

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (S) No.5780 of 2016**

Smt. Shitala Diwan, W/o Late Shri Pyare Lal Diwan, Age around 35 years, Presently posted as Panchayat Secretary at Gram Panchayat Hatoud, Janpad Panchayat Kasdol, R/o Gram Kosamsara (Baya), Tahsil Kasdol, District-Baloda Bazar-Bhatapara (CG)

---- Petitioner**Versus**

1. State of Chhattisgarh, Through the Secretary, Department of Panchayat and Social Services, Mantralaya, Naya Raipur, Raipur (CG)
2. Collector, Baloda Bazar-Bhatapara, District-Baloda Bazar-Bhatapara (CG)
3. Chief Executive Officer, Zila Panchayat, Baloda Bazar-Bhatapara, District-Baloda Bazar-Bhatapara (CG)
4. Chief Executive Officer Janpad Panchayat Kasdol, District-Baloda Bazar-Bhatapara (CG)

---- Respondents

 For Petitioner : Mr. Matin Siddique, Advocate.
 For Res.No.1 & 2/State : Mr.Gary Mukhopadhyay, Dy.G.A.
 For Res.No.3 & 4 : None present

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****24/01/2017**

1. The petitioner's husband while working as Teacher (Panchayat) at Government High School, Baya, Janpad Panchayat Kasdol died in harness on 30.10.2011. She made an application for appointment on compassionate ground on the post of Assistant Teacher (Panchayat). Since the petitionener did not have

qualification for appointment on the post of Assistant Teacher (Panchayat) as per applicable rules, her case was not considered and ultimately, matter of appointment was sent to the State Government seeking instructions. The State Government by order dated 8.1.2016 issued the circular holding that dependents of the deceased Teacher (Panchayat) who have no minimum qualification for the post of Assistant Teacher (Panchayat), their cases may be considered for appointment on the post of Secretary (Panchayat). Accordingly, case of the petitioner was considered for the post of Secretary (Panchayat) at Gram Panchayat Hatoud and she was granted appointment by order dated 12.5.2016 on the post of Secretary (Panchayat). Thereafter, notice dated 30.9.2016 (Annexure P/1) was issued by respondent No.3 stating that the Government has issued the instructions dated 24.8.2016 holding that earlier circular dated 8.1.2016 would be applicable to the dependents of Teacher (Panchayat) who have died on or after 8.1.2016, therefore, the show-cause notice as to why petitioner's appointment be not cancelled has been issued, which has been challenged by the petitioner in the present writ petition under Article 226 of the Constitution of India stating inter-alia that the respondents have already made up their mind to cancel her appointment and circular dated 8.1.2016 has been issued by the State Government, whereas instruction

dated 24.8.2016 has been issued by the Deputy Secretary of the State Government, which is not by the State Government, therefore, the impugned notice deserves to be set aside.

2. Mr.Matin Siddique, learned counsel appearing for the petitioner, would submit that the petitioner's husband died on 30.10.2011 and case of the petitiioener was pending consideration and ultimately on the basis of instructions given by the State Government for consideration on the post of Secretary (Panchayat) by the circualr dated 8.1.2016 her case has been considered and she has been granted compassionate appointment, therefore, her appointment cannot be interfered with on the basis of insturctions dated 24.8.2016 and as such, the impugned notice dated 30.9.2016 (Annexure P/1) deserves to be quashed.
3. On the other hand, Mr.Gary Mukhopadhyay, learned Deputy Government Advocate appearing for respondents No.1 and 2, would submit that the circular dated 8.1.2016 is not applicable to the petitioner as the petitioner's husband died on 30.10.2011, therefore, respondent No.3 has rightly issued the notice to the petitioner. He would further submit that memo dated 24.8.2016 is merely clarificatory circular. The circular dated 8.1.2016 does not have retropective effect. The said circualr has been issued by the State Government to consider the pending cases of the dependents of Teacher (Panchayat)

who have died on or after 8.1.2016, therefore, the present writ petition deserves to be dismissed.

4. None present for respondents No.3 and 4 though they have been served through registered post by deeming provision.
5. I have heard learned counsel appearing for the parties, given thoughtful consideration to the submissions raised herein and also gone through the documents appended with the petition with utmost circumspection.
6. It is not in dispute that the petitioner's husband while working on the post of Teacher (Panchayat) died in harness on 30.10.2011 and the petitioner did not have minimum qualification for appointment on the post of Assistant Teacher (Panchayat).
7. This Court in the matter of Smt. **Jaya Bai Verma Vs. State of Chhattisgarh**, decided on 26.10.2015 has clearly held that a candidate who does not have minimum educational qualification for the post of Assistant Teacher (Panchayat) is not entitled for compassionate appointment. Thereafter, the State Government has considered the difficulty of dependents of Teacher (Panchayat) who have died, but they have no educational qualification for the post of Assistant Teacher (Panchayat) and issued the circular dated 8.1.2016, in which it has been clearly held that dependents of Teacher (Panchayat) who have no minimum educational qualification shall not be

given compassionate appointment for the post of Assistant Teacher (Pachayat), but they shall be given appointment on the post of Secretary (Panchayat), if they have passed 12th examination.

8. Considering the aforesaid circular, the petitioner's case was considered for appointment on the post of Secretary (Panchayat) at Gram Panchayat Hatoud, Janpad Panchayat Kasdol and order of appointment has been given.
9. It appears from the record that on instructions sought, the Deputy Secretary of the State Government has informed by memo dated 24.8.2016 that the circular dated 8.1.2016 would be applicable to those dependents of the deceased Teacher (S) (Panchayat) who have died on or after 8.1.2016. This circular has been issued by the Deputy Secretary of the State Government. It has not been issued by and in the name of the Governor as required under Section 166(1) of the Constitution of India.
10. Section 2(41) of the Chhattisgarh General Clauses Act, 1857 defines State Government as under:-

“41. State Government or Government means the Governor of the State of Chhattisgarh.”

11. In **Gullapalli Nageshwar Rao Vs. Andhra Pradesh State Road Transport Corporation**¹, Their Lordships of the Supreme Court observed as under:-

¹ AIR 1959 SC 308

“A State Government means the Governor. The executive power of State vests in the Governor; it is exercised by him directly or by officers & sub-ordinate to him in accordance with the provisions of the Constitution. The ministers headed by the Chief Minister advise him in exercise of his functions

12. It is well settled that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in such manner as may be specified in the rules to be made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. Article 77(3) lays down that:

“77. (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.”

Likewise, Article 166(3) lays down that:

“166. (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.”

13. Article 166 of the Constitution was considered by Their Lordships of the Supreme Court in **State of Bihar Vs. Kripalu**

Shankar² and observed as under:-

“14. Now, the functioning of Government in a State is governed by Article 166 of the Constitution, which lays down that there shall be a Council of Ministers with the Chief Minister at the head, to aid and advise the Governor in the exercise of his functions except where he is required to exercise his functions under the Constitution, in his discretion. Article 166 provides for the conduct of government business. It is useful to quote this article:

‘166. Conduct of business of the Government of a State.—(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.’

15. Article 166(1) requires that all executive action of the State Government shall be expressed to be taken in the name of the Governor. This clause relates to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this article nor even noting by a Minister. Every executive decision need not be as laid

2 (1987) 3 SCC 34

down under Article 166(1) but when it takes the form of an order it has to comply with Article 166(1). Article 166(2) states that orders and other instruments made and executed under Article 166(1), shall be authenticated in the manner prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this article, therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2)."

14. The above-stated decision i.e. **Kripalu Shankar** (supra) has been followed by Their Lordships of the Supreme Court in **Jaipur Development Authority and others Vs. Vijay Kumar Data and another**³ and held as under:-

"53. It is thus clear that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government. A reading of the Letter dated 6-12-2001 shows that it was neither expressed in the name of the Governor nor was it authenticated in the manner prescribed by the rules. That letter merely speaks of the discussion made by the Committee and the decision taken by it. By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 of the Constitution."

3 (2011) 12 SCC 94

15. If the facts of the present case are examined in the light of above-quoted Constitutional provisions and judgment of the Supreme Court, it is quite vivid tht circualar dated 8.1.2016 has been issued by the State Government in confirmity with Article 166(1) of the Constitution of India expressing it in the name of the Governor, but the memo dated 24.8.2016 has been issued by the Deputy Secretary to Government. It is not in confirmity with Article 166(1) of the Constitution of India as it has not been expressed in the name of the Governor. No counter affidavit has been filed that memo dated 24.8.2016 has been issued by the State Government and there is omission to state the same in the name of the Governor. Therefore, it cannot be held that memo dated 24.8.2016 has been issued by the State Government clarifying the earlier circular dated 1.8.2016
16. The next submission of learned Deputy Government Advocate is that the notice dated 30.9.2016 (Annexure P/1) is merely show-cause notice and thereore, the writ petition is not maintainable against the show-cause notice.
17. It is well settled law that the writ Court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless it is without jurisdiction and without authority of law but it is equally well

settled when the notice is issued with pre-meditation, the writ petition would be maintainable against show cause notice.

18. In the matter of **M/s. Siemens Ltd. Vs. State of Maharashtra and others**⁴, Their Lordships of the Supreme Court have held tht the writ petition against show cause notice would be maintainable when notice is issued with premeditation and observed as under:-

“9.Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr. AIR 1987 SC 943, Special Director and Another v. Mohd. Ghulam Ghouse and Another, (2004) 3 SCC 440 and Union of India and Another v. Kunisetty Satyanarayana, 2006 (12) SCALE 262], but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See K.I. Shephard and Others v. Union of India and Others (1987) 4 SCC 431]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.

10. The said principle has been followed by this Court in V.C. Banaras Hindu University and Ors. v. Shrikant (2006) 6 SCALE 66, stating: (SCC p.60, paras 48-49)

"48. The Vice Chancellor appears to have made up his mind to impose the punishment of dismissal on the Respondent herein. A post decisional hearing given by the High Court was illusory in this case.

4 (2006) 12 SCC 33

49. In K.I. Shephard & Ors. etc. etc. v. Union of India & Ors. [AIR 1988 SC 686], this Court held : (SCC p.449, para 16)

"It is common experience that once a decision has been taken, there is tendency to uphold it and a representation may not really yield any fruitful purpose."

19. A careful perusal of the notice dated 30.9.2016 (Annexure P/1) would show that the petitioner's case has already been reconsidered by respondent No.3 and decision has been taken to revoke the appointment of the petitioner and as such, final decision has already been taken to revoke the appointment of the petitioner, therefore, the writ petition is held to be maintainable as respondent No.3 has already made up its mind to terminate the services of the petitioner.
20. Consequently, the impugned notice dated 30.9.2016 (Annexure P/1) issued by respondent No.3 is hereby quashed and it is held that the petitioner is entitled to work on the post of Secretary (Panchayat) at Gram Panchayat Hatoud.
21. The writ petition is allowed to the extent indicated hereinabove. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-

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HIGH COURT OF CHHATTISGARH AT BILASPUR

(SB: Hon'ble Shri Justice Sanjay K. Agrawal)

Writ Petition (S) No.5780 of 2016

Petitioner

Smt. Shitala Diwan

Versus

Respondents

State of Chhattisgarh and others

HEAD-NOTE

(English)

Writ petition against the show-cause notice is maintainable, if notice is issued with pre-meditation.

(हिन्दी)

यदि कारण बताओ नोटिस पहले से विचार कर जारी किया गया हो तो उसके विरुद्ध रिट याचिका पोषणीय है।