
(2018) 07 MP CK 0164

In the Madhya Pradesh High Court

Case No : Writ Petition No. 13411 Of 2018

Ram Gopal Shah & Another

APPELLANT

Vs

State Of Madhya Pradesh & Ors

RESPONDENT

Date of Decision : 18-07-2018

Acts Referred:

Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 — Rule 5, 6(5)

Madhya Pradesh Junior Administrative Service (Recruitment and Service Conditions of Service) Rules, 2011 — Rule 9(2)

Hindu Marriage Act, 1955 — Section 5

Citation : (2018) 07 MP CK 0164

Hon'ble Judges : Hemant Gupta, CJ; Vijay Kumar Shukla, J

Bench : Division Bench

Advocate : V.P. Shah, Amit Seth

Final Decision : Dismissed

Judgement

The petitioners are Patwaris and are seeking appointment to the post of Naib Tehsildar, for which advertisement was issued on 4.6.2018. Such post

has to be filled up by Limited Departmental Competitive Examination.

Petitioner No.1 was born on 2.7.1974 and he got married on 22.5.1990, when he was 15 years 10 months and 21 days old. Petitioner No.2 was born

on 20.6.1977 and he got married on 6.6.1996, when he was 18 years 11 months and 18 days old. The condition of eligibility in the advertisement is that

a candidate should not have solemnized marriage before the minimum age of marriage in terms of Rule 5 of the Madhya Pradesh Civil Services

(General Conditions of Service) Rules, 1961 (for short the "Rules").

The argument of learned counsel for the petitioners is that condition of minimum age of marriage is not fixed in the said Rules. Rule 6(5) of the Rules

contemplate that "No candidate shall be eligible for appointment to a service or post who has married before the minimum age fixed for

marriage". Such Rule was inserted on 10th of March, 2000, but omitted vide Notification dated 24.5.2013. Therefore, the argument of the learned

counsel for the petitioners is that petitioners cannot be declared ineligible in terms of Rule 6(5) of the Rules, as such condition stands omitted.

On the other hand Mr. Amit Seth refers to Madhya Pradesh Junior Administrative Service (Recruitment and Service Conditions of Service) Rules,

2011 [for short "Recruitment Rules"]. Such Recruitment Rules contemplates the following conditions:-

9. Disqualifications-

(1) Any attempt on the part of a candidate to obtain support for his candidature by any means may be held by the appointing authority to disqualify him

for appearing in the examination/selection.

(2) In accordance with the provisions of rule 5 of the Madhya Pradesh Civil Services (General Conditions of Services) Rules, 1961, no candidate shall

be eligible for appointment in any service or post who has married before the minimum age fixed for the marriage.

(3) A candidate shall not be eligible for another service or post who has more than two living children, one of them is born on or after 26th January,

2001:

Provided that no candidate shall be disqualified for appointment to a service or post, who has already had one living child and in the next delivery takes

place on or after the 26th January, 2001, in which two or more than two children are born.

It is contended that though the condition of disqualification for a candidate who has married before the minimum age fixed for marriage has been

omitted in the Rules, but such condition stands incorporated in the Recruitment Rules, therefore, it is legislation by incorporation and, therefore, the

omission of such Rule from the Rules will not affect the condition of disqualification on account of marriage before the minimum age of marriage fixed under law.

It may be stated that both the petitioners are Hindus and are governed by Hindu Marriage Act, 1955 (for short the "Act"). Section 5 of the Act

contemplates that a marriage can be solemnized between two Hindus if the

condition of age is satisfied that the bride-groom has completed the age of 21 years and the bride has completed the age of 18 years. Since both the petitioners have not completed the minimum age as fixed in Section 5 of the Act, therefore, the marriage solemnized by them was not a valid marriage in terms of Section 5 of the Act.

The question as to when, the provision can be said to be incorporated in statutory provisions has been examined by Division Bench of this Court in

Writ Petition No. 9716/2016 [District Cooperative Central Bank Employees and Officers Federation, Chhindwara Vs. State of MP and others]

decided on 23.2.2018. It has been held that in the case of legislation by incorporation, the subsequent repeal will not affect the efficacy of the provision

incorporated in the Statute, whereas subsequent repeal in the case of legislation by reference will stand omitted. After considering the cases of the

Honorable Supreme Court reported as *Girnar Traders (3) vs. State of Maharashtra and others*, (2011) 3 SCC 1; *C.N. Paramasivam and another*

vs. Sunrise Plaza Through Partner and Others, (2013) 9 SCC 460; and, *State of Maharashtra vs. Sant Joginder Singh Kishan Singh*, 1995 Supp (2)

SCC 475, it has been so held:-

17. In another judgment reported as (2013) 9 SCC 460 (*C.N. Paramasivam and another vs. Sunrise Plaza Through Partner and others*), the Court

has held as under:-

17. Legislation by incorporation is a device to which legislatures often take resort for the sake of convenience. The phenomenon is widely

prevalent and has been the subject-matter of judicial pronouncements by courts in this country as much as courts abroad. Justice G.P. Singh in his

celebrated work on *Principles of Statutory Interpretation* has explained the concept in the following words:

Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction

of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the

provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The effect of incorporation is

admirably stated by Lord Esher, M.R.:

If a subsequent Act brings into itself by reference some of the clauses of a

former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it.' Wood's Estate, In re., ex. p. Works and Buildings Commissioners, (1886) 31 Ch D 607 (CA) at p. 615.

Even though only particular sections of an earlier Act are incorporated into later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by Lord Blackburn:

'When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. Portsmouth Corpn. v. Smith, (1885) 10 AC 364 (HL) at p. 371.'

18. In Ram Kirpal Bhagat v. State of Bihar (1969) 3 SCC 471 this Court examined the effect of bringing into an Act the provisions of an earlier Act and held that the legislation by incorporation of the provisions of an earlier Act into a subsequent Act is that the provisions so incorporated are treated to have been incorporated in the subsequent legislation for the first time. This Court observed: (SCC p. 478, para 18):

'18. The effect of bringing into an Act the provisions of an earlier Act is to introduce the incorporated sections of the earlier Act into the subsequent Act as if those provisions have been enacted in it for the first time. The nature of such a piece of legislation was explained by Lord Esher, M.R. in Wood's Estate, In re that: (Ch D p. 615)

'if some clauses of a former Act were brought into the subsequent Act the legal effect was to write those sections into the new Act just as if they had been written in it with the pen.'

19. To the same effect is the decision of this Court in Mahindra and Mahindra Ltd. v. Union of India, (1979) 2 SCC 529 wherein this Court held that once the incorporation is made, the provisions incorporated become an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute.

The following passage is in this regard apposite: (SCC p. 548, para 8)

8. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were a part of it. Legislation

by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions

from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the

incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to

refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute.

20. We may also refer to the decisions of this Court in *Onkarlal Nandlal v. State of Rajasthan* (1985) 4 SCC 404, *Mary Roy v. State of Kerala* (1986)

2 SCC 209, *Nagpur Improvement Trust v. Vasantrao* (2002) 7 SCC 657 and *Surana Steels (P) Ltd. v. CIT* (1999) 4 SCC 306 which have reiterated

the above proposition of law.

18. We do not find any merit in the argument raised by learned counsel for the petitioner that when there is general reference in the Act in question to

some earlier Act and that there is no specific mention of the provisions of the former Act, then it is to be considered as legislation by reference.

Firstly, there is specific reference to the provisions of reservation only under the 1994 to Rules in question. Secondly the Rule of Reservation is

applicable only for the purpose of direct recruitment. The principle is that when an earlier Act or certain of its provisions are incorporated by

reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it.

19. Keeping in view the principle of law enunciated in the above said judgments, we find that the amendment in the Rules ordered by the Registrar in

exercise of powers under Section 55 of the Act is a case of legislation by incorporation. The entire provisions of the Act have not been referred to in

the Rule. The 1994 Act provides for fixation of percentage for reservation of post, the selection/screening or promotion committee, the grant of

concession in respect of fees for any competitive examination or interview and relaxation in age, caste certificate etc. However, it is only Rule of

reservation contained in Section 4 of the 1994 Act which is incorporated in view of the language of the Rule which talks about reservation as per the

1994 Act, therefore, it is the percentage of the reservation for the purpose of direct recruitment alone which has been incorporated in Rule 6.2.4.â??

In view of the aforesaid enunciation of law, we find that Rule 6(5) of the Rules is legislation by incorporation and thus subsequent omission of such

provision from the Rules will not render the condition of eligibility as redundant.

Still further, Rule 9(2) of the Recruitment Rules is to the effect that no candidate shall be eligible for appointment who has married before the

minimum age fixed for marriage. In view of the above, we do not find any merit in the present petition.

Accordingly, the writ petition stands dismissed.Â