

GAHC010195182024



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

Case No. : WP(C)/4815/2024

DR. S ROHIT
S/O- NANU SASIDHARAN,
FLAT NO. 203, TYPE 4 QUARTER,
AIIMS, GUWAHATI, CHANGSARI,
KAMRUP, ASSAM- 781101.

VERSUS

UNION OF INDIA AND 5 ORS
REPRESENTED BY SECRETARY TO MINISTRY OF HEALTH AND FAMILY
WELFARE,
ROOM NO. 348, A WING, NIRMAN BHAVAN,
NEW DELHI- 110011.

2:THE ALL-INDIA INSTITUTE OF MEDICAL SCIENCES
REPRESENTED BY ITS DIRECTOR

GUWAHATI
CHANGSARI
ASSAM

PIN- 781101.

3:THE PRESIDENT
ALL INDIA INSTITUTE OF MEDICAL SCIENCES
GUWAHATI
CHANGSARI
ASSAM
PIN- 781101.

4:THE DIRECTOR
ALL INDIA INSTITUTE OF MEDICAL SCIENCES

GUWAHATI
CHANGSARI
ASSAM
PIN- 781101.

5:DR. ASHOK PURANIK
EXECUTIVE DIRECTOR

ALL INDIA INSTITUTE OF MEDICAL SCIENCE
GUWAHATI

CHANGSARI
PIN- 781101.

6:DR. JAYA SHANKAR KAUSHIK
HOUSE NO. 002
TYPE 4 FACULTY QUARTERS

AIIMS
GUWAHATI
CHANGSARI

KAMRUP
ASSAM- 781101

Advocate for the Petitioner : MR. K N CHOUDHURY, MR T R SEN,MR. S P SHARMA,K
AHMED

Advocate for the Respondent : DY.S.G.I., MR K J HAZARIKA(R-6),MR. R B PHOOKAN(R-6),R
SARMAH(R-6),MR D.S. BHATTACHARYA(R-5),MR. S K SAIKIA(R-5)

BEFORE
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

ORDER

Date : 03.10.2024

Heard Mr. K.N Choudhury, learned Senior Counsel, assisted by Mr. S.P. Sharma, learned Counsel for the petitioner. Also, heard Mr. K.Gogoi, learned CGC for respondent nos. 1 to 4, Mr. D.S. Bhattacharya, learned Counsel appearing for respondent no. 5, Mr. R. Phukan, learned Counsel

appearing for respondent no.6.

- 2.** By way of this Writ Petition under Article 226 of the Constitution of India, the petitioner is assailing the termination order dated 11/09/2024 passed by the respondent no.7.
- 3.** The facts of the case is that the petitioner, who is presently serving as Assistant Professor in the Department of Neonatology in All India Institute of Medical Sciences, (hereinafter referred to as AIIMS), Guwahati, was terminated from service by order dated 11/09/2024 without any notice or reasons whatsoever.
- 4.** The petitioner was appointed initially as Associate Professor at AIIMS, Guwahati, in the Department of Pediatrics and after he resigned from this post on 31/07/2023, he joined at a lower post of Assistant Professor in the Department of Neonatology at AIIMS, Guwahati, on probation by appointment order dated 22/07/2023 pursuant to advertisement dated 01/04/2023.
- 5.** During the aforesaid period of probation, the services of the petitioner was terminated by order dated 11/09/2024 by giving one month notice period. Aggrieved by such action, the present Writ Petition has been filed.
- 6.** Mr. K.N Choudhury learned Senior Counsel submits that the termination order is in clear violation of the terms and conditions of the appointment letter dated 22/07/2023. He further submits that the notice of termination has been issued to harm the petitioner's reputation as because the wife of the petitioner is a victim of sexual harassment by respondent no. 6, which has been established by the ICC report dated

17/02/2024. He further submits that the impugned notice has been issued to protect respondent no. 6 because the termination of the petitioner would automatically lead to closure of the sexual harassment case of the petitioner's wife.

7. He further submits that the termination order dated 11/09/2024 with 1(one) month notice period is in violation of the terms and conditions of the appointment order dated 22/07/2023, whereby the petitioner was appointed to the post of Assistant Professor in level 12 of Pay Matrix as per 7th CPC Minimum Pay of Rs. 1,01,500/- Plus other allowances as admissible on Regular Basis and the Department of Neonatology at AIIMS, Guwahati on probation wherein at clause 3 it was specifically prescribed that the said appointment is subject to termination at any time with a 3 (three) months notice and to pay in lieu of notice period by which the notice falls short. He further submits that in terms of the O.M. dated 11/03/2019, it is imperative for the respondent to inform the probationer of his shortcomings, if any, well before the expiry of the original probationary period so that he can get an opportunity for self improvement.

8. He further submits that the termination order being issued without giving the 3 (three) months requisite notice period and without giving any opportunity to improve the shortcoming as mandated under the aforesaid Office Memorandum, is totally erroneous.

9. Per Contra Mr. K. Gogoi, learned CGC, submits that the All India Institute of Medical Sciences Regulation, 2019, framed under Sub Section 1 of Section 29 of All India Institute of Medical Sciences Act,

1956, provides that during the period of probation, failing satisfactory service of the probationer, the authorities at any time without any notice or reason being assigned can terminate the services of the probationer. He further submits that the said regulations being framed under the provisions of the statute, the same is statutory and the same cannot be overridden by way of executive instructions. He accordingly submits that the Master Circular on probation/confirmation issued by the Government of India, circulated by Office Memorandum dated 11/03/2019 providing an opportunity to the probationer to improve his shortcomings before taking the drastic step of discharge cannot override the statutory regulations.

10. Mr. D.S. Bhattacharya, learned Counsel for respondent no. 5, while adopting the argument of Mr. K. Gogoi, further submits that despite the Executive Director, AIIMS, Guwahati, having performed his duties in accordance with law has been arrayed in person by alleging *malafide* against him. He further submits that Clause 2 of the terms and conditions of the appointment order dated 22/07/2023 which mandates the appointing authority to give opportunity to improve the performance of the appointee/probationer is distinct and separate from Clause 3 of the said terms and conditions of the appointment order whereby the appointing authority is empowered to terminate the services of the appointee/probationer by giving 3 (three) months notice period without assigning any reason whatsoever, and it shall be open to the Institute to pay in lieu of notice by which the notice falls short.

11. Mr. R. Phukan, learned Counsel for respondent no. 6 submits in all fairness that in the event the petitioner is allowed to continue with his

probation period as an interim measure pending adjudication of the present Writ Petition, he should be directed to perform his assigned duties for the interest of the hospital.

12. I have given my prudent consideration to the argument made by the learned Counsel for the contesting parties and have perused the material available on record.

13. Pertinent that though this case was fixed today for consideration of interim relief, in view of the fact that the respondents have filed their counter-affidavits and with consent of all the contesting parties, the matter has been taken up for final disposal.

14. Before adverting to the contentious issues raised in the Writ Petition, apt to refer to the appointment order dated 22/07/2023 of the petitioner, which is reproduced hereunder for ready reference.

“All India Institute of Medical Sciences, Guwahati

SilbharalmChangsari, District- Kamrup

Assam-781101

No.2-43/2022-23/AIIMS/GHY/ESTT./RECT-FACT/PT-I/444 22.07.2023

S. Rohit

S/o- No. Sashidharan

*Flat 203, Type 4 Quarter, All India Institute of Medical Sciences, Guwahati
Changsari, Kamrup, Assam- 781101.*

*Sub: Offer of Appointment for the post of Assistant Professor in Level 12 of
Pay Matrix as per the 7th CPC, Minimum Pay of Rs. 1,01,500/- Plus Other
Allowances as admissible on regular basis in the Department of Neonatology at
the All India Institute of Medical Sciences, Guwahati.*

Ref: Advt. No. 2-43/2022-23/AIIMS/GHY/ESTT/RECT-FACT/Pt-01/02 & 03 dated 01.04.2023.

Madam/Sir,

With reference to your application and subsequent Personal Interview, based on the recommendation of the Standing Selection Committee and approval of the HR Subcommittee, the Competent Authority of AIIMS, Guwahati is pleased to offer you appointment to the post of Assistant Professor in the Level 12 of Pay Matrix as per the 7th CPC, Minimum Pay of Rs. 1,01,500/- Plus Other Allowances as admissible on Regular Basis in the Department of Neonatology at the All India Institute of Medical Sciences, Guwahati on the following terms and conditions:

- 1. You will be on probation for a period of 2 (two) years from the date of appointment. The period may be extended or curtailed at the discretion of the Competent Authority.*
- 2. During the period of probation, you will be temporary employee and will be governed by the applicable Service Rules. During the period of probation, you will be liable to be discharged from service at any time without any notice, if*
 - (a) On the basis of your performance or conduct you are found unsuitable for further retention in service, or*
 - (b) If you are otherwise found ineligible or unsuitable for being retained in the service.*
- 3. Your appointment may be terminated at any time with a 3 (three) months' notice by either side, viz., the Appointing Authority without assigning any reason whatsoever. It will be open to the Institute to pay, in lieu of notice period by which the notice falls short. Similarly, if you wish to resign your post you may do so by depositing with the Institute pay and allowances in lieu of the notice period subject to the approval of the Competent Authority.*

4. *You will have to take an oath of allegiance to the Constitution of India in prescribed form.*
5. *If married, you will sign a declaration that you have not more than one living spouse at the time of joining. In accordance with orders in force in regard to recruitment to service under Government of India, no person who has more than one wife living or who is having a spouse living, contracts a second marriage, though such marriage is void by reason of it taking place during the life time of such spouse shall be eligible for appointment to service provided that the Central Government may if satisfied that there are special grounds for so ordering, exempt any person from the operation of this rule. Similarly, no such woman whose marriage is void by reason of its taking place during the life-time of her spouse or who has married to such a person whose wife is living at the time of marriage shall be eligible in service unless the Government of India has granted exemption to such a woman in accordance with the relevant rule after being satisfied that there are special grounds for so ordering. This Offer of Appointment is therefore, conditional upon your satisfying the requirement mentioned above and also furnishing to this Institute a declaration to the effect in prescribed format at the time of joining. If, however, you desire to be exempted from the operation of this Rule for any special reason(s), you should make a representation in this behalf immediately. This Offer of Appointment should in that case be treated as cancelled and future communication will be sent to you in due course, if upon consideration of your representation, it is decided to offer you the appointment.*
6. *You will have to declare your immovable and movable property in the prescribed format at the time of joining.*
7. *If you claim to belong to a Scheduled Caste, Scheduled Tribe or Other Backward Classes (non-creamy), you have to produce a certificate issued in the prescribed form by any of the Appropriate Authority as provided under the Law. You should note that your appointment will be provisional and is subject to verification of the Caste/Tribe Certificate through proper channels*

and that if the claim to belong to SC/ST/OBC/EWS is found to be false, the services will be terminated forthwith without assigning any reason and without prejudice to such further action that may be taken under the Indian Penal Code for production of false certificate. You should also intimate the change, if any, of your religion, after appointment, immediately to the Appointing/Administrative Authorities concerned.

8. Private practice of in any form including laboratory and consultant practice is strongly prohibited. Further, you have to comply with all guidelines of Govt. of India regarding prescribing generic medicines as applicable.

9. You will not engage in any trade or business or undertake any employment full-time or part-time while in service of the Institute without the explicit permission of the Executive Director or Officer authorized by him/her.

10. The appointment will be further subject to the compliance of the following pre-requisites before joining the post:-

(i) Verification of Character and Antecedents from Competent Authority as per the Rules. In case you are employed and the same has already been done, submit a certified copy of Verification Certificate from your present employer within two weeks. Further in case any adverse comments about your suitability for the job is received at any stage after your joining, your appointment will be terminated without giving you any opportunity for representation.

(ii) Medical Certificate of Health and Physical Fitness for service issued by a Standing Medical Board either from the Government or AIIMS in prescribed format should be submitted. In case you are in employment and the same has already been done, a certified copy of the relevant Medical Certificate should be furnished.

(iii) Production of the following certificates, in original, in proof of your academic qualification, experience(teaching/research)/and age before joining the post.

- a) Degrees/Diplomas/Certificates.*
 - b) Certificate(s) proving requisite Teaching/Research Experience as per the advertisement for the post being offered. Teaching/Research experience in this regard are to be recognized by the appropriate Authority of Govt. of India/AIIMS, Guwahati.*
 - c) Certificate of Age.*
 - d) Good Character Certificate from two Gazetted Officers of the Central/State Governments or Stipendiary Magistrate.*
 - e) Discharge/Relieving Certificate from your previous employer.*
 - f) A statement of marital declaration.*
- 11. You will be governed by Central Civil Services (Conduct) Rules, 1964 and Central Civil Services Classification Control and Appeal Rules, 1965 as amended from time to time.*
- 12. Other conditions of service will be as provided under the Rules, Bye Laws and Regulations of the Institute.*
- 13. You may please note that you will be required to conform to the Rules, By Laws, Regulations, Discipline and Code of Conduct as applicable to the employees of this Institute.*
- 14. You are advised to apply for the allotment of the Institute's accommodation within a week of your joining the Institute and the same will be provided as per the availability of the accommodation. In case the accommodation is not available, then you will be paid HRA as admissible under the Rules.*
- 15. You are liable to serve in any of the Urban/Rural Health Centers of the Institute including AIIMS Hospital, Extension Center, Satellite Centre etc., if so required.*
- 16. You will be at the disposal of the Institute on whole time basis and your services may be utilized in any manner required by the Competent Authority of the Institute without claiming any additional remuneration.*
- 17. If any of the declarations made or information furnished by you are proved to be false or if you are found to have willfully suppressed any material*

information you will be liable for removal from the Institute's services besides any other action (Legal and/or Administrative/Disciplinary) that the Institute may deem necessary.

18. No travelling or other allowances will be payable to you for obtaining the medical or other certificate or for joining the post at the Institute. However, the grant of travelling Allowance to a Permanent Government Servant or who has completed three years of temporary services will be considered as applicable under the relevant rules.

19. You will NOT be governed under:-

(i) CCS (Pension) Rules, 1972.

(ii) CCS (Commutation of Pension) Rules, 1981.

(iii) CCS (Extraordinary Pension) Rules, 1939.

(iv) CCS (Family Pension) Rules, 1964.

(v) General Provident Fund (Central Services) Rules, 1960.

However, you will be governed by "New Pension Scheme" as per G.O.I., Ministry of Finance, Notification No. 5/7/2003-ECB & PR dated 22-12-2003 - Published in the Gazette of India, Extraordinary, Part-1, Section-1 dated 22-12-2003 and as amended from time to time. Further, all other issues pertaining to service matters will be regulated as per the extant instruction of Govt. of India and decision of the Competent Authority.

20. You have to produce an affidavit on non-judicial stamp paper mentioning that all your educational qualifications and teaching/research experiences are from Govt. of India recognized Institutes/College.

21. If you are willing to accept the appointment on the above terms and conditions, you are requested to submit the following to the office of Executive Director, AIIMS, Guwahati immediately and in any case not later than 15 (fifteen) days from the date of issue of this letter, failing which this Offer of Appointment is liable to be treated as cancelled.

(i) Acceptance of Offer of Appointment along with the terms and conditions as mentioned.

(ii) Attestation Forms (4 copies enclosed) - duly filled in for verification of character and antecedents in case the same is not done by your present Employer, if already done, a certified copy of the same may be submitted.

(iii) Copies of Self attested educational certificate starting Matriculation onwards and copy of Teaching/Research Experience Certificate establishing your eligibility for the post. The Teaching/Research Experiences Certificate should clearly state either of in Teaching or Research Experiences and its effective date and duration.

(iv) To report for medical examination by the AIIMS-Guwahati, Medical Board as applicable for obtaining Medical Fitness Certificate.

22. This Offer of Appointment is purely provisional and subject to your fulfillment of all eligibility criteria such as age, educational qualifications, teaching/research experience etc. as per the advertisement and if it is found that you are not fulfilling the same at any stage, then this Offer of Appointment will be treated as cancelled even after you have joined the post. You are to join the post after completing all above formalities within a month from the date of receipt of this offer of appointment."

15. Apparent reading of the aforesaid terms and conditions of the appointment order that the petitioner was appointed on probation for a period of 2 (two) months, from the date of appointment and that during the period of probation the petitioner shall remain as a temporary employee and will be governed by the applicable service rules and that under Clause 2 of the terms and conditions, he will be liable to be discharged from service at any time without any notice, if on the basis of his performance or conduct, he is found unsuitable for further retention in service, or if he is otherwise found ineligible or unsuitable for being retained in the service. It further appears that under Clause 3 of the terms and conditions of the appointment order, his appointment on

probation is subject to termination at any time with a 3 (three) months notice period without issuing any reason whatsoever. It further appears that it is open to the Institute to pay in lieu of the notice period which falls short.

16. It appears that by order dated 11/09/2024, the petitioner was placed under termination by giving 1 (one) month notice period which will expire on 10/10/2024. A copy of the said termination order is reproduced hereunder for ready reference.

“No: 2-43/2024-25/AIIMS/GHY/ESTT./TERM-FACT/PT-I/1708

11.09.2024

To

Dr. S. Rohit

Assistant Professor, AIIMS Guwahati,

Flat 203, Type 4 Quarter, AIIMS Guwahati,

Changsari, Kamrup, Assam-781101

Sub: NOTICE OF TERMINATION OF SERVICE: DR. S ROHIT

Ref: Offer of Appointment Letter No. 2-43/2022-

23/AIIMS/GHY/ESTT./RECT- FACT/PT-1/444 dated 22.07.2023.

In pursuance of the terms and conditions mentioned in the Appointment letter referred above, I hereby give notice to Dr. S Rohit, presently serving on probation period, that his services shall stand terminated with effect from the date of expiry of a period of one month from the date on which this notice is served on or, as the case may be, tendered to him.

(Dr. Ashok Puranik)

Executive Director, AIIMS Guwahati”

17. Apparent thus, that the service of the petitioner was terminated by giving 1 (one) month notice period without payment in lieu of the notice period which has fallen short.

18. The issue that arises for considering in the present Writ Petition is the legality and validity of the said termination order dated 11/09/2024. Apt to refer to the Office Memorandum dated 11/03/2019 issued by the Deputy Secretary to the Government of India, whereby the Master Circular issued by O.M. dated 21/07/2014, wherein the instructions on probation/confirmations have been consolidated. Clause 7 of the said Master Circular on Probation and Confirmation in Central Services is reproduced hereunder for ready reference.

“7. A probationer, who is not making satisfactory progress, should be informed of his shortcomings well before the expiry of the original probationary period so that he can make special efforts at self-improvement. This can be done by giving a written warning to the effect that his general performance has not been such as to justify his confirmation and that, unless he shows substantial improvement within a specified period, the question of discharging him would have to be considered. Even though this is not required by the rules, discharge from the service being a severe, final and irrevocable step, the probationer should be given an opportunity before taking the drastic step of discharge.”

19. Reading of the aforesaid clause indicates that in the event the performance of the probationer is not satisfactory, an opportunity in

writing is required to be given to the probationer in order to give him an opportunity to improve his performance.

20. It appears from the affidavit in opposition filed by the respondent authorities AIIMS, on 01/10/2024, that the petitioner having found unsuitable for confirmation while on probation on the merits of performance, his services ultimately had to be terminated. Paragraph 12 and 16 of the aforesaid affidavit in opposition is reproduced hereunder for ready reference.

“12. That, with regard to the statement made in paragraph 12 of the Writ Petition, the deponent begs to state that, the statement made in this paragraph are wrong and baseless, hence denied. The petitioner has taken a path of making false and malicious accusations against the superior authorities to create confusion and gain sympathy. The AIIMS administration has followed due process and taken action as appropriate and deemed necessary while addressing all the complaints and events as cited by the petitioner. All actions of the AIIMS administration have been without any prejudice. There was discussion in the Governing Body and the Institute Body, which was convened as a emergency meeting to consider the various aspects of the Complaints made by the petitioner and his spouse. It would be pertinent to mention here that the Governing Body and the Institute Body are the top decision-making bodies with complete powers for appointment, termination, dismissal etc. Thereafter, opinion was also sought from AIIMS legal counsel appointed by Central Government. As such action taken after application of collective wisdom of the Institute Body and the Governing Body of the Institute (AIIMS).

16. That, with regard to the statement made in paragraph 16 of the Writ Petition, the deponent begs to state that, the petitioner is misleading the Hon'ble Court by making false and imaginary allegations against the superiors. The matter related to sexual A harassment of his spouse is being repeatedly brought in to divert the attention of the honourable court to the core issue that the de petitioner was found unsuitable for confirmation while on probation on the merits of performance and the due process has been AS followed. The condition of Probation has been kept in the system only to ensure that employees with proper attributes and attitude and displaying performance in line with mission of the institute are only retained."

21. What emerges out of the aforesaid pleadings from the respondent authorities is that the service of the petitioner has been terminated upon his services being found unsatisfactory. Admittedly, no written warning has been given to the petitioner to improve his performance prior to issuing the impugned termination order as per Clause 7 of the Office Memorandum dated 11/03/2019.

22. Though Mr. Gogoi, by referring to the All India Institute of Medical Sciences Regulation, 2019, has submitted that during the period of probation appointing authority can terminate the services of the appointee/probationer at any time without any notice or reason being assigned, in the opinion of this Court, is misplaced in the context of the present case.

23. Clause 7 of the Office Memorandum dated 11/03/2019 provides that, a probationer should be given an opportunity to improve his

shortcomings/performances before taking the drastic step of discharge, whereas, Clause 25 of the said Regulations provides that a probationer if fails to perform satisfactory service, his services shall be liable to termination at any time without any notice or reason being assigned for the same. Thus, a cogent reading of both the provisions indicates that in the event the service of a probationer is found to be unsatisfactory, he shall be given an opportunity to improve the shortcomings and failing such improvement of his services, he is liable to be terminated in terms of clause 25 of the said regulations. In other words, Clause 7 of the said Office Memorandum gives the right of opportunity to the probationer to improve his performance in the event the respondent find his performance is shortcoming, before taking the drastic step of termination. This is in consonance with the principles of Natural Justice and Clause 2 of the appointment order which provides the applicability of the applicable service rules.

24. Reference is made to the decision of the Apex Court in the case of ***Parshotam Lal Dhingra V Union of India reported in 1958 SCR 828***, paragraph 28 of the aforesaid Judgment is reproduced hereunder for ready reference.

“28. The position may, therefore, be summed up as follows: Any and every termination of service is not a dismissal, removal or reduction in rank. A termination of service brought about by the exercise of a contractual right is not per se dismissal or removal, as has been held by this Court in Satish Chander Anand v. Union of India (Z) (supra). Likewise the termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract

Article 311(2), as has also been held by this Court in Shyam Lal v. State of Uttar Pradesh. In either of the two abovementioned cases the termination of the service did not carry with it the penal consequences of loss of pay, or allowances under Rule 52 of the Fundamental Rules. It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is, as Chagla, C. J., has said in Shrinivas Ganesh v. Union of India wholly irrelevant. In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with. As already stated if the servant has got a right to continue in the post, then, unless the contract of employment or the rules provide to the contrary, his services cannot be terminated otherwise than for misconduct, negligence, inefficiency or other good and sufficient cause. A termination of the service of such a servant on such grounds must be a punishment and, therefore, a dismissal or removal within Article 311, for it operates as a forfeiture of his right and he is visited with the evil consequences of loss of pay and allowances. It puts an indelible stigma on the

officer affecting his future career. A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the government servant has right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstances may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his

substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

25. Apparent the petitioner was appointed on probation for a fixed period and in the event the service of the petitioner is found unsatisfactory, he is entitled for a written warning to improve his services before issuance of the final/termination order and failing such improvement, his services is liable to be terminated by giving 3 (three) months notice period before effectuating the termination in lieu payment failing short of the notice period.

26. In the present case, the impugned termination order is passed without giving the requisite 3 (three) months notice on 11/09/2024 as required under Clause 3 of the terms and conditions of the appointment order. However, it appears, from the relevant file i.e., file no.2-356/2023-24/AIIMS-Guwahati-Establishment-Personnel, placed before this Court by learned CGC, that by letter dated 19/09/2024 issued by the Executive Director (respondent no.4), in addition to the 1 (one) month notice period provided under the impugned termination order dated 11/09/2024, the petitioner is to be paid additionally for 2 (two) months of pay, in lieu thereof. It appears that the said payment for the notice period falling short was subsequently directed after the present Writ Petition being filed on 17/09/2024. The manner in which the respondent authorities have terminated the service of the petitioner does not inspire confidence of this Court. Be that as it may, apparent that no written

warning as required under Clause 7 of the Office Memorandum to improve the performance of the petitioner was provided despite the stand of the respondent authorities as emerged out of the affidavit in opposition that the services of the petitioner was terminated upon being found unsuitable for confirmation while on probation on the merits of performance. That being so, in the context of the facts and circumstances of the present case, this Court is of the opinion that before proceeding to issue of the termination order, the petitioner ought to have been given a written warning so as to be provided an opportunity to improve his performance. Therefore, the principles of Natural Justice and the terms and conditions of the subject appointment order read with the subject Office Memorandum is being grossly violated and contravened. Hence, the impugned termination order is *per se* illegal and *void ab initio*.

27. In view of the above, the termination order dated 11/09/2024 is hereby set aside and quashed.

28. It is needless to be clarified that during the period of probation, in the event the services of the petitioner is found unsatisfactory, the respondent authority is at liberty to proceed in accordance with law.

29. With the aforesaid observation and direction this Writ Petition stands disposed of.

JUDGE

Comparing Assistant