

Court No. - 4

Case :- WRIT - A No. - 4779 of 2024

Petitioner :- Alok Kumar

Respondent :- State Of U.P. Thru. Addl. Chief Secy./ Prin. Secy. Deptt. Of Technical Education Lko. And Others

Counsel for Petitioner :- Abhineet Jaiswal

Counsel for Respondent :- C.S.C., Shailendra Singh Rajawat, Vipul Kumar Mishra

Hon'ble Rajesh Singh Chauhan, J.

1. Heard Sri Abhineet Jaiswal, learned counsel for the petitioner and Sri Sandeep Sharma, learned Standing Counsel for the State and Sri Shailendra Singh Rajawat, learned counsel for the opposite party Nos.6 & 7.

2. Sri Abhineet Jaiswal, learned counsel for the petitioner, at the very outset, has stated that he may be permitted to delete the names of opposite party Nos.6 & 7 from the array of opposite parties.

3. On the aforesaid request, Sri Abhineet Jaiswal, learned counsel for the petitioner is permitted to delete the names of opposite party Nos.6 & 7 from the array of opposite parties, during the course of day.

4. By means of this petition the petitioner has prayed the following reliefs:-

"(i) to issue a writ, order or direction in the nature of Certiorari quashing the Impugned Order dated 15.09.2023 passed by the Principal Secretary, Department of Technical Education, U.P Civil Secretariat, Lucknow i.e Respondent No. 2, copy whereof is contained in Annexure-1 to the Writ Petition.

(ii) to issue a writ, order or direction in the nature of Certiorari quashing / expunging the adverse remarks recorded by the Respondent No. 5 against the Petitioner in impugned ACR dated 31.03.2022 for the year 2021-2022, copy whereof is contained in Annexure- 2 to the Writ Petition.

(iii) to issue Writ, Order or Direction in the nature of Mandamus commanding the Respondents not to proceed with the adverse entries / remarks recorded against the petitioner in the impugned ACR dated 31.03.2022.

(iv) to issue Writ, Order or Direction in the nature of Mandamus commanding the Respondents not to take any adverse action against the petitioner in furtherance of impugned order dated 15.09.2023."

5. Learned counsel for the petitioner has submitted that the petitioner was appointed on the post of Lecturer, Textile Technology Branch in government Polytechnic, Saraijeet, District-Sitapur vide appointment letter dated 13.02.2019.

6. It is further submitted that on 31.03.2022, a Special Adverse Entry has been given to the petitioner for the year 2021-22, however, the same was communicated to the petitioner on 31.12.2022 i.e after 9 months which is beyond the period of 45 days as prescribed under Uttar Pradesh Government Servants (Disposal of representation against Annual Confidential Reports and allied matters) Rules, 1995 (here-in-after referred to as Rules, 1995) Against the entry, petitioner made a representation on 04.02.2023 before the respondent no. 2-Additional Chief Secretary/principal Secretary, Department of Technical Education, U.P Civil Secretariat, Lucknow, the same was rejected vide order dated 15.09.2023.

7. Learned counsel for the petitioner has drawn attention of this Court towards the various judgments wherein the relevant provisions of law relating to Rules, 1995 have been dealt with. However, this Court in the case in re: **State of U.P. v. Narendra Singh, 2010 SCC OnLine All 2683** has not only referred the relevant rules but has interpreted the relevant rules which are also applicable in the present case so as to decide the controversy in hand. The relevant paragraphs are reproduced herein below:-

"5. It is further submitted that in order to bring clarity in matters of communication of adverse entries and for disposal of representation expeditiously, so that the Government servant may not get deprived of service benefits because of non-disposal of representation, in the year 1995, the State Government in exercise of powers conferred under the proviso to Article 309 of the Constitution of India, framed Rules known as "Uttar Pradesh Government Servants (Disposal of Representation against Annual Confidential Reports and allied Matters) Rules, 1995. The Rules, 1995 have overriding effect over all existing Rules and orders on the subject relating to disposal of representation against Annual Confidential Reports.

6. Rule 4 of Rules, 1995 reads as under:

"4. Communication of adverse report and procedure for disposal of representation.—

(1) Where a report in respect of a Government Servant is adverse or critical, wholly or in part, hereinafter referred to as adverse report, the whole of the report shall be communicated in writing to the Government Servant concerned by the accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority, within a period of 45 days from the date of recording the report and a certificate to this effect shall be recorded in the report.

(2) A Government Servant may, within a period of 45 days from the date of communication of adverse report under sub-rule (1), represent in writing directly and also through proper channel to the authority, one rank above the accepting authority, hereinafter referred to as the competent authority, and if there is no competent authority, to the accepting authority itself, against the adverse report so communicated:—

Provided that if the competent authority or the accepting authority, as the case may be, is satisfied that the Government Servant concerned had sufficient cause for not submitting the representation within the said period, he may allow a further period of 45 days for submission of such representation.

(3) The competent authority or accepting authority as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under sub-rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report, for his comments who shall, within a period not exceeding 45 days from the date of receipt of the representation, furnish his comments to the competent authority or the accepting authority, as the case may be—

Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments.

(4) The competent authority or the accepting authority, as the case may be, shall within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3), consider the representation along with the comments of the appropriate authority, and if no comments have been received without waiting for the comments, and pass speaking orders—

(a) rejecting the representation; or

(b) expunging the adverse report wholly or partly as he considers proper.

(5) Where the competent authority due to any administrative reasons, is unable to dispose of the representation within the period specified in sub-rule (4), he shall report in this regard to his higher authority, who shall pass such orders as he considers proper for ensuring disposal of the representation within the specified period.

(6) An order passed under sub-rule (4) shall be communicated in writing to the Government servant concerned.

(7) Where an order expunging the adverse report is passed under sub-rule (4), the competent authority or the accepting authority, as the case may be, shall omit the report so expunged.

(8) The order passed under sub-rule (4) shall be final.

(9) Where any matter for—

(i) communication of an adverse report;

(ii) representation against an adverse report;

(iii) transmission of representation to the appropriate authority for his comments;

(iv) comments of the appropriate authority; or

(v) disposal of representation against an adverse report: is pending on the date of the commencement of these rules, such matters shall be dealt with and disposal if within the period prescribed therefore under this rule.

Explanation.— In computing the period prescribed under this rule for any matters specified in this sub-rule, the period already expired on the date of the commencement of these rules shall not be taken into account."

7. Rule 5 of Rules, 1995 provide that wherein the adverse reports were not communicated to the incumbent or where a representation against an adverse entry had not been disposed of in accordance with Rule 4, such report/entry would not be treated as adverse for the purposes of promotion, crossing of efficiency bar and other service matters of the Government servant.

8. Rule 5 reads as under:

"5. Report not to be treated adverse:— Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume II, Parts-I to IV, where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purpose of promotion, crossing of efficiency-bar and other service matters of the Government Servant concerned."

9. Rule 7 of Rules, 1995 provides for penalty in the event of failure to communicate adverse report or wilfully fails to dispose of the representation within the prescribed period and for wilful default in placing the report before the competent authority by a Section Officer in the Secretariat and for treating such a default to be a misconduct punishable in accordance with the punishment rules applicable to the incumbent.

Rule 7 is being quoted below:

"7. Penalty:— (1) Where an officer legally bound to communicate an adverse report to the Government servant concerned or where an officer legally competent to dispose of a representation against an adverse report under these rules, wilfully fails to do so, within the period prescribed therefore, shall be guilty of misconduct and be punishable in accordance with the punishment rules applicable to him.

(2) A Section Officer in the Secretariat and an officer or official incharge of an office, other than the Secretariat, shall place the representation, comments of the appropriate authority thereon and other relevant records, if any, before the competent authority or the accepting authority, as the case may be, immediately after their receipt. Any wilful default, in this behalf, on his part shall be a misconduct and he shall be punishable in accordance with the punishment rules applicable to him."

12. Rule 5 comes into play in two contingencies only:

(I) Where the adverse report has not been communicated (a provision thereof is made in Rule 4(1))

(II) Where a representation against the adverse entry has not been disposed of in accordance with Rule 4.

13. It is only these two contingencies that the report is not to be treated as adverse for the purpose of promotion, crossing of efficiency bar and other service matters. Had it been the intention of the legislature to give the benefit where the representation has been disposed of though beyond the prescribed time schedule, it would have been specifically provided for such third contingency in Rule 5 but the same is not so.

23. "The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other". "For ascertaining the real intention of the Legislature, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered". If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory. Whenever a statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence.

39. The analysis of the provisions of rules 1995 makes it crystal clear that there is a prescribed time schedule for disposal of the representation and the time starts from the stage of communication of the adverse reports in writing to a Government servant. The authorities have been given discretion to allow further time of 45 days to the Government servant, where Government servant fails to submit his representation against the adverse report within the time of 45 days from the date of communication, on showing sufficient cause for not submitting the representation within the prescribed period of 45 days. The rule further mandates that if the comments of the authority, who has recorded the adverse report are not received within the time prescribed, the competent authority has to proceed further without waiting for the comments and pass speaking orders within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3)."

8. In the light of the aforesaid rules and also in the case in re: **Narendra Singh (supra)**, learned counsel for the petitioner has stated that since the statutory representation of the petitioner has not been disposed of/ decided within the time so stipulated under Rules, 1995, therefore, this writ petition may be allowed

on the aforesaid ground alone.

9. Per contra, Sri Sandeep Sharma, learned Standing Counsel has stated that though the statutory representation of the petitioner has not been decided within the time so stipulated under Rules, 1995 but the allegations against the petitioner are serious, therefore, the adverse entry has been awarded to the petitioner.

10. Sri Sharma has also stated that on the basis of the facts and circumstances of the issue in question and also the allegations so levelled against him, the petitioner is a habitual litigant for no cogent reason but to exert the pressure upon the authorities concerned.

11. Heard learned counsel for the parties and perused the material available on the record.

12. After hearing learned counsel for the parties and going through the records available, it is found that the petitioner has made a representation within 45 days of the communication of the Special Adverse Entry dated 31.12.2022 as per Rule 4(2) of the Rules, 1995. The representation made by the petitioner is to be decided by the Competent Authority or Accepting Authority, as the case may be, within a period of 120 days as per Rule 4 (4) of the Rules, 1995 from the date of expiry of 45 days specified in Sub Rule 3.

13. Sub Rule 3 of Rule 4 of the Rules, 1995 provides that the Competent Authority or Accepting Authority as the case may be, shall within a period not exceeding one week from the date of receipt of the representation under sub-Rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report, for his comments, who shall, within a period not exceeding 45 days from the date of receipt of the representation, furnish his comments to the competent authority or the Accepting Authority, as the case may be.

14. Perusal of aforesaid provisions the Competent Authority or the Accepting Authority to take decision on the representation of the delinquent employee against the adverse annual confidential report within a period of 120 days from the date of expiry of 45 days as specified in sub-rule (3). In the present case, the representation has been decided on 15.09.2023, after expiry of time so stipulated in Rules, 1995.

15. Notably, the statutory representation of the petitioner has not been decided within the time so stipulated under Rule 4 of the Rules, 1995, therefore, the adverse entry awarded to the

petitioner would not be treated as averse against the petitioner for the purposes of promotion, crossing of efficiency bar and other service benefits in terms of Rule 5 of the Rules, 1995.

16. According, the writ petition is **allowed**.

17. A writ in the nature of certiorari is issued quashing the impugned punishment order dated 15.09.2023 (Annexure No.1) passed by the Principal Secretary, Department of Technical Education, U.P., Civil Secretariat, U.P., Lucknow and the impugned adverse remarks dated 31.03.2022 (Annexure No.2) for the year 2021-2022 recorded by the opposite party No.5. The opposite parties are directed to pass consequential orders ignoring the impugned ACR dated 31.03.2022 and the impugned punishment order dated 15.09.2023 which have been quashed by this order.

18. No order as to the costs.

[Rajesh Singh Chauhan,J.]

Order Date :- 17.9.2024
Suresh/