

## **P. Elango Vs The State of Tamil Nadu and The Secretary Tamil Nadu Public Service Commission, Omandurar Government Estate**

**Court:** Madras High Court

**Date of Decision:** Nov. 6, 2009

**Acts Referred:** Constitution of India, 1950 " Article 12, 14, 16, 162, 309

Drugs and Cosmetics Act, 1940 " Section 21, 21(2), 3, 33

Drugs and Cosmetics Rules, 1945 " Rule 49

Penal Code, 1860 (IPC) " Section 21

**Hon'ble Judges:** K. Chandru, J

**Bench:** Single Bench

**Advocate:** V.C. Janarthanam, for R. Nagasundaram, for the Appellant; R.P. Kabilan, AAG assisted by A.C. Mani Bharathi, for R1 to R3 and C.N.G. Ezhilarasi, for R4, for the Respondent

**Final Decision:** Dismissed

### **Judgement**

@JUDGMENTTAG-ORDER

K. Chandru, J.

The petitioner claims to be qualified for the post of Pharmacist holding a Degree in Bachelor of Pharmacy and also had

registered his name with the Tamil Nadu Pharmacy Council. He had also registered his name in the Employment Exchange. He claims that he is

also having sufficient experience in the field of drug manufacturing and inspection of manufacturing units.

2. He applied for the post of Drug Inspector and was once called for an interview by the Union Public Service Commission, New Delhi. He was

not selected on merits. He is now 42 years old and had crossed the age for making any application for the post in the State service.

3. The petitioner after coming to know of advertisement given by the Tamil Nadu Public Service Commission, namely the 4th respondent vide its

Notification/advertisement No. 198 published in THE HINDU newspaper dated 5.4.2009 has filed the present Writ Petition.

4. A copy of the said advertisement is enclosed in the typed set of papers. The said advertisement called for applications for the post of Drug

Inspectors in respect of 24 vacancies. The educational qualification prescribed in para 4(B) reads as follows:

(B) EDUCATIONAL QUALIFICATION: Candidates should possess on the date this Notification, viz., 4.4.2009, the following or its equivalent

qualification awarded by a University or Institution recognised by the University

Grants Commission for the purpose of its grant.

A Degree in Pharmacy or Pharmaceutical Sciences or a Degree in Medicine with specialisation in Clinical Pharmacology or Microbiology.

Persons claiming equivalent of qualification should enclose evidence for such claims.

The applicants were subjected to written examination and viva voce test. For selection, rules of reservation also has been prescribed.

5. The grievance of the petitioner is that the qualification prescribed in the advertisement by the Tamil Nadu Public Service Commission is not in

conformity with proviso to Rule 49 of the Drugs and Cosmetics Rules, 1945. The said Rule reads as follows:

49. Qualification of Inspectors:- A person who is appointed an Inspector under the Act shall be a person who has a degree in Pharmacy or

Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law:

Provided that only those Inspectors:

(i) who have not less 18 months" experience in the manufacture of at lease one of the substances specified in Schedule C; or

(ii) who have not less than 18 months" experience in testing of at least one of the substances in Schedule C in a Laboratory approved for this

purpose by the licensing authority; or

(iii) who have gained experience of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C

during the tenure of their services as Drugs Inspectors;

shall be authorised to inspect the manufacture of the substances mentioned in Schedule C;

(Provided further that the requirement as to the academic qualification shall not apply to persons appointed as Inspectors on or before the 18th day

of October, 1993.)

6. According to the petitioner, the advertisement though prescribes educational qualification in terms of the Rule, in so far as it did not include the

prescription of minimum experience provided therein, the advertisement is ultra vires of the Drugs and Cosmetics Rules, 1945 and the Drugs and

Cosmetics Act, 1940.

7. Pending the Writ Petition, the petitioner was able to persuade this Court for an interim order, stating that the proviso to Rule 49 of the Drugs

and Cosmetics Rules, 1945 has not been incorporated in the advertisement. On being persuaded that the proviso to Rule 49 was not incorporated

in the said advertisment, an interim order was granted by this Court.

8. On notice from this Court, the 4th respondent has filed a counter affidavit dated 10.7.2009. They have also produced an order of the

Government in G.O.Ms. No. 74, Health Department dated 18.2.2009 amending the Special Rules for Tamil Nadu Medical Service with reference

to the Category-3, Drugs Inspectors. The qualification for the said post has been prescribed, which is as follows:

Must possess a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a

University or Institution recognised by the University Grants Commission for the purpose of its grant.

The amendment has come into force from 18.2.2009.

9. In the counter affidavit filed, it was stated that the earlier rule for Drug Inspector, amended in G.O.Ms. No. 708, Health dated 11.11.1995,

containing the verbatim reproduction of Rule 49 was substituted by the present amendment. The Government felt that there was absolutely

necessary to delete the experience qualification and to specify the educational qualification alone to cater to the needs of the Department and have

issued orders revising the educational qualification prescribed for appointment to the post of Drug Inspector by direct recruitment.

10. The preamble to the said Government Order amending the Rule reads as follows:

In the Government Order first read above, amendments to the Special Rules for the Tamil Nadu Medical Service were issued amending the

method of appointment, qualification, experience, etc., for the posts of Senior Drugs Inspector and Drugs Inspector. In the said amendment for the

post of Drugs Inspector, experience for a period of not less than eighteen months in the manufacture/testing of the substances among other things

has been prescribed for appointment as Drugs Inspector. The Director of Drugs Control has now stated that since the issue of amendment, no

appointment of Drugs Inspector through direct recruitment has been made and hence no necessity arose for the revision of the amendment. Now,

there is dire necessity to fill up the vacant posts of Drugs Inspector. Hence, there is absolutely necessary to delete the experience qualification and

to specify educational qualification alone to cater to the needs of Department.

11. However, Mr. C.V. Janarthanan, learned Counsel for the petitioner submitted that the State Government cannot transgress Rule 49 of the

Drugs and Cosmetics Rules, 1945. If at all, the Rule can be amended only by the Central Government, which alone is authorised to amend any of

the Drugs and Cosmetics Rules, 1945. He also further submitted that an Inspector appointed under the Act must have all the qualifications

prescribed under Rule 49.

12. In this context, the learned Counsel referred to Section 3(i) of the Drugs and Cosmetics Act, 1940 wherein it is stated that the term

prescribed"" means prescribed by Rules made under this Act. Thereafter, the learned Counsel pointed out to Section 21 of the Act, by which

Inspectors under the Act were appointed. The said section reads as follows:

21. Inspectors:- (1) the Central Government or a State Government may, by notification in the Official Gazette, appoint such persons as it thinks

fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or the State

Government, as the case may be.

(2) The powers which may be exercised by an Inspector and the duties which may be performed by him, the drugs or classes of drugs or

cosmetics or classes of cosmetics in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may

be exercised or performed shall be such as may be prescribed.

(3) No person who has any financial interest in the import, manufacture or sale of drugs or cosmetics shall be appointed to be an Inspector under

this section.

(4) Every Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860), and shall be

officially subordinate to such authority having the prescribed qualifications as the Government appointing him may specify in this behalf.

13. It was contended that a conjoint reading of Sections 3(i), 21 and 33 of the Act will make it clear that any qualifications prescribed for an

Inspector must necessarily conform to Rule 49 framed by the Central Government. Inasmuch as the current prescription of qualification is contrary

to the proviso to Rule 49, the amendment made by the State Government by virtue of exercise of power under Article 309 of the Constitution of

India is ultra vires. He also stated that since the main Act comes under List II of Schedule VII, the State Government cannot go back on its earlier

Rule. This Court is unable to agree with the said submission made by the petitioner.

14. While Section 21 of the Act mentions about Inspectors under the Act, it takes into account the multifarious roles of an Inspector. A reading of

Section 21(2) of the Act makes it clear that the power which may be exercised by an Inspector and the duties which may be performed by him,

the drugs or classes of drugs or cosmetics or classes of cosmetics in relation to which and the conditions, limitations or restrictions subject to

which, such powers and duties may be exercised or performed shall be such as may be prescribed. Therefore, when the Central Government

framed Rule 49, it took into account the different nature of works to be performed by an Inspector. While the main part of Rule 49 prescribes the

educational qualifications for the post of Inspectors, the proviso, which was introduced by GSR 658(E) dated 19.10.1993 has made an additional

prescription of minimum experience for an Inspector in case he is authorised to inspect the manufacture of the substances mentioned in Schedule

C. In fact, the second proviso to Rule 49 will make this position very clear because the said G.O has been made prospectively, namely to come

into force from 19.10.1993. Therefore, such of those Inspectors who were appointed before 19.10.1993, even if they do not have the experience

prescribed as per the first proviso were not made ineligible to inspect Schedule "C" manufactory. But, after the date of amendment, i.e.,

19.10.1993, it is not only the educational qualification but also the experience provided under the first proviso is necessary for inspecting the units

manufacturing substances mentioned in Schedule C. But the learned Counsel for the petitioner wanted to contend that there can be only one class

of Inspector. Hence, all Inspectors appointed under the Act read with Rules must have not only the educational qualification but also the

experience prescribed under the proviso to the Rule.

15. In support of his contention, the learned Counsel cited several judgments of the Supreme Court to re-enforce the contentions raised by him.

The first decision related to Inder Parkash Gupta Vs. State of Jammu and Kashmir and Others, . In that case, it was held that the Rule framed u/s

124 of the Jammu & Kashmir Constitution, which corresponds to Article 309 of the Constitution, is held to be statutory in nature and they must be

scrupulously followed by the Public Service Commission while making selection to posts. Even if any procedural rules are made by the Public

Service Commission must conform to the impugned statute. In the present case, the Tamil Nadu Public Service Commission had not deviated from

the Rules framed under Article 309 of the Constitution of India.

16. The second decision relied upon by the learned Counsel is relating to National Fertilizers Ltd. and Others Vs. Somvir Singh, . In the said

matter, it was held that National Fertilizers Limited was a "State" within the meaning of Article 12 of the Constitution. Therefore, being an

instrumentality of the State, they are bound to comply with the constitutional requirements contemplated under Articles 14 and 16 of the

Constitution of India. When an employer makes recruitment Rules, he was also bound to apply those standards and in case any appointment is

made contrary to the Rules, they are invalid.

17. The third decision relied upon by the learned Counsel for the petitioner is Malik Mazhar Sultan and Another Vs. U.P. Public Service

Commission and Others, . In that case, the Supreme Court dealt with the age prescribed in an advertisement made for a particular post. It was

held that the advertisement cannot override the provisions of the statutory Rules. Therefore, if any error found in the eligibility requirement in the

advertisement if it is found to be inconsistent with the Rules, it would not create any right in favour of the candidates. As already pointed out, the

present Rule made by the State Government is under Article 309 of the Constitution of India, prescribing a particular qualification for the post of

Drug Inspector. It is not necessary that the entire Rule 49 should be incorporated in case of all posts of Drug Inspectors, as this Court had already

held that the proviso will apply only to Inspectors inspecting particular class of drug manufacturers and not to the all drugs or cosmetics

manufacturers intended to be covered by the Central Government.

18. The learned Counsel also referred to the judgment of the Supreme Court in Punjab Water Supply and Sewerage Board, Hoshiarpur Vs.

Ranjodh Singh and Others, . In that case, the Supreme Court held that the order issued by the Central Government by its executive power under

Article 162 cannot override the statutory Rules prescribed under Article 309 of the Constitution of India. In the said case, it was held that no

instructions or policy decision can prevail over the statutory rules. As already held, in the present case the relevant statutory rule is the amendments

made by the State Government to the relevant service rule under Article 309 of the Constitution. The advertisement now impugned is not in conflict

with the Rules in question.

19. The learned Counsel also referred to the judgment in Rajasthan Public Service Commission Vs. Kaila Kumar Paliwal and Another, . It is only

for the proposition that a Selection Committee in the absence of any executive power cannot relax the essential qualification. On the contrary, the

Tamil Nadu Public Service Commission had only conformed to the statutory rules and has not in violation or relaxation of relevant Rule.

20. The learned Counsel also referred to the judgment of the Supreme Court in Nagendra Chandra and Ors. v. State of Jharkhand and Ors.

reported in (2008) 1 SCC 798. In that case, the question which arose for consideration was that if the relevant Rules prescribed for advertising a

vacancy in the newspaper and also notified to the employment exchanges and if any deviation is made, then such appointments will be an infraction

of the Rules and violative of the Articles 14 and 16 of the Constitution of India. It is not clear as to how the said decision has any relevance to the

case on hand.

21. The next judgment referred to by the learned Counsel is Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others, . In

that case, the Supreme Court held that while an illegality cannot be condoned but an irregularity can be cured. If there is any illegality in the matter

of appointments, it will result in nullity and such appointment will be void ab initio.

22. The learned case thereafter placed reliance upon the two decisions of the Supreme Court. The first one related to K.A. Nagamani Vs. Indian

Airlines and Others, . In Nagamani's case, in the context of Indian Airlines Corporation (Employees other than Flying Crew and Aircraft

Engineering Department) Service Rules, the executive instructions are pressed into the service in respect of promotion. The Supreme Court held

that an agreement or settlement is complimentary to each other and they will have to be read together. Even if the Airlines wanted to rely upon the

settlement, it should not run counter to any statutory instrument. But, in that case, it was found that the recruitment and promotion Rules were not

statutory in nature but in the nature of guidelines. Therefore, the Supreme Court also noted that if the Rules are not issued under any statutory

provisions and also not notified in the Gazette, they cannot held to be statutory Rules. In the present case, the earlier Special Rules under Article

309 was amended by an appropriate procedure contemplated by issuing notification in the Tamil Nadu Government Gazette. Therefore, it cannot

be said to be either non-statutory rule or executive amendment to the Rule framed under Article 309 of the Constitution was applied while notifying

the vacancies by the Tamil Nadu Public Service Commission.

23. Finally, the learned Counsel placed reliance upon the latest judgment of the Supreme Court in V.V.S. Rama Sharma and Others Vs. State of

U.P. and Others, . Though the said case arose under the Stamp Act, the learned Counsel wanted to rely upon the passage found in paragraph 21

of the said judgment, wherein it is stated that the Rule making power of the State Government is only to the extent as provided under the Central

law, namely, the Stamp Act. Therefore, the Court held that in a particular central law, if the power is delegated to the State, it only acts as a

delegate and it cannot go beyond the provisions of the Act nor override the provisions of the main enactment.

24. In any event, this Court had already held that the present advertisement is only for the post of Drug Inspector and nowhere it is stated that such

a Drug Inspector will also be sent to inspect the manufacture of the substances mentioned in Schedule "C". That stage is yet to arrive in the present

case. It must also be noted that the Central Act, 1940, viz., Drugs and Cosmetics Act, 1940 deals with many classes of drugs and also by a

subsequent amendment even cosmetics have been brought into the provisions of the Act. Therefore, an Inspector under the Act has multifarious

roles. Therefore, at this stage, this Court cannot presume that the Drug Inspectors appointed by the State Government will also perform the duties,

which will be in conflict with proviso to Rule 49. Unless it is shown that a Drug Inspector will be sent to inspect a manufacturer, manufacturing

\_Schedule \_C" drugs, this Court cannot presume that any appointment of a Drug Inspector will lead to conclusion that they will perform all roles

including inspection of \_C" Schedule manufacturers.

25. When the petitioner, who is having no locus standi to question the impugned notification has come forward to challenge even a prior

recruitment process on the ground that the advertisement runs counter to the statutory rule, this Court cannot go into the issue as to the few

functions of such Drug Inspectors, who are to be appointed pursuant to the notification.

26. The other contention raised by the learned Counsel that the State Government cannot amend its own service rules in terms of Article 309 of

the Constitution and it has to be made only by the Central Government by an appropriate statutory amendment to the Rules, cannot be

countenanced by this Court. An Inspector functioning under the Act also belongs to a State service. Therefore, it is open to the State Government

to prescribe Rules under Article 309 of the Constitution and it cannot be compelled to go before the Central Government for making amendment

even for appointment of Drug Inspectors. First of all in the present case, in respect of educational qualification, there is no violation of the statutory

rule prescribed under the Drugs and Cosmetics Rules, 1945. What is pressed into service is the first proviso to Rule 49. As already stated, it is

only with reference to empowering an Inspector to inspect Schedule \_C" manufacturers. Therefore, this Court is unable to countenance the

contentions raised by the petitioner.

27. In the result, the Writ Petition stands dismissed. No costs. The connected Miscellaneous Petitions stand closed.