



GAHC010211662015

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3605/2015

DR. DEEPAK KUMAR GOGOI
S/O LT. MAHENDRA NATH GOGOI R/O HOUSE NO. 21, UDAY PATH, R.G.
BARUA ROAD, GUWAHATI- 781024, DIST. KAMRUP METRO, ASSAM.

VERSUS

OIL INDIA LIMITED and 5 ORS
A GOVT. OF INDIA ENTERPRISE REGD. OFFICE DULIAJAN P.O. DULIAJAN-
786602, DIST. DIBRUGARH, ASSAM REP. BY THE CHAIRMAN- CUM-
MANAGING DIRECTOR CMD.

2:THE RESIDENT CHIEF EXECUTIVE

OIL INDIA LIMITED P.O. DULIAJAN--786602
DIST. DIBRUGARH
ASSAM.

3:THE HEAD-MEDICAL SERVICES

MEDICAL DEPARTMENT
OIL INDIA LIMITED P.O. DULIAJAN - 786602
DIST. DIBRUGARH
ASSAM.

4:THE HEAD HOSPITAL ADMINISTRATION

MEDICAL DEPARTMENT
OIL INDIA LIMITED
P.O. DULIAJAN - 786602
DIST. DIBRUGARH
ASSAM.

5:THE GENERAL MANAGER Fand A



OIL INDIA LIMITED
P.O. DULIAJAN - 786602
DIST. DIBRUGARH
ASSAM.

6:THE DIRECTOR HR and BD
A APPELLATE AUTHORITY OIL INDIA LTD. PLOT NO. 19
SECTOR 16-A
NOIDA- 201301
UTTAR PRADESH.

7:SMTI TULIKA GOGOI

W/O- DR. DEEPAK KUMAR GOGOI
R/O- OIL INDIA LIMITED HOUSING COLONY
D-67
P.O- DULIAJAN
PIN- 786602
DIST- DIBRUGARH
ASSAM.

8:SHIVANGI GOGOI
C/O SMT. TULIKA GOGOI
D/O DR. DEEPAK KUMAR GOGOI
R/O AND C/O G. MOHAN
CHITTRANJAN BARUAH PATH
PHUKAN NAGAR
SIVASAGAR
ASSAM
PIN-785640

9:RUSTAV GOGOI
C/O SMT. TULIKA GOGOI
S/O DR. DEEPAK KUMAR GOGOI
R/O AND C/O G. MOHAN
CHITTRANJAN BARUAH PATH
PHUKAN NAGAR
SIVASAGAR
ASSAM
PIN-78564

Advocate for the Petitioner : MR.R SALOI

Advocate for the Respondent : MR.K KALITA



BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. BD Konwar, Sr. Advocate
Mr. H Agarwal, Advocate
For the Respondents : Mr. MK Choudhury, Sr. Advocate
Mr. AM Bora, Sr. Advocate
Mr. Mr. K Kalita, Advocate
Mr. J Patowary, Advocate
Date of Hearing : 28.03.2024
Date of Judgment : 22.04.2024

JUDGMENT AND ORDER(CAV)

1. Heard Mr. BD Kownar, learned Senior assisted by Mr. H Agarwal, learned counsel for the petitioner. Also heard Mr. M K Choudhury, learned Senior counsel assisted by Mr. K Kalita, learned counsel for the respondent Oil India Limited and Mr. AM Bora, learned Senior Counsel assisted by Mr. J Patowary, learned counsel for the respondent Nos. 7,8 and 9.
2. The instant writ petition is filed assailing an order dated 16.09.2014 passed by the respondent No. 2 (Disciplinary Authority) imposing the penalty of dismissal from service upon the petitioner. The further challenge is an order dated 23.01.2015 passed by the respondent No.6 (Appellate Authority) dismissing the appeal preferred by the petitioner against the order dated 16.09.2014. A prayer for a direction to the respondent authority to reinstate the petitioner in service with all service benefits has also been made in this writ petition.



3. It is recorded here that the petitioner has in the meantime attained the age of superannuation during the pendency of this writ petition. It is also recorded herein that the wife, the daughter and the son of the petitioner were also impleaded in this writ petition as respondent Nos. 7,8 and 9 on their prayers as they claimed certain payment out of the financial benefits given to the petitioner.

4. The undisputed facts:

Before proceeding to the merit of the arguments advanced by the learned Senior Counsel for the parties, let's this Court first record the undisputed facts in the following paragraphs:

- I. By a communication dated 07.06.2013 (Ext.1), the Head of Medical Services alleged that, the petitioner engaged himself in some 'nefarious' activities neglecting his official duties during his official visit to Guwahati.
- II. It was further alleged that such nefarious activities even may affect the diagnostic capability of the petitioner, which may lead to fatal situation. And accordingly, departmental action should be taken against the petitioner.
- III. By an order dated 27.06.2013, the petitioner was put under suspension with effect from his date of arrest on 21.06.2013 in connection with Duliajan PS case No. 148/2013 under Section 498(A) IPC, registered on a complaint lodged by the wife of the petitioner.



- IV. In the order of suspension, it was also provided that during the subsistence of suspension, the head quarter of the petitioner shall be Duliajan and he shall not leave the head quarter without obtaining prior permission of the residency executive, the person who issued the suspension order.
- V. On 05.08.2013, the petitioner submitted an application to grant him privilege leave and station leave from 06.08.2013 for a period of 10 days to visit Guwahati for legal consultation with his lawyer.
- VI. On the application filed by the petitioner, a note was put to the effect that as per CBC Guideline, the suspended executive may be granted permission to leave station for a certain period, however there is no provision for granting leave during suspension. Another note was put to the effect that no executive should leave station before 15.08.2013.
- VII. However, after filling the application, the petitioner left the station.
- VIII. Accordingly, on 17.08.2013, a show cause notice was issued to the petitioner to the effect that the petitioner had left the station without obtaining prior written permission and he was asked to report back.
- IX. The petitioner filed a reply on 30.08.2013 and made the following explanations:
 - a. He submitted the application before Head of Medical Services, who

verbally replied that leave would be sanctioned and therefore, he proceeded to Guwahati.

- b. While travelling, his vehicle met with a serious accident. Such accident delayed the consultation with his lawyer for filing a divorce petition.
- c. Thus, his absence from Duliajan and delay in reporting back to the employer was for a bonafide reason and there was no intention on his part to disobey the reasonable order of his superior.
- d. He submitted another leave application along with the show case reply. The leave application filed along with show cause reply also narrates the same story.

X. Thereafter, the memorandum of charge along with statement of imputation, list of document and witnesses was issued.

5. The petitioner while serving under the respondent Oil India Limited was served with a memorandum of charges dated 16.11.2013 along with statement of imputation proposing to hold an enquiry under Rule 25 of Oil Executives (Conduct, Discipline and Appeal) Rules, 1982 (hereinafter referred to as Rules, 1982). The petitioner filed his written statement of defence. An enquiry officer was appointed, an enquiry was conducted, wherein the petitioner duly participated and the Enquiry Officer found that the charges were proved. Accordingly, the penalty was imposed.



6. The charges:

- I. The contents of article of charge and statement of imputation are as follows:
 - a. The petitioner / employee had committed certain acts of commission and omission constituting serious misconduct, he failed to maintain absolute integrity, devotion to duties and acted in a manner unbecoming of public servant.
 - b. It was reported that the petitioner neglected his official duties and engaged in some nefarious activities, which is in total disregard of companies image and are not conducive to the position of a Senior Doctor.
 - c. The petitioner was arrested by Duliajan Police on 21.06.2013 in connection with case No. 148/2013 under Section 498(A) IPC and was taken into custody for more than 48 hours.
 - d. In terms of Rule 1982 the petitioner was put under suspension w.e.f. 21.06.2013 with a further direction that during the period of suspension he shall not leave the head quarter (Duliajan) without prior permission of the residency executive.
 - e. However, it was reported that on 06.08.2013 the petitioner without obtaining prior written permission and in spite of communication to



him by Head Medical Service to report back immediately, he did not report back at the station till issuance of the statement of article of charge.

- f. For such action show cause notice was issued on 17.08.2013 asking him to reply to such show cause on or before 31.08.2013 and though he filed the reply, such reply was found not acceptable and by a communication dated 23.09.2013, he was advised to report the Head of Medical Service forthwith. However, he did not report till issuance of the article of charge.
- g. Thus, the petitioner has failed to maintained absolute integrity, devotion to duty and acted in a manner which is unbecoming of public servant and acted in a manner prejudicial to the interest of the company and thus, disobeyed lawful and reasonable order of superior and absented from appointed place of work without permission and thus, contravened the provisions of Sub-rule 4.1.1, 4.1.2 and 4.1.3 and committed misconduct under Sub-rules 5.5, 5.6, 5.9, 5.17, 5.18 and 5.20 of the Rules, 1982.

II. The allegation of nefarious activity is based on a communication dated 07.06.2013 (Ext.1), which was made a part of the charge memo. The allegation levelled in the said communication are as follows:

- a. The petitioner took casual leave from 16.03.2013 to 18.03.2013

citing certain personal works.

- b. However, he booked room No. 214 of hotel Natraj and undertook a misadventure of illegal love making with a lady impersonating her as legally married wife in the hotel register.
- c. Such action is a serious offence and is punishable under penal code.
- d. Such action of adultery got televised in a TV network causing damage to Oil India Hospital and medical profession as a whole.
- e. It has also a demoralising affect on the executive and staff of the Oil India Hospital as well as to other Oil India staff. Accordingly, a disciplinary action was proposed by the Head of Medical Services.

7. The defence:

The petitioner filed the written statement of defence, which can be summarized as follows:

- a. That there is no nefarious activity on his part and his relationship with his wife cannot be termed as nefarious activities and except complaint arising on his family background there have been no complaint against the petitioner so far relating to his service.
- b. Regarding the unauthorised absence, he took similar stand as taken in his reply dated 31.08.2013 to the show cause dated 17.08.2013. He took a specific stand that he had not received any communication



dated 07.06.2013 (Ext.1).

8. Assailing the aforesaid proceeding as well as punishment imposed, Mr. BD Konwar argues the followings:

- I. Referring to annexure 3, an application dated 05.08.2013, Mr. Konwar contends that the petitioner requested for grant of privilege leave and station permission for 10 days from 06.08.2013 in order to visit Guwahati for legal consultation. Therefore, in the absence of any determination that such absence of the petitioner was wilful or deliberate, the petitioner cannot be treated as an unauthorised absentee from duty inasmuch as such absence cannot be held to be wilful but it was for a compelling circumstances as the petitioner was earlier arrested in connection with Duliajan PS case No. 148/2013 under Section 498(A) IPC on an FIR lodged by his wife and on the date when the petitioner sought leave, the petitioner was already under suspension.

- II. The learned senior counsel further contends that as regards the charge of being involved in nefarious activities, such charge is also not clear and in the statement of imputation, it is not explained in what kind of nefarious activities the petitioner is involved. The complaint on the basis of which the allegation of nefarious activity was lodged relates to dispute in the domestic front and no complaint against the petitioner in involving his service is made. However, by linking the petitioner's private/



family matters with his service, the authorities have unreasonably and arbitrarily initiated the departmental proceeding against the petitioner.

- III. The learned Senior counsel further contends that the MW1 and MW3, who were brought to the proceeding to prove the allegation of the nefarious activities, deposed nothing in support of such charge. However, the enquiry authority has drawn inferences and conclusions, which were not there in the recorded evidence of MW1 and MW2 and was even not part of statement of imputation. Therefore, the conclusion of the enquiry authority is perverse. According to the learned senior counsel the evidences of MW1, MW2 and MW3 are hearsay evidences.
- IV. Accordingly, the learned senior counsel concludes that the entire proceeding is liable to be set aside and quashed on the ground of not framing any specific charge as regards nefarious activities, for the reason of having no conclusion as regards wilful absence of the petitioner from duty and also for the reason that the findings of the enquiry officer are perverse.
- V. Mr. Knownar, learned senior counsel contends that even if it is assumed that the petitioner found guilty, then also the penalty imposed is shockingly disproportionate, more particularly for the reason that the alleged unauthorised absence was during the period of suspension and that the fundamental allegation relates to and arises out of family dispute



of the petitioner and the same nowhere connects any omission or commission during his service, resulting in any misconduct. Accordingly, alternatively Mr. Konwar, learned Senior counsel submits that in the event it is held that the allegation is established, some lesser punishment other than dismissal from service should be imposed.

VI. In support of such contentions raised, Mr. Konwar relies on the decisions of the Hon'ble Apex court in the case of ***Krushnakant B Parmer Vs Union of India and Anr*** reported in ***(2012) 3 SCC 178***, ***State of Uttar Pradesh Vs Saroj Kumar Sinha*** reported in ***(2010) 2 SCC 772*** and ***S.R. Tewari vs Union of India & Another*** reported in ***(2013) 6 SCC 602***.

9. Per contra Mr. MK Choudhury, learned Senior counsel submits:

- I. This court may not sit as an appellate authority and re-appreciate the facts and evidences in exercise of its power of judicial review, more particularly, in absence of any allegation of procedural impropriety or violation of principles of natural justice.
- II. The learned Senior counsel further contends that a bare perusal of Ext.1, Ext. 3 and depositions of MW1 and MW3 shall clearly establish that the petitioner was involved in nefarious activities inasmuch as nefarious activity means activities that are wicked, immoral or criminal. Thus, on the basis of aforesaid material, the enquiry authority has arrived at the



conclusion and therefore, this court in exercise of its power of judicial review may not re-appreciate such evidence, more particularly when there are evidences on record to come into such a conclusion and it is not a case that enquiry authority has concluded finding without any evidence. He further contends that sufficiency of evidence cannot be a subject matter of judicial review in case of departmental proceeding.

III. So far relating to alternative argument of Mr. Konwar, Mr. MK Choudhury, contends that remanding the matter for a fresh punishment will be a futile exercise in the given fact of the case inasmuch during the pendency of this writ petition, the petitioner had already attained the age of superannuation and therefore there cannot be any question of reinstatement. Payment of back wages cannot also be directed when the determination made by the enquiry authority is held to be correct.

10. This court has given anxious consideration advanced by the learned counsel for the parties, perused the record of the disciplinary authority.
11. The charges as discussed hereinabove were alleged contravention of the provision of Sub-rule 4.1.1, 4.1.2 and 4.1.3 of Rule 4 and Sub-rules 5.5, 5.6, 5.9, 5.17, 5.18 and 5.20 of Rule 5 of Rules, 1982.
12. As Rule 4 is one of the bone of contention same is quoted herein below:

“4. General.-

4.1 every employee of the company shall at all times-

4.1.1 maintain absolute integrity;

4.1.2 maintain devotion to duty; and

4.1.3 do nothing which is unbecoming of Government servant."

13. The term "integrity", "devotion" and "unbecoming" have not been defined in the Rules, 1982. The dictionary meaning of integrity is the quality of being honest and having strong moral principle. Devotion shall mean committing or dedicating oneself to a purpose. Unbecoming is unsuitable or inappropriate. In the context of service rule, therefore, integrity shall relate to being honest and having strong moral principle while serving the institution. Similarly, devotion shall mean in the present context committing or dedicating to the duty assigned as employee. Yet again unsuitability or inappropriate shall also relate to the service rendered by the employee. In this regard, the test in term of the decision rendered by the Hon'ble Apex Court in ***S. Gobinda Menon vs Union of India*** reported in ***AIR 1967 SC 1274***, is a test whether the act or omission has some reasonable connection with the nature and condition of his service or whether the act or omission has cast any reflection upon the reputation of the employee for integrity or devotion to duty as a public servant.
14. The other charge relates to misconduct, which is classified under Rule 5 of the Rules, 1982. According to the article of charge, the petitioner acted in a manner prejudicial to the interest of the company (5.5), wilful disobedience of lawful and reasonable



order of the superior (5.6), neglect of works or negligence in performance of duty (5.9), commission of act which amount to a criminal offence involving moral turpitude (5.17), absence from place of work without permission or sufficient cause (5.18), commission of any act subversive of discipline or which amount to a criminal offence.

15. The enquiry officer on the basis of allegation made in Ext. 1 and oral evidence of MW1 concluded that the petitioner did not attend the IMA meeting and meeting with different companies regarding procuring of generic medicine during official tour with effect from 02.02.2013 to 10.02.2013 and as per MW1 the petitioner could be busy with some other business, which is not becoming of his status. The enquiry officer on the basis of the Ext 1 letter dated 07.06.2013 and on the basis of deposition of MW1 concluded that the complaint (Ext.1) is true inasmuch as the petitioner could not substantiate his claim that he attended the IMA conference at Guwahati during his official tour from 02.02.2013 to 10.02.2013 and thus concluded that the charged employee has neglected his official duty.
16. In the case of **Surath Ch. Chakrabarty Vs State of West Bengal** reported in **AIR 1971 SC 752**, it was held by the Hon'ble Apex Court that it is not permissible to hold an enquiry on a vague charge as the same does not give clear picture to the delinquent to make an effective defence, because he may not be aware, as what is the allegation against him and what kind of defence he can put in rebuttal thereof. It was further observed that the grounds on which the definite charge or charges are framed is to be communicated to the person to the person charged together with a



statement of allegation, on which charge is based and any other circumstances, which it is proposed to be taken into consideration. The Hon'ble Apex Court further went to hold that such rule embodies a principle which discloses the allegation on which the charges preferred are founded.

17. In ***Sawai Singh Vs- State of Rajasthan*** reported in ***AIR 1986 SC 995***, the Hon'ble Apex Court held that even in a domestic enquiry, the charge must be clear, definite and specific as it would be difficult for any delinquent to meet the vague charges. It was also held that evidence should not be perfunctory even if the delinquent does not take defence or make a protest that the charges are vague and that does not save the enquiry from being vitiated for the reason that there must be fair play in action, particularly in respect of an order involving adverse or penal consequence. However, in the case in hand there is no whisper in the charge memo or statement of imputation as regards any illicit relation of the petitioner with the lady in question.
18. In the case in hand and as recorded hereinabove, neither the charge memo nor the statement of imputation discloses anything as regards the negligence of the petitioner in not attending the IMA conference or not attending meeting with the companies for purchase of generic medicine. The letter dated 07.06.2013 (Ext 1), on the basis of which the disciplinary proceeding was initiated, only states that taking advantage of his official tour from 02.02.2013 to 10.02.2013, the petitioner did not bother to accomplish any of the assigned duties for which he was granted tour, rather he used

that official tour for his nefarious activities. Such allegation cannot be concluded to be a charge that the petitioner was assigned with the duties to attend IMA conference and to meet companies for purchase of generic medicine, however, he neglected such duties. The fact also remains that no material of such assignment were either part of list of documents or part of the departmental proceeding. Such conclusion of guilt and the conclusion that the allegation levelled in Ext. 1 is correct was based on the deposition of MW1. The MW1 deposed that as per the statement of the colleague and the then Head of Medical Services, the petitioner was not seen in the conference and the then Medical Head intimated the MW1 that the petitioner could be busy with some other businesses which are not becoming of his status. The fact remains that none of the said colleague and the then medical head who issued the Ext. 1 were examined and the MW1 was not part of the team who visited Guwahati for the assignments. It is true that in a departmental enquiry, this court should not look into the sufficiency of evidence but this court can very well appreciate whether the allegation against the delinquent has been established by such evidence acting upon which a reasonable person acting reasonably arrive at such finding upholding the charge against the delinquent person. If there are some legal evidences on which such finding could have been arrived, the court will not look into the sufficiency or adequacy of evidence. In the case in hand, as discussed hereinabove, not only any definite charge as regards non-attending the IMA conference and meeting with company for purchase of generic medicine but also the statement of imputation is silent about such charge. The author



of Ext. 1, on the basis of which the proceeding was initiated was also not examined as MW. The MW1 was admittedly not the Head of Medical Services when the allegation was made, nor was he a part of the team, who were supposed to attend the meeting and conference and his deposition is based on hearsay evidence. Such evidence cannot be treated as legal evidence to reasonably conclude negligence and impose the penalty of dismissal from service as has been done upon the petitioner. It is also true that strict rules of evidence are not applicable in a departmental proceeding however, the allegation against the delinquent must be established by such evidence, upon which a reasonable person acting reasonably and with objectivity, may arrive at finding upholding the gravity of the charge against delinquent employee, which the enquiry officer has failed, in this case as discussed hereinabove. That apart, the charge so far relating to negligence of duty on the basis of which the petitioner was found guilty as reflected at paragraph-8.1(i) and 8.1(ii) of the enquiry report was also vague.

19. Now coming to the allegation of nefarious activities, the findings of the enquiry officer is based on the evidence of MW-1 and MW-3 and on the basis of Exhibit-2 and Exhibit-3. Such allegation is dealt and determined at paragraph 8.1(iii) of the enquiry report. The conclusion is quoted herein below:-

“In view of his open declaration and exhibition of illicit love affairs by CO himself in the Face Book through (Exhibit (fresh)-2, Exhibit (fresh) -3, the postings of CO’s friends and well wishes reflecting the response of the



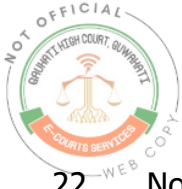
members of the OIL community towards the outrageous, irresponsible and disgusting behaviour of CO; his staying together in Hotel Nataraj with Ms. Jimly Gogoi (Bora) impersonating as his wife; the incident of his arrest along with the said lady at Guwahati which was televised, their transfer to Tinsukia Police Station (Ref. Oral evidence of MW-3) and his arrest by Duliajan Police prove that CO was engaged in some nefarious activities which were in total disregard of the Company's image and were not conducive to the position of a senior doctor".

20. So far relating to the aforesaid conclusion, there was also no specific charge against the petitioner alleging any activity of the petitioner having illicit relation with any lady or finding them in Hotel Nataraj or their arrest in connection with the illicit relation, televised news etc. except the statement that the petitioner was involved in "nefarious activities" while attending the IMA Conference and meeting with companies for the purchase of generic medicine. That being the position, in the absence of any specific charge, the enquiry officer could not have reasonably arrived at the conclusion as reflected at paragraph 8.1(iii) of the enquiry report. That apart, though the MW-1 and MW-3 did not specifically depose anything as regards any nefarious activities, however, the enquiry officer relying on the Exhibit-2 and Exhibit-3, the uploaded photographs in facebook concluded "it is visible from the demeanour of both MW-1 and MW-3, their actual feeling about the context of these documents and they remained **unspoken out of their decency on one hand and on the other hand,**



uncomfortable feeling of shame towards having openly express their opinion of such behaviour the petitioner visible nefarious activities.” In the considered opinion of this Court, a reasonable person could not have made the conclusion as made by the enquiry officer as regards nefarious activities on the basis of such evidence inasmuch as the Exhibit-2 and Exhibit 3 are photographs of petitioner and one lady standing nearby downloaded from facebook post.

21. Yet another aspect as regards the conclusion of commission of nefarious activities, it is clear that such conclusion is based on the illicit relationship. The aspect relating to illicit relationship requires factual proof and on the basis of surmises and conjecture, a presumption cannot be drawn in this regard. The Hon'ble Apex Court in the case of ***Ministry of Finance and another vs S. B. Ramesh*** reported in ***(1998) 3 SCC 227***, dealing with a departmental proceeding in the backdrop of an allegation against an Income Tax Officer of having illicit relationship with another lady, made an observation that an act of relationship entered by an individual with another female or male as the case may be, while his/her spouse is alive, would be an act amounting to adultery and be considered as an immoral act, so far as Indian society is concerned, the same would, however, not be a ground for initiating departmental proceeding by the employer and it be left best for the person, who may be affected individually to take remedy and proceed against him/her in civil law or for initiating divorce proceeding as the case may be. Such ratio is squarely applicable in the present case in the given fact as recorded hereinabove.



22. Now, coming to the allegation of leaving station without obtaining prior written permission, the enquiry officer recorded its conclusion and finding at paragraph 8.3. The conclusion is to the effect that the order of suspension (Exhibit-10) clearly stipulates that during suspension, the petitioner's headquarter shall be Duliajan and he shall not go out of the station during period of suspension without prior permission of residency executive, however, he left the station without obtaining prior permission. Though the petitioner intimated the fact of his leaving head quarter to the MW-1, however, the petitioner was fully aware that the MW-1 did not have authority to grant him leave during the period of suspension and thus the petitioner acted under his own risk and responsibility and therefore disobeyed his superior's lawful order and failed in duty.
23. Regarding the similar allegation of continued absence of the petitioner without permission in spite of advice from his superior and that the petitioner did not report back in spite of the show cause notice dated 17.08.2013, the enquiry officer concluded that through the letter dated 25.09.2013 the petitioner expresses his unwillingness to join back at Duliajan and requested to join in any location, other than Duliajan and thus, the petitioner committed misconduct.
24. The Hon'ble Apex court in the case of **Krushnakant B Parmer (supra)** in no un-equivocal term held that whether unauthorised absence from duty amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether the absence is wilful or because of

compelling circumstances. In the case in hand, so far relating to the unauthorised absence, there is no discussion what-so-ever as regards the defence taken by the petitioner, explaining the reason of absence, not to say of any conclusion of the enquiry authority that the absence of the petitioner was wilful.

25. It is well settled that absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful and in case of absence under compelling circumstances, such absence cannot be held to be wilful. Therefore, in the enquiry proceeding, a determination was required to be made whether such absence was wilful unauthorised absence or whether the explanation given by the delinquent can be plausible reason, which may ultimately lead to the conclusion that though it was unauthorised absence, but it was not wilful. No such determination has been made by the enquiry officer. That being so, such conclusion without there being any recorded reason is also a perverse decision.
26. Thus, this Court is of the unhesitant view that the authority has committed serious procedural error by not framing specific charge and making conclusion on the basis of facts, which were not part of statement of imputation resulting in manifest injustice and violation of principle of natural justice inasmuch as the petitioner was not aware of the specific allegation to defend himself as discussed and detailed hereinabove. This Court is also of the unhesitant view that the charges against the petitioner was concluded to be proved on the basis of the evidence as discussed hereinabove, acting upon which, a reasonable person acting reasonably and with objectivity could not



have concluded in that way. Thus, the petitioner did not receive fair treatment during the disciplinary procedure. Similarly, the explanation given for alleged unauthorized absence and for not joining within time was even not taken into consideration and no conclusion was made as regards wilful disobedience/absence in duty. In view of the above, determination and decision, this Court is of the view that the petitioner has been able to make out a case of interference in exercise of power of judicial review. Accordingly, the impugned order dated 16.09.2014 and 23.01.2015 stands set aside and quashed.

27. Having held so, this Court cannot also be oblivious of the fact that the petitioner has in the meantime attained the age of superannuation. Therefore, in the given facts of the present case, it is provided that the petitioner be treated to continue in service till his age of superannuation for the purpose of granting him the superannuation benefit and his pay and other benefits be notionally fixed for grant of the superannuation benefit. After such fixation, the benefit be granted, if any, to the petitioner. Such exercise be carried out within a period of six weeks from the date of receipt of certified copy of this order to be furnished by the petitioner before the competent authority.
28. As regards the claim of back wages, the initial burden is upon the employee to establish that he was not gainfully employed during the period of dismissal. It is also well settled that a right will not be created for grant of back wages only for the reason of setting aside the order of dismissal by a Court and same will depend upon given



fact of each case. In the case in hand, the petitioner was by profession a Doctor and whether he was gainfully employed during the period of dismissal or not, cannot be determined in the present proceeding. However, it is provided that in the event, the petitioner claims back wages, before the authority, the respondent employer shall consider the same and pass a reasoned order in this regard. Such exercise be carried out within a period of six weeks from receipt of the claim that may be filed by the petitioner.

29. The writ petition stands disposed of accordingly. The parties to bear their own costs.

JUDGE

Comparing Assistant