HIGH COURT OF MADHYA PRADESH : JABALPUR

(Division Bench)

W.P. No.3190/2018

Shri Rajendra Kumar Shrivas and another ……Petitioners

versus

State of M.P. and others ….Respondents

CORAM:

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Vijay Kumar Shukla, Judge

Appearance:

Shri Bramhanand Pandey, Advocate for the petitioners.

Whether approved for reporting : **Yes**

Law laid down:

- The appointment or promotion made in excess of quota provided in M.P. Higher Judicial Service (Recruitment and Conditions of Service) Rules, 1994, at best, can be said to be merely an irregularity but not the illegality. In absence of any challenge to such promotion on the ground of lack of eligibility, qualification; or clear infringement of law, such exercise cannot be disputed by way of a writ of *quo warranto*.

Cases followed -

(2014) 1 SCC 161 (Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and others)
(2011) 4 SCC 1 (Centre for PIL and another vs. Union of India and another)
(2009) 8 SCC 273 (Mahesh Chandra Gupta vs. Union of India and others)
(1993) 4 SCC 119 (R.K. Jain vs. Union of India)
(1979) 1 SCC 168 (Ram Sarup vs. State of Haryana and others)
AIR 1968 SC 1495 (Statesman (Private) Ltd. vs. H. R. Deb and others)

Significant paragraphs: 11, 12, 13, 14, 15, 16 & 17.

O R D E R

{23rd February, 2018}

Per: Hemant Gupta, Chief Justice:

1. The challenge in the present writ petition is to the notification dated 19th January, 2018 whereby appointments by promotion were made to Higher Judicial Service governed by Madhya Pradesh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 1994 (for short **"the Rules"**).

2. The case set up is that the Rules provide 50% by promotion from amongst the Civil Judges (Senior Division) on the basis of merit-cum-seniority and passing suitability test; whereas 25% posts are required to be filed up by promotion on the basis of merit through limited competitive examination from amongst Civil Judges having not less than 5 years qualifying service. The said clause of 25% has to be read as 10% in terms of the judgment of the Supreme Court in **All India Judges' Association and others vs. Union of India and others, (2010) 15 SCC 170**.

3. The grievance of the petitioners is that only 10% of the seats can be filled up by limited departmental competitive examination. Thus, only 61 posts could be filled up from amongst the candidates by way of limited competitive examination. It is contended that 78 posts have been filled up since 2016, therefore, the 11 posts which have been advertised will lead to 89 posts to be filled under Rule 5(1)(b) of the Rules which is contrary to the judgment of the Hon'ble Supreme Court and the statutory rules.

4. Petitioner No.1 is a suspended Third Additional District and Sessions Judge whereas petitioner No.2 is an Advocate. The petitioners have pointed out that an advertisement was issued on 22.07.2017 to fill up the 11 posts under Rule 5(1)(b) of the Rules whereas 42 posts were advertised to be filled up by way of a direct recruitment for which advertisement was published on 16.03.2017. It is contended that total sanctioned strength of the Higher Judicial Service is 611 and thus only 10% posts are required to be filled up by way of a limited competitive examination.

5. A perusal of the notification, subject matter of challenge dated 10.01.2018 published in the M.P. State Government Gazette on 19.01.2018, five members of Civil Judges (Senior Division) were appointed as Additional District Judges in terms of Rule 5(1)(b) of the Rules. In terms of such order, the High Court posted such five officials vide circular dated 25.01.2018.

6. The entire argument of learned counsel for the petitioners is based upon an argument that appointments from amongst the Civil Judges (Senior Division) in terms of Rule 5(1)(b) of the Rules has been made in excess of the quota made for such candidates. It may also be noticed that none of the officers whose appointment is said to be against in excess of the quota, have been impleaded in the present writ petition claiming a writ of *quo warranto*.

7. The question as to when a writ of *quo warranto* can be entertained has been examined by Hon'ble Supreme Court in a judgment reported as **(2004) 3 SCC 349 (Ashok Kumar Pandey vs. State of W.B.)** wherein it has been held that the public interest litigation must be real and general public involved in the litigation and not merely an adventure of a knight errant or

poke one's nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. The relevant extract of the said judgment is reproduced as under:

> "4. When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, the said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuse averted it also becomes a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of a knight errant or poke one's nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting *bona fide* and having sufficient interest in the proceeding of public interest litigation will alone have a *locus standi* and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in Janata Dal vs. H.S. Chowdhary and others, (1992) 4 SCC 305 and Kazi Lhendup Dorji vs. Central Bureau of Investigation, (1994 Supp (2) SCC 116). A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. See Ramjas Foundation vs. Union of India, (AIR 1993 SC 852) and K.R. Srinivas vs. R.M. Premchand, (1994 (6) SCC 620)."

8. In another judgment reported as **(2004) 3 SCC 363 (Dr. B. Singh vs. Union of India and others)**, the Court held that the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. The Court held as under:-

> "12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting *bona fide* and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.
>
> 14. The Court has to be satisfied about (a) the credentials of the applicant; (b) the *prima facie* correctness or nature of information given by him; and (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii)

> avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of *Pro Bono Publico*, though they have no interest of the public or even of their own to protect.
>
> 15. Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra vs. Prabhu, (1994 (2) SCC 481), and Andhra Pradesh State Financial Corporation vs. M/s GAR Re-Rolling Mills and Anr., (1994) 2 SCC 647). No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Buddhi Kota Subbarao (Dr) v. K. Parasaran (1996) 5 SCC 530. Today people rush to Courts to file cases in profusion under this attractive name of public interest. Self styled saviours who have no face or ground in the midst of public at large, of late, try to use such litigations to keep themselves busy and their names in circulation, despite having really become defunct in actual public life and try to smear and smirch the solemnity of court proceedings. They must really inspire confidence in Courts and among the public, failing which such litigation should be axed with a heavy hand and dire consequences."

9. Learned counsel for the petitioners relies upon the judgment of the Supreme Court reported as **AIR 1965 SC 491 (The University of Mysore and another vs. C.D. Govinda Rao and another)** to contend that if appointments are made against the statutory provisions, then a writ of *quo*

warranto can be issued. The reliance of the learned counsel for the petitioner is on the following part of the judgment, which reads as under:-

> "(7) As Halsbury has observed*:
>
> "An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."
>
> Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

10. We find that the said judgment is not helpful to the arguments raised as the aforesaid was a case where the question was in respect of post of

Research Reader in English. It was a case where the appointment was made against the conditions in the advertisement. The High Court examined the question that the qualifications prescribed in the advertisement were not satisfied. The Court held that the question as to whether the candidate has obtained 50% marks is purely an academic matter and the Court would necessarily hesitate to express an opinion when the Boards of experts was satisfied that the candidate was qualified.

11. In **R.K. Jain vs. Union of India**, **(1993) 4 SCC 119** the Court held that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and the manner in which the appointment came to be made. It was also held that judicial determination is confined to the integrity of the decision-making process in terms of the statutory provisions. The Court held as under**:**

> "73. Judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and reasonable. Exercise of judicial review is to protect the citizen from the abuse of the power etc. by an appropriate Government or department etc. In our considered view granting the compliance of the above power of appointment was conferred on the executive and confided to be exercised wisely. When a candidate was found qualified and eligible and was accordingly appointed by the executive to hold an office as a Member or Vice-President or President of a Tribunal, we cannot sit over the choice of the selection, but it be left to the executive to select the personnel as per law or procedure in this behalf. In **Shri Kumar Padma Prasad vs. Union of India, (1992) 2 SCC 428** K.N. Shrivastava, M.J.S., Legal Remembrancer, Secretary of Law and Justice, Government of Mizoram did not possess the requisite qualifications for appointment as a Judge of

> the High Court prescribed under Article 217 of the Constitution, namely, that he was not a District Judge for 10 years in State Higher Judicial Service, which is a mandatory requirement for a valid appointment. Therefore, this Court declared that he was not qualified to be appointed as a Judge of the High Court and quashed his appointment accordingly. The facts therein are clearly glaring and so the ratio is distinguishable."

12. In a judgment reported as **Centre for PIL and another vs. Union of India and another, (2011) 4 SCC 1**, the Supreme Court held thus:-

> "64. Even in R.K. Jain case, this Court observed vide para 73 that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and *the manner in which the appointment came to be made* or whether the procedure adopted was fair, just and reasonable. We reiterate that the Government is not accountable to the courts for the choice made but the Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review justification. We do not wish to multiply the authorities on this point."

13. In a judgment reported as **(2009) 8 SCC 273 (Mahesh Chandra Gupta vs. Union of India and others)**, the Court held that eligibility to hold a post is a matter of fact whereas suitability is a matter of opinion. The writ of *quo warranto* would lie only in the case of lack of eligibility. The reason is that eligibility is not a matter of subjectivity. The Court held as under:-

> "**71.** "The overarching constitutional justification for judicial review, the vindication of the rule of law, remains constant, but mechanisms for giving effect to that jurisdiction vary." *Mark Elliott*
>
> "Judicial review must ultimately be justified by constitutional principle." *Jowett*

> In the present case, we are concerned with the mechanism for giving effect to the constitutional justification for judicial review. As stated above, "eligibility" is a matter of fact whereas "suitability" is a matter of opinion. In cases involving lack of "eligibility" writ of *quo warranto* would certainly lie. One reason being that "eligibility" is not a matter of subjectivity. However, "suitability" or "fitness" of a person to be appointed a High Court Judge : his character, his integrity, his competence and the like are matters of opinion."

14. In view of the aforesaid judgments, we find that there is no allegation that candidates promoted under Rule 5(1)(b) of the Rules are not eligible for being promoted to the Higher Judicial Service. The only allegation is that their promotion is in excess of quota. An appointment in excess of quota can be said to be merely irregularity as held in **Ram Sarup vs. State of Haryana and others, (1979) 1 SCC 168,** the relevant part of the Judgment is as under:-

> "**3.** The question then arises as to what was the effect of breach of Clause (1) of Rule 4 of the Rules. Did it have the effect of rendering the appointment wholly void so as to be completely ineffective or merely irregular, so that it could be regularised as and when the appellant acquired the necessary qualifications to hold the post of Labour-cum-Conciliation Officer. We are of the view that the appointment of the appellant was irregular since he did not possess one of the three requisite qualifications but as soon as he acquired the necessary qualification of five years' experience of the working of labour laws in any one of the three capacities mentioned in Clause (1) of Rule 4 or in any higher capacity, his appointment must be regarded as having been regularised. The appellant worked as Labour-cum-Conciliation Officer from January 1, 1968 and that being a post higher than that of Labour Inspector or Deputy Chief Inspector of Shops or Wage Inspector, the experience gained by him in the working of Labour Laws in the post of Labour-cum-Conciliation Officer must be regarded as

> sufficient to constitute fulfillment of the requirement of five years experience provided in Clause (1) of Rule 4. The appointment of the appellant to the post of Labour-cum-Conciliation Officer, therefore, became regular from the date when he completed five years after taking into account the period of about ten months during which he worked as Chief Inspector of Shops. Once his appointment became regular on the expiry of this period of five years on his fulfilling the requirements for appointment as Labour-cum-Conciliation Officer arid becoming eligible for that purpose, he could not thereafter be reverted to the post of Statistical Officer. The order of reversion passed against the appellant, was therefore, clearly illegal and it must be set aside."

15. In a judgment reported as **(2014) 1 SCC 161 (Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo and others)** the Court held as under:

> "**21**. From the aforesaid exposition of law it is clear as noonday that the jurisdiction of the High Court while issuing a writ of quo warranto is a limited one and can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules. That apart, the concept of locus standi which is strictly applicable to service jurisprudence for the purpose of canvassing the legality or correctness of the action should not be allowed to have any entry, for such allowance is likely to exceed the limits of quo warranto which is impermissible. The basic purpose of a writ of quo warranto is to confer jurisdiction on the constitutional courts to see that a public office is not held by usurper without any legal authority."

16. In **Statesman (Private) Ltd. vs. H. R. Deb and others, AIR 1968 SC 1495** the Supreme Court held that the High Court in a *quo warranto* proceeding should be slow to pronounce upon the matter unless there is a clear infringement of law.

17. Thus, we find that for breach of quota rule even if it is assumed to be so, it cannot be said that the candidates were not qualified for promotion. It is, at best, an irregular promotion which will not entitle the petitioners to seek a writ of *quo warranto*. Still further, in terms of **Statesman's case** the writ of *quo warranto* cannot be issued, unless there is clear infringement of law. Since there is no challenge to the eligibility, therefore, the present writ of *quo warranto,* on the basis of the violation of the quota rule cannot be said to be maintainable. Consequently, the same is **dismissed**.

(Hemant Gupta)
Chief Justice

(Vijay Kumar Shukla)
Judge

Psm