The High Court of Madhya Pradesh:

Bench at Indore

Case Number	**W.P.No. 19104/2020**
Parties Name	Smt. Shashibala Chauhan W/o Mr. Anand Chauhan Vs. State of M.P. & Ors.
Case Number	**W.P.No. 3365/2014**
Parties Name	Smt. Pushpa Dubey W/o Shri Dinesh Dubey Vs. State of M.P. & Ors.
Date of Order	07/10/21
Bench	**Division Bench:** Justice Sujoy Paul Justice Anil Verma
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	YES
Name of counsel for parties	Shri Sumeet Samvatsar, learned counsel for the petitioner in WP No.19104/2020. Shri VK Patwari, learned counsel for the petitioner in WP No.3365/2014. Shri Pushyamitra Bhargava, learned Additional Advocate General for the respondents/State.
Law Laid Down	***Sub-Rule (1-e), (1-j) of Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu) Sanshodhan Adhiniyam, 2011 / Fundamental Rules – Constitutionality of** – By impugned provisions, the Govt. raised the age of superannuation of every govt. nurse from 62 to 65 years but deprived the staff nurses working in Ayush Department. The Court held that there is no intelligible differentia or reasonable classification to deprive the left out group of staff nurse of Ayush Department. Keeping in view their interchangeability, same nature of duties and same age of superannuation before issuance of Impugned Adhiniyam offending provisions are declared as *ultra vires*. ***Constitution of India – Article 14 of the Constitution –** Article 14 permits reasonable classification for the purpose of legislation.

	However, it forbids class legislation or a legislation which divides a homogeneous class and creates a class within the class. In absence of any intelligible differentia and objects sought to be achieved in depriving the nurses of Ayush Department, the impugned provisions are held to be *ultra vires*. ***Arrears of salary and Consequential Benefits –** The petitioners were all along willing to perform their duties till attaining the age of 65 years like their counter parts of other department but were deprived to do so for the reasons solely attributable to the Department. They are entitled to continue up to 65 years of age with all consequential benefits. ***Discrimination –** The staff nurses working in Ayush Department were transferred on several occasions to Allopathic Hospitals and they performed their duties there even as a Covid Front-line Worker. The age of retirement of both the sets of nurses working in the govt. hospitals was 62 years which was disturbed by issuance of impugned notification whereby except nurses of Ayush Department, the age of superannuation of other nurses was raised. There was no change in nature of duties and responsibilities of govt. nurses in the meantime. Hence, the action was held to be discriminatory in nature.
Significant Paragraph Numbers	**19-30**

O R D E R

(Passed on 07th October, 2021)

Regard being had to the similitude of the questions involved, on the joint request of the parties, the matters were analogously heard and decided by this common order.

WP No.19104/2020:-

2) The petitioner, a Staff Nurse, has challenged the constitutionality of explanations Fundamental Rule 56 to proviso to Sub-Rule (1-e), (1-j) of Madhya Pradesh Shaskiya Sevak

(Adhivarshiki-Ayu) Sanshodhan Adhiniyam, 2011 (Impugned Adhiniyam), whereby Fundamental Rules are amended and while extending the age of superannuation of every government nurse, explanations are appended which deprives the petitioner, a Staff Nurse working in the Ayush Department of the government.

3) Briefly stated, the relevant facts are that the petitioner underwent a mandatory 18 months training in nursing men, women and children and in Midwifery and in Community Health Nursing in a recognized institute and was declared qualified to practice vide certificate dated 10.11.1983.

4) The Competent Authority by order dated 03rd February 1999 appointed the petitioner as Staff Nurse at Govt. Ayurvedic College, Gwalior. The petitioner was transferred by order dated 31.05.2000 (Annexure P/4) to Mahatma Gandhi Hospital, Dewas which is an allopathic hospital. This fact is pleaded by petitioner to demonstrate that as and when it was required, the petitioner's services were taken as Staff Nurse in Ayurvedic as well as in Allopathic Hospitals. The petitioner is professionally and educationally competent to discharge her duties as Staff Nurse in both the kinds of hospitals.

5) The Govt. of Madhya Pradesh promulgated Impugned Adhiniyam vide Gazette Notification dated 06.05.2011 whereby retirement age of government nurses was raised from an existing 62 years to 65 years. The Sub-Rule (1-e) and (1-j) to F.R. 56 are framed in such a manner which deprives the petitioner to serve the department till 65 years of age.

WP No.3365/2014:-

6) The petitioner Smt. Pushpa Dubey was appointed by order of Joint Director, *Public Health Services,* Bhopal on 05.05.1977 (Annexure P/1). She was transferred on various occasions which is evident from transfer order (Annexure P/2). The petitioner although appointed in the Public Health Department was subsequently required to work as a Staff nurse in Ayush department. For this reason alone,

the petitioner was not given the benefit of age of superannuation up to 65 years.

7) Shri Sumeet Samvatsar, learned counsel for the petitioner submits that before issuance of Impugned Adhiniyam, the age of retirement of petitioner i.e. Staff Nurses working in Ayush Department and their counter parts working in other Govt. departments was same i.e. 62 years. There is no change in the service conditions of the Nurses of all the departments and, therefore, the Adhiniyam is discriminatory and arbitrary to the extent it deprives the petitioner to serve up to 65 years of age.

8) The petitioner was a Covid Frontline Worker during the pandemic era and as per the Integrated Financial Management Information System of Govt. of Madhya Pradesh, the date of superannuation of petitioner was shown w.e.f. 31.12.2023. This document is filed as Annexure P/8. Thus, petitioner was under an impression that she will continue in employment till attaining the age of 65 years.

9) Criticizing the offending provisions of Adhiniyam/F.R. 56 as aforesaid, Shri Sumeet Samvatsar submits that there is no justification in not extending the same benefit of age of retirement to the Staff Nurses working in Ayush Department. The impugned Notification is violative of Article 14 of the Constitution and is discriminatory in nature. Reliance is placed on recent judgment of Supreme Court passed in ***Civil Appeal No.4578/2021 (North Delhi Municipal Corporation vs. Dr. Ram Naresh Sharma & Ors.)***. It is contended that in the said case, the Department raised the age of superannuation for allopathic doctors but gave a discriminatory treatment to the AYUSH doctors. This provision of discrimination was assailed by AYUSH doctors before the Central Administrative Tribunal (Tribunal) which set aside the said provision and directed that AYUSH Doctors are entitled for parity in the matter of age of superannuation with allopathic doctors. This order of Tribunal was unsuccessfully challenged before the High Court and the Supreme Court.

10) Shri Sumeet Samvatsar, learned counsel for the petitioner has taken pains to contend that case of present petitioner is on a better footing than that of ***Dr. Ram Naresh Sharma*** (supra) because as demonstrated above, the petitioner's services were periodically taken by the respondents in Allopathic hospitals also. This shows that the nature of job performed by Nurse in both the hospitals is similar and interchangeable. In this backdrop, it is not proper to give a discriminatory treatment to the petitioner.

11) The next reliance is placed by petitioner on a Full Bench Judgment of this Court in ***State of M.P. vs. Yugal Kishore Sharma (2018(2) M.P.L.J. 450)***. It is submitted that as per this judgment, the classification mentioned in the Recruitment Rule is not decisive in nature. The Full Bench gave wide meaning to the expression 'Teacher' and was not impressed with the contention of Department that as per the Recruitment Rules 'Teachers' and 'Instructors' are differently defined trained and recruited and hence Instructors can be retired on different age.

12) Shri Pushyamitra Bhargava, learned AAG opposed the contentions of petitioner and by placing reliance on ***(2020) 12 SCC 506 Ramkrishna Grover vs. Union of India*** and ***M.P. Vidyut Karmchari (Federation) Jabalpur vs. Madhya Pradesh Electricity Board*** [(2004) 9 SCC 755] urged that the fixing the age of superannuation is within the province of the employer. It is legislature's primary function to make laws. The employees have no right to continue up to 65 years of age.

13) The judgment of Supreme Court in ***Chiranjeet Lal Choudhary vs. Union of India (AIR 1951 SC 41)*** is pressed into service to contend that if there is a classification, the Court will not held it invalid merely because the law might have even extended to other persons, who in some respect might resembled the class for which the law was made for. Legislature is the best judge of the need of particular class and scope of interference by Courts is extremely limited.

14) To support the classification so made by the impugned notification, it is averred in the reply that petitioner is working in Ayush Department and is governed by the *M.P. Public Health (Indian Systems of Medicine and Homeopathy) Class-III Ministerial Services Recruitment Rules, 1987 (1987 Rules)* whereas the Staff Nurses, who have been given the benefit of extension of superannuation age up to 65 years are governed by different set of recruitment rules namely, *The Madhya Pradesh Public Health and Family Welfare Department (Directorate of Health Services) Class III Nursing Service Recruitment Rules 1989 (1989 Rules)*. By preparing a comparative table, it is demonstrated that Nurses recruited under the Rules of 1989 are much more qualified than the Nurses appointed under Rules of 1987. Thus, there is a well-defined classification which does not hit Article 14 of the Constitution.

15) Parties confined their arguments to the extent indicated above.

16) We have bestowed our anxious consideration on rival contentions and perused the record.

17) Before dealing with rival contentions, it is apposite to quote the relevant provision of the Impugned Adhiniyam. It reads as under:-

> "(1-e) (a) Subject to the provisions of sub-rule (2), **every Government nurse** other than a Government nurse mentioned in sub-rule (1-j) shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty five years:
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> Provided that a Government nurse, other than a Government nurse mentioned in sub-rule (1-j), whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty five years.
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> Explanation.- For the purpose of this clause a **"Government nurse" means a Government Servant by whatever designation called,** appointed to a post mentioned under Group 'C' Nursing Services in Schedule-1 of the Madhya Pradesh Public Health and Family Welfare (Gazetted) Services Recruitment Rules, 2007 and under Schedule-I of the Madhya Pradesh Public Health and Family Welfare Department (Directorate of

Health Services) Class-III Nursing Service Recruitment Rules, 1989, for the purpose of nursing in accordance with the recruitment rules applicable to such appointment provided he holds a lien on a nursing post of an institution under the Public Health and Family Welfare Department.

(1-j) Subject to the provisions of sub-rule (2), **every Government nurse** other than a Government nurse mentioned in sub-rule (1-e) shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty five years:

Provided that a Government nurse other than a Government nurse mentioned in sub-rule (1-e), whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty five years.

Explanation.- For the purpose of this clause, a **"Government nurse" means a Government Servant by whatever designation called, appointed to a post mentioned under College of Nursing**, Indore in Schedule-1 of the Madhya Pradesh Medical Education (Gazetted) Services Recruitment Rules, 1987 and under Schedule-I of the Madhya Pradesh Public Health and Family Welfare Department (Directorate of Health Services) Class-III Nursing Service Recruitment Rules, 1989, for the purpose of nursing in accordance with the recruitment rules applicable to such appointment, **provided he holds a lien on a nursing post of an institution under the Medical Education Department.**"

(Emphasis Supplied)

18) The comparative chart prepared by the respondents is extracted from their reply on the strength of which classification has been justified:-

The Madhya Pradesh Public Health (Indian Systems of Medicine and Homeopathy) Class III Ministerial Services Recruitment Rules, 1987.	**Madhya Pradesh Public Health and Family Welfare Department (Directorate of Health Services) Class III Nursing Service Recruitment Rules 1989.**
BSc or Registered Nurse Mid Wife holding a Certificate from	10+2 in Physics, Chemistry Maths. BSc Graduate Nursing

Nurse Counsel and 2 years Experience.	Degree/Diploma Nursing and registration in RNRM (registered Nurse and Registered Mid Wife) from Madhya Pradesh Nursing Council.

19) The constitution bench in ***AIR 1955 SC 191 (Budhan Choudhry & Ors. Vs. State of Bihar*** dealt with scope and effect of Article 14 of the Constitution. The *litmus test* laid down by the Constitution Bench is as under:-

> "**While Art. 14 forbids class legislation,** it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, **(i)** that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and **(ii)** that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure."
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> **(Emphasis Supplied)**

The *ratio decidendi* of ***Budhan Choudhry*** has been consistently followed in ***Hiralal P. Harsora v. Kusum Narottamdas Harsora*** (2016) 10 SCC 165, ***Karnataka Live Band Restaurants Assn. vs. State of Karnataka*** (2018) 4 SCC 372, ***Lok Prahari vs. State of U.P.*** (2018) 6 SCC 1, ***CRPF vs. Janardan Singh*** (2018) 7 SCC 656, ***Navtej Singh Johar vs. Union of India*** (2018) 10 SCC 1 and ***Rana Nahid vs. Sahidul Haq Chisti*** (2020) 7 SCC 657.

20) Sub Rules 1(e) and 1(j) provides that every government nurse other than government nurse mentioned in Sub-Rule (1-j) and (1-e) shall retire from service on attaining the age of 65 years. The explanation below Rule (1-e) makes it clear that although definition of

government nurse is very wide because of use of expression *'government nurse means a government servant by whatever designation called'*, the broadness of this expression is sought to be curtailed by mentioning that such government nurse must have been appointed to a post under the Rules of 2007 or 1989. In addition, such nurse must be holding a lien on a nursing post in an institution under the Public Health and Family Welfare Department.

21) Similarly, explanation to Rule (1-j) provides that such nurse must have been appointed to a post as per M.P. Medical Education (Gazetted) Service Recruitment Rules 1987 and Rules of 1989 provided he/she holds a lien on a nursing post of an institution under the Medical Education Department.

22) A combined reading of both the explanations appended to Rule (1-e) and (1-j) shows that the government nurses appointed under the Rules of 1989, 2007 and under MP Medical Education (Gazetted Service Recruitment) Rules 1987 were given the benefit of extension of age of superannuation. However, the petitioners appointed under the Rules of 1987 aforesaid who did not have lien on a nursing post in any institution under the Public Health and Family Welfare Department or in Medical Education Department are put to a comparative disadvantageous position in the matter of raising the age of superannuation. The petitioners are working under Directorate AYUSH of Govt. of M.P.

23) During the course of hearing, on a specific query from the bench, learned counsel for both the parties fairly admitted that before the Impugned Adhiniyam came into being, the petitioners and their counter parts working in other departments including Medical Education and Family Welfare Department were having same age of retirement i.e. 62 years. It is also not pointed out by counsel for the State that the service conditions of petitioners or their counter parts were altered at any subsequent stage. The specific pleadings and proof given by the petitioners that their services were utilized by respondents in Allopathic Medical Colleges was also not denied by

the government. In this factual backdrop, the question is whether Impugned Notification by which age of superannuation was not raised for staff nurses of Ayush Department is *ultra vires* or not.

24) Article 14 permits legislation which is founded upon reasonable classification. The twin test to pass the test of permissible classification are that classification must be based on an intelligible differentia which distinguishes a category from the other left out category and such differentia has a rational nexus with the object sought to be achieved by statute in question.

25) The stand of respondents shows that they need the services of nurses up to the age of 65 years, therefore, age of superannuation of every government nurse is raised, who were appointed as per the Rules mentioned in both the above explanations and whose lien is maintained in Public Health and Family Welfare Department and in Medical Education Department. The staff nurse of Ayush department is put to a comparatively disadvantageous position on the basis of educational qualification mentioned in their Rules which it is evident from the comparative chart reproduced hereinabove. The pivotal question is whether difference of qualification for the purpose of recruitment can be a basis to deprive the staff nurses of Ayush Department. Moreso, when despite this difference of educational qualification, prior to 06th May, 2011, their age of superannuation was same i.e. 62 years. That difference of educational qualification at the time of recruitment of Staff Nurses pales into insignificance because the nature of work performed by nurses of all department is same. For this reason, petitioners' services were utilized in allopathic hospitals also. Thus, the educational qualification or birth mark relating thereto in our opinion, cannot create any intelligible differentia which really distinguishes the nurses of Ayush department with their counter parts of other departments. There exists neither any intelligible differentia nor any objects sought to be achieved by keeping the petitioners at the bay and depriving them from same age of superannuation. We find support in our view from the Full Bench judgment in the case of

Yugal Kishore (supra). One of the questions posed before the Full Bench was as under:-

> "(1) Whether the writ-petitioners who are not designated and classified in the cadre of a 'teacher' under relevant Recruitment Rules but, are engaged in teaching or imparting training, can be held to be a 'teacher' for the purpose of the age of superannuation under Fundamental Rule 56?"

26) Pertinently, in the said case, the definition of 'teacher' was very wide and the persons, who were 'instructors' under the Rules were claiming that they should be treated as 'teachers' for the purpose of age of retirement. This Court opined thus:-

> "41. In view of the above, we hold that classification in the recruitment Rules is not determinative of the fact: whether a Government servant is a Teacher or not – as the meaning assigned to Teacher in the State Act has to be preferred over the classification of Teacher in the recruitment Rules. The Amending Act has given wide meaning to the expression "Teacher", which includes the "Teachers irrespective of the designation and appointed in a Government Technical and Medical institutions". Therefore, the "Instructors" engaged for imparting training to women in the Tailoring Center work under the Department of Women and Child Development are entitled to extension in age up to the age of 62 years being teachers as mentioned in the amending Act."
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> (Emphasis Supplied)

27) The classification in the Recruitment Rules was held to be not decisive in nature. Indeed, it was held that the relevant portion of the fundamental rules is a beneficient provision and it should be read in a manner to include instructors engaged for imparting training to women. The Apex Court in its recent judgment in ***Dr. Ram Naresh Sharma*** (supra) poignantly held as under:-

> "22. The common contention of the appellants before us is that classification of AYUSH doctors and doctors under CHS in different categories is reasonable and permissible in law. This however does not appeal to us and we are inclined to agree with the findings of the Tribunal and the Delhi High Court that the classification is discriminatory and unreasonable since doctors under both segments are **performing the same function of**

> **treating and healing their patients. The only difference is that AYUSH doctors are using indigenous systems of medicine like Ayurveda, Unani, etc. and CHS doctors are using Allopathy for tending to their patients. In our understanding, the mode of treatment by itself under the prevalent scheme of things, does not qualify as an intelligible differentia.** Therefore, such unreasonable classification and discrimination based on it would surely be inconsistent with Article 14 of the Constitution."
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> (Emphasis Supplied)

28) In view of these judgments, we are of the considered opinion that the impugned provisions of the Adhiniyam are arbitrary and discriminatory in nature. For the reasons stated above, we are unable to persuade ourselves that employer has any unfettered right to raise the age of superannuation of one set of employees by leaving aside another despite the fact that there exists no reasonable classification which permits the employer to discriminate the left out group. No doubt it is the prerogative of the employer to decide the age of superannuation but while doing so, the employer cannot be permitted to undertake said exercise in an arbitrary and discriminatory manner. The step motherly treatment cannot be given to similarly situated nurses of Ayush Department. Putting it differently, the employer cannot be permitted to divide a homogenous class and create a class within the class for no valid reasons. It cannot be disputed that nurses working in Ayush Department and other departments/hospitals perform similar nature of duties. Merely because the nature of treatment in allopathic and Ayush Department are different, the staff nurses of Ayush Department cannot be treated to be a separate class. The classification so made by impugned notification cannot sustain judicial scrutiny in view of *litmus test* laid down in ***Budhan Choudhry*** (supra). The *ratio decidendi* of judgment of ***Dr. Ram Naresh Sharma*** (supra) also does not approve such classification. Hence it cannot be given stamp of approval by this Court.

29) The matter may be viewed from another angle. In ***1991 Supp (2) SCC 565 (The Employees of Tannery and Footwear Corporation***

of India Ltd. & Anr. Vs. Union of India & Ors.), the employees of one Corporation of Govt. of India claimed parity in the matter of pay scale with their counter parts working in another Corporation of Govt. of India. They claimed that the parity between both the sets of employees working in both the departments was continuously maintained till such time pay scale of similarly situated employees of one Corporation was raised. We are not oblivious of the fact and legal position and test for the purpose of applying principle of equal pay for equal work and age of retirement are different. Yet it is noteworthy that Apex Court opined that both the Corporations are two distinct legal entities, but they are governed by the same Constitution. After 1970, there was no change in duties and functions of persons holding corresponding posts in two organizations. Thus, revising pay scale in one Corporation and depriving the employees of other will be arbitrary and violative of directives contained in part IV of the constitution. In the instant case also, it is not the case of the department that service conditions/job nomenclature of staff nurses of Ayush Department or their counter parts have undergone a change after their appointments and, therefore, for the purpose of analogy, the aforesaid judgments can be relied upon and it can be safely held that staff nurses of Ayush Department are similarly situated qua the staff nurses of other departments. There is no justification at all to deprive the staff nurses of Ayush Department from the age of superannuation.

30) In view of foregoing analysis, we declare the said explanation to provisio to Sub-Rule (1-e) and (1-j) of Notification dated 06.05.2011 as *ultra vires* and strike down the same to the extent it deprives the nurses of Ayush Department from getting the benefit of increased age of retirement up to 65 years. Since petitioners were all along willing to perform their duties and were deprived to do so up to 65 years of age for the reasons solely attributable to the respondents, the petitioners shall be continued in employment till 65 years of age. This order will reap all consequential benefits for the petitioners as if they were not retired at the age of 62 years.

31) This order be complied within 60 days from the date of production of copy of this order.

The petitions are **allowed**.

(Sujoy Paul)
Judge

(Anil Verma)
Judge

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