HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No.354/1994

Reserved on: 19.12.2023
Pronounced on: 30.01.2024

Dr. B.A.Wani S/o Kh. Noor-ud-din Wani
R/o Srinagar

....Petitioner(s)

Through:- Mr. R.A.Jan, Sr. Advocate with
Mr. Adil Mushtaq, Advocate

V/s

1. State of Jammu & Kashmir through
Commissioner/Secretary to Govt.
Health and Medical Education Deptt.,
New Secretariat Jammu/Srinagar.

2. Institute of Medical Sciences, Soura,
Srinagar through Governing Body.

3. Director,
Institute of Medical Sciences, Soura,
Srinagar.

…Respondents(s)

Through:- Mr. Furqan Yaqub Sofi, GA

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. The petitioner is aggrieved of and has called in question an order dated 08.12.1993 passed by the Director, Sher-I-Kashmir Institute of Medical Sciences, Soura, Srinagar ["SKIMS"], whereby the petitioner has been removed as Professor Department of Cardiology from the services of

the SKIMS for unauthorized willful absence from duty w.e.f. 19.05.1992. The petitioner also prays for a direction to the SKIMS to accept his request for voluntary retirement in terms of Article 230 of the Jammu & Kashmir Civil Service Regulations ("CSR" for short) and treat him as having voluntarily retired from service with all consequential post-retirement benefits.

2. The petition filed by the petitioner and the reliefs prayed for by him have arisen in the background of following factual matrix:

Factual Matrix

3. The petitioner was initially appointed as Assistant Surgeon Grade-II in SMHS Hospital vide Government Order dated 22.07.1966. During the course of service as Assistant Surgeon Grade-II in the Medical Department of the then State, the petitioner was deputed to undergo DM Medicine (Cardiology) at PGI, Chandigarh. On completion of DM Cardiology, the petitioner was appointed as Assistant Professor in Government Medical College, Srinagar on 17.01.1981. His services were later on transferred and he was appointed as Senior Consultant (Associate Professor) in the department of Cardiology of SKIMS vide Government Order No.245/MS of 1981 dated 24.12.1981. The petitioner rose to the position of Professor Cardiology in the year 1986 when he was so appointed by the Government vide order No.108/MS of 1986 dated 11.11.1986. It is pertinent to notice that in the year 1985 also the petitioner was removed from services on account of willful and unauthorized absence from duties w.e.f. 01.06.1985 vide Government

Order No.130/MS of 1985 dated 19.10.1985. However, from the record it could not be ascertained as to under what orders he was taken back in service. It seems that after removal of the petitioner from service on account of willful unauthorized absence w.e.f. 01.06.1985, the petitioner was appointed afresh and this time as Professor vide Government Order dated 11.11.1986 (supra).

4. While the petitioner was serving as Professor, Department of Cardiology in SKIMS, on an application made by the petitioner, an earned leave for 80 days was sanctioned w.e.f. 29.02.1992 vide Order No.SIMS/286 of 1992 dated 17.03.1992 with the condition that no extension in the leave as sanctioned shall be granted. This was also so undertaken by the petitioner in writing. On expiry of the sanctioned earned leave, the petitioner did not report back for duties and requested for extension of leave on medical grounds. The request was acceded to by the SKIMS and vide order No.SIMS/777 dated 11.11.1992, half pay leave of 100 days w.e.f. 19.05.1992 to 27.08.1992 and extra-ordinary leave without allowances of 126 days w.e.f. 28.08.1992 to 31.12.1992 was sanctioned. The grant of half pay leave/extra-ordinary leave was subject to the petitioner's producing necessary medical certificate in support of his statement of illness. The petitioner failed to produce the medical certificate. He did not even report for duties even after 31.12.1992.

5. The petitioner was put on show cause notice by the SKIMS to explain as to why disciplinary action as warranted under rules be not initiated against him for unauthorized absence w.e.f. 19.05.1992. He was

also given an opportunity to be heard in person before the disciplinary authority. The petitioner neither responded to the show cause notice nor did he express his desire to be heard in person. The petitioner instead of responding to the show cause notice or submitting medical certificate in support of his illness and explaining his unauthorized absence after 31.12.1992, submitted an application in the form of a representation for seeking voluntary retirement from service. This request of the petitioner was declined by the competent authority and the petitioner was given a final notice to show cause as to why penalty of removal from service of the Institute be not imposed upon him. The petitioner again failed to respond to the show cause notice and accordingly, Director, SKIMS vide impugned order dated 08.12.1993 removed him from the services of the SKIMS. It is this order, which is called in question by the petitioner.

Submissions on behalf of the petitioner

6. The impugned order is assailed by the petitioner on the ground that the Director SKIMS is not competent to initiate any disciplinary action against the petitioner or order his removal from service. The impugned order is also challenged on the ground that no enquiry, as envisaged under Rule 33 of the Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 ["CCA Rules"], was conducted by the competent authority and the entire proceedings were conducted at the back of the petitioner, thus, violating his right of being heard guaranteed by Rule 33 of the CCA Rules as also Article 14 of the Constitution of

India. Mr. Jan, learned senior counsel representing the petitioner, also raised the plea of disproportionality of penalty inflicted on the petitioner.

Submission on behalf of the respondents

7. *Per contra*, the stand of the SKIMS, as reflected in the counter affidavit filed by the Director, is that the petitioner remained unauthorizedly absent from duties 19.05.1992. It is submitted that, though, on the request of the petitioner half pay leave of 100 days w,e,f, 19.05.1992 to 27.08.1992 and extra-ordinary leave without allowances of 126 days w.e.f. 28. 08.1992 to 31.12.1992 was sanctioned in favour of the petitioner on medical ground but this was subject to the production of medical certificate by the petitioner. It is argued that since the petitioner failed to produce any medical certificate in support of his ailment, as such, it was rightly concluded that the petitioner had remained absent from duties w.e.f. 19.05.1992 to 31.12.1992 willfully and unauthorizedly.

8. To top it all, the petitioner, it is argued, did not report back for duties even after 31.12.1992 and it is only when he was put on show cause notice, he, instead of joining back his duties, applied for voluntary retirement. The petitioner was given a notice to show cause and explain his unauthorized absence as also the notice of proposed penalty but he declined to respond. He submitted his representation through his wife in which he would clearly admit that he had received the notices but was not interested to serve the Institute. In these circumstances, contends learned counsel for the Institute, the SKIMS was left with no option but to remove

the petitioner from services and accordingly, the impugned order was passed.

9. Having heard learned counsel for the parties and perused the material on record, it is necessary to first notice few admitted facts.

10. The petitioner was admittedly serving as Professor in the department of cardiology, SKIMS when he proceeded on 80 days earned leave, which was sanctioned in his favour by the competent authority w.e.f 29.02.1992. It is equally not in dispute that the petitioner was specifically told that no extension in his leave would be granted. As a matter of fact, the petitioner had also undertaken in writing not to claim any further extension. However, he applied for extension of leave on medical ground. The SKIMS conceded to the request of the petitioner and granted him half pay leave of 100 days w.e.f. 19.05.1992 to 27.08.1992 and extra-ordinary leave without allowances of 126 days w.e.f. 28.08.1992 to 31.12.1992. However, this leave was subject to the petitioner producing medical certificate in support of his state of illness. This is not in dispute that the petitioner failed to produce certificate and, therefore, in all circumstances, is to be presumed to be unauthorizedly absent from 19.05.1992. To top it all, the petitioner chose not to join back his services even on the expiry of his leave on 31.12.1992.

11. As is apparent from the pleadings of the parties, the petitioner had proceeded on foreign assignment and was reluctant to join back. When pressure was created by the SKIMS on the petitioner to join in the SKIMS

in the interest of patient care, the petitioner decided to call it quits. The petitioner knew that for remaining unauthorizedly absent from duties the SKIMS authorities had put him on show cause notice and disciplinary action was in the offing. He very cleverly and in a well thought after plan applied for voluntary retirement from service with all consequential pensionary benefits. This was declined by the respondents on the ground that request for voluntary retirement was not entertainable in view of the disciplinary proceedings contemplated against him for remaining unauthorizedly absent from duties.

12. The action of SKIMS declining the request of the petitioner for voluntary retirement was perfectly legal and supported by the provisions of Article 230 of the Jammu & Kashmir Civil Service Regulations, 1956 ["CSR"]. Proviso first to Clause(ii) of Article 230 of CSR leaves no manner of doubt that an employee who has been placed under suspension or against whom any enquiry or investigation is pending or is contemplated on any charge of administrative or criminal nature is not entitled to seek voluntary retirement by having resort to Article 230 of the CSR. For facility of reference, proviso first appended to Clause (ii) of Article 230 of the CSR is set out below:-

> "*Provided further that the right conferred under this article shall not be available to an officer who has been placed under suspension/or against whom any enquiry or any investigation is pending or is contemplated on any charge of administrative or criminal nature."*

13. From a reading of the proviso reproduced herein above, it is abundantly clear that a government servant, who may be otherwise eligible under Article 230 of CSR to seek voluntary retirement after having completed 20 years/40 completed six monthly periods of qualifying service or 45 years of age would not be permitted to seek voluntary retirement if he is either placed under suspension or against him any enquiry or any investigation is pending or is contemplated on any charge of administration or criminal nature. In the case on hand, at the time the petitioner applied for voluntary retirement in terms of Article 230 of CSR, enquiry against the petitioner on the charge of administrative nature was contemplated and petitioner was already put on notice to show cause as to why he should not be proceeded for disciplinary action for remaining unauthorizedly absent after expiry of his sanctioned leave.

14. For the reasons given above and in view of the clear provisions of Article 230 of CSR, in particular proviso reproduced above, the plea of the learned counsel for the petitioner that he was illegally and arbitrarily denied voluntary retirement under Article 230 of CSR is baseless and without any substance.

15. This brings me to the next question raised by Mr. R.A.Jan, learned senior counsel appearing for the petitioner. With regard to the argument of learned counsel for the petitioner that the procedure envisaged under Rule 33 of the CCA Rules was not adhered to, in that, no formal enquiry was conducted, suffice it to say that this argument is not available to the petitioner for the simple reason that the petitioner being all along aware

that he has been issued a show cause notice and given a copy of charge-sheet did not submit any reply or claim any enquiry. Conduct of the petitioner is, thus, self speaking. In the application filed by the petitioner dated 18.11.1993 seeking his voluntary retirement, the petitioner has clearly admitted that he had been receiving the show cause notices, charge-sheet etc. from the respondents but was not getting any response to his request for voluntary retirement. With reference to the reply sought by the respondents to the charge-sheet, the petitioner states that he has taken the matter to the Court and, therefore, has been advised by his lawyer not to submit any reply. For facility of reference relevant extract of the representation made by the petitioner to the Director, SKIMS on 18.11.1993, which is part of the writ petition of the petitioner, is reproduced hereunder:-

> *"……..The aforementioned application for voluntary retirement was submitted with a request to grant me the same on the same analogy as Dr. M.Ramzan, Assistant Professor, Deptt. Of General Medicine, SKIMS. Instead of receiving the reply to my application, I have been receiving charge sheets and show cause notices, ignoring my request of voluntary retirement. On issue of charge sheet, the matter was taken to the court. Therefore, I have been directed by my lawyer to point out that :- "Matter is sub-judice in Hon'ble High Court before Hon'ble Division Bench (DB) on the issue of jurisdiction of the authorities to proceed in disciplinary jurisdiction against me having lawfully retired voluntarily in exercise of right under Article 230 of CSR."*

16. From a reading of the aforementioned representation of the petitioner, in particular, paragraph reproduced above and the communications of the wife of the petitioner on record, it is clearly demonstrable that the petitioner was all along aware of the disciplinary proceedings launched against him and had been receiving show cause notices as well charge-sheet but submitted no reply probably on the basis of some advice received by him from his legal counsel.

17. Be that as it may, in these circumstances, the petitioner cannot be heard to say that the procedure laid down under Rule 33 of the CCA Rules or rule of *audi alteram partem* has been violated by the respondents in any manner. Otherwise also, action against an employee envisaged under Article 128 of the CSR can be taken even without following the procedure laid down in Rule 33(1) of the CCA Rules.

18. Before taking the discussion further, I deem it appropriate to set out Article 128 of the CSR, which reads thus:-

> "128. Absence without leave or after the end of leave involves loss of appointment, except as provided in Article 203 (b) or when due to ill-health in which case the absentee must produce the certificate of Medical Officer.
>
> Exception 1.-Grace not exceeding 7 days may be allowed in cases when the Head of a Department is satisfied that the default of an officer is due to circumstances beyond his control. But no allowance can be granted for the period by which the leave is over-stayed unless an extension of leave is admissible under these rules.

Exception 2.-Whenever a Government servant is detained on the road owing to its being blocked by land-slip, snow etc. he should be treated as on duty during the period of unavoidable detention, but he will be entitled, until he re-joins his appointment, to draw leave allowance only.

The above concession will not apply in cases of overstay of casual leave or quarantine leave such leave being not recognized leave.

Exception 3.- Whenever a Government servant, on his return from leave (other than casual leave or quarantine leave) is detained owing to cancellation of air flight due to bad weather or otherwise, he may be treated as on duty for the period of unavoidable detention, subject to a maximum of two days for the period of enforced halt, he will be entitled, until he re-joins his appointment to draw leave allowance only."

19. From a reading of Article 128 of the CSR, it clearly transpires that absence without leave or after the end of the leave except when it is due to illness or for the reasons provided in Article 203 (b) CSR entails loss of appointment. Unauthorized absence or absence after expiry of leave, if it is wilful may be tantamount to misconduct inviting disciplinary action against the delinquent employee. In such circumstances, it is necessary for the disciplinary authority to hold an enquiry to prove that the absence of the delinquent employee is not only unauthorized but is also wilful.

20. Indisputably, there could be many reasons like accident, closure of road leading to the place of employment, illness etc etc. In such situation, if delinquent employee is put on a notice to show cause and he comes up with a cause which prevented him from joining back his duties after

availing leave, it is incumbent upon the disciplinary authority to conduct an enquiry in terms of Rule 33 of CCA Rules. This may not be required if the employer decides to proceed under Article 128 of the CSR. The provisions of Article 128 of the CSR are very clear and unequivocal and provide clearly that except when a person is prevented from attending his duties due to ill health, absence without leave or after the end of the leave involves loss of appointment.

21. True it is that even for proceeding under Article 128 of the CSR, least that is required to be done by the disciplinary authority is to put the delinquent employee on a show cause notice and provide him opportunity to explain his absence from duties. If he comes up with a plea that he could not join back due to ill health and produces certificate of a medical officer, proceedings against such an employee may be dropped. We cannot lose sight of the three exceptions appended to Article 128 of the CSR. Exception 1 prescribes for giving grace not exceeding 7 days in cases where the head of a department is satisfied that the default of an officer is due to circumstances beyond his control. Similarly, as per Exception 2, whenever a government servant is detained on the road owing to any blockade due to landslide or snow, he would be treated as on duty during the period of unavoidable detention. This concession would be available to the employee only if he re-joins the duties. Similarly, Exception III deals with situation where a government servant on his return from leave is detained due to cancellation of air flight due to bad weather or otherwise. In such situation also government employee may be

treated as on duty for the period of unavoidable detention. Note 1 and 2 essentially deal with the manner in which such unauthorized absence which is due to circumstances beyond control of government employee is to be treated.

22. Be that as it is, there should be no manner of doubt that Article 128 of the CSR is a provision different from unauthorized absence which amounts to misconduct and, therefore, needs to be treated differently. In my opinion, for proceeding under Article 128 of CSR against an employee, strict adherence to procedure laid down in Rule 33 of CCA Rules is not called for. However, before taking any action, as envisaged under Article 128 of CSR for absence without leave or after the end of the leave, least that is required is compliance with the principles of natural justice viz. strict adherence to the principles of *audi alteram partem.* It is only when a delinquent government servant is put on notice and given an opportunity to explain he would be in a position to demonstrate before the competent authority that he was prevented to join back his duty due to ill health or due to reasons beyond his control as are vividly laid down in exceptions 1, 2 and 3 of Article 128 of the CSR.

23. Any order amounting to loss of appointment of a government employee passed without complying with principles of natural justice would be a nullity in the eye of law. In the instant case, the petitioner had ample opportunity to explain his absence. He had received show cause notices and the charge-sheet but chose not to give any reply. Silence of the petitioner was, thus, his admission that absence from duty was not

only unauthorized but was wilful and that he had no explanation for not joining back after the end of his leave or for not submitting medical certificate subject to which he had been granted leave w.e.f. 19.05.1992 to 31.12.1992.

24. Viewed, thus, I fiund no merit in the argument of learned senior counsel appearing for the petitioner that in the matter of imposing penalty of removal of the petitioner from services of the SKIMS, principles of natural justice have been violated or that the procedure laid down in Rule 33 of the CCA Rules has been breached. Whether we view the impugned order as an action taken under Article 128 of the CSR or an action for misconduct, the result would remain the same. Even if one were to assume that there is lack of adequate opportunity granted to the petitioner for defending himself in the enquiry, yet I would say that in the given facts and circumstances and the conduct exhibited by the petitioner it would not have made any difference if the petitioner would have been given a better opportunity of hearing and defending himself. I have found from the record as also from the representations made by the petitioner and his wife that the petitioner was all along aware of the disciplinary proceedings and had been receiving the show cause notices and charge-sheet but deliberately chose not to contest the proceedings. In such circumstances, even if another opportunity is granted to the petitioner to defend himself, it will not make any difference. In these circumstances, providing of post decision hearing to the petitioner would also be a useless formality.

25. This brings me to the question of competence of the Director to impose penalty of removal from service. The contention of the learned counsel for the petitioner is that the petitioner was appointed as Professor in SKIMS by the Government and, therefore, could have been reduced in rank, dismissed or removed from service only by the Government. Learned counsel for the petitioner submits that it is not in dispute that the disciplinary proceedings against employees of the SKIMS including its faculty positions are governed by the CSR and CCA Rules, 1956, the major penalty viz. reduction in rank, removal or dismissal from service can be imposed only by the Government and such powers cannot be delegated by the Government to any authority subordinate to it. For facility of reference, Rule 32 of the CCA Rules is set out below.

> *"32. (1) Subject to the provisions of these rules, Government may impose any of the penalties specified in rule 30 on any member of a service.*
>
> *(2) Subject to such conditions, if any, as Government may prescribe, it may delegate to any subordinate authority power to impose any of the penalties specified in rule 30:*
>
> *Provided that the power to impose the penalties specified in clause (iv), (vii) and (viii) of rule 30 shall not be so delegated in the case of the members of any gazetted service.*
>
> *Delegation:-*
>
> *Under sub-rule (2) of this rule, Government delegates to* -----

(i) the Heads of Departments the power to censure and withhold increments in respect of District Officers and below sub-ordinate to them;

(ii) Class I Officers the power to censure and withhold increments of officers getting a salary not exceeding Rs. 600/ - p. m . ;

(iii) Clause II Officers the power to censure officers getting a salary up to Rs. 500/p. m. ; and

(iv) the various appointing authorities the power to impose any of the penalties except compulsory retirement specified in rule 30 on such members of the services as such appointing authority is competent to appoint"

26. In the reply affidavit filed by the Director of the Institute, there is no attempt made to explain the competence of the Director to impose penalty of removal from service of a gazetted officer. It is also not demonstrated by the respondents whether the status of the Professor and other faculty positions of SKIMS is that of a gazetted officer or not. The petitioner, too, has not placed on record any material to show that the petitioner at the time of his removal from service, in terms of the impugned order, was a gazetted officer. He, too, has failed to place on record any gazette/notification to show that the post of Professor in SKIMS is a gazetted post. In the absence of such material, it is not possible for this Court to come to any definite conclusion as to whether petitioner was a gazetted officer and could be removed from service only by the Government. However, if this Court holds that the impugned order is traceable to Article 128 of the CSR, yet in the absence of specific delegation made by the Government to the Director, SKIMS, the

impugned order would be without jurisdiction and competence of the Director. I, therefore, find sufficient substance in the submission of Mr. Jan that the Director, SKIMS was not a competent authority to remove the petitioner from service, who at the relevant time was Professor and head of the department of Cardiology in SKIMS. I am more inclined to accept this plea for the simple reason that to the specific averments made by the petitioner in paragraph No.14 & 15 of the writ petition in respect of incompetence of the Director, SKIMS to issue the impugned order, there is no specific reply or rebuttal by the respondents. On this ground alone, I find the impugned order vitiated in law having been issued by an authority not competent to do so. In view of the above, the determination of plea of proportionality of penalty is held unnecessary.

27. In view of the aforesaid, this petition is allowed in the following manner:-

i) Impugned order dated 08.12.1993 issued by the Director, SKIMS is set aside.

ii) The competent authority i.e. Government is left free to initiate fresh disciplinary action against the petitioner in accordance with law within a period of four weeks from today.

iii) That in the disciplinary action that may be initiated by the respondents/competent authority, the petitioner shall be given adequate opportunity to defend himself. The procedure laid down in Rule 33 of the CCA Rules shall be strictly adhered to in such disciplinary proceedings, which shall be concluded within a period

of two months from the date charges are served upon the petitioner.

iv) In case no such proceedings are envisaged or initiated against the petitioner, his application for voluntary retirement under Article 230 of the CSR shall be considered and appropriate orders passed within one month from the date of expiry of time stipulated herein above for conclusion of the disciplinary proceedings.

v) Needless to say that in case respondents decide not to initiate any disciplinary proceedings and accept the request of the petitioner for voluntary retirement, post retiral benefits, as may be available to the petitioner under law shall be released without any further delay.

Record be returned back to the learned counsel for the respondents.

(**Sanjeev Kumar)**
Judge

Srinagar
30 .01.2024
Vinod.

Whether the order is speaking: Yes
Whether the order is reportable: Yes