

(2022) 05 MP CK 0059

In the Madhya Pradesh High Court

Case No : Writ Petition No. 6022 Of 2005

Basant Kumar Chourasia And Others

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 13-05-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 309
Madhya Pradesh Technical Education (Gazetted Service) Recruitment Rules, 1990 — Rule 5, 6, 13, 14, 14(1)
Madhya Pradesh Technical Education Engineering College (Teaching Cadre) Service (Recruitment) Rules, 2004 — Rule 2(a), 3, 3(a), 4, 12, 12(4), 13, 17
Society Registration Act, 1973 — Section 43

Citation : (2022) 05 MP CK 0059

Hon'ble Judges : Ravi Malimath, CJ;Purushaindra Kumar Kaurav, J

Bench : Division Bench

Advocate : Aakash Choudhary, Amit Seth, Ashok Kumar Chourasia

Final Decision : Dismissed

Judgement

Purushaindra Kumar Kaurav, J

1. The petitioners in the instant writ petition are challenging the constitutional validity of the Rules, namely, The Madhya Pradesh Technical Education Engineering College (Teaching Cadre) Service (Recruitment) Rules, 2004 (for short the "Rules of 2004") as ultra vires to the Constitution. Petitioners have also prayed for declaring the advertisement dated 28.01.2005 (Annexure P-7) and 11.02.2005 (Annexure P-8) as void and illegal.

2. The facts of the case are that petitioners are holding the post of Reader and Professor in Government Engineering Colleges. According to them, some of the petitioners are having qualification such as M.E, M.Tech, and Ph.D etc. They all have been appointed between 1990 to 1993 on their respective posts.

3. The appointments of the petitioners have been made through Public Service Commission (for short "PSC"). Their appointments were made in accordance with

the Rules known as Madhya Pradesh Technical Education (Gazetted Service) Recruitment Rules, 1990 (for short the "Rules of 1990"). The post of Principal under the Rules of 1990 is 100% promotional and the eligible Professors are entitled to be promoted to the post of Principal. On 29th May, 1997, the State Government has taken a decision to declare all Engineering Colleges as autonomous Society to be registered under the Society Registration Act, 1973 (for short the "Act of 1973"). The said order was published in the Official Gazette on 06th June, 1997 (Annexure P-3). It is stated that the State Government in exercise of powers conferred under Section 43 of the Act of 1973 has made the Rules of 2004 relating to recruitment and other conditions which are under challenge in the instant petition.

4. Learned counsel appearing for the petitioners submits that the Rules of 2004 are not sustainable as the same are in contravention to the Rules of 1990 which are already governing the service conditions of the petitioners. The appointment of Teachers as per Rules of 1990 were to be made by the Government through PSC, however, in the Rules of 2004, the Societies are empowered to recruit the Teachers. The Rules of 2004 would create anomaly, inasmuch as, there would be two cadres of Teachers. One would work under the State Government and the other would be working under the Societies. The Teachers working under the Societies would not be entitled for the benefit of Pension and other dues. As per Rules of 1990, the channel of promotion to the post of Principal is available to the Professors, whereas, such benefit is not available in the Rules of 2004. The cadre of Teachers working against various posts as per the Rules of 1990 is declared as dying cadre. The Teachers working as per 1990 Rules shall be treated to be on deputation with the Society with no deputation allowance. The reservation Policy of the State Government has not been made applicable in the Rules of 2004. Each College is now treated to be an independent Society and the post of Head of the Department (H.O.D) and Principal have become singular posts and, therefore, the reservation would not be applicable. Under the Rules of 1990, the post of Principal and Professors is transferable from one college to another college. However, as per the Rules of 2004, the transfer of a Teacher would not be permissible from one Society to another Society. Since the Rules of 1990 are framed under the Proviso of Article 309 of the Constitution, therefore, the Rules of 2004 which are framed in exercise of powers vested under the provisions of the Act of 1973 would not override the Constitutional Rules. The petitioners have also challenged the advertisement dated 28.01.2005 and 11.02.2005 on the ground that if such appointments are made, they would not be treated as Government employees and their services would be governed by the Rules of 2004. It is, therefore, submitted that the Rules of 2004 are arbitrary, unjust and unreasonable and in violation of Article 14 and 16 of the Constitution. Counsel for the petitioners has relied on the decision of the Hon'ble Supreme Court in the matter of B.S.Vadera Vs. Union of India and others AIR 1969 SC 118 , Dr. Ram Pal Chaturvedi Vs. State of Rajasthan and others (1970) 1 SCC 75. , Hukum Chand Vs. Union of India AIR 1972 SC 2427 and State of Punjab and

Others Vs. Inder Singh and Others (1997) 8 SCC 372.

5. The State Government has not filed any separate reply, however, it has adopted the reply filed in W.P.No.626-2005 which shows that W.P.No.626-2005 was related to the Teachers of Polytechnic College. The stand of the State Government was that for regulating the Conditions of service of Officers working in Government Polytechnic Colleges, the Rules of 1990 were framed. Since the State Government has taken a policy decision to give complete autonomy to Polytechnic and Engineering institutions in the matter of management and control, therefore, it was decided to constitute the Societies under the provisions of the Act of 1973 so that the management and control of these institutions can be done at the college level. The composition of Society has been explained so as to substantiate that the same is consisting of Government Officers headed by the Departmental Minister and Secretary of the concerned department. The posts held by petitioners are declared to be dying Cadre and automatically will be abolished on retiring of the concerned incumbent. It is submitted that the rights of the Teachers under the Rules of 2004 are protected. It is, therefore, submitted that the impugned Rules do not change the service conditions of the petitioners. The terms and conditions of the petitioners continue to remain the same except that they shall work on deputation in the Society as being employees of the State Government. The State Government has submitted that the petitioners have not been able to demonstrate as to how the Rules in question are ultra vires to the Rules of 1990. The petitioners do not have any cause of action to challenge the constitutionality of the rules of 2004. It is the stand of the State Government that after the institutes were declared as a Society and are governed by the provisions of the Act of 1973, the State is competent to frame the rules of 2004 in exercise of the powers conferred under Section 43 of the Act of 1973. Reconstitution, change of cadre and right to promotion etc, are not the part of service condition and under Fundamental Rule 110, the employer is empowered to send an employee on deputation even without his consent. Learned counsel appearing for the State places reliance on a decision of the Hon'ble Supreme Court in the matter of Chiranjit Lal Chowdhuri vs. Union of India and others AIR 1951 SC 41.. Counsel for the respondents relied on the decision of the Hon'ble Supreme Court in the matter of S.Murugan and Others Vs. Union of India and another (2002) 10 SCC 96 and Mohammad Shujat Ali and others Vs. Union of India (1975) 3 SCC 76.

6. We have heard the learned counsel appearing for the parties and perused the record.

7. It is well settled that a law made by Central or State Legislature can be struck down only on the following grounds :-

- (a) the legislative competence of the Legislature in question; or
- (b) violation of any fundamental right; or
- (c) violation of any other constitutional provision

There is a presumption in favour of legislation. It is only in the event of gross violation of Constitutional sanction that a Court would be within its jurisdiction to declare legislative enactment to be an invalid piece of legislation and not otherwise. {See: State of Andhra Pradesh Vs. McDowell (1996) 3 SCC 709, State of Kerala and another Vs. Peoples Union for Civil Liberties, Kerala State Unit and Others (2009) 8 SCC 46, Githa Hariharan (Mrs) Vs. Reserve Bank of India (1999) 2 SCC 228 and V. Subramanian Vs. Ragesh Raghuvendra Rao (2009) 5 SCC 608}.

8. The Hon'ble Supreme Court in the matter of V.T.Khanzode and others Vs. Reserve Bank of India and another (1982) 2 SCC 7 has considered the decision of Reserve Bank of India in reference to integration with common seniority and inter-group, mobility among different groups of Officers belonging to Group-I (Section A), Group-II and Group-III with retrospective effect. The contention in that case before the Hon'ble Supreme Court was that the decision of requiring combine seniority list was violative of their fundamental right under Article 14 and 16 of the Constitution. In para-40 and 41 of the said judgment the Hon'ble Supreme Court has held that private interest of the employees of public undertakings cannot override public interest and an effort has been made to harmonize two considerations. No Scheme governing service matters can be fool proof and some section or other of the employees is bound to feel aggrieved on the score of its expectations being falsified or remaining to be fulfilled. Arbitrariness, irrationality, perversity and mala fides will of course render any scheme unconstitutional but the fact that the scheme does not satisfy the expectations of every employee is not evidence of these. It was found that integration of different Cadres into one Cadre did not involve violation of equality clause and that neither Article 14 nor Article 16 forbids creation of different Cadres in Government service.

9. The Hon'ble Supreme Court in the matter of Union of India and Others Vs. Krishna Kumar Others(2019) 4 SCC 319 has held that there is no vested right to promotion but there is only a right to be considered for promotion in accordance with law. While placing reliance on earlier judgments it has been held that the right to be considered for promotion is in accordance with law which is enforced on the date of consideration. In other words law is thus clear that a candidate has a right to be considered in the light of existing Rules, namely, the Rules enforced on the date of consideration takes place.

10. The Hon'ble Supreme Court in the matter of Ajay Kumar Shukla and Others Vs. Arvind Rai and Others(2021) SCC Online SC 1195 has reiterated the principle that promotion is not a fundamental right.

11. The Hon'ble Supreme Court in the matter of Mohammad Shujat Ali⁷ has held that a right to be considered for promotion is a condition of service mere chances of promotion are not. A Rule which merely affects chances of promotion cannot be regarded as varying a condition of service. While taking into consideration the fact that as a result of application of Andhra Rules, the number of posts of Assistant Engineers available to non-graduate Supervisors from the erstwhile

Hyderabad State for promotion was reduced, the Hon'ble Supreme Court has held that the right of consideration is not affected but chances for promotion were severely reduced. Such a reduction in chances of promotion has been held to be not constituting variation in the condition of service.

12. It is also well settled that there can be no reservation of the solitary post and that in order to apply the Rules of reservation within the Cadre, there must be plurality of posts. {See : R.R.Inamdar Vs. State of Karnataka and Others 15 (2020) 19 SCC 543}.

13. The Hon'ble Supreme Court in the matter of S. Murugan and Others Vs. Union of India and another (2002) 10 SCC 96. has held that constitution and formation of a Cadre is the prerogative of the employer and it is for the employer to decide which unit of service would constitute a Cadre.

14. We have taken note of the aforesaid legal pronouncements of the Hon'ble Supreme Court to appreciate the submissions made by the rival parties in the context of the Rules which are under challenged.

15. The scheme of the Rules of 1990 would show that the services of Madhya Pradesh Technical Education (Gazetted) Officers are governed by the said Rules. Rule 5 of the Rules of 1990 deals with Classification, Scale of Pay, etc. Rule 13 deals with Appointment by promotion and Rule 14 prescribes Conditions of Eligibility of Promotion. Schedule-I under Rule-5 of the Rules of 1990 shows that the posts of Principal, Professor and Reader etc. are Class-I posts. Schedule-II under Rule-6 of the Rules of 1990 shows that all the posts of Professors, Readers are to be filled 100% by direct recruitment. So far as the post of Principal is concerned, the same is 100% promotional post. Schedule-IV under Rule 14(1) of the Rules of 1990 shows that the feeder cadre for the promotional post of Principal is Professor having 5 years experience on the post of Professor with educational and other qualifications as mentioned under Schedule-IV of the Rules of 1990.

16. The scheme of the Rules of 2004 would show that Rule 2(a) defines "Appointing Authority" which would mean in respect of Principal, who, at the commencement of the Rules are holding substantive posts mentioned in column 3 to 7 of Schedule-II means the Government and in respect of the posts shown in Column 8 to 12 of Schedule II as transferred to the Society means the Board of Governors of the Society. Schedule-II under Rule-3 of the Rules of 2004 shows that with respect to the petitioners, the Appointing Authority would continue to be that of State Government. Rule 3 of the Rules of 2004 prescribes for Constitution of the service and Rule 4 prescribes Classification, Scale of Pay, etc. Rule 3 and Rule 4 of the Rules of 2004 are reproduced as under :-

"3. Constitution of the service.- The service shall consist of the following persons, namely:-

(a) Persons, who at the commencement of these rules are holding substantively

the posts specified in Schedule-II shall constitute a Dying Cadre;

(b) Persons recruited to the Service before commencement of these rules; and

(c) Persons recruited to the service in accordance with the provisions of these rules.

4. Classification, scale of pay etc.- The classification of the Service, the scale of pay attached there to and the number of posts included in the Service shall be in accordance with the provisions contained in Schedule-I:

Provided that the posts relinquished by the Government servant on retirement, resignation, death etc. shall be transferred to the Society of the engineering college.

17. Rule 12 of the Rules of 2004 prescribes Conditions of Services and Rule 13 of the Rules of 2004 deals with lien. Rule 12 and 13 of the Rules of 2004 are reproduced as under :-

"12. Conditions of Services.- (1) Every person recruited on initial posts such as Lecturer, Programmer, Assistant Workshop Superintendent, Librarian and Physical Training Instructor shown in Schedule III shall be appointed initially for a period of three years on contract. On completion of this period, performance of the candidate shall be reviewed by the Appointing Authority as per approval procedure as approved by the Government and, if found suitable, he shall be offered a regular appointment.

(2) The Society shall be able to make regular appointment on probation for a period of two years on posts such as Readers, Workshop Superintendents, Professors and Principals shown in Schedule II.

(3) Conduct of any person appointed under these Rules shall be governed by the Madhya Pradesh Civil Services (Conduct) Rules, 1965, as amended from time to time.

(4) A person appointed under these Rules shall not be entitled to pension and other benefits relating thereto. However, persons who at the commencement of those rules are holding substantively, the posts mentioned in Schedule II on selection to the higher

posts will be entitled to the pensioners benefit from the posts from which they retire.

(5) Services of a person appointed under these Rules shall be terminated even before the expiry of the contract/ probation on one month notice from either side or one month pay in lieu thereof.

(6) A person appointed under these Rules shall be entitled to benefit of medical facilities and traveling allowance similar to those to which the employees of the State Government in equivalent cadres are entitled.

(7) A person appointed under these Rules shall also be entitled to benefit of Contributory Provident Fund as decided by the State Government from time to time.

(8) A person appointed under these Rules on contract shall be entitled to casual leave for 13 days and optional holidays for 3 days in a year but he shall not be entitled to any other kind of leave or vacation. Other persons appointed on regular basis shall be entitled to leave benefits as applicable to Government employees.

(9) A person appointed on contract/ regular basis shall be entitled to incentives for possessing higher qualifications as per norms of the All India Council of Technical Education.

(10) Other conditions of service shall be such as may be specified in the order of his/ her appointment.

13. Lien.- If a person who at the commencement of these rules is holding a post specified in column (3) to (7) of Schedule I in a substantive capacity shall be on deputation and if selected after the commencement of these Rules for a higher post in accordance with the provisions of these rules shall be permitted to retain lien on his substantive post for a maximum period of three years. Before completion of the period specified above the Appointing Authority of the institute in which he is serving will have to take a final decision about the absorption of the candidate."

18. Rule 17 of the Rules of 2004 speaks about Repeal and Savings. The same is reproduced as under :-

"17. Repeal and Saving.- All rules corresponding to these rules and enforced immediately before the commencement of these rules are hereby repealed in respect of matters covered by these Rules.

Provided that any order made or action taken under the Rules so repealed shall be deemed to have been made or taken under the corresponding provision of these Rules.

19. A perusal Sub Rule (4) of Rule 12 of the Rules of 2004 would show that a person appointed under the Rules of 2004 shall not be entitled to pension and other benefits relating thereto. However, a person who, at the commencement of the Rules of 2004 is holding substantive posts mentioned in Schedule II on selection to the higher posts will be entitled to the benefit of pension from the posts from which they retire. Rule 13 shows that if a person who at the commencement of these rules is holding a post specified in column (3) to (7) of Schedule-I in a substantive capacity shall be on deputation and selected after the commencement of these Rules for a higher post in accordance with the provisions of these rules shall be permitted to retain lien on his substantive post for a maximum period of three years. Before completion of the period specified above the Appointing Authority of the institute in which he is serving will have to

take a final decision about the absorption of the candidate.

20. It is thus seen that under Rule 3(a) of the Rules of 2004 persons, who at the commencement of these rules are holding substantively the posts specified in Schedule-II shall constitute a Dying Cadre. However, Rule (4) of Rule 12 of the Rules of 2004 protects their right to entitlement of pensionary benefits from the posts from which they would retire. It is thus understood that there is no substantial change in the service condition of the petitioners, so far as the benefit of pay scale, pension and designation etc. are concerned. What is being contended is that the petitioners were under the direct employment of the State Government and now by virtue of the Government Notification dated 29.05.1997, the concerned Colleges are declared as autonomous Societies and, therefore, petitioners have become employees of autonomous institutions. A perusal of the composition of the Members of the Society which is headed by the Departmental Minister assisted by the Government Officers of the State would clearly show that the State Government for better administration has constituted autonomous Societies instead of them being directly working under the State Government. However, the pervasive control of the State Government on such autonomous Societies still continues through the Board of Directors of the Societies. It is thus seen that so long as there is no change of the service condition of the petitioners, they cannot object to the nature and method of governance of the Colleges. It would be appropriate to refer Fundamental Rule 110 which provides that the consent of the employee is not required for transfer of services to a body controlled by the State.

21. The Division Bench of this Court in the matter of Trilok Kumar Shrivastava Vs. State of Madhya Pradesh W.A.No.143 of 2016 decided on 01.04.2016 has held that prior consent of the Government employee is not necessary for transfer to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government. The same view has been taken by another Division Bench of this Court in the matter of Dr. Hiralal Sangam Vs. State of Madhya Pradesh and Others W.A.No.193 of 2016 decided on 14.07.2016 and by the learned Single Judge in the matter of Prateek Vajpayee Vs. State of Madhya Pradesh and another W.P.No.13933 of 2021 decided on 25.08.2021..

22. A perusal of Schedule-III of the Rules of 2004 also shows that all the posts mentioned therein are to be filled through direct selection. The petitioners have raised a grievance that their right of promotion is adversely affected. There is no substance in the said contention. All the petitioners are holding the post of Reader except one who is holding the post of Professor. The post of Reader is now re-designated as Associate Professor. In the Rules of 1990 also there was no channel for promotion from the post of Reader to the post of Professor and the post of Professor in the Rules of 1990 is to be filled-up 100% by direct selection. Similarly, in the Rules of 2004 also the post of Professor is of 100% direct selection, therefore, so far as the chances of promotion are concerned, there is no adverse effect on the petitioners those who are working on the post of Reader

(Associate Professor). So far as one petitioner who is working on the post of Professor is concerned, he of course, cannot have the chance of promotion to the post of Principal in view of the Rules of 2004. As has been considered in the preceding paragraph that the reduction of chances of promotion is not a service condition and, hence it is held that since there is no channel of promotion on the post of Principal from the post of Professor, on that ground alone the Rule in question cannot be declared to be unconstitutional. The petitioner who is working as Professor would still be entitled to face direct selection and stake his claim.

23. For the aforesaid reason, the judgment relied upon by the learned counsel for the petitioner in the case of B.S.Vadera AIR 1969 SC 118 and Dr. Rampal Chaturvedi (1970) 1 SCC 75 is not applicable. It is also seen that in both the cases B.S.Vadera AIR 1969 SC 118 and Dr. Rampal Chaturvedi (1970) 1 SCC 75 there was a substantial change in the conditions of service as per the Rules framed under the provisions of Article 309 of the Constitution and other relevant Rules under which the employees in those cases were to be treated. In the case of B.S.Vadera AIR 1969 SC 118, the employees were reverted in exercise of powers under the Railway Board's Secretarial Clerical Service (Re-organization) Scheme and in the case of Dr. Rampal Chaturvedi (1970) 1 SCC 75., an argument was raised that provisions of the Ordinance No.65 of the concerned University cannot override the provisions of Article 309 of the Constitution. In the present case, the petitioners services are not being sought to be governed by any Scheme or Ordinance but the State Government has framed Rules in exercise of statutory power under Section 43 of the Act of 1973.

24. As far as decision relied upon by the learned counsel for the petitioners in the case of Hukum Chand AIR 1972 SC 2427 , is concerned, the same relates to retrospective applicability of the relevant Rules. The same is not the case here.

25. In the last judgment relied upon by learned counsel for the petitioner in the case of State of Punjab and Others Vs. Inder Singh (1997) 8 SCC 372., the Hon'ble Supreme Court has held that the petitioner in that case is a person appointed as Constable in Punjab Police cannot be sent on deputation to Criminal Investigation Department (CID) of Punjab Police. In the said case, the facts were different. The Constables who were working in the Police Department of State of Punjab were sent on deputation to Criminal Investigation Department (CID) of the Punjab Police. During the course of deputation, they were promoted on adhoc basis and some of the Constables reached the rank of adhoc Sub Inspector. When they were sought to be repatriated to their parent department, they were to go back as Constables or Head Constables if during deputation they earned any promotion in their parent department. They had served for long years in the CID and the prospects of going back as Constables was not to their liking. They, therefore, approached the High Court of Punjab and Haryana and the High Court held that the order of their repatriation was legal, however, directions were given to the State to consider their cases for promotion in their parent department on the relevant dates when persons junior to them were promoted at different levels

and, if necessary, even to relax the Rules. Their claim was rejected by the Hon'ble Supreme Court also on the ground that they cannot claim promotion in their parent department in contravention of the statutory Rules as they did not satisfy the eligibility conditions therein. However, taking into consideration the long service in CID while affirming the order passed by the High Court, the Hon'ble Supreme Court directed to consider their applications for voluntary retirement. However, in the present case the Fundamental Rule 110 specifically empowers the department to send the petitioner on deputation. In the present case, the Cadre of the petitioners to which they belong to has been declared as Dying Cadre. However, with an object to protect their rights regarding pension, treating them working in the same institution and after abolition of the Rules of 1990, the petitioners are treated to be on deputation in the same Colleges which are now being declared as autonomous institutions. Strictly speaking it is not a case of sending of an Officer from one department to another department on deputation.

A deputationist can always and at any time be repatriated to his parent department at the instance of either borrowing department or parent department. There is no vested right in favour of deputationist to continue for long on deputation or get absorbed in borrowing department unless his claim is based upon statutory Rules, Regulations or an order having force of law. If the aforesaid principles of deputation are examined in the present case it would clearly appear that the present case involves peculiar circumstances where the petitioners are working in the same Colleges and still by virtue of law they are considered to be a deputationist. Such a situation has arisen to protect the rights of the petitioners and also to ensure that administration of Colleges in question is governed by the autonomous Societies.

26. So far as the argument of learned counsel for the petitioners with respect to precedence of the Rules is concerned, the same is only an academic issue and is not required to be adjudicated under the facts of the present case. The petitioners are not challenging the authority of the State Government to bring the Government Engineering Colleges under an autonomous Societies established under the provisions of the Act of 1973. Once the institutions where the petitioners are working have been declared to be autonomous Societies, obviously, their services have to be governed in accordance with the Rules framed in exercise of powers vested under the Act of 1973. The State Government has taken a decision to repeal the Rules of 1990 protecting the rights of those Teachers who are working under the Rules of 1990 extending them the protection under the Rules of 2004 to the extent of their designation, pay scales and pensionary benefits are concerned. Under such circumstances when all Engineering Colleges are declared to be Societies each institution forms a separate unit. The petitioners cannot claim that on account of non-possibility of their transfer to different Colleges, the Rules of 2004 be declared unconstitutional. If the State Government thinks that for better administration of a particular institution and considering its nature and functioning there should

not be any transfer of its Officers, such a decision cannot be said to be arbitrary or violative of Article 14 and 16 of the Constitution. It is also to be noted that the petitioners have not challenged the decision of the State Government dated 29.05.1997 wherein the institutions where the petitioners are working have been declared as an autonomous Societies under the Act of 1973. Having accepted the formation of Societies, the petitioners cannot challenge the consequences ensuing on account of formation of such Societies.

27. It is also seen that during pendency of the present writ petition none of the petitioners has been selected to any higher post, therefore, question of their lien being terminated or retained in view of Rule 13 of the Rules of 2004 does not arise.

28. For the aforesaid reasons, we do not find any substance in the instant writ petition to strike down the The Madhya Pradesh Technical Education Engineering College (Teaching Cadre) Service (Recruitment) Rules, 2004. Hence, the writ petition stands dismissed.