

AFR

Neutral Citation No. - 2024:AHC-LKO:35165-DB

Court No. - 2

Case :- SPECIAL APPEAL No. - 64 of 2024

Appellant :- Dr. Bhawana

Respondent :- State Of U.P. Thru. Its Prin. Secy. Deptt. Of Ayush
Govt. Of U.P. Lko. And Others

Counsel for Appellant :- Shivang Tiwari, Apoorva Tewari, Vimalesh
Kumar Singh

Counsel for Respondent :- C.S.C.

Hon'ble Rajan Roy, J.

Hon'ble Om Prakash Shukla, J.

1. Rejoinder affidavit filed today, copy of which has been served to learned Standing Counsel much earlier, is taken on record.
2. Heard Shri Apoorva Tewari along with Shri Shivang Tiwari, learned counsel for the appellant and Shri V.P. Nag, learned Standing Counsel for the State.
3. This is a Special Appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 challenging the judgment and order dated 19.03.2024 passed by the writ Court in Writ - A No. 2075 of 2024 by which writ petition of the appellant/petitioner has been dismissed.
4. In the aforesaid writ petition the following reliefs had been sought:-

"a) issue a writ, order or direction in the nature of certiorari to quash orders dated 30.01.2024, passed by the Director, Ayurvedic services, Uttar Pradesh, Lucknow, as contained in Annexure no. 1 to the writ petition;

b) issue a writ, order or direction in the nature of mandamus commanding the respondents to grant the petitioner a study leave of 12 (twelve) months in accordance with the provisions laid down in the Financial hand book;

c) Issue such other orders, which this Hon'ble Court may deem just and proper in favour of the petitioners; and

d) allow the petition with costs."

5. The facts of the case in brief are that on 18.09.2021 an examination was held for admission to P.G. Course, namely, M. D.- Ayurveda Kayachikitsa, in which, the appellant being eligible participated. It was a three years course. Before the result of the said examination could be declared an Advertisement was issued on 23.11.2021 for recruitment to the post of Medical Officer, Community Health Center (Ayurvedic and Unani) in the services under the State of Uttar Pradesh. Written test was held on 31.07.2022. The appellant/petitioner qualified the same. She was called for interview which was held on 15.12.2022. The result of the selection was declared on 11.01.2023 and the petitioner was one of the successful candidates. Accordingly, an appointment letter was issued to her on 01.09.2023. The appointment was on probation of two years as Medical Officer in the Pay-scale of Rs.15600-39100 Grade Pay- 5400/- (Matrix Level - 10). The appellant/petitioner joined her service on the said post on 30.09.2023.

6. In the interregnum, the result of the entrance test to the P.G. Course referred above was declared and appellant/petitioner was admitted to the said course. She took admission on 01.03.2022 i.e. immediately after issuance of Advertisement i.e. 23.11.2021 and

possibly after having applied for recruitment to the post of Medical Officer, Ayurveda.

7. By the time, she joined on 30.09.2023 she completed almost one and half years study in the P.G. Course and 16 months study remained, as, informed by Shri Apoorva Tewari, learned counsel for the appellant. Accordingly, the appellant/petitioner applied for leave on 30.11.2023, however, the said application was rejected on 30.01.2024, meaning thereby, in view of this rejection the appellant/petitioner could not complete P.G. Course. Consequently, she challenged the said decision by filing the aforesaid writ petition out of which this special appeal arise. The rejection order is on record and the only reason assigned for rejecting the leave prayed for by the appellant/petitioner is that there is no such provision for grant of study leave to a probationer, especially as, the appellant/ petitioner had put in less than four months of service. Reference was made in this regard to Rule 81-B(4) and 84 of the Financial Handbook Vol. 2 Part-II and subsidiary Rule 146(2) as also Rules 81-B of Financial Handbook Vol. 2 Part- II to IV Chapter-10 and Subsidiary Rule 157-A (4). The learned Single Judge has dismissed the writ petition with reference to the Rules referred in the order impugned before it as also Rule 84.

8. Learned counsel for the appellant in order to assail the judgment of the writ Court and the order impugned before it has invited our attention to subsidiary Rule 104(b) which relates to grant of leave to probationers as also to the Rules made under Rule 104(b) i.e. Rule 170. He has also invited out attention to subsidiary Rule 146-A and use of the word 'ordinarily' therein in the context of probationers. According to him, this itself indicative of the fact that it does not exclude or preclude the grant of leave including the Study Leave to probationers also of course in exceptional circumstances, such as, the one existing in the case at hand wherein the appellant/petitioner has completed half the course and midway had to join her services on the post of Medical

Officer, Ayurveda in State of Uttar Pradesh. He also submits that higher qualification which she will acquire consequence to such study leave being granted will ultimately benefit the public at large, as, she would be better equipped and qualified to render of her services in Medical Department of the State. Moreover, he has referred to the discrimination being practiced by the State of U.P. in this regard by extending the joining time of freshly recruited Doctors of Provincial Medical Health Services (P.M.H.S.) vide order dated 14.03.2024. The submission in this regard is that the Doctors of the Ayurvedic Services and P.M.H.S. are similarly situated as far as Study Leave and an application for Fundamental and Subsidiary Rules contained in the Financial Handbook referred hereinabove are concerned. A person who does not even join the service he is being given extension up to three years to complete the P.G. Course that too without any bond in the case of those recruited to the P.M.H.S., but, in a case, such as, the appellant/petitioner who has in fairness after taking leave from the Institution where she was pursuing her P.G. Course and was half way through, has joined the services and thereafter, duly applied for grant of leave but the same has been rejected on the mistaken ground that there is no provision under which the probationer, especially one who had barely put in a few months of service, could be granted such leave. The submission is that this reasoning can not be justified in view of the Rule position and in view of the Government Order dated 14.03.2024 when the State extends the joining of persons who have not even joined the service to facilitate completion of their study. He also says that in the fact the appellant/petitioner is ready to give a personal bond that after completing her P.G. Course she will join her services and serve the public in the State of U.P. as per the terms and conditions of her service.

9. Learned Standing Counsel on the other hand has tried to persuade the Court that the Government Order dated 14.03.2024 has no

application because they have been given the benefit before joining the services and therefore, such recruits to the P.M.H.S. are differently placed than the appellant/petitioner who has already joined but has put in less than four months of service. He has also invited our attention to subsidiary Rule 146-A to contend that such leave is not admissible. He has also referred Fundamental Rule 67 and 84 to contend that leave is not a matter of right and it is the discretion of the Authority to refuse or revoke leave of any description and this right is reserved to the Authority empowered to grant it. The U.P. Fundamental Rule 84, according to him, clearly mentions that the leave may be granted to Government servants, on such terms as the Governor may by rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account. According to him, subsidiary Rule 164- A (2) does not permit grant of Study Leave to a Government Servant of less than five years service in a routine manner. He also refers to subsidiary Rule 170 in support of his contention. As regards subsidiary Rule 157 regarding extraordinary leave the submission is that it is a separate leave and was not applied by the appellant/petitioner. Extraordinary Leave can not be granted for study purposes. It is also his submission that the appellant/petitioner was aware of the fact that she had applied for being recruited to the post of Medical Officer, Ayurved on 23.11.2021 itself and therefore, she would have desisted from taking admission to the P.G. Course subsequently on 01.03.2022. Knowingly having done so, she has to face the consequence and she has to be treated in terms of the Rules applicable and not merely on the asking of the appellant/petitioner.

10. Referring to the Government Order dated 14.03.2024 and discrimination alleged by the appellant/petitioner we had passed an order on 03.04.2024 which reads as under:-

"1. Let the opposite parties file affidavit specifically addressing the issue as to how the claim of the petitioner for study leave could have been rejected by the Director, Ayurvedic Services vide order dated 30.01.2024 on the ground that there is no provision for grant of such leave to probationers whereas even as per the impugned judgment passed by the Writ Court, Subsidiary Rule 146A(2) provides study leave should not ordinarily be granted to Government Servant of less than five years' service or to Government Servants within three years of the date at which they have the option of retiring, meaning thereby in exceptional circumstances it can be granted. This can be the only understanding of said provision in view of the use of word 'ordinarily' and also as in the context of doctors of PMHS and doctors of Dental Service, Government Order dated 14.03.2024 has been passed, which permits extension of joining of such persons, who have been selected for appointment as Medical Officer in PMHS for a period of six months and even beyond the date till three years with the permission of department, whereas the case of the petitioner is better placed in the sense that she has very fairly joined the service after seeking leave from the Institution where she was pursuing the P.G. Course and has then applied for study leave. How double standards can be adopted in respect of apparently similarly placed candidates/Government Servants albeit appointed or proposed to be appointed in different services, but under the same employer, i.e. the State Government and in any event

if the study leave is not permissible why on the same principle extraordinary leave cannot be granted, especially in view of S.R. 157A(IV) of the Subsidiary Rules made under the Financial Handbook.

2. List this case on 18.04.2024 as fresh.

3. In the meantime, the appellant may move an application before the Institution where she was pursuing her P.G. Course seeking indulgence for providing further leave, if it is otherwise permissible."

11. In response to which a counter affidavit has been filed by the State. We have gone through the counter affidavit and we do not find any rational and intelligible criteria mentioned therein for differentiating the Doctors who have been recruited for joining as Medical Officers in the Provincial Medical Health Services and such as the appellant/petitioner who, after such recruitment as Medical Officer Community Health Center (Ayurvedic and Unani) has already joined the service, for the purposes of grant of study leave.

12. The Government Order dated 14.03.2024 extends the joining of such recruits in the P.H.M.S. up to three years to enable such recruits to the Provincial Medical Health Service to complete their study/course or to acquire a specialization to which they have already been admitted, meaning thereby, even though, they have been recruited they have not joined the service and the services of such Doctors would not be available to the Public and the State Government for different periods up to three years depending upon the facts of each case because they will be pursuing their courses of study but the request of the appellant for study leave has been rejected on the ground that Rules do not permit the same. The appellant is no way differently situated.

13. In the case of the appellant/petitioner, she in all fairness joined on 30.09.2023 and thereafter applied for study leave. No doubt, she is a

probationer and she has put in less than four months of service, but, she is better placed than those recruits in P.M.H.S. who have not even joined the service. Moreover, the extension of joining of such recruits to P.M.H.S. has been done without asking for any bond from them, meaning thereby, it is quite a possibility that some of the them after completing their P.G. or whatever courses they are pursuing, may not join, but, no security has been taken in this regard by the State from them. This is apparently discriminatory so far as appellant/petitioner is concerned. Moreover, learned Standing Counsel, on being asked to show which rule permits the benefit granted to recruits of P.M.H.S. Cadre as discussed above, he could not show any Rules but contended that they had not yet joined the service, whereas, the petitioner had already joined the service, therefore, they stand on a different footing. Such a contention can hardly be accepted as this can not form any rational basis for differential treatment for the purpose of grant of study leave/ or extension of joining, for completing the course to which both of such category have already been admitted.

14. Now, we come to the Rule position. Rule 84 of the Fundamental Rules reads as under:-

"84. Leave may be granted to Government servants, on such terms as the Governor may by rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account."

15. The Study Leave Rules as contained in the Subsidiary Rules have been made by the Government under this Fundamental Rule 84.

16. Fundamental Rule 104 reads as under:-

"104. During their period of probation or apprenticeship, probationers and apprentices are entitled to leave as follows:

(a) if appointed under contract in the United Kingdom with a view to permanent service in India, or if appointed in the United Kingdom posts created temporarily with the prospect, more or less definite, of becoming permanent:

(i) to such leave as is prescribed in their contracts, or, when no such prescription is made;

(ii) (1) when the period of probation is not less than three years, to the same leave which would be admissible if they held permanent posts; or

(2) when the period of probation is less than three years, to leave on average pay up to one eleventh of the period spent on duty, to which may be added, on medical certificate, leave on half average pay; provided that the total leave granted under this clause shall not exceed three months reckoned in terms of leave on average pay; and

(b) If appointed otherwise, to such leave as is admissible under rules framed by the Government on this behalf.

17. Fundamental Rule 104 provides that during their period of probation or apprenticeship, probationers and apprentices are entitled to leave as mentioned therein. Now, Clause (a) thereof deals with those appointed under the contract in the United Kingdom with which we are not concerned, but, Clause (b) thereof which applies to this case, goes on to state that if appointed otherwise i.e. otherwise than what is

mentioned in Clause (a), a probationer would be entitled to such leave as is admissible under rules framed by the Government on this behalf.

18. Now, there are Rules which have been made under FR 104- (b). These rules are contained in Chapter XVII. We are concerned with Chapter XVII of the Subsidiary Rules. For the case at hand it is Subsidiary Rule 170 which is relevant and it reads as under:-

"170. Leave may be granted to a probationer if it is admissible under the leave rules which would be applicable to him if he held his post substantively otherwise than on probation."

19. Now, in this very context we may refer to Subsidiary Rule 146-A contained in Chapter XI-A and has been made by the Governor under Rule 84 of the Fundamental Rules under the heading 'Study Leave Rules'. Rule 146- A reads as under:-

"146-A. The following rules have been made by the Governor to regulate the grant of additional leave to Government servants for the study of scientific, technical or similar problems, or in order to undertake special courses of instruction. These rules relate to study leave only. They are not intended to meet the case of Government servants deputed to other countries at the instance of the Government, either for the performance of special duties imposed on them or for the investigation of specific problems connected with their technical duties. Such cases will continue to be dealt with on their merits under the provisions of Rules 50 and 51 of the Uttar Pradesh Fundamental Rules. These rules apply to the Public Health and Medical Research Departments, the Civil Veterinary Department, the Agricultural Department, the Education Department, the Public Works Department and the Forest Department (except in respect of Continental tours, to which special rules apply). The rules may be extended by the Government to any Government servant not

belonging to any of the departments mentioned above in whose case they may be of opinion that leave should be granted in the public interests to pursue a special course of study or investigation of a scientific or technical nature."

20. Fundamental Rule 67 is also relevant and it reads as under:-

"67. Leave cannot be claimed as of right, when the exigencies of the Public service so require, discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it."

21. Fundamental Rule 67 clearly means that if exigencies of Public service so require any prayer for leave can be refused and can not be claimed as a matter of right and discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it. Now, discretion obviously has to be exercised keeping in mind the object and intent of the Rules and also in a reasonable manner. Discretion can not be exercised unfairly and unreasonable merely on whims or fancies, clearly not to discriminate or in a manner which may result in discrimination.

22. Now, we come to Fundamental Rule 84 which provides that leave may be granted to Government servants, on such terms as the Governor may by rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account. Fundamental Rule 84 permits grant of leave for study whether scientific, technical or of any other nature referred therein subject of course to the terms as the Governor may by rule or order prescribe.

23. Now, Subsidiary Rule 146-A has been framed under Fundamental Rule 84. We have already quoted it above. It is under the heading 'Study Leave Rules'. The said rule applies only to Government servants which the appellant/petitioner before us is. The said rule has been made by the Governor to regulate the grant of additional leave to Government servant for the study of scientific, technical or similar

problems, or in order to undertake special courses of instructions. These rules relate to study leave only. From a reading of the said Rule it is clear that these rules are in addition to other Rules admissible to Government servants including the extraordinary leave under Subsidiary Rule 157. The rule specifically states that they apply to the Public Health and Medical Research Departments, the Civil Veterinary Departments and other departments, therefore, the rule clearly envisages situation where the Officers and employees of such departments may require study further in addition to the educational qualifications already acquired by them and therefore, the Rule caters to such situation. In fact, the rule further goes on to state that the rule may be extended by the Government to any Government servant not belonging to any of the departments mentioned therein in whose case they may be of opinion that leave should be granted in the public interest to pursue a special course of study or investigation of a scientific or technical nature, therefore, there is an element of public interest implicit in the grant of such study leave and Subsidiary Rule made by the Governor itself recognizes it and extend the same even to those departments which are not specifically mentioned under Subsidiary Rule 146-A, subject of course to there being public interest involved.

24. Thereafter, Sub-rule (2) of Subsidiary Rule 146-A, inter alia, provides that study leave should not **ordinarily** be granted to Government servant of less than five years' of service or to government servant within three years of the date at which they have the option of retiring. The use of the word '**ordinarily**' itself is indicative that in given circumstances, may be extraordinary circumstances, such leave can be granted to a Government servant who has put in less than five years of service.

25. Fundamental Rules were framed prior to independence, therefore, the reference therein to Public Health and Medical

Departments has to be understood accordingly in the light of the departmental structure existing in the State of U.P. at present and the Rules have to be applied accordingly to corresponding departments including Medical and Health Departments such Ayurveda and Unani Medicine and it is not the case of the opposite parties that the position is otherwise.

26. From the Rules discussed above the ground for rejection of leave requested by the appellant is that there is no provision, can not be sustained as, apparently there is a provision in the said Rules even if hedged with conditions whether these conditions are satisfied in the case of the appellant is to be considered.

27. Now, against this backdrop, we consider the case of the appellant/petitioner. We find that it is not a case where she has joined service barely two three months earlier and thereafter has applied for admission to the P.G. course i.e. after joining, though, the Rules do not specifically debar such an option also, but, it is a case where on 18.09.2021 itself she had appeared in an entrance examination for admission to a P.G. Course as referred above, but, before the result could be declared the advertisement was issued inviting applications for recruitment to the post of Medical Officer, Ayurveda. Obviously, she being eligible applied for the same and ultimately qualified. In the interregnum, the result of the entrance examination for admission to P.G. Course was declared before the written test for recruitment was held and she joined the P.G. Course on 01.03.2022. Ultimately, on being successful and the result of recruitment having been declared, after taking due leave from her educational institution, she joined her service as Medical Officer, Ayurveda on 30.09.2023 and then applied for grant of study leave on 30.11.2023.

28. Now, the situation is that she has completed half of the Course and only half remains to be completed, which, according to the learned

counsel for the appellant/petitioner, would take another 16 to 18 months, however, she had applied for study leave of 12 months.

29. In this very context, of course he has submitted that she is better placed than those who have not even joined the P.M.H.S. but their joining has been extended for the same purpose and has pleaded discrimination.

30. Now, the term 'ordinarily' used in Subsidiary Rule 146-A(2) would include an extraordinary circumstance as mentioned hereinabove, as, she was already pursuing a P.G. Course prior to selection for the post of Medical Officer and was halfway through on the date of her joining, especially as, ultimately, the higher qualification which she wants to acquire and is in fact in the process of acquiring, the same will ultimately benefit her services which are to be rendered to the public at large as a Government Servant, therefore, the element of public interest is also satisfied.

31. We are, therefore, not satisfied with the stand of the State Government that the Subsidiary Rule 146-A does not contain any provision for grant of study leave to a person who is a Government servant and who has put in less than five years of service or for that matter who has put in less than four months of service. No such period of less than four months of service is mentioned in the said rules nor any such rule has been pointed out.

32. We are of the considered opinion that use of the word 'ordinarily' in the said Rule permits the grant of study leave in extraordinary circumstances (not ordinarily or in a routine manner) and we are also of the opinion that facts before us constitute extraordinary circumstances as already discussed hereinabove, more-so because the appellant must have deposited fee etc. and incurred other expenses for the said Course, all of which will go waste.

33. We may in this very context refer to Subsidiary Rule 170 which has been made under Fundamental Rule 104(b) and says that leave may be granted to a probationer if it is admissible under the leave Rules which would be applicable to him **if he held his post substantively otherwise than on probation**, meaning thereby, if the probationer was substantively appointed on a post after completed of probation and would be entitled to certain leaves, then, those leaves would also be admissible to a probationer. This rule also does not come in the way of the appellant/petitioner in the grant of study leave in the factual circumstances as already noticed hereinabove, rather it supports her case.

34. No doubt, Rule 67 is there, but, then, the State Government has not rejected the leave application with reference to any Public exigency nor with reference to Fundamental Rule 67, in fact, rejection is on the ground that it is impermissible, there being no such provision for a probationer, which is factually and legally incorrect as already discussed.

35. Moreover, the State can not blow hot and cold in the same vein. If there is no such provision for a probationer where is such provision for a new recruit who is yet to join service who have been given this benefit by Government Order dated 14.03.2024. To say that the latter have not joined service as yet, therefore, Fundamental Rules/ Subsidiary Rules do not apply to them, they form a different class vis-a-vis the appellant who has already joined service, is an argument made only to be rejected. It is accordingly rejected as being discriminatory and arbitrary. Once, it has extended the joining of new recruits to the P.M.H.S. who have not even joined the service, that too, up to a period of three years, then, it cannot say that in the case of the appellant-petitioner, who is the only person seeking such leave after having joined, *albeit* in the Ayurvedic Services, she is not entitled to similar benefit, especially as, she claims leave for only 12 or 18

months as the case may be. Both the classes consist of Doctors, one of P.M.H.S. Service, the other of Ayurvedic Service and there can be no discrimination in this regard. Rule 67 can not be pressed into service in the case of the appellant-petitioner while giving a go by to it while issuing the order dated 14.03.2024 in respect of new recruits, who are yet to join the P.M.H.S. Service.

36. We are convinced that any differential treatment to the appellant/petitioner as has been metted out to her by the order which was impugned before the Writ Court, would be a clear case of discrimination, which the Constitution abhors in letter and spirit.

37. The reasons in the order, which were impugned before the writ Court, are not sustainable in view of the above discussion. The learned Writ Court has also lost sight of the rule position and the extraordinary situation as discussed hereinabove.

38. As regards the reliance placed by Shri V. P. Nag, learned Standing Counsel upon a judgment of Uttarakhand High Court reported in **(2015) 6 SERVLR 85; Krishna Kant Pandey Vs. State of Uttarakhand and Ors.**, there was no case of discrimination in the said case, as has been set up by the appellant/petitioner herein, successfully. Moreover, that was a case, where the petitioners before Uttarakhand High Court had not joined hence the Court held that they had no right under Fundamental Rule 170, but, here in this case, similarly placed persons who have not joined PMHS, have been granted the benefit by the State of U.P. vide Government Order dated 14.03.2024, therefore, the said judgment does not apply here.

39. At this stage, Shri V. P. Nag, learned Standing Counsel submits that the order of rejection of the leave in respect of the appellant/petitioner is dated 13.01.2024, whereas, the benefit granted to the new recruits of P.M.H.S. is by subsequent Government Order dated 14.03.2024. This hardly improves the situation. This has nothing

to do with the point of time when the claim of the appellant/petitioner was rejected and the date on which the request of new recruits to P.M.H.S. was acceded. It is a case of unfair treatment or unfair policy. It is a clear case of differential treatment for grant of study leave. There can be no rational and intelligible criteria for treating the two classes differently.

40. We do not consider the plea of the appellant- petitioner that extraordinary leave would also be admissible, as, we are of the considered opinion that not only it was permissible to grant study leave to the appellant, this was a fit case where study leave should have been granted.

41. For all these reasons, we set aside the judgment of Writ Court as also the order impugned before it.

42. The Director, Ayurvedic Services is directed to issue necessary orders afresh in the light of what has been discussed hereinabove within a period of three weeks from the date a certified copy of this order is submitted. The appellant is also permitted to move a fresh application, if required.

43. Accordingly, the Special Appeal as also the writ petition is **allowed.**

(Om Prakash Shukla,J.) (Rajan Roy,J.)

Order Date :- 7.5.2024

R.K.P.