

(2012) 07 MP CK 0100

In the Madhya Pradesh High Court

Case No : Writ Appeals No. 568 and 569 of 2010

State of M.P. and others

APPELLANT

Vs

Ku. Ramani Bai Bhagat

RESPONDENT

Date of Decision : 10-07-2012

Acts Referred:

Constitution of India, 1950 — Article 16, 309

Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 — Section 2(1)

Citation : (2012) 3 JLJ 158 : (2013) 1 MPHT 96 : (2012) 4 MPLJ 639

Hon'ble Judges : J.K. Maheshwari, J;G.D. Saxena, J

Bench : Division Bench

Advocate : Raghvendra Dixit, Government for State, for the Appellant; C.P. Singh and S.P. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Maheshwari, J.—This order shall govern the disposal of both these two writ appeals which have been preferred against the orders passed in two writ petitions bearing No. 5050/2008 and 5151/2008 on the same date i.e. 21.8.2009. The facts of these two cases and the issue involved are similar but because of two orders were passed separately against which present two appeals have been preferred which are being decided by this common order. The aforesaid two writ appeals u/s 2(1) of Madhya Pradesh Uchcha Nyalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 have been filed assailing the order dated 21.8.2009 passed by the learned Single Judge in Writ Petition No. 5050/2008 and 5151/2008. By the said order, it is directed that the petitioners would be entitled to get regular increments after one year from the date of their initial appointment. It is further directed that the respondents would fix the pay after expiry of one year from the date of their initial appointment and arrears shall also be paid. In the aforesaid two writ petitions, the facts remain that the petitioners were appointed as Assistant Grade III and joined their duties. In the order of appointment, it was specified that the petitioners ought to have passed

the Hindi typing examination within the period of two years, otherwise their services may be terminated. The said period was extended time to time. As the petitioners could not have passed Hindi Typing Examination, and on completion of the age of 40 years, the increments were allowed to him with effect from 4.3.1993 in view of the conditions so specified in the order of appointment. Learned Single Judge referring the Recruitment Rule 8 and Schedule III of M.P. Irrigation Department (Non-Gazetted) Service Recruitment Rules, 1969 (for brevity it be called "the Rules of 1969") observed that the qualification indicating eligibility prescribed in Rules is to pass the matriculation or equivalent examination and preference to those who possess the certificate in typing. In such circumstances, it is held that under the statutory rules passing of typing examination was not the essential qualification for the post of Lower Division Clerk (Assistant Grade III), therefore, denial of increments is not in conformity to the Rules of 1969. However, direction has been issued to pay the regular increments with arrears.

2. Learned counsel appearing on behalf of the appellant-State has contended that learned Single Judge while adjudicating the issue has referred the judgment of this Court in the case of Dongar Singh Pawar Vs. State of M.P. and Others , and distinguished the judgment of Division Bench of this Court in the case of State of M.P. v. Smt. Sushma Surana, reported in 2005(II) MPWN 116. It is submitted that the judgment of Dongar Singh Pawar (supra), has been further considered by the Division Bench of this Court in the case of State of Madhya Pradesh and Others Vs. Vinod Mohan Shrivastava, whereby held that irrespective of the Rules framed under Article 309 of the Constitution of India if any specific bar providing a specific stipulation regarding the minimum eligibility criteria has been prescribed in the appointment order, it is permissible under the law. However, distinguishing the judgment of Dongar Singh Pawar (supra), and relying upon the judgment of the Hon"ble apex Court rendered by it in the case of State of Rajasthan and others v. Rajendra K. Verma [(2004) 13 SCC 706], held that the judgment of Dongar Singh Pawar (supra), does not lay down the correct proposition of law and in such cases the payment of increments on attaining the age of 40 years granted by the State Government to the petitioners was found justified. In this view of the matter, it is urged that the judgment so delivered by the learned Single Judge is based upon the judgment of Dongar Singh Pawar (supra), which has already been overruled by this Court, however, the order impugned may be set aside allowing this appeal.

3. Per contra, Shri C.P. Singh and Shri S.P. Sharma, learned counsel representing the petitioners have argued in support of the findings so recorded by the learned Single Judge and submitted that the appointment of petitioner on the post of Lower Division Clerk (Assistant Grade III) was made after due process of law on possessing requisite qualification prescribed in rule 8 and Schedule III of the Rules of 1969. The Rules of 1969 have been framed in exercise of powers conferred under the proviso to Article 309 of the Constitution of India, however, executive instruction, if any, issued showing additional qualification cannot have

overriding effect. In fact the regular increment ought to be automatically granted as per the Fundamental Rule 24, until withheld by an order of competent authority. In such circumstances, the order passed by the learned Single Judge is liable to be upheld. Learned counsel has placed reliance on the Division Bench decision of this Court rendered in the case of Jageshwar v. State of M.P. reported in 1982 MPWN 275; State of M.P. and Another Vs. Onkarlal Khande, and in the case of State of M.P. v. Smt. Savita Naulakha, reported in 2012(I) MPWN 15. It is submitted that in the case of Jageshwar (supra), this Court held that if the lower division clerk possesses the qualification so prescribed under the Rules, termination by virtue of the additional qualification specified in the circular is not permissible under the law. It has further been held that the qualification specified by executive instructions cannot be given overriding effect to the Rules framed in exercise of powers under Article 309 of the Constitution of India. The aforesaid judgment has not been taken note in the later judgment of Vinod Mohan Shrivastava (supra). Thus, the judgment of Vinod Mohan Shrivastava (supra), does not lay down the correct proposition of law because the earlier Division Bench judgment has not been considered. It is further submitted that recently the Division Bench of this Court in the case of Onkar Lal (supra), and Smt. Savita Naulakha (supra), has followed the view taken in the case of Jageshwar (supra). However, the judgment of Vinod Mohan Shrivastava (supra), cannot be regarded as good law and liable to be ignored. It is also submitted that the qualification so prescribed in the Rules cannot be overridden by executive instructions, however, regular increments cannot be denied. Thus, learned Single Judge has rightly directed for grant of the increments and the arrears thereof, therefore, the order impugned may be upheld.

4. After hearing learned counsel appearing on behalf of the parties and to appreciate their rival contentions, first of all, it is required to be seen that for the post of Lower Division Clerk (Assistant Grade III) in Irrigation Department what is the qualification prescribed in the Rules. It is not indispute that the services of the petitioners are governed by the Rules which are known as M.P. Irrigation Department (Non-Gazetted) Service Recruitment Rules, 1969. Rule 8 specifies the conditions of eligibility for direct recruitment; relevant rule 8(B) deals with the educational qualification which is reproduced as thus :

8(B) Educational Qualifications. He must possess the educational qualification as prescribed for the service as shown in Schedule III provided that:

(i) in exceptional cases the Chief Engineer may on the recommendation of the Selection Committee/Appointing authority treat as qualified, who though not possessing any of the qualifications prescribed in this clause, has passed examination conducted by other institutions by a standard which in the opinion of the Engineer-in-Chief/Chief Engineer, justifies the consideration of the candidate for selection; and

(ii) candidates who are otherwise qualified but have taken degrees from Foreign Universities, being Universities not specifically recognized by the Government

may also be considered for selection at the discretion of the concerned Chief Engineer.

Schedule III of the aforesaid Rule prescribes qualification for a Lower Division Clerk as under :

Lower Division Clerk : Age 18 years to 25 years

Matriculation or equivalent examination pass.

Preference to those possessing certificate in typewriting.

In view of the foregoing, it is clear that for the post of Lower Division Clerk, the candidate must be in between the age of 18 to 25 years and pass the matriculation or equivalent examination. It is further apparent that if such a candidate possesses a certificate in typewriting, be given preference. The "Preference" means that if a person possessed matriculation qualification but not possessing the certificate of typing, while other possesses the said certificate shall be preferred. Thus, it is clear that the preference on possessing typing examination cannot be equivalent to basic qualification prescribed to the post. In the order of appointment reference of a circular of the Government dated 21.6.1980 has been made to impose the condition that if the petitioner does not pass the typing examination, his services may be terminated. The aforesaid circular is an executive instruction and it cannot override the eligibility prescribed in the Recruitment Rules, 1969 framed in exercise of powers under the proviso of Article 309 of Constitution of India. In this respect, the guidance may be taken from the judgments of Hon''ble the apex Court in the case of Dr. Rajinder Singh Vs. The State of Punjab and Others, . In para 7 of the said judgment, Hon''ble apex Court has held as under:

7. The settled position of law is that no Government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, Class II of the service can be treated as Class 1 only by way of notification. Following such a course in effect amounts to amending the rules by the Government order and ignoring the mandate of Article 309 of the Constitution.

In another judgment Honourable the apex Court in the case of T.N. Housing Board Vs. N. Balasubramaniam and Others, in para 6, held as under :

6. It is one thing to say that there exists no provision in the Regulations which would attract the rules specified in Regulation 28(a) or the instructions and rulings thereunder, but it is another thing to say that the instructions if implemented cannot be given effect to having regard to the consequences provided for in the extant Regulations, still the same would be applicable. We

have noticed hereinbefore that for Junior Engineers and Draftsmen eligibility criteria have been laid down. It is not in dispute that the said eligibility criteria are mandatory in nature and the validity thereof had not been questioned. If a Draftsman is to be promoted to the post of Assistant Executive Engineer, he must complete 15 years of service in the said capacity, whereas the Junior Engineer may have to complete only 10 years in the said post. Once the eligibility criteria are considered to be a prerequisite for giving effect to the statutory Regulations, the purported executive instructions would not be applicable. Once it is held that relying on the basis of the executive instructions in terms of Regulation 28(a), the Draftsmen who have been getting higher salary are given preference over the diploma-holder Junior Engineers, the eligibility criteria contained in the statutory Regulations would become otiose, the logical corollary thereof would be that the executive instructions would prevail over the statutory Regulations. Such a consequence would lead to an absurdity and in that view of the matter it must be held that the executive instructions cannot be given effect to.

In the recent judgment in the case of Ajaya Kumar Das Vs. State of Orissa and Others, , Honourable apex Court after discussing the provisions of the rule and also the circular i.e. executive instructions held as under :

11. Rule 74(b) of the Code is aimed at protecting the scale of pay of a Government employee in his promotional cadre and seeks to ensure that in no case an incumbent is directed to receive less emoluments, less pay than what he was drawing prior to his promotion. This provision statutorily ensures that the State Government employee gets the benefits of receiving higher scale of pay than that of the post held by him prior to such promotion. Surely, in the light of rule 74(b), initial pay in the timescale of higher post of a Government servant cannot be fixed which is less than the pay he was getting immediately before promotion.

12. The Circular dated 18.6.1982 contemplates that the completed years of service rendered by SERs under OSEB should be treated as having been rendered under the Government in the Government scale of SERs and their pay in the scale of Assistant Engineers under the Government be fixed following the principle under rule 74(b) of the Code.

13. The aforesaid Circular was modified by a subsequent Circular dated 17.3.1983 whereby a clarification was made that in case of promotion of SERs of OSEB to the rank of Assistant Engineer under the Government, if the pay so fixed as per the principles laid down in the Government Circular dated 18.6.1982 becomes less than the pay last drawn by them under the Board, the difference may be allowed to them by reducible personal pay to be absorbed in future increments.

14. Neither the Circular dated 18.6.1982 nor the subsequent Circular dated 19.3.1983 modifying the earlier Circular dated 18.6.1982 can override the statutory provision contained in rule 74(b) of the Code if it results in reduction of

pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars.

5. In view of the foregoing, it can safely be held that the qualification so prescribed in the Recruitment Rules cannot be tinkered with by issuing a circular by the State Government. The executive instructions cannot override the eligibility prescribed in the Recruitment Rules. If it is allowed to be operative, the Recruitment Rules would become otiose and the executive instructions would prevail over the statutory rules.

6. In this case, learned Government Advocate has placed heavy reliance on the Division Bench judgment of this Court in the case of Vinod Mohan Shrivastava (supra), wherein this Court has held that any stipulation in the appointment letter regarding minimum eligibility criteria made, it would be incumbent on the part of the employee concerned to fulfil the said criteria and before he acquires the eligibility to gain increment and becomes the member of service as he accepts the appointment on certain terms and conditions when he entered into the employment. The aforementioned corollary has been drawn relying upon the judgment of Hon"ble the apex Court in the case of Rajendra K. Verma (supra). To advert the aforesaid argument, the legal position in cases of employees of same department relying upon the same rules prevalent as per other case laws is required to be seen. In the case of Jageshwar (supra), on termination of the service on account of adding the qualification in the advertisement contrary to the rules, the issue arose for consideration before this Court. The Division Bench of this Court has held as thus :

The petitioner passed High School Examination in 1976 from Uttar Pradesh Board which is equivalent to Matriculation Examination. The recruitment of Lower Division Clerk in Irrigation Department is governed by the M.P. Irrigation Department (Non-Gazetted) Service Recruitment Rules, 1959 the minimum qualification required for a Lower Division Clerk is Matriculate or equivalent examination. The petitioner admittedly fulfilled this qualification. It appears that by circular dated 14th December 1972 (Annexure "C") it was stated that the minimum qualification for the post of a Lower Division Clerk will be Higher Secondary Examination. In the advertisement also the same qualification was mentioned (see Annexure R-1). In our opinion, however, when the minimum qualification was fixed by a statutory rule, the same could not be changed by a circular which had not the effect of a statutory rule. It is not necessary for us to decide whether, in spite of the fact that a minimum qualification is prescribed by

a statutory rule, the Government cannot insist for a higher qualification in the advertisement. The fact remains that the petitioner was selected and appointed as Lower Division Clerk. Thereafter the petitioner's services could not be terminated on the ground that he did not possess the minimum qualification when he did possess the minimum qualification as required by the statutory rules. Petition allowed.

7. Bare reading of the ratio of the said judgment, it is clear that the qualification prescribed in the rules cannot be changed by circulars, which is not having an effect of statutory rules. It has further been observed that after selection of a person on having qualifications so prescribed in the rules, services cannot be terminated on the ground that he did not possess the minimum qualification though the employee possesses the minimum qualification as required by the statutory rules. The said view has been followed in recent two Division Bench judgments of this Court in the case of Onkar Lal (supra), and Smt. Savita Naulakha (supra). In the case of Onkar Lal (supra), the Division Bench of this Court has held as thus :

8. The respondent was appointed in the employment of Water Resources Department. His recruitment was under M.P. Irrigation Department (Non-Gazetted) Service Recruitment Rules, 1969 (for short, the Rules). The eligibility criteria provided in the Rules for recruitment on the post of Lower Division Clerk on which the respondent was appointed was passing of Matriculation or equivalent examination. It further provides that preference shall be given to those possessing certificate in typewriting. Thus as per the Rules, the essential qualification for the purpose of recruitment on the said post was passing of matriculation or equivalent examination. The candidates possessing the certificate of typewriting were only to be given preference.

9. In the circumstances, passing of typing examination being not the essential qualification for the purpose of recruitment on the said post, the imposition of stipulation of passing of the Hindi Typewriting Examination as prerequisite condition for release of the increment cannot be said to be justified. The said condition imposed" in his appointment order that the increment shall be payable only after passing of the Hindi Typing Examination being contrary to the recruitment rules, the same cannot be made basis to deny the benefit of regular increments after one year from the date of his initial appointment.

10. In view of the aforesaid, in our considered view, the order passed by the learned Single Judge being in consonance with the Rules, no case for interference in this intra-Court appeal is made out.

The Division Bench of this Court in the case of Smt. Savita Naulakha (supra), relying upon the decision of Jageshwar (supra), and Onkarlal (supra), has held as thus :

5. In the case of State of M.P. v. Onkarlal (supra), a Division Bench of this Court, after considering that the writ petitioner's appointment was under M.P. Irrigation

Department (Non-Gazetted) Service Recruitment Rules, 1969, in which the criteria for recruitment on the post of Lower Division Clerk was passing of Matriculation or equivalent examination, held that in such circumstances passing of typing examination being not the essential qualification, the imposition of stipulation, as prerequisite condition for release of the annual increments, cannot be said to be justified. In the case of *Jageshwar v. State of M.P.* (supra), a Division Bench of this Court has held that minimum qualification for appointment prescribed under the rules of recruitment cannot be changed by circular.

8. In view of the foregoing facts, looking to the consistent view of this Court, it is apparent that to pass typing examination in terms of the conditions specified in the order of appointment by virtue of the circular contrary to the statutory rules cannot be allowed to prevail over.

9. In the case of *Vinod Mohan Shrivastava* (supra), which is of the Irrigation Department, the approach of the Division Bench is contrary to the old judgments in the case of *Jageshwar* (supra), and also the recent view in the case of *Onkar Lal* (supra), and *Smt. Savita Naulakha* (supra). It is to be observed here that in the light of the judgments of the apex Court in the case of *Rajendra K. Verma* (supra); *Rajinder Singh (Dr.)* (supra); *N. Balasubramaniam* (supra); and *Ajaya Kumar Das* (supra), it is apparent that the qualification so prescribed in the rules cannot be tinkered with or overridden by issuing the executive instructions. As per the order of appointment, it is clear that passing of the typing examination so mentioned in the order is based on the Government circulars although such qualification has not been prescribed in the rules. Thus, in view of the various pronouncements, said condition cannot be added in the appointment order. It can further be observed that the appointment of the petitioner is after following the due process of law. It is not a case of the respondent that the offer of appointment was made to the petitioner which is accepted by him giving consent, however the order of appointment has become contract. Thus, in the opinion of this Court, the conditions unilaterally specified in the appointment Order, contrary to the rules, is not required to be fulfilled by the employees. The judgment of *Rajendra K. Verma* (supra), of Hon"ble the apex Court is on different facts and not on the context in issue, however, having no application as discussed hereinabove.

10. In view of the foregoing, the judgment of *Vinod Mohan Shrivastava* (supra), which was delivered without considering the earlier Division Bench judgment of *Jageshwar* (supra), and two recent Division Bench judgments on the issue following *Jageshwar* (supra), taking different view and also against various judgments of Hon"ble the apex Court, thus, *Vinod Mohan Shrivastava* (supra), can be ignored and cannot be relied upon further. It is further observed that the judgment of *Dongar Singh Pawar* (supra), laid down the correct proposition of law. It is hereby explained that the judgment of *Smt. Sushma Surana* (supra), is of the different department wherein the Rules specifying eligibility are different. However, the said judgment is having no application in the facts of the present

case.

11. In the present case the petitioner was denied the regular increments because he could not have passed the typing examination as specified in the order of appointment. As per the discussions made herein above, it is clear that imposition of such condition is contrary to the rules and not permissible, however, the grant of regular increment to an employee recruited as per the rules shall be permissible as per Fundamental Rule 24 which may be profitably referred and reproduced as thus :

F.R. 24. An increment shall ordinarily be drawn as a matter of course unless it is withheld.

12. The issue regarding grant of regular increment has been considered by the learned Single Judge of this Court in the case of State of M.P. and another Vs. Rameshchandra Sharma and another, In the said judgment, this Court has held as thus :

If anything more has to be said to hold that the defence was wholly meritless and the poor and petty employee had to make a wild cry in the wild wilderness, I have to merely refer to F.R. 24 on which the claim of the plaintiff was founded; and I quote :

F.R. 24. Withholding of increments. -- An increment shall ordinarily be drawn as a matter of course unless it is withheld. An increment may be withheld from a Government servant by a local Government, or by any authority to whom the local Government may delegate this power under rule 6, if his conduct has not been good or his work has not been satisfactory. In ordering the withholding authority shall state the period for which it is withheld and whether the postponement shall have the effect of postponing future increments.

The only power which is vested in the Government to withhold increment of a Government servant is to be found in the aforesaid statutory rule and it is trite law that the power must be exercised subject to the condition by which it is circumscribed. When conduct of a Government servant has not been good or his work has not been satisfactory that an order withholding his increment may be passed. In this case, admittedly, the situation is entirely different. Indeed defence taken is wholly irrelevant to the statutory provision aforesaid. It has never been the case of the State either here or in any of the Courts below that the work of the plaintiff had not been "good" or "satisfactory"; merely on the basis of a circular which could not, and indeed, did not bind the plaintiff, he is sought to be saddled with a disqualification as is not contemplated under the aforesaid statutory provision. As I have held above, it was not the condition of service of employment of the plaintiff-respondent manifested, whether in the order dated 30.7.1971 or the subsequent order dated 9.3.1972, that he will not draw the time scale salary, but he will draw a fixed salary of Rs. 90/- till he had passed "typing examination". In *Indrasen Jain (supra)*, I had taken the view with reference, albeit, to the sister provision F.R. 25 that there can be no

unreasonable restrictions imposed, whether by executive order or statutory provision in the enjoyment of the right to time scale salary of the Government servant because such an action is interdicted to Article 16. If some more has to be said, mere mention of *Olga Tellis* (1) is sufficient.

13. In view of the foregoing, it is apparent that the increment which ordinarily be drawn to an employee as a matter of course, unless it is withheld by the order of competent authority. The reason of withholding the increment based upon the condition specified in the order of appointment, is contrary to the rules, however, the condition of the appointment order shall not prevail over to rules and it can be held that if a person appointed after following the due process of law and possessing the eligibility so prescribed in the rules applicable at the time of appointment would be entitled to get the regular increments unless and until it is withheld by the competent authority by passing the order. In such circumstances the denial of the benefit of regular increments is contrary to the Fundamental Rule. Thus, as per above discussions, the order passed by the learned Single Judge is hereby upheld. In the light of the judgments of Division Bench of this Court in the case of *Jageshwar* (supra); *Onkar Lal* (supra); and *Smt. Savita Naulakha* (supra), and also in the light of the judgments of the apex Court in the case of *Rajendra K. Verma* (supra); *Rajinder Singh (Dr.)* (supra); *N. Balasubramaniam* (supra); and *Ajaya Kumar Das* (supra), the Division Bench judgment of this Court in the case of *Vinod Mohan Shrivastava* (supra), is hereby ignored and it cannot be followed or relied upon further. It is hereby held that the judgment of *Dongar Singh Pawar* (supra), laid down the correct proposition of law and the learned Single Judge has not committed any error to pass the order impugned which is hereby upheld. Ex consequenti, both the appeals are hereby dismissed. It is directed that the compliance of the order passed by the learned Single Judge now be made within a period of two months in *stricto sensu*. In the facts and circumstances of the case, parties to bear their own costs.