

Court No. - 6

Case :- WRIT - A No. - 3620 of 2024

Petitioner :- Dr. Divyani

Respondent :- State Of U.P. Thru. Prin. Secy. Deptt. Ayush, Lko. And 3 Others

Counsel for Petitioner :- Shivang Tiwari, Vimallesh Kumar Singh

Counsel for Respondent :- C.S.C.

Hon'ble Abdul Moin, J.

1. Heard Sri Shivang Tiwari, learned counsel for the petitioner and Sri Sandeep Sharma, learned Standing counsel appearing on behalf of the State-respondents.
2. With the consent of learned counsel appearing on behalf of the contesting parties and considering the urgency as expressed by the learned counsel for the petitioner of the petitioner being required to rejoin for the course of M.S (Ayurveda) in Institute of Teaching and Research in Ayurveda, Jamnagar, Gujrat by 26.04.2024 and she having already filed an application seeking extension of time for joining the said course, the writ petition is being finally decided.
3. The facts of the case have already been set forth in detail in the order dated 09.05.2024 which for the sake of convenience is reproduced below:-

"1. Heard.

2. *The contention of learned counsel for the petitioner is that the petitioner had been selected for appointment as Medical Officer (Ayurvedic), Community Health Center, on 11.01.2023. In pursuance of the selection, she has joined her services on 01.09.2023. The petitioner applied for grant of study leave for one year for the purpose of pursuing her post-graduation in M.S. (Ayurveda). The leave was applied in terms of Rule 146-A of the Study Leave Rules as per the Financial Handbook Vol. II. The leave application of the petitioner has been rejected vide the order impugned dated 30.01.2024, a copy of which is Annexure-1 to the petition, by indicating that Note 2 of Rule 146-A provides that study leave should not ordinarily be granted to government servants of less than five year's service, or to government servants within three years of the date at which they have the option of retiring and as the petitioner has only joined services on 01.09.2023 and has thus not rendered five years of service, consequently she would not be entitled for such leave.*

3. *Raising a challenge to the order impugned, the contention of learned counsel for the petitioner is that Note 2 to Rule 146-A uses the word 'ordinarily', meaning thereby that in extraordinary circumstances, as are applicable with respect to the petitioner, study leave can be granted to her.*

4. *The other contention is that Rule 170 of the subsidiary rules of the Financial Handbook also provides 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 that the same study leave rules would be applicable on a*

probationer as on a regular government employee in case the regular government employee is entitled for leave.

5. Placing reliance on the aforesaid, the argument of learned counsel for the petitioner is that the respondents have patently erred in taking a strict view of Note 2 of Rule 146-A in rejecting the claim of the petitioner for grant of study leave and have not considered the extraordinary circumstances as are applicable on the petitioner of she to pursue her PG course.

6. Learned Chief Standing Counsel prays for and is granted a week's time to seek instructions in the matter.

7. List in the next week as fresh."

4. From a perusal of the order dated 09.05.2024 it emerges that the petitioner who has been appointed as a Medical Officer (Ayurvedic) and is working as a probationer, her study leave application has been rejected vide order impugned dated 30.01.2024 by indicating that Note 2 of the Rule 146-A provides that study leave should not **ordinarily** be granted to government servants of less than five year's service or to government servants within three years of the date at which they have the option of retiring and as the petitioner has only joined the services on 01.09.2023 consequently, she not having rendered five years of service as such, she is not entitled for study leave.

5. Learned counsel for the petitioner contends that this aspect of the matter has been considered threadbare by the Division Bench of this Court in the case of **Dr. Bhawana Vs. State of U.P and Ors passed in Special Appeal No. 64 of 2024** decided on **07.05.2024- Neutral Citation No. 2024:AHC-LKO:35165-DB.**

6. It is contended that before the Division Bench, the matter pertained to a case of a probationer whose application for study leave had been rejected on the ground that she is a probationer.

7. In the instant case, although the application has not been rejected solely on the ground of the petitioner being a probationer but the purport of the order impugned dated 30.01.2024 would indicate that as the petitioner is a probationer and is having less than five years of service consequently, the respondents have rejected the application for grant of study leave.

8. The urgency expressed by the learned counsel for the petitioner, as already

indicated above, is that she has secured admission in M.S (Ayurveda) and she was expected to rejoin the course by 26.04.2024 and despite the last date having passed, she has applied for extension of the time per which she is waiting to rejoin and hence it is prayed that the matter be decided.

9. Learned counsel for the petitioner further contends that although the respondents have rejected the application of the petitioner for grant of study leave by the order impugned but they have not considered the fundamental Rule 67 as has been referred to by the Division Bench of this Court in the case of **Dr. Bhawana (supra)**.

10. For the sake of convenience, the relevant observations of the Division Bench of this Court in the case of **Dr. Bhawana (supra)** are reproduced below:-

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 our 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.

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."

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."

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.

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.

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."

11. From a perusal of the aforesaid judgment in the case of **Dr. Bhawana (supra)** it thus emerges that although in the case of **Dr. Bhawana (supra)** the claim of the said employee had been rejected on the ground that she is a probationer yet the Division Bench was of the view that said rejection has only been made by the respondents without considering the "extraordinary" circumstances which were prevalent as well as without considering the provisions of Fundamental Rule 67 and the facts that the benefit has been extended to new recruits to PMHS who have not even joined the services.

12. In the instant case also, a perusal of the order impugned would indicate though the respondents have simply rejected the application of the petitioner by contending that ordinarily such study leave is not be granted without considering the extra ordinary circumstances which are prevailing in the instant petition and of the petitioner having secured admission in M.S (Ayurveda) and she being required to rejoin in the said course in order to complete her study.

13. Learned Standing counsel also does not dispute the proposition of law as laid down by the Division Bench of this Court in the case of **Dr. Bhawana (supra)**.

14. Keeping in view the aforesaid discussion, the writ petition is allowed. The

order impugned dated 30.01.2024, a copy of which is annexure 1 to the writ petition is quashed. The competent authority, who is said to be the Director, Ayurvedic Services, Lucknow i.e the respondent no. 2, is directed to pass an order on the study leave application of the petitioner keeping in view the Division Bench judgment of this Court in the case of **Dr. Bhawana (supra)** within a period of one week from the date of receipt of a certified copy of this order. It is also provided that in case the respondents have proceeded to pass any other order in ignorance of the Division Bench judgment of this Court in the case of **Dr. Bhawana (supra)** the same would also not be considered while considering the application of the petitioner in pursuance to the direction issued by this Court.

15. Let a copy of this order be provided to learned counsels appearing on behalf of the contesting parties on payment of usual charges within twenty four hours.

Order Date :- 17.5.2024

Pachhere/-