

THE HIGH COURT OF MADHYA PRADESH BENCH

GWALIOR

**(DB–Hon'ble Shri Sanjay Yadav &
Hon'ble Shri Vivek Agarwal.JJ)**

Writ APPEAL NO.296 of 2016.

Smt. Asha Kushwah.

Appellant.

Versus

State of M.P. and others.

Respondents.

For Appellant	: Shri Ankur Mody, learned counsel,
For Respondents/State	: Shri Praveen Newaskar, learned Government Advocate.
For Respondent No.4.	: Shri Pratip Bisoria learned counsel.

J U D G M E N T

(Delivered on 3rd day of October, 2018)

Per Vivek Agarwal.J.

1. This writ appeal has been filed by the appellant being aggrieved by the order dated 31.8.2016 passed by learned Single Judge in W.P. No.330 of 2010, wherein, in third round of litigation, impugned order passed by the District Magistrate Morena in favour of the appellant vide Annexure P/1 has been set-aside so also the consequential resolution of the Gram Panchayat, Pacher, district Morena, passed in its meeting dated 24.8.2009 and a direction was given to Gram Panchayat to reconsider the candidature of the petitioner who is respondent no.4 in this writ appeal for appointment to the post of Panchayat Karmi/Secretary Gram Panchayat, Pacher.

2. Learned counsel for the appellant submits that an advertisement was issued on 24.5.2006 inviting applications for appointment as Panchayat Karmi. Vide order dated 18.7.2006, one Sandeep Dohare was appointed as Panchayat Karmi. On 20.6.2007, Collector Morena had

allowed the appeal preferred by present appellant and one Jovendra Singh assailing appointment order of Sandeep Dohare. Sandeep Dohare had challenged the order of Collector by filing W.P.No.3960 of 2007 which was allowed with a direction to Gram Panchayat to appoint a Panchayat Karmi by adopting correct procedure of selection instead of election through raising of hands. This order of High Court is dated 1.4.2008. Thereafter on 9.4.2008 Collector Morena had directed Sarpanch Gram Panchayat Pacher, Janpad Panchayat Sabalgarh, to appoint Smt. Asha Kushwah on the vacant post of Panchayat Karmi on the basis of merit. The communication reads as under :

“तथा प्रकरण अधीनस्थ न्यायालय को इस निर्देश के साथ लौटाया जाता है कि ग्राम पंचायत पचेर में रिक्त पंचायत कर्मी के पद पर नियुक्ति मेरिट के आधार पर श्रीमती आशा कुशवाहा अपीलार्थी की की जावे। न्यायालय निर्णय की छाया प्रति संलग्न है।

अतः माननीय अपर आयुक्त चबंल संभाग मुरैना के न्यायालय से प्रकरण क्रमांक/98/2006-2007/अपील एवं प्रकरण क्रमांक/119/2006-2007/अपील में पारित आदेश दिनांक 20.06.2007 के पालन में ग्राम पंचायत पचेर में पंचायत कर्मी के पद हेतु श्रीमती आशा कुशवाहा का नियुक्ति आदेश जारी कर ग्राम पंचायत में पंचायत कर्मी के पद पर उपस्थित करावें। तथा सचित घोषित हेतु प्रस्ताव इस कार्यालय को भेजें।”

3. On 9.4.2008, Sarpanch had issued an appointment order in favour of present appellant in pursuance to the directions of the Collector Morena dated 8.4.2008 and the directions issued by the High Court in W.P.No.3960 of 2007 (S) Annexure P/9. Vide Annexure P/10 dated 11.4.2008 Collector had conferred secretarial powers upon appellant in exercise of authority under Section 69 (1) of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam 1993 (hereinafter would be referred as “Adhiniyam of 1993”). This order of Gram Panchayat, appointing appellant was challenged by respondent No.4 by filing W.P.No.5432 of 2008 pointing out that he is more meritorious than Smt. Asha Kushwah as he had secured 65% marks in High School and being also a handicap person as against 57% marks of the present appellant in High School and therefore, he was more meritorious than the present appellant. This writ petition

was decided by the High Court vide order dated 10.7.2009 (W.P.No.5432 of 2008) Annexure P/8 and after taking into consideration the facts, it was observed as under :

“The Gram Panchayat has referred the matter to the Collector and it is the Collector who has passed the impugned appointment order in respect of respondent no.4 on the post of Panchayat Karmi. Collector, while appointing the respondent no.4 on the post of Panchayat Karmi though has mentioned that respondent no.4 is being appointed on the basis of merit but has not enclosed any merit list nor the respondents while filing the return have denied that the petitioner has received 65.08% of marks. In the present case, this court is of the considered opinion that as the matter was remitted back to the Gram Panchayat, it was the bounden duty of the Gram Panchayat to comply with the order passed by this court and therefore, as no resolution has been passed by the Gram Panchayat for appointment on the post of Panchayat Karmi, the orders passed by the respondent-Collector dated 8.4.2008 and the order dated 11.4.2008 conferring the powers as per Section 69(1) of the Adhinyam of 1993 are hereby quashed. The impugned order passed by the Commissioner dated 15.10.2008 also stands quashed.

Resultantly, this petition is disposed of with a direction to the respondent Gram Panchayat to hold a meeting for considering all the candidates who have applied pursuant to the advertisement for the post of Panchayat Karmi. The Gram Panchayat shall complete the entire process afresh positively within a period of 30 days from the date of receipt of a certified copy of this order. In case the Gram Panchayat does not comply the process of passing a fresh resolution, respondent-Collector, is directed to take appropriate action as per Panchayat Raj Avam Gram Swaraj Adhinyam of 1993 against the members of the Gram Panchayat”.

4. This order was challenged by present appellant by filing a W.A.No.308 of 2009 which was dismissed vide order dated 10.8.2009.

5. After passing of the aforesaid order by the High Court in W.P.No.5432 of 2008, the matter was again taken up by Gram Panchayat, Pacher, and vide resolution annexure P/2 dated 24.8.2009, Gram Panchayat taking into consideration the pendency of a criminal case, age of the candidate Omprakash Rawat and also the fact that he is not a local resident of Pacher, again resolved to appoint present appellant on the post of Panchayat Karmi. This order was

challenged before Collector Morena but Collector Morena upholding resolution of Gram Panchayat dated 24.8.2009 bestowed secretarial powers upon appellant in pursuance of Section 69 (1) of the Adhiniyam of 1993.

6. This order by the Collector and resolution passed by the Gram Panchayat Pacher, were subject matter of dispute before the writ court and the contention which was raised by respondent no.4 in the present appeal was that Panchayat Karmi scheme issued on 12.1.1995 Annexure P/3 does not prescribe any upper age limit for appointment as Panchayat Karmi. Similarly, qualification which is prescribed is 10th or High School Certificate Examination under 10+2 system and if the concerned Gram Panchayat wishes to provide for some additional qualification then the concerned Gram Panchayat may pass a resolution and include such additional qualification, as mandatory, in the advertisement to be issued for appointment of Panchayat Karmi. It is submitted that no such conditions were included and also he was wrongly adjudged to be not a local resident of Gram Panchayat, Pacher, whereas Clause 3.4 of the scheme only prescribes, that if possible, a candidate should be local that means that local residence was not a mandatory condition. It was also submitted that on the last date of submitting applications, applicant was not facing any criminal case and therefore, malafidely, he has been deprived of selection despite being more meritorious on other considerations which have been discussed in the resolution dated 24.8.2009 depriving him from such appointment.

7. Learned counsel for the appellant submits that learned Single Judge has taken into consideration that there is no disqualification prescribed in regard to the involvement of a candidate in criminal case, besides there being no necessity for a candidate to be a local resident of Gram Panchayat/village where appointment is to take place.

It is also submitted that learned Single Judge has taken into consideration the guidelines dated 12.9.1995 (Panchayat Karmi Yojna) which do not prescribe any upper age limit for being eligible to be appointed as Panchayat Karmi. He submits that the scheme of 2011, has now prescribed upper age limit of 35 years and looking to the fact that respondent no.4 at the time of making application was 40 years plus, therefore, he was not qualified. It is also submitted that at the time of adjudging eligibility of a candidate for appointment, his suitability too is to be adjudged and when on these twin grounds resolution of Gram Panchayat and consequential action of the Collector conferring secretarial powers on the appellant is concerned then the impugned order has failed to take into consideration the aspect of suitability inasmuch as even if two grounds, there being no prescription of higher age limit and local residence are overlooked then also criminal antecedents could not have been overlooked by learned Single Judge because it is not being mentioned as disqualification in the scheme. It is also pointed out that State Government had issued policy dated 27.1.2006 Annexure P/4 in which, selection procedure has been provided, in particular in para (iii) which reads as under :

“(iii) प्राप्त आवेदन पत्रों का परीक्षण कर वरीयता एवं श्रेष्ठता के आधार पर सूचीबद्ध किया जावे तथा ग्राम पंचायत/जनपद पंचायत के सूचना पटल पर सूची प्रदर्शित की जावे।”

8. Learned counsel for the appellant has placed reliance on the judgment of Supreme Court in the case of **The State Of Maharashtra & Anr vs B. K. Takkamore & Others as reported in AIR 1967 SC 1353** pointing out that even if Gram Panchayat had considered several factors while recommending the name of present appellant then an administrative or quasi-judicial order based on several grounds all taken together cannot be sustained if it is found that some of the grounds are non-existent or irrelevant and there is nothing to show that the authority

would have passed the order on the basis of other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant can be sustained if the court is satisfied that the authority had passed the order on the basis of other relevant and existing grounds and the exclusion of the irrelevant or non-existent ground could not have affected the ultimate opinion or decision of the authority.

9. Learned counsel for respondent No.4 on the other hand, submits that respondent no.4 has been acquitted of the criminal charge and it has come on record that respondent No.5 Sarpanch at the relevant time was hands in glove with the present appellant and therefore, acting malafidely sabotaged the candidature of respondent No.4 on one or the other ground. It is submitted that only criteria for consideration was as to whether on the last cut off date of filling up of the application form whether respondent no.4 was eligible and whether on such date, a criminal case against him was pending and if yes, can it be treated as disqualification or not. It is pointed out that learned Single Judge has rightly held that since there is no mention of any disqualification in regard to having criminal antecedents in the guidelines Annexure P/3 and advertisement Annexure P/5 and they did not prescribe criminal antecedents as any disqualification for appointment to the post of Panchayat Karmi, therefore, merely on these grounds, petitioner could not have been denied appointment as Panchayat Karmi. Respondent No.4 has placed reliance on the judgment of Supreme Court in the case of **M.V.Nair Vs. Union of India** as reported in **(1993) 2 SCC 429**, in which it has been held that 'suitability' and 'eligibility' has to be considered with reference to the last date for receiving applications unless the date is otherwise specified in the notification calling for the applications. It is also pointed out that in case of **Avtar**

Singh Vs. Union of India as reported in **(2016) 8 SCC 471**, the law has been laid down in para 30 (4) (a) that in a case, trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which, if disclosed, would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

10. The issue which is to be decided in this case is as to whether the four grounds which have been taken by Gram Panchayat while passing its resolution namely over age of the petitioner, being not a local resident, criminal antecedents of respondent No.4 and whether age limit prescribed in 2011 Recruitment Rule will have application to the case of selection of the petitioner, has been rightly proceeded resulting in quashment of the impugned orders and direction to respondent No.3 to reconsider the candidature of the petitioner for appointment to the post of Panchayat Karmi.

11. After hearing parties and going through the material on record, this court is of the opinion that three findings in regard to local residence, over age and non applicability of 2011 Rules, having no retrospective application, does not call for any interference. This leaves aspect of criminal antecedents, as the only bone of contention.

12. There are two aspects to a recruitment; one is eligibility and other is suitability. So far as eligibility is concerned, it is to be adjudged at the last date of filling up of the form for recruitment. However, when it comes to suitability, it is always open to the appointing authority that apart from being qualified, a candidate must be suitable for recruitment. This suitability is to be adjudged according to some norms. In case of **K.George Vs. State of Kerala AIR 1964 Kerala 238** a Division Bench of the Kerala High Court held that the fact that a candidate was communist,

was a relevant consideration for excluding him from appointment without violating Article 16 (1).

13. In case of **N.P.Mathur Vs. State of Bihar AIR 1972 Patna AIR 1972 Patna 93 (Full Bench)**, it has been held that it is not necessary that the selection rules must use the word 'suitable' or 'suitability' as a criteria for appointment to certain posts.

14. In case of **Ramanand Sadanand Gairola Vs. Union of India AIR 1969 Allahabad 370 (DB)**, it has been held that the occurrence of the word 'adjudged' 'suitable' in recruitment rules do not indicate that the Selection Board must act quasi-judicially and must give a hearing to every candidate before he was rejected since the word 'adjudged' does not mean adoption of a judicial process.

15. In case of **Pervez Qadir Vs. Union of India as reported in AIR 1975 SC 446**, the Supreme Court has held that the word 'suitability' itself is correlated with the object of recruitment, namely, that a person has to be considered suitable for appointment to a superior service which itself furnishes the norm that he is considered suitable having regard to his service. In fact, pendency of a criminal case could not have been brushed aside lightly especially when in whole of the petition, the petitioner has failed to make out any allegation of malafide against respondent No.5 and to substantiate it too. In fact, there is no suggestion even to the effect that such malafide exercise was made at the behest of the present appellant. Requirement of malafide as to how they are required to be proved, have not been fulfilled by the respondent No.4 in his writ petition.

16. So far as the law laid down in **M.V.Nair (Supra)** is concerned, the context was different. Controversy was that a request was sent seeking services of a suitable officer on transfer on deputation basis on the post of Director, National Research Laboratory for Conservation of Cultural

Property (N.R.L.C). Six names were received including appellant, M.V.Nair and respondent no.3 in the appeal, Dr. I.K.Bhatnagar but only two persons were found eligible by the Union Public Service Commission namely Dr. Nair and another person Dr.Tandon. As service records of Dr.Tandon were not sent, he was not called for interview and therefore, only Dr.Nair remained in the field. He was interviewed and selected. His selection was questioned by Dr.Bhatnagar by way of an original application before Central Administrative Tribunal Principal Bench New Delhi seeking relief to the effect that a direction be issued to the respondents to declare him entitled to be like Dr.Nair in the requirement of five years' service as Project Officer so as to make him eligible to be called for interview to the post of Director, N.R.L.C. In the relevant Recruitment Rules, eligibility criteria for appointment by promotion/transfer on deputation to the post of Director was amongst other, five years services in the posts in the scale of Rs.1500-2000 or equivalent. However, the letter dated 26.6.1989 calling for applications from the eligible persons mentions the pay scale as 3700-5000 revised or equivalent instead of Rs.1500-2000 or equivalent. This pay scale of Rs.1500-2000 was revised by the Central Government with effect from 1.1.1986 to Rs.3700-5000 whereas, State Government where Dr.Nair was functioning in the scale of Rs.1500-2065 with effect from 1975 was revised to 2070-3550 on 1.11.1989 with effect from 1.7.1988. In this manner, the controversy erupted as to whether Dr.Nair's pay scale of Rs.1500-2065 being not revised to Rs.3700-5000 will be eligible for consideration. In this background, the Supreme Court quashed the orders of CAT and held that since the pay scale of 1500-2000 has been prescribed in the rules and Mr.Nair was working in this pay scale prior to pay revision since 1975, he was eligible and there was no ground to pray equivalence on the basis of revised pay

scale instead to the prescription of rules. This was the context in which, Supreme Court talked of suitability and eligibility. But in the present case, the facts are different.

17. So far as case of **Avatar Singh (Supra)** is concerned, Full Bench of this court in case of **Ashutosh Pawar Vs. High Court of M.P. And others reported as 2018 (2) MPLJ 419** has referred to the theory of separation of powers first propounded by the French thinker Montesquieu (in his book 'The Spirit of Laws') and a Full Bench Decision of this Court in Writ Appeal No.581/2017 in the case of **Nitin Pathak Vs. State of M.P. and Others** so to answer the question of extent of exercise of power of judicial review, the Full Bench, held as under :

"32.In respect of the second question, this Court does not and should not act as Court of Appeal in the matter of opinion of experts in academic matters as the power of judicial review is concerned, not with the decision, but with the decision-making process. The Court should not under the guise of preventing the abuse of power be itself guilty of usurping power."

It is settled principal of law that an order of appointment is subject to judicial review on the ground of illegality, non-application of mind and malafide. As has been observed above, so far as malafide is concerned, it has not been proved and there are no sufficient pleadings to prove malafide against respondent No.5. There is no illegality or non-application of mind while adjudging the suitability of a candidate especially when Panchayat Karmi is to be conferred with the powers of Panchayat Secretary and looking to the nature of the duties and the trust imposed in a Panchayat Secretary to be custodian of the properties of Gram Panchayat so also, the works to be carried out by the Gram Panchayat, if suitability of the respondent no.4 has not been found to be proper by the assessing authority and reasons have been assigned for the same, then that cannot be a ground for judicial review. Thus, on twin grounds namely, Gram Panchayat was entitled to adjudge not only

the eligibility but also the suitability of a candidate and since a criminal case was pending on the date of such consideration, respondent no.4 had become ineligible and also on the aspect of limits of judicial review, as enunciated above, this Court is of the opinion that the impugned order passed by learned Single Judge deserves to be overruled on the single ground that though institution of a criminal case is prescribed as disqualification under the scheme of appointment, yet the appointing authority was entitled to adjudge suitability of a candidate on the touchstone of criminal antecedents as this court is of the opinion that the eligibility is to be seen on the cut off date whereas, suitability can be adjudged even on the date of consideration of the case for appointment.

18. Even otherwise, the judgment rendered by the Supreme Court in the case of **Pervez Qadri (Supra)** is not applicable in the facts of the present case as in this case the issue involved is of 'suitability' and not 'eligibility' on the date of consideration.

19. Admittedly, there was a criminal case pending on the date of adjudging suitability, the appeal deserves to be allowed. Impugned order is set-aside. Consequential action to follow.

20. Parties to bear their own costs.

(Sanjay Yadav)
Judge

(Vivek Agarwal)
Judge