
(2007) 01 MP CK 0082

In the Madhya Pradesh High Court

Case No : Writ Petition No. 6738 of 2003

M.P. Rajpatrit Ayurved Chikitsa Sangh and Others

APPELLANT

Vs

State of M.P. and Another

RESPONDENT

Date of Decision : 16-01-2007

Acts Referred:

Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 — Rule 12

Citation : (2007) 2 MPLJ 583

Hon'ble Judges : R.K. Gupta, J

Bench : Single Bench

Advocate : D.K. Dixit, for the Appellant; Alok Pathak, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Gupta, J.

The Petitioners by way of filing this petition have challenged the wrong conferring the seniority to them. The claim of the Petitioners is that they are entitled to count their seniority from the first date of their appointment and not from the date their appointment was approved by the Public Service Commission.

It is the case of the Petitioners that on the date when they were appointed, there were no rules regulating the appointment to the post of Vaidya Grade I and, therefore, on the basis of Rule 12 of M. P. Civil Services (General Condition of Service) Rules, 1961, they are entitled to count their seniority from the first date of their appointment and not from the date their appointment is approved by the Public Service Commission or according to the merit list prepared by the Public Service Commission.

The Petitioners initially were appointed on different dates prior to the order dated 17-2-1972 as Vaidya Grade I. By an Order Annexure A/2 dated 17-2-1972 the post of Vaidya Grade I was declared to be a Class II Gazetted post. Thereafter the State Government framed the rules regulating the recruitment on the post of

Vaidya Grade I. These rules are known as Madhya Pradesh Public Health (Indian System of Medicine and Homeopathy (Gazetted) Service Recruitment Rules. 1987. Prior to 1987 there were no rules regulating the appointment to the post of Vaidya Grade-I.

Learned Counsel appearing for the State Government had also not been able to show any rules by which the appointments prior to the enforcement of the Rules of 1987, there were any rules regulating the appointment to the post of Vaidya Grade-I.

In the present case the order of appointment in relation to each Petitioner were issued, it was a condition stipulated therein that the appointment is subjected to selection by the Public Service Commission as and when the post of Vaidya is advertised by the Public Service Commission. The appointment of all the Petitioners were made on the basis of the Departmental Selection Committee on temporary basis till further orders.

It is contended by learned Counsel for the Petitioners that since there were no rules prior to 1987 regulating the recruitment on the post of Vaidya Grade-I. therefore, in the order of appointment of the Petitioners, the condition which was imposed by the State Government that each Petitioner has to be selected by the Public Service Commission as and when the post of Vaidya is advertised was without any authority and the condition as such could not have been imposed in the order of appointment.

It is contended that the State Government has declared the post of Vaidya Grade-I as Class II Gazetted post only by an order dated 17-2-1972 copy of which is placed on record as Annexure A/2 and not before that, therefore, the post under the purview of the Public Service Commission have been declared as Class II Gazetted post was brought for the first time in the year 1972. therefore, the Petitioners were not required to be cleared after their selection by the Public Service Commission and are entitled to count their seniority from the first date of their appointment with reference to each Petitioner.

The question as such under the similar circumstances has been considered by the Apex Court in its judgment reported in Masood Akhtar Khan and Others Vs. State of Madhya Pradesh and Others, . In the aforesaid case, the Apex Court was considering the question where the appointments to a post were made without there being any recruitment rules. The Apex Court also considered the question that grant of seniority was depend upon the date when a candidate has cleared after selection by the Public Service Commission and accordingly the candidate as such shall only be entitled to count his seniority on the basis of the merit list prepared by the Public Service Commission. The aforesaid case relates to the appointment of Assistant Engineers in Public Health Department. In the said case, the Apex Court has also considered the question in paragraph 3 of its judgment and held that the State Government did not frame any specific rules for appointment to the post and, therefore, General Condition of Service Rules,

1961 shall have the application. While considering the aforesaid question the Apex Court came to the conclusion that merely because there had been no rules and under Rule 12 of the General Condition of Service Rules, 1961, does not provide for grant of seniority from the initial date of appointment. For the purpose of convenience, it would be profitable to refer paragraph 3 of the judgment which reads as under:

Mr. Ramamurthi's second contention was that there were no special rules for appointment to the said posts and. therefore, it is the General Rules of 1961 (supra) which applied and according to Rule 12 of the said Rules, the seniority is to be counted from the date of initial appointment. We do not read any such provision in Rule 12. On the contrary. Rule 12(a)(i) makes it clear that where the appointment has to be made in consultation with the Commission, the seniority is firstly from the date of the selection by the Commission and secondly according to the order of merits given by the Commission. Hence none of the authorities relied upon by Mr. Ramamurthi, viz. Direct Recruit Class II Engineering Officers" Association v. State of Maharashtra, D. N. Agrawal v. State of M. P. and Union of India v. Ansusekhar Guin helps him. These authorities unequivocally make it clear that if the initial appointment is not made according to the Rules, subsequent regularization of his service does not entitle an employee to the benefit of intervening service for seniority.

In the said case also which was considered by the Apex Court, the appointments were made on temporary basis. The Apex Court considered the applicability of Regulation 5 M. P. Public Service Commission (Limitation on Functions) Regulations, 1957 and while considering the Regulation No. 5. the Apex Court came to the conclusion that it was not intended by the State Government that the post on which the Petitioners were appointed were the tenure post, in fact the State Government intended to appoint the persons on permanent basis. It was also not treated to be an emergency appointment even though in the order, the word "temporary" is mentioned but the Apex Court considered that it has to be treated as an ad hoc appointment till the regularization procedure is completed. The Apex Court further considered that once the appointment was intended to be made on permanent basis then the post is intended to be a permanent one and. therefore, if appointment is to be made on the said post, consultation with the Public Service Commission is obligatory.

M. P. Public Service Commission (Limitation on Functions Regulations, 1957 was enacted to obtain consultation with regard to certain posts.

Rule 5 reads as under:

(1) It shall not be necessary for the Commission to be consulted on the suitability of a person for appointment, promotion or transfer to a post, the period of which does not exceed six months.

(2) In other cases where appointment, promotion or transfer to a service or post would otherwise require consultation with the Commission, it shall not be

necessary to consult the Commission, if owing to an emergency the Commission cannot be consulted without detriment to public service: Provided that -

(i) intimation of such appointment, promotion or transfer shall be sent to the Commission at the same time, and

(ii) action to fill up the post in the normal way or to obtain the concurrence of the Commission, as the case may be, shall be initiated as early as possible.

In this context Rule 5(1) is relevant. According to the same, it shall not be necessary for the Commission to be consulted on the suitability of a person for appointment, promotion or transfer to a post, the period of which does not exceed six months. In the present case, the appointment though initially was made till further orders and it does not state that the appointment shall be beyond the period of six months but the State Government since imposed a condition that the regular appointment shall only be made after their selection by the Public Service Commission, this itself indicates that the intention of the Government to appoint such persons was on regular basis and not for a period of six months, therefore, in terms of Regulation 5(1), it was necessary for the Respondents to consult the Public Service Commission. The appointment was made by way of direct recruitment in the post as the Petitioners prior to that are not functioning in any other post. Thus, the contention of learned Counsel for the Petitioners cannot be accepted that sine there were no rules regulating the appointment wherein it was provided that the regular appointment shall be subject to selection by the Public Service Commission, cannot be accepted in the light of Rule 5(1) as aforesaid.

Thus, merely because the post of Vaidya Grade 1 was declared a class II Gazetted post by an order dated 17-2-1972. on this basis it cannot be said that after 17-2-1972 the Public Service Commission was to be consulted and not before that, by the force of Regulation 5(1) if the appointment is to be made for a period of more than six months then consultation with the Public Service Commission is necessary.

Another aspect of the matter is that Rule 7 of M. P. Civil Services (General Condition of Service) Rules, 1961 provides the method of recruitment. Accordingly a candidate shall be selected for appointment to a service or post by one or more methods as may be prescribed. The methods of recruitment are direct recruitment, promotion or by transfer. The proviso to the same also contemplates that the Commission shall be consulted before a person is appointed to a service or post if such consultation is necessary, as this Court has already held that in pursuance to Regulation 5(1), no person can be appointed without consultation of the Commission, if the appointment exceeds for a period of six months. The appointment in the present case exceeded for a period of six months, therefore, consultation with the Public Service Commission was necessary.

The Petitioners participated in the selection and in pursuance to their

participation, they were selected and a merit list has been prepared by the Public Service Commission and accordingly on the basis of the merit list prepared by the Public Service Commission the seniority has been conferred on the Petitioners.

In the present case it was specifically mentioned in the order of appointment that they have to be cleared after their selection by the Public Service Commission. The intention of the State Government was to create the permanent post, therefore, till such creation is not completed the appointments were made by mentioning in the order of appointment that they are appointed temporarily. The Apex Court in paragraph 2 of its judgment in Masood Akhtar (*supra*) has held that if the post is intended to be a permanent one and, therefore, if appointment is to be made on the said post, consultation with the Commission is obligatory even though there had been no rules as it has already been discussed that the case which is decided by the Apex Court, there had also no recruitment rules and in the present case also there had been no recruitment rules. In fact, the State Government intended to create permanent post and, therefore, till such creation is not completed the appointments were made by mentioning in the order of appointment that they are appointed temporarily. Even assuming the word "temporary" is used in the order of their appointment, that has to be treated as an ad hoc appointment and was not a tenure appointment. Para 2 of the aforesaid judgment reads as under:

The contention of the Petitioners is that they should be given seniority from the date of their initial appointment on October 25, 1972 and not from April 14, 1977 because even their initial appointments were according to rules which were in existence at that time. We are not persuaded to accept this contention for the following reasons: In the first instance, both the advertisement of June 4, 1972 as well as the appointment letter of October 25, 1972 made it clear that the appointments of the Petitioners were temporary and only for a period of six months or till the expiry of two weeks after the Commission had made the regular selection. According to Rule 7 of Madhya Pradesh Civil Services (General Condition of Service) Rules, 1961 (hereinafter referred to as the "Rules") whether the appointment was by direct recruitment or by promotion or by transfer, the Commission had to be consulted and any appointment made to the said posts without such consultation would not have been regular. Hence, in the advertisement and in the appointment letter, the Government had rightly stated that the said appointments were pending the regular selection by the Commission. It is, therefore, clear, as held by the High Court, that the appointments to the Petitioners and others who were appointed along with them on October 25, 1972 were a stop-gap emergency arrangement pending the regular selection by the Commission. Although the words "ad hoc" are not mentioned either in the advertisement or in the appointment letter, the word "temporary" is mentioned there and read with the rest of the contents they leave no doubt that the appointments were as and by way of stop-gap arrangement pending the regular selection by the Commission. Mr. Ramamurthi's contention

that the said Rule 7 has to be read with the Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957 and if so read, it would show that the present posts were beyond the consultative jurisdiction of the Commission has no merit in it. Regulation 5 of the said Regulations, on which he placed reliance for the said submission does not warrant the conclusion which he wants us to draw. The said regulation reads as follows:

(1) It shall not be necessary for the Commission to be consulted on the suitability of a person for appointment, promotion or transfer to a post, the period of which does not exceed six months. (2) In other cases where appointment, promotion or transfer to a service or post would otherwise require consultation with the Commission, it shall not be necessary to consult the Commission, if owing to an emergency the Commission cannot be consulted without detriment to public service: Provided that -

(i) intimation of such appointment, promotion or transfer shall be sent to the Commission at the same time, and

(ii) action to fill up the post in the normal way or to obtain the concurrence of the Commission, as the case may be, shall be initiated as early as possible.

It is not and cannot be contended that the tenure of the present posts is only six months. The post is intended to be a permanent one and, therefore, if appointment is to be made to the said post, consultation with the Commission is obligatory. In fact, consultation with the Commission for appointment to such posts is waived only if on account of emergency, the Commission cannot be consulted without detriment to public service. Even then, the government is obliged to intimate such emergency appointment to the Commission. Merely because, initially the appointment was made for a period of six months, it does not mean that the tenure of the post itself was only six months.

On the basis of the discussions as such, the facts of the present case are also similar to the case which has already been decided by the Apex Court in Masood Akhlar (supra) and accordingly the ratio of the said case shall have full application in the present case also. The Petitioners under the circumstances shall have a right to count their seniority on the basis of merit list prepared by the Public Service Commission and, therefore, the claim of the Petitioners is liable to be rejected.

Learned Counsel for the Petitioners fairly submitted to this Court that there are certain persons those who had been working in the Department and shall be affected if the claim of the Petitioners for grant of seniority from the first date of their appointment is accepted. It is seen that Petitioners have not chosen to implead all those persons as the Respondents in the present case. The Apex Court in Rajbir Singh, HFS-II Vs. State of Haryana and Another, , (1996) 2 SCR 59 , V.P. Shrivastava v. State of M. P. and others has held that there cannot be effective adjudication in the absence of necessary parties as Respondents and accordingly the petition suffers with non-joinder of necessary parties as the

Respondents. Merely because the action of the State Government; is being challenged by the Petitioners that by itself would not be sufficient for not impleading the necessary parties as the Respondents whose rights are going to be affected in case the petition is allowed.

No other point is argued.

There is no substance in the petition and accordingly the petition as such is dismissed.