HIGH COURT OF MADHYA PRADESH : JABALPUR

(Division Bench)

Writ Petition No. 15680/2017

Manoj Kumar …..... ..PETITIONER

Versus

State of Madhya Pradesh & Another …..... RESPONDENTS

WITH

Writ Petition No. 15682/2017

Ashraf Ali …..... ..PETITIONER

Versus

State of Madhya Pradesh & another …..... RESPONDENTS

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice H.P. Singh, Judge

Appearance:

Shri Raghu Nayyer, Advocate for the petitioners.

Shri Pushpendra Yadav, Deputy Advocate General for the respondent No.1/State.

Shri Anshuman Singh, Advocate for the respondent No.2.

Whether Approved for Reporting : **Yes**

Law Laid Down:

- The eligibility of the candidate has to be satisfied before a candidate is permitted to appear in the examination and to undergo the selection process.
- In absence of any clause in the application form seeking information about the number of children, disqualification in terms of Clause 3(a) of the Advertisement is inferential disqualification and such clause which is not clear and categorical, cannot be extended to the candidate**.**
- It is always open to the High Court to adopt the statutory Rules framed by the State Government for the purposes of recruitment to the Judicial services. By

adoption of such Rules, the High Court is not acting contrary to the Constitutional scheme to ensure independence of the Judiciary. Such clause of disqualification for having more than two living children has a larger public purpose with the aim to control population in the country, therefore, such clause cannot be deemed to be illegal violating any of the provisions of the Constitution or the judgments referred to by the petitioners.

Significant Paragraph Nos.: **11 to 19**

Reserved On : 12.02.2018

O R D E R

(Passed on 23rd February, 2018)

Per : Hemant Gupta, Chief Justice:

The questions of fact and law involved in both these writ petitions being common, they were heard together and are being disposed of by this common order.

2. The challenge in the present petitions is to the communication dated 7th September, 2017 (Annexure P-1) whereby services of the petitioners were terminated in terms of Rule 9(3) [*sic* 9(c)] of Madhya Pradesh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 1994 (for short "**the Rules**") for the reason that they have more than two children; one of whom is born after 26th January, 2001.

3. The brief facts leading to the present petitions are that an advertisement was published on 23rd November, 2015 for direct recruitment in the cadre of Higher Judicial Officers under the Rules. The petitioners applied for such post. After due selection process, they were appointed and joined duties on 06.04.2017. After joining, for the purposes of filling up of service-book, information was sought for the first time with respect to living

children of the petitioners. Petitioner – Manoj Kumar furnished information that he has five children whereas petitioner – Ashraf Ali submitted that he has three children. An explanation was sought from petitioner – Manoj Kumar on 11.05.2017 and similar explanation was sought from petitioner – Ashraf Ali on 26.05.2017, which were replied by the petitioners. It is, thereafter, an impugned order of termination of services was passed on 7th September, 2017.

4. The argument of the learned counsel for the petitioners is that the Rules framed under Article 223 read with proviso to Article 309 of the Constitution of India do not have any condition that an employee, who has more than two living children, will be disqualified to work under the State. In the advertisement, clause 3 was inserted whereby the candidature of the candidates was liable for cancellation, which included the provisions of Rules as well as M.P. Civil Services (General Conditions of Services) Rules, 1961 (for short "**the 1961 Rules**"). The 1961 Rules were framed in terms of proviso to Article 309 of the Constitution of India prior to coming into force of the Rules. It is also pointed out that for the Lower Judiciary, M.P. Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994 (for short "**the Subordinate Judiciary Service Rules**") have been framed. Even the said Rules do not have any disqualification, as is contemplated in 1961 Rules. On the basis of such facts, it is contended that the Rules and the Subordinate Judiciary Service Rules framed by this Court do not have a disqualification for having more than two children living as on 26th January, 2001 and that 1961 Rules have not been framed in consultation with the High Court, therefore, such Rules are not applicable and extended to the

Judicial Officers appointed or to be appointed under the Rules and the Subordinate Judiciary Service Rules. Learned counsel for the petitioners has also alleged that impugned termination order dated 7th September, 2017 has been passed without giving any opportunity of hearing to the petitioners by the Principal Secretary, Department of Law and Legislative Affairs of Madhya Pradesh.

5. A strong reliance of the learned counsel for the petitioners was on the Constitutional Bench judgment of the Supreme Court reported as **(2000) 4 SCC 640 (State of Bihar and another vs. Bal Mukund Sah and others**) and also on the judgment reported as **(2016) 9 SCC 313 (Vijay Kumar Mishra and another vs. High Court of Judicature at Patna and others**), which draw a distinction between appointment and selection for the post of District Judge (Entry Level) in the State of Bihar. Learned counsel for the petitioners submitted that since the Constitution of India provides for framing of the Rules pertaining to Judicial services by the Governor in consultation with the High Court, therefore, the 1961 Rules particularly the one containing that an employee, who has more than two children, will be a disqualification, has been applied against the petitioners without consultation of the High Court. Thus, such provision cannot be applied to the members of the Judicial services to maintain independence of the judiciary.

6. The reliance is placed upon the Supreme Court judgment reported as **AIR 1975 SC 915 (Ramchandra Keshav Adke (Dead) by LRs vs. Govind Joti Chavare and others)** to contend that when a power is given to

do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. In this context, reliance was also placed upon Supreme Court judgment reported as **AIR 1936 PC 253 (Nazir Ahmad vs. King-Emperor)**. Thus, the argument is that since the service conditions of the members are required to be framed in consultation with the High Court, therefore, such disqualification has been wrongly applied against the petitioners.

7. Learned counsel for the petitioners also referred to judgment of the Supreme Court reported as **(1987) 4 SCC 646 (Durgacharan Misra vs. State of Orissa and others**) wherein the action of the Public Service Commission prescribing an additional requirement for selection either as to eligibility or as to suitability was set aside for the reason that the selection is to be conducted in accordance with the applicable recruitment Rules. Learned counsel for the petitioners also relied upon a judgment reported as **AIR 2010 SC 3714 (Ramesh Kumar vs. High Court of Delhi and another**) wherein it has been held that there is no inherent jurisdiction with the selection committee to lay down norms for the selection in addition to the procedure prescribed by the relevant recruitment Rules. Learned counsel further placed reliance upon a Supreme Court judgment reported as **(1976) 1 SC 311 (Shri Krishnan vs. The Kurukshetra University, Kurukshetra**) wherein it was held that it was for the University Authorities to scrutinize the form and having failed to do so, the petitioner cannot be disqualified. On the strength of the said judgment, it is argued that in the application form required to be submitted by a candidate, no information was sought in respect of number of children born to a candidate.

8. On the other hand, stand of the High Court is that in the advertisement dated 23rd November, 2015 it was specifically provided in Clause 3(a) thereof that a candidate who does not fulfill the provisions of the Rules and 1961 Rules shall not be qualified for the advertised post. It is submitted that the Rules are required to be framed in consultation with the High Court is not a proposition which is in dispute but it is always open to the High Court to apply any of the statutory Rules of the State. In the selection process initiated vide advertisement dated 23rd November, 2015 the High Court clearly stipulated that a candidate has to comply with the Rules and Rules of 1961. Once the High Court has put such condition in the advertisement, the High Court has explicitly made applicable the 1961 Rules to the selection in question. After appointment, on information being received from the petitioners, a show cause notice was issued to the petitioners and after considering the reply filed by the petitioners, an order of termination has been passed pursuant to the decision taken by the Full Court in its meeting dated 26th July, 2017. It is also pointed out that the petitioners applied in response to the advertisement dated 23rd November, 2015 whereby it was clearly and specifically stated that the persons disqualified under the 1961 Rules shall not be eligible for appointment to the post of District Judge (Entry Level). Still further, the petitioners are estopped from challenging the eligibility and disqualification criteria having participated in the selection process without any demur.

9. Learned counsel for the High Court further submitted that the recruiting Authority is always entitled to specify the provisions of eligibility qualification at the time of recruitment and that the persons who participate

in the process without fulfilling such eligibility criteria are not entitled to challenge the eligibility at the subsequent stage. It is also stated that the judgment of this Court passed on 10.10.2013 in **W.P. No. 18252/2013 (Smt. Sarika Chaturvedi vs. State of M.P. And others**) was a case where a candidate sought relaxation in upper age limit pursuant to the provisions contained in M.P. Civil Services (Special Provision for Appointment of Women) Rules, 1997. Such Rules were not framed in consultation with the High Court. In these circumstances, it was held that the relaxation which is not specifically provided for in the Subordinate Judicial Service Rules shall not be applicable to the person applying for such services. It is also pointed out that advertisement leading to the judgment in **Smt. Sarika Chaturvedi**'s case (**supra**) did not provide for any relaxation. It was also averred that the judgment of the Supreme Court in **Bal Mukund Sah (supra**) is not applicable as it does not deal with the issue of disqualification specifically provided for in the advertisement. In respect of violation of principles of natural justice, it was averred that the principles of natural justice cannot be put in a straightjacket formula and are not the rites to be performed before a decision is taken. It is pointed out that a show cause notice dated 19.05.2017 and 26.05.2017 respectively were served upon the petitioners and after considering the reply filed by them, orders have been passed and therefore, there is no question of providing any opportunity of personal hearing.

10. We have heard learned counsel for the parties.

11. The Madhya Pradesh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 1994 for recruitment to the Higher Judicial

Services do not have any disqualification clause. The relevant extracts of the 1961 Rules and the 1994 Rules read as under:-

"M.P. Civil Services (General Conditions of Services) Rules, 1961"

"3. **Scope of application**. - The rule shall apply to every person who holds a post or is a member of a service in the State, except-

(a) person whose appointment and conditions of employment are regulated by the special provisions of any law for the time being in force;

(b) persons in respect of whose appointment and conditions of service special provisions have been made, or may be made hereafter by agreement;

(c) persons appointed to the Madhya Pradesh Judicial Service:

Provided that in respect of any matter not covered by the special provisions relating to them, their services or their posts, these rules shall apply to the persons mentioned in clauses (a), (b) and (c) above.

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6. Disqualification. –

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(6) No candidate shall be eligible for appointment to a service or post who has more than two living children one of whom is born on or after the 26th day of January, 2001."

Madhya Pradesh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 1994

9. Probation:-

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(3) The High Court may at any time during or at the end of period of probation revert a promotee member of the service to his substantive post from which he was promoted and in the case of a direct recruit recommend termination of his service."

12. At this stage, it would also be relevant to refer to the relevant conditions of the advertisement in question, which read as under:-

"**3. Disqualifications**:- In any of the following cases, Applicants/Candidates may be liable for prosecution and/or cancellation

of their candidature for selection may be cancelled and he/she may be prohibited, temporarily or for any specific time period, to appear in any Examination conducted by M.P. High Court:-

(a) If he or she does not fulfil the provisions of M.P. Higher Judicial Service Rules, 1994 and M.P. Civil Services (General Conditions of Service) Rules, 1961, or

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13. The argument of the learned counsel for the petitioners is that the recruitment to the post advertised and the conditions of service were stipulated to be governed by the Rules as mentioned in the opening part of the advertisement. It is only in the clause relating to disqualification reference was made to 1961 Rules.

14. The argument of the learned counsel for the petitioners relying upon **Bal Mukund Sah**'s case **(supra)** is not tenable. **Bal Mukund Sah (supra)** was a judgment in which the State and the High Court were at variance with respect of applicability of the Rules of reservation for appointment to the members of Judicial service. However, in the present case, the High Court in the advertisement itself made a stipulation for the candidates that the candidate may be liable for cancellation of candidature if he or she does not fulfill the provisions of 1961 Rules. In the teeth of such categorical condition in the advertisement, we do not find any merit in the argument that in the absence of statutory Rules framed by the Governor in consultation with the High Court, the 1961 Rules cannot be extended for the purposes of Judicial services.

15. The argument that where a power is given to do certain thing in a certain way, things must be done in that way or not at all, is again not applicable to the facts of the present case as it was always open to the High

Court to adopt the statutory Rules framed by the State Government for the purposes of recruitment to the Judicial services. By adoption of such Rules, the High Court is not acting contrary to the Constitutional scheme to ensure independence of the Judiciary. Such clause of disqualification for having more than two living children has a larger public purpose with the aim to control population in the country, therefore, such clause cannot be deemed to be illegal violating any of the provisions of the Constitution or the judgments referred to by the petitioners. Therefore, neither the judgment in **Bal Mukund Sah (supra**) nor **Nazir Ahmad's** case **(supra**) nor the other judgments that things must be done in a certain way prescribed or not at all, are applicable to the facts of the present case.

16. It is contended that the advertisement issued is not clear and categorical in respect of eligibility of candidates, who have more than two living children as on 26th January, 2001. There was no clause in the application form seeking information about the number of children, therefore, disqualification in terms of Clause 3(a) is inferential disqualification and such clause, which is not clear and categorical, cannot be extended to the petitioners. The condition of the advertisement is that the candidate needs to satisfy the condition of eligibility as contemplated in the Rules. The 1961 Rules are not applicable to M.P. Judicial Services. M.P. Judicial Services are not defined under the aforesaid Rules, therefore, Clause (c) of Rule 3 of the 1961 Rules would include the Higher Judicial Services as well as Lower Judicial Services but the proviso contemplates that if any matter is not covered by any special provision relating to Judicial Services, these Rules shall apply.

17. It is not the case of any of the parties that the Rules have any condition similar to disqualification for having more than two living children, therefore, in terms of proviso, the condition of having more than two living children as contained in Rule 6(6) of the 1961 Rules would be applicable to the candidates for the purposes of determining the eligibility of the candidates. Though, the language of the advertisement is not clear but keeping in view the rule of interpretation that various clauses in the advertisement have to be read together, once the advertisement specifies that disqualification as contemplated in the 1961 Rules would be applicable, it necessarily implies that the conditions of eligibility as contained in 1961 Rules are also applicable for the purposes of recruitment to the post of District Judge (Entry Level).

18. Still further, the petitioners have not disputed such clause prior to the selection or even in the present writ petition. Having participated in the selection process wherein 1961 Rules were adopted in respect of selection process for the post of District Judge (Entry Level), the petitioners are estopped to challenge adoption of such clause for the purposes of eligibility and disqualification.

Having said so, we find that if such was the eligibility condition, it was mandatory for the High Court to seek information about the number of children in the application form itself. The eligibility of the candidate has to be satisfied before a candidate is permitted to appear in the examination and to undergo the selection process. Since the High Court has not sought the information in terms of 1961 Rules in the prescribed application form, it is

not open to the High Court to declare a candidate ineligible for the reason that the candidate has more than two children as such information was not elucidated in the application form.

19. The Supreme Court in **Shri Krishnan**'s case **(supra)** has held that the Head of the Department nor the University Authorities took care to scrutinize the admission form then the question of the candidate committing fraud did not arise. Keeping in view the said principle, in the absence of any information sought from the candidate in respect of eligibility of having more than two children as on 26th January, 2001, it is the High Court which has failed to elucidate relevant information to determine eligibility of a candidate and disqualify the candidate from facing the selection process itself. Once the petitioners have been subjected to selection and subsequent appointment then to cancel the candidature is unreasonable action on the part of the High Court.

20. Consequently, the orders of termination dated 7th September, 2017 are set aside. Both the writ petitions stand **allowed**. The High Court is directed to reinstate the petitioners and grant all consequential benefits except salary from the date of termination till the date of reinstatement. The respondents are directed to comply with the order passed by this Court at the earliest preferably within a period of one month from today.

(HEMANT GUPTA)
Chief Justice

(H.P. SINGH)
Judge

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