



GAHC010107852022

Page No.# 1/16



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

Case No. : WP(C)/3838/2022

DR. PRABHAS CHANDRA SARMA
S/O- LATE PRAFULLA SARMA,
R/O- P.C HRIDAYALAY, MEHERPUR,
P.O- MEHERPUR,
P.S- RANGIRKHARI, SILCHAR,
DIST- CACHAR, PIN-788005, ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMMISSIONER AND SECRETARY GOVT. OF ASSAM,
HEALTH AND FAMILY WELFARE DEPARTMENT , DISPUR,
GUWAHATI- 06

2:THE DIRECTOR
GOVT. OF ASSAM
HEALTH AND FAMILY WELFARE DEPARTMENT
HENGRABARI

GUWAHATI

3:THE ADDL. SECRETARY
GOVT. OF ASSAM
HEALTH AND FAMILY WELFARE DEPARTMENT
DISPUR

GUWAHATI- 06

4:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
BELTOLA
MAIDAMGAON
GUWAHATI-2



Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : MR. D P BORAH(SC, HEALTH)

**BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : **13.03.2023.**

Date of judgment : **02.05.2023.**

JUDGMENT & ORDER (CAV)

Heard Mr. K. N. Choudhury, learned senior counsel assisted by Mr. R. M. Deka, learned counsel appearing for the writ petitioner. Also heard Mr. D. P. Borah, learned Standing Counsel, Health & Family Welfare Department, Assam appearing for the respondent Nos.1, 2 and 3. Mr. A. Hasan, learned Standing Counsel, office of the Accountant General (A & E), Assam has appeared for the respondent No.4. This writ petition is being taken up for disposal at the stage of admission hearing with the consent of both the parties.

2. By filing this writ petition, the petitioner has assailed the order dated 03.11.2021 dismissing him from service on the ground of the alleged misconduct having been established in the departmental proceeding drawn up against him. The facts of the case, as projected in the writ petition, are that the petitioner was originally appointed as a Resident Physician, TID vide order dated 09.01.1990 and posted at the Assam



Medical College & Hospital, Dibrugarh, in which post, he had joined on 12.01.1990. Since then, the petitioner has been continuously rendering his service under the Health & Family Welfare Department, Government of Assam. While serving as the Professor in the Department of Cardiology, Silchar Medical College & Hospital (SMCH), Silchar, by the order dated 08.12.2016, the petitioner was transferred from Silchar and posted as Professor of Cardiology in the Gauhati Medical College & Hospital (GMCH) against a vacant post. However, in the notification dated 08.12.2016, it was mentioned that the petitioner will be attached in the same capacity at the Fakharuddin Ali Ahmed Medical College & Hospital (FAAMC&H), Barpeta against the vacant post of Professor of Cardiology Department, GMCH, Guwahati for the purpose of strengthening of the Cardiology Department of FAAMC&H, Barpeta. Pursuant to the transfer order dated 08.12.2016 the petitioner had joined at GMC&H, Guwahati on 23.12.2016 but he did not report for duty at the FAAMC&H, Barpeta. According to the writ petitioner, he was suffering from various health problems besides facing some personal difficulties, as a result of which, he could not report for duty at Barpeta. As per averments made in paragraph 5 of the writ petition, the petitioner had submitted leave applications seeking earned leave and medical leave for the period of his absence. The petitioner had also submitted a representation before the authorities on 30.12.2016, through proper channel, intimating that his application for availing winter vacation with effect from 01.01.2017 for a period of two months was already under process before the Director of Medical Education, Assam. On 29.12.2017 the petitioner had submitted another representation before the respondent No.1, through proper channel, expressing difficulties on health



ground as well as family problems faced by him, with a request to modify the order attaching him at FAAMCH, Barpeta. In the representation dated 29.12.2017, it was also mentioned that if the transfer order dated .08.12.2016 cannot be revised by placing him either at the SMCH or the GMCH then he be allowed to go on voluntary retirement. The representation dated 29.12.2017 was followed up by similar representations dated 26.03.2018 and 18.05.2018 wherein, the petitioner had stated that he was suffering from various diseases which would make it difficult for him to relocate at Barpeta. During the pendency of those representation submitted by the petitioner, the respondent No.3 had issued a show cause notice dated 04.01.2020 alleging that the petitioner had remained unauthorizedly absent from duty with effect from 23.12.2016 leading to serious disruption in patient care and academic activities. The petitioner was, therefore, asked to explain within seven days, as to why, a disciplinary proceeding should not be drawn against him.

3. On 09.01.2020, the petitioner submitted his reply to the Show Cause Notice dated 04.01.2020 explaining his stand in the matter with a request to sanction his leave as well as the application for voluntary retirement. However, not being satisfied with the reply submitted by the petitioner, charge-sheet dated 26.11.2020 was served upon the petitioner under Rule 9(2) of Assam Services (Discipline & Appeal) Rules, 1964 calling upon him to show cause as to why, penalty prescribed under Rule 7 should not be imposed upon him. The writ petitioner had submitted his reply to the charge-sheet and the statement of allegations appended thereto on 04.12.2020. An Enquiry Officer was appointed to go into the charge brought against the petitioner. The Enquiry Officer submitted his report dated 05.05.2021 holding that the allegation



of misconduct brought against the petitioner stood fully established. Based on the Enquiry Report dated 05.05.2021, the impugned order dated 03.11.2021, imposing major penalty of dismissal from service with disqualification for future employment, under Rule 7(vii) of the Assam Services (Discipline & Appeal) Rules, 1964, was imposed upon the petitioner with immediate effect. Challenging the aforesaid order dated 03.11.2021 the instant writ petition has been filed.

4. Mr. K. N. Choudhury, learned senior counsel appearing for the petitioner has argued that this is not a case of unauthorized absence from service but a genuine case where the petitioner, owing to his personal difficulties, could not report for duty at Barpeta. Mr. Choudhury further submits that the petitioner had submitted applications seeking leave during the period of absence but the said applications have not been considered by the authorities in accordance with law. It is also the submission of Mr. Choudhury that once a request for allowing him to go on voluntary retirement was made by the petitioner vide his letter dated 29.12.2017, the respondent authorities were duty bound to consider his request and allow the petitioner to go on voluntary retirement under F.R. 56(c). The same not having been done and no order having been passed till date on the request for allowing the petitioner to go on voluntary retirement, the initiation of the departmental proceeding leading to the imposition of major penalty of dismissal from service upon the petitioner is illegal and hence, liable to be declared so by this Court. In support of his above arguments, Mr. Choudhury has relied upon the law laid down by the Supreme Court in the case of **Dinesh Chandra Sangma vs. State of Assam and others** reported in **(1977) 4 SCC 441** and in **Union of India and others vs. Sayed Muzaffar Mir**



reported in **1995 Supp (1) SCC 76.**

5. The learned senior counsel for the petitioner has further argued that although the respondents have projected that the petitioner was in between, transferred and posted at the Jorhat Medical College & Hospital, Jorhat, yet, no such transfer order was ever served upon the petitioner. Under the circumstances, submits Mr. Choudhury, this is a clear case of harassment being meted to the petitioner for reasons which were not bonafide.

6. The respondents have not filed any affidavit despite time granted by this court. However, responding to the arguments made by the petitioner's counsel, Mr. D. P. Borah, learned Standing Counsel, Health & Family Welfare Department, Assam has argued that the petitioner has not denied that he had remained absent from duty continuously since 23.12.2016, without obtaining permission from the departmental authorities. Such unauthorized absence from duty by the petitioner had disrupted the functioning of the Cardiology Department in an important Medical College Hospital besides causing serious disturbance in the academic curriculum of the students undergoing MBBS courses. It is in such factual backdrop the respondent authorities were compelled to initiate disciplinary proceeding against the petitioner since he was unrelenting in his conduct.

7. In so far as the request to allow the petitioner to go on voluntary retirement is concerned, Mr. Borah has submitted, in his usual fairness, that such request made by the petitioner had been received but according to the learned standing counsel, an application for voluntary retirement would have to be considered by the



Government in accordance with law. Mr. Borah further submits that the petitioner did not submit any formal application seeking voluntary retirement in proper format by serving proper notice upon the respondents, as a result of which, his request has not been considered by the authorities till date.

8. I have considered the submissions made by learned counsel for both the sides and have gone through the materials available on record.

9. Save and except issuance of the transfer dated 31.12.2019 posting the petitioner at the Jorhat Medical College & Hospital, Jorhat, the facts of this case are more or less admitted. The entire controversy started since 23.12.2016 when the petitioner, after joining at the GMCH in terms of the transfer order dated 08.12.2016, did not report for duty at the FAAMC&H, Barpeta. The petitioner has claimed that he had made repeated requests either to allow him to go on leave or to go on voluntary retirement due to the difficult circumstances faces by him on account of health condition and family life. The learned departmental counsel has not disputed such claim of the petitioner nor is there anything on record to controvert the same. As such, this court would have to proceed with the matter by treating such claim of the petitioner as correct.

10. Since the impugned order dated 03.11.2021 imposing major penalty of dismissal from service upon the petitioner is under challenge in this writ petition on the grounds of violation of procedural safeguards by contending that there was no definite charge brought against the petitioner and the Enquiry Officer went into issues which were beyond the charge-sheet, it would be necessary for this court to



examine the contents of the Charge-sheet. In the Charge –sheet dated 26.11.2020, it has been *inter-alia* alleged that the petitioner had failed to join at Jorhat pursuant to the transfer order dated 31.12.2019. The relevant portion of the charge-sheet is quoted herein below for ready reference :-

“.....Whereas, in pursuance of Government notification No.HLB.35/1990/139 dated 08/12/2016, you were transferred and posted at Gauhati Medical College & Hospital against the vacant post of Professor of Cardiology Department and attached in the same capacity at Fakhruddin Ali Ahmed Medical College & Hospital. You were also transferred from Gauhati Medical College & Hospital and posted as Professor, Department of Cardiology in Jorhat Medical College & Hospital vide order No.HLB.217/2019/269-B dated 31.12.2019, but you did not join at Jorhat Medical College & Hospital;.....”

11. However, the Statement of Allegations does not refer to absence from duty at the Jorhat Medical College & Hospital, Jorhat. The Statement of Allegations made in the charge-sheet is reproduced herein below for ready reference :-

“While you were serving as Professor of Cardiology, Gauhati Medical College & Hospital attached to Fakharuddin Ali Ahmed Medical College & Hospital, you remained unauthorizedly absent for long periods from your duties and submitted applications for leave which have not been recommended by Principal-cum-Chief Superintendent, Gauhati Medical College & Hospital/ Fakharuddin Ali Ahmed Medical College & Hospital and Director of Medical Education, Assam.”

12. It will be significant to note here-in that according to the petitioner, no such order of transfer dated 31.12.2019 posting him at JMCH, Jorhat was ever served upon him. A copy of the letter dated 12.01.2022 issued by the Senior Accounts Officer,



Office of the Accountant General (A&E) Assam, addressed to the Principal-cum-Chief Superintendent, Jorhat Medical College & Hospital has been annexed to the writ petition as Annexure-L. A perusal of the communication dated 12.01.2022 goes to show that the transfer order dated 31.12.2019 was never formally issued by the department. The aforesaid letter substantiates the claim of the writ petitioner that the transfer order dated 31.12.2019 was never served on him. Notwithstanding the same and despite the fact that the statement of allegation did not contain any imputation regarding the petitioner failing to join at Jorhat, such allegation has been made in the charge –sheet. Not only that, the Enquiry Officer had recorded categorical findings in the Enquiry Report dated 05.05.2021 to the effect that upon receipt of the Show-Cause Notice dated 04.01.2020 the petitioner became aware of his transfer to Jorhat and therefore, by not complying with such transfer order, the writ petitioner has committed misconduct of insubordination, thus violating clause 3(1) of the Assam Civil Services (Conduct) Rules 1965. The above finding of the Enquiry Officer, in the opinion of this court, is wholly untenable in the eyes of law firstly on account of the fact that, unless a transfer order is properly served upon an employee, he or she cannot be expected to comply with the same. Secondly, contrary to the findings recorded by the Enquiry Officer in the report dated 05.05.2021, there is no reference to the transfer order dated 31.12.2019 in the Show-Cause Notice dated 04.01.2020. The transfer order dated 31.12.2019 finds mention for the first time in the Charge – Sheet dated 26.11.2020 served upon the petitioner in the departmental proceeding. The petitioner could not have complied with a transfer order merely based on a reference to the same in the Charge-Sheet, far less defend himself on a vague



allegation of non-compliance of the same leading to alleged misconduct.

13. Law is well settled that charge must be definite and specific. It is not permissible to hold departmental enquiry on vague charges as the same do not give a clear picture to the delinquent to make out an effective defense. [see **Anant R Kulkarni v Y.P.Education Society** reported in **(2013) 6 SCC 515**].

14. Law is equally well settled that Enquiry Officer is not permitted to travel beyond the charges. Any punishment imposed on the basis of a finding which was not the subject matter of the charge is wholly illegal [see **Narinder Mohon Arya v United India Insurance Company Ltd. And Others** reported in **(2006) 4 SCC 713**]

15. In the present case, as noticed above, not only are the allegations brought against the petitioner found to be vague, even the findings of the Enquiry Officer are found to be perverse. Not only that, the Enquiry Officer had travelled beyond the charge and found the writ petitioner guilty of misconduct for seeking voluntary retirement in lieu of his prayer for modification of the transfer order 08.12.2016 by holding that the same amounts to insubordination although no such charge was brought against the petitioner either in the charge sheet or the in the statement of allegation. The order dated 03.11.2021 imposing the major penalty of dismissal from service was evidently based on such finding of the Enquiry Officer on the question of alleged misconduct which did not form part of the charge-sheet or the statement of allegation thereby having a vitiating effect on the order dated 03.11.2021.

16. It is also to be noted here in that the petitioner has taken a specific stand that the order dated 03.11.2022 imposing the order of penalty of dismissal from service



was never served upon him and he became aware of the said order only from the communication dated 12.01.2022 issued by the Senior Accounts Officer. The learned Departmental Counsel could not rebut such assertion of the petitioner by placing cogent materials before this court. It is therefore, evident that the departmental proceeding conducted against petitioner is in clear violation of the procedural safeguards available to him as well as the principles of natural justice. As such, the order of penalty dated 03.11.222 issued on the basis of Enquiry Report dated 05.05.2021 is clearly unsustainable in law and hence, liable to be set aside by this court.

17. Having held as above, this court would now examine the plea raised by the writ petitioner that in view of Fundamental Rules 56(c) he ought to have been deemed to have voluntarily retired from service based on his application/representation dated 29.12.2017. There is no dispute in this case that FR 56 (c) will be applicable in the case of the petitioner. FR 56 (c) reads as follows :-

“ FR 56(c) - Any Government Servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years or has completed 25 years of service, whichever is earlier”

18. In the present case, the request made by the petitioner either to modify the transfer order or to allow him to go on voluntary retirement was made in writing on 29.12.2017, addressed to the Commissioner to the Government of Assam, Health & family Welfare Department who is the appropriate authority to consider the same. His



request to allow him to go for voluntary retirement was communicated formally to the departmental authorities. The same was un-equivocal and had been reiterated in the subsequent representation dated 18.05.2018 as well as in his reply to the show cause notice submitted on 09.01.2020. There is no dispute in this case that on the date of submission of his request to go for voluntary retirement, the petitioner had completed more than twenty five years in service and was also more than 50 years old. As such, the petitioner did fulfill the requirement of FR 56 (c) in so far as his eligibility to apply for voluntary retirement is concerned. Notwithstanding the same, the respondent authorities had remained silent on his request to go on voluntary retirement. Although Mr. Bora has submitted that the application for voluntary retirement was not submitted by the writ petitioner in proper format, yet, such argument could not be substantiated by the learned departmental counsel by producing any relevant material before the court. Therefore, the key issue that would arise for consideration of this court in the present case is as to whether, in view of the provision of FR 56(c) the request for allowing him to go on voluntary retirement made by the petitioner had automatically taken effect under the law on the expiry of three months notice period from the date of serving the notice of such intent or was there any requirement under the law for the Government to accept such a request by issuing any further order ?

19. An issue of similar nature had arisen before the Supreme Court in the case of **Dinesh Chandra Sangma** (supra) relied upon by Mr. Choudhury wherein, appellant therein, who was a member of the Assam Judicial Service, Grade-I, after attaining the age of 50 years, had served a notice declaring his intention to go for voluntary



retirement under FR 56 (c) due to some domestic reasons. The request was initially accepted by the Government pursuant where to, the High Court had also allowed him to go on one month's leave preparatory to his retirement with effect from July 2, 1976, on which date he had relinquished charge of office. Subsequently, the Government retraced its step as above and by the order dated 28.07.1976, countermanded its earlier order dated 01.07.1976 allowing the appellant to go on voluntary retirement. The High Court had also concurred with such decision of the Government and by order dated 31.07.1976, the appellant was transferred from Dibrugarh to Dhubri. The appellant did not join at Dhubri and instead, submitted representation to the Government and to the High Court to recall the order of revocation of permission to go on voluntary retirement and his transfer. While the Government by order dated 04.12.1976 declined his prayer, the High Court by order dated 31.07.1976 had directed the appellant to join at Dhubri within 10 days, failing which disciplinary action would be initiated against him. Aggrieved thereby, the appellant had approached the High Court on the judicial side under Article 226 of the Constitution seeking a writ of certiorari setting aside the Government order dated 28.07.1976 and the order of the High Court dated 31.07.1976 issued on the administrative side. The High Court dismissed the writ petition by holding that application under FR56(c) was subject to compliance with clause (3) of Rule 119 of DISI Rules 1971. Allowing the appeal filed by the aggrieved employee against the order of the High Court the Supreme Court has held as follows :-

“17. The High Court committed an error of law holding that consent of the Government was necessary to give legal effect to the voluntary retirement of



the appellant under F.R. 56(c). Since the conditions of F.R. 56(c) are fulfilled in the instant case, the appellant must be held to have lawfully retired as notified by him with effect from August 2, 1976."

20. By relying on the law laid down in the case of **Dinesh Chandra Sangma** (supra) it was further held in the case **Union of India and Others v Sayed Muzaffar Mir** reported in **1995 Supp (1) SCC 76** that when a Government servant seeks premature retirement under FR 56 (c) it does not require any acceptance and the retirement comes into effect on completion of the notice period.

21. The law laid down by the Supreme Court in the case of **Dinesh Chandra Sangma** (supra) and **Sayed Muzaffar Mir** (supra) leaves no room for doubt that once an application for voluntary retirement is received by the authorities, subject to fulfillment of the conditions laid down in FR 56 (c), the same will take effect automatically on completion of the notice period and there would be no requirement for communicating acceptance of such application for the Government. In a case where no notice period is clearly spelt out in the application, the application for voluntary retirement must be deemed to take effect upon expiry of the statutory period of three months as provided under FR 56 (c). In other words, once an application for voluntary retirement is received from an employee who has attained the age of 50 years or has completed 25 years of service, his/her request for voluntary retirement would come into effect automatically on expiry of the notice period and there would be no further requirement under the law for the employer to specifically accept such request of the employee.

22. In the present case, as noted above, the petitioner fulfills the conditions laid



down in FR 56 (c) for making a request for voluntary retirement and his request has also been received by the Government prior to initiation of the departmental proceeding by serving the charge –sheet dated 26.11.2020. The department neither declined his request for voluntary retirement nor called for any further information but simply ignored his request by remaining silent over the matter. The petitioner was subjected to the departmental proceeding by treating him on service ever after expiry of three months from the date of receipt of the formal request to allow him to go on voluntary retirement. Under the circumstances, this court is of the opinion that the departmental authorities had committed a serious error in initiating the departmental proceeding against the petitioner by treating him to be in service while ignoring his application for voluntary retirement.

23. In so far as the allegation of absence from duty by the petitioner prior to his premature retirement is concerned, it is no doubt correct that such period of absence would be liable to be dealt with by the authorities in accordance with law. However, it also appears that the petitioner had submitted a number of applications seeking earned and medical leave for the period of absence, through proper channel, but no action has been taken by the departmental authorities on such application. Therefore, the respondents are required to consider the applications submitted by the petitioner for leave during the period of his absence prior to the date of voluntary retirement and pass appropriate order therein as per law.

24. For the reasons stated here-in above, the impugned order dated 03.11.2021 is hereby set aside. However, in view of the finding recorded by this court to the effect



that the petitioner be deemed to have retired from service based on his application for voluntary retirement, no direction for his reinstatement in service is called for in this case. The respondent Nos 1, 2 and 3 are, however, directed to examine the records and pass consequential order(s), in the light of the observations made here-in above, *inter-alia* notifying the actual dated of retirement of the petitioner, the fate of his applications seeking leave during the period of absence from duty prior to his retirement and also the retirement benefit that the petitioner would be entitled to under the law. The aforesaid exercise be carried out and completed within a period of 4 (four) weeks from the date of receipt of a certified copy of this order.

The writ petition stands allowed to the above extent.

There would be no order as to cost.

JUDGE

T U Choudhury

Comparing Assistant