

CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH

ORIGINAL APPLICATION NO.170/01664/2018

DATED THIS THE 03RD DAY OF JUNE, 2019

HON'BLE DR.K.B.SURESH, MEMBER (J)

HON'BLE SHRI C.V. SANKAR, MEMBER (A)

B.Arulappa
S/o P.Balasubramanian
Aged about 54 years
Commissioner of Income Tax
Davanagere
Permanent resident of
No.75, 2nd Cross
Kalidasa Layout, Yelahanka
Bangalore-560 064.

..... Applicant

(By Advocate Shri B.S. Venkatesh Kumar)

Vs.

1. Union of India represented by
Secretary to Government
Department of Revenue
Ministry of Finance
North Block
New Delhi-110 001.

2. Central Board of Direct Taxes
 Represented by its Chairman,
 Ministry of Finance,
 Department of Revenue,
 North Block, New Delhi – 110 001

3. Principal Chief Commissioner of
 Income Tax (CCA)
 Queen's Road
 Bangalore-560 001.

....Respondents

(By Shri H.R. Sreedhara, Counsel for the Respondents)

O R D E R (ORAL)

(HON'BLE DR. K.B. SURESH, MEMBER (J))

This matter seems to be covered by our order in OA No. 380/2018 dated 19.02.2019 which we quote:

"O R D E R

(PER HON'BLE SHRI C.V.SANKAR, MEMBER (ADMN))

The case of the applicant is that he joined the service of Income Tax Department as Asst. Commissioner on 16.9.1991. He was promoted as Dy. Commissioner in 1999, Joint Commissioner in 2001, Addl. Commissioner in 2003 and finally as Commissioner of Income Tax in the year 2012. He had rendered a total of 26 years of service as on 29.9.2017 and he was aged 54 years. On 29.9.2017(Annexure-A1), he submitted notice of retirement under FR 56(k)(1) for personal reasons with a further request that he would be retiring w.e.f. 28.12.2017. The 1st respondent has rejected the notice of the applicant by impugned office order dtd.20.12.2017(Annexure-A3). The applicant submits that as per DOPT letter dtd.27.2.2014(Annexure-A4) at para 2 makes it clear that it is open to the appropriate authority to withhold permission to a government servant who seeks to retire under FR 56(k)(1) only if such a government servant is under suspension, or a charge sheet has been issued and the disciplinary proceedings are pending or if a judicial proceedings on charges which

may amount to grave misconduct are pending. On 3.4.2018, the applicant was served with a memorandum under Rule 16 of CCS(CCA) Rules proposing to initiate minor penalty proceedings. However, the same has no bearing on the issue presently dealt with for the reason that as on the date of submission of notice under FR 56(k) there was no charge sheet issued and no disciplinary proceedings pending. He fulfills all the ingredients of the stipulations in FR 56(k)(I) as per which he had given three months notice in writing to the appropriate authority, is a Group A officer and was aged more than 50 years. He was not under suspension at any point of time. He submits that the Hon'ble Delhi High Court in WP(C) No.8102/2010 vide judgment dtd.13.2.2011(Annexure-A5) has granted relief to the individual therein holding that action to reject his case for retirement under FR 56(k) is illegal as he was not under suspension on the date of notice. Aggrieved by the action of the respondents in rejecting the notice of retirement under FR 56(k), the applicant has filed the present OA praying for quashing and setting aside the impugned office order dtd.20.12.2017(Annexure-A3) passed by the 1st respondent as arbitrary, unjust, illegal and unsustainable and also to declare that the applicant stood retired w.e.f. 28.12.2017 i.e., after the expiry of period of notice of retirement dtd.29.9.2017 and issue further direction to settle the terminal benefits of the applicant immediately.

2. On the contrary, the respondents have submitted in their reply statement that on the ground of Vigilance Status received from the office of the Principal Director General of Income Tax (Vigilance), Central Board of Direct Taxes, New Delhi, the VRS application dtd.29.9.2017 of the applicant was rejected by the competent authority vide CBDT's office order dtd.20.12.2017 and a memorandum dtd.26.3.2018(Annexure-R1) under Rule 16 of CCS(CCA) Rules, 1965 has been issued to the applicant by the Under Secretary to the Govt. of India. Since the VRS notice was rejected on account of vigilance status, the OA is devoid of merit and is liable to be dismissed. The respondents have also filed Vigilance Report.

3. The applicant has filed written arguments note enclosing therewith the judgments of Hon'ble Supreme Court and CAT, PB, N.Delhi. He also produced DOPT OMs stating that vigilance clearance cannot be withheld on grounds of contemplation of disciplinary proceedings(Exhibits 2, 3, 4 & 5). He submitted his VR application on

29.9.2017 and charge sheet was served on 26.4.2018 which contains two charges viz., he had allocated a file with major audit objection to a junior most ITO. This exercise was done on the advice and request of the JCIT under statutory powers vested by virtue of Section 127 of the Income Tax Act. It is well known that such actions cannot be questioned as laid down by the decisions of the Hon'ble Supreme Court in K.K.Dhawan's case and in the case of Zunjarrao Bhikaji Nagarkar. The second charge is that the applicant had not followed the guidelines regarding major audit objection where it is sought to be made out that it is the personal responsibility of the CIT. The very guideline was superseded by instruction No.7/2017 dtd.21.7.2017 which does not cast strict responsibility on CIT as sought to be made out in the charge sheet. He submits that the proceedings initiated are itself not valid but he submitted himself to the inquiry as it is only to find facts. As per the CVC instructions dtd.3.3.2003, the time limit for issuing final orders in minor penalty cases is two months from the receipt of defence statement(Exhibit-7). However, at every stage, there is inordinate delay. All guidelines prescribed have been violated. This has taken more than 16 months and during this period, he has been put to serious hardship. As this instruction is prior to the date of issue of charge memorandum relying on an outdated instruction itself is unjust and arbitrary.

4. We have heard the Learned Counsels for both the parties and perused the materials placed on record in detail. The main issue in this case is relating to FR 56(k)(1) which stands today after the amendment to the FR, 1922 dt.17.1.2014 as follows:

“ 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, if he is in Group “A” or Group “ B” service or post, (and had entered Government service before attaining the age of thirty five years), and in all other cases after he has attained the age of fifty-five years:

Provided that

(a) Not printed (Since Clause (a) has been deleted)

(b) Nothing in the clause shall also apply to a Government servant, including scientist or technical expert who (i) is on assignment under the Indian Technical and Economic co-operation (ITEC) Programme of the Ministry of External affairs and other aid Programmes, (ii) is posted abroad in a foreign-based office of a Ministry/Department and (iii) goes on a specific contract assignment to a foreign Government unless, after having been transferred to India, he had resumed the charge of the post in India and served for a period of not less than one year; and

(c) it shall be open to the Appropriate Authority to withhold permission to a Government servant, who seeks to retire under this clause, if,-

*(I) the Government servant is under suspension: or
(ii) a charge sheet has been issued and the disciplinary proceedings are pending; or
(iii) if judicial proceedings on charges which may amount to grave misconduct, are pending.*

Explanation :- For the purpose of this clause, judicial proceedings shall be deemed to be pending, if a complaint or report of a police officer, of which the Magistrate takes cognizance, has been made or filed in a criminal proceedings."

In this particular case, the respondents have rejected the notice dtd.29.9.2017 vide Annexure-A3 which is under challenge. As stated by the applicant, FR 56 (k)(1) in item 'c' reads reads as follows:

“(c) it shall be open to the Appropriate Authority to withhold permission to a Government servant, who seeks to retire under this clause, if,-

(I) the Government servant is under suspension: or

(ii) a charge sheet has been issued and the disciplinary proceedings are pending; or
 (iii) if judicial proceedings on charges which may amount to grave misconduct, are pending.

Explanation :- For the purpose of this clause, judicial proceedings shall be deemed to be pending, if a complaint or report of a police officer, of which the Magistrate takes cognizance, has been made or filed in a criminal proceedings."

5. The three main contentions of the applicant that (a) he is not under suspension (b) the charge sheet has not been issued and the disciplinary proceedings were not pending and (c) that judicial proceedings on charges which may amount to grave misconduct were not pending have to be taken as correct and this has also not been disputed by the respondents. The main contention of the respondents is that the application for voluntary retirement was rejected based on the vigilance report and the fact that the respondents were contemplating major disciplinary proceedings while deciding on the voluntary retirement application of the applicant. The point to be decided by us is only with respect to whether, when the rule position very clearly cites the instances where the appropriate authority can withhold permission are not satisfied in this case, the respondents are entitled to take a plea of contemplating disciplinary proceedings to reject the application for VR. A similar case arose before the Hon'ble CAT, Principal Bench in OA.No.2655/2012 in the case of Dr.Jay G.Varshney vs. Indian Council of Agricultural Research(ICAR) where considering the facts and circumstances of the case, the Principal Bench held that even though the applicant was not under suspension (it was the only reason for withholding the permission to retire as per the Fundamental Rules that existed at that time), it was not a fit case for interference by the Tribunal against the decision of the respondents to refuse permission for voluntary retirement of the applicant. The main reason given by the Tribunal was given in para-14 of that order which reads as follows:

"The issue arises whether the Competent Authority has a right to reject (not to accept) the request of the applicant for taking voluntary retirement? As per the Government of India instructions i.e. decision no. (iii) referred to above, it is seen

that for Government servants under suspension, the voluntary retirement can be withheld and this is not the only condition but it provides that acceptance of voluntary retirement 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 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. Government of India instructions being supplementary in nature to the Rule 48 and 48(A) of the CCS (Pension) Rules, 1972, and FR 56 (k) would be fully applicable in the instant case.”

6. The applicant while furnishing the written arguments note has also cited the DOPT instructions vide DOPT OM No.11012/11/2007-Estt. (A) dtd.14.12.2007 & 21.6.2013 which reads as follows:

16. Voluntary Retirement / Resignation

(a) Notice of Voluntary Retirement Under FR 56 (k) or Rule 48 (1) of CCS (Pension)

Rules, 1972

It shall be open to the Appropriate Authority to withhold permission to a Government Servant under suspension who seeks to retire under either of these rules.

Proviso (c) of FR 56 (k) (1) (c) and second proviso to Rule 48(1) of CCS (Pension) Rules, 1972

(b) Voluntary Retirement under rule 48-A of Pension ,Rules

A notice of voluntary retirement given after completion of twenty years' qualifying service will require acceptance by the appointing authority if the date of retirement on the expiry of the notice would be earlier than the date on which the Government servant concerned could have retired voluntarily under the existing rules applicable to him [e.g., FR 56 (k), Rule 48 of the CCS(Pension) Rules, 1972, Article 459 of CSRs or any other similar rule]. 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.

7. We have had the advantage of looking at the vigilance report based on which the request was rejected by the respondents. The case in brief against the applicant is that while the applicant was in charge of Commissioner of Income Tax, Trichy-2, he had by notifying a re-opened assessment case involving potential tax effect of more than Rs.15.69 crores to a junior most Income Tax Officer, who completed the assessments accepting the returned income without any verification, conferring undue benefits to the assessee company and thereby failed to exercise his Supervisory role as administrative CIT. The charge has been issued as a minor penalty proceedings under Rule 20 of the CCS(Conduct) Rules, 1964. Two other officers have been charged in the same issue, one the Assessing Officer at the level of ITO and the Range Head at the level of Joint Commissioner of Income Tax. The notification of the case to be handled by a junior most officer was approved by the applicant based on the recommendation made by the range head, the Joint Commissioner of Income Tax. In his version on the allegation made, the ITO claims that the related files were kept by the Joint Commissioner of Income Tax till the last date depriving the ITO of any opportunity to pass appropriate assessment orders based on the receipt of audit objections from the office of the Accountant General. The Joint Commissioner in turn has refuted this allegation citing lack of documentary evidence to prove that the file was with him only as alleged. In the same vigilance report after notifying the case to be

handled by the junior most ITO, the applicant in the present OA apparently had communicated on 13.1.2015 as follows:

“JCIT – to look into all files and keep track of the potential of each case and closely monitor the assessment including the order.”

However, the range head, the JCIT has claimed that he was on election duty during this period and therefore only the other officer holding additional charge was responsible for acting on the communication sent by the applicant. In view of the completion of the assessment on the re-opened case by the ITO, the department had been left with no alternative and had not been able to proceed further. A writ petition is also said to be pending in the Madras High Court on this issue. Having taken note of all the facts of the case, the Central Vigilance Commission vide its letter No.017/ITX/047/371964 dtd.22.2.2018 has recommended for minor penalty proceedings against the applicant and major disciplinary proceedings against the ITO and JCIT based on which the disciplinary proceedings have been initiated against the applicant vide Annexure-R1. The applicant has stated that he is cooperating with the inquiry since it is for finding out the facts and has also not challenged the same in the present application. From the vigilance report, it also transpires that he had once again given a voluntary retirement application dtd.30.5.2018 to be allowed to retire w.e.f. 1.9.2018 which has also not been given vigilance clearance. Any specific order issued in this regard is not available in the vigilance report. It can be safely presumed that this application has once again been rejected in view of the withholding of vigilance clearance.

8. From the above, it is clear that as per the rule position, the applicant's application for voluntary retirement w.e.f. 28.12.2017 should have been accepted by the respondents. It is also true that the department was contemplating major disciplinary proceedings against the applicant on the same date when they rejected his application for voluntary retirement. Only subsequent to the CVC recommendations in February 2018, the proceedings are undertaken now as minor disciplinary proceedings. It is obvious that considering the facts and circumstances of the case, the respondents do not contemplate either

removal or dismissal from service of the applicant as they have agreed to go ahead with the minor disciplinary proceedings. Even taking note of the case ordered by the Principal Bench and the DOPT instructions in this regard, it is clear that the respondents can take a favourable decision with regard to the application for voluntary retirement given by the applicant. Since the period in question has already elapsed, we direct the respondents to consider the application for VR if any filed by the applicant on any date with effect from the date of these orders favourably. It is always open for the respondents to continue the proceedings after retirement as per rules if they deem fit unless, of course, the proceedings have already reached a finality.

9. The OA is therefore allowed. No costs.”

2. When a person had sought for Voluntary Retirement, before deciding that, there is no power resident in any authority to transfer such an employee, given whatever reasons. Therefore, the transfer order is hereby quashed. There will be a mandate to the respondents to consider and pass an appropriate order on the Voluntary Retirement application within one month next.

3. The OA is allowed to this limited extent. No order as to costs.

(C.V. SANKAR)

MEMBER (A)

(DR.K.B.SURESH)

MEMBER (J)

/ksk/

Annexures referred to by the applicant in OA No. 170/01664/2018

Annexure-A1: Copy of the transfer order dated 09.10.2018

Annexure-A2: Copy of the transfer policy for Group A officers of Indian Revenue Services

Annexures with Reply Statement

Annexure-R-1: Copy of the Central Board of Direct Taxes Circular dated 16.02.2010

Annexures with Additional Reply Statement

Annexure-R-2: Copy of the Central Board of Direct Taxes Minutes of the meeting of the Placement Committee dated 28.09.2018

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