HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case No.	**W.P No.21231/2017**
Parties Name	*Madhur* ***Vs.*** *State of M.P.*
Date of Judgment	17/04/18
Bench Constituted	Single Bench.
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	**YES**
Name of counsels for parties	For petitioner: Shri Vipin Yadav, Advocate. For Respondents: Shri Ankit Agrawal, Govt. Advocate.
Law laid down	**(1) The word 'suitable' does not require a definition because any man of experience would know who is suitable. However, each case has to be viewed in the context in which the word 'suitability' or 'suitable' is used i.e. the object of the enactment & the purpose sought to be achieved.** **(2) 'Eligibility' is a matter of fact whereas 'suitability' is a matter of opinion.** **(3) M.P. Civil Services (General Conditions of Service) Rules, 1961- when Competent Authority has examined the suitability under Rule 6(3) of Rules of 1961, interference is totally not warranted. The Competent Authority has not committed**

	any error in treating the petitioner as not suitable for the post of Assistant Director (Finance) in view of pendency of criminal cases for offences which are not trivial in nature. **(4) The scope of judicial review of administrative order is limited.**
Significant paragraph numbers	**10, 12**

O R D E R
(17/04/2018)

This is the third visit of the petitioner to this Court for the same grievance. In this round, the challenge is made to the order dated 17-11-2017 whereby the petitioner's claim for appointment on the post of Assistant Director (Finance) was rejected.

2. Briefly stated, the admitted facts between the parties are that pursuant to an advertisement issued by the M.P. Public Service Commission (P.S.C.), petitioner submitted his candidature for the post of Assistant Director (Finance). In the select list dated 25-06-2016, the petitioner's name finds place. Below the name of petitioner in the select list, names of Shri Ganesh Kumar and Shri Vinod Kumar Shrivastava find place. The respondents appointed said Shri Ganesh Kumar and Shri Vinod Kumar Shrivastava by order dated 19-12-2016 (Annexure P/3) and 22-12-2016 (Annexure P/4). The petitioner feeling aggrieved by the selection of said persons, who were below him in the select list, filed WP. No.608/17, which was

disposed of on 13-01-2017 by directing the respondents to decide the representation. In turn, the respondents passed the order dated 30-03-2017 (Annexure P/9) and rejected the claim of the petitioner. Aggrieved, the petitioner again filed WP. No.5150/17, which was decided on 22-09-2017. This Court after taking note of judgment of Supreme Court in the case of ***Avtar Singh vs. Union of India reported in (2016) 8 SCC 471*** directed the respondents to consider the case of the petitioner for appointment in regard to judgment of Apex Court in the case of ***Avtar Singh*** (supra) as well as Rule 6 of M.P. Civil Services (General Conditions of Service) Rules, 1961 (hereinafter referred to as 'Rules of 1961'). The respondents passed the impugned order dated 17-11-2017 and opined that it will not be in public interest to appoint the petitioner on the said post.

3. Shri Vipin Yadav, learned counsel for the petitioner criticized the impugned order by contending that (i) when petitioner submitted his candidature for the said post, he was not facing any criminal proceedings. The FIRs were lodged against him at a later point of time. Soon thereafter, he apprised the department about lodging of said FIRs. Thus, there was no suppression of fact by the petitioner about FIRs/criminal cases. (ii) the impugned order is not in consonance with the dicta of Avtar Singh (supra); and (iii) the respondents have not considered the candidature in the light of Rule 6 of Rules of 1961. There is no embargo in appointing the petitioner because of filing of challans. Reliance is also placed on Rule 8(3)(a) of M.P. State Services Rules, 2015 for the same purpose

(Annexure P/17) (hereinafter referred to as the 'Rules of 2015').

4. *Per contra*, Shri Ankit Agrawal, learned Government Advocate supported the impugned order. He submits that the petitioner is facing two criminal cases vide Crime No.295/15 and 357/17 under Sections 384,386,294,506,387 r/w 34 of the IPC. The challans have already been filed before Chief Judicial Magistrate, Chhatarpur on 07-06-2017. The petitioner is not fit to be appointed on a sensitive post of Assistant Director (Finance). The decision taken by State Government is in consonance with the Rules of 1961 and the judgment of Supreme Court in the case of ***Avtar Singh*** (supra). Merely because Rule 6 of Rules of 1961 is not mentioned in specific in the impugned order dated 17-11-2017, the order will not stand vitiated. The order needs to be read in its entirety.

5. Parties confined their arguments to the extent indicated above.

6. I have bestowed my anxious consideration on the rival contentions of the parties and perused the record.

7. Before dealing with rival contentions, it is apposite to reproduce Para 38.3 and 38.7 of the judgment of Avtar Singh on which heavy reliance is placed by Shri Vipin Yadav, which read as under:-

> *"38.3 The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.*

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper."

8. Interestingly, Shri Agrawal placed reliance on Para 38.6 of the same judgment. He also placed reliance on Para 36 of this judgment, which reads as under:-

"36. What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are not sensitive, nature of duties, impact of suppression on suitability has to be considered by concerned authorities considering post/nature of duties/services and power has to be exercised on due consideration of various aspects."

9. Rule 6 of Rules of 1961 reads as under:-

"6. Disqualifications.-.

(1) No male candidate who has more than one wife living and no female candidate who has married a person having already a wife living shall be eligible for appointment to any service or post : Provided that the Government may, if satisfied that there are special grounds for doing so, . exempt any such candidate from the operation of this rule.
(2) No candidate shall be' appointed to a serviCeor post unless he has been found, after such medical examination as may be prescribed, to be in good mental and bodily health and free from any mental or bodfly defect likely to interfer~.with the·discharge of the duties of the service or post: Provided that in exceptional cases a candidate may be appointed provisionally to a service or post before his medical examination, subject to .the condition that the appointment is liable to be terminated

forthwith if he is'found medically unfit.

(3) No candidate shall be eligible for appointment to a service or post if, after such enquiry as may be considered necessary, ***the appointing authority is satisfied that he is not suitable in any respect for the service or post****.*

**(4)No candidate shall be eligible for appointment to a service or post who' has been. convicted of an offence against women : Provided that where such cases are pending in a court against a. candidate his -case of appointment shall be kept pending till thefinal decision of the Criminal Case."*

Rule 8(3)(a) of the Rules of 2015 reads as under:-

"8 (3)(a) A candidate convicted for any crime against woman will not be eligible for any service or appointment to any post:

Provided that where such cases are pending in a court of law against any candidate, the matter of appointment of such candidate shall be kept pending till the final decision of criminal proceedings."

(Emphasis supplied)

10. The argument of Shri Yadav, in nutshell, is that the employer has no unfettered discretion in deciding the question of eligibility/suitability of a candidate. Once the rules are laid down, the employer has to examine the aspect of suitability in the light of said rules. The argument appears to be attractive. Douglas J. in the ***United States vs. Wunderlich 96 L Ed 113*** opined that "law has reached its finest moments when it has freed man from the unlimited discretion of some ruler……. Where discretion is absolute, man has always suffered." It is in this sense that the rule of law may be said to be the sworn

enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in ***R vs. Wilkes 98 All ER Rep 570*** means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful." The Apex Court considered the aforesaid judgments of other jurisdiction with profit in ***(2012) 10 SCC 1 (Natural Resources Allocation, In Re. Special Reference)***. Thus, spinal issue in the present case is whether the respondents have misused their discretion or such exercise of discretion is capricious or contrary to law. Sub rule 3 of Rule 6 of Rules of 1961 gives ample power to the Appointing/Competent Authority to examine the aspect of suitability of an employee. The said provision, in no uncertain terms makes it clear that if Appointing Authority is satisfied that a candidate is not suitable in any respect for service or post, he can take appropriate decision in this regard. In the impugned order although enabling provision of the Rules of 1961 were not quoted, the power of said authority can be traced from Sub-rule 3 of Rule 6 of Rules of 1961. The question of suitability can be gone into by the Competent Authority in the teeth of Sub-rule 3 of Rule 6. This is trite law that wrong quoting of provision or not mentioning of provision will not denude the authority from taking a decision or passing an order, if source of power can be traced from an enabling provision/statute. Thus, the argument of Shri Yadav that there is no mention of Rules of 1961 in the impugned order will not improve the case of the petitioner. In the considered opinion of this Court, the employer has acted on due consideration of rules. In ***Avtar Singh*** (supra), it was poignantly held that for deciding the suitability what yardstick is to be applied depends upon the

nature of post, higher post would involve more rigorous criteria. The suitability of candidate has to be considered by authorities concerned considering post/nature of duties and power has to be exercised on due consideration of various aspects. Every eventuality cannot be reduced in writing in any judgment. Thus, it was left open to the discretion of the Appointing Authority to decide whether a candidate is suitable for appointment. Indisputably, petitioner was selected for a sensitive post and facing criminal cases which are not of trivial nature. In this backdrop, it cannot be said that the respondents have either misused their discretion or acted contrary of the rules. Rule 8(3)(a) deals with crime against women. In such cases only the candidature was decided to be kept alive till conclusion of proceedings. There is no such allegation against the petitioner in aforesaid crime numbers. Thus, said rules of Rules of 2015 have no application in the present case.

The "suitability" cannot be confused with eligibility". In the 'Major Law Laxicon' by P. Ramanatha Iyer about the word following view is expressed-"the word 'suitable' does not require a definition because any man of experience would know who is suitable. However, each case has to be viewed in the context in which the word "suitability" or "suitable" is used, the object of the enactment and the purpose sought to be achieved." A constitution Bench of Supreme Court in ***State of J & K vs. Trilokinath Khosa (1974) 1 SCC 19*** and another Bench in ***State of Orissa vs. N.N. Swami (1977) 2 SCC 508*** opined that eligibility must not be confused with the suitability of the candidate for appointment. These judgments were considered

by Calcutta High Court in ***2013 SCC Online 22909 (All b. Ed. Degree Holders Welfare Association vs. State of West Bengal).*** In ***(2009) 8 SCC 273 (Mahesh Chandra Gupta vs. Union of India)*** it was again held that suitability of a recommendee and the consultation are not subject to judicial review but the issue of lack of eligibility or an effective consultation can be scrutinized.. The Supreme Court in ***(2014) 11 SCC 547 (High Court of Madras vs. R. Gandhi)*** while dealing with appointment on a constitutional post opined that 'eligibility' is an objective factor. When 'eligibility' is put in question, it could fall within the scope of judicial review. The aspect of 'suitability' stands excluded from the purview of judicial review. At the cost of repetition, the Apex Court opined that 'eligibility' is a matter of fact whereas 'suitability' is a matter of opinion. In this view of the matter, when Competent Authority has examined the suitability in the teeth of relevant enabling provision i.e. Rule 6 (3) of Rules of 1961, interference is totally unwarranted.

11. The scope of judicial review of a matter of this nature is limited. The decision making process is subject matter of judicial review and not the decision itself. A Full Bench of this Court in a recent judgment passed in WP. No.5865/16 ***(Ashutosh Pawar vs. High Court of M.P. & Another)*** considered a catena of judgments of Supreme Court and came to hold that High Court in exercise of power under Article 226 of the Constitution can only examine the decision making process and cannot step into the shoes of the Competent Authority in relation to a final decision.

12. This is trite law that administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. The scope of judicial review of administrative orders is rather limited. The consideration is limited to the legality of decision-making process and not legality of the order *per se*. The test is to see whether there is any infirmity in the decision making process and not in the decision itself. Mere possibility of another view cannot be ground for interference. To characterize a decision of the administrator as ``irrational'' the Court has to hold, on material, that it is a decision ``so outrageous'' as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future. [***See (2005) 5 SCC 181 (State of NCT vs. Sanjeev)***]

13. The same view was taken by the Supreme Court in ***(2002) 3 SCC 496 (Haryana Financial Corporation & Anr. vs. Jagdamba Oil Mills & Anr.)***. In ***(2008) 7 SCC 580 (State of Meghalaya & Ors. vs. Mecken Singh N. Marak)***, it was laid down that when a statute gives discretion to the Administrator to take decision, scope of judicial review would remain limited. The scope of judicial review is limited to the deficiency in decision making process and not the decision of Administrator. ***[See (2006) 2 SCC 1 & 165 (Rameshwar Prasad vs. Union of India), (2004) 4 SCC 714 (State of U.P. vs. Johri Lal), (2004) 11 SCC 213 & 218 (Delhi Development Authority vs. UEE Electricals Engg. (P) Ltd., (2005) 10 SCC 84 & 95 (Damoh***

Sagar Panna Rural Regional Bank vs. Munna Lal Jain), (2005) 5 SCC 181 (State of NCT of Delhi vs. Sanjeev) and (2006) 8 SCC 200 (Jayrajbhai Jayantibhai Patel vs. Anilbhai Nathubhai Patel)]

14. In ***(2006) 8 SCC 590 (Muni Suvrat Swami Jain SMP Sangh vs. Arun Nathuram Gaikwad & Ors.)***, it was poignantly held that the High Court cannot impede the exercise of discretion by the statutory authority by issuance of a mandatory order.

15. In the considered opinion of this Court, the respondents have taken a plausible decision regarding suitability of petitioner by taking into account the relevant factors namely criminal cases, nature of duties and power attached to the post. The said discretion exercise is founded upon enabling provision ingrained in Rule 6 of Rules of 1961. I am unable to hold that such exercise of power and impugned order is arbitrary or capricious in nature. This plausible view taken by the respondents does not require any interference by this Court.

16. The petition is devoid of merits and is hereby dismissed. No cost.

(Sujoy Paul)
Judge

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