REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2320 OF 2021
(ARISING OUT OF SLP (CIVIL) NO. 7487 OF 2020)

THE STATE OF UTTAR PRADESH & ORS. .....APPELLANT(S)

VERSUS

DR. MANOJ KUMAR SHARMA .....RESPONDENT(S)

J U D G M E N T

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order passed by the Division Bench of the High Court of Allahabad, Lucknow Bench at Lucknow on 05.03.2020, affirming the order passed by the learned Single Bench on 07.08.2019. Vide the aforesaid orders, the appellants were directed to calculate and pay 50% of the back wages to the respondent, hereinafter referred to as writ petitioner, and to grant all the consequential benefits in accordance with law.

2. The writ petitioner was posted in State of Uttaranchal (for short 'Government of Uttaranchal' now Uttarakhand, hereinafter referred to as Uttarakhand) as a Medical Officer before the reorganization of the State of Uttar Pradesh. The writ petitioner was transferred to State of Uttar Pradesh as per the option given by Medical Officers of State of Uttar Pradesh including the writ petitioner. As many as 208 Medical Officers and 5 Dental doctors of Class -2 Category belonging to the U.P. Provincial Medical and Health Services (Male

Cadre) were posted in the State of Uttar Pradesh on 6.3.2002. The name of the writ petitioner appears at Serial No. 99 of the said list of Medical Officers. The writ petitioner was to report at Badaun under the Chief Medical Officer.

3. The State of Uttarakhand relieved the Medical Officers in phases. The writ petitioner was amongst 22 Medical Officers in the second phase who were relieved by the State of Uttarakhand on 5.7.2003 in terms of the posting order of the Uttar Pradesh Government dated 06.03.2002. The name of the writ petitioner appears at Serial No. 13, then posted as Surgeon at District Hospital, Uttarkashi, Uttarakhand. The writ petitioner was relieved by Chief Medical Superintendent, District Hospital, Uttarkashi on 12.09.2003.

4. It is thereafter that the writ petitioner instead of reporting at place of posting i.e., Badaun, submitted a letter to Director Medical Health Services, Lucknow on 19.09.2003 submitting his joining report. On the same date, by another letter, a request was made to get a posting in Muzaffarnagar, Ghaziabad or Bijnore District. Even though the writ petitioner was posted at Badaun, he did not join there and was well satisfied by giving a letter to Director Medical Health Services of his joining in that office.

5. Subsequently, the writ petitioner filed a writ petition in the year 2006 wherein he claimed a writ of mandamus commanding the State to post the writ petitioner as Medical Officer in any Hospital according to his qualification and experience in the specialized

cadre. The learned Single Judge allowed the writ petition *inter alia* on the ground that the counter affidavit was silent as to in what manner the office memorandum or the posting order was served upon the writ petitioner. The argument by the State counsel that the writ petitioner did not join at Badaun was said to be not supported by any letter of the writ petitioner. The learned Single Judge found that no decision has been taken in pursuance of letter dated 19.09.2003 for posting of the writ petitioner. The Court thus concluded that the posting order or the transfer order was never communicated or served upon the writ petitioner at any point of time. Therefore, the judgments referred to by the State counsel were not applicable in the facts and circumstances of the case. Further, the Secretary, Medical Health, Government of U.P. was summoned to the Court who justified the non-posting of the writ petitioner. The Court concluded as under:

> "The aforesaid conduct of the State Government in dealing with its officers is not happy state of affair. The State Government should have acted with responsibility and should have been quick enough to take a decision in the matter. The State Government has been sitting tight over the matter since 2006 when the writ petition was filed. Action of the State Government, therefore in these circumstances, cannot be justified and neither the State Government can take benefit of the posting order issued on 6th March, 2002. We are therefore of the view that a heavy cost is required to be imposed upon the State Government for approaching in such a callous manner.
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> We accordingly impose a cost of Rs.50,000/- upon the State Government. The State government will deposit the cost before this Court within fifteen days, which shall be transferred to the Mediation Centre of this Court. Further, a writ in the nature of mandamus is issued to the State Government to issue a posting order in respect of the

petitioner within the aforesaid period.

Question of back wages is left open in the present writ petition.

The Secretary, Medical Health need not appear again."

6. In pursuance of the said order of the High Court, a fresh posting order was issued to the writ petitioner on 09.12.2016, posting him under Chief Medical Officer, Muzaffarnagar. Subsequently, another writ petition was filed for direction for payment of back wages. The writ petition was disposed of with a direction to decide the question of back wages within a period of four weeks.

7. The Principal Secretary declined the grant of back wages on 27.2.2009 *inter alia* on the following grounds:

> "It is pertaining to mention that Dr. Manoj Kumar Sharma Surgeon District Hospital Uttarkashi after being relieved on 05.07.2003 from the State of Uttaranchal submitted joining before Director General Medical and Health Services U.P. Lucknow on 18.09.2003, repeatedly made request for posting near his home District Saharanpur. If his request for place of posting was not accepted it was not open to him to say that any hindrance was created in his joining and he remained in waiting for posting. The period of Dr. Manoj Kumar Sharma from 05.07.2003 to 09.12.2016 cannot be treated as compulsory waiting period as he had been given posting but he did not comply with posting order and there was no justification to sit idle for about 13 years and not performing Government work in anticipation of decision to be taken on his representation and such attitude does not reflect his readiness to work."

8. The back wages for the said period were thus declined for the reason that the writ petitioner has not performed any government work from 05.07.2003 till 09.12.2016 and it cannot be treated as compulsory waiting period under the provisions of Fundamental

Rules 9(6)(b)(iii) of Financial Hand Book Volume-2-Part 2-4 and he was thus granted extra ordinary leave for the aforesaid period.

9. The writ petitioner challenged the said decision by way of another writ petition. The order of the learned Single Bench shows that an office memorandum was issued on 08.02.2018 proposing to initiate departmental enquiry on the ground of non-joining. The contempt petition was filed and it appears that in view of the contempt petition, the office memorandum was cancelled on 29.05.2018. The learned Single Judge in the order dated 7.8.2019 held that the order in the writ petition dated 26.09.2016 had attained finality, therefore, the benefit of back wages could not have been declined. The Court held as under:

> "That once the order dated 26.09.2016 attained finality and there was no challenge to the same, thus, the issues and the findings in the aforesaid writ petition could not be in the domain of the respondents to challenge indirectly by issuing the impugned office memorandum dated 27.02.2019. It is no more res-integra that what cannot be done directly cannot be done indirectly either. In the present facts and circumstances, the issue regarding the fact of the petitioner not being able to join between 05.07.2003 to 09.12.2016 was the core issue in the earlier writ petition decided on 26.09.2016. The Division Bench of this Court while deciding and allowing the aforesaid writ petition had categorically noticed that the State was unable to establish the fact that the alleged joining order dated 06.03.2002 was ever served or communicated to the petitioner. This Court has already re-produced the relevant portion of the aforesaid judgment and thus, it is evident that the reason indicated in the office memorandum dated 27.02.2019 is the same which stood decided in the earlier writ petition in favour of the petitioner."

10. The learned Single Judge also noticed the fact that the writ petitioner was gainfully employed during this period but still

granted 50% of back wages. The Court held as under:

> "Notwithstanding the aforesaid, this Court has to balance the equities in between the parties and considering the fact that the petitioner did not deny the plea of the respondent that he was gainfully employed even though the burden to prove the same was on the employer coupled with the fact that the respondent have only taken a bald plea in their counter affidavit and no positive evidence or document was placed on record to substantiate its plea.
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> Hence, taking a holistic view, this Court is of the opinion that ends of justice would be served if the petitioner is granted 50% back wages for the period 05.07.2003 to 28.12.2016 treating the petitioner to be in continuous service. As far as the other consequential benefits, admissible under law, are concerned the respondents in the impugned order also admit that the same are to be given to the petitioner."

It is the said order which was affirmed by the learned Division Bench, which is subject matter of challenge in the present appeal.

11. The learned Single Bench in the first round held that the State has not produced as to how and when the posting order was communicated to him. The Court was aware of the fact that the writ petitioner has been relieved by the Government of Uttarakhand on 12.09.2003 and a communication has been addressed by Shri K.M. Mehrotra, Joint Director on 12.09.2003 and that he had submitted a joining report on 18.09.2003. The said joining report was submitted not at the place of posting but before the Director Medical Health Services. We find that the High Court in this background, when the writ petitioner stood relieved from Uttarakhand, could not have returned a finding that the State has not shown as to how the transfer and posting order was conveyed

to the writ petitioner. The High Court overlooked a judgment of this Court reported as ***State of Punjab*** v. ***Khemi Ram***[1] wherein a question arose that whether the order of suspension was to be actually received by the employee to be affected. This Court examined the question as to whether communicating the order means its actual receipt by the concerned government servant. The Court held as under:

> "16. …It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the concerned government servant, it must be held to have been communicated to him, no matter when he actually received it. We find it difficult to persuade ourselves to accept the view that it is only from the date of the actual receipt by him that the order becomes effective. If that be the true meaning of communication, it would be possible for a government servant to effectively thwart an order by avoiding receipt of it by one method or the other till after the date of his retirement even though such an order is passed and despatched to him before such date. An officer against whom action is sought to be taken, thus, may go away from the address given by him for service of such orders or may deliberately give a wrong address and thus prevent or delay its receipt and be able to defeat its service on him. Such a meaning of the word "communication" ought not to be given unless the provision in question expressly so provides. ……."

12. Therefore, it was not open to the writ petitioner to defy the order of transfer on the ground of non-communication when more than 100

1 AIR 1970 SC 214

Medical Officers were transferred by the same common transfer order. Firstly, he stood relieved by the State of Uttarakhand and secondly, he did not report at the place of posting but submitted an application before Director Medical Health Services. In the first round, even after directing to issue a posting order to the writ petitioner, the question of back wages was left open. It is thereafter, in pursuance of another writ petition, the competent authority in the State passed an order declining back wages but granted extra ordinary leave for the aforesaid period.

13. Learned counsel for the writ petitioner submitted that in the writ petition he has sought to post him anywhere in the State of Uttar Pradesh and that in the order dated 26.09.2016 a finding is returned i.e., posting order dated 06.03.2002 was not served upon the writ petitioner. It is also pointed out that the Government of Uttarakhand has relieved medical officers in stages and all of them submitted joining report to the Director Medical Health Services, U.P. and not at the place of posting mentioned in the order issued by the Uttar Pradesh Government. A reference is made to general practice in the Government of Uttar Pradesh as a Medical Officer is asked to submit three choices of place of posting and that this practice still continues.

14. We do not find any merit in the arguments raised. The writ petitioner was relieved by the Government of Uttarakhand in 2003, however, he filed writ petition in 2006, meaning thereby for three

years, “he was awaiting posting orders”. Under the guise of awaiting posting orders, he started private practice and intentionally delayed the decision on the writ petition for almost 13 years. The writ petition was dismissed in default on 22.09.2008 and was restored on 11.12.2014. Such conduct of the writ petitioner suggests that he was not keen to join as a Medical Officer after he was relieved by the Government of Uttarakhand. The writ petitioner cannot take a stand that he had not received the order dated 06.03.2002. The order of Uttarakhand Government relieving him on 05.07.2003 is in pursuance of the order of the Government of Uttar Pradesh on 06.03.2002. It is a case of the feigned ignorance. Even if there is a practice that the Medical Officer report at the office of Director Medical Health Services is not a ground on the basis of which illegality can be permitted to be perpetuated. The option of posting would be available only if there are general transfers not in a case where the Medical Officers have been allocated to their parent state in view of the option exercised.

15. As noticed by the learned Single Bench in the third round, the writ petitioner was gainfully employed and it is impossible to imagine that a Medical Officer would sit idle for 13 long years. Therefore, the grant of 50% of back wages for the entire period would be giving benefit of one’s own wrong who intentionally abstained from duty for 13 long years and now wants to take benefit of back wages as well. Such stand of the writ petitioner is not only unjustified but wholly condemnable. The State was remiss in not taking action

against the writ petitioner for absence from duty. Once the writ petitioner did not join the place of posting, the State should have taken steps to initiate disciplinary proceedings. Still further, the State issued posting order as per the directions in the first writ petition. The attempt of the State to initiate proceedings in the year 2018 invited ire of the Court. The State government cancelled the proceedings to initiate disciplinary proceedings.

16. Another disturbing feature which comes to our notice is that in the first round, the Secretary, Medical Health was called in-person in the Court. Even in the present proceedings, after stay of the order of the Division Bench of the High Court on 22.2.2021, an order was passed by the High Court on 2.3.2021 to seek personal presence of the officer on the next date of hearing. In these circumstances, this Court in the present proceedings passed the following order on 6.4.2021: -

> "On 22.02.2021, we had issued notice in the Special Leave Petition and stayed the operation of the impugned order.
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> The present application has been filed for stay of the contempt proceedings on account of the order passed on 02.03.2021.
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> To say the least, we are quite shocked at the perusal of the order dated 02.03.2021. Once the operation of the order has been stayed, the natural consequence would be that the contempt proceedings would be kept in abeyance. It is not as if this aspect was not brought to the notice of the learned Judge dealing with the Contempt Petition No.139/2020 as an application had been filed for exemption from personal appearance. However, the exemption from personal appearance was granted only for the date of 02.03.2021 and the matter was listed on 08.04.2021 once again directing both the officers to remain present in Court in pursuance to

an earlier order dated 05.02.2021.

Once the order of which contempt was alleged was stayed, there would be no cause for calling the officers as there was no question of any non-compliance of the order which had been stayed. This Court has even on various occasions through judicial pronouncements deprecated the practice of unnecessarily calling officers to Court. In that context, it has been observed that the trust, faith and confidence of the common man in the judiciary cannot be frittered away by unnecessary and unwarranted show or exercise of power. Greater the power, greater should be the responsibility in exercising such power[2]. The frequent, causal and lackadaisical summoning of high officials by the Court cannot be appreciated. We may add that this does not mean that in compelling situations the same cannot be done but the object cannot be to humiliate senior officials[3]. In the present case, we are concerned with contempt proceedings. No doubt if the order is not complied with, presence can be directed unless exempted. However, if the operation of the order is stayed, we fail to understand what purpose was being served by calling the officers for the next date as no specific date had been fixed by the Court post the stay having been granted. We do believe that this is unnecessary harassment of the officers and there was no occasion to pass the order on 02.03.2021. It has resulted in the petitioners being compelled to move the present application.

We stay the contempt proceedings in Contempt Petition No.139/2020 pending before the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow and further make it clear the no presence of any officer concerned is required. We also make it clear that as and when, if the occasion so arises, for restarting the contempt proceedings, the matter will be placed before a Bench of another Judge. A copy of this order be placed before the learned Judge who passed this order as well as the Chief Justice. The IA stands disposed of."

17. A practice has developed in certain High Courts to call officers at the drop of a hat and to exert direct or indirect pressure. The line of separation of powers between Judiciary and Executive is sought to

2 State of U.P. & Ors. v. Jasvir Singh & Ors. – (2011) 4 SCC 288
3 R.S. Singh v. U.P. Malaria Nirikshank Sangh & Ors. – (2011) 4 SCC 281

be crossed by summoning the officers and in a way pressurizing them to pass an order as per the whims and fancies of the Court.

18. The public officers of the Executive are also performing their duties as the third limbs of the governance. The actions or decisions by the officers are not to benefit them, but as a custodian of public funds and in the interest of administration, some decisions are bound to be taken. It is always open to the High Court to set aside the decision which does not meet the test of judicial review but summoning of officers frequently is not appreciable at all. The same is liable to be condemned in the strongest words.

19. This Court in a judgment reported as ***Divisional Manager, Aravali Golf Club & Anr.*** v. ***Chander Hass & Anr.***[4] observed that judges must know their limits. They must have modesty and humility, and not behave like emperors. The legislature, the executive and the judiciary all have their own broad spheres of operation. It is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction. This Court held as under:

> "19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.
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> 20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of

4 (2008) 1 SCC 683

> powers under the Constitution and each organ of the State—the legislature, the executive and the judiciary—must have respect for the other and must not encroach into each other's domains.
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> 21. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book *The Spirit of Laws*) broadly holds the field in India too. In Chapter XI of his book *The Spirit of Laws* Montesquieu writes:
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> > "When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
> >
> > *Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*
> >
> > There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."
> >
> > (emphasis supplied)
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> We fully agree with the view expressed above. Montesquieu's warning in the passage above quoted is particularly apt and timely for the Indian judiciary today, since very often it is rightly criticised for "overreach" and encroachment into the domain of the other two organs."

20. Thus, we feel, it is time to reiterate that public officers should not be called to court unnecessarily. The dignity and majesty of the Court is not enhanced when an officer is called to court. Respect to the court has to be commanded and not demanded and the same is not enhanced by calling public officers. The presence of public officer comes at the cost of other official engagement demanding their attention. Sometimes, the officers even have to travel long

distance. Therefore, summoning of the officer is against the public interest as many important tasks entrusted to him gets delayed, creating extra burden on the officer or delaying the decisions awaiting his opinion. The Court proceedings also take time, as there is no mechanism of fixed time hearing in Courts as of now. The Courts have the power of pen which is more effective than the presence of an officer in Court. If any particular issue arises for consideration before the Court and the Advocate representing the State is not able to answer, it is advised to write such doubt in the order and give time to the State or its officers to respond.

21. The writ petitioner was posted at Badaun. He was to report at the place of posting and after reporting at the place of posting, he should have asked for transfer, if permissible, according to the requirement of the State. But he could not have dictated the place of posting without even joining the place where he was first posted. Therefore, we find that the orders of the High Court dated 05.03.2020 and 07.08.2019 are wholly unjustified, unwarranted, arbitrary and illegal. The same are set aside and the appeal is allowed with no order as to costs.

.....J.
(SANJAY KISHAN KAUL)

.....J.
(HEMANT GUPTA)

NEW DELHI;
JULY 9, 2021.