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**(2006) 11 MP CK 0094**  
**In the Madhya Pradesh High Court**  
**Case No : Writ Petition No. 4751 (S) of 2006**

Archana

APPELLANT

Vs

State of M.P. and others

RESPONDENT

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**Date of Decision :** 02-11-2006

**Acts Referred:**

Constitution of India, 1950 — Article 309

**Citation :** (2007) 1 MPLJ 484

**Hon'ble Judges :** J.K. Maheshwari, J

**Bench :** Single Bench

**Advocate :** V.K. Patwari and L.C. Patne, for the Appellant; A.S. Gokhale, Government Advocate, for the Respondent

**Final Decision :** Allowed

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## Judgement

J.K. Maheshwari, J.

This order shall also govern the disposal of following writ petitions:

(2) W.P. No. 3874/2006 (S) Sarda Rawat and Ors. v. State of M.P. and Ors. (3) W.P. No. 4405/2006 (S) Meer Bhuria and Ors. v. State of M.P. and Ors. (4) W.P. No. 4547/2006 (S) Premlata and Ors. v. State of M.P. and Ors. (5) W.P. No. 4752/2006 (S) Shayani Sissodiya v. State of M.P. and Ors. (6) W.P. No. 4753/2006 (S) Sunita v. State of M.P. and Ors. (7) W.P. No. 4754/2006 (S) Asha v. State of M.P. and Ors. (8) W.P. No. 4755/2006 (S) Ku: Ranubala v. State of M.P. and Ors. (9) W.P. No. 4938/2006 (S) Ku. Sharda v. State of M.P. and Ors.

All these petitions have been filed challenging the orders dated 5-7-2006, 11-7-2006, 27-7-2006, 20-7-2006, 28-7-2006 and 19-7-2006 by which the selection of Petitioners for training of Multi Purpose Family Health Worker (hereinafter referred as "MPFHW") has been ordered to be cancelled, in view of the instructions issued by the Directorate of Health Services dated 5-7-2006, 20-7-2006 and 24-7-2006.

It is the case of Petitioners that they have passed the High School Certificate Examination after the Education Session 1996-97 from Madhya Pradesh Rajya Open School Board, Bhopal. The aforesaid Board, is recognised by the Government and its High School Certificate Examination is at par to the High School of Madhyamik Shiksha Mandal, M.P. as per the notification dated 4-10-1996. It is further a case of Petitioners that the selection for training of MPFHW are governed by the Rules framed by the Government in exercise of powers conferred by the proviso of Article 309 of the Constitution of India. Those Rules are known as M.P. Public Health and Family Welfare Department Non-Ministerial (Related to the Directorate of Health Services) Class-III Service Recruitment Rules, 1989 (hereinafter referred as "Rules").

Under Rule 6, the method of the recruitment has been specified, Rule 8 further specifies the conditions of eligibility for direct recruits. By which, it is apparent that the candidates must possess the requisite qualification as specified in column No. 5 of Schedule (iii) for the posts of MPFHW. The qualification prescribed after amendment of rules in the year 1997 is reproduced herein below:

| Name of post | included in the Service | Minimum age limit | Upper age limit | Essential qualification |
|--------------|-------------------------|-------------------|-----------------|-------------------------|
|--------------|-------------------------|-------------------|-----------------|-------------------------|

|                          |    |    |                                                                                                                                                                                     |
|--------------------------|----|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (B) Female Health worker | 18 | 30 | (1) should have passed 10th class examination in 10 + 2 Education System. Candidates having passed 10th Class Examination with Mathematics, Science and Biology shall be preferred. |
|--------------------------|----|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                                                                           |
|---------------------------------------------------------------------------|
| (2) Should have passed 18 months training course of Female Health Worker. |
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Bare perusal of the aforesaid, it is apparent that candidates who have passed the 10th Class examination in 10 + 2 education system are eligible to participate. But those candidates who have passed 10th class examination with the mathematics, science and biology having preference. They should have further passed 18 months training course of female health worker, for their appointment. The Learned Counsel appearing for the Petitioners submits that, as per advertisement also the educational qualification was prescribed as under:

The candidate must have passed 10th class high school examination in 10 + 2 education system, recognised by the M.P. Madhyamik Shiksha Mandal Bhopal or they should have passed the Higher Secondary Examination (old pattern) with the subject Physics, Chemistry and Biology.

It is further a case of Petitioners that as per the qualification prescribed under the advertisement as well as under the Rules Petitioners have passed the High School Certificate Examination by 10 + 2 system. Under the rules or as per the advertisement they are not required to pass High School with science subjects for their eligibility. The language of the rule only indicates the preference to them who have passed High School Certificate Examination with science subjects. However, Petitioners have submitted their application as per advertisement; after due selection and as per the recommendations they have found place in the lists

of selection of trainees issued on different dates for different district on 15-6-2006, 12-6-2006 etc. Thereafter, without issuing any show-cause notice or furnishing an opportunity of hearing, the orders dated 5-7-2006, 11-7-2006, 27-7-2006, 28-7-2006, 20-7-2006 and 19-7-2006 were issued cancelling their selection for training of MPFHW.

Learned Counsel for Petitioners submits that the order passed by the Respondents cancelling their selection is contrary to the Rules. It is said that under the Rules essential qualification was i.e. High School pass in 10 + 2 education system. Petitioners are possessing the requisite qualification i.e. high school as per mark sheets produced along with the petitions, therefore, the orders of cancellation of selection, issued due to not passing the high school examination with the subjects Mathematics Science and Biology are contrary to the Rules. It is further said that the cancellation has been ordered taking into consideration the preferential qualification, which cannot take place the essential qualification, therefore, the orders of cancellation for training are contrary to the Rules and advertisement itself. It is further submitted by the Petitioners that the orders of cancellation have been issued on the basis of certain instructions issued by the Directorate of Health Services on 5-7-2006, 20-7-2006 and 24-7-2006, those are in contravention to the Rules. The executive instructions may supplement, but cannot supplant the qualification which is not prescribed under the rules. It is said that as per settled legal position, executive instruction cannot override the rules. However, the orders of cancellation of Petitioners' training are against the Rules, and also against the settled legal position, hence deserves to be quashed.

Per contra, the Respondents State has filed their return, wherein it is set forth that Petitioners are not possessing the qualifications as prescribed under the instructions issued by the Directorate of Health Services as per Annexures R/1, R/2 and R/3 dated 5-7-2006, 20-7-2006 and 24-7-2006, however, the order of cancellation of their selection for 18 months training have rightly been passed. It is further said that under the recruitment Rules amendment was introduced as per Annexure-R/4 on 18-6-1997, whereby the candidates who have passed the High School Certificate Examination in 10 + 2 system with the subject Mathematics, Science and Biology be given preference. Because of the Petitioners are not possessing such preferential qualification and the word preference indicate the option to the Government to select those candidates who are possessing preferential qualification. Therefore, the order of cancellation of training has rightly been passed. It is also urged by the counsel for Respondents that merely inclusion of the name of Petitioners in selection list, does not confer them any right to prosecute their training as per Rule 12(3) of the Rules. Thus, prayer is made to dismiss the petition and to uphold the orders of cancellation as passed by the Government.

I have heard Learned Counsel appearing for the parties and perused the records. On perusal of records, it is apparent that under the Scheduled III of the Rules,

educational qualifications for selection to the training have been prescribed. By which, it is apparent that the candidates who have passed the 10th class examination in 10 + 2 education system and completed 18 months of training may be appointed female health worker, if they are in between the age of 18 to 30 years. Under the schedule, it is also mentioned that "if candidates have passed 10th class examination with Mathematics, Science and Biology shall be preferred". Bare reading of the amended Rules, specifies that a candidate shall be eligible for appointment MPFHW on possessing the certificate of 10th Class in 10 + 2 education system and have completed 18 months training of the course of female health worker. It further gives an impression that the candidates who have passed the 10th class examination with Mathematics, Science and Biology shall be preferred from those who have passed 10th class with other subjects, however, as per the Rules, qualifying the 10th class examination by any subject is essential qualification. But those candidates who have passed the 10th class examination with the subject Mathematics, Science and Biology are having preference.

In the present case, the orders of cancellation of selection for their training have been passed for the reason that the Petitioners are not possessing the certificate of 10th class examination with the subject of Mathematics, Science and Biology, as required under the circulars of the Directorate of Health Services Annexures-R/1 to R/3 dated 5-7-2006, 20-7-2006 and 24-7-2006.

During the course of arguments, it has also urged by the Learned Counsel for Petitioners that prior to issuing the executive instructions Annexures-R/1 to R/3 all the candidates were permitted to participate in the process of selection in this year and in the preceding years on passing High School Examination such candidates had selected and also undergone their training. Only by this year as per the executive instructions of Directorate the order of cancellation has been passed. The factual position with respect to selection of the candidates in the preceding year, who were possessing the High School Certificate Examination from open school has not been disputed by the Respondents.

Learned Counsel appearing for Petitioner submits that preferential qualification cannot be treated as essential qualification and the order passed by the Respondents on such basis is arbitrary. Reliance has been placed on the judgment of Supreme Court in the case of State of V.P. and Anr. v. Om Prakash and others, reported in 2006 SCC L&S 1418, wherein similar question to possess the essential qualification or preferential qualification was before the Apex Court wherein Apex Court has held as under:

In the instant case, the requisite academic qualification for the post of Medical Officer of Homeopathy as prescribed in the advertisement was recognised degree in homeopathy or a recognised diploma in homeopathy. A proviso has been added that preference will be given to degree-holders. This would mean that a recognised diploma in homeopathy prescribed in the advertisement is also a required minimum educational qualification with which they are entitled to

compete with those candidates possessing the degree. The word "preference" would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merit list prepared by the Commission. But preference does not mean en-bloc preference irrespective of inter se merit and suitability.

In this context, we can profitably refer the meaning of word "preference", which is given in Law Laxicon "Preference means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another". In the judgment of Omprakash (supra) the Apex Court has also interpreted the meaning of the word preference in this perspective. Thus, it is apparent that all candidates, who are possessing the requisite educational qualification prescribed in the advertisement, and under the rule i.e. High School may be considered as essential qualification for selection to the training of MPFHW, but when one or more are found equally positioned, then only the preferential qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merits list prepared by the selection committee. But preference does not mean en-bloc preference irrespective of inter-se-merit and suitability.

As per the rules prescribed educational qualification for the post of MPFHW under scheduled III is 10th class examination in 10 + 2 education system. It is further apparent that if such candidate has passed the 10th class examination with the subject Mathematics, Science and Biology are having preference. In the present case, the selection of the Petitioners have been made for training course of MPFHW because they are possessing the requisite/essential qualification of 10th class examination. The orders of cancellation of their selection from training have been passed on the pretext that they have not passed the 10th class examination with the subject of Mathematics, Science and Biology, i.e. the preferential qualification. However passing the order of cancellation on the basis of not having preferential qualification is illegal and arbitrary.

After going through the record and as per the arguments of the Respondents that the order to give preference is based upon the circulars dated 5-7-2006, 20-7-2006 and 24-7-2006 (Annexures-R/1, R/2 and R/3, which are the executive instructions issued by the Directorate. However it is also required to be dealt with here that whether executive instructions issued by the Directorate can override the provisions of the Rules. Learned Counsel appearing on behalf of Petitioner has placed reliance on the judgment of Supreme Court in the case of State of Maharashtra v. Jagannath Achyut Karandikar, reported in AIR 1989 SC 1133. In that judgment the Hon"ble Supreme Court in para 6 observed as under:

6....The circular states that the 1995 Rules permitting relaxation cannot be utilised to relax the rules which regulate conditions of service. It further states

that the scope of the Rules should be limited only to matters relating to travelling allowance, leave, etc. But this appears to be an exercise in vain. The circular is an executive instruction whereas the 1955 Rules are statutory since framed under the proviso to Article 309 of the Constitution. The Government could not have restricted the operation of the statutory rules by issuing the executive instruction. The executive instruction may supplement but not supplant the statutory rules. The High Court was in error in ignoring this well accepted principle.

Thus executive instructions, cannot override the provisions of the rules; it can be supplementary to the rules but cannot supplant the rules. In this case, as per rules, passing the high school in 10 + 2 system is essential, but with science subjects, it is preferential qualification for training of MPFHW; however, no order can be passed relying the executive instructions and ignoring the rules.

The arguments further advanced by the Dy. Government Advocate that the selection does not confer any right to the candidates, who found place in the selection list of training is also required to be dealt herewith. As per the discussion made hereinabove, it is apparent that cancellation of the selection list has been ordered relying on the executive instructions ignoring the rules. As per the settled legal position and in view of the judgment of Supreme Court in the case of Jagannath Achyut Karandikar (*supra*) it is apparent that the executive instructions may supplement, but not supplant the statutory Rules. Thus by the circulars of the Directorate Annexure-R/1 to R/3, the qualification as supplanted by the Respondents is arbitrary. At the same time, the language of the rules as well the advertisement indicates that passing of High School Examination with the subjects Mathematics, Science and Biology is the preferential and not the essential qualification. The order of cancellation of selection list for training of M.P.F.H.W. has been passed treating it as the essential qualification is arbitrary. Once, the action of the Respondents has been held arbitrary in the matter of cancellation of the selection list, in such circumstances, the aforesaid argument of learned Government Advocate is of no substance. It is suffice to say that, selection of the Petitioners is as per their eligibility and in accordance with the rules, however, the cancellation order is arbitrary.

In view of the foregoing discussion, it is apparent that orders of cancellation of the Petitioners selection were based on executive instructions Annexures-R/1 to R/3, although as per the rules, no such qualification were prescribed. Under the Rules passing of High School Examination with the subjects of Maths, Science and Biology but it is not the essential but, it is a preferential qualification, therefore, the order of cancellation of the selection to the training course of Petitioner for the post of MPFHW is arbitrary and against the rules. In that view of the matter, the orders of cancellation as passed by the Respondents dated 5-7-2006, 11-7-2006, 27-7-2006, 20-7-2006, 28-7-2006 and 19-7-2006 are liable to be quashed.

Consequently the orders of cancellation of the training course of Petitioners as

MPFHW dated 5-7-2006, 11-7-2006, 27-7-2006, 28-7-2006, 20-7-2006 and 19-7-2006 are hereby quashed. At this stage it is reported that in Some of the cases Court has granted interim relief and on the strength of the same, some Petitioners are undergoing their training course and in some of the case interim relief was not granted, however they are not undergoing the training. Considering this aspect, it is directed that if the Petitioners are undergoing their training on the strength of the stay orders, they will continue, to complete their training. But, those who were not sent for training, now they be sent for training by the Government and to allow them to complete their training as prescribed under the rules. With the aforesaid directions, this petition is allowed. In the facts and circumstances of the present case, there is no order as to costs.