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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE VIVEK AGARWAL**

ON THE 21st OF FEBRUARY, 2024

WRIT PETITION No. 29054 of 2023

BETWEEN:-

**AYESHA ALI W/O SHRI SIRAJ AHMED, AGED ABOUT 59
YEARS, OCCUPATION: SERVICE R/O 181/4, PROFESSOR
COLONY BHOPAL, DISTRICT BHOPAL (MADHYA
PRADESH)**

.....PETITIONER

(BY SHRI SANJAY K. AGARWAL - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THROUGH
THE PRINCIPAL SECRETARY DEPARTMENT OF
AAYUSH GOVERNMENT OF MADHYA PRADESH
MANTRALAY VALLABH BHAWAN BHOPAL
(MADHYA PRADESH)**
- 2. COMMISSIONER AYUSH DEPARTMENT OF AYUSH
GOVERNMENT OF MADHYA PRADESH SATPUDA
BHAVAN BHOPAL DISTRICT BHOPAL (MADHYA
PRADESH)**
- 3. THE ADMINISTRATOR M.P. STATE HOMEOPATHY
COUNCIL 6CQC 7V8, BASEMENT AREA,
VINDHYACHAL BHAVAN, PASCHIM KHAND,
NEAR STATE BANK OF INDIA, BHOPAL (MADHYA
PRADESH)**
- 4. DR. ANITA GUPTA HOMEOPATHY MEDICAL
OFFICER PRESENTLY POSTED AS REGISTRAR
M.P. STATE HOMEOPATHY COUNCIL BHOPAL
DISTRICT BHOPAL (MADHYA PRADESH)**

.....RESPONDENTS

***(RESPONDENT No. 1 TO 3/STATE BY SHRI VIVEK SHARMA - DY.
ADVOCATE GENERAL ALONGWITH SHRI SANJAY MISHRA - DY.
SECRETARY, AAYUSH DEPARTMENT PRESENT IN PERSON. SMT.
KALPANA SHRIVASTAVA, ADDL. CHIEF SECRETARY, AAYUSH
DEPARTMENT IS PRESENT THROUGH VIDEO CONFERENCING)***

(RESPONDENT No. 4 BY SHRI K.C. GHILDIYAL - SR. ADVOCATE ASSISTED BY SHRI ADITYA VEER SINGH - ADVOCATE)

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This petition coming on for admission this day, the court passed the following:

ORDER

This writ petition is filed being aggrieved of order dated 05.10.2023 (Annexure P-15) issued by the Dy. Secretary to the State Government giving charge of the post of Registrar, State Homeopathy Council in favour of the private respondent Dr. Anita Gupta.

2. Petitioner's contention is that vide Annexure P-6, an advertisement was issued by the Commissioner, Aayush on 23.08.2023, thereafter, applications were invited, these applications were scrutinized and as per the requirement of qualifications prescribed in the advertisement to possess a Post Graduate Degree from a recognized University in Homeopathy and five year's administrative experience. Besides preference was to be given to a Law Graduate, petitioner alongwith the private respondent and another person had made application for giving charge of the post of the Registrar.

3. After scrutinizing the aforesaid applications the Committee which was constituted by the Commissioner, Aayush as contained in Annexure P-8, petitioner was found to be the only eligible candidate but instead of giving charge to the petitioner, charge has been handed over to the private respondent and that being the bone of contention, it is submitted that once a legitimate expectation was raised, applications were invited, petitioner was found to be eligible candidate and then not giving charge to the petitioner is arbitrary and illegal.

4. Shri Agarwal, learned counsel for the petitioner, placing reliance on the

reply filed by the State alongwith I.A. No. 1063 of 2024 on 22.01.2024 submits that the only ground which has been taken in the said reply to deny charge to the petitioner is that petitioner was over age as per the requirements of the Recruitment Rules. It is mentioned in para-8 of the said reply that the relevant statute i.e. M.P. Homeopathy Parishad Officers and Other Servants (Recruitment and Conditions of Services) Rules, 1996, prescribes minimum and maximum age for the candidate to be appointed as 25 & 35, respectively and in the present case, no candidate falls within this statutory bracket and when this position was realized, the process was halted, because the supremacy of a statute governing the recruitment was not intended to be ignored.

5. In view of such reply, it is submitted that when a fresh advertisement was issued which is not disputed by either the private respondent or by the State whereby qualifications pertaining to age limitation was removed, then, the advertisement as has been produced by the respondents/State wherein the column of minimum and maximum age has been deleted, then there was no justification for the State to deny appointment or handing over charge of the post of the Registrar despite recommendations of the Scrutiny Committee finding the petitioner to be the only eligible candidate to hold the charge of the post of Registrar.

6. Reliance is placed on the judgment of Co-ordinate Bench in *W.P. No. 27876 of 2022 (Dr. Jogendra Singh Thakur Vs. State of M.P. & Ors.) decided on 04.10.2023*, to point out that in the light of decision of Hon'ble Supreme Court in the case of *E.P. Royappa Vs. State of Tamil Nadu & another AIR 1974 SC 555* which was not considered by the Co-ordinate Bench of this High Court while deciding *Dr. V.B. Singh Baghel Vs. State of M.P. (2016)3 MPLJ 152* on which reliance is placed by Shri Vivek Sharma

learned Dy. Advocate General has been distinguished by the same Bench, it is held that action of withdrawal of officiating charge can be subject matter of judicial review on the anvil of Article 14 & 16 of the Constitution. Although, the said action cannot be called in question in the teeth of Article 311 of Constitution. Reliance is also place on the decision of this Court dated **31.03.2023** passed in ***W.P. N. 2107 of 2023 (Dr. Narendra Nath Mishra Vs. State of M.P. & Ors.)***. Reliance is also placed on the judgment of Supreme Court in the case of ***R.S. Mittal Vs. Union of India; 1995 Supp. (2) SCC 230*** where in the ratio of the law is that where there is a vacancy which can be offered to a selected candidate on the basis of his merit position, denial of appointment to him without a proper reason, held unjustified.

7. Similarly, reliance is also placed on the judgment of Supreme Court in the case of ***Union of India & another Vs. Pradeep Kumar Kedia & Ors. (2012)1 SCC 432***, wherein it is held that where Court does not find any reason for authorities not to offer any appointment to candidate, placed in Selection panel, Court can direct appointment. Similarly reliance is placed on the judgment of Supreme Court in the case of ***East Coast Railway & another Vs. Mahadev Appa Rao & Ors. (2010)7 SCC 678***, wherein it is held that though a candidate who has passed the examination and whose name appears in select list does not have an indefeasible right to be appointed, yet appointment cannot be denied arbitrarily, nor can selection test can be cancelled without giving proper justification.

8. In this backdrop, prayer is made that petitioner be directed to be given charge of the post of the Registrar, Homeopathy Council.

9. Shri Vivek Sharma, learned Dy. Advocate General for the State referring

to the provisions contained in the Proviso below Section 19(1) of the M.P. Homeopathy Parishad Adhiniyam, 1976 submits that vacancy occurring in the office of the Registrar, can be given to any person to act as a Registrar and therefore, no indulgence is required in the matter.

10. It is also submitted that, in their reply vide I.A. No. 1063 of 2024, it is mentioned that petitioner is working as Specialist (Homeopathy) Super Class-I Officer in the Grade-pay of Rs.7600/- and on the other hand the Grade-pay of Registrar, M.P. State Homeopathy Council is Rs.5400/- which is lower to the current Grade-pay of the petitioner and in view thereof the petitioner has no right to raise her claim on a lower post.

11. Shri K.C. Ghildiyal, learned Sr. Advocate for the respondent No.4 submits that petitioner has firstly no locus to challenge the order. It is submitted that this post is not filled on deputation either by appointment or transfer, therefore, the ratio of the law laid down in the case of *Ashok Kumar Ratilal Patel Vs. Union of India & Ors. (2012)7 SCC 757* will not be applicable. It is also submitted that petitioner having worked for 22 years as the Registrar of the Homeopathy Council has no vested right to continue as a Registrar. It is also submitted that petitioner is working on a higher post of Specialist and she is required to give her services as a Specialist as she happens to be the only Specialist in the Aayush Department. It is also submitted that since, the procedure which culminated from the issuance of the amended advertisement was not completed, no direction to appoint the petitioner can be given. It is also submitted that the committee was constituted prior to the advertisement and thus, constitution of the committee is illegal.

12. Smt. Kalpana Shrivastava, Addl. Chief Secretary to the State of Madhya Pradesh on our cross questioning admits that Annexure P-6 was issued by the

Commissioner Ayush. Commissioner had thereafter, rectified her mistake and she owes responsibility on behalf of the department for the acts of the Commissioner. In view of such facts the first issue which came for deliberation yesterday, that whether there was cancellation of the earlier advertisement or not and who was responsible for issuance of a fresh advertisement stands concluded in the following terms, that, there is no dispute that a fresh advertisement on 23.08.2023 was issued by the Commissioner, whereby she has rectified the mistake as were noted by her in Annexure P-6 namely she had rectified the requirement of appointment with handing over the charge of the post of Registrar and Secondly, since the requirement of age limit is prescribed for direct recruitment, therefore, that age limit was deleted, despite making mention of the provisions contained in Section 51 of the Fresh advertisement on the even date.

13. This Court would like to place on record its appreciation for such fair admission by the Addl. Chief Secretary and also the assurance given by the Addl. Chief Secretary, since the mistake was of the Commissioner, Aayush she will not try to pass on the buck to any Subordinate Officer for her own mistake and lapses

14. At this stage, Addl. Chief Secretary Smt. Kalpana Shrivastava also submits that the Registrar as per the terms of provisions contained in Section 19 of the M.P. Homeopathy Parishad Adhiniyam, 1976 is to be a full time salaried employee of the council and is to be appointed by the State Government and submits that this fact be taken into consideration.

15. After hearing learned counsel for the parties and going through the records, certain order-sheets of the department as have been handed over to

this Court for perusal by the State Counsel assisted by the Dy. Secretary of the Department in person and the Addl. Chief Secretary appearing through the Video Conferencing, it is evident that the decision was taken to fill the post of Registrar, Homeopathy Council by following the procedure as prescribed under law. Thereafter, a decision was taken to call for the advertisement. Earlier same Minister Ram Kishore Nanu Kaawre had issued a direction to give charge of the Homeopathy Council to one Dr. Akhilesh Rathore, thereafter, on 11.07.2023 the Principal Secretary had made a note that matter was discussed and applications be invited following a transparent procedure in this behalf and after inviting the panel proceedings be carried out. This note of the Principal Secretary was approved by the concerned Minister as can be seen from the order-sheet on 12.07.2023.

16. Thereafter, again a request was made by the concerned Minister to appoint one Dr. Anita Gupta who happens to be the private respondent No.4 in this Case as the Registrar of the Homeopathy Council, but when this request was made prior to that in pursuance of the orders of the Government a Committee was constituted on 16.08.2023 as is evident from Annexure P-8 filed by the petitioner alongwith this writ petition.

17. Thus, in terms of the directions of the State Government a Committee was constituted to adopt a transparent procedure for scrutinizing the cases of the applicants for giving charge to the post of Registrar, Homeopathy Council.

18. Thereafter, that Committee which was constituted on 16.08.2023 had scrutinize the applications as were received in pursuance to the advertisement dated 23.08.2023 and had found that it was only the petitioner who fulfills the requirements of the advertisement and two other candidates namely Dr. Pooja Sharma, Reader and Head of the Department and Dr. Anita Gupta,

Homeopathy Medical Officer, did not fulfill the qualifications as prescribed in the advertisement. Thus, the proceedings reveals that there is a surprising twist in the matter that when the private respondent and the another candidate were not fulfilling the conditions for appointment, then how can the State be allowed to say that in terms of the proviso below Sub-Section (1) of Section 19 of the Adhiniyam of 1976 they can fill a vacancy by appointing anybody.

19. There are few limitation which have been ignored by the State Government namely that such post cannot be filled as an stop-gap arrangement for more than two months. Though, it is submitted by the Addl. Chief Secretary, that they have already sent a requisition to the Public Service Commission for making direct recruitment to the post of Registrar, Homeopathy Council but fact of the matter is that Addl. Chief Secretary in all fairness admits that as per her communication with the Secretary of the Madhya Pradesh Public Service Commission such process takes about three months because the appointment is to be made on a single post. Thus, when this aspect is taken into consideration, then the submission made by Shri Vivek Sharma learned Dy. Advocate General supported by the Addl. Chief Secretary that they can fill the vacancy as a stopgap arrangement by appointing anybody to the said post is not made out because there is a time cap of two months and that statutory time limit cannot be violated as has been accepted by the State Government in para-8 of their reply filed vide I.A. No. 1063/2024, though in a different context. Thus, the bogie of age limit raised by the State Government reflects poorly of the understanding of statutory provision and intentions of the State Government. After having issued an advertisement on 23.08.2023 but deleting the conditions prescribing age limit, it was not open to them to file a reply in the month of

January, 2024 and say that petitioner was disqualified for not fulfilling the requirement of the age as prescribed in the relevant rules. This reflects really poorly on the intentions of the State that they are not willing to assist the Court but wishes to camouflage the proceedings so to misguide the Court.

20. Thus, when it is examined that the matter was duly examined by a committee there is no dispute to the fact that only three applicants had made an application for giving charge of the post of the Registrar, Homeopathy Council and that advertisement was displayed on the Portal of the Department, that means that all the members of the department were having open invitation to apply for the said post and they had chosen not to apply, then after finding other two including the private respondent to be ineligible merely on the note-sheet of the concerned State Minister, independent charge of Water Resources Department, followed by a Note-sheet of the Principal Secretary to the Chief Minister saying that Chief Minister has requested to give charge of the post of the Registrar, Homeopathy Council to Dr. Anita Gupta, further making a request to proceed in the matter as per Rules, absence of this fact that Chief Minister was ever notified by the Department that the Rules require fulfillment of certain qualifications to hold the post of the Registrar and said Dr. Anita Gupta did not fulfill those qualification as per the scrutiny which was carried by the Department alCommittee constituted by the Commissioner on 16.08.2023, issuance of posting order in favour of the private respondent cannot be given a seal of approval. Therefore, that order deserve to be set-aside and is hereby set-aside.

21. Today, we are informed that Department has already withdrawn the said order and has given charge of the post of the Registrar to the Superintendent of the Council.

22. Be that may be the fact of the matter is that in terms of the Proviso below Section 19(1) of the Act of 1976, charge cannot be given for a period of more than 2 months to an illegible person and Superintendent being admittedly a Class-III employee as Shri K.C. Ghildiyal submits that he has earlier challenged that in a different writ petition cannot hold charge for more than two months, then the issue comes than where there is existence of a vacancy, there is an eligible persons available to hold the charge, there is no allegation of any kind of negativity against that candidate, then merely because she hold the posts of Specialist can become a disqualification to give charge after raising legitimate expectations by issuing an advertisement and calling for the applications when examined in the teeth of the law laid down by Supreme Court in the case of *E.P. Royappa (supra)*, cannot be given a seal of approval. Therefore, the natural consequence will be that the respondents till the completion of the process of direct recruitment for which requisition is already sent to the M.P. State Public Service Commission is obliged to give charge to the shortlisted candidate and that being the ratio of the law laid down in case of *R.S. Mittal (Supra)* and also in case *East Coast Railway (Supra)*, after raising a legitimate expectation without assigning any reason they cannot deny handing over of charge in favour of the petitioner.

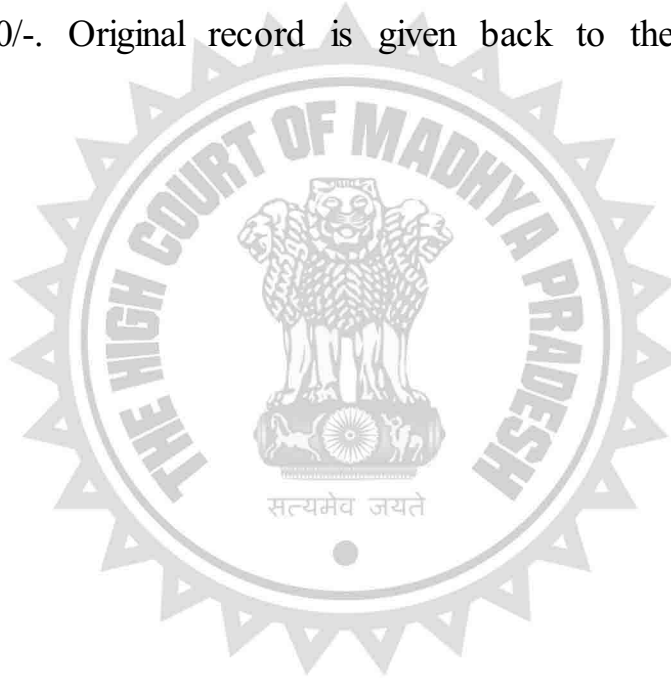
23. This Court is conscious that it cannot order the State to give appointment to anybody despite his or her merit but the fact of the matter is that this Court gets strength from the ratio of law laid down in case of *East Coast Railway and another (Supra)* that once the process was initiated, it culminated in the selection and recommendation, then, without assigning any proper and cogent reason that recommendation cannot be overlooked by the

State and that being the ratio of law and when read in continuation with the provisions contained in the Proviso below Section 19(1) and also the law laid down by the Co-ordinate Bench in the case of *Dr. Jogendra Singh Thakur* distinguishing the judgment of this High Court in the case of *Dr. V.B. Singh Baghel*, this Court is of the opinion that withdrawal of the officiating charge can be a subject matter of judicial review on the anvil of Article 14 & 16 of the Constitution.

24. That, being the legal position, this writ petition is allowed and disposed.

25. Respondents to bear cost of this litigation which is quantified at Rs.25,000/-. Original record is given back to the learned Dy. Advocate General.

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(VIVEK AGARWAL)
JUDGE