

Case relating to relaxation of Rules:

Parties : S.S. Seethavasan & Others Versus The Government of Tamil Nadu, represented by its Secretary HR&CE Department & Others

Court : High Court of Judicature at Madras

Case No : W.P.Nos.28739, 28809, 28810 & 30011 of 2007 & M.P.NOS.1,2,1,1,1 & 2 of 2007

Judges: THE HONOURABLE MR. JUSTICE K. CHANDRU

Appearing Advocates : For the Petitioners: Rajnish Pathiyil, P.K. Rajesh, U. Karunakaran, Advocates. For the Respondents : R. Neelakantan, GA, C.N.G. Ezhilrasi for TNPSC.

Date of Judgment : 01-12-2009

Head Note :-

Constitution of India - Article 226 – Service-Tamil Nadu State and Subordinate Services-Rule 12(b)(iii)- Age Relaxation- whether this Court is empowered under Article 226 of the Constitution of India to interfere with the qualifications prescribed by the authorities? – Held: - No

(Para 12,16 and19)

Constitution of India – Article 14-Article 226- Service- Recruitment- Cut-off marks fixed by the Authorities- fixing of cut-off marks cannot violate the principles of equality enshrined under Article 14 of the Constitution- the power of the employer to fix cut-off marks can neither be denied nor disputed- cut-off mark is fixed on rational basis- no exception could be taken to the same.

(Para 21)

Constitution of India- Article 226- Policy Matters-Power Of Courts and Tribunal- the Government has got a right to notify the scheme- It has a right to issue amendments- no court or tribunal could compel the Government to change its policy involving expenditure.

(Para 23 and 24)

Constitution of India – Article 226- Age Relaxation- interference by the court and Tribunal- age relaxation can never be given by a Court – it is purely administrative action-Court cannot interfere such matters. Held:- Writ petitions are dismissed.

(Para 26 and 27)

Cases Referred: -1. All India Judges' Assn. v. Union of India; (2002) 4 SCC

247{Referred}

2. A.P.Porkodi Vs. The State of Tamil Nadu 1996 Writ L.R. 352{Relied}

3. Union of India Vs. S.Vinod Kumar reported in 2007 AIR SCW 5989 {Relied}
4. Mallikarjuna Rao v. State of A.P., reported in (1990) 2 SCC 707{Relied}
5. Indian Railway Service of Mechanical Engineers Association and others -vs- Indian Railway Traffic Service Association and another 1993 Supp (4) SCC 473{Relied}
6. Technical Executive (Anti-Pollution) Welfare Association v. Commr. of Transport Department and another, (1997) 9 SCC 38,{Relied}
7. Tirumala Tirupati Devasthanams v. K. Jotheeswara Pillai (2007) 9 SCC 461{Relied}
8. B. Bharat Kumar v. Osmania University (2007) 11 SCC 58{Relied}

Comparative Citation:

2010 (4) MLJ 15

Judgment :-

(Prayer: W.P.No.38739 of 2007 has been preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the records of the second respondent pertaining to the impugned notification No.122 dated 1.8.2007 insofar as clause 6(B)(ii) and note under clause 11 is concerned and quash the same and consequently direct the respondents to permit the petitioner to appear for the examination for the post of Assistant Commissioner in the Tamil Nadu Hindu Religious and Charitable Endowments Department.

W.P.Nos.28809 and 28810 of 2007 have been preferred under Article 226 of the Constitution of India for the issue of a writ of mandamus to direct the third respondent to reckon the age from the date of the issuance of the relevant G.O.Ms.No.152, dated 18.09.2006 instead of 1.7.2007 as mentioned in the notification/advertisement No.120 issued by the third respondent.

W.P.No.30011 of 2007 is preferred under Article 226 of the Constitution of India for the issue of a writ of certiorarified mandamus to call for the records of the first respondent of its notification issued vide advertisement No.120/07 and to quash the same so far as Clause6(A) of the said notification is concerned which read as Age (as on 1.7.2007) save the words "AGE" for fixing the cut off date in reckoning the age limit and consequently direct the first respondent to fix the cut off date as 17.7.2006, the date of issuance of G.O.Msw.No.98 P&AR Department, dated 17.7.2006 as the date of reckoning the age limit so far as the petitioners availing benefit under 6(A) Note (iii) of impugned notification and consider the petitioners for direct recruitment for the vacancies for the year 2006-2007 for the posts included in Group I services.)

Common Order:

Heard both sides. The four writ petitions are filed by four different persons.

2. In W.P.No.28739 of 2007, the petitioner, who was a Law Graduate got enrolled in the roll of the Bar Council of Tamil Nadu on 27.10.1995. After getting selected for the post of Audit Inspector, he joined the service on 24.1.2003. He has challenged the notification issued by the Tamil Nadu Public Service Commission (for short TNPSC) by their advertisement No.122, dated

01.08.2007 calling for applications to the posts of Assistant Commissioner in the Hindu Religious and Charitable Endowment Department (for short HR&CE).

3. With reference to educational qualification, in paragraph 6(B)(2) of the notification, it was stated that a candidate must be actually a practising Advocate or a Pleader in Courts of civil and criminal jurisdiction for a period of not less than three years.

4. The grievance of the petitioner was that he was a Lawyer for seven years. Thereafter, he suspended his practice and went for a Government job. Therefore, he should also be considered for the said post without the condition that he should be a practising lawyer. This writ petition was admitted on 31.8.2007. Along with other writ petitions, this Court by an interim order, dated 31.8.2007, directed the respondent TNPSC to receive the application forms and also permitted them to appear for the examination. However the results were directed to be withheld.

5. On notice from this court, the respondent TNPSC informed the Standing Counsel by a communication, dated 4.8.2009 that the same notification in Advertisement No.122, dated 1.8.2007 for direct recruitment to the post of Assistant Commissioner was set aside by this court by an order, dated 22.10.2007 in W.P.No.28891 of 2007 filed by D.Rathinavel Pandian and 23 others. In view of the same, the writ petition has become infructuous.

6. In that case, the petitioners never challenged the relevant rule framed in the year 1968. But, this Court held that the rule was not followed for several years and the officers in the Department, who are Law graduates, working as Ministerial staff and subordinate Staff were having sufficient experience in conducting the departmental matters. It was also observed in paragraphs 12 and 13 of the said order which may be reproduced:

"12....Merely because a person is practicing as an advocate for a period of three years either in civil or criminal law, it cannot be stated that his experience would become more than what the Officers in the administration of the temple are having....

13....Further, the notification says that the person must be a lawyer practicing in civil or criminal law for a period of three years; but the syllabus does not contain any subject in criminal law. As stated above, the notification does not speak about any rule, pursuant to which the notification is issued. In the instant case, for the reasons stated above, this Court is of the considered opinion that the notification can be declared as bad."

7. It is not clear as to how the relevant rule came to be quashed without there being any direct challenge. However, the State Government did not go on appeal against the said order. On the contrary, it issued G.O.Ms.No.335, Tamil Development, Religious Endowments and Information Department, dated 09.11.2009 and decided to amend the relevant service rule.

Accordingly, the rules were amended so as to include not only the candidates who are actually practising Advocates or Pleaders in the Courts of civil or criminal jurisdiction for a period of not less than three years, but also persons who have put in not less than six years service in the post of Executive Officer, Grade I to Grade IV or Inspector or Head Clerk or Manager or Superintendent in the HR&CE Administrative Department to be eligible to apply for the posts of Assistant Commissioners by direct recruitment. The special rules were made to come into effect from 09.11.2009.

8. But, the counsel for the petitioner Mr.Rajnish Pathiyil contended that by virtue of the court order, his client had already written the examination. Further, in view of the subsequent amendments brought into effect from 09.11.2009, the result of his client must be declared and he should be appointed to the post of Assistant Commissioner, HR&CE Department.

9. On the contrary, the counsel for the respondents Department stated that the petitioner's challenge to the qualification in the original writ petition cannot be considered. Since the notification No.122, dated 1.8.2007 itself has been quashed by this court in the earlier writ proceedings, this writ petition should be dismissed. In that case, this Court merely directed the Government to take into account its observations and to issue a fresh notification, which the Government had already done.

10. W.P.Nos.28809 and 28810 of 2007 are filed by two individuals, seeking for a direction. Though age relaxation upto five years was given in view of ban on recruitment by G.O.Ms.No.152, P&AR Department, dated 18.9.2006, the persons will be eligible to get that age relaxation, but the notification issued by the TNPSC, the age as per the rule as well as subsequent relaxation was to be calculated from 1.7.2007 vide Advertisement No.120. Since the two petitioners were affected by the cut-off date of 1.7.2007, they wanted the cut-off date should be from the date of the Government G.O. granting relaxation, i.e. 18.9.2006. In essence, the two petitioners wanted to contend that fixing upper age limit as per advertisement as on 1.7.2007 was arbitrary as it denies them the benefit of writing competitive examinations.

11. It must be noted that while the first petitioner is working as an Assistant Section Officer in the Secretariat, the second petitioner is working as a Senior Co-operative Auditor in the office of the Assistant Director of Co-operative Audit and they are already in service. Because of the notification, they wanted to contend that their chances of further moving up in their career is denied. An interim order was also granted in their case, permitting them to write examinations and for processing their applications.

12. The respondents have filed a counter affidavit. In the counter affidavit, it was stated that the Government granted enhancement of maximum age limit as five years by G.O.Ms.No.98, P&AR Department, dated 17.7.2006 and it was also given effect to various posts notified by the Commission. Subsequently, as per the General Rules, in Rule 12(b)(iii) of Tamil Nadu State and Subordinate Services, it is stipulated that a person must satisfy the age prescribed in the

special rule on the first day of July of the year, in which the vacancy is notified. Since vacancies were notified by Advertisement No.120 for posts which arose during the year 2007, the age reckoning has to be made as per the special rules for that year and the cut-off date was correctly fixed as 1.7.2007.

13. The petitioner in W.P.No.28810 of 2007 has filed an additional affidavit, dated 18.11.2009, stating that because of the cut-off date, the petitioner will be losing his chance to enter into higher Government service forever as he had already crossed 40 years and therefore, fixing the cut-off date was improper.

14. In the reply affidavit, dated 25.11.2009, he also stated that the Government has got powers to make retrospective amendment. Therefore, necessary amendments to the rule should have been made by the Government to save persons like the petitioner.

15. In W.P.No.30011 of 2007, nine petitioners have filed the writ petition, seeking to challenge the advertisement No.120 of 2007 fixing cut-off date as 1.7.2007 for reckoning the upper age and also the note No.3 attached to para 6(A) of the said notification, wherein the age relaxation of five years was made applicable to persons who are unemployed youth and those who are in Government service in terms of the Government Order in G.O.Ms.No.98, P&AR Department, dated 17.7.2006 and G.O.Ms.No.152, P&AR Department, dated 18.9.2006 and wanted the petitioners cases to be considered for direct recruitment for the vacancies for the year 2006-2007 for Group-I post. This Court, by an interim order, dated 20.9.2007, granted similar relief as done in the other cases.

16. On behalf of the respondent TNPSC, a counter affidavit, dated 4.4.2008 has been filed. In the counter affidavit, it was stated that the age criteria has been fixed in terms of Rule 12(b)(iii) of the General Rules for Tamil Nadu State and Subordinate Services. Note (iii) to para 6(A) of the notification cannot be changed by the TNPSC without order of the Government. It was also stated that without challenging the enabling provision, the petitioners cannot seek for modification of the Government order. The contentions raised by the petitioners were misconceived.

17. In view of the commonality among all the cases, they were heard together and a common order is being passed.

18. On behalf of the writ petitioner in W.P.No.28739 of 2007, Mr.Rajnish Pathiyil, learned counsel also filed one written brief, stating that the Supreme Court by virtue of the order in All India Judges' Assn. v. Union of India reported in (2002) 4 SCC 247 has permitted fresh Law graduates to appear for the post of Civil Judge (Junior Division) and that the Assistant Commissioners of HR&CE are not expected to discharge any quasi-judicial function. Therefore, the rule was invalid. Since the Government did not challenge the order passed by this court in setting aside

the rule, the petitioner's case should be allowed in the light of the said judgment. This Court is unable to agree with the said submission.

19. First of all, the question as to whether this Court is empowered under Article 226 of the Constitution of India to interfere with the qualifications prescribed by the authorities itself is a doubtful proposition. When the rule states that one must be actually practising Lawyer for direct recruitment, the same cannot be extended to a person who had already suspended his practice or that the rule was irrelevant and that it was suffice that they possess a mere Law degree on the ground that the post do not contemplate any judicial work.

20. In fact, a Division Bench of this Court presided by M.Srinivasan, J (as he then was) in A.P.Porkodi Vs. The State of Tamil Nadu and the Registrar, High Court, Madras reported in 1996 Writ L.R. 352 held that the term "actual practice" cannot include the period for which one had suspended practice for taking employment. No contention can be made after suspending the service rendered as a Junior Assistant in the Law Department or as a part-time Law Professor in a Law College for inclusion of such a service as actual practice. In paragraph 6 of the order, the division bench had observed as follows:

"6....In such cases, the question whether the applicant has satisfied the requirement in not obtaining the B.L. Degree has to be considered and the question for equivalent qualification will arise. But, in the case of actual practice in Courts, there cannot be any equivalent qualification, particularly, when the person concerned has worked in Government Department or as Junior Professor. By no stretch of imagination, such work can be equated to actual practice in Courts."

21. Apart from the fact that this judgment was not brought to the notice of the learned Judge, when the earlier order was passed by this Court in more or similar circumstance in W.P.No.29135 of 2006 in R.Sivasankar Vs. The Government of Tamil Nadu and another, dated 12.11.2007 was also not noted. In that case, this Court upheld the very same notification in Advertisement No.120, dated 1.8.2007. A judgment of the Supreme Court in Union of India Vs. S.Vinod Kumar reported in 2007 AIR SCW 5989 was relied upon. In that case, when an employer wanted to recruit candidate and fixed a cut-off mark, the same was sought to be challenged. The Supreme Court repelled the contention and held that the fixing of cut-off marks cannot violate the principles of equality enshrined under Article 14 of the Constitution of India. It was held that the power of the employer to fix cut-off marks can neither be denied nor disputed. If cut-off mark is fixed on rational basis, no exception could be taken to the same.

22. It must also be noted that a Division Bench of this Court presided by P.K.Misra, J. (as he then was) dealt with the question of amendment made by the HR&CE Department in respect of fixing the quota for filling up of the posts of Assistant Commissioner vide G.O.Ms.No.341, dated 10.11.2004. It fixed a quota of 40:60 for the direct recruitment and recruitment by

transfer. For this purpose all the substantive and temporary vacancies were also taken into account. The Division Bench in dealing with a case in W.P.No.36522 of 2005 relating to N.Subramanian and others Vs. State of Tamil Nadu and others and batch cases, by a common judgment, dated 13.2.2009 rejected the contentions and upheld the power of the State to amend the relevant service rule under Article 309 of the Constitution.

23. In this context, it is necessary to refer to the judgment of the Supreme Court in Mallikarjuna Rao v. State of A.P., reported in (1990) 2 SCC 707. The following passage found in paragraph 12 is relevant and it may be usefully reproduced below: -"Para 12.The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive...."

24. The judgment of the Supreme Court in Indian Railway Service of Mechanical Engineers Association and others -vs- Indian Railway Traffic Service Association and another reported in 1993 Supp (4) SCC 473 must also be noted in this regard. The following passage found in paragraph 19 is relevant, which may be extracted below: -"Para 19. In the light of this background, when we examine the order of Tribunal, we find it had erred in interfering with a scheme. It is well-settled in law that the Government has got a right to notify the scheme. It has equally a right to issue amendments. Therefore, it could amend the scheme including the provisions relating to the predominant factor from 6 to 37.5%. This is a matter of policy. This Court had taken the view in Union of India v. Tejram Parashramji Bombhate that no court or tribunal could compel the Government to change its policy involving expenditure. Again in Asif Hameed v. State of J&K in paragraph 19, page 1906 this Court observed thus: (SCC p. 374, para 19)

"When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority...."

25. The Supreme Court in Technical Executive (Anti-Pollution) Welfare Association v. Commr. of Transport Department and another, reported in (1997) 9 SCC 38, had emphasised the need for self restraint. The following passage found in paragraph 4 may be usefully reproduced:

"Para 4. ... It would be for the appropriate Government to take policy decision. The Tribunal is not competent to give directions to lay down the policy or to issue directions to create promotional avenues. Such a direction would amount to entrenching upon area of policy-making

which is exclusively within the purview of the appropriate Government. The Tribunal, therefore, was right in rejecting the application and holding that there was no contempt.

26. The Supreme Court vide judgment in *Tirumala Tirupati Devasthanams v. K. Jotheeswara Pillai* reported in (2007) 9 SCC 461 has held that age relaxation can never be given by a Court order. The relevant passages found in paragraphs 6 to 10 from the said judgment may be extracted hereunder:

"6. Rule 4 gives a long list of rules made by the Government of Andhra Pradesh in respect of the employees of the State Government which have been made applicable to Tirumala Tirupathi Devasthanams employees, which includes the Fundamental Rules and the Subsidiary Rules issued thereunder, the Andhra Pradesh Civil Services (Conduct) Rules, 1964, the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1963, etc. Rule 11 of the Rules clearly provides that no person shall be eligible for appointment to the service by direct recruitment to any post in the service of Tirumala Tirupathi Devasthanams in Annexure II if he has completed the age of 28 years or the age prescribed therefor in the said annexure as on 1st July of the year in which the notification for recruitment is issued. It also provides for general relaxation of age in accordance with the orders issued by the Government and also in respect of persons belonging to reserved categories such as Scheduled Castes and Scheduled Tribes and backward classes. Thus the Rules make complete provisions regarding qualification and age for direct recruitment and also in respect of category of persons to whom relaxation can be granted which would be in accordance with the government orders. The Rules do not mention anywhere that while making direct recruitment any services rendered as an NMR employee has to be taken into consideration or some relaxation in age is to be granted on its basis. The writ petitioners had worked for a brief period as NMR employees in 1984-86. It was after a gap of more than six years that they were appointed by way of direct recruitment on 17-8-1992. Under the Rules they were clearly ineligible for being given any appointment as admittedly they were overage.

7. Learned Single Judge allowed the writ petition mainly on the ground that on two earlier occasions the appellant had granted exemption from age and qualifications and no material was placed before the High Court as to why such a discretion could not be exercised by the appellant in favour of the employees concerned, namely, the writ petitioners. The learned Single Judge has also issued a writ of mandamus to the appellant to consider whether Writ Petitioner 5 was entitled for exemption from the requirement of age-limit having regard to certain GOs issued by the Revenue Department of the State Government.

8. In our opinion the reasons given by the learned Single Judge for allowing the writ petition are wholly untenable in law. Merely because on two earlier occasions the appellant granted exemption from eligibility criterion in respect of some employees cannot be a ground to grant relief to the writ petitioners. Even if some concession had been shown to some employees in the

past it would not confer any right upon anyone seeking employment in future to claim exemption from eligibility criterion as a matter of right.

Therefore, the view taken by the learned Single Judge that by not granting exemption from age criterion the appellant had indulged in invidious discrimination is clearly erroneous in law.

9. The learned Single Judge has also issued a writ of mandamus directing the appellant to consider the case of Writ Petitioner 5 as to whether he was entitled for exemption from age qualification. As already mentioned the Rules do not make any provision for granting exemption except to the limited extent as provided in the second para of Rule 11. The principles, on which a writ of mandamus can be issued, are well settled and we will refer to only one decision rendered in Bihar Eastern Gangetic Fishermen Coop. Society Ltd. v. Sipahi Singh² where this Court observed as under: (SCC p.152, para15)

“[A] writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.”

10. There being no statutory provision or rule providing for exemption from eligibility criterion, the learned Single Judge clearly erred in issuing a writ of mandamus against the appellant directing it to consider the case of Writ Petitioner 5 for granting him exemption from the rule providing for upper age-limit for fresh appointment.

27. The Supreme Court while dealing with the question of fixing of retirement age by employer, held that it is prerogative of legislature and the court cannot grant any direction entering into such arena. The Supreme Court in B. Bharat Kumar v. Osmania University reported in (2007) 11 SCC 58 held in paragraph 23 as follows:

" .. Further, merely because in Yashpal case⁶ the observations are about the gamut of the University it does not necessarily mean that the State Government will not be able to decide the age of retirement, particularly where it has the discretion to do so as also the legislative powers..."

28. The counsel for the petitioners contended that since by the interim orders, their applications have been processed and they were allowed to write examination and hence the benefit of the interim order should be granted.

29. In w.P.No.28739 of 2007, it was also stated that subsequently, the Government had amended the special rules to include non law graduates also to be considered and hence the

case of the petitioner should be considered. This Court considers that such a submission is misconceived. Qualifications will have to be decided on the date of notification. The subsequent change in the relevant rule without there being any retrospective to the rules, the benefit cannot be granted to the petitioner. If the petitioner's case will be considered through court orders, then there may be many other non lawyers would have applied for the post. Even in the previous case dealing with the similar notification, this Court had only directed the Government to amend the rules and did not give any relief to individuals.

30. In the light of the above legal precedents and the factual matrix, no relief can be granted to the petitioners. Hence all the writ petitions will stand dismissed. No costs. Consequently, the connected miscellaneous petitions also stand dismissed.