

Writ Petition No.11580 of 2016
Writ Petition No.12043 of 2016

20.07.2016

Shri Mahendra Pateriya, learned counsel for the petitioner in W.P.No.11580/2016.

Shri Akash Choudhary, learned counsel for the petitioner in W.P.No.12043/2016.

Shri Samdarshi Tiwari, learned Dy. Advocate General for the respondents/State.

Petitioners serving as Constables in the Police Department have approached this Court challenging the advertisement issued by the Professional Examination Board for appointment to posts in the cadre of Subedar, Sub-Inspector and Platoon Commander through competitive Examination, 2016.

The solitary ground of challenge relates to upper age limit with reference to provision as contained under Clauses 1.6.2 and 1.6.11.1 of the advertisement and Clauses 2.3 and 3 of the circular dated 12.07.2016. For ready reference relevant Clauses are reproduced below :-

Advertisement :-

"1.6.2 मध्य प्रदेश शासन के स्थायी अथवा अस्थायी शासकीय सेवकों की अधिकतम आयु

दिनांक 1 जनवरी, 2017 को 36 वर्ष से अधिक नहीं होगी।

1.6.11.1 परिवार कल्याण कार्यक्रम के अंतर्गत ग्रीन कार्ड धारण करने वाले अभ्यर्थियों के मामले में उच्चतर आयु सीमा में अधिकतम 2 वर्ष तक की छूट दी जावेगी।

Circular dated 12.07.2016 :-

क्र.	भरती का तरीका	न्यूनतम आयु-सीमा	अधिकतम आयु-सीमा
2.3	संबंधित वर्दीधारी विभागों के भर्ती नियमों का अनुसरण करते हुए नियुक्त किये गये विभागीय कर्मचारी।	21 से 28 वर्ष	28 + 10 वर्ष

3. उपरोक्तानुसार विभाग अपने भर्ती नियमों में तत्काल संशोधन की कार्यवाही करें।"

Petitioners claim to be Green Card holders and, therefore, according to the petitioners, the conjoint reading of aforesaid Clauses 1.6.2 and 1.6.11.1 of advertisement provide for maximum age limit of 38 (36 + 2) years for them as per the advertisement. However, in terms of the circular issued by the State Government dated 12.07.2016 (Annexure P-9) since the maximum age limit has

been further increased to 38 years, for the categories of applicants belonging to General Police Force Department, therefore, according to the petitioners, with addition to two years by virtue of Green Card Holder, (38+2) maximum upper age limit comes to 40 years. Therefore, petitioners fulfill the eligibility conditions as regards the age of the candidate. Hence, eligible for appearing in the competitive examination under reference for appointment to posts in cadres of Subedar, Sub-Inspector and Platoon Commander. Learned counsel for the petitioner in Writ Petition No.12043/2016 additionally made submissions in the context of Rule 21 of the Recruitment Rules. For ready reference the said Rule is reproduced below :-

“Relaxation.- Nothing in these rules shall be construed to limit or abridge the powers of the Governor to deal with the case of any person to whom these rules apply, in such a manner as may appear to him to be just and equitable.

Provided that the case shall not be dealt with in any manner less favourable to him than that provided in these rules.”

It is contended that the circular issued by the State Government on 12.07.2016, in fact, is a mandate having legal sanction issued by the orders of the Governor referable to Rule 21 and, therefore,

the same is required to be given effect in the matter of maximum upper age limit of candidates.

However, applications submitted by the petitioners online since have not been accepted, therefore, the instant petition has been filed for issuance of writ in the nature of mandamus commanding respondents to allow petitioners for appearing in the competitive examination in view of the aforesaid facts and circumstances.

On notice, respondents/State has entered appearance and made submissions with reference to the advertisement and the circular of the State Government dated 12.07.2016, already on record, as well as the relevant service Rules known as Madhya Pradesh Police Executive (Non-Gazetted) Service Recruitment Rules, 1997 (hereinafter referred to as “the Recruitment Rules”). Learned counsel referred to Rule 8 which talks of Conditions of eligibility of candidates for direct recruitment and *inter-alia* referred to Clause (c) which provides that the upper age limit will be relaxable in respect of candidates who are or have been employees of the Madhya Pradesh Government, to the extent and subject to the conditions specified therein. Learned counsel contends that relaxation in upper age limit are

provided under Clauses (e) (f) and (g) which read as under :-

“(e) The upper age limit shall also be relaxed upto two years in respect of green card holder candidates under the Family Welfare Programme;

(f) The General upper age limit shall be relaxed up to 5 years in respect of awarded superior caste partner of a couple under the inter caste marriage incentive programme of the Tribal, Scheduled Caste and Backward Classes Welfare Department;

(g) The upper age limit shall also be relaxable upto 5 years in respect of “Vikram Award” holder candidates;”

Whereas, the upper age limit for different categories of employees are also provided for under Clauses (c) (d) (h) and (i) which are reproduced below :-

“(c) The upper age limit will also be relaxable in respect of candidates who are or have been employees of the Madhya Pradesh Government, to the extent and subject to the conditions specified below :-

(i) A candidate who is a permanent Government servant should not be more than 36 years of age.

.....

(d) The general upper age limit shall be relaxable up to 35 years in respect of widow, destitutes or divorced women candidates;

(h) The upper age limit shall be relaxable up to a maximum of 36 years of age in respect of candidate who are employees of Madhya

Pradesh State Corporation/Board;

- (i) The upper age limit shall be relaxed in the case of voluntary Home Guards and non-commissioned officers of Home Guards for the period of service rendered so by them subject to the limit of 8 years but in no case their age should exceed 36 years.”

It is contended that upper age limit prescribed for a candidate as a permanent Government servant is 36 years subject of course to further relaxation as provided for under Clauses (e) (f) and (g) (*supra*). There is no other provision under the Rules providing for relaxation in the upper age limit for the purposes of recruitment under the Rules.

Learned counsel contends that provision of upper age limit relaxations in the advertisement in question are in conformity with the provisions as contained under Rule 8 (c) referable to Clause 1.6.2 and under Rules 8 (e) referable to Clause 1.6.11.1. That apart, the relaxation provided for in Clauses (e) (f) and (g) are in fact motivational relaxation and if any candidate has more than one basis of relaxation in the maximum age limit being given as motivation, then he shall be allowed to avail any one basis of motivation which extends highest benefit in the maximum age limit. Learned counsel in that

connection refers to Note 3 appended to Rule 8 inserted by Government notification dated 15.03.2013. It is, therefore, submitted that any candidate fulfilling the aforesaid eligibility conditions as regards upper age limit shall be eligible for appearing in the competitive examination and none else.

Learned counsel while replying to the contention as regards further relaxation in the context of circular dated 12.07.2016 issued by the General Administrative Department contends that as a matter of fact the circular so issued is of the nature of executive instructions and itself provides under Clause (3) that concerned department may take necessary steps for incorporating amendments in the Recruitment Rules, therefore, unless Rules are amended in conformity with the aforesaid executive instructions, effect thereto cannot be given. Learned counsel submits that petitioners cannot rest their claim, as regards upper age limit on the circular dated 12.07.2016 for reasons; (i) the advertisement was issued much prior to issuance of the executive instructions on 12.07.2016 and even the process of selection had commenced on 23.06.2016, hence, *ex-facie* circular cannot be given retrospective effect

after the process of selection has commenced; (ii) circular dated 12.07.2016, itself, under Clause 3 provides that necessary amendments are required to be carried out by the concerned Department in the Recruitment Rules, as such the aforesaid executive instructions are in no way conclusive in nature and can be termed as binding; (iii) the advertisement has been issued in conformity with the Recruitment Rules. The provisions in the circular cannot be incorporated in the advertisement unless amendment is carried out in the Recruitment Rules; (iv) as a matter of fact in response to the executive instructions dated 12.07.2016 there is a sustained correspondence going on between the Police Headquarters and the Home Department expressing reservations in the context of enhancement of the upper age limit as indicated in the circular and thereafter there shall be further deliberation with the General Administration Department before finalization, as such it is too early to say that the upper age limit in the recruitment process is indicated in the circular; (v) Learned counsel further contends that Rule 21 has no application to the factual matrix in hand. The powers of the Governor therein are not general in nature but for a case

specific in relation to any person or even a class of persons whom the rules apply to pass such orders as may appear to be just and equitable. The aforesaid provision cannot be construed to contain power for amendment in the Recruitment Rules, therefore, the power is to bring an equitable result in a given case, however, the circular dated 12.07.2016 is still in the form of proposal and the same is yet to be considered for incorporation, therefore, the same cannot be given effect to with the help of Rule 21.

Learned counsel relies upon the judgment of the Supreme Court in the case of **R.N.Nanjundappa Vs. T.Thimmaiah and another** reported in **AIR 1972 SC 1767** to bolster his submission that the requirement of Rules are required to be fulfilled for appointment on the post prescribed under the Rules and the Government is not free to overlook the provisions of the statutory Rules while making appointment by way of executive fiat under executive instructions. Service Rules are framed under the proviso of Article 309 of the Constitution of India having statutory force. The executive powers of the State under Article 162 of the Constitution of India in no way can be construed to be a power enabling the Government to frame Rules

and, therefore, the Government cannot make appointment based on executive instructions contrary to the Rules.

Learned counsel also refers to the judgment rendered by the Supreme Court in the case of **Supreme Court Employees Welfare Association Vs. Union of India and others** reported in **AIR 1990 SC 334** to contend that this Court while exercising extraordinary constitutional jurisdiction under Articles 226 and 227 of the Constitution of India cannot direct the legislature to make a particular piece of legislation as the same shall tantamount to stepping out of the limitation known for exercising powers under Article 226 and 227 of the Constitution of India.

Learned counsel further submits that in the light of the aforesaid factual matrix in hand no direction can be sought from this Court for enhancement of age limit of candidates based on the circular dated 12.07.2016 (Annexure P-9) as this Court may not issue directions which are not in conformity with the Rules as held by the Supreme Court in the case of **Union of India Vs. Association for Democratic Reforms and another** reported in **AIR 2002 SC 2112** in para 21 which reads thus :-

“At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules”

With the aforesaid submissions, learned counsel contends that the insistence of the petitioners that they be treated fulfilling eligibility condition of age of the candidates with the help of the circular dated 12.07.2016 is contrary to the Rules and cannot be countenanced.

Heard counsel for the parties.

The advertisement in question is for recruitment to the post of Subedar, Sub-Inspector and Platoon Commander as prescribed under Schedule-I appended to the Recruitment Rules. Rule 8 of the Recruitment Rules deals with conditions of eligibility of candidates for direct recruitment *inter-alia* prescribed for upper age limit of 36 years in Clause 8 (c) (i). Relevant portion has been reproduced herein above. The same is provided under Clause 1.6.2 of the advertisement. Clause 8 (e) prescribes for relaxation upto two years in respect of Green Card holder candidates and the same is provided in Clause 1.6.11.1, as such the

advertisement is strictly in accordance with the Recruitment Rules framed under proviso to Article 309 of the Constitution of India. Law is well settled that recruitment to posts prescribed under the Recruitment Rules have to be done in accordance with conditions of eligibility of candidates as provided for under the Recruitment Rules. The executive instructions cannot substitute requirement under Rules as the executive powers of the State under Article 162 of the Constitution of India does not empower the State to amend the Rules framed under proviso to Article 309 by its executive authority, therefore, in absence of amendment in the Rules as also indicated in the circular dated 12.07.2016, the proposed upper age limit in the circular cannot be given effect to as claimed by the petitioners. Further, power of relaxation embodied in set of Rules are generally construed by Courts as power to relax the applicability of any Rule as such, and not the provisions contained thereunder, as the same shall be in excess of the authority of relaxation and tantamount to amending the rules.

Even otherwise, power of relaxation as rightly pointed out by the learned counsel for the respondents/State under Rule 21 is not general in

nature but, case specific and exercisable involving an element of subjectivity on just and equitable consideration. This Court also finds substantial force in the submission of the learned counsel for the respondents that in exercise of powers under Article 226 and 227 of the Constitution of India, the Court cannot give direction to the State to relax the conditions stipulated in the Rules based on executive instructions in the matter of recruitment to posts under the Rules and well settled by catena of decisions of the Apex Court referred above.

Consequently, this Court is of the view that the submissions advanced by the learned counsel for the petitioners are misconceived and devoid of substance, hence, warrant rejection.

Writ Petitions *sans* merit and are hereby dismissed.

(Rohit Arya)
Judge