Panchayat Act, 1961 as government servants could be extinguished by making retrospective amendment of the said Act in 1978. Striking down the said amendment on the ground that it offended Articles 311 and 14 of the Constitution, this Court said:

52. "The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. The legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in

the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history."

23.The said decision in Raman Lal Keshav Lal Soni&Ors. (supra) of the Constitution Bench of this Court has been followed by various Division Benches of this Court. (See : [K.C. Arora &Anr. v. State of Haryana &Ors.](#), [1984] 3 SCR 623; [T.R. Kapur&Ors. v. State of Haryana &Ors.](#), [1987] 1 SCR 584; [P.D. Aggarwal &Ors. v. State of U.P. &Ors.](#), [1978] 3 SCR 427; [K.R. Narayanan &Ors. v. State of Kamataka&Ors.](#), [1994] Supp. 1 SCC 44; [Union of India &Ors. v. Tushar Ranjan Mohanty &Ors.](#), [1994] 5 SCC 450 and [K. Ravindranath Pai &Anr. v. State of Kamataka&Anr.](#), [1995] Supp. 2 SCC 246.

24.In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (supra), B.S. Yadav (supra) and Raman Lal Keshav Lal Soni &Ors".

(emphasis supplied)

19. In light of the legal position discussed above, let us give a second look to the impugned Government Order to find out whether it is retroactive, retrospective or prospective in operation as also to find out whether it has the effect of taking away any of the accrued or vested rights of the petitioners.

20. From a bare look on the impugned Government Order and the implication it has on the ongoing process of making engagement of ReTs, we find that paragraph (i) of the Government Order only declares formal closure of the ReT Scheme notified vide Government Order 396-Edu/2002 dated 28.04.2000 along with subsequent modifications/amendments with a further stipulation that the existing ReTs i.e, ReTs in position as on the date of issuance of the Government order shall continue to be governed under the erstwhile scheme till their regularization or otherwise. Paragraph first of the Government order is clear and unequivocal and does not permit any two interpretations. It is indeed prospective in operation, in that, the ReT Scheme promulgated in the year 2002 along with subsequent amendments made thereto has been formally closed w.e.f 16.11.2018 and the benefits envisaged under the Scheme in respect of engagement of ReTs shall not be available in future. Paragraph first, thus, operates in futuro.

21. Insofar as paragraph (ii) of the Government order is concerned, it provides for cancellation/withdrawal of all the Advertisement notifications for engagement of ReTs or the panels prepared which have not fructified into issuance of formal engagement orders of the selected candidates. Needless to say that mere issuance of Advertisement notifications or mere participation in the selection process or even figuring of a candidate in the select panel does not confer any right on such person to claim his selection/appointment/engagement as a matter of right. The impugned Government order only stops the process of selection w.e.f 16.11.2018 i.e the date of its issuance and, therefore, even if

presumed to be retrospective in operation, does not take away any vested or accrued right.

22 Paragraph (iii) of the impugned Government order provides that no fresh Advertisement for recruitment/engagement under any ReTScheme shall be issued henceforth. It is clearly prospective in operation and is a necessary consequence of the formal closure of the ReT Scheme. The said paragraph also operates in future and, therefore, prospective in nature.

23 Having understood and appreciated the impugned Government order and the clear legal position laid down by the Hon'ble Supreme Court, we are of the considered view and reiterate that the impugned Government order is prospective in nature and does not seek to reverse the processes which have culminated into creating any vested and accrued rights.

24 In the instant case where pursuant to Advertisement notices issued under the repealed Scheme, the selection panels, which have been prepared and acted upon and the formal engagement orders have been issued, are not affected by the impugned Government order. They shall continue to work as ReT till they are considered for their regularization under the repealed/closed scheme. This is so vividly and unequivocally provided in paragraph first of the impugned Government order.

25 As observed above, neither the participation in the selection process, nor mere placement in the select list gives any vested right to a person who has participated in the selection process and is figuring in the select list, to be necessarily appointed or engaged. The Selecting Body/Appointing Authority is well within its

powers to withdraw the selection process provided such withdrawal is not arbitrary and violative of Articles 14 and 16 of the Constitution.

26 As discussed above, we have already found the Government order impugned having been issued for larger public interest and for good reasons. Paragraph two of the impugned Government order is though suggestive of retrospective operation, but when it is closely scrutinized and analyzed, it is seen that the same has the effect of the Government taking a decision to withdraw the selection process and not to act upon the panels wherever prepared. There is nothing wrong with the impugned Government providing the words “*ab initio*” used in paragraph (ii) of the impugned Government order are superfluous and their presence or absence is of no consequence.

The effect of the impugned Government Order on the pending litigation in the Court

27. It has been vehemently argued before us by learned counsel appearing for the petitioners that the respondents are denying the petitioners the benefit of concluded judgments passed by this Court on the ground that the same are incapable of being implemented in view of issuance of the impugned Government order.

28 In the constitutional scheme that we have, the Executive is under an obligation to obey the judicial orders. The Legislature, may, in certain situations, nullify a judicial or executive decision by enacting appropriate legislation, however, absent such legislation, neither the Executive nor the Legislature could set aside a judicial order. Permitting the Executive to review, revise or sit over the decisions of the Court by issuing executive orders or instructions

would be tantamount to interference with the exercise of judicial functions by the Judiciary.

29 The issue was considered by the Hon'ble Supreme Court in **Union of India v. K.M.Sankarappa, A (2001) 1 SCC 582** wherein a Division Bench of the Supreme Court even held the decisions of quasi-judicial Authorities like the Tribunals which are headed by a retired or sitting judge of the High Court are binding on the Executive and cannot be overruled or overturned by the Executive Authority by issuing Government orders or executive instructions. The issue of "legislative override and the scope of judicial review" is elaborately discussed by the Supreme Court in **Madras Bar Association vs. Union of India, 2021 SCC Online SC 463**. Paragraph (44) of the judgment authored by Justice L. Nageswara Rao to which Justice S. Ravindra Bhat has concurred by writing a separate judgment, is relevant for our purpose to some extent and is, thus, reproduced hereunder:

"44. The permissibility of legislative override in this country should be in accordance with the principles laid down by this Court in the aforementioned as well as other judgments, which have been culled out as under:

a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective. Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Constitution.

*b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect 49 (1995) 6 SCC 1650, **P. Sambamurthy & Ors. v. State of Andhra Pradesh & Anr.** (1987) 1 SCC 362 51 **Lohia Machines Ltd. & Anr. v. Union of India & Ors.** (1985) 2 SCC 197 would not have been passed, if the altered*

position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect pointed out should have been cured such that the basis of the judgement pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise [See: S.R. Bhagwat (supra)]. Even interim directions cannot be reversed by a legislative veto [See: Cauvery Water Disputes Tribunal (supra) and [Medical Council of India v. State of Kerala &Ors.](#)].

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the rule of law and of [Article 14](#) of the Constitution of India. Validity of the Impugned Ordinance”

30. The position of law has been explained by the Supreme Court in relation to the legislative override, whereas, we, in the present case, are confronted with executive override which, in any case, is not permissible in law. The Executive, as said above, is bound to comply with the orders of the Court and has no power, jurisdiction or competence to sit over or overturn such decision by mere executive fiat.

31. We have heard both the sides at some length on the impact of the Government order on the pending litigation and we cull out our conclusion as under:

(i). That the impugned Government order will not affect the select panels prepared by the respondents which have been acted upon and formal orders of engagement have been issued;

(ii) That the impugned Government Order will not override or effect the judgments passed or to be passed by this Court holding a candidate/candidates entitled to engagement in the selection process which was/is under challenge before the Court;

(iii) Where the select panels are approved and the aggrieved party has approached the Court before it could be acted upon, shall also be not affected by the impugned Government order, in that, but for litigation in the Court, the approved panel/panels could have been acted upon and formal letters of engagement in favour of the selected candidates issued prior to the issuance of the impugned Government order; and,

(iv) Notwithstanding issuance of the impugned Government order, the respondents shall abide by the judgments passed by any competent Court of law which have attained finality. However, the writ petitions involving adjudication of disputes in respect of tentative merit lists or tentative select panels shall be liable to be dismissed in view of the impugned Government order, in that, it would not be permissible for a Court of law to direct the respondents to finalize the tentative merit lists or tentative select panels and issue engagement orders in view of closure of the scheme and a clear stipulation contained in paragraph 2nd of the impugned Government order.

32. In view of the discussion made and the reasons given above, challenge to the constitutionality of the impugned Government Order fails and consequently, all the petitions are disposed of by providing that the impugned Government order shall be understood and made applicable in the manner explained hereinabove in the judgment.

33 Pending Writ Petitions shall be considered by the Single Bench in the light of observations made and law laid down in this judgment.

(MOKSHA KHAJURIA KAZMI)
JUDGE

(SANJEEV KUMAR)
JUDGE

SRINAGAR:
04 .02.2023
Altaf

Whether the order is reportable? Yes

