

(1989) 03 MP CK 0055
In the Madhya Pradesh High Court
Case No : L.P.A. No. 5 of 1985

Dr. P. Gopal Ratnam Raman and another APPELLANT
Vs
Dr. Shyam Babu Gupta and another RESPONDENT

Date of Decision : 23-03-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104, 105, 4

Citation : (1989) MPJR 481 : (1989) MPLJ 610

Hon'ble Judges : T.M Singh, J;N.K. Singh, J

Bench : Division Bench

Advocate : J.P. Gupta, for the Appellant; P.L. Dubey and R.D. Jain for Respondent No. 1 and R.A. Roman, Deputy Government Advocate for State, for the Respondent

Final Decision : Allowed

Judgement

Dr. T.M Singh, J.

In the Writ Petition heard and decided by the learned Single Judge, the two appellants Dr. P. Gopal Ratnam Raman and Dr. Shrikrishna yeshikar were impleaded respectively as non-petitioners Nos. 4 and 3. They have appealed against the decision rendered in that petition on 22-4-1985 while the other non-petitioners, State of Madhya Pradesh (No. 1) and the State Public Service Commission (No.2) have not appealed and are impleaded in the instant appeal as respondents Nos. 2 and 3 respectively. Dr. Shyam Babu Gupta, the writ - petitioner, figures as the first respondent in the instant appeal.

We are required in this matter to consider and decide first the question of maintainability of the appeal as that has been seriously questioned by Shri P.L. Dubey, learned counsel appearing for the first respondent. He has relied mainly on a Bench decision of this Court in the case of Vijayaraje Scindia, 1978 MPLJ 78 : 1988 JLJ 861 to which one of us (Dr. T.N. Singh, J.) was a party. He has also cited other decisions to contend that the learned single Judge having issued the

writ against the State of Madhya Pradesh by making certain direction against that respondent, in the absence of appeal by the State, the order passed by the learned Single Judge is not assailable at the instance of the appellants. On behalf of the appellants, their learned counsel, Shri J.P. Gupta, on the other hand, placed implicit reliance on the decision of the Apex Court in Pushkar Nath Nehru and Others Vs. Administrator (now by Executive Officer), Municipality, Srinagar and Another, to contend that the question is no longer res Integra. He has also drawn our attention to the prayer portion of the writ petition and to the operative part of the impugned order that relief was granted by making necessary direction in that regard. As aggrieved persons, the instant appeal at their instance, is maintainable and it is also urged that in the Court's Judgment in Vijayaraje Scindia (supra), the question of maintainability of Letters Patent Appeal against order passed by learned Single Judge in the writ jurisdiction was not decided.

In our opinion the three-fold contention raised by Shri Gupta must prevail. Although in Pushkar Nath (supra), their Lordships were required to determine the question of maintainability of the appeal with respect to the provisions of Letters Patent applicable to Jammu and Kashmir High Court what we read in para 8 of the Report is indeed of signal relevance to the question mooted before us. Indeed, the crux of the controversy no doubt revolves round the question as to whether a Single Judge of a High Court, in passing an order or making direction envisaged under Article 226 of the Constitution exercise original Civil Jurisdiction even through that jurisdiction. The language of clause 10 of the Letters Patent of this Court, in terms, refers to that centre of the controversy. Let relevant portion thereof be extracted:

10. Appeal to the High Court from Judges of the Courts -- And we do further ordain that an appeal shall lie to the said High Court of Judicature at Nagpur from the judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made in the exercise of the appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act, or in the exercise of criminal jurisdiction of one judge of the said High Court or one Judge of any Division Court, pursuant to section one hundred and eight of the Government of India Act.....

Their Lordships in Pushkar Nath (supra) answered the question in the affirmative and the contention relating to maintainability of the appeal was rejected. This Court, in Vijayaraje Scindia (supra) had an occasion to construe the afore-quoted clause 10 in terms of Sections 4, 104, 105, and Order 43, Civil Procedure Code. Reference was made by this Court to the Apex Court's decision in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, wherein Letters Patent of the High Court was regarded as "special law". This Court, however, took the view that when provision for an appeal for any matter with respect to the relevant

circumstances is made in Civil Procedure Code, there will be no scope for the operation of Section 4 because the Apex Court has held that provisions of Section 104, CPC does not operate in such a case, to allow the special law to prevail over the Civil Procedure Code. It was also held by this Court that when right of appeal is conferred under any other enactment in express terms, the general law contained in the Letters Patent shall not prevail and for the purpose of Section 4, CPC that provision shall be deemed "special law" and not the Letters Patent, because in terms Section 4 refers to "any special jurisdiction or power conferred, or any form of procedure prescribed." This view was taken on the premises that Letters Patent spoke generally of the forum of appeal and provided nothing of the sort of "special form of procedure" in connection with trial of the issues in any matter raised before a Single Judge of the High Court. In *Vijayaraje Scindia's* case (supra), the Letters Patent Appeal which was held not maintainable was one against an order passed by a learned Single Judge of this Court in appeal from an order passed by the trial Court under Order 43 Rule 1 CPC on the ground that Section 104(2) CPC expressly barred a "Second Appeal" in such cases.

We are of the view that it is not necessary at all to consider the scope of writ jurisdiction of English Court or even to consider the scope and effect of writ of mandamus or certiorari or any other writ that any High Court in India is empowered to issue in exercise of its powers under Article 226 of the Constitution, *T.C. Basappa Vs. T. Nagappa and Another*, and *Ghulam Sarwar Vs. Union of India (UOI) and Others*, besides relying further on *Katikara Chintamani Dora and Others Vs. Guntreddi Annamainaidu and Others*, but reliance thereon would not avail the contesting respondent. In one case, the scope of writ of certiorari and in another case that of habeas corpus is discussed and in the last-mentioned decision at para 59, stressed by Shri Dubey, the holding is on the scope of Section 96(3), CPC to the effect that bar thereunder against consent decree being appealed is based on the broad principle of estoppel. In the instant case, although the appellants were impleaded as non-petitioners, the impugned order passed by learned Single Judge cannot be considered a "consent decree" in so far as they are concerned merely because the other two non-petitioners (State and the P.S.C.) have not appealed and have accepted the order. On the nodal point of the controversy, there remains no lingering doubt because of the holding in *Pushkar Nath* (supra) that when a single Judge of a High Court disposes of a writ petition, he exercises "Original Civil Jurisdiction", though that is a "new" jurisdiction. Because Article 226 of the Constitution does not provide in express terms any "special form of procedure" for disposal of petitions made thereunder, reliance by Shri Gupta for dividing the scope of clause 10, Letters Patent on cognate provisions of Civil Procedure Code, cannot be held inappropriate. Counsel has rightly, in our opinion, submitted that although Clause 10, in terms, does not name the "aggrieved person" or, in terms, indicate the extent of the right available thereunder in terms of parties, for that reason merely, citizens who are affected adversely by any order passed by a learned

judge of the High Court under Article 226 of the Constitution cannot be denied the right of appeal under Clause 10 on the ground that writ or direction issued by the High Court under Article 226 is meant to be obeyed only by the State. He has implored us to draw analogy from Sections 96, 100, 104 and Order 43, CPC submitting that in those provisions also, the right of appeal contemplated is in general terms and the extent thereof is not limited by naming the "person aggrieved", entitled to file appeal thereunder He has also rightly contended, in our opinion, that as in Clause 10, reference is made in those provisions only to the "decree" or "order" which can be challenged in appeal.

Reliance is placed by Shri Gupta also on case-law to which we may profitably refer. In *Ebrahim Aboobakar and Another Vs. Custodian General of Evacuee Property*, , the General law on the scope of appellate jurisdiction was discussed and it was observed, "Ordinarily, a Court of appeal has not only jurisdiction to determine the soundness of decision of inferior Court as a Court of error, but by the very nature of things, it has also jurisdiction to determine any point raised before it.....", adding further "when a person is given a right to raise a contest in a certain matter and his contention is negatived, then to say that he is not a person aggrieved by the order does not seem to us to be at all right or proper". In *The Province of Bombay Vs. Western India Automobile Association*, , it was held that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court provided leave in that regard is obtained from the trial Court because a person who is affected by an order cannot be denied remedy for the wrong done to be redressed. Similar view was taken in *Pulla (sic)* (AIR 1949 Mad 91) interpreting Section 96, CPC and Sections 37 and 75, Provincial Insolvency Act wherein it was observed that though Section 96 does not enumerate the persons who can file the appeal, a person who is party to the decree cannot be deprived of his right of appeal therefrom. Indeed, in *State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another*, Sarkaria, J. expressed view to the same effect and observed, "As a Rule, leave to appeal will not be refused to a person who might have been made eo nomine party". Not only the Bombay decision aforesaid was approved, dictum of Lindley, L.J. in (sic) *Insurance Co.*, (1894) 2 Ch 410 any person "if he is either bound by the order or is aggrieved by it or is prejudicially affected by it" has the right of appeal was also approved.

For the reasons aforesaid, we hold that the contention of Shri Dubey has no force and that the instant appeal is maintainable, to be heard and disposed of on merits.

The facts pertaining to the core to the controversy which has to be decided in accordance with statutory provisions lie within a narrow compass. Accordingly, before dealing with the legal contentions, we consider it appropriate to state certain facts. With the writ petition, the contesting respondent filed Annexure P/1 from which it appears that on selection made by the State Public Service Commission, the petitioner as also the two appellants were "appointed

temporarily until further orders in M.P. Medical Service Class II" as Lecturers in Medicine and posted in the Medical Colleges at Gwalior, Bhopal and Rewa respectively. Dr. Shyam Babu Gupta (respondent No.1) w.e. from 25-1-1967 and the two appellants w.e. from 21-1-1967 (appellant No. 2) and 6-2-1967 (appellant No. 1). Admittedly, while they were so serving, the Madhya Pradesh Health (Gazetted) Service Recruitment Rules, 1967, for short, "the Rules", were brought into force w.e. from 12-6-1970, With the writ petitions were also filed Gradation Lists, but reliance on those was rightly held inappropriate by the learned Single Judge and indeed, it is not necessary to refer to those for the valid reason that shoe (same) are provisional lists. Admittedly, in terms of the provisions of Rule 6, State Public Service Commission advertised for five posts of Reader in Medicine to be filled in by direct recruitment and held selection accordingly pursuant to which the order Annexure R/1 was passed on 11-3-1982 under which the two appellants and three other Doctors came to be selected for the posts of Ruder in the different Medical Colleges of the State, at Gwalior, Rewa, Bhopal and Indore. That Order became the bone of contention between the parties at the stage of hearing of the writ petition and indeed, in this appeal also validity of that order really is the crux of controversy to be decided by us with reference to statutory provisions. Contesting respondents, challenge to the order was upheld by the learned Single Judge holding that appointment of two appellants by direct recruitment was illegal because the authorities had to consider if the petitioner had any right to appointment to one post of the Reader because the relevant Rule provided for appointment not only by direct recruitment, but also by promotion and specified quotas for both sources.

In assailing the decision rendered by the learned Single Judge, Shri Gupta submitted in the fore-front of his argument that on the language of the relevant provision, there is very little to be read in the impugned order which is based only on certain observations made by the Apex court in Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, . Indeed, that decision was rendered on a review application and their Lordships explained the scope of their holding in the main judgment rendered in the case, which is reported in Paramjit Singh and Others Vs. Ram Rakha and Others, . Wherever that may be, the contention of learned counsel that the rights of parties have to be determined mainly and primarily with respect to the relevant statutory provisions appear to us to be unanswerable. It is necessary to examine indeed the scoped the relevant rules to see how the quota system is meant to be implement It has to be seen whether the learned Single Judge was right in holding that the quota operated with respect to each and every "vacancy"" in the post and recruitment had to be made by "rotation" from two sources.

We accordingly quote in extenso Rule 6 of the Rules:

6. Method of Recruitment. (i) Recruitment to the Service, after commencement of these rules, shall be by the following methods and as far as may be, according to the proportion specified in the Schedule II,--

- (a) by direct recruitment;
 - (b) by promotion of the members of the service as specified in the Schedule,
 - (c) by transfer of persons who hold post in different branches of this service or in such services as may be specified in this behalf.
- (2) The number of persons recruited under clause (b) or clause (c) of sub-rule (1) shall not at any time exceed the percentage shown in the schedule, for promotion quota of the number of duty posts (as specified in the Schedule).
- (3) Subject to the provisions of these rules, the method or methods of recruitment to be adopted for the purposes of filling any particular vacancy or vacancies in the services as may be required to be filled during any particular period of recruitment, and the number of persons to be recruited by each method, shall be determined on each occasion by Government in consultation with the Commission.
- (4) Notwithstanding anything contained in sub-rule (1) if in the opinion of Government, the exigencies of service so require, the Government may after consulting the commission, adopt such methods of recruitment to the service other than those specified in the said sub-rule, as it may by order issued in this behalf prescribed.

Let the Scheme of the Rules be briefly surveyed as that will definitely throw light on the scope and object of the provision quoted and also on the entire body of the Rules generally. Under Rule 2 are defined certain terms including "Duty Post" as per clause (j) to mean "any post in Public Health Department whether permanent or temporary specified in column No. 2 of the Schedule." Vide Rule 3 the general application of M.P. Civil Service (General Conditions of Service) Rules, 1961 to the members of the "Service" (M. P. Health Service) is expressly saved. As per Rule 4, Constitution of the Service is provided and sub-rule (2) there of refers to "persons recruited to the service in accordance with the provisions of these rules". Under Rule 7, it is provided that all appointments to the service after the commencement of the rules shall be made in no other manner "except after selection by one of the methods of recruitment specified in Rule 6". While Rule 8 lays down conditions of eligibility of direct recruits and procedure for such recruitment is provided in Rules 11 and 12 provisions are made in Rules 13, 14 and 15 as regards appointment, selection and conditions of eligibility for promotion/transfer. Rule 19 provides that whether any person is recruited directly or is promoted, he has to serve on probation on that post for a period of two years which may be extended. Although the Rules have four Schedules, we are required to only refer to Schedule II in this case. It has six columns. Columns (1), (2), (3) respectively refer to Name of the Post, Name of Service and Total number of "duly posts," Columns (4), (5) and (6) are clubbed under the main heading. "Percentage of the number of duty posts to be filled in". The return columns, (4), (5) and (6) bear sub-headings respectively "By direct recruitment vide rule 6 (a)", "By promotion of substantive members of the service vide rule 6

(b)" and "By transfer of persons from other services vide rule (6)". Against the post Reader named in column 1, in column 3 appears the figure 130 denoting the total number of posts for that post and in columns 4 and 5 against that post, it is mentioned respectively "50 percent by direct recruitment" and "50 per cent by promotion".

On a plain reading of Rule 6 afore-quoted, it has appeared to us that as per Schedule II "duty posts" are to be filled, and that the post of Reader, by direct recruitment and by promotion, according to the "proportion" specified therein, namely, 50 per cent from each source. The Rule does not provide that Reader's posts in different disciplines by direct recruitment cannot be filled even to the extent of the proportion indicated or specified in Schedule II unless and until recruitment by promotion proceed *pari passu*. By enacting sub-rule (2), the purport of sub-rule (1) is made clear that in so far as the question of filling posts by direct recruitment is concerned, that can be done to the extent of the percentage shown in the Schedule. Sub-rule (2) clearly indicates that the "promotion quota" is fixed with respect to "the number of duty posts" and not to the number of vacancies arising at any time. If there is any prohibition written in sub-rule (2) against making appointment of any person, that is only to the effect that by promotion the specified percentage shall not be exceeded "at any time" in filling up the duty posts specified in the Schedule. However, sub-rule (2) has to be read also with sub-rule (3) and if that is done, the view we have taken stands buttressed. For filling up any particular vacancy or vacancies in the service, "during any particular period of recruitment" the State Government is authorised to take necessary steps in that regard in consultation with the Commission and in doing so, power is vested in the State Government to follow or adopt the appropriate "method or methods of recruitment". By that, in our opinion, it is clearly meant that the quota system is not required to operate in variably by rotation. Stress is clearly laid on vacancy to be filled "during any particular period". For following the appropriate method of recruitment, albeit in accordance with sub-rule (1) under which "proportions" "specified", the only requirement to be fulfilled is the consultation with the Public Service Commission of the State. The provision has to be interpreted in the light of the other Rules, such as Rules 11 to 18. When any appointment has to be made by promotion, a different procedure is prescribed and cases of such candidates are required to be dealt with in accordance with the provisions of Rules 13 and 18 under which is contemplated preliminary selection by "Committee" and preparation of "Select List" to be reviewed and revised every year and then constitution in respect of that list with the Public Service Commission is also contemplated. On the other hand, for "direct recruitment" decision in that regard can be taken at any time by the State Government in consultation with the Commission and the candidates are recommended for such appointment by the Commission itself on making selection in the prescribed manner, albeit as per Rule 6(1)(a) to the prescribed "percentage" only of total number of the particular "duty post".

Having regard to the provisions of Article 309 of the Constitution under which the

Rules aforesaid have been framed, we have no doubt that the required Constitutional authority in that regard is vested in the State Government to formulate such Rules for all matters concerning recruitment and conditions of service of any person appointed or to be appointed in any post in connection with the affairs of the State. There is no constitutional restriction on the State Government or Union Government framing "service rules" to provide for recruitment to any Service in any particular manner and also to specify in the Rules any particular procedure of recruitment, the number of posts to be filled up and the manner in which those are to be filled up. Article 309 invests plenary powers in the Governments of the States and the Union in that regard and the only restrictions on those powers are to be read in Part C of the Constitution. Hence, unless the vires of any Service Rules is challenged Courts are bound to give full effect to the Rules enacted under Article 309, albeit in the matter of interpretation thereof, established canons of construction must provide the necessary guidelines. Accordingly, it is open, in our opinion, to the State Government to provide in the Rules whether any post is required to be filled up only by direct recruitment or also by promotion and in what manner the recruitment has to be made from the two sources,

12A. Let it be noted in this connection that the rules aforesaid do not form a self-contained Code and deal only with the question of recruitment of persons appointed in the Public Health Department of the State Government because under Rule 3, the applicability of the general provisions applicable to other Government servants is specifically saved and no provisions in regard to other matters or other service conditions are made in the Rules. So, neither the interpretation, nor the validity or reasonableness of Rule 6, afore-quoted, is to be tested with reference to any other matters, such as confirmation or seniority of persons recruited from three different sources under Rule 6 to the M.P. Health Service. It was open to the Government to provide in the Rules aforesaid, that the quota or "percentage" of recruitment was to be observed with respect to any particular vacancy or "particular period" for any duty post. Recruitment from any of the sources in blocks is not prohibited specifically. No provision has been made specifically in the Rules for recruitment Solo, only, by "rotation", and in the absence of that provision, to read any such rule of rotation to supervene filling up any vacancy at any "particular period" according to the percentage or quota fixed would, in our opinion, be violating the language and purport of Rule 6 read as a whole. Because, under sub-rule (3), to determine the appropriate "method" for filling up "any particular vacancy or vacancies" competence is vested in State Government and Public Service Commission. We must construe Rule 6 in its entirety harmonising and giving effect to all provisions thereof, following the established canons of interpretation.

We may now look at Paramjit Singh's case (supra) and indeed. First the main Judgment reported in Paramjit Singh and Others Vs. Ram Rakha and Others, . The only question that was considered and decided was that of seniority and confirmation. On the construction of the relevant Service Rule of that case, it was

held that the Quota Rule was linked up with the Seniority Rule. Because, under those Rules the date of entering service did not determine seniority; date of confirmation determined seniority and any delinking would render the Seniority Rule wholly unreasonable. In other words, the Quota Rule, it was held, would operate at both stages, of confirmation and seniority. In that case, the "Quota system" was required to be considered in the context of grievance made of denial of proper seniority. The decision in that case, turned on a complete Code of Service Rules, namely, Punjab Police Service Rules, 1959, dealing not only with constitution of Service and recruitment etc., but also with other conditions of service, such as pay, seniority, discipline etc. We do not think if it can be questioned that different considerations are pertinent to the questions of recruitment, confirmation and seniority and that not only in framing the Service Rules the distinction has to be maintained, in interpretation of the Rules also that position must be borne in mind. At para 15 of the Report, the decision in A.K. Subraman and Others Vs. Union of India (UOI) and Others, , cited by counsel, was analysed and explained. It was observed that situation in two cases was "materially different" and that ignoring relevant Rule applicable to the case in their Lordships hands that seniority was dependent upon confirmation "a proposition of universal application" cannot be laid down. It was further observed, "Everything will depend upon the whole body of rules and harmonious construction has to be put upon the rules so as to avoid the possibility of a rule becoming unreasonable."

Our attention was drawn by Shri Gupta to para 5 of the impugned Judgment by the learned Single Judge wherein he has observed that "As a rule also, the quota should be correlated to the vacancies, which are to be filled in" and in support of that proposition, relied on the observations made by their Lordships in their later decision reported in Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, in which the earlier decision was explained. We entertain no doubt that the extract which the Learned Judge quoted from para 6 of the Report in AIR 1980 SC 314 cannot be read, torn out of context. Indeed, we do not think if the observation, "while making recruitment quota rule is required to be strictly adhered to" carries, in itself, the specific requirement of vacancies being filled up invariably by rotation. Indeed, in the same paragraph, proceeding further, their Lordships explained that what they meant to say: "The quota rule would apply to vacancies and recruitment has to be made keeping in view the vacancies available to two sources according to the quota". That vacancies were not required to be filled up by rotation, one for one, but according to quota, is explained by them clearly, saying; "In other words, whenever vacancies occur, first recruit four promoters irrespective of the factors or circumstances causing the vacancies and as soon as four promotees are recruited bring in a direct recruit. To set at rest confusion and lingering doubt, they further observed in para 8 "if recruitment is strictly made according to quota there will be no difficulty in applying the very rule of quota even while giving confirmation" and indeed, very relevant in the context of the present lis is their observation in para

4 which formed part of an extract from their earlier Judgment. "The difficulty arises when recruitment in excess of the quota is made.....".

Although Shri Gupta raised other contentions also to submit that writ petitioner, contesting respondent has no case even otherwise and the petition was liable to be dismissed, we have considered it unnecessary to deal with those contentions. Because, we have taken the view that the Order Annexure R/1, impugned in the writ petition, being in complete conformity with the provisory of Rule 6 of the Rules, on that ground itself the petition ought to have been dismissed. During the relevant period when Order Annexure R/1 was passed, there were admittedly ten vacancies in the post of Reader in Medicine and by that order, only five posts were filled up and the two appellants were selected to fill up those posts by direct recruitment along with three others. We have no doubt that in doing so, the State Government as also the Public Service Commission were mindful of the provisions of Rule 6 (1) and of the "percentage" fixed in Schedule II of the Rules and, therefore, only 50% of the vacant duty posts (Reader in Medicine) were filled up by direct recruitment. If the petitioner, having offered himself for direct recruitment, was not selected, his chance to selection by promotion in due course has not been impaired in any manner by the order Annexure R/1, Indeed he has not made any grievance that in taking steps for filling up the remaining five vacant duty posts of Reader in Medicine by promotion, his case has not been considered in accordance with the relevant provisions of Rule 13 et. seq. of the Rules.

In the premises aforesaid, we are constitutionally obliged to allow the appeal. We hold the view that the petitioner; contesting respondent had no case and he was not entitled to any writ from the Court or to have any direction in the nature that was made by the learned Single Judge, impugned in this appeal. We are of the view that the appointment of the two appellants being made in accordance with the provisions of Rule 6 of the Rules, their appointment cannot be quashed. The order passed on 22-4-1985 in Misc. Petition No. 74 of 1982 by the learned Single Judge is accordingly set aside. That Writ Petition stands dismissed. We also direct that in the Court below as also in this Court parties shall bear shall their own costs.