

(1962) 04 AP CK 0009
In the Andhra Pradesh High Court
Case No : Writ Petition No. 123 of 1960

M. Bhaskara Rao	Vs	APPELLANT
State of Andhra Pradesh and Others		RESPONDENT

Date of Decision : 16-04-1962

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)

Citation : AIR 1963 AP 357 : (1962) 2 LLJ 647

Hon'ble Judges : Munikannaiah, J;Basi Reddy, J

Bench : Division Bench

Advocate : K. Ramachandra Rao and G. Ramanujulu Naidu, for the Appellant;
N.V.B. Sankara Rao, Second Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Munikanniah, J.—This writ petition, having been referred by one of us to a Bench, has come up for hearing before as. The petitioner impugns G. O. Ms. No. 2454 Revenue Department dated 26-11-1959 (sic) of the Government of Andhra Pradesh and prays that the same may be quashed.

2. The facts leading to the filing of this petition under Article 226 of the Constitution may be briefly set out: The petitioner was entertained in service in the composite State of Madras in the year 1937 as a clerk in the Revenue Department. Thereafter, after he had put in five years of service in the Commercial Taxes Department to which he was transferred, he was put on probation as an Assistant Commercial Tax Officer till 24-7-1952. The prescribed period of probation for appointment as a full member of that service was two years. According to Rule 13(b) of the Commercial Taxes Subordinate Services Rules, he was required to pass the tests specified under Rule 6(c) of the said rules within the period of his probation. The petitioner, however, did not pass any tests within this period of probation. A reference to the records showed that the Deputy Commissioner of Commercial Taxes, Kakinada, issued a declaration dated 4-2-1955 to the petitioner that he had completed his period of probation as an

Assistant Commercial Tax Officer with effect from the afternoon of 23-7-1954. The petitioner has been since then holding the substantive post of Assistant Commercial Tax Officer.

But the Board of Revenue gave him a notice dated 19-3-1959 to show cause why his probation in the cadre of Assistant Commercial Tax Officer should not be terminated with immediate effect. The petitioner submitted his explanation dated 13-5-1959. He maintained that the declaration made on 4-2-1955 was not subject to the condition that he should pass the tests within a specified time. He pointed out that he passed two of the tests after 23-7-1954 and that he has to pass only the Account Test (Part I) prescribed for Subordinate Officers. He also requested that he may be allowed reasonable time to pass that remaining test. Thereupon, the Board of Revenue recommended to the Government and pointed out to the Government that the Deputy Commissioner, Kakinada, declared that the petitioner satisfactorily completed the probation without due regard to the rules as the petitioner has not passed the tests within the period of his probation. The Board of Revenue was further of the view that the probation should have been either terminated or extended till the petitioner passed the prescribed tests. The only way of helping the petitioner who has put in seven years of service as Assistant Commercial Tax Officer was to extend his period of probation after relaxing the general Rule 28 of the State and Subordinate Service Rules so that he may pass the Account Test also within that extended period of probation.

This recommendation by the Board of Revenue has therefore been responsible for the passing of the impugned order by the Government. It may be mentioned that G. O. Ms. No. 2454 Revenue dated 28-11-1959" (sic) (impugned order) cancelled the order of the Deputy Commissioner of Commercial Taxes, Kakinada dated 4-2-1955 and made mention of the relaxation of Rule 28 by the Governor of Andhra Pradesh, who acted under general Rule 49 of the State and Subordinate Services Rules. The purpose for which such an extension has been granted has also been specifically mentioned in that G.O. as with a view to enable the petitioner to pass the Account Test. The G.O. also directed the Board of Revenue to consider the question of recovery from the petitioner of sums drawn as increments in the time scale of pay of Assistant Commercial Tax Officer.

3. Mr. K. Ramachandra Rao, the learned counsel for the petitioner, raised before us almost the identical contentions set forth in para 5 of the affidavit of the petitioner filed in support of the writ petition. The contentions on behalf of the petitioner as thus put forward proceed mainly on the basis that (1) there is no power in the Government to cancel the order of declaration issued by the Deputy Commissioner and that neither Rule 28 or Rule 49 has any application so as to confer power to extend the probation which has been declared under Rule 27 to have been satisfactorily completed; (2) that the exercise of any such power by the Governor or the Government has been arbitrary and discriminatory inasmuch as the impugned order has been passed about four years after the order of declaration which is dated 4-2-1955; (3) that the want of a second notice for

offering the final explanation has vitiated the proceedings, as such a procedure has been made obligatory lay what has been laid down in *Khem Chand Vs. The Union of India (UOI)and Others*, ; (4) that inasmuch as the petitioner is relegated to the position of a probationer while he has been occupying the substantive post, in any case, the inhibition contained in Article 311(2) will apply as he had been denied reasonable opportunity to show cause against the action; and (5) that the Government is estopped from going behind the declaration issued by the Deputy Commissioner, inasmuch as it has allowed the petitioner to believe that he was fully qualified and eligible to hold the post and thereafter caused serious detriment to his seniority, rank, salary, allowances and also future career and prospects.

4. On behalf of the 1st respondent, the impugned order is sought to be justified on the following grounds: (1) The declaration by the Deputy Commissioner of Commercial Taxes is not valid as it was without reference to the prior requirements; (2) as the petitioner did not acquire the qualifications necessary to claim the substantive post, the extension of probation, in those circumstances, does not effect any reduction in rank of the petitioner; (3) the impugned order did not seek to punish the petitioner and does not offend Rule 49; (4) that this is not a case which falls within the purview of Article 311(2), but it, if at all concerns only with the rules framed in pursuance of Article 309 which are not justiciable as the petitioner is holding the post at the pleasure of the Governor; (5) that the petitioner was given an opportunity to explain and that it is in compliance with the petitioner's request that the probation was extended to enable him to pass the remaining test and (6) the argument for the petitioner based on estoppel is wholly misconceived.

5. While judging the rival contentions, it is necessary at the outset to observe that the points taken by the learned counsel for the petitioner arise to be examined in detail only if it is found that the order of declaration dated 4-2-1955 validly declared that the probation was satisfactorily completed and the petitioner thereby became entitled to the substantive post. In other words, the question primarily hinges upon the validity and effect of the declaration which has been made under Rule 27 (b). It is necessary also to observe, that though it was averred in the affidavit of the petitioner that these rules are not applicable it was not disputed before us that the general rules contained in the Madras State and Subordinate Services Rules applied to this case. Therefore, an examination of those relevant rules becomes necessary. Rule 26 relates to suspension, termination or extension of probation in regard to a person who has been put on probation.

The relevant portion of that rule is as here-under :

"26.

(b) (i) If within the period of probation a probationer fails to acquire the special qualifications or to pass the special tests, if any, prescribed in the Special Rules,

or to acquire such other qualifications as may be declared by the State Government or by the appointing authority with the approval of the State Government to be equivalent to the said special qualifications or special tests, the appointing authority shall, by order, discharge him from the service unless the period of probation is extended under Rule 28.

(ii) If within the period of probation prescribed in the Special Rules for the service or within the extended period of probation, as the case may be, a probationer has appealed for any such tests or for any examinations in connection with the acquisition of any such qualifications and the results of the tests or examinations for which he has so appeared are not known before the expiry of such period, he shall continue to be on probation until the publication of the results of the tests or examinations for which he has appeared or the first of them in which he fails to pass, as the case may be.

In case the probationer fails to pass any of the tests or examinations for which he has so appeared, the appointing authority shall, by order, discharge him from the service.

(iii) Any delay in the issue of an order discharging a probationer under Clause (i) or Clause (ii) shall not entitle him to be deemed to have satisfactorily completed his probation."

What is contemplated by this rule is that if within the period of probation or within the period as extended under Rule 28 the probationer fails to pass the tests, the appointing authority shall, by order, discharge him from the service. Rule 28 lays down that the appointing authority may extend the probation to enable the probationer to acquire special qualifications or pass the prescribed tests, or to enable the appointing authority to decide whether the probationer is suitable for full membership or not. Such extended period of probation, it is also laid down, shall terminate at the latest by the completion of one year from the date of expiry of the period of probation. There is also the provision as made in Rule 26 (b) (ii) that when the results of the examinations are not known before the expiry of probation or the extended period of probation, the probation continued until the publication of the results of the tests or examinations. Otherwise, these two rules make it beyond doubt that when a probationer does not pass the tests, it should be attended with the necessary consequence of his discharge from service and also that even the want of an order discharging the probationer does not entitle the probationer to be deemed to have satisfactorily completed his probation (vide Rule 26 (b) (iii)). Emphasis, therefore, seems to have been laid rightly, we should think, on the probationer acquiring the qualifications or passing the examinations as a sine qua non for further promotion.

6. It may now be useful to refer, with this as the background, to Rule 27 which reads:

"27. Probationer's suitability for full membership :

(a) At the end of the prescribed or extended period of probation, as the case may be, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category for which he was selected.

(b) If the appointing authority decides that a probationer is suitable for such membership, it shall as soon as possible issue an order declaring the probationer to have satisfactorily completed his probation. On the issue of such order, the probationer shall be deemed to have satisfactorily completed his probation on the date of expiry of the prescribed or extended period of probation."

Sub-rule (c) pertains to the procedure to be adopted by the appointing authority if the probationer is Found to be not suitable for full membership of the service, and therefore, it is not necessary to be extracted in the present context. The scheme so envisaged by Rule 27 is apparently for the purpose of further finding out whether the probationer who has passed the tests, is suitable for full membership of the service, class or category for which he was tentatively selected. A consideration regarding this could be made by the appointing authority only at the end of the prescribed or extended period of probation; and cannot, therefore, in our view, be said without relation to the qualifications of the tests which the probationer is expected to pass while he is a probationer. The first sentence in Rule 27 (b), we think, makes it more than plain that only as consequence of the appointing authority deciding that a probationer is suitable for full membership of the service, an order declaring the probationer to have satisfactorily completed his probation shall issue.

Thus, the inter-dependence of completion of probation by acquiring the qualifications or passing the tests and the decision relating to suitability is more than obvious in the process which enables the probationer to sustain his claim for the substantive post. This supports our view that the declaration of suitability is not without reference to the probation during which tests have to be passed or qualifications are to be acquired. Thus the judging of suitability of a probationer is not an independent process. Moreover, the order of declaration declaring the probationer to have satisfactorily completed his probation could thus be issued only after finding that the probationer is suitable for the full membership of the service; and one could not also be said to be suitable for the full membership unless, during the probation, he has acquired the qualifications or passed the tests. It is only in this sense that we find that the second sentence in Rule 27 (b) acquires its meaning; and the deeming provision therein should be construed in the light of it only. That sentence lays down that :

"On the issue of such order, the probationer shall be deemed to have satisfactorily completed his probation on the date of the expiry of the prescribed or extended period of probation."

Since these rules contemplate the issue of an order of declaration that the probationer has satisfactorily completed his probation -- not always immediately after the completion of probation --this deeming clause has become necessary to

be framed as part of Rule 27 (b). The scope, therefore, of this deeming clause is thus indeed restricted to a certificate taking effect as on the date of the expiry of the period prescribed or extended period of probation. Therefore, to have to read this as if it is a deeming clause in general, relating to the completion of the probation without the probationer having to pass the tests or acquire qualifications, appears to us to be far-fetched, if not unwarranted. The learned advocate for the petitioner suggested the latter construction. But we are unable to accept the same as the language employed in Rule 27 (b) in the context does not support such an interpretation.

Thus, on a proper reading of the rules and correct construction of the language employed in Rules 26 and 27, we do not find support for inferring that the appointing authority can, without reference to probation or the tests or qualifications acquired during the probation, declare the suitability of the probationer for the full membership of the service and thereafter by implication arising out of any deeming clause to have made the probationer occupy the substantive post. On the other hand, any order of an appointing authority declaring the probationer to have satisfactorily completed the probation when he has not passed the tests is invalid and also inoperative and has no legal force to enable the probationer to have his promotion or of binding nature on the Government so as to render the Government in any way bound by that order or declaration. Such an order could, therefore, be said to have no legal force. Further, when, as a qualification for the suitability of a probationer for full membership, the process prescribed under Rule 26 has become imperative, the appointing authority cannot ignore a part of the rules and make use of another part.

Such a course, when adopted by the appointing authority, would really lay bare the appointing authority to the charge, that he has ignored or abrogated some of the very rules under which he has to make the declaration. The majority of the Bench which decided the case in *K.S. Srinivasan Vs. Union of India (UOI)*, , held the view that when Rule 4 (b) of the Central Civil Services (Temporary Service) Rules. (1949) required consultation of the Public Service Commissioner to be made, it operated certainly as a mandatory provision so far as the subordinate appointing authority who had to make a declaration was concerned, and an order made without consulting the Public Service Commission did not entitle the officer to claim the benefit of Rule 3. There, the declaration with which the Supreme Court was dealing related to the question whether the Government servant shall be deemed to be in quasi-permanent service to enable the officer for further recruitment to a specified post. *S. K. Das, J.*, who spoke for the majority, postulated at page 430 :

"Quasi-permanent status is a creature of the rules, and Rule 4 (b) requires that no declaration under Rule 3 shall be made except after the consultation with the Public Service Commission (when recruitment to a specified post is required to be made in consultation with the Public Service Commission). An officer cannot

claim the benefit of Rule 3 and ignore at the same time the condition laid down in Rule 4 (b); in other words, he cannot claim the benefit of a part of the rules and refuse to be bound by the conditions of the other part".

The ratio of this decision, in our view, is attracted to the instant case with greater force since, as observed by us, Rules 26 and 27 are not only interlinked, but are interdependent and have to be treated as containing between them all the conditions necessary for issuing an order declaring a probationer to have satisfactorily completed his probation.

7. Having thus been fortified with this weighty authority in the construction of the rules in the matter of consequences which follow when a Subordinate appointing authority violates the rules, we find it impossible thereafter to hold that the petitioner had been legally holding the substantive post of the Assistant Commercial Tax Officer or satisfactorily completed the probation, and that by reason of the impugned order, he had been so adversely affected that he was reduced in rank, or has been punished in any manner. It is the contrary view that is pressed upon us by the learned counsel for the petitioner that forms the basis of his argument that the inhibition contained in Article 311(2) of the Constitution is drawn to this case.

But, in our view, it is not to be assumed that the petitioner held a rank above that of a probationer and became entitled to the substantive post when it is actually found that nothing of a benefit could have accrued by the illegal order of the Deputy Commissioner of Commercial Taxes which purported, though unsuccessfully, to declare that the petitioner has satisfactorily completed his probation. We are, therefore, unable to countenance such a contention as in any way strengthening the case of the petitioner. Equally so is the contention based upon the allegation that the petitioner was held out by the Government to have been in the substantive post for a period of four years and thereafter the impugned order operated to his detriment, and that, therefore, considerations of estoppel or akin thereto arose. The reasons already given apply with equal force so as to cut the ground -- that he held the substantive post of an Assistant Commercial Tax Officer -- under the feet of the petitioner. For the same reason, it is not also possible to hold that there is any substance in the further contentions made on behalf of the petitioner that no second notice was given.

Here it may be mentioned that the impugned order has not decided that the petitioner is not suitable for full membership of the service, or that any penalty should be imposed on him. In our view, the reliance placed by the learned counsel for the petitioner on the decision in *Khem Chand Vs. The Union of India (UOI)and Others*, , is, therefore, not correct.

8. Of the contentions raised on behalf of the petitioner there remain those which question the power of the Government to cancel the order of declaration issued by the Deputy Commissioner and the power of the Governor to extend the probation. What is urged on behalf of the petitioner is that any decision to relax

Rule 28 of the State and Subordinate Services Rules has not the effect of conferring any power to extend the probation of the petitioner in any manner in which the Governor chooses to order; and secondly, that the order of the Governor, in so far as it purports to be under Rule 49, contravenes even the limitation imposed by that rule on the Governor by reason of the proviso thereto. As for the first point, we need only point out that once it is decided that Rule 28 shall be relaxed, the time limit regarding the extension of probation is done away with and thereafter the period of fixing the probation or the date from which the probation shall take effect, would then be at the pleasure of the Governor. Since it is only the terms of Rule 28 that bind the Government, the relaxation of that rule enables orders to be passed in regard to probation without reference to the limitations imposed by that rule. So far as Rule 49 is concerned, after the same has been amended by G O. Ms No 910 G.A. (Ser-A) Department, dated 14-6-1958, it is as hereunder:

"No rule made under the proviso to Article 309 of the Constitution of India or continued by Article 313 of that Constitution shall be construed to limit or abridge the power of the Governor to deal with the case of any person serving in a civil capacity under the Government of Andhra Pradesh in such manner as may appear to him to be just and equitable.

Provided that, where any such rule is applicable to the case of any person or a class of persons, the case shall not be dealt with in any manner less favourable to the person or class of persons than that provided by that rule."

The obvious purpose for which this is enacted appears to be beyond doubt; that though in accordance with the proviso contained in Article 309 of the Constitution, the Governor of a State or such person as he may direct may make rules regulating the recruitment, and the conditions of service of persons appointed, no such rule shall, at any rate be construed to limit any of the powers of the Governor concerning the persons serving in a civil capacity under the Government, and that the Governor may deal with a civil servant as it may appear to him to be just and equitable. In other words, this rule points out the acts of the Governor concerning a civil servant are non-justifiable. But then again, the proviso to this rule specifies a limitation which makes it plain that the case of that civil servant shall not be dealt with by the Governor in any manner less favourable to that person or class of persons than the manner in which it could be dealt with by the rule which appropriately applied to that case. No doubt, it appears at first flush that though the exercise of the power under this rule cannot be examined by Courts, what is contained in that proviso may be gone into in particular cases.

But then on mature consideration, we find this interpretation also is not feasible as no limitation or abridgement of the power of the Governor is indeed at all contemplated by the terms of the main portion of Rule 49. The further question whether the rule in the terms as posited in Rule 49 is intra vires or not, would, in our view, be dependent upon the exact scope and ambit of Article 310 of the

Constitution. In so far as it is relevant for the purpose of discussion, that portion of that Article which posits that "every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State", needs to be referred to in this context. The decisions dealing with the aspect what acts of the Governor pertaining to civil servants could be questioned are not uniform; nay, they indicate conflicts also (Vide *The State of Bihar Vs. Abdul Majid*, , *C.S. Rajagopala Ayyar Vs. State of Madras and Another*, , *Joga Rao v. State (S)* AIR 1957 AP 197; *State of Andhra Pradesh v. S. Kameswara Rao (S)* AIR 1957 AP 794, *A. Sambandhan Vs. Regional Traffic Superintendent (Personnel) Southern Railway and Others*, , *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , *Dr. G. V. Pantulu v. Govt. of Andhra* AIR 1958 AP 240 , *Jagdish Dajiba Vs. The Accountant-General of Bombay and Others*, , *A. Sambandhan Vs. Regional Traffic Superintendent Southern Rly. Tiruchirapalli and Others*, , *Mohamed Hyder Vs. State of Andhra Pradesh*, , *S. Framji Vs. Union of India*, ; *K.P. Shankerlingam Vs. Union of India and Another*, *M. Kamalamma v. State of Mysore* AIR 1960 Mys 255 and *Union of India (UOI) Vs. R. Akbar Sheriff*, .

The question as to whether an infraction of service rule confers a legal right which could be agitated in Court has indeed been left open by the Supreme Court in *The State of Andhra Vs. Gaddam Venkatappayya*, . That question thus awaits a future authoritative decision. At present, any answer to this question is not free from difficulties; and in the view we have taken of the instant case, this matter does not directly arise to be considered by us. We, therefore, do not find it necessary to have to go into this question at length, nor decide it. Further, even assuming for a moment that the matter can be gone into by a Court, we find in the instant case before us that the impugned order is not one which is calculated to constitute an infraction of the proviso to Rule 49.

As already pointed out by us, the petitioner held no substantive post in the capacity of the Assistant Commercial Tax Officer, but should have been discharged by strict application of Rule 26. Further, by virtue of Rule 26 (b) (iii), the want of an order discharging him cannot entitle him to urge that he should be deemed to have satisfactorily completed his probation. The order declaring him to have satisfactorily completed his probation is without legal effect or force. In the circumstances, his case would be one where by a mistake he got into a post without the necessary qualifications. In such a case, the impugned order which has given him an advantage of continuing as a probationer cannot be said to have dealt with him in a manner less favourable than that provided by the rules applicable to him. In this view, it becomes rather difficult to have to find that the impugned order has violated the terms of the proviso to Rule 49.

This apart, the facts of the instant case make it plain that when an explanation was called for from the petitioner, he prayed for time for passing the remaining test. The impugned order which was passed after considering that explanation would, in the circumstances, appear to be in the nature of a concession made in

the case of the petitioner so as to meet the ends of justice. It is not thereafter open to the petitioner to complain about the order in question, or to approach this Court by way of a writ petition.

9. It is also necessary for us before parting with this petition to observe that the case of the petitioner is least filled to be Rone into in an application for the issue of a, Writ. It is not as though the petitioner has qualified himself in the appropriate time and any injustice has been done to him. Therefore, we would consider that the interests of justice do not require the issue of a Writ in this case.

10. However, one matter alone requires the consideration by the Government. It is stated by the petitioner that the Government communicated the impugned order on 30-12-1959 and the extended time was only upto 31-3-1960 and that during the time so left to him, no examinations were held. Having regard to this, we are of the opinion that the case of the petitioner could be considered leniently since he has passed the remaining tests in March 1961.

11. Moreover, though indeed the recovery from the petitioner of the excess amount drawn as increments could be said to fall within Clause (c) of Rule 27, the same may not be so enforced as to make it a matter of punishment, but adjusted as accords with the occasion.

12. In the result, this writ petition is dismissed with costs. Advocate's fee is fixed at Rs. 100/-.