

IN THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE RAVI MALIMATH,

CHIEF JUSTICE

&

HON'BLE SHRI JUSTICE PURUSHAINDRA KUMAR KAURAV

WRIT PETITION No. 1566 of 2004

Between:-

- 1. R.K.SHRIVASTAVA, AGED ABOUT 58 YEARS, SO/O LATE SHRI R.D.SHRIVASTAVA, PRESIDENT, VIDHI ANUWADAK SANGH, G-38/1, SOUTH T.T.NAGAR, BHOPAL.**
- 2. KU.KRANTI JOHARI, AGED ABOUT 57 YEARS, D/O DR.J.P.JOHARI, G-3/119, 11000 QUARTERS, ARERA COLONY, BHOPAL.**
- 3. B.P.GEROLA, AGED ABOUT 57 YEARS, S/O SHRI L.N.GEROLA, 56 HIG BAGH MUGALIYA, BHOPAL.**

.....PETITIONERS

(BY MS. MALTI DADARIYA, ADVOCATE FOR PETITIONER NO.2, AND NOT PRESSED FOR PETITIONER NO.1 AND 3)

AND

- 1. THE PRINCIPAL SECRETARY, GOVERNMENT OF MADHYA PRADESH DEPARTMENT OF LAW, VINDHYACHAL BHAWAN, BHOPAL.**
- 2. SHRI V.K.JAIN, UNDER SECRETARY LALW, GOVERNMENT OF MADHYA PRADESH, DEPARTMENT OF LAW, VINDHYACHAL BHAWAN, BHOPAL.**

3. **SHRI MAHENDRA JAIN (UNDER SECRETARY) SECTION OFFICER, O/O DY.ADVOCATE GENERAL, MADHYA PRADESH, GWALIOR.**

....RESPONDENTS

(BY SHRI ASHISH ANAND BERNARD, DEPUTY ADVOCATE GENERAL FOR RESPONDENTS/STATE)

Reserved on : 04.02.2022

Passed on : 09.02.2022

Per : Justice Purushaindra Kumar Kaurav :

ORDER

This petition under Article 226 and 227 of the Constitution, has been preferred seeking issuance of writ of certiorari quashing the amendment dated 28.02.2004 made in the Madhya Pradesh State Legal Service Rules, 1994 (hereinafter referred to as the "Rules of 1994) being *ultra vires* to the Constitution of India. The petitioners have also prayed for declaring the promotion of respondents No.2 and 3 as illegal and arbitrary with the further direction to command to respondent No.1 to convene a fresh DPC and to declare petitioner No.2 and 3 to be eligible for promotion to the post of Under Secretary w.e.f. 02.01.2004.

2. At the outset, learned counsel appearing for the petitioners submits that the present petition is only confined to petitioner No.2 and the same is being not pressed for the petitioners No.1 and 3. The said statement is taken on record.

3. The brief facts necessary for adjudication of the present petition are that petitioner started her career as Translator in the year 1978 and she was promoted on the post of Assistant Director in the year 1997. The service of the petitioner is governed by the Rules of 1994 which have been framed in exercise of powers conferred under Article 309 of the Constitution of India. The next promotional post from the post of Assistant Director is Under Secretary (Translation and Under Secretary Hindi Vidhai Samiti). There were two posts of Under Secretary (Translation and Under Secretary Hindi Vidhai Samiti). The petitioner further stated that the next promotional post from the post of Section Officer is also Assistant Legal Remembrancer/ Under Secretary/ Draftsmen and Under Secretary. There were six posts of Under Secretary for promotion of Section Officers, therefore, it is understood that there are two categories of Under Secretaries; one arising from Assistant Director and the other from Section Officer.

4. The crux of the arguments of the petitioner is that in accordance with the Rules of 1994 against each category of Under Secretary there were $6+2=8$ posts. The petitioner, however, submits that by the impugned amendment dated 28.02.2004, one post of Under Secretary from each category has been reduced which would mean that the posts of Under Secretary, Legal Remembrancer and Draftsmen are reduced from 6 to 5 and the posts of Under Secretary (Translation)/ Under Secretary Hindi Vidhai Samiti were reduced from 2 to 1. The petitioner also stated that the said amendment cannot be made applicable with retrospective effect from 01.11.2000 and such retrospective application of the Rules, is arbitrary, illegal and in violation of Article 14 of the Constitution. Petitioner further states that her case was crystallized for

promotion on the date of DPC i.e 07.10.2003 for the post of Under Secretary when two Under Secretaries of category to which she was to be promoted, namely, Shri K.S.Dubey and Shri J.P.Vyas were promoted on the post of Deputy Secretary. It is stated that against these two posts, which had fallen vacant, the petitioner No.2 should have been considered. However, the cases of Section Officers were considered and vide order dated 02.01.2004, Shri Hemant Patkar and Mahendra Jain were promoted to the post of Under Secretary.

5. Respondents have filed their reply and have stated that before coming into force the Madhya Pradesh Reorganization Act, 2000 w.e.f 01.11.2000, there were 8 posts of Under Secretary in the ratio of 6:2 as per Schedule-1 Part-2 of the Rules of 1994 and after coming into force of the Madhya Pradesh Reorganization Act, when the State of Chhatisgarh was constituted, two posts of Under Secretary were allotted to the State of Chhattisgarh. Thus, the remaining six posts of Under Secretary were divided in the ratio of 5:1. On account of reduction of posts from 8 to 6, it became imperative to make necessary amendment in the Rules of 1994 and accordingly on 28.02.2004, the impugned amendment has been incorporated which has been given effect to from the date of operation of the State Reorganization Act i.e. 01.11.2000. It has also been submitted that the Review DPC to the earlier DPC dated 07.10.2003 was conducted on 01.06.2004 and on the date of review DPC, only one post of Under Secretary (Translation) was available and, therefore, the DPC has considered the candidature of one Shri B.P. Gerola and of the petitioner. On the basis of criteria of the review DPC, Shri B.P. Gerola secured 16 marks against 13 marks

obtained by the petitioner. Hence, Shri B.P. Gerola was promoted to the post of Under Secretary and the petitioner is not entitled for any relief.

6. The respondents have relied upon the decision of Hon'ble Supreme Court in the matter of *CMD/Chairman, B.S.N.L. and others Vs. Mishri Lal and others*¹ and submit that the State is empowered to frame the Rules under the proviso to Article 309 of the Constitution and making them operational with retrospective effect.

7. We have heard the learned counsel for the parties and perused the record.

8. So far the challenge to the amendment in the Rules of 1994 resulting into reduction of one post of Under Secretary (Translation) dated 28.02.2004 w.e.f. 01.11.2000 is concerned, the same does not have any substance and, therefore, deserves to be rejected. The source of power of framing and amending the Rules originate from Article 309 of the Constitution of India. Entry 41, List II of Seventh Schedule of the constitution confers legislative power on the state with respect to "State public services". The Hon'ble Supreme Court in *Mishri Lal*¹ has held that the Rules made under the proviso to Article 309 of the Constitution are constitutional Rules and not like the Rules made under the statute. A legislative act can destroy existing rights (unless it is constitutional right). The petitioner has not been able to satisfy as to on which ground the impugned amendment dated 28.02.2004 in the Rules of 1994 should be declared as *ultra vires* except to state that the same has been made operational w.e.f. 01.11.2000. However, on examination of facts, we find there exists a reasonable nexus between the concerned Rule and its restrospectivity which relates to the date of

¹ (2011) 14 SCC 739.

coming into operation of the M.P. Reorganization Act, by which date the posts of Under Secretary of the State of M.P. were reduced on account of the same being allocated to the newly created State of Chhattisgarh.

9. It is settled proposition of law that the constitutional validity of any statute can be challenged only on the ground of lack of legislative competence; violation of any of the fundamental rights or being against the existing statutory provision of law. *{See :State of A.P. and others Vs. Mcdowell & Co.And others² and Bakhtawar Trust and Others Vs. M.D.Narayan and Others³}*. What is being sought to be argued is that the vested right of the petitioner, accrued as on 07.10.2003, have been taken away with retrospective effect. Promotion is not a fundamental right. Right to be “considered for promotion”, however, is a fundamental right. Such right brings within its purview an effective, purposeful and meaningful consideration. Suitability or otherwise of the candidate concern, however, must be best left at the hands of the DPC. The same has to be determined in terms of the rules applicable. *{See :Union of India and others Vs. Sangram Keshari Nayak⁴}*.

10. On examination of the facts, we find that the DPC dated 7.10.2003 was reviewed by the DPC held on 01.06.2004 and the entitlement of the petitioner for promotion has been considered in accordance with her rank and eligibility. The petitioner cannot claim that despite there was no post after amendment dated 28.2.2004 in the Rules of 1994, she should be promoted on the post of Under Secretary. Such submission cannot be accepted. Availability of the post on the

² (1996) 3 SCC 709.

³ (2003) 5 SCC 298.

⁴ (2007) 6 SCC 704.

date of promotion is a prerequisite condition. The State is legally empowered to frame the Rules under the proviso of Article 309 of the Constitution of India in connection with the affairs relating to recruitment and conditions of service of persons appointed to such service and post as discussed above. No motive can be attributed to Rule making body. Hence, we do not find any substance in the arguments of the learned counsel for the petitioner that any vested right of the petitioner has been taken away.

11. In view of aforesaid analysis, we do not find any merit in the instant writ petition. The same is accordingly dismissed.

(RAVI MALIMATH)
CHIEF JUSTICE

(PURUSHAINDR KUMAR KAURAV)
JUDGE

MKL.

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