

Neutral Citation No. - 2024:AHC-LKO:38362

Court No. - 6

Case :- WRIT - A No. - 2767 of 2024

Petitioner :- Dr. Jagpal Singh Yadav

Respondent :- State Of U.P. Thru. Addl. Chief Secy. Medical Health And Family Welfare U.P. Lko. And 2 Others

Counsel for Petitioner :- Anurag Shukla

Counsel for Respondent :- C.S.C.

Hon'ble Abdul Moin,J.

1.Heard.

2. Instant petition has been filed praying for quashing of the order dated 19.02.2024 passed by respondent no.1, a copy of which is Annexure-1 to the petition. Also under challenge is the order dated 14.09.2023 passed by respondent no.1, a copy of which is Annexure-4 to the petition.

3. Vide order dated 19.02.2024 the representation of the petitioner against he being transferred from Sambhal to Sonbhadra has been rejected. Vide order dated 14.09.2023 the suspension order of the petitioner was revoked and he has been transferred to Sonbhadra.

4. Bereft of unnecessary details, the facts of the case are that the petitioner while working on the post of Medical Officer at Sambhal had been placed under suspension vide order dated 03.03.2022. A challenge was raised to the said order by filing Writ-A No.6462 of 2023 in re: Dr. Jagpal Singh Yadav vs. State of U.P. and others. The writ Court vide judgment and order dated 29.08.2023, a copy of which is Annexure-8 to the petition, disposed of the petition, after considering that inquiry proceedings have been completed with the filing of the inquiry report, directing the concerned authority to take a final decision with regard to inquiry proceedings within eight weeks. However, without taking any final decision in the inquiry proceedings the suspension order of the petitioner has been revoked vide order dated 14.09.2023 and he has been transferred to Sonbhadra. Being aggrieved by

his transfer to Sonbhadra, the petitioner preferred Writ-A No.9823 of 2023 in re: Dr. Jagpal Singh Yadav vs. State of U.P. and others. The writ Court vide judgment and order dated 09.01.2024, a copy of which is Annexure-3 to the petition, disposed of the petition permitting the petitioner to make a representation to respondent no.1 i.e. Additional Chief Secretary, Department of Medical Health & Family Welfare, Govt. of U.P., Civil Secretariat, Lucknow, who was required to consider the petitioner's representation in accordance with law. While considering the representation, the writ Court had noted the grievance of the petitioner pertaining to he having being transferred from Sambhal to Sonbhadra and that the petitioner's ailing mother is about 85 years old and is living at Sambhal and the wife of the petitioner, who is also a Medical Officer, is posted at Sambhal and that it would be very difficult to the petitioner to come and attend the inquiry proceedings at Sambhal from Sonbhadra as the distance between two places is about 700 kms.

5. The competent authority vide order impugned dated 19.02.2024 has rejected the representation of the petitioner by contending that the transfer of the petitioner to Sonbhadra has been occasioned on account of Sonbhadra being an aspirational district and the petitioner having been posted in public interest.

6. However, the said order does not indicate the difficulties as have been expressed by the petitioner in his representation which was required to be made by the petitioner in pursuance to the direction of the writ Court.

7. Raising a challenge to both the orders, as aforesaid, instant petition has been filed.

8. This Court vide order dated 29.04.2024 noticing the aforesaid facts as well as the fact that the suspension order of the petitioner has been revoked vide the order impugned dated 14.09.2023 by indicating that there is a provision for reviewing a suspension order after six months had passed a detailed order on 29.04.2024, which, for the sake of convenience, is reproduced below:

"1. Heard.

2. In pursuance to the order of this Court dated 22.04.2024 learned Standing Counsel states that he has received instructions.

3. He states that by means of order dated 14.09.2023, a copy of which is annexure 4 to the petition, while revoking the suspension of the petitioner, he has been reinstated and transferred to Sonbhadra, a copy of which is annexure 4 to the petition. He further states that there is no punitive element attached with the said transfer order against which the representation filed by the petitioner has been rejected vide order dated 19.02.2024, a copy of which is annexure 1 to the petition.

4. The argument of learned counsel for the petitioner is that apart from the fact that there were patently trivial charges against the petitioner which had led to suspension order and although, in the inquiry report which has been submitted on 07.02.2023, a copy of which is annexure 20 to the petition, the charges have been found proved against the petitioner which has subsequently led the respondents to revoke suspension of the petitioner vide order dated 14.09.2023 yet there cannot be any occasion for the respondents to have transferred and posted the petitioner at Sonbhadra a far off place and hence malice in law is writ large on the face of the order impugned.

5. A perusal of order impugned dated 14.09.2023 would indicate that the order has been passed by his Excellency the Governor whereby the suspension order has been revoked.

6. Paragraph 2 of the order dated 14.09.2023 specifically reads as under:

"संदर्भित प्रकरण में डा0 यादव को निलम्बित रहते हुए 06 माह से अधिक का समय व्यतीत हो चुका है। निलम्बन की अवधि 06 माह से अधिक हो जाने पर निलम्बन का पुनरीक्षण किये जाने का प्राविधान है। अतएव सम्यक् विचारोपरान्त डा0 जगपाल सिंह यादव, चिकित्साधिकारी, जिला संयुक्त चिकित्सालय, जनपद सम्भल का निलम्बन समाप्त कर सेवा में बहाल करते हुए मुख्य चिकित्साधिकारी, सोनभद्र के अधीन एतद्वारा तैनात किया जाता है।"

7. Perusal of paragraph 2 of the said order indicates that as the petitioner has remained under suspension for a period of more than six months as such as there is a provision for reviewing the order of suspension hence the suspension order has been revoked and the petitioner has been transferred to Sonbhadra.

8. The Court has gone through the relevant Rules namely the U.P. Government Servants (Discipline and Appeal) Rules, 1999 which admittedly are the rules applicable on the petitioners. The provision of suspension is contained in Rule 4 of the Rules 1999.

9. For the sake of convenience, Rule 4 of the Rules 1999 is reproduced below:

"4. Suspension. -

(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority :

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty:

Provided further that concerned Head of the Department empowered by the Governor by an order in this behalf may place a Government servant or class of Government servants belonging to Group 'A' and 'B' posts under suspension under this rule :

Provided also that in the case of any Government servant or class of Government servants belonging to Group 'C' and 'D' posts, the appointing authority may delegate its power under this rule to the next lower authority.

(2) A Government servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may at the discretion of the appointing authority or the authority to whom the power of suspension has been delegated under these rules, be placed under suspension until the termination of all proceedings relating to that charge.

(3) (a) A Government servant shall be deemed to have been placed or, as the case may be, continued to be placed under suspension by an order of the authority competent to suspend, with effect from the date of his detention, if he is detained in custody, whether the detention is on criminal charge or otherwise, for a period exceeding forty-eight hours.

(b) The aforesaid Government servant shall, after the release from the custody, inform in writing to the competent authority about his detention and may also make representation against the deemed suspension. The competent authority shall after considering the representation in the light of the facts and circumstances of the case as well as the provision contained in this rule, pass appropriate order continuing the deemed suspension from, the date of release from custody or revoking or modifying it.

(4) Government servant shall be deemed to have been placed, or as the case may be, continued to be placed under suspension by an order of the authority competent to suspend under these rules, with effect from the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed consequent to such conviction.

Explanation.- The period of forty-eight hours referred to in sub-rule will be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken to account.

(5) Where a penalty of dismissal or removal from service imposed upon a Government servant is set aside in appeal or on review under these rules or under rules rescinded by these rules and the case is remitted for further inquiry or action or with any other directions :

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any such directions as aforesaid, be deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under suspension, he shall, if so directed by the appellate or reviewing authority, be deemed to have been placed under suspension by an order of the appointing authority on and from the date of the original order of dismissal or removal:

Provided that nothing in this sub-rule shall be construed as affecting the power of the disciplinary authority in a case where a penalty of dismissal or removal in service imposed upon a Government servant is set aside in appeal or on review under these rules on grounds other than the merits of the allegations which, the said penalty was imposed but the case is remitted for further inquiry or action or with any other directions to pass an order of suspension pending further inquiry

against him on those allegations so, however, that any such suspension shall not have retrospective effect.

(6) Where penalty of dismissal or removal from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of law and the appointing authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal or removal was originally imposed, whether the allegations remain in their original form or are clarified or their particulars better specified or any part thereof a minor nature omitted:

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any direction of the appointing authority, be deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under such suspension, he shall, if so directed by the appointing authority, be deemed to have been placed under suspension by an order of the competent authority on and from the date of the original order of dismissal or removal.

(7) Where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise) and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the Government servant shall continue to be under suspension till the termination of all or any of such proceedings.

(8) Any suspension ordered or deemed to have been ordered or to have continued in force under this rule shall continue to remain in force until it is modified or revoked by the competent authority.

(9) A Government servant placed under suspension or deemed to have been placed under suspension under this rule shall be entitled to subsistence allowance in accordance with the provisions of Fundamental Rule 53 of the Financial Hand Book, Volume 11, Parts II to IV."

10. Perusal of Rule 4 of the Rules 1999 indicates that there is no provision under the Rules for reviewing the suspension order after a period of six months as has been explicitly stated in paragraph 2 of

the order dated 14.09.2023. However, once the order of revocation of suspension has been passed at the highest level of the government and the order itself indicates that the suspension order is being reviewed on the ground that there is a provision for review of suspension order after a period of six months and the Rules 1999 do not appear to be providing for the same consequently, before proceeding further, the Court requires a personal affidavit to be filed by the Additional Chief Secretary of Medical Health and Family Welfare i.e. the respondent no. 1 duly bringing on record the Rules which provide for review of a suspension order which has continued beyond six months.

11. Let the personal affidavit be filed within 10 days.

12. List immediately thereafter as fresh."

9. From perusal of the aforesaid order it emerges that this Court had considered the provisions of Rule 4 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the 'Rules, 1999') and after considering the same this Court had observed that perusal of Rule 4 of the Rules 1999 does not provide for review of a suspension order after a period of six months and thus required filing of a personal affidavit by the Additional Chief Secretary of Medical Health and Family Welfare to bring on record the Rules which provide for review of a suspension order which has continued beyond six months.

10. In pursuance thereof, the personal affidavit dated 08.05.2024 of Principal Secretary has been filed.

11. Learned Standing Counsel has referred to paragraph 5 of the personal affidavit to indicate that reference to two Government Orders dated 12.08.1980 and 08.05.1987, copies of which have been filed as Annexures 1 and 2 to the personal affidavit, have been indicated to justify the review of the order of suspension of the petitioner.

12. Once a personal affidavit has been filed by the Principal Secretary of the concerned department, thus, it is expected that the said affidavit must have been filed with a sense of responsibility.

13. Considering the aforesaid, the Court has gone through the two Government Orders dated 12.08.1980 and 08.05.1987, as annexed to the said personal affidavit.

14. The aforesaid Government orders are prior to the issue of statutory rules namely 1999 Rules and thus on this ground alone no cognizance can validly be placed on the said Government Orders.

15. Hon'ble the Supreme Court in the case of **Dr. Rajendra Singh versus State of Punjab** reported in (2001) 5 SCC 482 has held that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. It has been further held that following any other course would be disastrous and would be against the constitutional scheme and accepted service jurisprudence. The relevant portion of the judgment is as follows:-

"The settled position of law is that no Government Order, Notification or Circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the rules, the Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a Government Order and ignoring the mandate of Article 309 of the Constitution."

16. Similarly a full bench of this Court in the case of **Vijay Singh and others versus state of U.P. and others** reported in 2005 (23) LCD 1696 has held that it is a settled legal proposition that executive instructions can not over ride the statutory provision nor can be issued in contravention of statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law. Relevant portions of the judgment are as follows:-

" 6. It is settled legal proposition that executive instructions cannot override the statutory provisions [Vide B.N. Nagrajan v. State of Mysore, AIR 1966 SC 1942; Sant Ram Sharma v. State of Rajasthan and Ors., AIR 1967 SC 1910; Union of India and Ors. v. Majji

Jangammya and Ors., AIR 1977 SC 757; B.N. Nagarajan and Ors. v. State of Karnataka and Ors., AIR 1979 SC 1676; P.D. Agrawal and Ors. v. State of U.P. and Ors., (1987) 3 SCC 622; M/s. Beopar Sahayak (P) Ltd. and Ors. v. Vishwa Nath and Ors., AIR 1987 SC 2111; State of Maharashtra v. Jagannath Achyut Karandikar, AIR 1989 SC 1133; Paluru Ramkrishnanianah and Ors. v. Union of India and Ors., AIR 1990 SC 166; Comptroller and Auditor General of India and Ors. v. Mohan Lal Malhotra and Ors., AIR 1991 SC 2288; State of Madhya Pradesh v. G.S. Dall and Flour Mills, AIR 1991 SC 772; Naga People's Movement of Human Rights v. Union of India and Ors., AIR 1998 SC 431; C. Rangaswamaiah and Ors. v. Karnataka Lokayukta and Ors., AIR 1998 SC 96.]

7. Executive instructions cannot amend or supersede the statutory rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory Rule nor does it have any force of law; while statutory rules have full force of law provided the same are not in conflict with the provisions of the Act. (Vide State of U. P. and Ors. v. Babu Ram Upadhyaya, AIR 1961 SC 751; and State of Tamil Nadu v. M/s. Hind Stone etc., AIR 1981 SC 711)."

17. This court in the case of **Afsar Shahin versus Basic Shiksha Parishad and others** reported in 2004 (22) LCD 1164 has also held to the same effect that a statutory provision can not be diluted, modified or overridden by government orders which fall within domain of the government under executive functions.

18. It is thus apparent that with the promulgation of the Rules, 1999, the said Government orders would lose relevance and thus any action which is to be taken by the respondents would have to adhere to the provisions of the Rules, 1999. Once the Rules, 1999 do not provide for any review of an order of suspension after a period of six months consequently the order of review passed by the competent authority and that too indicating in the order impugned dated 14.09.2023 that there is a rule for review of a suspension order after six months is nothing but non-application of mind on the part of the competent authority.

19. Another aspect of the matter would be that the Government Order dated 08.05.1987 has been issued after considering the provisions of Civil Services (Classification, Control and Appeal) Rules. Rule 17 of the Rules, 1999 has

rescinded the Civil Services (Classification Control and Appeal) Rules, 1930 along with Punishment and Appeal Rules for Subordinate Services Uttar Pradesh, 1932 meaning thereby that any government order which has been issued considering the provisions of Civil Services (Classification, Control and Appeal) Rules, 1930 would obviously be not applicable now with the Rules 1930 having themselves been rescinded.

20. However, the Court would not like to further dwell into the personal affidavit filed by the Principal Secretary of the department concerned more particularly considering the incongruities as have been indicated above. The matter is left at that requiring the responsible officer of the State to be extra cautious and more responsible while filing the affidavits before the Courts of Law.

21. Be that as it may, the fact of the matter remains that the prayer of the petitioner against his transfer from Sambhal to Sonbhadra has been rejected without considering the grounds which were raised by the petitioner in his representation which was to be submitted in pursuance to the direction issued by the writ Court dated 09.01.2024.

22. As already indicated above, none of the grounds, as were raised by the petitioner in his representation and as finds place in the order of the writ Court dated 09.01.2024 have been considered by the competent authority while passing the order impugned dated 19.02.2024.

23. Considering the aforesaid, the writ petition is **partly allowed**. The order impugned dated 19.02.2024, a copy of which is Annexure-1 to the petition, is quashed. The competent authority is directed to pass a fresh order on the representation of the petitioner dated 15.01.2024, a copy of which is Annexure-15 to the petition.

24. Let an order be passed within a period of three weeks from the date of receipt of a certified copy of this order.

25. Till the decision on the representation of the petitioner, the petitioner shall not be compelled to join at the transferred place of posting i.e. Sonbhadra.

Order Date :- 21.5.2024

A. Katiyar