

(2018) 05 MP CK 0048
In the Madhya Pradesh High Court
Case No : WRIT APPEAL 510 OF 2018

Virendra Kumar

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 08-05-2018

Acts Referred:

Constitution of India — Article 21, 77(2), 77(3), 158, 166, 166(2), 166(3), 213, 226, 309
Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 — Section 2(1)
General Clauses Act, 1897 — Section 14, 15, 16, 17, 18, 19, 20, 21
Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 — Rule 2(a), 2(d), 9, 9(2), 22, 23(iii), 24
CCS (Pension) Rules, 1972 — Section 9(2)(b)(i)
M.P. Civil Services (Pension) Rules, 1976 — Section 9(2)(b)(i)

Citation : (2018) 05 MP CK 0048

Hon'ble Judges : SANJAY YADAV, J; ASHOK KUMAR JOSHI, J

Bench : Division Bench

Advocate : MPS Raghuvanshi, Praveen Newaskar, S.P. Jain

Final Decision : Disposed Of

Judgement

This appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, is directed against the

order dated 08.03.2018 passed in Writ Petition No.6587/2017.

(2) The Writ Petition was directed against the order dated 12.09.2017, whereby the appellant, member of State Administrative Services, the then

Deputy Director, Madhya Pradesh State Regional Office was visited with the penalty of 'Censure', as the charges levelled against him that he

derelicted in not taking timely action against the traders indulged in trading on forged transit passes, were found partly proved. The impugned order as

evident therefrom was issued in the name of and by order of the Governor
½ signed by the

Additional Secretary (Personnel) State Government of Madhya Pradesh; General
Administration Department. Construing the said order being passed

by the State Government and not by the Governor, learned Single Judge
dismissed the Writ Petition holding that the appellant has a remedy of appeal

under Rule 24 of the Madhya Pradesh Civil Services (Classification, Control and
Appeal) Rules, 1966. In arriving at said conclusion, learned Single

Judge relied on the decision by co-ordinate Single Bench in WP.5906/2017
[Sanjeev Kumar Dubey Vs. Commercial Tax Department decided on

12.09.2017]. In Sanjeev Kumar Dubey (supra), learned Single Judge had relied
on the decision by the High Court of Chhattisgarh in G.S. Dewangan

Vs. State of Chhattisgarh and others, W.A.No.80/2012 decided on 15.02.2012.

(3) The issue which crops up for consideration is whether when an order of
punishment passed in a proceeding under the Rules of 1966 is addressed

in the name and by the order of Governor is to be construed as an order
not by the Governor but by the functionaries of the State and an appeal

against such order would lie before the Governor himself.

(4) The Division Bench of Chhattisgarh High Court in G.S. Dewangan (supra)
being impressed with the proposition that even under the Rules of 1966

the Governor discharges an executive function as contemplated under Article 166
of the Constitution, held:

11. Rule 23(iii) of the Rules, 1966 provides that subject to the provisions of
Rule 22 of the Rules, 1966, a Government servant may prefer an

appeal against an order of suspension made or deemed to have been made
under Rule 9 of the Rules, 1966. Indisputably, the order of suspension was

passed under Rule 9(2) of the Rules, 1966 which is an appellable as the order
was not passed by the Governor himself, but in the name of the

Governor which is the requirement of Article 166(2) of the Constitution of India,
wherein the allocation of work has been done and business of the

Government has been allocated to various departments in respect of the
employees of the same department. Thus, the order passed in the name of the

Governor was an executive order and not the order passed by the Governor
himself. Thus, bar under Rule 22 of the Rules, 1966 is not applicable in

the case.

(5) The Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966, are framed by the Governor in exercise of the powers

conferred by Article 309 of the Constitution of India.

(6) As to the nature of powers exercised under Article 309 of the Constitution of India, it is held by their Lordships in *V.K. Sood vs. Secretary,*

Civil Aviation and others (AIR 1993 SC 2285):

3.It would thus clear that the rules made by the President or authorised person under proviso to Art. 309 are subject to any law made by the

Parliament and the power includes rules regulating the recruitment and the conditions of service or post. They are statutory and legislative in

character. The statutory rules thus made are subject to the law that may be made by the Parliament.

(7) Furthermore, dwelling upon the scope and field of operation of Article 309 of the Constitution, three judges bench in *Brajendra Singh Yambem*

Vs. Union of India and another [(2016) 9 SCC 20], it is held:

42. The judgment of this Court in the case of *Dr. Yashwant Trimbak* (supra) also does not apply to the facts of the case on hand. This Court had

held in that case that the order of sanction to initiate disciplinary proceedings granted by the Governor cannot be scrutinized by this Court in exercise

of its power of judicial review, as the said action comes within the protection of Article 166(2) of the Constitution of India. This principle of law is not

applicable to the present fact situation for the reason that the order of sanction granted by the President of India is not in exercise of his executive

power under Article 77(2) of the Constitution which speaks of orders and other instruments made and executed in the name of President of India. The

Rules specified under Article 77(3) of the Constitution are rules framed by the President of India for transaction of business of the Government of

India. The said constitutional immunity conferred either upon the Governor or President is confined only to the executive action of the appropriate

Government.

43. The order of sanction to be granted by the President of India as provided under Rule 9(2)(b)(i) of the CCS (Pension) Rules, 1972 is for initiation of

the disciplinary proceedings against the appellant, which cannot be treated as an executive action of the Government of India. Rather, it is a statutory

exercise of power by the President, under Rule 9(2)(b)(i) of the CCS (Pension)

Rules, 1972. The said Rules are framed by the President of India in exercise of legislative power conferred under Article 309 of the Constitution of India.

44. Article 309 of the Constitution provides for framing Rules and Regulations for the regulation of recruitment and conditions of service of persons

serving under the Union or a State government, and reads as under :

309. Recruitment and conditions of service of persons serving the Union or a State- Subject to the provisions of this Constitution, Acts of the

appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with

the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of

the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the

State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provisions in that

behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of

any such Act.

45. Discussing the scope and powers of the President and Governor under Article 309, a Constitution Bench of this Court in *B.S Yadav v. State of*

Haryana, held as under: [SCC pp.546-47, paras 44-45]

44. It is in this context that the proviso to Article 309 assumes relevance and importance. The State legislature has the power to pass laws

regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the

exercise of that power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it

abhors a vacuum. It has therefore made provisions to deal with situations which arise on account of the ultimate repository of a power not exercising

that power. The proviso to Article 309 provides, in so far as material, that until the State legislature passes a law on the particular subject, it shall be

competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The

Governor thus steps in when the legislature does not act. The power, exercised by the Governor under the proviso is thus a power which the

legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is

legislative power.

45. That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the

Governor's power under the proviso to Article 309 being in the nature of a legislative power. By Article 158, the Governor of a State is a part of the

legislature of the State. And the most obvious exercise of legislative power by the Governor is the power given to him by Article 213 to promulgate

Ordinances when the legislature is not in session. Under that Article, he exercises a power of the same kind which the legislature normally exercises:

the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Article 213 occurs, is significant: "Legislative Power

of the Governor". The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power.

Under Article 213, he substitutes for the legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the

legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject." (emphasis supplied)

46. The distinction between the powers under Articles 77(3), 166(3) and 309, regarding the framing of Rules and Regulations was discussed by a

Constitution Bench of this Court in Sampat Prakash v. State of J&K, as under:- [AIR p.1124, para 11] "11. As an example, under Article 77(3),

the President, and, under Article 166(3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of

the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the

interpretation of these provisions, Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President

or a Governor would become inflexible and the allocation of the business among the Ministers would forever remain as laid down in the first rules.

Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in

these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service

rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to,

amend, vary or rescind any of those rules. (emphasis supplied)

47. It becomes clear from a perusal of the constitutional provisions and the decisions by constitution benches of this Court referred to supra that the

powers under Articles 77(3), 166(3) and 309 operate in completely different fields. It would thus, be clear that the Rules framed in exercise of power

under Articles 77(3) and 166(3) cannot be compared while exercising power under Article 309 of the Constitution and framing rules and regulations

for recruitment and conditions of service of persons appointed to such posts either in connection with the affairs of the Union government or a state

government. It is for this reason that the statutory exercise of power by the President of India under Rules 9(2)(b)(i) and (ii) of the CCS (Pension)

Rules, 1972 cannot be equated with power exercised under Article 77(2) of the Constitution of India.

48. The High Courts and this Court can exercise power of judicial review under Articles 226 and 32, respectively, of the Constitution of India in cases

of statutory exercise of power by the President or Governor. In Dr. Yashwant Trimbak, this Court held that the power of judicial review is not

available in case of executive exercise of power by the President or the Governor. The said observation made by this Court in the said case is not

tenable in law in view of the decision of this Court in the landmark judgment of His Holiness Kesavananda Bharati Sripadagalvaru & Ors. v. State of

Kerala and Anr.[10] wherein this Court has clearly held that the power of judicial review is part of the basic structure of the Constitution of India.

50. The observation made by this Court in the case of Dr. Yashwant Trimbak to the extent that orders of sanction granted by the Governor are

outside the scope of judicial review, is untenable in law. The same is contrary not only to the law laid down by this Court referred to supra, but also the

provisions of Articles 77(2) & 166(2) of the Constitution of India. Therefore, the same has no application to the fact situation for the reason that the

President has exercised his statutory power for grant of sanction under Rule 9(2) (b)(i) of the CCS (Pension) Rules, 1972 to initiate the disciplinary

action but not the executive action against the appellant.â??

(8) Thus, where Rules are framed under Article 309 of the Constitution, the exercise of powers thereunder by the President or the Governor, as the case may be, has to be adjudged under the said Rules and not with the aid of Article 77 or Article 166 of the Constitution.

(9) Now, coming back to the Rules of 1966. Rule 2(a) of the Rules 1966 defines â??appointing authorityâ? in relation to a Government servant means:

(i) the authority empowered to make appointments to the service of which the Government servant is for the time being a member or to the grade of

the service in which the Government servant is for the time being included; or

(ii) the authority empowered to make appointments to the post which the Government servant for the time being holds; or

(iii) the authority which appointed the Government servant to such service, grade or post, as the case may be; or

(iv) where the Government servant having been permanent member of any other service or having substantively held any other permanent post, has

been in continuous employment of the Government, the authority which appointed him to that service or to any grade in the service or to that post,

whichever authority is the highest authority.â??

(10)As per Rule 2(d), â??disciplinary authorityâ? means the authority competent under these rules to impose on a Government Servant any of the penalties specified in rule 10.

(11)â??Head of the Departmentâ??, as per Rule 2(g) means:

â??'head of the department' for the purpose of exercising the powers as appointing, disciplinary, appellate or reviewing authority, means the authority,

declared to be the head of the department under the Fundamental and Supplemental Rules or the Civil Service

Regulations, as the case may be.â??

(12)Rule 2(h) defines â??Scheduleâ?? to mean the Schedule to these rules.

(13)Rule 4 of the Rules 1966 classifies civil service of the State as follows:

â??4. Classification of services. (1) The Civil Service of the State shall be classified as follows:-

(i) State Civil Services, Class I;

- (ii) State Civil Services, Class II;
- (iii) State Civil Services, Class III;
- (iv) State Civil Services, Class IV;

(2) If a Service consists of more than one grade, different grades of such service may be included in different classes.â??

(14)Part III of the Rules of 1966 deals with Appointing Authority. Rules 7 and 8 whereunder respectively stipulate:

â??7. Appointments to class I and class II services and posts.-All appointments to State Civil Services, Class I and Class II shall be made by the

State Government.

Provided that the State Government may, by a general or a special order and subject to such conditions as it may specify in such order delegate to any

other authority the power to make such appointments.

8. Appointments to other Services and Posts.- All appointments to the State Civil Services Class III and Class IV, shall be made by the authorities

specified in this behalf in the Schedule.

(15)That Rules 10 to 13 under Part V deal with the penalties, punishment of members of Class IV service, disciplinary proceedings and authority to

institute proceedings.

(16)Whereas Part VI, Section 14 to 21 lay down the procedure for imposing minor and major penalties.

(17)That Part VII which we are concerned with deals with appeals whereunder Rule 22 carves an exception. This rule categorizes the order(s)

against which no appeal would lie. It stipulates:

â??22. Orders against which no appeal lies.-

Notwithstanding anything contained in this part, no appeal shall lie against,- (i) any order made by the Governor;

(ii) any order of an interlocutory nature or ofthe nature of a step-in-aid for the final disposal of a disciplinary proceeding;

(ii-a) any order passed under rule 11;

(iii) any order passed by an inquiring authorityin the course of an inquiry under rule 14.

(iv) any order passed by the High Court as anAppellate Authority.

(18) Rule 23 of the Rules 1966 deals with the orders against which an appeal lies. It stipulates:

23. Orders against which appeal lies. Subject to the provisions of rule 22, a Government servant may prefer an appeal against all or any of the

following orders, namely:-

(i) an order imposing any of the penalties specified in rule 10 whether made by the disciplinary authority or by any appellate or reviewing authority;

(ii) an order enhancing any penalty, imposed under rule 10;

(iii) an order of suspension made or deemed to have been made under rule 9.

Explanation.- In this rule the expression "Government servant" includes a person who has ceased to be in Govt. service.

(19) In consonance with Rule 23, Rule 24 lays down as to who can be the Appellate Authority. It stipulates:

24. Appellate authorities.- (1) A Government servant including a person who has ceased to be in Government service, may prefer an appeal

against all or any of the orders specified in rule 23 to the authority specified in this behalf either in Schedule or by a general or special order of the

Governor or, where on such authority is specified: (i) Where such Government servant is or was a member of a State Civil Service Class I or Class II

or holder of a State Civil post, Class I or Class II-

(a) to the appointing authority, where the order appealed against is made by an authority subordinate to it; or

(b) to the Government, where such order is made by any other authority.

where such Government servant is or was a member of a State Civil Service Class III or Class IV or holder of a State Civil Post, Class III or Class

IV, to the authority to which the authority making the order appealed against is immediately subordinate.

(2) Notwithstanding anything contained in subrule (1),-

(i) an appeal against an order in a common proceeding held under rule 18 shall lie to the authority to which the authority functioning as the disciplinary

authority for the purpose of that proceeding is immediately subordinate.

(ii) where the person who made the order appealed against becomes by virtue of his subsequent appointment or otherwise, the appellate authority in

respect of such order, an appeal against such order shall lie to the authority to

which such person is immediately subordinate.

(20) Schedule appended with the Rules of 1966 lays down description of post, appointing authority, the authorities competent to impose penalties which it may impose (with reference to item No.5 in Rule 10) and the Appellate Authority. In respect of State Executive Services, as per schedule, the appointing authority is the State Government, authority competent to impose punishment is the State Government and the appellate authority being the Governor.

(21) A Division Bench of our High Court in *Smt. Shanti Bavaria Vs. State of M.P. & Ors*: WA.58/2017 decided on 10.10.2017 where on the issue as to whether the Governor under Rule 9(2)(b)(i) of the M.P. Civil Services (Pension) Rules, 1976 requires a personal sanction of the Governor for taking decision to initiate disciplinary proceedings, after taking into consideration the decision in *â??Rai Sahib Ram Jawaya Kapur and others Vs. The State of Punjab* [AIR 1955 SC 549]â?; *â??Samsher Singh and another Vs. State of Punjab* [(1974) 2 SCC 831]â?; and *â??Nabam Rebia and Bamang Felix Vs. Deputy Speaker, Arunachal Pradesh Legislative Assembly and others* [2016 (8) SCC 1]â?;, was pleased to hold:

â??14- Thus, there is no doubt that the Honâ??ble Governor acts on the aid and advice of his Council of Ministers except the matters which fall exclusively to be exercised by him in his discretion. The power as to whether pension of an employee should be stopped or not is not a matter which falls within his exclusive discretion. Therefore, the charge-sheet dated 11.1.2012 served upon the appellant in the name of Honâ??ble Governor cannot be said to be without jurisdiction and thus same is not suffering from any illegality.â??

(22) In the case at hand, evidently, the order of punishment is â??in the name and on behalf of the Governorâ?, and in view of the law laid down in *Brajendra Singh Yambem (supra)*, it being an order by Governor, an appeal before the Governor is excepted vide Rule 22(i) of the Rules of 1966.

(23) In view whereof, we respectfully disagree with the view taken by their Lordships of the High Court of Chhattisgarh in *G.S. Dewangan (supra)*.

Accordingly, the orders passed by the learned Single Judge in *Sanjeev Kumar Dubey (supra)* and in *Virendra Kumar Vs. State of M.P. and others*

[WP.6587/2017] do not lay down correct law. Consequently, order dated

08.03.2018 passed in WP.No.6587/2017 is set aside. The matter is relegated to learned Single Judge for the decision on merit.

(24)Appeal is finally disposed of in above terms. No costs.