

Court No. - 2

Case :- WRIT - A No. - 11189 of 2020

Petitioner :- Abu Adil

Respondent :- State Of U.P. Thru. Secy. Medical And Health Lko And Others

Counsel for Petitioner :- Krishn Kumar Srivastava, Manoj Kumar

Srivastava, Sameer Kalia, Srideep Chatterjee

Counsel for Respondent :- C.S.C., Shikhar Anand

Hon'ble Rajan Roy, J.

Hon'ble Om Prakash Shukla, J.

1. Heard.

2. This is a writ petition challenging the judgment and order dated 05.03.2020 passed by U.P. Public Services Tribunal, Lucknow in Claim Petition No.1584 of 2018.

3. The facts of the case in brief are that petitioner was appointed as '*Pharmacist*' on 30.06.1987 under the orders of Director General, Medical and Health Services, Lucknow, UP, in pursuance to which, the appointment letter was issued to the petitioner, copy of which is annexed at Page No. 45 and it is also dated 30.06.1987. The order passed by the Director General, Medical and Health Services, Lucknow, UP dated 30.06.1987 is not on record. On 15.1.2001, the petitioner submitted an application to the Chief Medical officer, Ambedkarnagar, informing him that he had been selected for appointment in Ministry of Health as "*Pharmacist*" in Saudi Arabia, therefore, he may be permitted to perform his services in the foreign country. It is also claimed that the Medical Officer, Incharge, PSC, Hanswar, Ambedkarnagar forwarded and recommended the said application, but no such permission was granted.

4. It is not in dispute that the petitioner went to Saudi Arabia and, as claimed, when he returned, he submitted his joining in the Department of Medical Health and Services before the Medical Officer, Incharge, PSC, Hanswar, Ambedkarnagar on 4.1.2012, after a gap of more than eleven years. The Medical Officer, Incharge, PSC, Hanswar, Ambedkarnagar expressed his inability to allow him to join and advised him to approach the Chief Medical Officer, Ambedkarnagar. The fact of the matter is that the petitioner was not allowed to join for reasons which are obvious.

5. The petitioner, thereafter, filed a writ petition before this Court bearing Service Single No.2117 of 2012 seeking a writ of mandamus, commanding the opposite parties to consider and take appropriate action with regard to joining of petitioner submitted before opposite party No.3 therein on 7.1.2012, which was the joining submitted before the Chief Medical Officer, Ambedkarnagar, as informed by Shri Sameer Kalia, learned counsel for the petitioner. The writ

petition was dismissed after noticing the facts and unauthorised absence of the petitioner. The said judgment dated 17.1.2013 reads as under:-

"Heard learned counsel for petitioner as well as learned Standing Counsel.

The writ petition has been filed seeking direction to opposite parties to consider and take appropriate action with regard to joining of petitioner submitted before opposite party no. 3 on 7.1.2012.

The facts of the case are that petitioner was initially appointed in the year 1987 on the post of Pharmacist i.e. on 30.6.1987 in the office of Chief Medical Officer, Moradabad. The petitioner was transferred to Primary Health Centre Akbarpur, district Faizabad on 7.4.1988. The petitioner worked at Additional Primary Health Centre, Haswar, district Ambedkar Nagar during the period 1.7.1994 to 1.2.2001. Vide application dated 15.1.2001, petitioner sought permission from opposite party no. 3 to work abroad in Saudi Arab. Petitioner thereafter went to Saudi Arab and worked there during the period from 2.2.2001 to 1.1.2012. Thereafter petitioner came back to India and submitted his joining on 7.1.2012, however, he was not permitted to join.

Learned counsel for petitioner submits that petitioner had duly informed the authorities about his going abroad and had gone to Saudi Arab for better career prospect. No action has been taken by the opposite parties for absence of petitioner during the period 2001 to 2012 and lien of the petitioner remained with opposite parties, as such, he cannot be denied to work on the post of Pharmacist on which he was working prior to 2.2.2001.

Learned Standing Counsel on the basis of counter affidavit on the other hand submitted that petitioner could not have worked at Saudi Arab without seeking prior permission from his parent department. The petitioner without any permission on his own had gone abroad and worked there. The petitioner as such is not permitted to join back on the post on which he was working prior to 2.2.2001.

It is further submitted that as per relevant rules and regulations no employee can be granted sanctioned leave for more than five years unless and otherwise under special circumstances the State Government takes a decision to grant leave for a period of more than five years.

It is further submitted that petitioner is liable to face disciplinary proceedings for unauthorized absence for such a long time and for working abroad without permission from the competent authority.

I have considered the submissions made by parties counsel.

It is admitted position that petitioner worked at Saudi Arab during the period 2.2.2001 to 1.1.2012 without any prior permission from his parent department or the competent authority. The petitioner cannot take advantage of inaction on the part of opposite parties in not initiating disciplinary proceedings against petitioner and taking appropriate action against him.

It is to be noted that petitioner remained absent unauthorizedly during the period 2.2.2001 to 1.1.2012, as such, I am of the considered view that the relief claimed by the petitioner is totally misconceived and cannot be granted by the Court.

The writ petition being devoid of merit is dismissed."

6. The dismissal was on merits.

7. This judgment was put to challenge in Special Appeal bearing No.57 of 2013. After arguing the aforesaid appeal, the same was withdrawn and it was dismissed as such on 5.2.2013. The said order of the Division Bench passed in Special Appeal No.57 of 2013 reads as under:-

"Order (Oral)

After some arguments, learned counsel for appellant prays for and is permitted to withdraw the special appeal.

Hence, it is dismissed as such. "

8. No further challenge was raised to the said order or the order of Writ Court, instead it appears that the petitioner approached the department concerned seeking voluntary retirement by filing an application dated 31.4.2014, which was rejected on 16.1.2015. The said application has not been brought on record by the petitioner.

9. By the order dated 16.1.2015, while declining the request for voluntary retirement, the petitioner was declared/ treated as having been removed from service. In this order, there is no reference to the order of the Writ Court dated 17.1.2013, by which the right claimed by the petitioner to join back in service had already been decided on merits and had been rejected. Once he was not permitted to join, there was no question of any application for voluntary retirement, as only a person, who is in service, can apply for voluntary retirement.

10. There is nothing on record to show that the petitioner ever brought the said orders to the notice of the concerned authority i.e. Chief Medical Officer, Ambedkarnagar, who had passed the order dated 16.1.2015. It is true that counter affidavit had been filed before the Writ Court, but, every officer is not expected to know as to what were the pleadings filed before the High Court. It was the duty of the petitioner to apprise the officer about the facts that his rights regarding joining had already been settled by the Writ Court way back on 17.1.2013 and the appeal against the said order had been withdrawn by him without raising any further challenge to the same, therefore, all these orders created a bar to the petitioner raising any fresh claim before the authorities concerned or specially in view of withdrawal of the appeal by him.

11. Thereafter, it appears that, the petitioner filed the writ petition before this Court bearing Service Single No.206 of 2015, challenging the order dated 16.1.2015. The said petition was disposed of on 13.2.2018 permitting the petitioner to make a fresh representation and directing the Director General, Medical and Health, Swasthya Bhawan, Lucknow, to decide the same. The said order reads as under:-

"1. Heard Sri Krishna Kumar Srivastava, learned counsel for the petitioner and learned Standing counsel.

2. Petitioner has filed the present writ petition against the order dated 16.01.2015 by which he was removed from service against the said order, during pendency of writ petition, petitioner has preferred an appeal before Director General, Medical and Health, Swasthya Bhawan, Lucknow (opposite party no.2).

3. Learned counsel for the petitioner submits that grievance of the petitioner would be fully met in case his appeal pending before opposite party no. 2 is decided in a time bound manner.

4. In view of aforesaid, petitioner is permitted to make a fresh representation annexing therewith a certified copy of this order and any other document in support of his case within a period of three weeks from today. In case, such a representation is made by the petitioner, the Director General, Medical and Health, Swasthya Bhawan, Lucknow shall decide the said representation and appeal by reasoned and speaking order within a period of four months from the date of certified copy of this order is placed before him.

5. In view of aforesaid, writ petition is disposed of. "

12. In this order also, there is no reference to the earlier order dated 17.1.2013 passed by the Writ Court nor about the withdrawal of the Special Appeal by the petitioner.

13. We asked learned counsel for the petitioner to place a copy of the writ petition bearing Service Single No.206 of 2015, but he could not. We find the same is not on record nor in possession of petitioner's counsel.

14. Thereafter, it appears that, in pursuance to the above quoted order dated 13.2.2018, the representation before the Director General, Medical and Health was, in fact, treated as an Appeal and decided on 16.7.2018 affirming the order dated 16.1.2015. The appeal or representation had been filed beyond 90 days.

15. Ultimately, the said orders were put to challenge in Claim Petition No.1584 of 2018, which has been dismissed by the impugned judgment on the ground that the same was barred by limitation. The Tribunal found that the appeal/representation itself had been filed beyond the period of 90 days, therefore, no benefit of pendency of the said appeal would be available for filing the claim petition or treating it as within limitation, as prescribed under Section 5 (1) (b) of the UP Public Services Tribunal Act, 1976, rightly so.

16. Learned counsel for the petitioner says that Tribunal while dismissing the petition on the ground of limitation has also touched merits of the matter. Be that as it may, there is no escape from the fact that the rights of the petitioner to join back in service were adjudicated by the High Court under Article 226 of the Constitution of India on merits on 17.1.2013 and it was categorically observed that he has no such right. The said judgment was put to challenge in Special appeal before the Division Bench, but, the same was withdrawn and no further challenge was raised.

17. In this view of the matter, we fail to understand as to how any subsequent proceedings could have been initiated by the petitioner either before the authorities concerned or before the Writ Court by filing writ petition Service

Single No.206 SS/ 2015, unless of course, all these facts were disclosed and were taken into consideration while deciding the said writ petition 13.2.2018, which is not the case.

18. In view of the above discussion, the contention of Shri Sameer Kalia, learned counsel for petitioner that a full-fledged inquiry should be held in terms of Fundamental Rule 18 before any such action against the petitioner and action as has been taken by the order impugned before the UP Public Services Tribunal cannot be accepted. Such claim should have been raised in the earlier writ petition which was dismissed on 17.1.2013 on merits, which has attained finality and if it was not raised, then it cannot be raised subsequently. The judgment dated 17.1.2013 and the subsequent withdrawal of the Special appeal have attained finality between the parties.

19. Purely in the facts of this case, this is not a fit case for interference with the Tribunal's law in exercise of extraordinary discretionary jurisdiction of this Court.

20. In view of the above, the instant writ petition is **dismissed**.

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

Order Date :- 7.5.2024
Gurpreet Singh