

(1977) 11 MP CK 0006

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 192 of 1977

Omprakash

APPELLANT

Vs

The State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 23-11-1977

Acts Referred:

Constitution of India, 1950 — Article 320, 323
Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 —
Rule 13(3)

Citation : AIR 1978 MP 59 : (1978) JLJ 143 : (1978) 23 MPLJ 136 : (1978) MPLJ 136

Hon'ble Judges : Shiv Dayal Shrivastava, C.J.;J.S. Verma, J;J.P. Bajpai, J

Bench : Full Bench

Advocate : D.M. Dharmadhikari, for the Appellant; S.L. Garg, General, S.L. Saxena and A.P. Tare, Govt. Advs., for the Respondent

Judgement

Shiv Dayal, C.J.

Six questions have been referred to this Bench for answer.

The Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 (hereinafter called the "Recruitment Rules") came into force with effect from May 2, 1969. Rule 13 (5) provides for emergency appointment. It reads thus:--

"13 (5) Emergency appointments.-- If Commission's panel of selected candidates is not available, the post may be filled by emergency appointments in the following manner:--

(a) an advertisement shall be issued by Government;

(b)" Applications for emergency appointments shall be submitted in the form prescribed in Schedule V.

(c) Applications received shall be registered and tabulated according to the

following criteria:--

Category

Qualifications

Division in M.A./M.Sc./M.Com.

(1)

(2)

A

(i) I plus Ph.D. plus experience of teaching for at least 6 months in a Government College of M. P.

(ii) I plus Ph.D.

B

(i) II plus Ph. D. plus experience of teaching for at least 6 months in a Govt. College in M. P.

(ii) II plus Ph.D.

C

(i) I plus experience of teaching for at least 6 months in a Govt. College of M. P.

(ii) I

D

(i) II plus experience of teaching for at least 6 months in a Govt. College of M. P.

(ii) II

The names will be arranged in each sub-category according to the marks secured by the candidates at the M. A./M. Sc./ M. Com. Examination:

Provided if and when Public Service Commission panel for these subjects is available, these teachers will be liable to be removed without notice.""

By order dated Sept. 8, 1972, the petitioner was appointed a Lecturer in Military Science in the pay scale of Rupees 325-600 on temporary and emergency basis until further orders and was posted to the Government Science College, Jabalpur. This appointment was made on the petitioner's application which he had made in response to an advertisement. In 1973, the M. P. Public Service Commission (respondent No. 3) (hereinafter called the "Commission") published advertisement No. 6/73 for filling 10 posts of Lecturers in Military Science. The petitioner applied; he was interviewed and he was selected for appointment to the post of Lecturer in Military Science, his name being at serial No. 2 in the merit list of selected candidates. The petitioner's case is that in spite of the

recommendations of the Public Service Commission, he was not appointed in the vacant post. Subsequently, in the year 1975, the Public Service Commission issued another advertisement. The petitioner again applied but this time he was not called for interview at all. The Public Service Commission informed the petitioner that he could not be selected for interview, as he did not fall within the criterion fixed by the Commission, vide para 8 of the general instructions to candidates. The petitioner made representations but to no effect. On these premises, the petitioner filed this petition under Article 226 of the Constitution, contending inter alia that the State Government had no right to override and ignore the list of candidates selected by the Public Service Commission in the year 1973, and, secondly, the Public Service Commission was bound to call him for interview when he applied in pursuance to the second advertisement No. 8 of 1975.

The case for the State Government (respondent No. 1) is that since complaints challenging the impartiality of the experts for the interview held in 1973 were received, the Government decided to have a thorough high level probe. However, that enquiry is still pending and no appointment order on the basis of the recommendations of the Public Service Commission made in 1973, has been made. By virtue of the executive instructions, the list of 1973 lapsed on the expiry of one year so that the list of 1973 became inoperative. The selection by the Public Service Commission does not create any title to the post in any candidate. The Public Service Commission is merely a recommending body whose recommendations are not at all binding on the State Government. The Commission's decision about the eligibility or otherwise of the candidates is final as per Rule 11 of the Recruitment Rules.

The case for the State Government further is that the University Grants Commission recommended a higher scale of pay of Rs. 700-1600 for a Lecturer of Post Degree College and the U.G.C. recommended requisite qualifications for appointment of a Lecturer, on the basis of which the Government of India issued a letter to the State Government. A substantial grant of 80% was to be given to the State Government by the Government of India to meet the rise in the scales of pay. A letter was accordingly addressed to the Public Service Commission prescribing better qualifications for direct recruits. It was in these circumstances that the Public Service Commission issued advertisement No. 8/75, prescribing higher qualifications, namely, post-graduate degree in First Class and also B. A./ B. Sc. in Second Division.

The learned counsel for the petitioner relies on Article 323(2) of the Constitution in support of his contention that the Government is bound to accept the advice of the Public Service Commission and consequently to appoint him in the vacant post. Clearly, this contention is not right. Article 323(2) only makes the Government answerable to the Legislature of the State, but it does not confer any right upon any candidate to get the recommendations of the Public Service Commission enforced through the Court.

For the petitioners reliance is then placed on Rule 13 (1) and (2) of the M. P. Educational Service (Collegiate Branch) Recruitment Rules, 1967, which reads thus:--

"Rule 13. list of candidates recommended by the Commission.-- (1) The Commission shall forward to the appointing authority the names and other details of candidates whom they consider most suitable duly arranged in order of preference and candidates belonging to Scheduled Caste and Scheduled Tribes who, though (do) not qualify by that standard, are declared by Commission to be suitable for appointment to the service with due regard to the maintenance of efficiency of administration.

(2) Candidates on the Commission's panel shall be appointed strictly in the order in which they have been placed. For instance, if the name of a lecturer already working as an emergency measure occurs lower in the panel, his services be terminated if necessary, to appoint a candidate who ranks higher on the panel."

That rule merely enjoins the Government to make appointment strictly in accordance with the list sent by the Public Service Commission. The Government cannot alter the order of merit. It cannot appoint No. 2 ignoring No. 1 unless for other good reasons No. 1 is found unsuitable for appointment, for instance because of bad conduct or character. Nor can the Government make appointment of a person whose name does not appear in the list. Barring these two constraints, the Government is not bound to make any appointment.

It is a misconception that selections made by the Public Service Commission tantamount to appointment of the candidate selected. The function of the Public Service Commission is merely to select candidates suitable for appointment, but the appointing authority is the Government. It is undoubted position that an authority, which has the power to appoint, has also the power not to appoint. The Government may impose restrictions on itself by making rules, which then would become binding on it. The restrictions imposed in Rule 13 of the Rules do not make it mandatory for the Government to make appointment, once it has received the list of candidates selected by the Public Service Commission. Since it is not necessary to do so, we do not express any opinion whether the Government can within one year of the receipt of the list from the Public Service Commission, just ignore or brush it aside and ask the Public Service Commission to make a fresh selection.

In the absence of any rules it is open to the Government to issue administrative instructions, according to which a list of selected candidates received from the Public Service Commission may automatically lapse on the expiry of one year.

In *Banarsi Das and Others Vs. The State of Uttar Pradesh and Others*, , their Lordships observed thus (at p. 521):--

"In our opinion, it is open to the appointing authority to lay down the requisite qualifications for recruitment to Government service and it is open to the

authority to lay down such prerequisite conditions of appointment as would be conducive to the maintenance of proper discipline amongst Government servants."

Their Lordships further observed at p. 522):--

"Like all other employers, Government are also entitled to pick and choose from amongst a large number of candidates offering themselves for employment under the Government."

In *State of Mysore v. K. N. Chandrasekhara* AIR 1965 SC 532, it was observed (at p. 537):--

"The Commission is undoubtedly a body constituted pursuant to the provisions of the Constitution and has to exercise powers and perform functions entrusted to it by the Rules framed under Article 309."

Shri Dharmadhikari relied on *State of Haryana, Vs. Shamsheer Jang Bahadur, etc.*, , where it was observed (at p. 1547):

"Undoubtedly the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service."

Clearly, these observations are not apposite. That was a case regarding promotion. The Government is not competent to alter the rules framed under Article 309 of the Constitution, by means of administrative instructions. In *The State of Haryana Vs. Subash Chander Marwaha and Others*, , their Lordships observed that the list of candidates sent by the Public Service Commission is of great importance inasmuch as there can be no departure from the list, either by the Public Service Commission, the High Court, or the State Government. The service rules made in consultation with the Public Service Commission and the High Court are binding on all. Vacancies must be filled in accordance with the selected list and in the order they have been placed in that list. However, it is open to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. It was further observed in that case (at p. 2220):

"There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence..... there is no constraint on the Government fixing a higher score of marks for the purpose of selection."

If the State Government, while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect,

It seems to us clear that the policy underlying the establishment of a Public

Service Commission is threefold; to ensure a selection of the best available person for appointment in a post because the Public Service Commission is constituted by persons of high ability, varied experience and undoubted integrity and further assisted by experts on the subject; secondly, to avoid possibility of arbitrariness and nepotism, inter alia, in the matter of appointments, and, thirdly, to protect persons at the helm of a democratic Government, who are elected by the common man, from pressures in the matter of appointment, etc. The appointments on the Public Service Commission are no doubt by the Government, but once they are appointed, their independence is secure by the Constitutional provisions (Articles 316 and 317 of the Constitution). The true position of the law is this:--

(i) Where the Government is required to consult the Public Service Commission in the matter of selection of candidates to higher public office, the selection has to be made by the Commission. The Government has to fill up posts by appointing those who are selected by the Public Service Commission. The Government has to adhere to the order of merit in the list of candidates sent by the Public Service Commission. However, the selection by the Public Service Commission is recommendatory in character, so that the Government may decline to accept a list of candidates selected by the Commission. But, in that case, the Government has to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is answerable to the House for any departure (Article 323 of the Constitution). This, however, does not confer any right on a candidate to claim that the Government must accept the recommendation of the Public Service Commission.

(ii) Where the Government does not accept the recommendation of the Public Service Commission the matter is not justiciable except on ground of fraud or mala fide.

(iii) Once the Public Service Commission is asked by the Government to make a selection, it is entirely in the wisdom and discretion of the Commission what mode or method it would adopt. This is subject to statutory provisions, if any. Where minimum qualifications for eligibility are prescribed by a statute or by the Government, the Public Service Commission cannot select a candidate who does not possess those qualifications. However, the Public Service Commission, is free to screen the applicants, classify them in various categories according to their plus qualifications and/ or experience, and call for interview only those candidates who fall within those categories, eliminating others who do not satisfy those criteria. Such classification does not tantamount to any hostile discrimination. Practicability may also require such categorisation. For instance, if for three posts there are 3000 applicants, all eligible, the Commission cannot afford to spend months together in selecting three out of 3000.

(iv) Any person, who possesses the qualifications requisite for eligibility, has a right to apply for the post but there is no right to be called for interview, merely because he is eligible for being appointed. If the Public Service Commission has

made categories of persons, either of plus qualifications or of those possessing experience, no applicant can question his elimination at the threshold, if he does not come within such category.

In view of the above discussion we may now answer the questions thus:
Question No. (1)-

Whether on the request of the State Government when the Public Service Commission invites applications and selects the candidates and a candidate is declared as selected, is it open to the State Government not to appoint him when the post is still vacant "except by taking action under Article 323(2) of the Constitution?"

Answer: (a) It is open to the State Government not to appoint any one from the list of candidates selected by the Public Service Commission. However, it is not open to the Government (i) to appoint any person whose name does not appear in the list; or (ii) to appoint out of turn any person whose name appears in the select list by disturbing the order of merit of that list, unless, under the rules for the time being in force, the candidates ranking above him in the said list are ineligible for appointment in Government service.

(b) Where the Government does not accept the advice of the Public Service Commission, it has to report its reasons to the Legislature of the State. Thus, the Government is answerable to the Legislature, but not to any candidate; nor is the matter justiciable except when there is violation of any statutory rule. For instance, where a person is appointed whose name does not appear in the list at all or when in making an appointment the Government alters the order of merit in which the Public Service Commission made the selection.

(c) The Court can interfere in an action of the Government on the ground of fraud or mala fide. Question No. (2)-

Whether a list published by the Public Service Commission of the candidates selected in pursuance of the advertisement in an interview automatically lapses on expiry of one year?

Answer-- In the absence of any statutory rule to the contrary, the Government may issue executive instructions under which the list may automatically lapse on the expiry of one year. Question No. (3)-

Whether the State Government can override the selection made by the Public Service Commission, by not filling the post for a period of one year, "so that the list of selected candidates lapses", and whether by this method the Government can defeat the purpose of the Public Service Commission and disregard its recommendations?

Answer-- The Public Service Commission merely selects suitable candidates, but the appointing authority is the State Government. For reasons of its own it may not fill the post at all. It is not bound to make an appointment. If by omission to

make an appointment the list lapses on the expiry of one year, there is no violation of any statutory rule, for which the Court can interfere. It is different matter that the Government may be answerable to the Legislature. Question No. (4)-

Whether, when the posts remained unfilled, can the State Government request the Public Service Commission for a fresh selection by ignoring and superseding the former list of selected candidates?

Answer:-- (a) After the list of selected candidates lapses, the Government may request the Public Service Commission for a fresh selection.

(b) Since it is not necessary to answer in the context of the present case, we reserve our opinion as to whether before the expiry of one year the Government can ignore and supersede the list of selected candidates and ask the Commission for a fresh selection.

Question No. (5)-

Whether under Rule 13 (3) of the M. P. Educational Service (Collegiate Branch) Recruitment Rules, 1967, is it incumbent on the State Government to fill the vacant post in accordance with recommendations of the Public Service Commission?

Answer:-- (a) The Government is not bound to fill any vacant post.

(b) The Government cannot fill the vacant post by appointing a person whose name does not appear in that list, nor the order of merit in the selected list can be disturbed by the Government in making an appointment.

Question No. (6)-

Whether the Public Service Commission can fix any criterion other than those given in the advertisement on the fulfilment of which a candidate is eligible for appointment?

Answer:-- (a) The Public Service Commission has unfettered right to evolve its own method or modus operandi for selection of most suitable candidates and for that purpose it may fix any criterion, subject to the eligibility fixed by the Statute or by the Government being satisfied. The Commission will be within its rights to classify the numerous applications into certain categories and to call for interview only those candidates, who come within certain specified categories.

(b) There is no contravention of any rule in fixing the minimum standard for selection. The Commission can fix a category on the basis of plus qualifications and/or plus experience. That matter is in the absolute discretion of the Commission.

The petition shall now be placed before a Division Bench.