
(2014) 04 MP CK 0057
In the Madhya Pradesh High Court
Case No : W.P. No. 7735 of 2013

J.S. Raghuvarshi

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Rajmata Vijaya Raje Scindia Krishi Vishwavidyalaya (Sanshodhan) Adhiniyam, 2009 — Section 2(1)

Citation : (2014) 3 MPJR 103 : (2014) 3 MPLJ 101

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : N.S. Kirar, Advocate for the Appellant; Vivek Khedkar, Deputy Advocate General, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sujoy Paul, J.—The petitioners are the Professors (CAS) working with respondent No. 3-Rajmata Vijaya Raje Scindia Krishi Vishwavidyalaya, Gwalior (for short, the "University"). In this writ petition, the petitioners have assailed the advertisement dated 10-9-2013 (Annexure P-1), whereby the University intended to fill up the posts of Professor and Head of the Department. It is prayed that all the petitioners have a preferential right to occupy and continue on the post of Head of the Department. The brief facts necessary for adjudication of this matter are that the petitioners are working as Professors. In addition, they have been entrusted with the work of Head of the Department (HOD) of their department. In para. 5.1 of the petition, the petitioners have mentioned the dates of their initial appointment as Professor, date of appointment as HOD and also the name of the department. The appointment orders of the petitioners as HOD are cumulatively filed as Annexure P-2. It is contended that the petitioners were Teachers/Professors in Jawahar Lal Nehru Krishi Vishwavidyalaya (for short, the "Vishwavidyalaya"). However, pursuant to Rajmata Vijaya Raje Scindia Krishi Vishwavidyalaya Adhiniyam, 2009 (No. 4 of 2009) (for brevity, the "Adhiniyam"), the petitioners continued as Teachers/employees of the University. It is

contended that there is no sanctioned post like "Professor and HOD" and the Professor is a different post from where by way of nomination under the Adhiniyam, one can be made HOD. It is urged that the petitioners' nomination by the Vice Chancellor as HOD is in consonance with the Adhiniyam. It is further submitted that advertisement runs contrary to the Adhiniyam. If the advertisement is permitted to be translated into reality, it will have an impact of bringing fresh recruits as HOD and placing them over and above the petitioners. This will also result into petitioners' discontinuance as HOD because the stand of the respondents is that their appointment as HOD is only a "stop gap arrangement".

2. Shri N.S. Kirar, learned counsel for the petitioners contended that the petitioners are senior and experienced Professors of the University. They have acquired experience of the post of HOD pursuant to their nomination by Annexure P-2. If the impugned advertisement is permitted to be implemented, a fresh recruit may come and become HOD, which is neither permissible under the Adhiniyam nor will be in the interest of administration. It will take away the valuable right of the petitioners to become HOD or continue as HOD. It is further urged that in absence of any post of "Professor and HOD", the advertisement is unsustainable and liable to be set aside. In support of his contentions, Shri Kirar relied on certain provisions including sections 33 and 57 of the Adhiniyam and further placed reliance on N.K. Jain Vs. State of M.P. and Others, ; Bharat Prasad Shukla Vs. The State of Madhya Pradesh and Others, ; and, Indian Council of Agricultural Research Vs. A.N. Lahiri,

3. Per Contra, Shri Vivek Khedkar, learned Deputy Advocate General for the respondents, contended that the petitioners were promoted as Professors under Career Advancement Scheme (CAS). They are not holding any substantive post of Professor. The post of Professor under CAS is outside the cadre of the Professor. It is like a financial upgradation only. Shri Khedkar submits that because of bifurcation of University u/s 9 of the Adhiniyam, the State Government deemed it proper to create posts and, accordingly, by notification dated 9-9-2008 created 12 number of posts of Professor and HOD. Petitioners have not challenged the validity of this notification. In absence of challenging the validity of set up, the petition is not maintainable. By relying on Statute 6(a)(ii), it is urged that in no case, more than one third of total number of positions of teachers in the cadre of Assistant Professor and Associate Professor may be promoted to cadre of Associate Professor and Professor respectively. Such promotions needs to be made on "merit" and in accordance with the norms laid down by the Indian Council of Agricultural Research (ICAR) and State Government. It is urged that the State Government earlier introduced a scheme, namely, Merit Promotion Scheme (MPS) w.e.f. 9-3-1989. However, the said scheme came to an end subsequently. The stand of the respondents is that there are no vacant posts of Professor available in the University. The petitioners are Professors under CAS and not full-fledged Professors. Their seniority is differently maintained. Reliance is placed on the judgment of Supreme Court in the case of

Dr. T.M. Vergese vs. Dr. J.S. Bhatia (Annexure R/4). It is submitted that the petitioners were appointed as Assistant Professor and became Professor under CAS. They are not regularly promoted and, therefore, in the promotion order itself, it is mentioned that the above promotion is against the post of Assistant Professor held by the incumbent, which is upgraded for the purpose. This upgradation of post shall be personal to the incumbent. The promotion orders are filed as Annexure R/5 (collectively). Referring to section 33(3) of the Adhinyam, it is argued that the word "Professor" in this section would mean full fledged Professor and if the Professor of that status is not available, the Dean of Faculty can work as HOD until a duly qualified person is available. The petitioners are not full-fledged Professor and, therefore, they may participate in the process of selection because in the advertisement itself relaxation has been granted to all the University employees as well as ICAR fellows. Such petitioners, who have minimum eligibility, can participate in the selection pursuant to Annexure P-1. It is urged that in fact, the petitioners No. 4 and 8 have already participated in the selection.

4. Shri Vivek Khedkar, by relying on the Statute submits that there are three types of teachers, namely, Professor, Associate Professor and Assistant Professor. The minimum qualification for induction as Professor is also prescribed in the Statute. The earlier Merit Promotion Scheme (MPS) is abolished and in place of it, Career Advancement Scheme (CAS) is brought into force w.e.f. 27-7-1998. At page 8 (para. 3) of the return, it is stated that the Statute makes it clear that under MPS or CAS, as and when a person gets promoted to higher post, post shall be deemed to be automatically created by upgradation of the lower post and it shall be a cadre post. It is further specifically stated that "deemed upgraded higher post shall automatically be converted into lower post when the incumbent vacates the higher post for whatsoever reason." It is further pleaded that looking to the provisions of the Statute, it is clear that a person can be appointed directly under the direct recruitment as Assistant Professor or Professor. The induction under MPS or CAS would only provide them pay scale and they, by no stretch of imagination, can be treated as full-fledged Professor. So far petitioners nomination as HOD is concerned, it is stated that it is a stop gap arrangement which will be discontinued on appointments pursuant to the impugned advertisement. By relying on State of Haryana Vs. S.M. Sharma and others, it is submitted that the petitioners are at best current charge holder of HOD having no right to continue on the said post. Lastly, it is urged that as per section 33 of the Adhinyam, there is no separate post like HOD and it is only a power given to the Vice Chancellor to appoint HOD, which is not a separate post. In support of his contentions, Shri Khedkar relied on M.P. Electricity Board and Others Vs. S.K. Dubey ; Dr. Rashmi Srivastava and Dr. B.D. Srivastava Vs. Vikram University and others, and, The Director General, Indian Council for Agricultural Research and Others Vs. D. Sundara Raju,

5. The petitioners by filing rejoinder relied on the order dated 14-2-2011 (Annexure R/5) which shows that on promotion as Professor (CAS) the post of

Assistant Professor stood upgraded. Reliance is also placed on Annexure P/9. By referring to section 38 of Jawahar Lal Nehru Krishi Vishwavidyalaya Adhiniyam, it is contended that there exists a post of HOD, which needs to be filled up by a due nomination by the Vice Chancellor. The HOD will receive a special pay of Rs. 50/- in addition to his regular salary. In nutshell, the contention of the petitioners is that if the provisions of the Adhiniyam, Statute and MPS/CAS are read together, it will be clear that the petitioners appointment as Professor cannot be said to be out side the cadre nor it can be said that they are not occupying any substantive post. It is further urged that when the employees of Vishwavidyalaya are taken over by the University, they became employees of the University and the terms and conditions governing their services cannot be altered to their detriment.

6. No other point is pressed by the parties.

7. I have heard the rival contentions and perused the record.

8. The bone of contention of the petitioners is that their appointment as Professor (CAS) is on a substantive post and within the cadre, whereas by placing heavy reliance on paras 39 and 40 of the judgment of Supreme Court in Dr. Rashmi Shrivastava (supra), it is contended by Shri Khedkar that the petitioners are neither occupying the post nor it is within the sanctioned cadre. By way of executive instructions, the petitioners were only given upgraded pay scale. Thus, the core issue is whether on appointment as Professor (CAS), the petitioners are occupying the post of HOD and whether said post will be a cadre post?

9. Before dealing with this aspect, it is apt to quote certain provisions relevant for deciding this aspect.

Section 2(1) of the Adhiniyam defines the word "University". It means the Rajmata Vijaya Raje Scindia Agriculture University.

Section 33 of the Adhiniyam reads as under:--

33. (1) Each Faculty shall comprise of such Department of Study as may be prescribed by the Statute.

(2) There shall be a Head of the Department for each Department of Study.

(3) The Vice-Chancellor shall nominate one of the Professors as Head of the Department and if there is no Professor, the Dean of the Faculty shall act as the Head of such Department until a duly qualified person is available.

(4) The terms and conditions of appointment, duties and functions of the Head of the Department shall be prescribed by the Statutes.

Section 51 of the Adhiniyam reads as under:--

51. No person shall be appointed by the Board as a salaried teacher of the University except on the recommendation of a selection committee for the

purpose in accordance with the provisions of the Statutes.

Section 57(1), (2)(a)(iii) and (b) of the Adhiniyam reads as under:--

57. (1) As from such date as the State Government may, by notification, specify in this behalf all constituent colleges of the Jawahar Lal Nehru Krishi Vishwavidyalaya situated in the areas specified in sub-section (1) of section 6 imparting instruction in Agriculture, Horticulture, Veterinary, Science and Animal Husbandry or any other allied subjects for bachelor's degree or higher and all research stations within those areas which are operated for carrying out research in agriculture and allied sciences together with lands, hostels and other buildings, furniture, library books, laboratories, stores, instruments, apparatus, appliances and equipments and livestock belonging to such colleges and stations and the budget programme made for them shall be transferred to and vest in the University.

(2) On and from the date of transfer of any college or research station under sub-section (1), the following consequences shall ensue, namely:--

(a) the employees of the Jawaharlal Nehru Krishi Vishwavidyalaya--

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) except the employees who have been recruited against the separate cadre created in College of Horticulture, Mandsaur, College of Agriculture Tikamgarh and Ganjbasoda and College of Veterinary Science and Animal Husbandry, Rewa, who opt for transfer to the University and are permitted by the Committee constituted by the State Government for the purpose within a period of six months or a period as extended by the State Government.

shall become the employees of the University and shall thereafter be governed by the terms and conditions governing the services under the University:

Provided that the terms and conditions offered by the University to such employees consequent upon their absorption in the service of the University shall not be less favourable than those applicable to such employees prior to the said date.

(b) any right, privilege, obligation or liability acquired accrued or incurred by the Jawaharlal Nehru Krishi Vishwavidyalaya in respect of the college or research station, as the case may be, shall be deemed to be the right, privilege obligation or liability acquired, accrued or incurred by the University.

10. During the arguments, on a specific question from the Bench, Shri Vivek Khedkar submitted that Jawaharlal Nehru Krishi Vishwavidyalaya Statutes are still in force. On another question, he agreed that the MPS Scheme mentioned in the Statute is now substituted by CAS Scheme. Statute 6 provides that all posts of officers of Vishwavidyalaya mentioned u/s 12 of the Act and Statute 3 (except

those of Chancellor, Vice-Chancellor and Dean of Faculties) and teachers as defined u/s 2(X) of the Act and detailed in Statute 32 and the posts of Technical Assistant (Lib.) College Librarian, Assistant Librarian, P.T.Is/Sports Officer shall be filled up by selection based strictly on merit and All India advertisement. Statute 6(a)(ii) deals with Merit Promotion Scheme, which was introduced on 9-3-1989. As contended by Shri Khedkar, now MPS is abolished and, in lieu thereof, CAS is substituted. Statute 6(a)(ii)(A)(iii)(c) reads as under:--

6(a)(ii) Notwithstanding anything to the contrary contained in any provision of JNKVV Act, 1963 and this Statute, not more than one third of the total number of positions of teachers in the cadre of Assistant Professor and Associate Professor may be promoted to cadre of Associate Professor and Professor respectively, strictly based on merit and in accordance with the norms laid down by the Indian Council of Agricultural Research and the State Govt. from time to time.

(A) The Merit Promotion Scheme in accordance with the Govt. of M.P., Agriculture Department Order No. - B-4-39/87/14-2, dated 9-3-1989 shall continue to be applicable to the existing teachers provided the teachers give an option to continue to be governed by the provisions of this scheme within a date to be notified by the Vishwa Vidyalaya. They will be entitled to the designations envisaged for various categories of teachers in these schemes but the scale will be as follows:--

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) Professor - Rs. 4500-5700/-.

(a) Provided that only those teachers shall be considered for merit promotion who have put in at least 10 years of continuous service in their respective cadre of which at least five years service should be in this Vishwa Vidyalaya.

(b) xxx xxx xxx

(c) AND provided, nothing contained in the present clause of Statute shall affect the post of the teachers of the University to be filled by direct recruitment in accordance with the provisions of Statute 6(a)(i). On promotion under MPS Scheme, the higher post shall be deemed to be automatically created by upgradation of the lower post and it shall be a cadre post. Further the deemed upgraded higher post shall automatically be converted into the lower post when the incumbent vacates the higher post for whatsoever reasons.

(Emphasis Supplied)

Clause (E) of this Statute reads as under:--

(E) The Merit Promotion Scheme shall stand abolished with effect from 27-7-1998 and thereafter all teachers irrespective of their options for Merit Promotion Scheme shall be eligible for benefit under the revised Career

Advancement Scheme with effect from 27-7-1998 and onwards.

11. The whole argument of Shri Khedkar, learned Deputy Advocate General, is based on the judgment of Dr. Rashmi Shrivastava (*supra*). He relied on paras 39 and 40 of this judgment. It is apt to quote the relevant portion of these paragraphs:--

39. At this stage it would also be appropriate to consider whether the promotee Readers and Professors under the merit promotion scheme as recommended by the Commission and adopted by the university concerned in the absence of any statutory creation of a distinct and fresh source of recruitment by way of promotion, can be said to fall in the same class as directly recruited Readers or Professors. The answer becomes obvious. They cannot be said to be forming the same class. The following distinct characteristics between these two classes of employees become at once visible.

(i) The directly recruited Readers and Professors fill up the vacancies in the cadres of Readers and Professors for which direct recruitment is resorted to. While the promotees under the merit promotion scheme stand outside the cadre and fill no posts as such, since no posts are created. The promotion given to them are purely personal and the posts to which they are upgraded do not survive their service career. The posts vanish with the incumbent person like the shadow vanishing with the substance. Such a promotee fills up no vacancy in the promotional avenue since no post is available by promotion.

(ii) The directly recruited Readers and Professors are recruited pursuant to the only source of appointment contemplated by section 49, that is by way of direct recruitment. The promotee Readers and Professors are appointed not in the cadre posts but under an entirely different scheme, namely merit promotion scheme. Even under this scheme, no posts as such are created.

(iv) The promotee Readers and Professors are not holding any officiating or even temporary post of Reader or Professor nor is there any temporary addition to the cadre strength of Readers and Professors.

(vi) There is a qualitative difference in the process of selection of direct recruits under the scheme of section 49, as compared to the promotion of the merit promotees. Although for the latter the infrastructure of Selection Committee u/s 49 may be made available, the criteria for their promotion are entirely distinct and different as envisaged by the guidelines governing the merit promotion scheme.

40. The aforesaid distinguishing features clearly indicate that merit promotee Professors and Readers form a distinct class of ex cadre or supernumerary appointees as compared to cadre employee, namely, directly recruited Readers and Professors. They are unequals not only because of the source of their appointment but also because of the nature and character of their appointment and of the nature of the posts which they hold. They cannot be treated equally

for all purposes and particularly for seniority and promotion if any. For this purpose the nature of work they do is irrelevant. The competition for seniority can only be amongst those who are in the cadre posts. Otherwise, the mandate of Articles 14 and 16(1) would get violated.

In this judgment, the questions before the Supreme Court were as under:--

1) Whether a merit promotee Reader or Professor as the case may be in the service of respondent No. 1 university can be treated at par with directly recruited Reader or Professor for the purpose of fixing their inter se seniority?

2) If the answer to the first point is in the negative whether such merit promotee Readers and Professors cannot be considered as Professors and Readers for fixing inter se seniority of such promotee Readers and Professors and their seniority should be shown only in the cadre of Lecturer or Reader from which they are promoted?

3) Whether respondent No. 1 university is liable to pay any compensation to respondent No. 4 in Civil Appeal No. 6002/94?

4) Whether the pay scales of Professors available to the appellants in C.A. No. 6002/94 should be reduced?

5) What is final order?

12. On the strength of the judgment in Dr. Rashmi Shrivastava (supra), it is contended that the case of petitioners is covered by this judgment of Supreme Court. The petitioners are not full-fledged Professors. Their induction as Professor is by way of an executive instruction (CAS) and, therefore, they are not entitled to be treated at par as regular Professor for any purpose whatsoever. In any case, they are not entitled to become HOD. They were made HOD as a stop gap arrangement which did not create any right in their favour.

13. The Apex Court in Dr. Rashmi Shrivastava (supra) considered earlier judgment of Supreme Court in the case of Balkrishna Agarwal (Dr.) vs. State of M.P., reported in (1995) 1 SCC 614. The earlier judgment in Balkrishna Agarwal was distinguished in Dr. Rashmi Shrivastava (supra) by holding that in U.P. Act, there is already an amendment by insertion of section 31(A) which provides for a distinct source of promotion. In Vikram University Act (applicable in Dr. Rashmi Shrivastava's case), there was no such provision. Till appropriate amendment is effected, as it was there in section 31-A of the UP Act, there would be no occasion for considering the merit promotees to have entered the cadre of Reader or Professor, as the case may be. In para. 39, the Apex Court made it clear that in the absence of any statutory creation of a distinct way of recruitment by way of promotion, the promotee cannot fall in the same class as directly recruited Readers or Officers.

14. Pausing here for a moment, it is apt to remember that in Dr. Rashmi Shrivastava (supra), the Apex Court basically dealt with the question of inter se

seniority between directly recruited Reader and Professor and merit promotee Reader and Professor. The findings given by the Apex Court are related with the questions posed.

15. Statute 6(a)(ii)(iii)(c), in no uncertain terms, makes it clear that on promotion under the scheme, the higher post shall be deemed to be automatically created by upgradation of lower post and it shall be a cadre post. A plain reading of the aforesaid provision makes it clear that when a promotee occupies a higher post, the lower post gets automatically upgraded as higher post and such post shall be a cadre post. The MPS/CAS has been given statutory sanction because of Statute 6. Thus, it cannot be said that the beneficiaries under the MPS/CAS are enjoying the position only pursuant to an executive instruction. At the cost of repetition, it is made clear that Statute itself recognizes the induction through MPS/CAS and, therefore, such induction has a statutory backing and cannot be said to be on an executive fiat. A minute reading of paras 39 and 40 of Dr. Rashmi Shrivastava judgment would show that the Apex Court gave the said finding because in Vikram University, CAS Scheme did not have any statutory sanction.

16. The judgment of Dr. Rashmi Shrivastava (supra) was again considered by the Supreme Court in Dr. Km. Suman Agarwal Vs. The Vice-Chancellor and Others, The judgment of Dr. Rashmi Shrivastava was distinguished. The Apex Court considered Statute 11, framed under U.P. State Universities Act, 1973. The said clause 11 reads as under:--

11. (I) The post of Reader or Professor to which personal promotion is made, shall be temporary addition to the cadre of Professor or Reader, as the case may be, and the post shall stand abolished on the incumbent ceasing to occupy it.

In paras 15 and 16, the Apex Court considered the case of Dr. Rashmi Shrivastava (supra). In para. 15, it is opined as under:--

Therein, this Court has pointed out that there was no statutory source for appointment by promotion on personal promotion scheme.

In para. 16, it is opined as under:--

In that case, the promotees did not form part of the same cadre. On the other hand, they entered into the service under a different scheme which was personal to the post which ceases with the retirement by the candidate. Though, in this case, the cessation has been provided for, but operation of section 31-A(1) read with Statute 17.05-B and Statute 11.12-B, clause (6) makes all the difference in the case. The personal promotees get berth through statutory force u/s 31A(1) and the post held by the promotee becomes a temporary addition to the sanctioned cadre occupied by direct recruits. Such a provision was absent in the Rashmi Shrivastavacase. On the other hand, to avoid stagnation, the benefit has been provided for promotion u/s 31-A(1) of the Act and it was termed as the "personal promotion" so long as the candidate holds the post. The post remains

with the candidate and the post ceases with the cessation of the service with the retirement of the holder of the post etc.

(Emphasis Supplied)

In para. 18, the Apex Court, in no uncertain terms, made it clear that in Dr. Rashmi Shrivastava's case, statutory source of recruitment was absent and, therefore, the Supreme Court observed that in the absence of similar provision, like section 31-A of U.P. Act, as was considered in Dr. Balkrishna Agarwal (*supra*), no post could be treated as created. This judgment makes it clear that the judgment of Dr. Rashmi Shrivastava will be of no help if the post under the MPS/CAS has a statutory colour/sanction. In Prof. S.A. Siddiqui Vs. Prof. M. Wajid Khan and Others, the Apex Court again distinguished the judgment of Dr. Rashmi Shrivastava. In paras 9 and 10 of the judgment, the Apex Court opined as under--

9.The Statutes give to the Executive Council the power of appointment even otherwise than by direct recruitment. The Merit Promotion Scheme has been adopted by Aliearh Muslim University, on the basis of the recommendations made by the Academic Council which have been accepted by the Executive Council as provided under Statute 17. The ratio, therefore, of Rashmi Shrivastava case will not apply.

10. In the case of Dr. Km. Suman Agarwal Vs. The Vice-Chancellor and Others, this Court considered the same question of a person directly recruited as a Reader and a person promoted as a Reader under the Merit Promotion Scheme. The Court rejected the contention that a Reader appointed by personal promotion was not a member of the cadre of Readers, on the basis of the provisions of the U.P. State Universities Act, 1973. Distinguishing the case of Rashmi Srivastava (*supra*) this Court said that. In the case of a personal promotion, so long as the candidate holds the post, the post remains in the cadre. It ceases with the cessation of the service of the holder of the post. Nevertheless, the post of a promotee is a temporary addition to the cadre strength.

17. The principles which can be culled out from the aforesaid judgments would be that in cases where person is promoted under MPS/CAS and said MPS/CAS has no statutory sanction, support or colour, the beneficiary of said scheme cannot be held to be occupying a substantive post nor such post shall form part of the cadre. However, in cases where MPS/CAS has a statutory backing, the person shall be treated to be occupying a substantive and cadre post. At the cost of repetition, I deem it proper to quote the Statute 11, which was considered by Supreme Court in Dr. Suman Agarwal (*supra*) in juxtaposition to the present Statute. The same is reproduced here as under:--

A comparative reading of both the provisions aforesaid makes it clear that there is a great similarity in the Statutes. Suffice it to say that the induction of Professor under MPS/CAS is also a statutory mode of induction in addition to

direct recruitment. Such inductee/appointee occupies a post of Professor so long as he continues on that post and that post forms part of the cadre.

18. As analyzed above, in the present case, the MPS/CAS is having statutory sanction, backing and support. Thus, the judgment of Dr. Rashmi Shrivastava (*supra*) will not apply and is clearly distinguishable. The petitioners shall be treated to be Professor. It can be safely concluded that they are occupying a substantive post in the cadre. Thus, the said core issue is answered against the respondents.

19. The next question is whether the impugned advertisement is bad in law?

20. This is settled in law that if law prescribes to do a thing in a particular manner, it has to be done in the same manner or not at all. The Apex Court has taken this view in catena of judgments including *Dhananjaya Reddy etc. Vs. State of Karnataka*, This Court in *Satyanjay Tripathi and Another Vs. Banarsi Devi*, has followed the said ratio.

21. A plain reading of section 33 of the Adhiniyam leaves no room for any doubt that there must be a HOD for each Department of Study. In mandatory terms in sub-section (3) of section 33, it is made clear that Vice Chancellor shall nominate one of the Professors as HOD. If no Professor is available, the Dean of the Faculty concerned can act as HOD until a duly qualified person is available. Sub-section (3) makes it clear that preferential right is given to the Professors. In absence of Professor, the Dean of Faculty, as a stop gap arrangement, can be made HOD. Apart from this, nothing could be brought to the notice of this Court to show that the Adhiniyam or Statute prescribe any post like "Professor and HOD". Section 12 of the Adhiniyam prescribes the "officers of the University". A plain reading of clause (a) to (j) of section 12 shows that there exists no such post like "Professor and HOD". In my view, if Adhiniyam mandates that the HOD can be nominated by the Vice- Chancellor, the nomination or assignment can be made only by said method. By way of executive instruction, the respondents cannot adopt a different method. Thus, even if the petitioners have not chosen to challenge Annexure P-4, by which certain number of posts of Professor and HOD are created, the advertisement cannot be approved. The statutory posts are either defined in the Adhiniyam or in the Statute. There exists no post of "Professor and HOD" either in the Adhiniyam or in the Statute. No executive instruction can supplant or modify the method of statutory induction. Thus, I am unable to approve the impugned advertisement, whereby the respondents intended to fill up the posts of "Professor and HOD".

22. Shri Vivek Khedkar, learned Deputy Advocate General, although relied on a Full Bench judgment of this Court, reported in *M.P. Electricity Board and Others Vs. S.K. Dubey*, in my opinion, the said judgment is of no assistance to him. In the said judgment, a different provision was under consideration. In the said case, the executive instruction did not have any statutory force. The said judgment has no application in the facts and circumstances of the present case.

Similarly judgments of Sundara Raju and Vergese (supra) have no application in the present matter.

23. For the reasons stated above, the advertisement to the extent it relates with the post of Professor and HOD, is bad in law. The respondents are free to fill up other posts mentioned in the advertisement.

24. Resultantly, the advertisement (Annexure P-1) to the extent it relates to the post of Professor and HOD is set aside. The respondents are free to implement the advertisement for remaining posts in accordance with law. Petition is allowed. No costs.