(2016) 03 CHH CK 0005

CHHATTISGARH HIGH COURT

Case No: WP(S) No. 1659 of 2015.

Ramsingh Kanwar, S/o Late Shri Than Singh Kanwar Aged About 60 Years Presently Working as Chief Executive Officer, Janpad Panchayat, Katghora, District Korba, (Chhattisgarh) - Petitioner @HASH State of Chhattisgarh Through the Secretary, Department of Sch	Vs	APPELLANT RESPONDENT

Date of Decision: March 28, 2016

Citation: (2016) LIC 4430

Hon'ble Judges: Shri Sanjay K. Agrawal, J.

Bench: Single Bench

Advocate: Mr. Jitendra Pali, Advocate, for the Petitioner; Mr. Suvigya Awasthi, Panel Lawyer, for the Respondent Nos. 1 to 3; Mr. Umakant Singh Chandel, Advocate, for the Respondent No. 4

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Shri Sanjay K. Agrawal, J. - The petitioner who is substantively holding the post of Chief Executive Officer, Janpad Panchayat seeks to challenge the legality, validity and correctness of the order dated 16.03.2015 (Annexure P/2) passed by respondent No. 1/State of Chhattisgarh whereby respondent No. 4/Deputy Collector has been

appointed on the post of Chief Executive Officer, Janpad Panchayat, Dondi, District Balod and the petitioner has been transferred on the post of In-charge Assistant Director, Office of Assistant Commissioner, Tribal Welfare, Korba alleging the said appointment to be contrary to the applicable rule.

2. The aforesaid challenge has been made on the following factual matrix:-

2.1 The petitioner is substantially holding the post of Chief Executive Officer, Janpad Panchayat, Katghora as he was promoted on the said post by the order of the State Government on 1st June, 1998. The appointment to the post of Chief Executive Officer, Janpad Panchayat is governed by the Chhattisgarh Scheduled Tribe and Scheduled Caste Development (Gazzetted) Service Recruitment Rules, 2006 (hereinafter referred to as "the Rules of 2006")

2.2 By the impugned order dated 16.3.2015 (Annexure P/2), respondent No. 4/Deputy Collector has been appointed on the post of Chief Executive Officer, Janpad Panchayat Katghora in place of the petitioner and by separate order dated 16.03.2015 (Annexure P/3) petitioner has been transferred and posted as In-charge Assistant Director in the Office of Additional Commissioner, Tribal Welfare, Korba. The case of the petitioner is that post of Chief Executive Officer, Janpad Panchayat, Katghora under the Rules of 2006 can be filled up either by direct recruitment or by promotion and the State Government cannot post Deputy Collector on the post of Chief Executive Officer, Janpad Panchayat contrary to the rules and therefore, appointment of respondent No. 4 is contrary to the rules and it is liable to be quashed.

2.3 Return has been filed by the State Government stating inter-alia that the State Government has decided to send the newly recruited Deputy Collectors on deputation to the Department of Scheduled Caste and Scheduled Tribe so that they may gain some experience from the rural problems. It is further case of the State Government that under the Rules of 2006 appointment of Deputy Collectors on the post of Chief Executive Officer is not barred and as such, purely on administrative ground newly recruited Deputy Collectors including respondent No. 4 have been appointed on the post of Chief Executive Officer rather they have been sent on deputation on the post of Chief Executive Officer, Janpad Panchayat vide Annexure P/1. Therefore, the writ petition deserves to be dismissed.

2.4 No rejoinder has been filed by the petitioner against the return filed by the Respondents/State.

3. Mr. Jitendra Pali, learned counsel appearing for the petitioner, would submit that the petitioner is discharging the duty of Chief Executive Officer, Janpad Panchayat honestly and to the utmost satisfaction of his superior officer after having been substantially appointed on the said post on promotion, to which the Rules of 2006 is applicable and the said Rules governing the service conditions pertaining to Chief Executive Officer, Janpad Panchayat would show that post of Chief Executive Officer

has to be filled up 40% by direct recruitment and 60% by way of promotion and there is no third source of recruitment on the post of Chief Executive Officer, Janpad Panchayat. Mr. Pali would further submit that respondent No. 4 is a Deputy Collector/State Administrative Junior Level Officer, he cannot be posted as Chief Executive Officer, Janpad Panchayat as same would be contrary to the Rules of 2006 being impermissible in law. He would lastly submit that the petitioner can be replaced only by regular Chief Executive Officer and a person from outside cadre cannot be appointed on the post of Chief Executive Officer, Janpad Panchayat in violation of Rules of 2006 and therefore the appointment of the respondent No. 4 in breach of Rules of 2006 is illegal and liable to be quashed and writ petition be allowed.

4. Mr. Suvigya Awasthy, learned Panel Lawyer for respondents No. 1 to 3/State, would support the order of the respondent No. 1/State Government and submit that there is no bar in the Rules of 2006 to post the member of State Administrative Service on the post of Chief Executive Officer, Janpad Panchayat and on administrative exigency, such appointment can be made by the State Government, it has rightly been made by the impugned order and therefore there is no illegality in the appointment of respondent No. 4 on the said post and writ petition having no merit deserves to be dismissed with cost(s).

5. I have heard learned counsel appearing for the parties and considered the rival submissions made therein and gone through the record of the case with utmost circumspection.

6. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Chhattisgarh has framed the rules namely "The Chhattisgarh Scheduled Tribe and Scheduled Caste Development (Gazzetted) Service Recruitment Rules, 2006". The above-stated rules govern the recruitment/appointment on the post of Chief Executive Officer. The post of Chief Executive Officer has to be filled as per Rule 6, Schedule-II of the Rules of 2006. The Rules of 2006 has suffered amendment by notification dated 8th February, 2011 and now 40% post of the Chief Executive Officer has to be filled by direct recruitment and 60% post has to be filled by promotion of Area Organiser. The Rules of 2006 nowhere contemplate third mode of making appointment on the post of Chief Executive Officer, Janpad Panchayat.

7. At this stage, it would be appropriate to notice certain judgments of the Supreme Court laying down the law that the power of Governor under proviso to Article 309 of the Constitution of India is legislative in character.

7.1 The Constitution Bench of the Supreme Court in the matter of B.S. Yadav and others v. State of Haryana and others, 1980 Supp SCC 524 has held that the power exercised by the Governor under proviso to Article 309 of the Constitution of India is legislative power and held as under:-

"44. It is in this context that the proviso to Article 309 assumes relevance and importance. The State legislature has the power to pass laws regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the exercise of that power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it abhors a vacuum. It has therefore made provisions to deal with situations which arise on account of the ultimate repository of a power not exercising that power. The proviso to Article 309 provides, insofar as material, that until the State legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The Governor thus steps in when the legislature does not act. The power exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is legislative power.

45. That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governor''s power under the proviso to Article 309 being in the nature of a legislative power. By Article 168, the Governor of a State is a part of the legislature of the State. and the most obvious exercise of legislative power by the Governor is the power given to him by Article 213 to promulgate ordinances when the legislature is not in session. Under that Article, he exercises a power of the same kind which the legislature normally exercises: the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Article 213 occurs, is significant: "Legislative Power of the Governor". The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power. Under Article 213, he substitutes for the legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject."

8. Similarly, in the matter of Raj Kumar and others v. Shakti Raj and others, (1997) 9 SCC 527, Their Lordships of the Supreme Court has held that power of the Governor under proviso to Article 309 of the Constitution is legislative in character and held as under:-

"12.....The power of the Governor under proviso to Article 309 is constituent power and legislative in character subject to an Act of legislation....."

9. Likewise, in the matter of A.K. Bhatnagar and others v. Union of India and others, (1991) 1 SCC 544, Their Lordships of the Supreme Court have held that the rules framed under proviso to Article 309 of the Constitution of India must be followed by the Government and should act in accordance with those rules and observed as under:-

"13. On more than one occasion this Court has indicated to the Union and the State Governments that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does create problem and dislocation. Very often Government themselves get trapped on account of their own mistakes or actions in excess of what is provided in the rules. We take serious view of these lapses and hope and trust that the Government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules."

10. In the matter of J&K Public Service Commission, and others v. Dr. Narinder Mohan and others, (1994) 2 SCC 630, Their Lordships of the Supreme Court have held that once statutory rules have been framed, the appointment shall be only in accordance with the rules and held as under:-

"7. Existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is coextensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but only supplement the law..... "

11. Likewise, in the matter of S.L. Sachdev and another v. Union of India and others, (1980) 4 SCC 562 , Their Lordships of the Supreme Court have held that any direction contrary to the rules would amount to amendment of the rules framed under proviso to Article 309 of the Constitution of India which is impermissible in law and observed as under:-

"13.....Any directive which goes beyond it and superimposes a new criterion on the Rules will be bad as lacking in jurisdiction. No one can issue a direction which, in substance and effect, amounts to an amendment of the Rules made by the President under Article 309. That is elementary. We are unable to accept the learned Attorney-General''s submission that the directive of the Director General is aimed at further and better implementation of the Recruitment Rules. Clearly, it introduces an amendment to the Rules by prescribing one more test for determining whether UDCs drawn from the Audit offices are eligible for promotion to the Selection Grade/Head Clerks Cadre."

12. A conspectus of the above-stated judgments would show that the rules framed under proviso to Article 309 of the Constitution of India by the Governor is statutory in character and it has been framed in legislative power and binding to the Government, any appointment on the post covered by the Rules has to be made in

accordance with the Rules and if the appointment is made contrary to the Rules, it would be venerable. Thus, the appointment of a post has to be made in accordance with the rules for good governance. The responsibility for good administration and good governance is that of the Government. Appointment of an efficient, honest and experienced administrative officer as per the recruitment rules, is a must for due discharge of that responsibility. See K.B. Shukla and others v. Union of India and others, (1979) 4 SCC 673 (paragraph 26). Keeping in mind the above-stated objective and responsibility, the State Government has framed the Rules of 2006 laying down the method of appointment on the post of Chief Executive Officer, Janpad Panchayat and as per rules, the post of Chief Executive Officer can be filled up either by direct recruitment or by promotion as per quota provided in the Rules of 2006. In the instant case, respondent No. 4 who is a member of State Administrative Service (Deputy Collector), has been appointed on the post of Chief Executive Officer, Janpad Panchayat, he is not holding the substantive post of Chief Executive Officer under the Rules of 2006 and therefore he cannot be appointed on the said post, that too replacing the duly appointed Chief Executive Officer who is substantively holding the post of Chief Executive Officer, Janpad Panchayat as such the State Government cannot appoint such a person/respondent No. 4 on the post of Chief Executive Officer, Janpad Panchayat and that is contrary to the Rules of 2006 and therefore it is illegal and liable to be quashed as per law laid down in above-stated judgments.

13. As a fall out and consequence of the aforesaid discussion, appointment of respondent No. 4 on the post of Chief Executive Officer, Janpad Panchayat, Katghora and posting of the petitioner on the post of In-charge Director, Office of Assistant Commissioner, Korba are hereby quashed. The petitioner is entitled to work on the substantive post of Chief Executive Officer, Janpad Panchayat, Korba or any other place which the State Government may deem it fit as per administrative exigency.

14. The writ petition is allowed to the extent indicated herein above but without imposition of cost(s).