

\$~30

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : 02nd June, 2021

+ W.P.(C) 5462/2021

DR. MOHAMMAD AJAZUR RAHMAN Petitioner
Through: Ms. Payal Bahl, Advocate

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Chetan Sharma, ASG with
Mr. Anurag Ahluwalia, CGSC, Mr. Vinay Yadav,
Mr. Akshay Gadeock, Mr. Amit Gupta and
Mr. Sahaj Garg, Advocates for UOI
Mr. Anuj Aggarwal, ASC, with
Mr. Ayushi Bansal, Adv. for R-3 to 5

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

D.N. PATEL, CHIEF JUSTICE(ORAL)

Proceedings have been conducted through video conferencing.

1. This petition has been preferred for the following reliefs:

“a. Quash the said Impugned Notification vide Reference No.52 / DGHS / PH-IV/COVID-19/2020/Prsecyhwf/4957-5026 dated: 16th May 2021 as issued by the Respondent No. 4 i.e. The Honourable Principle Secretary, Health and Family Welfare Department, Government of NCT of Delhi;

b. Kindly direct the Respondent No. 3 i.e. Lt. Governor to

W.P.(C.) 5462/2021

Page 1 of 10

take appropriate remedial actions Impugned Notification and restrict Respondent No. 4 i.e. The Honourable Principle Secretary, Health and Family Welfare Department and Respondent No. 5 i.e. Health Minister of the Government of NCT of Delhi from issuing such impugned order in the future without wider consultation with all the stakeholders including Respondent No. 1 i.e. Secretary, Ministry of Home Affairs (UOI) and Respondent No. 2- Secretary, Department of Department of Personnel & Training (UOI)

c. Interim Prayer- Kindly be pleased to invoke the extraordinary powers under aegis of Article 226 (3) of the Constitution of India to grant injunction or stay against the implementation of the impugned notification vide Reference No. 52/DGHS/PH-IV/COVID-19/2020/Prsecyhwf/4957-5026 Dated: 16th May 2021 as issued by the Respondent No. 4 i.e. The Honourable Principle Secretary, Health and Family Welfare Department, Government of NCT of Delhi till the disposal of the Writ Petition;

d. Any other order or directions as the Hon'ble Court may deem fit and proper in the facts and circumstances of the case be also passed in favor of the Petitioner;

e. The cost of the present urgent Petition be also allowed in favour of the Petitioner and against the Respondents.

2. Learned counsel for the Petitioner submits that the impugned Notification dated 16.05.2021 (annexed as Annexure P-1 to the memo of this petition), has been issued by Respondent No.4 i.e. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, without approval from Hon'ble the Lieutenant Governor of Delhi and hence deserves to be quashed and set aside, being ultra vires Article 239AA of the Constitution of India.

3. Learned counsel appearing for the Petitioner has pointed out that as

per Section 44 of the Government of NCT of Delhi Act, 1991(herein after referred as GNCTD Act, 1991) as amended by GNCTD (Amendment) Act, 2021, in March, 2021, opinion of Hon'ble the Lieutenant Governor of Delhi was mandatory in terms of Proviso to Clause (4) of Article 239AA of the Constitution of India before issuing the impugned Notification dated 16.05.2021. For ready reference, impugned Notification dated 16.05.2021 is extracted hereunder: -

“GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI

***HEALTH & FAMILY WELFARE DEPARTMENT,
9TH LEVEL, A-WING, DELHI SECRETARIAT,
IP ESTATE, NEW DELHI-110002***

Ph: 011-2339 2254; c-mail: secyhealth@delhi.gov.in

***No. 52/DGHS/PH-IV/COVID-19/2020 Dated: May 16, 2021
/Prsecyhwf/4957-5026***

ORDER

In view of recent surge in COVID-19 cases and for efficient management of COVID-19 pandemic in NCT of Delhi, the competent authority is decided that all Medical Human Resource, category-wise shall function in following in levels, irrespective of differences in their pay scales & seniority:

<i>S.No.</i>	<i>Cadre</i>	<i>Levels</i>
<i>1.</i>	<i>Doctors</i>	<i>Consultant</i> - All Teaching and non-teaching specialist and equivalent <i>Duty Doctor</i> - All Senior Residents & equivalent <i>Junior Duty Doctor</i> - All Junior Residents &

		MOs - All Medical students, Interns, AYUSH & BDS Doctors
2.	Nursing Cadre	There will be only one LEVEL.
3.	Paramedical Cadre	There will be only one LEVEL.
4.	Patient Attendants	All Patient Attendants, Nursing Orderly and MTS be only one LEVEL.

Further, all teaching & non-teaching specialists and all other doctors/staff shall be assigned duty for COVID management irrespective department or branch of specialization.

This issued with the approval of Hon'ble Minister (Health & FW).

S/d
(Dr. ASHISH CHANDRA VERMA)
PR. SECRETARY (H&FW)”
(emphasis supplied)

4. Learned counsel for the Petitioner also argues that the impugned Notification has directed the doctors and allied medical staff to work as a single unit, irrespective of their seniority and differences in core medical specialisations in the treatment of Covid patients. This would lead to disturbance in seniority and change of cadres as also cast a negative impact on the treatment of patients derailing the entire medical/hospital administrative system for treatment of Covid patients in Government Hospitals in the National Capital Territory of Delhi.

5. We have heard learned Additional Solicitor General and learned counsel for the petitioner and looked into the facts and circumstances of the

case.

6. The impugned Notification dated 16.05.2021 (Annexure P-1), clearly provides that “all teaching and non-teaching specialists and all other doctors/staff shall be assigned duty for Covid management irrespective of department or branch of specialization”. It is evident that the impugned Notification was necessitated in light of the emergent situation arising due to extreme surge in the number of Covid-19 cases in the city of Delhi and is an action taken on account of public exigency. As the present situation is temporary in nature and it goes without saying that the life of the Notification is also short-lived. It is only to tide over the present situation that the Notification has been issued with an intent to ensure that the entire teaching and non-teaching specialists as well as the Doctors and other staff come together to treat patients affected by Covid-19 as a call of duty unaffected by their seniority. In fact, the Notification seems to have a laudable object i.e. to render the best and the most effective medical service to those who have got infected by the virus.

7. It ought to be kept in mind that in an unprecedented situation created by the Pandemic Covid-19, while on one hand the positivity rate is rising, on the other hand the strength of medical/paramedical staff is limited, it is the need of the hour that the medical/paramedical staff abides by the directions issued in the impugned Notification and perform their duties as assigned by the concerned Authority, in the larger public interest.

8. In view of the above, we cannot agree with the contention of the counsel for the petitioner that the impugned Notification in any manner negatively impacts the treatment of the patients and in our view, it only seeks to further the interest of those affected by Covid-19. By the impugned

W.P.(C.) 5462/2021

Page 5 of 10

Notification, Government of NCT of Delhi has only directed all doctors to function at the various levels prescribed in the Notification, be it consultants, duty doctors and junior duty doctors as a team with the assistance of nursing cadre, paramedical cadre etc. irrespective of the differences in their Pay Scales and seniority. It is not in the domain of this Court to interfere in an order passed by the concerned Authority assigning duties to doctors as per the requirements in the Hospitals. Impugned Notification was issued by the Government of NCT of Delhi keeping in mind the management of cases in various hospitals due to a sudden rise in the number of patients hospitalised and their medical needs and treatment. It is not open to the Petitioner, at this stage, to seek exemption from performing the duty in a particular manner, as assigned, by challenging the impugned Notification. It bears repetition to state that it is not for this Court to allocate and assign duties to the doctors or the other staff in the Hospitals.

9. Much has been argued by the counsel for the Petitioner that the impugned Notification violates Section 44 of the GNCTD Act, 1991 as amended by GNCTD (Amendment) Act, 2021. For ready reference, Section 44 of the GNCTD Act is extracted hereunder:-

Section 44 - Conduct of business — *(1) The President shall make rules—*

(a) for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and

(b) for the more convenient transaction of business with the Ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.

(2) Save as otherwise provided in this Act, all executive action of the Lieutenant Governor whether taken on the advice of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.

Provided that before taking any executive action in pursuance of the decision of the Council of Ministers or a Minister, to exercise powers of Government, State Government, Appropriate Government, Lieutenant Governor, Administrator or Chief Commissioner, as the case may be, under any law in force in the Capital, the opinion of Lieutenant Governor in term of proviso to clause (4) of article 239AA of the Constitution shall be obtained on all such matters as may be specified, by a general or special order, by Lieutenant Governor.

(3) Orders and other instruments made and executed in the name of the Lieutenant Governor shall be authenticated in such manner as may be specified in rules to be made by the Lieutenant Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Lieutenant Governor.”

(emphasis supplied)

10. We do not agree with the counsel for the Petitioner that the impugned Notification violates Section 44 of the GNCTD Act, 1991, especially looking to the fact that the same has been issued in peculiar and unprecedented circumstances and is operative for a limited duration. It also needs to be noticed that the impugned Notification does not affect the seniority or the Pay Scales and perks of any doctor/consultant/junior residents etc., contrary to what has been urged. Nor is there any change of cadre and all that the Notification seeks to do is to require the entire medical staff to work jointly and contribute to the cause of the patients as a team. It

does not need any emphasis that when Covid-19 patients are admitted in a hospital, especially those with co-morbidities, they may require the services of super-specialists/specialists in various fields such as Cardiology, Pulmonology, Nephrology etc. at the same time. For instance, if any Covid-19 patient has a cardiac problem, the super-specialist in Cardiology cannot refuse to attend to the patient suffering from Covid-19 and it is only to ensure the availability of specialists in various fields that the impugned Notification has been issued.

11. By no stretch of imagination, any exemption can be granted to any doctor who has specialised in a specific field and posted in super speciality branch. There may be other complexities alongwith Covid-19 infection, amongst the patients and hence in our view, the impugned Notification is justified and fair in the present peculiar circumstances obtaining on account of Pandemic Covid-19.

12. The Hon'ble Supreme Court in its order dated 31.05.2021, ***IN RE: Distribution of Essential Supplies and Services during Pandemic (Suo Motu Writ Petition (Civil) No.3 of 2021)*** reported as **2021 SCC OnLine SC 411**, has clearly ruled on the jurisdiction of the Courts in judicial review while dealing with issues relating to COVID-19 Pandemic as follows:

*“15. It is trite to state that separation of powers is a part of the basic structure of the Constitution. Policy-making continues to be in the sole domain of the executive. **The judiciary does not possess the authority or competence to assume the role of the executive, which is democratically accountable for its actions and has access to the resources which are instrumental to policy formulation.** However, this separation of powers does not result in courts lacking jurisdiction in conducting a judicial review of these policies. Our Constitution does not envisage courts to be silent spectators when constitutional rights of*

citizens are infringed by executive policies. Judicial review and soliciting constitutional justification for policies formulated by the executive is an essential function, which the courts are entrusted to perform.

xxx

xxx

xxx

18. Similarly, courts across the globe have responded to constitutional challenges to executive policies that have directly or indirectly violated rights and liberties of citizens. Courts have often reiterated the expertise of the executive in managing a public health crisis, but have also warned against arbitrary and irrational policies being excused in the garb of the “wide latitude” to the executive that is necessitated to battle a pandemic. **This Court in Gujarat Mazdoor Sabha vs State of Gujarat (2020), albeit while speaking in the context of labour rights, had noted that policies to counteract a pandemic must continue to be evaluated from a threshold of proportionality to determine if they, inter alia, have a rational connection with the object that is sought to be achieved and are necessary to achieve them.**

19. In grappling with the second wave of the pandemic, this Court does not intend to second-guess the wisdom of the executive when it chooses between two competing and efficacious policy measures. **However, it continues to exercise jurisdiction to determine if the chosen policy measure conforms to the standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons.** This Court is presently assuming a dialogic jurisdiction where various stakeholders are provided a forum to raise constitutional grievances with respect to the management of the pandemic. Hence, this Court would, under the auspices of an open court judicial process, conduct deliberations with the executive where justifications for existing policies would be elicited and evaluated to assess whether they survive constitutional scrutiny.”

(emphasis supplied)

13. Thus, for the foregoing reasons and considering the laudable objective behind the impugned Notification, we decline to interfere. Accordingly, the writ petition is dismissed with costs of Rs.5,000/- to be paid by the Petitioner to the Delhi State Legal Services Authority (DSLISA) within eight weeks from today. The aforesaid amount shall be utilized for the programme 'Access to Justice'.

14. Since the impugned Notification has been issued keeping in view the recent surge in Covid-19 cases and for their efficient management, needless to state that it is always open to the concerned Authority to review the situation keeping in backdrop the ground realities of the number of cases and the required management.

15. We make it explicitly clear that the order passed by this Court in the present petition is in the peculiar facts and circumstances obtaining herein and is not to be treated as a binding or a general pronouncement regarding the powers of the Government of NCT of Delhi vis-à-vis those of Hon'ble the Lieutenant Governor under the GNCTD Act, 1991.

16. A copy of this order be sent to the Member Secretary, Delhi State Legal Services Authority, Central Office, Patiala House Courts Complex, New Delhi - 110001.

CHIEF JUSTICE

JYOTI SINGH, J

JUNE 02, 2021/yg