

OA 722 of 2021**J U D G E M E N T**

The instant application has been filed praying for following reliefs :-

- a) Quash the order dated 04.09.2021 issued at 11.45 p.m. (Night), being No. HF/O/Vig/1147/9A-53/2021/Suspension/HFW-43011(11)/169/2021-ADMIN dated 04.09.2021 by the Joint Secretary to the Government of West Bengal through the Whatsapp message by the CMOH, Barasat.
- b) Direct the Respondent No. 2 to withdraw/cancel/rescind/recall the order of suspension dated Quash the order dated 04.09.2021 issued at 11.45p.m. (Night), being No. HF/O/Vig/1147/9A-53/2021/Suspension/HFW-43011 (11)/169/2021-ADMIN, which has been passed without application of mind and arbitrary manner.
- c) Stay the order of suspension dated 04.09.2021 issued at 11.45 p.m. (Night), being No. HF/O/Vig/1147/9A-53/2021/Suspension/HFW-43011 (11)/169/2021-ADMIN dated 04.09.2021 by the Joint Secretary to the Government of West Bengal through the CMOH, Barasat-II.
- d) To pass such other or further orders or orders as to the Hon'ble Tribunal deem fit and proper.

According to the applicant, on 02.09.2021, while he was working as B.M.O.H, Chotojagulia, one Raju Dutta, husband of local Panchayet Pradhan, Smt. Sandhya Dutta, suddenly entered into the Health Centre along with 10/12 persons and illegally demanded vaccination of his associates at Primary Health Centre The Supervisor of the said Duttapukur Health Centre, however, refused to do so, since the said day was fixed for vaccination for 100 (one hundred) pregnant women, who have already registered their name long back. But all of a sudden, said Raju Dutta became violent and started assaulting the health staff. Mrs. Ashalata Das, Health Supervisor, Duttapukur P.H.C., Barasat-I, who made a representation to the applicant on the very day i.e. on 02.09.2021, asking for ensuring security of the health staffs against the said Raju Dutta. The applicant, being the In-Charge of the B.P.H.C. Duttapukur, has forwarded the said complaint of Mrs. Ashalata Das to C.M.O.H. North 24 Pgs. on 02.09.2021 in the evening. The concerned C.M.O.H. on receipt of said complaint from Mrs. Das along with the forwarding letter had forwarded the same to Duttapukur P.S. against Raju Dutta and his associates. In response to which, one F.I.R. being Duttapukur P.S. case No.

751/21 under Section 186/506/509/34 of I.P.C. was lodged. Further the said Ashalata Das, the Health Supervisor also lodged a complaint with the O.C of Duttapukur P.S. On 03.09.2021(Annexure-A/9) and on the basis of such two F.I.Rs., Shri Raju Dutta was arrested on 04.09.2021 and was produced before the Ld. C.J.M. Barasat.

As per the applicant, in the aforesaid background, suddenly C.M.O.H, had called the applicant over phone at about 12.30 p.m. on 04.09.2021, whereby asking him to visit his office without explaining any reasons for such presence. However, as the applicant went to Appollo Hospital, Kolkata, to see his sister, who is a cancer patient, he visited the office of the C.M.O.H. at about 5.00 p.m., when the C.M.O.H. enquired about one Audio Clip dated 27.04.2021, which was telecasted repeatedly in one news Channel on 03.09.2021. However, as per the direction of C.M.O.H., the applicant submitted one write up denying the allegation before C.M.O.H. at about 5.30 p.m. on 04.09.2021. Subsequently, at 8.40 p.m. on 04.09.2021, when the applicant opened his Whats App messages, he received one Memo No. CMOH-North 24 Pgs/Estb-Emq/89086 dated 04.09.2021 in his messege box, which was sent at 15.13 hours on 04.09.2021, whereby the said Dy. C.M.O.H. of Health-I, North 24 Pgs. had asked him to submit statement of defence before the enquiry committee by 12.00 noon on 06.09.2021 with regard to his alleged involvement in the said viral audio. However, without granting any further opportunity to submit his statement of defence before the said committee, the applicant with utter shock and surprise received one Whats App messege at about 11.20 p.m. on 04.09.2021 night, thereby he has been suspended under Sub-Rule 1 (b) of Rule 7 of WBS (CCA) Rules, 1971 issued by the Joint Secretary on 04.09.2021 (Annexure-A/15).

It has been submitted by the applicant that though in their reply to the original application, the respondents had enclosed one order dated 03.09.2021 (Annexure-X to reply) by C.M.O.H., whereby one enquiry committee was constituted and who was directed to submit primary investigation report by 04.09.2021 and complete report within three days from the receipt of order dated 03.09.2021. However, no such report or order of constitution of committee was ever communicated to the applicant, which he has come to know only on 14.06.2022, when he was served with the copy of the reply filed before the Registry on 13.06.2022, (the said date was fixed by this Court under the heading 'Hearing' as per direction of the Hon'ble High Court). It has been further submitted by the applicant that though from the perusal of the said Memo dated 03.09.2021, it would be evident that as per the Whats App messege dated 04.09.2021 from Dy. C.M.O.H., (who is one of the member of the said committee), who had asked the applicant to submit

written statement of defence by 12.00 noon on 06.09.2021. However, without granting such opportunity to submit written statement, the so called enquiry report was submitted as claimed by the respondents on 04.09.2021 on the basis of a letter of the applicant submitted before the CMOH on his dictate, who is even not the member of the said enquiry committee as per Memo dated 03.09.2021.

It has been further submitted that even in the aforesaid letter dated 04.09.2021, the applicant never admitted that he had administered vaccination in lieu of money rather he had raised question about the intention of the said Dibakar Das. It has been further submitted even the CMOH, North 24 Pgs vide his Memo No. CMOH-NPG/8987 dated 04.09.2021 (Annexure-A/16) had forwarded the CD containing the said Audio Clip and had requested to investigate the matter to the Inspector In-Charge, Barasat Police Station, North 24 Pgs and take necessary action, which was received by the said P.S. at 8.25 hrs. under P.S. Case No. 698 of 2021 dated 05.09.2021 and one FIR was lodged on 05.09.2021 (Annexure-A/17).

As per the applicant, from the perusal of the said complaint dated 04.09.2021 of the CMOH, it would be evident that as per the CMOH, one of the person in the Audio Clip may be Dr. Sabyasachi Roy i.e. the applicant, whereas the genuinity and contents of the said Audio Clip is yet to be proved and even the CMOH is not sure that one of the voice is actually of the applicant. On the other hand, from the perusal of the report of the enquiry committee, it would be noted that as per them, they are sanguine about the allegation against the applicant but without granting any opportunity to submit defence statement.

The counsel for the applicant has submitted that from the perusal of the Show Cause Notice dated 30.05.2022, it would be evident that as per Director of Health Services, W.B., the allegation of misuse of vaccination was thus proved. From the above, it is clearly evident that the respondents one pre determined to hold him guilty and put him under suspension with a great speedy manner by not granting any opportunity before the preliminary enquiry committee to make submission by way of submitting written statement of defence as per their own order. Even the said Enquiry Committee and the Director of Health Services, W.B., in his Show Cause Notice dated 30.05.2022, had opined that they are sanguine that the allegation was proved.

As per the applicant, the instant case was admitted on 07.10.2021 directing the applicant to serve notice upon the respondent authority and to list the matter on 11.11.2021. In the meantime, the applicant filed one MA-105 of 2021 praying for a direction to the respondent authority to release the subsistence allowances to the applicant as the applicant was not getting any

subsistence allowance till the date of filing of said MA application i.e. on 09.11.2021. However, vide order dated 18.01.2022, the said MA application was disposed of, as in the meantime, the respondents had started providing subsistence allowance. But, as per the applicant, again his subsistence allowance has been stopped since March, 2022. Even the impugned suspension order has not been reviewed and his subsistence allowances has not been enhanced as per the settled principle of law and rules within ninety days under Rule 71 (4) of W.B.S.R. Part-I.

During the course of hearing, the counsel for the applicant has submitted that though repeated opportunities were granted to the respondents to file reply and the matter was fixed for final hearing on 14.06.2022 as per the High Court's order dated 24.03.2022 passed in WPST-25 of 2022, however, he was served with the reply just before one day i.e. on 13.06.2022. Further, one Memorandum of Show Cause dated 30.05.2022, was also served upon the applicant at 2.45 p.m. on 31.05.2022.

From the perusal of the said enquiry report, it would be evident that the Committee contended that they are sanguine about charges, by flouting all the government norms and Rules with ulterior motive. Further from the perusal of the Show Cause Notice dated 30.05.2022, it would also be evident that as per the report of the Enquiry Committee, the misuse of vaccine by the applicant was thus proved as has been stated by the D.H.S., W.B. Therefore, the issuance of such show cause notice and/or enquiry has become a futile exercise as the authority has already made up their minds to hold him guilty with regard to the so called alleged Audio Clip. Therefore, as per the applicant, such action of respondents clearly demonstrate that they have made up their mind to victimize and harass the applicant without following the principle of natural justice and in violation of settled principle of law and rules.

The counsel for the applicant has further submitted that preliminary enquiry has claimed that the charges upon the applicant has been proved, without any investigation or examining the person called Dibakar Das as alleged in the Show Cause. Further, the department concerned lodged one FIR before the Barasat PS being No. 628 of 2021 and the said Audio Clip ceased by the police authority on 5.9.2021, therefore, how the respondents opined on the said Audio Clip, which is yet to be investigated and proved.

The counsel for the applicant has further submitted that it is also evident though the respondents were in very much hurry to constitute a preliminary enquiry committee and the said committee had submitted the report as well as suspension order was issued by the Joint Secretary, within a couple of hours on the same date i.e. on 04.09.2021. However, neither they have reviewed the suspension order nor they have enhanced the subsistence allowance but only on 31.05.2022, when the matter was fixed for final hearing,

served the Memo dated 30.05.2022 to Show Cause as to why the applicant would not be punished, with a observation that the allegation against the applicant has already been proved by the preliminary enquiry committee. Therefore, the Show Cause Notice or further enquiry has become a futile exercise, which shows the colourable exercise of power on the part of the respondents. Therefore, the suspension order is liable to be quashed.

The respondents has filed their reply and has stated that during the pandemic period one Audio Clip was aired in a News Channel, which seems to be the voice of the applicant. The said Audio Clip consisting of conversation of two persons, which according to the respondent, one of the voices is of the applicant. A committee of three members was formed by the CMOH, North 24 Pgs, vide Memo dated 03.09.2021 and on the said date, in front of the applicant at 6.00 p.m., it was played at the office of the CMOH. Thereafter, the said committee summoned the applicant in order to put forward his defence with regard to above allegation by 12.00 noon on 6.9.2021. On 4.9.2021, the applicant submitted one write up before the CMOH on the same day, which was taken into consideration by the committee with utmost care and it was found that the applicant conversed in the respective Audio Clip with the said Dibakar Das, wherein he had admitted that he gave vaccine to one of the relative of said Dibakar Das but he denied the back ground/contents of the said conversation. Thus on the basis of that, the committee had submitted its preliminary enquiry report on 4.9.2021 suggesting initiation of Disciplinary Proceedings against the applicant. Thereafter, the authority concerned considering the report of the Committee had suspended the applicant on 4.9.2021 in terms of Rule 7(b) 1(a) of W.B.S. (CCA) Rules, 1971 as issued by the Joint Secretary, Vigilance Branch. Subsequently, Director of Health Services, West Bengal had issued Show Cause Notice vide Memo dated 30.05.2022. It has been submitted by the counsel for the respondent that they have followed the principle of natural justice. Therefore, they have prayed for dismissal of the instant of OA.

In the said reply the respondents had enclosed the order dated 03.09.2021(Annexure-X to reply) issued by the CMOH North 24 Pgs whereby three men enquiry committee was constituted and submitted preliminary investigation report on 04.9.2021 and to conclude the order within two days to the CMOH.

The counsel for the respondent has submitted that an order of suspension passed against a government servant pending disciplinary enquiry is neither of dismissal nor from removal from service within Article 311 of the Constitution as held by the Hon'ble Apex Court in the following cases :-

- a) 1985 (2) SLR page 1, State of Orisha Vs. S.P. Dass.
- b) AIR 1957 SC 246 Md. Ghouse Vs. State of Andhra.

The applicant has submitted rejoinder, wherein he has reiterated the submission made above and referred the following judgements :-

- a) (1993) 2 SCC 259 – D.K. Yadav Vs, JMA India Ltd.
- b) (1994) 4 SCC 126 – State of Orissa through its Principal Secretary, Home Deptt. Vs. Bimal Kumar Mohanty.
- c) (1999) 2 SCC 10 – Kuldeep Singh Vs. Commissioner of Police & Ors.
- d) (2008) 8 SCC 236 – State of Uttaranchal & Ors. Vs. Kharak Singh.
- e) (2010) 2 SCC 772 – State of Uttar Pradesh & Ors. Vs. Saroj Kumar Sinha.

I have heard both the parties and perused the records. As per the respondents, in consequence of receipt of one viral audio clip, which was aired on 03.09.2021, C.M.O.H. North 24 Pgs vide Memo No. C.M.O.H-N. 24 Pgs/Estb/8976 dated 03.09.2021 had constituted one Committee by following order :-

“In reference to the audio clip, in relation to the Covid vaccination, a committee comprising of the following officers has been constituted to enquire into the matter, which is evident from the viral audio, sent via Whats App.which speaks itself.

- i) Dr. Soumabha Dutta, Dy. CMOH-I, North 24 Parganas (Chairman)
- ii) Dr. Somnath Mondal, Dy. CMOH-III, North 24 Parganas.
- iii) Dr. Chinmay Nandi, DNO NUHM, North 24 Parganas.

It is directed to submit the primary investigation report on Saturday (04.09.2021) & complete report within three (3) days to the undersigned from the date of issue of this order.”

As per the respondents, the said viral audio clip was played before the applicant at 06.00 p.m. on the said day and the committee subsequently summoned the applicant asking him to submit defence statement by 12.00 noon on 06.09.2021 vide Memo No. CMOH-N24Pgs/Esbt-Enq/8986 dated 04.09.2021, which is as follows :-

“Your statement of defence must reach the enquiry committee by 12.00 noon on 06.09.2021, Monday.”

Subsequently, on the same day, the said Enquiry Committee submitted their preliminary report before the CMOH, which is as follows :-

“Observations of the committee:

An audio clip, was produced as the primary source.

On person (First person) over phone was heard asking the other person (Second person) to refund money taken on his behalf for arranging Covid vaccination. He also told the other party to keep it secret.

During the course of conversation, it was evident that some registration was done at the portal for first dose of vaccine by the first person.

Dr. Sabyasachi Roy gave a deposition to the CMOH, North 24 Pgs, where he confessed that the voice in audio recording was his and one Dibakar Das who runs a medical shop in Airport area. He stated in his deposition, the entire conversation was viral and telecasted a news channel. He stated that he gave vaccination to one relative of Dibakar Das in his residence. However, he denied taking any money against it.

The committee was thus sanguine that, the Dr. Roy, BMOH, Chhotojagulia BPHC, Barasat-I had flouted all Government norms and administered vaccine at the residences of individuals for some vested interest.

Recommendation :

The Committee suggests, initiation of Departmental Proceedings against Dr. Sabyasachi Roy.”

However, as per the applicant, he was called by the CMOH at about 12.30 p.m. on 04.09.2021, when he was asked about audio clip dated 27.04.2021, which was telecasted in one news channel on 03.09.2021 and further CMOH asked to submit one write up in this regard, which he submitted before the CMOH at about 5.30 p.m. on 04.09.2021, wherein the applicant denied that he never administered vaccination in lieu of money rather as per the applicant, he had raised the suspicion about the intention of the said Dibakar Das. Even the Dy. CMOH, asked him to submit defence statement by 06.09.2022, however, without granting him the opportunity of filing defence statement, and the said Committee submitted report, taking into account the

write up of the applicant submitted before CMOH (who is not even the member of the such Committee).

It is noted that as per the applicant he was never served with the Memo dated 03.09.2021, whereby the Enquiry Committee was constituted and/or report of the Enquiry Committee dated 04.09.2021, but one Whats App message was sent on 15.13 hours on 04.09.2021 asking him to submit defence statement by 12.00 noon by 06.09.2021. Even the respondents had sent suspension order dated 04.09.2021 via Whats App message at about 11.20 p.m. on 04.09.2021 i.e. within a couple of hours without granting him any opportunity to file defence statement as asked by the Dy. CMOH vide his letter dated 04.09.2021.

During the course of hearing on 12.02.2021, it has been specifically submitted by the counsel for the applicant that though the applicant was suspended, without affording any opportunity to file his defence statement before the Committee, within a couple of hours on 04.09.2021 at 11.20 p.m. through Whats App message, however till 24.02.2021 i.e. after lapse of almost six months, neither review of suspension order has been done nor Charge Sheet was issued though he has been suspended under Rule 7 (1) of WBS(CCA) Rules, 1971. Even the subsistence allowance also paid by the intervention of the Court but was again stopped subsequently.

Normally, when a Disciplinary Authority seeks to suspend an employee pending enquiry or contemplated enquiry or pending investigation into grave charges of misconduct or defalcation of funds or serious cause of omission and commission, the order of suspension would be passed after taking into consideration the gravity of the misconduct sought to be enquired into or investigated and any of the evidence placed before the Appointing authority and on application of mind by the Disciplinary Authority, the appointing authority or Disciplinary Authority should consider the main aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be an administrative written or automatic order to suspend an employee. The said suspension must be a step to the ultimate result of the investigation or enquiry.

It is observed that the alleged audio clip was aired in a news channel on 03.09.2021 and as per the respondents on receipt of the said audio clip, an Enquiry Committee was constituted on the same day by the CMOH. In pursuance to that Dy. CMOH had asked the applicant to file his written defence statement before the Enquiry Committee by 12.00 noon on 06.09.2021, however, on the same day i.e. on 04.09.2021, the said Enquiry Committee submitted their report and one suspension order was

communicated to the applicant through Whats App message at about 11.20 p.m.. However, as per the applicant, he was not informed about such constitution of Committee on 03.09.2021 but, had received one Whats message only at about 15.13 p.m. on 04.09.2021 whereby he was instructed to put forward his statement of defence regarding alleged involvement in the viral audio clip by 12.00 noon on 06.09.2021. Moreover, before submitting any such defence statement, the Committee has allegedly submitted their enquiry report (which was also not communicated to the applicant and not denied by the respondents also) and one suspension order was communicated to him through Whats App message on 04.09.2021 at late night.

From the perusal of the said Enquiry Report dated 04.09.2021, it is observed that the Enquiry Committee came to a conclusion being sanguine about the alleged involvement of the applicant only on the basis of one write up submitted before the CMOH who was not even the member of the said Committee, without granting the applicant any opportunity of submitting his defence. Even no further evidences or witnesses were examined or cross examined by the said Enquiry Committee.

It is further noted that simultaneous the authority with a great speed had suspended the applicant on the basis of one write up submitted before the CMOH (under duress and coercion as claimed by the applicant) and had communicated the suspension order passed by the Joint Secretary under sub-rule 1(b) of Rule 7 of WBS (CCA) Rules, 1971. Rule 7 (1) deals with the suspension, which stipulates hereunder:-

Suspension

7(1)

7(1) (a) The appointing authority or (b) any authority to which it is subordinate or (c) any authority empowered by the Governor in that behalf may place a Government employee under suspension :

- a) Where a disciplinary proceeding or departmental enquiry against him is contemplated or is pending ; or
- b) Where in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest of the security of the State; or**
- c) Where a case against him in respect of any criminal offense is under investigation or trial.

Provided that where the order of suspension is made by an authority lower than the appointing authority, such authority

shall forthwith report to the appointing authority the circumstances in which the order was made.”

As per the applicant, the contents and/or veracity of the said viral audio clip is yet to be proved and only on 05.09.2021, CMOH had filed a complaint before the police authority for investigation in this regard. (However, the allegation made by the respondents in the suspension order has no relation with the security of the State) the respondents had opined that the allegation against the applicant has been proved. Therefore, subsequent enquiry or Show Cause Notice, which was issued after a long time i.e. on 30.05.2022 would be a futile exercise.

It is observed that in one hand the applicant has been suspended on the ground of threat to the security of State without supplying him the order of constitution of Committee or Enquiry Report (which was only enclosed along with the reply filed by the respondents on 13.06.2022) even without granting him opportunity to make defence statement by the Dy. CMOH vide Whats app message dated 04.09.2021 at 15.13 p.m. and curiously enough, within a span of couple of hours, almost at mid night, he was communicated with the order of suspension by Whats App message. On the other hand, no further steps was taken either for further enquiry with regard to the veracity of the said audio clip and/or its contents thereof but only a Show Cause Notice was issued after eight months though in the meantime no stay order was passed and this Tribunal had repeatedly asked the respondents whether any Disciplinary Proceedings was initiated or not against the applicant. Since suspension is not a punishment and as per the respondents they are sanguine about the involvement in the said audio clip, therefore, it is not understood, why he was kept under suspension only for a long period without any review of the suspension order as required under Rule 71(4) Note (2) (iii). In this regard one specific Notification No. 9266-F(P) dated 16.11.2012 was issued, which stipulates interalia:

A) **Functions.**

- (i) “The Review Committee shall review the cases of Officers/employees under suspension in order to determine whether there are sufficient grounds for continuation of suspension.
- (ii) In every case the review shall be done within 90 (ninety) days from the date of order of suspension or deemed to have been placed under suspension. In a case where the period of suspension has been found to be prolonged, the next review

shall be done within 180 (One hundred eighty) days from the date of last review.

B. Procedure

- (i) The Review Committee, while assessing the justification for further continuation of any suspension, shall look into the progress of inquiry/investigation against the officer by obtaining relevant information from the authority inquiring/investigating into the charges.
- (ii) The Review Committee, while examining a case, shall consider the possibility of tampering with the evidence and/or influencing the process of inquiry or investigation by the Officer/employee under suspension.
- (iii) The Review Committee shall submit a detailed report clearly stating its recommendations including variation of the amount of subsistence allowance in terms of proviso to rule 71 (1)(a) of W.B.S.R. Part-I and the reasons for arriving at such recommendations to the appointing authority concerned for considering further course of action.”

From the perusal of Rule 71 (4) Note (2) (iii) as well as Notification dated 16.11.2012, it transpires that review shall be done within 90 (ninety) days from the date of order of suspension.

Further, the same issue has already been dealt with by the Hon'ble Apex Court in the case of Union of India & Ors. Vs. Dipak Mali reported in (2010) 2 SCC 222, wherein it has been held that since admittedly the review had not been conducted within 90 (ninety) days from the date of suspension, it became invalid after 90 (ninety) days.

In the instant case, admittedly the respondents did not follow their own rules, as they did not review his suspension order within 90 (ninety) days which endorse the arbitrariness of the respondents that they are only interested to keep the applicant under suspension but not to take any further steps as per provisions of the service rules.

Moreover, the applicant has been suspended under Rule 7(1)(b) of WBS (CCA) Rules, 1971, which may be invoked, if the activities of the employee is prejudicial to the interest of the security of the State. Therefore, the allegation against the applicant and his suspension under 7(1)(b) has no

relation, the respondents whimsically, arbitrarily and in colourful exercise of power has suspended the applicant.

In view of the above, in my considered opinion, the said suspension order is not sustainable as has been issued without granting the applicant the opportunity of submitting the defence statement as per their own order and/or without reviewing the suspension order or enhancement of subsistence allowance. Even since March-2022 his subsistence allowance has been stopped till the date of final hearing, which shows the arbitrariness on the part of the respondents. Therefore, I quash and set aside the suspension order dated 04.09.2021. Accordingly, the OA is disposed of with no order as to costs. .

URMITA DATTA(SEN)
MEMBER (J)