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ORISSA HIGH COURT: CUTTACK

W.P.(C) No.3029 of 2016

In the matter of an application under Articles 226 and 227 of the Constitution of India

Dr. Saroj Kumar Pradhan Petitioner

-versus-

State of Odisha and others Opp. Parties

Advocates appeared through hybrid mode

For Petitioner : Mr. Samir Kumar Das

For Opp. Parties : Mr. G.N. Rout, ASC

CORAM : JUSTICE SANJAY KUMAR MISHRA

JUDGMENT
08.12.2022

S.K. Mishra, J.

The Petitioner, who was appointed as Ayush Doctor, vide engagement Order dated 30.05.2007, has prayed to quash the show cause notice dated 05.01.2016, as at Annexure-8, so also Office Order dated 27.01.2016, as at Annexure-9, on the ground that the CDMO-Cum-District Mission Director, Jharsuguda- Opposite Party No.5 is incompetent to issue the show cause notice, so also Office Order of termination in view of the

Resolution of the Government of Odisha, Health and Family Welfare Department, dated 16.08.2012.

2. The factual matrix leading to filing of the present case is that the Petitioner, who having BAMS qualification, was selected for the post of Ayush Doctor and was engaged by the Order of CDMO, Jharsuguda on 30.05.2007. Then, he was posted as such under the Zilla Swasthya Samiti, Jharsuguda and engaged as Medical Officer In-Charge, in Rajpur PHC, vide Order dated 30.05.2007.

While continuing as such, the Petitioner was transferred and posted to Lakhanpur CHC by the Order of CDMO, Jharsuguda dated 30.10.2007 and was relieved by the Order dated 03.11.2007 of the Medical Officer In-Charge, CHC Brajarajnagar and directed to join his new place of posting i.e. at Lakhanpur CHC. While discharging his duties at Lakhanpur CHC, due to his personal difficulty, he applied for seven days leave, vide Application dated 09.11.2015 for the period from 10.11.2015 to 16.11.2015. But, due to his misfortune during such period of leave, his wife suffered from abdomen pain, for which the Petitioner had to extend his leave further. When the Petitioner was on leave, during such extended period, the

Collector, Jharsuguda, vide Office Order dated 13.11.2015, deputed the Petitioner from CHC Lakhanpur to PHC Konaktora. As the Petitioner was on leave, the said Order of deputation/transfer could not be served on him and he was not aware about Order of transfer.

It is further case of the Petitioner that the Mission Director issued a Circular dated 07.06.2013 fixing guidelines for transfer of Ayush Doctors. As per the said Circular, the Collector of the District became the Authority to pass an Order of transfer of a Doctor within the District. But such Order of transfer is to be made as per the requirement, not in a routine manner.

3. When the matter stood thus, the CDMO-Cum-District Mission Director, Jharsuguda, vide letter dated 05.01.2016 issued a show cause notice to the Petitioner asking him to submit necessary explanation within seven days as to the alleged irregularities pointed out in the said show cause notice. Since the Petitioner was still on leave and notice of show cause could not be served on him, there was no question of tendering his explanation in response to the said show cause notice.

4. Ultimately, vide Order dated 27.01.2016, as at Annexure-9, the CDMO-Cum-District Mission Director, Jharsuguda

terminated the services of the Petitioner in pursuance of the decision taken in the Contract Renewal Committee-NHM.

It is further case of the Petitioner that the impugned show cause notice, so also Order of termination are bad as the Commissioner-Cum-Secretary to Government, Health and Family Welfare Department, Bhubaneswar, vide Resolution dated 16.08.2012 circulated about the decision of the Government with regard to transfer of Ayush Doctors working under NRHM to the control of DIM & H, Odisha and in view of Clause-5 of the said Resolution, the disciplinary authority shall be with DIM & H. Similarly, referring to the said Resolution of the Government (supra), the Mission Director, NRHM & Ex-Officio Additional Secretary to Government, vide letter dated 28.08.2012 communicated to the Director, Indian Medicine & Homeopathy, Odisha, Bhubaneswar, so also all CDMO-Cum-District Mission Director, Odisha indicating therein that the establishment of contractual Ayush Doctors now under the control of NRHM stood transferred to the control of Director, Indian Medicine & Homeopathy, Odisha, with certain terms and conditions, w.e.f. 16.08.2012 and it was requested to follow the

terms and conditions scrupulously, as mentioned in the relevant paragraphs of the said Resolution.

It is also the case of the Petitioner that the Authority concerned issued the Order of termination without verifying the fact as to whether the show cause notice was served on the Petitioner or not and without affording him an opportunity to have his say. The Petitioner came to know about the said Order of termination only on 02.02.2016 when he reported for duty after recovering from his suffering. As such, the Order of termination being illegal and in clear violation of principles of natural justice and being without jurisdiction and authority in terms of the Resolution dated 16.08.2012 and the consequential Order of Mission Director, NRHM & Ex-Officio Additional Secretary to Government, dated 28.08.2012, the impugned communications, as at Annexures 8 and 9, are liable to be set aside.

It is further case of the Petitioner that he had put in 8 years of uninterrupted service and never mis-conducted himself during his entire period of service and only because of personal difficulty, he had to take leave with due intimation and permission of the Authority concerned and the Order of

termination suffers from violation of principles of natural justice and deserves interference by this Court. Hence, both the impugned show cause notice dated 05.01.2016 as well as Office Order dated 27.01.2016 being illegal and beyond authority, deserve to be set aside.

5. In response to the averments made in the Writ Petition, the stand of the State in its Counter Affidavit is that the Petitioner was engaged as Ayush Doctor at PHC Rajpur vide engagement Order dated 30.05.2007 issued by the Chief District Medical Officer, Jharsuguda for a period of 11 months. Thereafter, on completion of 11 months, the Petitioner was given further engagement after submission of his Performance Appraisal Report and the Petitioner has signed his contractual service Agreement dated 05.01.2015. After completion of tenure of Agreement on 04.12.2015, his service has not been renewed. Apart from reiterating the facts, as pleaded in the Writ Petition, with regard to applying for leave, it has been averred in the Counter Affidavit that the Petitioner remained absent unauthorizedly and to demonstrate the same, the leave applications submitted by the Petitioner have been annexed as Annexure-C/5 Series. It has been stated that the Petitioner was

unauthorizedly absent on 17.11.2015 as he had not applied for leave and the said leave was not sanctioned by the Medical Officer In-Charge, CHC, Lakhanpur. Further, the Petitioner also tampered the staff attendance register of the office by signing on 18th & 19th November, 2015 without joining in duty in the Office.

It has also been stated in the Counter Affidavit that the Petitioner was appointed by the CDMO and he signed the service contract Agreement with CDMO as per the letter dated 21.07.2014 of the Mission Director, NHM, Odisha and hence, the Disciplinary Authority, who is the Chief District Medical Officer, has the full power to reposition the Ayush Doctors within the District with the prior approval of Collector-Cum-District Magistrate in a routine manner only and the letter dated 21.07.2014, so also letter dated 07.06.2013 issued by the Commissioner-Cum-Director, NRHM supersede the previous Order issued in the year, 2012 and the said Orders were carried out in case of the Petitioner. It has also been stated that the show cause notice dated 05.01.2016 was sent by the O/o the CDMO, Jharsuguda to the Petitioner and the same was refused by the Petitioner, which was again resent to the Petitioner

through Special Messenger, which was also refused by the Petitioner.

It is also the stand of the Opposite Parties that the Petitioner was terminated vide Office Order dated 27.01.2016, as per the decision taken in the Contract Renewal Committee meeting of NHM held on 27.01.2016 under the Chairmanship of Collector-Cum-District Magistrate, Jharsuguda, because of his non-submission of Performance Appraisal Report for renewal of contract period beyond 05.12.2015 before expiry of the contract period, unauthorized absence continuously from 22.06.2015 to 24.06.2015, 25.12.2015 to 30.12.2015 and 17.11.2015, absence during visit of vigilance team to working place (CHC, Lakhanpur) dated 08.09.2015, recommendation for initiation of action against the Petitioner by the Superintendent of Police, Vigilance, Sambalpur Division, Sambalpur, vide Memo dated 06.10.2015, not staying at headquarter, willful disobedience of repositioning Order issued by the Collector & District Magistrate, Jharsuguda, not replying to the show cause notice and manipulation of office attendance register on 18th & 19th November, 2015.

6. In response to the Counter Affidavit filed by the State- Opposite Party, the Petitioner has filed Rejoinder Affidavit and more particularly, to demonstrate before this Court that the show cause notice dated 05.01.2016, as at Annexure-8, was never served on him and without following principles of natural justice, his services were brought to an end, the Petitioner has annexed an Affidavit sworn by the Process Server, through whom the allegedly show cause notice was sent to the Petitioner, whose report has been annexed to the Counter Affidavit as Annexure-K/5.

Today also, during hearing, the learned Counsel for the Petitioner files the original of the said Affidavit in the Court, which be kept on record.

7. Learned Counsel for the Petitioner submits that the impugned show cause notice, so also Order of termination are illegal and void *ab initio* being issued by the incompetent Authority in view of the Resolution dated 16.08.2012, so also the letter of the Mission Director, NRHM & Ex-Officio Additional Secretary to Government, dated 28.08.2012, and because of violation of principles of natural justice as to not give

opportunity to the Petitioner to have his say in response to the show cause notice dated 05.01.2016.

8. Learned Counsel for the Petitioner further submits that though the show cause notice is dated 05.01.2016, vide which he was given seven days time to have his say but to the contrary, the postal receipt annexed to the Writ petition, as at Annexure-K/5, is dated 20.01.2016 and there is no documentary evidence on record to prove that the said show cause notice dated 05.01.2016 was duly served on him.

9. Further, Mr. Das, learned Counsel for the Petitioner submits that though the Process Server's endorsement, as at Annexure-K/5, indicates that the Petitioner allegedly denied to receive the letter and asked the Process Server to send the letter officially via post, to the contrary, an Affidavit sworn by the Process Server Jatindra Kumar Sahu, which is annexed as Annexure-10, clearly demonstrates that rather he has stated on oath to the effect that he was deputed to serve a letter/notice addressed to the Petitioner. On reaching the house of the Petitioner, at Village-R. Katapali, he found that door of the house of the Petitioner was locked and none of the family members, including the Petitioner, was present nearby the said

house. Hence, he returned the said notice to the Medical Officer, In-Charge giving a report to the effect that he did not find the Petitioner nor his family members in his house as the house was locked and after filing of the case, the Medical Officer put pressure on the Process Server Mr. Sahu to write a letter mentioning therein that the Petitioner refused to receive the letter addressed to him and on being so pressurized, under the threat of removal from service, the Process Server Mr. Jatindra Kumar Sahu wrote another letter as per the instruction of the Medical Officer Dr. Jay Prakash Pradhan declaring therein that the Petitioner refused to receive the said letter.

The conduct of the concerned Officer well demonstrates that the show cause notice dated 05.01.2016 was never served on the Petitioner giving opportunity to him to have his say before terminating his service vide Office Order dated 27.01.2016 and that too by an incompetent Authority in view of the Government Resolution dated 16.08.2022, the same being issued by the CDMO-Cum-District Mission Director, Jharsuguda instead of the concerned Director, Indian Medicine and Homeopathic, Odisha, Bhubaneswar.

Learned Counsel for the Petitioner, referring to Clause-9 of the Contractual Service Agreement dated 05.01.2015 as Annexure-B/5, submits that the service of the Petitioner could only have been terminated by the competent Authority following due process of law and CDMO-Cum-District Mission Director, Jharsuguda, being incompetent to issue the show cause notice, so also Order of termination, both the impugned Orders deserve to be set aside.

10. Learned Counsel for the State submits that in view of Clause-9 of service Agreement dated 05.01.2015, as at Annexure-B/5 and the communications of the Mission Director, NHM, Odisha, Bhubaneswar, so also the Commissioner-Cum-Director, NRHM, Bhubaneswar, dated 18.07.2014 and 07.06.2013, respectively, as at Annexure H/5 and I/5, which are in supersession of the Resolution dated 16.08.2012, the CDMO-Cum-District Mission Director was competent to act as the Disciplinary Authority and there is no infirmity or illegality in the impugned show cause notice dated 05.01.2016, so also Order of termination dated 27.01.2016, by which sufficient opportunity was granted to the Petitioner to have his say but the Petitioner choose not to give his explanation. Hence, the

Authority concerned was justified to issue the Order of termination for the misconduct/irregularity committed by the Petitioner.

11. This Court perused the Resolution dated 16.08.2012 of the Commissioner-Cum-Secretary to Government, Health and Family Welfare Department and for ready reference, the relevant portions of the said Resolution are extracted below:

“The proposal for transfer of AYUSH Establishment from NRHM to DIM & H, Odisha was under the active consideration of Govt. after due consideration, **it has been decided to transfer the AYUSH Doctors under NRHM to the control of DIM & H, Odisha for smooth management of contractual AYUSH Doctors now working under NRHM with the following terms and conditions.**

- (i) xxx
- (ii) xxx
- (iii) xxx
- (iv) xxx

(v) **Disciplinary authority shall be with DIM & H.** Any instruction issued DIM & H in this regard shall be in consonance with the existing rules of the Govt. & as per the terms and condition of the PIP of AYUSH, Mission Directorate shall be kept informed.

(vi) The AYUSH Doctors will be making contract agreement with the CDMO of the concerned districts as is being done now.

(vii) Day to day administration and technical supervision shall continue to be with the concerned MOI/C.

(viii) Special skill up-gradation training etc. shall be given by NRHM/ SIHFW/ DIM & H.

(ix) As per decision taken in the AYUSH Core Committee Meeting held on 01.10.201, the AYUSH Inspectors working under DIM & H will do monitoring & supportive supervision of AYUSH Doctors & submit the observation report to the CDMOs for follow-up action.

This will come into effect from the date of issue of this Resolution.”

By order of Governor
Sd/-
(P.K. Mohapatra)
Commissioner-cum-Secretary
to Government”

(Emphasis supplied)

12. In pursuance of the said Resolution dated 16.08.2012, the Mission Director, NRHM & Ex-Officio Additional Secretary to Government, vide communication dated 28.08.2012 circulated to the Director, IM & H, Odisha, Bhubaneswar, so also all CDMO-Cum-District Mission Director, Odisha, which reads as follows:

“Sir,

Please refer to the Resolution No.21532 dated 16.08.2012 (copy enclosed) of Government in Health & Family Welfare Department on the above subject, in which the establishment of contractual Ayush doctors now under the control of NRHM has been transferred to the control of Director Indian Medicine & Homeopathy, Odisha with certain terms and conditions, with effect from 16.08.2012.

You are therefore requested to follow the terms and condition scrupulously henceforth, as mentioned in the relevant para's of the Resolution relating to your office.

Yours faithfully
Sd/-
Mission Director, NRHM &
Ex-Officio Additional Secretary
to Govt.”

(Emphasis supplied)

13. It may not be out of place to mention here that the Clause- 9 of the service agreement deals with termination of service of the Petitioner, the relevant portion of which extracted below:

“ 9. Termination xxx

Notwithstanding anything contained hereinabove, the services of the Second Party may be terminated at any point of time by the competent authority of the Society if the Second Party is found to be involved in criminal offence or guilty of any insubordination, intemperance or other misconduct or of breach or non-performance or at the completion of the project as intimated.”

14. So far as the letter of the Mission Director, NHM, Odisha, as at Annexure-H/5, dated 21.07.2014, which is addressed to the CDMO-Cum-DMDs of various District, is pertaining to contractual engagement of Ayush Doctors for PHC (New)/CHC under NHM from the panel pertaining to advertisement No.121/12, vide which it was requested to take steps for verification of documents, finalization of place of posting along

with issue of engagement Order on the same day and it was indicated that the engagement Order for the Doctors are to be issued by the CDMO-Cum-DMD concerned after strict verification of necessary original documents by a Committee, as provided in the Guideline issued earlier for the said purpose vide letter dated 15.09.2008 of the Commissioner-Cum-Secretary, H & F.W. Department. Similarly, the Office Order dated 07.06.2013, as at Annexure-I/5, issued by the Commissioner-Cum-Director, NRHM, Bhubaneswar is pertaining to reposition of contractual employees working under the Odisha State Health & Family Welfare Society and from both the said communication dated 21.07.2014, so also Office Order dated 07.06.2013, it can be well revealed that it is not in supersession of the Resolution of the Government dated 16.08.2012, wherein it has been clearly indicated that so far as Ayush Doctors under NHM, it was decided by the Commissioner-Cum-Secretary, H & F.W. Department for smooth management of contractual Ayush Doctors now working under NRHM and for that the disciplinary authority shall be with the DIM & H and any instructions issued by DIM & H in this regard shall be in consonance with the in existing Rules of

the Government and as per the terms and conditions of the PIP of Ayush, Mission Directorate shall be kept informed.

Further, from the Affidavit of Mr. Jatindra Kumar Sahu, Process Server, through whom alleged show cause notice was communicated to the Petitioner, clearly indicates that the said show cause notice was never served on the Petitioner as has been falsely averred. Rather, being pressurized by the officer concerned, the Process Server wrote the report in terms of instruction given by the Medical Officer Dr. Jay Prakash Pradhan. For ready reference, Paragraphs 3 to 6 of the Affidavit dated 12.10.2017 are extracted below:

“3. That, on reaching to the house of Dr. Saroj Kumar Pradhan at village- R. Katapali, I found that the house door of Dr. Saroj Kumar Pradhan was locked and none of the family members including Dr. Saroj Kumar Pradhan was/were present nearby to the said house. Hence I returned the said Letter to M.O., I/C, giving a written report to the effect that I do not find Dr. Saroj Kumar Pradhan or his family members in his house as the house was locked.

4. That, after filing of this case my Medical Officer, Dr. Jay Prakash Pradhan put pressure on me to write a report mentioning that Dr. Saroj Kumar Pradhan refused to receive the letter address to him.

5. That, under pressure and on the there at of my removal from the service, I wrote another report as per the instruction of my Medical Officer, Dr. Jay Prakash Pradhan declaring that Dr. Saroj Kumar Pradhan refused to receive the said letter.

6. That, I am swearing this affidavit in order to produce it before the Hon'ble High Court, Cuttack as my evidence of above mentioned facts.”

15. Law is well settled that if the power has been vested with the particular authority, same can only be exercised by the same authority. In **Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad and others**,¹ the apex Court held that it is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this Rule is traceable to the decision in **Taylor v. Taylor**,² which was subsequently followed by Lord Roche in **Nazir Ahmad v. King Emperor**,³ and subsequently, the said principle has also been followed in **Babu Verghese v. Bar Council of Kerala**,⁴.

16. In **Nazir Ahmed v. King Emperor**, it was held that “where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.” The said principles have been followed subsequently in **State of Uttar Pradesh v. Singhara Singh**,⁵ **Dhananjay Reddy v. State of Karnataka**,⁶

¹. (2015) 7 SCC 690

² (1875) LR I Ch D 426

³ AIR 1936 PC 253(2)

⁴ (1999) 3 SCC 422

⁵ AIR 1964 SC 358

⁶ AIR 2001 SC 1512

Chandra Kishore Jha v. Mahabir Prasad,⁷ Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd.,⁸ and Ram Deen Maurya v. State of U.P.,⁹.

17. Since admittedly, the notice of show cause dated 05.01.2016 was never served on the Petitioner and both the impugned show cause notice dated 05.01.2016 (Annexure-8), so also Office Order dated 27.01.2016 (Annexure-9), vide which, the services of the Petitioner were brought to end by way of termination, were issued by an incompetent authority i.e. CDMO-Cum-District Mission Director, Jharsuguda, the same are hereby set aside. The Petitioner be reinstated in service with all consequential service and financial benefits, as prayed for.

18. Accordingly, the Writ Petition stands disposed of. No Order as to costs.

**(S.K. MISHRA)
JUDGE**

Orissa High Court, Cuttack
The 8th December, 2022/PCD

⁷ AIR 1999 SC 3558

⁸ AIR 2008 SC 1921

⁹ (2009) 6 SCC 735