
(2008) 02 MP CK 0112

In the Madhya Pradesh High Court

Case No : Writ Petition No. 4422 of 2005 (S)

Ram Sewak Choudhary

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 29-02-2008

Acts Referred:

Madhya Pradesh Housing Board Act, 1972 — Section 15, 17

Citation : (2008) 4 MPLJ 308

Hon'ble Judges : Abhay M. Naik, J

Bench : Single Bench

Advocate : Shobhitaditya, for the Appellant; G.P. Singh, Government Advocate for Respondent No. 1 and Ms. Anjali Banerjee for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Naik, J.

This order disposes of W.P. No. 4422/05 as well as W.P. No. 4646/05. Reference to Annexures has been taken from W.P. No. 4422/05 unless otherwise mentioned.

Petitioners in both the writ petitions were working as work charged employees in the office of M.P. Housing Board. They succeeded in the departmental examination and consequently were appointed temporarily on the post of Assistant on probation of one year in the pay scale of Rs. 180-6-210-10-300EV-12?-350/-. Copy of appointment order is on record as Annexure P/1. Petitioners were asked to give joining upto 28-1-1982. It is pertinent to note that there was no condition in the appointment order that the petitioners were required to pass Hindi Typing examination.

Respondent No. 3 issued an order of amendment vide dated 11-3-1982 stating thereby that condition No. 7 was omitted in the appointment order due to inadvertence and the same was added in the appointment order by way of amendment to the following effect.

Appointed candidate shall have to pass the examination of Hindi Typing conducted by the M.P. Government within a period of one year.

Copy of this amendment order is Annexure P/2.

Respondent No. 2 vide his order dated 12-3-1997 refused to grant annual increment after completion of period of probation and instead granted the same to identically situated employee, namely, Ramnarayan Paliwal on attaining the age of 40 years on account of granting exemption from passing the Hindi Typing examination as per circular issued by the State Government. This order was challenged by Ram Narayan Paliwal in W.P. No. 578/97 before Indore Bench of this Court. Aforesaid petition was allowed on 8-8-2000 by learned Single Judge and the then petitioner was held entitled for grant of increment from January, 1983 onwards. Certain other identically situated employees junior to the petitioners made representations in the light of decision of Indore Bench which is on record as Annexure P/4. Benefit of Annexure P/4 was extended w.e.f. January, 1983 to four junior employees to the petitioners, namely, M.A. Nashtari, A.K. Sharma, S.N. Pure and Narendra Seth, as revealed in Annexure P/5 and P/6, whereas the same has not been granted to the petitioners despite repeated representations contained cumulatively in Annexure P/7. As regards petitioners, it was intimated vide letter dated 22-2-2005 that their case has been sent for necessary action to the Principal Secretary of Housing and Environment Department, Bhopal. This has compelled the petitioners to submit the present writ petitions with contention that in the absence of any condition in the appointment order to qualify the Hindi Typing examination, the petitioners are entitled to annual increment since January, 1983 and that they have been discriminated in hostile manner, as stated hereinabove.

Respondents No. 2 and 3 being the main contestants submitted their joint return denying thereby the claim of the petitioners. It has been stated in the return that in exercise of power under sub-section (3) of section 103 read with sections 15 and 17 of M. P. Housing Board Act, 1972 (hereinafter referred to as the Act for short), M.P. Griha Nirman Mandal Services (Ministerial/Executive Class III/Class IV) Recruitment and Conditions of Service Regulations, 1977 have been duly made. The petitioners were appointed as per provisions of the said regulations which provided qualification for the post of L.D.C./Rent Assistant as under:

Higher Secondary School Certificate and typing pass from the Board of Shorthand and Typing Examination of M.P. or an institute recognized by the State Government.

Thus, the condition of passing of Hindi Typing test was mandatory after enforcement of the regulations w.e.f. their publication in the M.P. Gazette dated 31st of March, 1978. This apart, passing of Hindi Typing test by L.D.C. appointed after 22-8-1973 was made mandatory vide circular dated 22-8-1974 and 27-2-1974 (Ann. R/2-2). Thus, the persons appointed as L.D.C. after 22-8-1973 have been entitled for annual increments after one year of their passing Hindi

Typing from the M.P. Board or any other Institute recognized by the State Government.

As regards Annexure P/1, it has been specifically and expressly stated in the return that the condition relating to passing the Hindi Typing test could not be mentioned in the appointment order Annexure P/1 due to inadvertence. On coming to know of the said omission, the answering respondent immediately issued an amendment dated 11-3-1982 thereby inserting the said condition in the order of appointment of the petitioners with retrospective effect. Petitioners did not raise any objections against the order of amendment for quite a long time. Naturally the insertion of condition of passing of Hindi Typing test was treated as having been impliedly accepted by the petitioners. Since passing of Hindi Typing test was one of requisite qualifications under the regulations for the post of L.D.C, the order of appointment was rightly amended and the same was made effective from the date of initial appointment. Since the petitioners have not passed the Hindi Typing test, they have rightly been denied the annual increment w.e.f. January, 1983. As regards grant of benefit on the strength of Indore Bench decision is concerned, it is mentioned that the benefit was extended to certain identically situated employees who were posted at Indore where Ramnarayan Paliwal was also working and whose writ petition was allowed. However, it is averred in the return that since the petitioners were not holding minimum qualification as per the regulations, they are not entitled to annual increment before passing the Hindi typing test. As regards grant of benefit of annual increment to Salim Ul Hasan was concerned, he was granted benefit only after completion of 40 years of age on account of having been granted exemption. Thus, the petitions suffer from unexplained huge delay and laches. Besides this, petitioners are also not entitled to the annual increments in violation of regulations.

Shri Shobhitaditya, learned counsel for petitioners, Shri G.P. Singh learned Government Advocate for respondent No. 1 and Ms. Anjali Banerjee, learned counsel for respondents No. 2 and 3 made their respective submissions which have been considered in the light of material on record and the legal position governing the situation.

Admittedly, the petitioners were appointed in the services of M.P. Housing Board on the post of Rent Assistant in the pay scale of Rs. 180-6-210-10-300 EV-HVi -350/- as revealed in Annexure P/1. It is crystal clear that no condition of passing of typing test was incorporated in the order of appointment. This was tried to be inserted by amendment order dated 19-3-1982 as revealed in Annexure P/2.

Shri Shobhitaditya, learned counsel for petitioners made much reliance on the Single Bench decision of this Court (Indore Bench) rendered in W.P. No. 578/97, as revealed in Annexure P/4. It is amply clear from Annexure P/4 that the aforesaid regulations were not placed before the learned Single Judge and consequently, the effect of regulations on the terms and conditions of

appointment of petitioners could not be considered. This being so, it cannot be said that the case of the petitioners is squarely covered by Annexure P/4. However, it cannot be denied that the same may be invoked by the petitioners in an appropriate manner to the extent indicated hereinabove.

Petitioners have been appointed vide order dated 11-12-1981 whereas regulations known as M.P. Griha Nirman Mandal Services (Ministerial/Executive Class III/Class and IV) Recruitment and Conditions of Service Regulations, 1977 (for short "the Regulation") were enforced w.e.f. 31st of March, 1978 on account of their publication in the M.P. Gazette, as revealed in Annexure R/2-1.

Shri Shobhitaditya, learned counsel for the petitioners contended that the appointment orders of the petitioners on the post of Rent Assistant were not under the regulations and the condition of passing the Hindi Typing test cannot be read into the appointment order dated 11-12-1982 by virtue of regulations or even by virtue of amendment order dated 11-3-1982. He further contended that conditions of appointment cannot be unilaterally changed to the detriment of the petitioners. Following are the relevant regulations which are liable to be considered for examining the gravity of the said contention:

3. Scope and application, -- These regulations shall apply to every member of the service.

Definition. -- (e) "Service" means the Madhya Pradesh Housing Board (Ministerial/Executive Services Class III and IV).

Constitution of the service. -- The service shall consist of the following persons, namely:

(i) Persons, who at the commencement of these regulations are holding the posts specified in Schedule I in a substantive/officiating capacity;

(ii) Persons recruited to the Service before the commencement of these regulation; and

(iii) Persons recruited to the Service in accordance with the provisions of these regulations.

Petitioners were admittedly appointed on the post of Assistant in the services of M.P. Housing Board after enforcement of the regulations. They were work charged employees and were appointed as revealed in the order of appointment on recommendation of Junior Selection Committee of the Board. Regulation 7 lays down that all appointments to the service after the commencement of the regulations shall be made in accordance with regulation 6.

Regulation 6 reads as under:

6. Method of recruitment and promotion. -- (1) Recruitment to the Service after commencement of these regulations shall be by the following methods, namely:--

(a) by direct recruitment, through competitive examination or through interview

conducted by Departmental Selection Committee;

(b) by promotion of members of the service as shown in columns (2) and (3) of Schedule III.

(2) Subject to the provisions of these regulations for the purpose of filling any particular vacancy or vacancies in the Service as may be required to be filled during any particular period of recruitment, and the number of persons to be recruited shall be determined on each occasion by the appointing authority.

In the set up of the Board, as revealed in Schedule No. 1 part A, there was no post of simpliciter "Assistant" with pay scale of Rs. 180- 350/-. Although it has been contended by Ms. Anjali Banerjee, learned counsel for respondents No. 2 and 3 that post of L.D.C./Rent Assistant was equated to that of Assistant and the Pay scale of Rs. 169-300 was revised to Rs. 180-350/-, but no material has been placed before me to establish that post of "Assistant" was recognized under the regulations in the set up of MP Housing Board. Although, regulation 7 lays down that all appointments to the service after the commencement of these regulations shall be made in accordance with regulation No. 6 it is nowhere provided in the regulations that any appointment made after enforcement of the regulations would be deemed to be an appointment under the regulations alone. Moreover, there is no provision in the regulations for promotion of work charged employee to the post of Assistant. In the regulation, qualifications for the post of L.D.C./Rent Assistant were prescribed as Higher Secondary School Certificate and typing pass from the Board of Shorthand and typing Examination of M.P. or an institute recognized by the State Government. This has been so prescribed in Schedule 2 annexed to the said regulation. Thus, under the regulations there was no scope for making appointment on the post of L.D.C./Rent Assistant of a candidate who had not passed typing examination. From the record, it is clear that the Board has made appointment of various persons who had not passed the typing test as prescribed in Schedule 2. Moreover, the Board has also granted exemption from typing test to certain employees who had attained the age of 40 years. This power to exempt is also not provided in the regulations. In this view of the matter, it is observed that the petitioners were not appointed strictly under the regulations and terms and conditions of appointment order as contained in the order of appointment could not have been altered unilaterally or without the consent of petitioners.

Respondents No. 2 and 3 have not placed on record any material to establish that while inviting the applications even from the Departmental candidates, a candidate was required to have passed Hindi typing test conducted by the MP Board or any recognized institute. This is also clear from the amendment order dated 11-3-1982 marked as Annexure P/2 wherein it was admitted that condition of requiring the candidate to have passed the Hindi Typing test was omitted mistakenly. In the appointment order, there is no mention that the appointment of the petitioners was made in accordance with law under the regulations. Therefore, the condition of qualification prescribed by the regulations cannot be

imposed upon the petitioners even by way of amendment order.

Section 17 of the Housing Board Act enables the Board to frame regulations for the purposes mentioned therein. For convenience section 17 is reproduced below:--

17. Regulations. -- Subject to the Provisions of this Act, the Board shall, with the previous approval of the State Government, make regulations --

- (a) fixing the salary and allowances of the officers and servants of the Board;
- (b) fixing the amount and nature of security to be furnished by any officer or servant from whom it may be deemed expedient to require security;
- (c) for regulating the grant of leave of absence, leave allowances, and acting allowances to the officers and servants of the Board : Provided that a servant of the Central or State Government employed as an officer or servant of the Board shall not be entitled to leave or leave allowances, otherwise than as laid down in the conditions of his service under the Central or State Government, as the case may be, relating to transfer to foreign service;
- (d) for regulating the subscriptions to the provident fund established u/s 18 and other matters relating thereto;
- (e) for determining the conditions under which the officers and servants or any of them shall on retirement receive gratuities or compassionate allowances and the amount of such gratuities and compassionate allowances.

Perusal of the said provision makes it clear that it does not empower the Board to frame regulations for prescribing the qualification or to make change in the terms and conditions of appointment of the employees who were not recruited in accordance with regulations.

Ms. Anjali Banerjee, learned counsel for respondents No. 2 and 3 placing reliance on the notification dated 27th of February, 1974 (Annexure R/2-2) contended that the petitioners ought to have possessed the Hindi Typing certificate since it was one of the minimum qualifications for the post of L.D.C. and Typist. Annexure R/2-2 is a memo issued by the General Administration Department of Government of M.P. wherein it is mentioned that Hindi Typing examination conducted by the M.P. Shorthand and Typing council or any other institute recognized by the State of M.P. is must for a candidate seeking appointment on the post of L.D.C. or Typist.

It may be seen that Annexure R/2-2 applies to all the offices of the State Government of M.P. Secondly, the petitioners were not appointed on the post of L.D.C. or typist but were appointed on the post of Assistant. Thirdly, it is nowhere mentioned that in the set up of M.P. Housing Board, Hindi Typing test must have been passed for securing the appointment. There is nothing on record to suggest that the Housing Board has ever adopted Annexure R/2-2. In this view of the matter, terms and conditions of services of the petitioners cannot be

treated as having been controlled by Annexure R/2-2.

As observed hereinabove, it may be seen that the condition of typing test was not incorporated in the appointment order issued to the petitioners. There is no indication in the appointment order that the appointment was made under regulations. Moreover, learned counsel for the Board has been unable to establish that the post of simpliciter "Assistant" was available in the set up of the Board prescribed under the Regulations. This being so, the terms and conditions of recruitment of petitioners would be governed by the appointment order alone and the recruitment qualifications could not be altered with retrospective effect so as to deprive the petitioners of their rights to the post to which they were recruited nor it could affect their confirmation as held by the Hon"ble Supreme Court of India in the case of Chandraprakash Madhavrao Dadwa and Others Vs. Union of India and Others, . Since there was no condition of Hindi Typing test in the appointment order marked as Annexure P/1, any kind of amendment in it not even on the basis of inadvertent omission would be permissible as it would amount to imposing the qualification of Hindi Typing test with retrospective effect. It would not only be arbitrary but would also be violative of Articles 14 and 16 of Constitution of India because the right of the petitioners to receive the annual increment would get disturbed.

Since the post of Assistant is not shown to have been in existence in the set up of the Board at the time of issuance of appointment orders in favour of petitioners, learned counsel for the Board has been equally unable to show that the regulations would govern the appointment of the petitioners. I may profitably refer to the decision of Apex Court rendered in the case of B.N. Sinha Vs. Union of India (UOI) and Others, .

It is important to note that identical Writ Petition bearing number 578/1997, (Ram Narayan Paliwal vs. State of M.P.) was decided by this Court (Indore Bench) vide order dated 8-8-2000 which is on record as Annexure P/4. Paragraph 7 of the same is reproduced below for convenience:

Admittedly in this case also the petitioners was given appointment on the post of Assistant, vide order dated 11-12-1981 (Annexure P/2) which did not contain any such condition that he would be entitled for increments only after passing the Typing Test. Any subsequent amendment made by respondents in this regard, whether communicated or not communicated would not change the legal position. Shri Singh appearing for respondents contended that once the Board had passed the Resolution in this regard that passing of Typing Test be included in the service condition will have the statutory force, is also of no consequence. He also contended that similar condition also exists in the service Rules. Be that as it may, the fact remains that when the petitioner was given the appointment letter no such condition was imposed or was communicated to the petitioner. Thus any subsequent amendment whereby respondents are trying to add or impose further condition would not be binding on the petitioner.

Not only Ramnarayan Paliwal (the then petitioner) but other identically situated employees of the Board namely Narendra Seth, A.K. Sharma, A.M. Nashtari and S.N. Pure were granted annual pay increment w.e.f. January, 1983 in the light of Annexure P/4. Annexure P/6 clearly goes to show that the names of the aforesaid petitioners were mentioned in the gradation list at inferior positions in comparison to the petitioners, as revealed in Annexure P/6. Respondents have admitted that benefit of Annexure P/4 has been extended to these persons. It is also not disputed that these persons were junior to the petitioners. Contention of the learned counsel for the Board is that the benefit was mistakably given to these persons and petitioners are no more entitled to the same. This plea is also found to be meritless because the point was duly adjudicated by this Court vide order Annexure P/4 and the Housing Board allowed the order to attain finality. This apart, benefit of Annexure P/4 is also admitted to have been given to identically situated junior employees. Depriving the petitioners of the same benefit clearly amounts to hostile discrimination which is prohibited under the constitutional provisions. Contention of the Housing Board is that after enforcement of regulations, petitioners could not have been appointed in violation of qualifications prescribed under the regulations. The rectification letter was issued on 11-3-1982, as revealed in Annexure P/2. Petitioners did not submit any objection to it, therefore, the petitions suffer from inordinate delay and laches and cannot be accepted. This contention is devoid of substance because this Court in Annexure P/4 has clearly observed that any subsequent amendment in the order of appointment whether communicated or not communicated would not change the legal position. Moreover, the petitions having been once admitted, petitioners cannot be deprived of their legal rights on the ground of delay, *moreso*, when the same has already been adjudicated by this Court vide Annexure P/4. It is quite astonishing that various representations were made by the petitioners, as revealed in Annexure P/7. Representations of identically situated junior employees have been allowed vide Annexure P/5 whereas that of petitioners were kept pending without any justifiable cause. Benefit of Annexure P/4 extended to other identically situated junior employees has never been withdrawn which goes to show that the Board has virtually accepted the claim for annual increment in accordance with initial order of appointment. Petitioners are obviously entitled to the same treatment.

In the result, both the writ petitions succeed and are hereby allowed. Petitioners are held entitled to annual increment as granted to other similarly situated junior employees vide Annexure P/5. Accordingly, it is directed that petitioners would be entitled to annual increment from January, 1983 onwards. Respondents are directed to carry out the direction in an expeditious manner preferably within a period of three months from the date of submission of certified copy of this order and grant all monetary benefit to the petitioners. Since, the respondents-Board has allowed the representations of other identically circumstanced junior employees and has dragged the petitioners to submit the writ petitions, the Board has to bear the cost of the petitioners in each petition, quantified at

Rs.3000/- per case, if already certified.