

(2019) 07 BOM CK 0148
In the Bombay High Court
Case No : Writ Petition No. 7929 Of 2019

Kiran Kirit Solanki

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 19-07-2019

Acts Referred:

Maharashtra Government Servants (Other Than Judicial Department Servants) Marathi Language Examination Rules, 1987 — Rule 3, 4, 4(6), 5
Constitution Of India, 1950 — Article 309

Citation : (2019) 07 BOM CK 0148

Hon'ble Judges : Ranjit More, J; Bharati Dangre, J

Bench : Division Bench

Advocate : L.S. Deshmukh, M.P. Thakur

Final Decision : Disposed Off

Judgement

1. The petitioner who has been appointed as a staff nurse in the year 2008 approached the Maharashtra Administrative Tribunal being aggrieved by the act of recovery of the amount due to her as increments on the ground of non passing of Marathi Language examination in terms of Maharashtra Government Servants (Other than Judicial Department Servants) Marathi Language Examination Rules, 1987.

2. In terms of the said Rules, on appointment being made, it is imperative on the part of the employee to pass the examination in Marathi Language within a period of two years. The Rules of 1987 also provide for consequences of failure to pass the examination. The consequences contemplate withholding of increment till the incumbent passes the examination.

3 On the increments being withheld, the petitioner approached the Tribunal by filing Original Application which came to be disposed of. Being aggrieved by the impugned order passed by the Tribunal, the present writ petition is filed.

4. With the assistance of the learned counsel for the parties, we have perused

the petition as well as the impugned order passed by the Tribunal. It is not in dispute that the petitioner came to be appointed as a staff nurse with effect from 12th September 2008 and it was incumbent on her to pass Marathi Language examination in terms of the said Rules of 1987 within a period of two years of her appointment. It is the case of the petitioner that in the month of September 2012 she was relieved to pursue two years training course of B.Sc. (Nursing) as an in-service employee and she resumed duty in October 2015 and thereafter in August 2016 she went on maternity leave and resumed in February 2017. It is the specific averment of the petitioner before the Tribunal as well as before this Court that she cleared the said examination on 16th July 2017. However, on account of non passing of the examination within the stipulated period in terms of the Rule 3 of the said Rules of 1987, increment of the petitioner came to be withheld.

It would be appropriate to make a reference to Rules 3 and 5 of the said Rules of 1987 which read thus:

"3. Passing of examination - Subject to the provisions of Rule 4 every Gazetted or Non- Gazetted Government servant shall be required to pass the -

(i). Lower Standard Examination before the expiry of two years from the date of coming into operation of these rules, or from the date of his appointment, whichever is later; and

(ii). Higher Standard Examination before the expiry of two years after his passing the Lower Standard Examination.

Note - An Officer belonging to the All India Services who is exempted from passing the Lower Standard Examination under sub-rule (6) of Rule 4 of these rules, shall be required to pass the Higher Standard Examination within four years from the date of his joining the State service.

5. Failure to pass examination - A Government servant, who fails to pass the examinations within the prescribed period shall, after the expiry of the said period, be liable to have his increments withheld until he passes the examination or examinations, as the case may be, or is exempted from passing the same under the provisions of Rule 4.

Note 1 - The date of passing the examination shall be deemed to be the date following the date on which the examination ends.

Note 2 - Increments so withheld shall become payable to the Government servant with effect from the date on which he passes the examination or is exempted from passing it and increments shall accrue to him as if no increments had been withheld. He shall not be entitled for the arrears due to withholding of increments."

5. The Rules are very clear and specific and the consequences of non passing of the examination enables the employer to withhold the increment till the

candidate passes the examination or is exempted for passing the same. The petitioner did not fall in exemption category and therefore, the consequences prescribed in Rule 5 must necessarily fall upon her due to non passing of the examination. The learned counsel for the petitioner has placed heavy reliance on the Judgment of the Apex Court in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) and others [(2015) 4 SCC 334]. The Maharashtra Administrative Tribunal has rightly refused to rely upon the said Judgment. We agree with the view of the Tribunal. In the said Judgment the Apex Court was dealing with the recovery of the amount paid in excess without fault of the recipient and it took into consideration hardship caused to the employee in case of recovery, in case such recovery cannot be attributed to the employee.

The Tribunal has rightly observed that the Applicant herself was at fault and to be blamed for non passing examination within the stipulated period provided by the said Rules. Therefore, the ratio laid down by the Apex Court in the case of Rafiq Masih (supra) cannot be of any support to the petitioner. As far as the contention of the learned counsel for the petitioner that she was never intimated about the examination being conducted and that she had to apply, we are of the view that the burden was cast on the petitioner to clear the departmental examination in terms of the Rules framed in exercise of power conferred under Article 309 of the Constitution of India and the employer was not duty bound to intimate the petitioner. Since the petitioner is at fault, the respondent was duty bound to act in terms of the Rule 5 of the Rules of 2007 but has released the increments which ought to have been withheld as a consequence of non passing of the examination.

6. In such circumstances, the subsequent recovery of the increments which have been paid to the petitioner and which has been upheld by the Tribunal by the impugned Judgment, in our view do not call for any interference. Resultantly, the order passed by the Tribunal is upheld and the petition filed by the petitioner is dismissed.

7. At this stage, the learned counsel for the petitioner informed us that the Tribunal has granted stay to the recovery of the amount and therefore, the amount is not yet recovered till 4th July 2019. He would submit that considering the financial position of the petitioner, recovery should be made in instalments. He also makes a categorical statement that the petitioner is required to pay her EMI. He would therefore urge this Court to deduct an amount of Rs.5000/- per month from her salary. The said request is vehemently opposed by the learned AGP. We concede to the request made by the petitioner. We direct the respondents that recovery of the amount due from the petitioner as a consequence for non passing of the departmental examination, should be effected in the form of instalments not exceeding Rs.5000/- per month from the salary of the petitioner.

With this direction Writ Petition is disposed of.