

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC (OA) No. 325 of 2018

An application under Articles 226 & 227 of Constitution of India.

AFR

Dr. Debidatta Dash

.....

Petitioner

-Versus-

State of Odisha & Others

.....

Opp. Parties

Advocate(s) appeared in this case:-

For Petitioner : M/s. C.S. Panda, S. Mohapatra &
K.C. Panigrahi, Advocates.

For Opp. Parties : Mr. N.K. Praharaj,
Government Advocate.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

22nd September, 2022

SASHIKANTA MISHRA, J.

The petitioner joined Government service as Assistant Surgeon on 18.04.1983 in the State Medical Health Centre. He was transferred to different places during his service career. While he was working as a Specialist in PPC, DHH, Bhadrak, he was transferred and

posted to Jorum Hospital, Cuttack as per order of the Government dated 04.04.2005. However, because of his physical ailment arising out of acute Diabetes, Hypertension and Mental Depression, the petitioner applied for leave as he was unable to join. Such leave application of the petitioner was never refused by the opposite party authorities. While on leave, the opposite party No.1 initiated a disciplinary proceeding against the petitioner under Rule-15 of the OCS (CCA) Rules 1962 vide Memorandum dated 11.03.2008. As per the articles of charges accompanying the memorandum, the petitioner was charged with disobedience of the orders of the superior authorities and willful absence from Government duties amounting to gross negligence. The petitioner submitted his written statement indicating that he had been forced to remain absent from duty because of his health condition and that he had applied for leave by submitting application along with medical certificates addressed to the Director of Health Services Odisha (opposite party No.2). In addition, the petitioner submitted another application on 05.05.2008 addressed to opposite

party No.1 with request to allow him to retire from Government service as per norms and conditions of the provisions relating to voluntary retirement. The matter remained as it is without any action being taken by the Government till the petitioner approached opposite party No.1 in his grievance cell on 21.03.2016 enclosing all the documents submitted previously on 05.05.2008 requesting for early conclusion of departmental proceeding as also for granting his request for voluntary retirement. The grievance petition dated 21.03.2016 was treated as statement of defence by the opposite party No.1 and an order was issued on 16.07.2016 appointing an Enquiry Officer and to conclude the enquiry quickly. The said order was followed by another letter issued on 21.03.2017 by the opposite party No.1 reminding the enquiry officer to conclude the enquiry quickly. The enquiry was concluded and the report dated 10.05.2017 was supplied to the petitioner on 24.05.2017, whereby the petitioner came to know that the Enquiry Officer held the charges against the petitioner to be not proved and recommended for dropping the charges. The petitioner

submitted his reply on 06.06.2017 accepting the enquiry report. However, by notice dated 23.08.2017, the opposite party No.1 intimated his disagreement with the opinion of the Enquiry Officer and referring to the provision under Rule 72(1) of the Odisha Service Code, proposed the penalty of removal from service and for treating the period of unauthorized absence as EOL which may not count towards service benefits. The petitioner submitted his reply on 20.09.2017 specifically taking the ground that he had not been proceeded against for the charge under Rule 72(1) of the Code and that as he had completed more than 25 years prior to 2008, his application for voluntary retirement should have been accepted as per Rule 42 of the OCS (Pension) Rules 1992. He also requested for release of his pension and pensionary benefits. The opposite party No.1 however, issued the final order dated 01.02.2018 imposing the proposed punishment on the petitioner.

Being thus aggrieved, the petitioner approached the erstwhile Odisha Administrative Tribunal,

Principal Bench, Bhubaneswar in O.A. No. 325 of 2018

seeking the following relief:

“In view of the facts mentioned in para-6 above the applicant prays for the following relief:

- i. To quash the impugned order dated 01.02.2018 as at Annexure-11 and direct the respondents to extend all consequential benefits in favour of the applicant in terms of his pension and his pensionary benefits treating him as a retired Government w.e.f. 31.08.2008 as per the provision of Rule 42 (2) of the OCS (Pension) Rules, 1992, within a time to be stipulated by the Hon’ble Tribunal.*
- ii. To grant any relief/reliefs as deemed fit and proper.”*

The said O.A. has since been transferred to this Court and registered as the instant writ petition.

2. A counter has been filed on behalf of opposite party No.1. Reading of the counter affidavit reveals that all the facts referred to by the petitioner in the writ application have simply been reiterated and the issuance of the impugned order has been attempted to be justified by stating that the petitioner had remained unauthorizedly absent for more than five years which amounts to violation of Odisha Service Code. Therefore, the Government concluded the proceeding drawn against the petitioner as per Rule-72(1) of the Code and imposed the punishment.

3. Heard Mr. C.S. Panda, learned counsel for the petitioner and Mr. N.K. Praharaj, learned Government Advocate for the state.

4. Mr. Panda would contend that the impugned order cannot be sustained in the eye of law because the same was issued on the basis of an allegation for which the petitioner was never charged. Secondly, the petitioner had cited justified reasons for his absence from duties and the Enquiry Officer found that the leave application had been duly submitted and therefore, held the charges to be not proved. The opposite party No.1 has not cited any acceptable reason for disagreeing with the findings of the Enquiry Officer. It is further argued by Mr. Panda that even otherwise petitioner's application for voluntary retirement was kept pending since 2008 without passing any order and therefore he must be deemed to have been voluntarily retired as per provisions of Rule -42 of the OCS (Pension) Rules, 1992 and therefore, the order imposing punishment of removal from service is invalid in the eye of law.

5. Per contra, Mr. Praharaj, learned State Counsel has contended that the petitioner remained willfully absent from duties from 2005 onwards and therefore, he cannot claim any benefit as are applicable to other Government servants. Secondly, the disciplinary authority has the right of disagreeing with the findings of the Enquiry Officer and therefore, the impugned order cannot be faulted with on such score. It is further argued by Mr. Praharaj that submission of application for voluntary retirement is not maintainable as per Rule 42 of OCS (Pension) Rules, 1992.

6. The facts of the case appear to be undisputed. The petitioner was originally charged on the two counts, namely, (i) Disobedience of orders of the superior authorities. (ii) Willful absence from Government duties which amounts to gross negligence in Government duties, remaining absent from Government duties without submitting leave application and leave address, misconduct and failed to maintain devotion to duty.

7. In the statement of imputation of misconduct in support of the articles of charges framed against him, it

is mentioned that while working at PPC, DHH, Bhadrak, he was transferred and posted to Jorum Hospital, Cuttack vide G.O. No. 8416/H dated 04.04.2005. Instead of joining at his new place of posting, he remained on leave/unauthorizedly at his sweet will after being relieved from PPC, DHH, Bhadrak. As a result, the people of his new place of posting were not getting health care and service. Hence, the above amounts to disobedience of orders of higher superior authorities in violation of Rule-4 of Odisha Government Servants Conduct Rules, 1959. In respect of Article-II, it is stated that he remained absent from duties at his own sweet will to avoid transfer, which amounts to gross negligence in Government duties. He neither submitted any leave application nor gave leave address, which amounts to misconduct in violation of Rule-3 of Odisha Government Servants Conduct Rules, 1959. Further, he failed to maintain devotion to duty.

8. In his written statement of defence, the petitioner took the ground that he was a chronic patient of Diabetes Mellitus, Hypertension and Metal Depression and he was under the treatment of Dr. Kasinath Padhiary,

Associate Professor of Medicine, MKCG, MCH, Berhampur. He further stated that he had sent his leave application on 01.04.2005 along with medical certificate to the Director of Health Services under certificate of posting and since then he has been suffering from the aforementioned diseases. He also informed that he was not fit enough to perform the Government duties and accordingly, applied for VRS along with the written statement.

9. The matter remained in suspended animation as it were, till the petitioner himself wrote to the opposite party No.1 vide letter dated 21.03.2016 to finalize the proceeding drawn up against him and to allow the VRS considering his health condition. The disciplinary authority thereafter woke up from its slumber and appointed an Enquiry Officer to enquire into the charges. Significantly, the enquiry officer found in course of enquiry that the petitioner had sent his application seeking leave on 01.04.2005, which was within the transit period and therefore, the charge of disobedience of orders of superior authority was not proved. Similarly, the

Enquiry Officer found that the petitioner had submitted leave applications on 17.04.2006, 22.08.2005, 19.05.2007 and 21.11.2007 about his illness with medical certificate and therefore, the charge of willful action from the Government duties also could not be proved. The disciplinary authority after issuing the first show cause notice, in reply to which the petitioner accepted the findings of the Enquiry Officer, disagreed with the findings of the Enquiry Officer as no exceptional circumstance was mentioned in the report due to which the delinquent officer remained unauthorizedly absent for about 11 years. The disciplinary authority further held that as per Rule 72 (1) of the Odisha Service Code, no Government servant shall be granted leave of any kind for a continuous period exceeding five years and since the delinquent officer had remained absent for a continuous period exceeding five years, he proposed the penalties of removal from service and for treating the period of unauthorized absence as EOL.

10. At this stage, it would apposite to refer to the statutory provisions. Rule 15(10)(i)(b) of OCS (CCA) Rules,

which the officer remained absent unauthorizedly for about 11 years. It must be noted here that the original charge was for unauthorized absence from 04.04.2005 (23.03.2005) till the date of initiation of the disciplinary proceeding i.e., 11.03.2008. The enquiry was also held on the charge of unauthorized absence for the aforesaid period. Therefore, while considering the enquiry report, it was incumbent upon the disciplinary authority to render his findings strictly with regard to the period of unauthorized absence for which the petitioner was charged with. What the disciplinary authority appears to have done is, the entire period of absence from 23.03.2005 till 10.03.2016 has been taken into account. Evidently, this is beyond the scope of the charge for which the petitioner was proceeded against and hence, cannot be approved in law.

12. Be that as it may, it is further seen that the disciplinary authority, while disagreeing with the findings of the Enquiry Officer has also referred to Rule -72(1) of the Odisha Service Code as a ground to impose penalty against the petitioner. Rule 72 reads as follows;

“72. Removal of Government servant after remaining leave for a continuous period exceeding five years.

(1) No Government servant shall be granted leave of any kind for a continuous period exceeding five years.

(2) Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962.

xx

xx

xx”

13. It is evident that no action can be taken against a Government servant under Rule-72 without following the procedure laid down in the OCS (CCA) Rules, 1962. The petitioner was never charged under Rule-72 (1) of the Code. As has already been discussed hereinbefore, the petitioner was charged for unauthorized absence from 23.03.2005 till 11.03.2008, the date on which the DP was initiated against him. It was not a charge under Rule 72(1) of the Code inasmuch as, it was not a case of the petitioner availing leave for a period beyond five years. Therefore, if the order of punishment is allowed to subsist,

it would be a case of punishing a Government servant for misconduct for which he was never charged with. It goes without saying that this is something that cannot be countenanced in law. It is reiterated that if the disciplinary authority had any valid reason to disagree with the findings of the enquiry officer, he could have recorded the same but law does not confer on him the power to travel beyond the findings of the enquiry officer to penalize the delinquent for misconduct for which he was not charged in the first place.

14. As regards the application submitted by the petitioner for voluntary retirement, it would be proper to first refer to the relevant statutory provisions, which is Rule-42 of the OCS (Pension) Rules, 1992. The relevant portion of which is extracted hereinbefore.

“42. Voluntary Retirement on completion of 20 years’ qualifying Service- (1) *At any time after a Government servant has completed twenty years’ qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.*

(2) *The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority.*

Note- *Such acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending or contemplated against the Government servant*

concerned for the imposition of a major penalty and the disciplinary authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case or (b) in which prosecution is contemplated or have launched in a Court of Law against the Government servant concerned. If it is proposed to accept the notice of voluntary retirement in such cases, approval of the Government should be obtained:

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date that of expiry of the said period.

xx

xx

xx”

15. Admittedly, the application for voluntary retirement was submitted by the petitioner on 05.05.2008. By such time, the departmental proceeding had already been initiated against him. Therefore, the application so submitted cannot be treated as valid application in the eye of law and therefore, the petitioner cannot be held entitled to the relief claimed on such score.

16. For the foregoing reasons therefore, this Court finds that the petitioner has made out a case for interference by this Court in the matter. Accordingly, this Court holds that the impugned order under Annexure-11 cannot be sustained in the eye of law and is therefore, quashed. This Court also holds that the petitioner would

be entitled to all service benefits consequent upon his exoneration from the charges leveled against him in the departmental proceeding. However, the petitioner shall not be entitled to any financial benefits for the period during which he did not render any service to the Government but shall be entitled to continuity in service notionally. It would also be open to the petitioner to submit a fresh application seeking voluntary retirement, if he so desires and in such event, it would be for the concerned authorities to take a decision thereon in accordance with law within a period of four weeks.

17. The writ petition is disposed of accordingly.

.....
Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 22nd September, 2022/ A.K. Rana