

(2010) 07 PAT CK 0169
In the Patna High Court
Case No : CWJC No. 10227 of 2007

Dr. Kaushal Kushum

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 02-07-2010

Acts Referred:

Bihar Service Code, 1952 — Rule 204, 205, 243
Constitution of India, 1950 — Article 226, 309

Citation : (2012) 1 PLJR 293

Hon'ble Judges : Ajay Kr. Tripathi, J

Bench : Single Bench

Advocate : Ashok Kumar Chaudhary and Binit Kumar, for the Appellant; Kinkar Kumar for the State, for the Respondent

Final Decision : Allowed

Judgement

Ajay Kr. Tripathi, J.—Petitioner was a Ph.D. student of Indian Veterinary Research Institute at Izat Nagar, in the State of Uttar Pradesh. While he was still in the midst of completion of the said course, he came to be selected for appointment as a Mobile Veterinary Doctor under the State of Bihar. He decided to join the service. Worked for a while which was less than a year. But he did not want to give up completion of study and acquisition of a Ph.D. degree, specially in the background that only three semesters of study was left. Petitioner approached the concerned authority to grant him study leave as 18 months would have been more than enough for him to acquire Ph.D. degree. The request was processed but leave under Rule 243 of the Bihar Service Code was authorized. Rule 243 deals with grant of extraordinary leave. Be that as it may, petitioner decided to approach the High Court by a writ application, which is Annexure-3 to the present writ. As an interim order the Court allowed the petitioner to proceed on leave to complete his studies and course and directed the authorities to consider his claim for grant of study leave and not leave of any other kind. The direction of the Court seems to have been carried out and a speaking kind of order dated 15th October, 2006 has been passed and communicated. The said order is

Annexure-4 to the writ application and this order is being challenged now. According to the petitioner, the earlier direction of the High Court was to consider the case for grant of study leave and not leave of extraordinary kind or any category of leave.

2. There is some significance and distinction between the two kinds of leave. In the case of study leave the employee is entitled to draw his salary and other perks and" requisites while pursuing his studies or curriculum during that period. The other kinds of leave including extraordinary leave only mean leave and nothing else.

3. The authorization of leave by the respondents to the petitioner under Rule 243 and not under Rule 204 therefore has become the subject matter of debate in the present writ application. Petitioner has vehemently argued that he is entitled to grant of study leave and if entitlement exists then there is no reason why the State would not consider extending benefit or privilege of that leave.

4. Learned Counsel for the petitioner has drawn the attention of this Court to a decision of a Division Bench which was rendered in the case of Dr. Anil Prasad Gara and Others vs. State of Bihar and Others, 1991(2) PLJR 384. Contention is that the case of the present petitioner is covered by the ratio of the decision rendered by the said Division Bench. The issue was grant of study leave under Rule 204. A set of doctors were before the Division Bench for grant of study leave vis-a-vis grant of leave under Rule 243 of the Bihar Service Code. In the said case there were many a doctors. young in age, who had completed their MBBS and had got admission to pursue higher studies while they were appointed by the State of Bihar and had not even worked for a year.

5. It was argued that grant of study leave was a rule and refusal an exception. The Court has assistance of the wisdom of the Division Bench, which is a well considered order. The sum essence of the said decision is that study leave can be and ought to be extended to Government employees who want to pursue higher education unless there are exceptional circumstances for refusing it. The Court is, however, tempted to quote paras 9 and 10 of the said decision, which are as follows:-

9. Adverting to proviso to Rule 243 of Service Code, which has been referred to by the Health Commissioner in his impugned order and relied upon by the Learned Counsel for the State, it would appear that the said provision occurs in a different sub-chapter dealing with extraordinary leave. The provision in regard to grant of leave in the Bihar Service Code has been divided into several sub-chapters of Chapter-VI. The provisions regarding grant of study leave are contained in sub-chapter-V of Chapter-VI. It is true that the proviso to Rule 243 does mention grant of extraordinary leave to enable the Government servant to undergo an approved course of study or training only if he has put in one year of service. It is settled principle of law that where specific provisions are made on a particular subject the general provisions or residuary provisions are not

applicable. *Generalia specialibus non derogant*. In my opinion, the proviso cannot be read as an independent provision. It has to be read along with main section or rule, as the case may be. A plain reading of the said rule would show that it contains a provision for grant of extraordinary leave upto certain period and in the first proviso it is mentioned that extraordinary leave for a longer period can be granted if a temporary Government servant is undergoing treatment for the diseases mentioned therein. Likewise, the second proviso also contemplates grant of extraordinary leave upto certain period for certain purpose as mentioned therein. In the instant case, we are not considering the question of grant of extraordinary leave and, therefore, reliance on the said proviso to Rule 243, in my opinion, is entirely misplaced.

10. Even if it is accepted for the sake of argument, without holding the same to be correct that one year's rule applies in the case of grant of study leave also, in my opinion, nothing prevents the Government from relaxing the said rule in appropriate cases to undo hardship and in the ends of justice and fair play. In this connection, I would like to refer to a statutory rule framed by the State Government in exercise of power under the proviso to Article 309 of the Constitution, which empowers the State Government to relax the requirements of a particular rule. I would better quote the aforesaid rule in extenso:-

No. III/RI-2010755A-11505 the 28th November, 1956.-In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, and in supersession of previous order on this subject the Governor of Bihar hereby makes the following Rules.

Where the State Government are satisfied that the operation of any rule regulating the conditions of service of State Government servants, causes undue hardship in any particular case, they may by order dispense with or relax the requirement of that rule to such extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner.

The Government has obviously acted unmindfully of its power as contained in the aforesaid rule while rejecting the request for grant of study leave. The question, therefore, that next arises for consideration is whether this Court in exercise of its writ jurisdiction should issue appropriate order or direction directing the concerned authority to grant study leave or not. Learned Counsel for the State has argued that the grant of leave being discretionary in nature, this Court has no jurisdiction to issue any mandamus in the matter. I regret my inability to agree to this contention. The Supreme Court in *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, after referring to the celebrated observations of Justice Subba Rao (AIR 1966 SC 81) that Article 226 is designed "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country", had this to say while laying down the scope of power of this Court under Article 226 of the Constitution in such matters:-

There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised the discretion."

The submission, therefore, of the Learned Counsel for the State that a mandamus of the nature suggested by the petitioners cannot be issued, has no merit.

6. The stand of the State is in favour of justifying the reasons indicated in the order under challenge which is Annexure-4. The order indicates that since the petitioner had not even completed a year of service under the Government and embargo of 5 years under Rule 205 comes in the way of the State. Since the petitioner did not fulfil that criteria, the State could only grant leave under Rule 243. The State has been fair enough in allowing the petitioner to complete his further studies and did not create any impediment on this score. The hand of the Government is tied on account of the provisions, because Rule 204 has to be read with Rule 205 and a reading of the two rules together allows the Government to grant leave only of the kind which has been extended to the petitioner.

7. The Court would have had no problem in accepting the submission of the Learned Counsel for the State, if there was no Division Bench decision of this Court on such an issue. In the case before Division Bench while interpreting the rules it was of the opinion that such a benefit could be extended to the doctors who were petitioners, even if they had not completed one year of service. Merely because petitioner happens to serve in another department and not medical department of the State, his case does not become distinguishable from the other. There is power vested in the State to dispense or relax the requirement of the rules for a just or equitable case as has been noticed by the Division Bench. Rule 205 does not prohibit or put an embargo to consider any request.

8. There has to be consistency in the decision making by the State authorities and they have an obligation to take the law laid down by the High Court into

consideration. In that view of the matter the reasoning given for non-grant of study leave to the petitioner, in the opinion of this Court, is hit by Division Bench decision and the order requires to be interfered with.

9. Annexure-4 stands quashed and the matter is relegated back to the concerned authority to apply himself afresh to the issue not only keeping the observation of this Court in the present order but also the decision of the Division Bench rendered in the case of Dr. Anil Prasad Gara (*supra*). The writ application stands allowed.