

Case relating to Relaxation of Rules:

Parties : Dr. S.S. Abdul Khuddus Azami Versus The Principal Secretary to Government, Health and Family Welfare Department & Another

Court : High Court of Judicature at Madras

Case No : Writ Petition No.16309 of 2010 & M.P.Nos.1 & 2 of 2010

Judges: THE HONOURABLE MR. JUSTICE S. MANIKUMAR

Appearing Advocates : For the Petitioner: K. Rajkumar, Advocate. For the Respondents: G. Sankaran, Spl. GA (Edn.).

Date of Judgment : 29-03-2011

Head Note :-

Constitution of India - Article 226 & 311(2) - General Rules for Tamil Nadu State and Subordinate Service Rules - Rule 10(a)(i) & 12A – Writ of Certiorarified Mandamus filed - After acquiring a Bachelor Degree in Unani Medicine and Surgery and selected to the post of Assistant Medical Officer by TNPSC and by an order, petitioner joined the Department of Indian Medicine of Homeopathy as Assistant Lecturer in Government Unani Medical College - He rendered 24 years of service, without earning any promotion and that he was due to retire on attaining the age of superannuation - Government, after considering the request of the petitioner for relaxation of the relevant rules, regarding passing 'Tamil' as Second Language Test, has rejected the same, vide order in G.O. (2D)No.49, Health and Family Welfare Department, removed the petitioner from service, as per Rule 12A of Rules - order is challenged in writ petition – impugned order is set aside and direction is issued to the respondents to allow the petitioner to retire from service, by granting relaxation of the rules, with consequential service and monetary benefits, including retiral benefits and pension, with effect from the date of attaining the age of superannuation and disburse the arrears - Writ Petition is allowed.

Cases Referred:

T.Ramamoorthy v. The Secretary, Sri Ramakrishna Vidyalyaya High School, etc. & Others 1998 Writ. LR 641U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh, [(2004) 4 SCC 268] Captain Sube Singh v. Lt. Governor of Delhi [(2004) 6 SCC 440]State of Jharkhand v. Ambay Cements 2005 (1) CTC 223

Judgment :-

(Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to G.O.(2D)No.49, Health and Family Welfare Department, dated 29.05.2010, issued by the first respondent, viz., the Principal Secretary to Government, Health and Family Welfare Department, Fort St. George, Chennai 9, quash the same and direct the respondents herein to allow the petitioner to retire from service with consequential service and monetary benefits, including the retiral benefits and regular pension, with effect from the date of reaching the age of superannuation and disburse the arrears.)

1. After acquiring a Bachelor Degree in Unani Medicine and Surgery and selected to the post of Assistant Medical Officer by TNPSC and by an order, dated 17.03.1996 of the Director of Indian Medicine, Homeopathy, the petitioner joined the Department of Indian Medicine of Homeopathy as Assistant Lecturer in Government Unani Medical College, Arignar Anna Government Hospital of Indian Medicine, Chennai. He has rendered 24 years of service, without earning any promotion and that he was due to retire on 31.05.2010, on attaining the age of superannuation.

The Government, after considering the request of the petitioner for relaxation of the relevant rules, regarding passing 'Tamil' as Second Language Test, has rejected the same, vide order in G.O.(2D)No.49, Health and Family Welfare Department, dated 29.05.2010 and consequently, removed the petitioner from service, as per Rule 12A of the General Rules for Tamil Nadu State and Subordinate Service Rules. The said order is challenged in this writ petition.

2. Assailing the correctness of the impugned order, Mr.K.Rajkumar, learned counsel for the petitioner submitted that when the Government have issued G.O.Ms.No.118, Indian Medicine and Homeopathy Department, dated 07.10.1987, regularising the services of the petitioner, along with the others, from the date of his initial appointment, i.e., on 24.03.1986, the date on which, the petitioner was temporarily appointed under Rule 10 (a)(i) of the General Rules for Tamil Nadu State and Subordinate Service, the respondents have no jurisdiction to invoke Rule 12A of the above said rules and remove the petitioner on the ground that he has not passed the Second Language Test. He further submitted that if a candidate, selected by the TNPSC and appointed to a service, fails to pass any test, he cannot be removed from service, which is nothing but imposing a major penalty and therefore, it is violative of Article 311(2) of the Constitution of India.

3. He further submitted that when the Government have issued G.O.(3D)No.37, Health and Family Welfare (IMAH) Department, dated 05.05.1998, discharging the petitioner from service, the same was challenged in O.A.No.9552 of 1998 before the Tamil Nadu Administrative Tribunal, Chennai and the Tribunal, by its order, dated 15.05.2001, has stayed the order of discharge. Subsequently, the said O.A., was transferred to this Court and re-numbered as W.P.No.4807 of 2006. According to him, when stay of discharge is in force from 2001 onwards, the action of the respondent, in removing the petitioner from service, would be amounting to dis-obedience of the orders of this Court.

4. Learned counsel for the petitioner submitted that as per G.O.Ms.No.1120, P & AR Department, dated 30.10.1984, the Government have powers to grant relaxation of passing departmental or any other test, subject to satisfying the following conditions, viz., (1) He should not be below 53 years, (ii) He should have attempted atleast 5 times to write the special examinations and (iii) He should have a satisfactory records of service.

5. Referring to the unblemished service of the petitioner and his unsuccessful attempts, learned counsel for the petitioner submitted that though the petitioner could not pass the Second Language Test in Tamil for some reason or the other, there was no complaint from any quarters, whatsoever, regarding the manner, in which, he had discharged nor deficiency in service, was recorded on account of his failure to pass the test.

6. Learned counsel for the petitioner further submitted that as an Assistant Lecturer in Government Unani Medical College and Doctor in Unani Medicine, there was no complaint either from the students or the faculty in or communicating with the patients and therefore, considering the fact that the petitioner has satisfied the conditions set out in G.O.Ms.No.1120, P & AR Department, dated 30.10.1984, the Government ought to have granted relaxation to him. He further submitted that the impugned order does not reflect due consideration of the requirements prescribed in the above said G.O., for exercising the power to relax the relevant rules.

7. Alleging discrimination on the part of the respondent in not exercising the discretion conferred on the authority, for relaxing the relevant rules in favour of the petitioner, learned counsel for the petitioner submitted that one Mr.G.S.N.Khadri, former Tutor, Government Medical College, was permitted to retire from Tamil Nadu Medical Service, after granting

relaxation for not passing departmental test in Medical Code and Second Language Test in Tamil, vide G.O.Ms.No.946, Health and Family Welfare Department, dated 08.08.2007. He further submitted that the first respondent ought to have applied the same yardstick to the case of the petitioner also and having regard to the unblemished continuous service, in the post of Assistant Medical Officer, there is no reason as to why and how, the petitioner stood on a different footing and in such circumstances, submitted that the respondent ought to have relaxed the relevant rules, regarding passing of the second language test.

8. Learned counsel for the petitioner further submitted that when the Government, in their letter No.23828/IM.2(1)/2001-4, Health and Family Welfare Department, dated 29.10.2001, instructed the department to issue necessary posting orders to the petitioner and to give two more consecutive years, to pass the language test in Tamil and though unfortunately, he could not pass the test, within the specified period, the Head of the Department or the Government, thought it fit to discharge the services of the petitioner, lateron he was allowed to continue in service for nine years, without insisting for a pass in the language test, until recently, the first respondent passed the impugned order of removal, by rejecting the request of the petitioner to grant relaxation of the rules and therefore, the department did not find any serious infirmity in the discharge of his duties, warranting removal from service and thereby, depriving him of the service benefits.

9. Considering the satisfactory service rendered by the writ petitioner for over 27 years of service in the department of Indian Medicine, Homeopathy, Chennai, learned counsel for the petitioner submitted that the impugned order of refusal to grant relaxation of the rules of a pass in the Language Test and the consequential removal from the service, has caused irreparable hardship and agony, as he would be finding it extremely difficult to maintain his large family.

10. Though the respondents have not filed any counter affidavit, Mr.G.Sankaran, learned Special Government Pleader submitted that the petitioner, having failed to pass in the Second Language Test, is not entitled to continue in service and therefore, no fault can be found with the impugned order of removal of the petitioner from service. He denied the contention that there was arbitrariness in exercising discretion, while considering the case of the petitioner.

11. Learned Government Advocate justified the impugned order on the ground that rule 12A of the General Rules for Tamil Nadu State and Subordinate Service Rules, enables the appointing/disciplinary authority to pass appropriate orders, if there is failure on the part of the government servant to pass the second language test, within a period of two years. For the above said reasons, he prayed for dismissal of the writ petition.

Heard the learned counsel for the parties and perused the materials available on record.

12. The petitioner has been appointed as Assistant Medical Officer, (Unani), on 24.03.1986. Subsequently, the Government, in exercise of their powers under Rule 23-A of the General Rules, for the Tamil Nadu State and Subordinate Service Rules, have issued orders in G.O.Ms.No.118, Indian Medicine and Homeopathy Department, dated 07.10.1987, regularising the appointment of the petitioner from the date of his initial appointment. Thereafter, when the petitioner did not pass the language test, within a period of four years from the date of issue of the orders, regularising his services, and even after two more chances, on the recommendations of the Director of Indian Medicine and Hemopathy, Chennai, issued orders in G.O.(3D)No.37, Health and Family Welfare (IMAH) Department, dated 05.05.1998, discharging the petitioner from service. When the above said order was questioned, the Tribunal, by its order, dated 26.11.1998 in O.A.No.9552 of 1998, set aside the said order of discharge and further directed that the petitioner be given two more years of time from the date of his

re-instatement from passing the Second Language Test under Rule 12A of the General Rules for Tamil Nadu State and Subordinate Service Rules, failing which, he could be discharged from service.

13. Pursuant to the directions stated supra, the petitioner was reinstated in service and by G.O.Ms.No.25, Health and Family Welfare Department, dated 18.01.1999, granted two years' time to pass the test, failing which, he would be removed from service. As the petitioner did not pass the test within the above said period, the Government issued yet another order in G.O.Ms.No.117, Health and Family Welfare Department, dated 22.03.2001, discharging the petitioner from service and subsequently, issued proceedings, dated 31.03.2001, removing the petitioner from service. The said G.O., has been challenged in O.A.No.3346 of 2001, on the file of the Tamil Nadu Administrative Tribunal, Chennai and after considering the sequence of events, the Tribunal, by its order, dated 15.05.2001, has granted interim stay.

14. Material on record further shows that the petitioner has made as many as, 27 attempts to pass the Second Language Test. In the representation, dated 21.01.2010, addressed to the Secretary to the Government, Health and Family Welfare Department, the petitioner has sought for relaxation of the rules, pertaining to the passing of Second Language Test. He has also referred to a case of one Mr.G.S.N.Khadri, former Tutor, Government Medical College, for whom, the Government have issued orders in G.O.Ms.No.946, Health and Family Welfare Department, dated 08.08.2007, relaxing the passing of the Second Language Test in Tamil and sought for similar concession.

15. As per Rule 12-A of the Tamilnadu State and Subordinate Service Rules, (a) no person shall be eligible for appointment to any service, by direct recruitment, unless he has an adequate knowledge of the official language of the State, viz., Tamil. Provided that a person, being otherwise qualified for appointment to the post to which recruitment is to be made, may apply for recruitment to the post, despite the fact that, at the time of such application, he does not possess adequate knowledge of Tamil.

16. Explanation to the above said rule states that a person shall be deemed to have an adequate knowledge of Tamil, if, in the case of post, for which, the educational qualification prescribed is the minimum general educational qualification and above, and that he has passed the SSLC public examination or its equivalent examination with Tamil, as one of the languages; or studied the high school course in Tamil Medium and passed the SSLC public examination or its equivalent examination in Tamil medium; or passed the second class language test in Tamil conducted by the Tamil Nadu Public Service Commission.

17. As stated supra, it is to be noted that the order of the Government in G.O.Ms.No.117, Health and Family Welfare Department, dated 22.03.2001, discharging the petitioner from service for not passing the Second Language Test in Tamil, had been challenged in O.A.No.3346 of 2001 and that an interim order had been granted on 15.05.2001. Subsequently, the said Original Application has been transmitted to this Court and re-numbered as W.P.No.48047 of 2006 and stated to be pending on this file. No counter affidavit has been filed in this writ petition, disputing the above said fact. It is the contention of the petitioner that when interim stay of discharge is in force, the Government, without considering the same, or taking steps to vacate the interim order, has passed the impugned order of removal from service.

18. In the case on hand, the petitioner has been appointed as Assistant Lecturer in Government Unani Medical College, Arignar Anna Government Hospital of Indian Medicine, Chennai. Certainly, the educational qualification prescribed for the post, would be higher than the minimum general educational qualification and therefore, he ought to have satisfied anyone of the criteria stated supra. However, such candidate, as is referred to, in the proviso to sub-Rule (A) to Rule 12, if selected and appointed, on or after 9th February' 1996 to any service, has to pass the Second Language Test in Tamil, conducted by the TNPSC, or pass the language test in Tamil, referred to rule 12-B(i) conducted by the appointing authority or pass the oral 12-B(ii) conducted by the appointing authority, as the case may be, within a period of two years from the date of his appointment. If he fails to pass the language test within the period of two years, he shall be discharged from service.

19. Admittedly, the petitioner had not passed the second language test and in which case, as per the rules, he can be only discharged from service. An order of removal is a penalty and that the same can be inflicted only if there is any grave misconduct proved, after providing an opportunity to the government servant, as per the procedure established by law. Failure to pass the second language test, even after repeated chances, cannot at any rate, be termed as misconduct, warranting any disciplinary action and in such circumstances, the appointing/disciplinary authority or the Government, as the case may be, cannot invoke rule 12-A of the above said rules, to remove a government servant from service.

20. In the case on hand, the course open to the appointing/disciplinary authority, for not passing the language test, in exercise of power under 12-A of the Tamil Nadu State and Subordinate Service Rules, is only to discharge a government servant. What has been done in the instant case, is removal of the petitioner from service, which is not permissible under Rule 12-A of the Rules. The principle that what cannot be done, directly, is sought to be done indirectly, is applicable to the facts of this case. In this context, it is necessary to refer to the definition of words, "colour" and "colourable" as per Black's Law Dictionary (Ninth Edition).

"Color:- Appearance, guise, or semblance; esp., the appearance of a legal claim to a right, authority, or office [color of title] [under color of state law].

Colorable:- 1. (Of a claim or action) appearing to be true, valid, or right [the pleading did not state a colorable claim]. 2. Intended to deceive; counterfeit [the Court found the conveyance of exempt property to be a colorable transfer, and so set it aside]."

21. The course which the respondent is competent to take, under Rule 12-A of the above said Rules, discharge from service, has been stayed by the Tribunal and that the said order is also said to be in force and in which event, the respondent, by colorable exercise, has removed the petitioner. It is well settled that when the rule confers power on the authority and the manner, as to how it should be exercised, the same has to be done only in the said manner and not otherwise and if there is an erroneous or colorable exercise of power, then the Courts would not hesitate to strike down such action. Useful reference can be made to the following decisions,

22. In T.Ramamoorthy v. The Secretary, Sri Ramakrishna Vidyalaya High School, etc. & Others reported in 1998 Writ. LR 641, at Paragraph 6, held as follows:

"If the statutory provision enacted by the Legislature prescribed a particular mode for terminating the service or dismissing the teaching or a non-teaching staff of a school, it can and has to be done not only in that manner alone, but it cannot be done in any manner too. This principle that where a power is given to do a certain thing in a certain way, things must be done in that way and not otherwise and that the other method of performance is necessarily

precluded, is not only well settled, but squarely applies to this case also in construing the scope of the power as also its exercise by the management under Section 22 of the Act."

23. In *U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh*, [(2004) 4 SCC 268], the Supreme Court, at Paragraph 12, held as follows:

"12. Although these observations were made in the context of the jurisdiction of the civil court to entertain the proceedings relating to an industrial dispute and may not be read as a limitation on the Court's powers under Article 226, nevertheless it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner."

24. In *Captain Sube Singh v. Lt. Governor of Delhi* [(2004) 6 SCC 440], the Supreme Court, at Paragraph 29, held as follows:

"29. In *Anjum M.H. Ghaswala*, a Constitution Bench of this Court reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. (See also in this connection *Dhanajaya Reddy v. State of Karnataka*.) The statute in question requires the authority to act in accordance with the rules for variation of the conditions attached to the permit. In our view, it is not permissible to the State Government to purport to alter these conditions by issuing a notification under Section 67(1)(d) read with sub-clause (i) thereof."

25. The Supreme Court in *State of Jharkhand v. Ambay Cements* reported in 2005 (1) CTC 223, at Paragraph 27, held as follows:

"27. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation and where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case of obtaining prior permission is mandatory, therefore, non-compliance of the same must result in cancelling the concession made in favour of the grantee-the respondent herein."

26. It is evident from the pleadings and materials on record that the government, instead of taking steps to vacate the interim stay of discharge granted in O.A.No.3346 of 2001, dated 15.05.2001, has chosen to issue the impugned order, dated 29.05.2010, which is nothing colorable exercise of power and game flouge of the earlier order, captioned as removal. As rightly contended by the learned counsel for the petitioner, what could not be done by the Government, directly, in view of the interim stay granted by the Tribunal, in O.A.No.3346 of 2001, dated 15.05.2001 and continued, is now sought to be done by an order of removal, passed on the representation, dated 21.01.2010.

27. Yet another issue to be considered is whether the Government had properly exercised its discretion in the matter of considering his request for relaxation, when he has satisfied the conditions prescribed in G.O.Ms.No.1120, P & AR Department, dated 30.10.1984. As per the said G.O., a Government servant, seeking exemption/relaxation of a pass in the Special Test or departmental test, has to satisfy the following conditions, (i) He should not be below 53 years, (ii) He should have attempted at least 5 times to write the special examinations and (iii) He should have a satisfactory records of service.

28. G.O.Ms.No.1120, P & AR Department, dated 30.10.1984, deals with the relaxation of the rules, pertaining to passing of special or departmental tests. Though the said G.O., does not specifically deal with a pass in Tamil, this Court is of the view that passing of the language test could be construed as one of the Special tests for those, who have no adequate knowledge of the official language of the State.

29. When the petitioner has made a representation to grant relaxation of the rule, pertaining to passing of the second language test, i.e., rule 12-A of the General Rules for the Tamil Nadu State and Subordinate Service Rules, stating that he had appeared for nearly 27 times and even then, he could not pass the tests, crossed the age of 57 years and due for retirement, on 31.05.2010, and maintained an unblemished record of service, there is no reason, as to why, his case was not considered, in the light of the above said government order.

30. In his representation, dated 21.01.2010, the petitioner has also referred to an order in G.O.Ms.No.946, Health and Family Welfare Department, dated 08.08.2007, passed in the case of Mr.G.S.N.Khadri, former Tutor, Government Medical College, who has been permitted to retire from Tamil Nadu Medical Service, by relaxing the rules, relating to non-passing of departmental test in Medical Code and Second Language Test in Tamil.

31. Therefore, when the Government have exercised their power, granting exemption from passing the second language test in Tamil and departmental test, viz., Tamil Nadu Medical Code in the case of Mr.G.S.N.Khadri, no reasons have been given by way of any reply, as to why the Government have not considered the representation of the petitioner, dated 21.01.2010, in proper perspective, in terms of G.O.Ms.No.1120, P & AR Department, dated 30.10.1984 and G.O.Ms.No.946, Health and Family Welfare Department, dated 08.08.2007. There is no reason as to why the Government have applied different yardsticks to the petitioner, when the above said Mr.G.S.N.Khadri, appointed as Assistant Surgeon in Tamil nadu Medical Service, through the Tamil Nadu Public Service Commission w.e.f. 27.01.81 and regularised w.e.f. 27.07.1981, could not pass the second class language test in Tamil, till the date of his retirement, i.e., 31.10.2006, inspite of his appearance for seven times, has been granted exemption and whereas, the petitioner, who had even attempted for more than 27 times, has not been considered for grant of relaxation in terms of G.O.Ms.No.1120.

32. Failure on the part of the respondents to exercise their jurisdiction in terms of the above G.O., is per se apparent and violation of Article 14 of the Constitution of India, stands proved. Though the rules mandate that a person, who has no adequate knowledge of Tamil, after entry into service, has to pass the second language test in Tamil, conducted by the TNPSC, the object in imposing such a condition to pass the test, within the prescribed or extended period, as the case may be, presumably is to communicate with the departmental staff or officers or such other persons, depending upon the nature of job and understand the official correspondence or the orders, etc., and in the instant case, with the students and patients, who attend the hospital. The petitioner had entered the department of Indian Medicine and Hemopathy, in the year 1986. His services have also been regularised by the Government. Though he had worked in the same post without any promotion, material on record does not even indicate that the petitioner had come to any adverse notice from the students, patients, staff or officers or any other person with which he had to work or interact with the discharge of his duties.

33. There is no indication in the orders issued by the Government from time to time, discharging his services, imputing any misconduct nor he was unable to communicate with the above said persons and therefore, he was not fit to continue in service and thus, exercise of powers under Rule 12-A of the above said Rules, was warranted, instead of considering his case for relaxation, as per the government order, stated supra. As observed earlier, the respondents

have failed to consider the case of the petitioner and exercise their discretion for relaxation, as per G.O.Ms.No.1120, and that discrimination is per se apparent, and there is violation of Article 14 of the Constitution of India.

34. In the absence of any serious complaints, from any of the quarters, stated supra, rejection of the request of the petitioner for relaxation of Rule 12-A of the General Rules is not only against the orders of the interim stay granted by the Tribunal and that the order of removal, a major penalty, cannot be inflicted, to achieve object of discharging him from service. As the petitioner has rendered 27 years of unblemished service, which is not controverted by the respondents, this Court is of the considered view that the Government ought to have shown some leniency in allowing the petitioner to retire peacefully from service, as done in the case of Mr.G.S.N.Khadri. Pension and other retiral benefits are the only source of income to a Government Servant, after rendering a long number of years of service. Except passing the second language test in Tamil, the petitioner had maintained a clean record of service, which deserves due consideration, and if pension and other retiral benefits are denied, it would cause serious hardship and agony. The petitioner has served his master satisfactorily for 27 years and he should not have been sent out by an order of removal, thus, depriving him of the retiral benefits, for the only mistake, in not passing the language test. Needless to say, even persons, who have committed misconduct are allowed to work, after awarding appropriate penalty, depending upon the gravity of the charge.

35. In such view of the above, this Court is inclined to interfere with the impugned order. Accordingly, the impugned order is set aside and consequently, a direction is issued to the respondents to allow the petitioner to retire from service, by granting relaxation of the rules, with consequential service and monetary benefits, including retiral benefits and pension, with effect from the date of attaining the age of superannuation and disburse the arrears.

36. In the result, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petitions are also closed.