

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR:
TRIPURA: MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR BENCH

WP (C) No. 238(AP) of 2009

Dizen Bezbaruah
S/o Shri Ambu Ram Baruah
Qtr. No. APP/Type-II/804
Police Reserve Line, Tezu,
District Lohit, Arunachal Pradesh

.....Petitioner

-Vs-

1. State of Arunachal Pradesh,
Through the Commissioner &
Secretary to the Government of
Arunachal Pradesh, Department of
Home, Itanagar.

2. The Director General of
Police, Government of Arunachal
Pradesh, Itanagar, Arunachal Pradesh.

3. Inspector General of Police,
Arunachal Pradesh Police,
Government of Arunachal Pradesh,
Itanagar.

4. Deputy Inspector General of Police,
Arunachal Pradesh Police,
Government of Arunachal Pradesh,
Itanagar.

.....Respondents

**BEFORE
THE HON'BLE MR. JUSTICE B D AGARWAL**

For the petitioner: Mr PK Tiwari, Advocate

For the respondent: Ms. G. Deka, AddI.Sr.G.A.

Date of hearing: 25.5.2011

Date of judgment: 09.6. 2011

JUDGEMENT AND ORDER (CAV)

This writ application under Article 226 of the Constitution of India has been filed seeking a writ in the nature of certiorari, so as to set aside the enquiry report dated 30.03.2000; the order dated 2.3.2005 passed by the Deputy Inspector General of Police (E), respondent NO.3 dismissing the writ petitioner from service and the orders dated 16.10.2007 and 12.5.2009 passed by the appellate authority and reviewing authority, dismissing the statutory appeal and the review application of the writ petitioner.

2. Heard Mr. P.K. Tiwari, learned counsel for the petitioner and Ms G. Deka, learned Addl. Sr. Govt. Advocate, Arunachal Pradesh.

3. The gist of the case is that at the relevant period, the writ petitioner was serving as Sub-Inspector of Police and he was posted at Tezu. The case of the department is that the writ petitioner had established illicit and extra marital relation with one girl Ms. Jyotsna Nath. Besides this, the petitioner was I also found taking liquor/alcohol with the said girl and one civilian lady, 'namely Smti. Bina Balmiki in the house of the later. In the night of 14.9.1998, the petitioner had visited the house of Bina Balmiki and after taking alcohol they went to stay in a hotel. It was also the case of the respondents during the departmental enquiry that the petitioner had a quarrel with Jyostna Nath which led to the murder of the said girl due to bullet injury, fired by the writ petitioner from his service pistol. The further story of the incident is that after committing, ... murder of Jyotsna Nath, the petitioner fled away from the hotel and on the way to home he handed over the service pistol to one Dilipso Tayeng from whose possession the said pistol was subsequently recovered in a half cocked position.

4. On the basis of the aforesaid facts, a departmental proceeding was held with the following charges:

"STATEMENT OF ARTICLE OF CHARGE FRAMED AGAINST SI D. BEZBARUAH OF PS TEZU

ARTICLE-I

That one 9 mm service pistol bearing registration NO.15180042 with 10 (ten) rounds ammunition was issued to SI D. Bezbaruah, RO Tezu on 29/7/98 for VIP duty at Namsai. On completion of duty he was required to deposit the arms and ammunition as he was no more required to carry the same with him. But he continued to keep the above arms and ammunition with him unauthorisedly without any permission thereof. Such unauthorized possession of Govt. service pistol with ammunition by SI D. Bezbaruah is highly objectionable and amounts to gross misconduct and violation of instruction issued vide standing order No. PHO/CR/194/96-97 dtd. 30.5.97.

ARTICLE-II

That on 14-8-98 in between 8 to 9 PM SI D. Bezbaruah was found taking liquor in the house of one civilian lady Smti Bina Balmiki, situated near Osin Hotel, Tezu with one girl namely Jyotsna Nath with whom he had alleged illicit relation. Some other people were also present there. In such indecent company SI D. Bezbaruah picked up quarrel with Jyotsna Nath and took out the service pistol, which was carried unauthorisedly by him and pointed the same at the girl to kill her. Such act on the part of SI D. Bezbaruah is gross misconduct and unbecoming of a member of disciplined force.

ARTICLE-III

That in the night of 14.8.98 SI D. Bezbaruah, accompanied with Jyotsna Nath, came to X Hotel Tezu having Govt. pistol with him and occupied one room thereat for his illicit relations. The company of Jyotsna Nath with SI D. Bezbaruah resulted in serious injury on her person by fire arm and ultimately to her death. But SI D. Bezbaruah was found missing from the place of occurrence without taking any step to inform the police regarding the incident or to shift Jyotsna Nath to the hospital. Such act on the part of SI D. Bezbaruah is gross misconduct, unbecoming of a member of disciplined force and prejudice to the reputation of the entire police department.

ARTICLE-IV

That the 9 mm service pistol bearing No. 15180042 with 10 Rds of ammunitions which was issued to SI D. Bezbaruah a long time was ultimately recovered (above pistol + 9 Nos of ammunitions) from the possession of Srhri Dilipso Tayeng on 15-8-98 in a half cocked position. Thereby it is apparently clear that SI D. Bezbaruah had handed over the Govt. service pistol and ammunition to an unauthorized person. Such act on the part of SI D. Bezbaruah is gross misconduct in the discharge of his official duty and handling of Govt. issued Fire arms and ammunition., "

5. The departmental proceeding was preceded with a preliminary enquiry conducted by the Inspector Manik Gogoi. Simultaneously, a criminal case of murder was also registered. In the departmental proceeding, 9 witnesses were examined and on the basis of the evidence of those witnesses Charge Nos. II, III and IV were found to have been established. In other words, Charge No. I did not sustain. After the departmental proceeding, the petitioner was dismissed from service.

6. The impugned orders of dismissal have been basically challenged on the ground that the enquiry was conducted de-hors to the rule and in violation of principle of natural justice. According to the learned counsel for the petitioner, the enquiry officer did not appoint any presenting officer and despite that he allowed PW 1, Manik Nath to act as de-facto presenting officer. The learned counsel further argued that the enquiry officer accepted the statement of the witnesses given under Section 161 of the Code of Criminal Procedure without furnishing the copies, of those statements to the delinquent before hand and also without summoning or examining the police officer who had recorded those statements in the criminal proceeding. The learned counsel also submitted that the enquiry officer has accepted the statement of Bina Balmiki, PW 7, given before a Judicial Magistrate under Section 164 Cr.PC without summoning or examining the Judicial Magistrate. According to the learned counsel, this document was also not supplied to the delinquent before initiation of the departmental proceeding. The learned counsel also submitted that the enquiry officer has concluded his report ignoring the fact that the prime witnesses of the department, viz PW 2 and PW 3 did not stick to their earlier statements.

7. The learned counsel for the writ petitioner, in support of his argument, has cited the judgment of the Hon'ble Supreme Court rendered in the case of **Roop Singh Negi -Vs- Punjab National Bank and Others; reported in (2009)2 SCC 570** to contend that the evidence collected during the investigation of a criminal case, cannot be treated as an evidence during the departmental enquiry. The learned counsel also cited the judgment of **Kuldeep Singh Commissioner of Police and Others; reported in (1999) 2 SCC 10** in support of his contention that if the disciplinary authority intends to rely upon the previous statement of witnesses, the copy of those statements should first be supplied to the delinquent and thereafter the delinquent should be given an opportunity to confront the witnesses with respect to their previous statements. However, this procedure was also not followed in the present case. Learned counsel for the petitioner also relied upon the judgment of the Hon'ble Supreme Court rendered in the case of **Captain M. Paul Anthony -Vs- Bharat Gold Mines Ltd and Anr; reported in 1999(3) SCC 679** to buttress his arguments that if the delinquent is also tried in a criminal proceeding on the basis of identical facts on same set of evidence and if the delinquent is acquitted in the criminal proceeding, the delinquent should also be exonerated in the departmental proceeding. According to the learned counsel, since the writ petitioner has been acquitted from the criminal trial of murder, the Charge Nos. II and III could not have been treated as proved by the enquiry officer.

8. Per contra, Ms G. Deka, learned Addl. Govt. Advocate submitted that the appointment of a presenting officer is not mandatory in view of the Rule 14 of the CCS(CCA), Rule 1965. According to the learned counsel, the sole object to appoint a presenting officer is to see that the delinquent is given fair opportunity to defend himself. The learned Govt. counsel also submitted that the statements of witnesses recorded under Section 161 CrPC, during the investigation of criminal case, may not be admissible in the criminal trial but those statements can be produced and relied upon in a departmental proceeding. Learned counsel further contended that the standard of proof of charge is not like in a criminal proceeding, wherein the charges have to be proved beyond all reasonable doubt and as such acquittal of the delinquent in the trial court cannot be a ground to set aside the orders of dismissal. The learned Addl Sr. Govt. Advocate also contended that the delinquent was

given adequate opportunity to cross-examine all the witnesses and as such no infirmity was committed by the enquiry officer to take into consideration the statements of the witnesses.

9. At this stage of the judgment, I would like to re-iterate that the disciplinary authority has accepted the enquiry report in toto. In other words, the disciplinary authority has accepted that the Charge No.I was not proved. Similarly, Sri Tiwari, learned counsel appearing for the petitioner also did not seriously challenge the findings of the enquiry officer with regard to the Charge No. IV. This charge relates to recovery of service weapon from a civilian, to whom the official weapon was given by the delinquent unauthorizedly. In this way, I am called upon to see whether the articles of Charge No.2 and 3 were proved by the department, adhering to the rules of service jurisprudence and the principles of natural justice.

10. There is no dispute that the department did not examine either the police officer, who had recorded the statements of witnesses under Section 161 Cr.PC nor the learned Judicial Magistrate who had recorded the statement of Smti. Bina Balmiki (PW 7) under Section 164 Cr.P.c. Learned Govt. Advocate also did not produce any evidence before me that the aforesaid documents were supplied to the delinquent before commencement of the departmental proceeding. However, the enquiry officer has thoroughly relied upon the those statements, while recording his findings on Charge Nos. II and III.

11. In the case of Kuldeep Singh (Supra), the Hon'ble Supreme Court has held that it is the mandate of Service Rule as well as Article 311(2) of the Constitution of India, to give reasonable opportunity of hearing to the delinquent and the said right of adequate hearing includes furnishing of statement of witnesses recorded under Section 161 CrPC. The relevant observations of their Lordships laying down the legal proposition are re-produced below :

" Apart from the above, Rule 16(3) has to be considered in the light of the provisions contained in Article 311(2) of the Constitution to find out whether it purports to provide reasonable opportunity of hearing to the delinquent. Reasonable opportunity contemplated by Article 311(2) means "hearing" in accordance with the

principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the delinquent who should thereafter be given an opportunity to cross-examine that witness."

12. With regard to the submission of the learned counsel that the petitioner's departmental proceeding ought to have been closed on the basis of his acquittal in the criminal trial, I am of the view that the submission is not acceptable inasmuch as the Charges in a disciplinary proceeding can be established on the basis of preponderance of probability, for a quasi judicial authority, while deciding issues on facts, may not insist upon conclusive proof. Contrary to it, to obtain a conviction of an accused, the prosecution has to establish criminal charges beyond all reasonable doubt. Be that as it may, in the criminal trial of murder, the accused/petitioner was acquitted giving the 'benefit of doubt'. To put it differently, the learned Deputy Commission-cum-Sessions Judge, Tezu did not give any finding that the charge of murder was absolutely baseless nor is there any finding that Ms Jyotsna Nath was in the company of any other person at the time of her murder or that she was killed by any person other than the accused. However, the accused was given benefit of doubt due to certain deficiencies/discrepancies in the prosecution case to establish that the bullet fired from the service pistol of the accused was actually fired by him.

13. In the case of **Senior Superintendent of Post Offices, Pathanamthitta and others-Vs. A Gopala;** reported in (1997) 11 SCC 239, the Hon'ble Supreme Court has held that acquittal in a criminal trial on benefit of doubt does not stand as a bar in imposing penalty in departmental proceedings.

14. I am also of the view that the ratio of judgment in the case of M. Paul Anthony (Supra) is not applicable in the present case. In the

aforesaid case, small quantity of gold bars were seized from the delinquent and both the departmental proceeding as well as the criminal proceeding were held on the same allegation, whereas in the case before me, the charges include gross mis-conduct of the delinquent by way of maintaining illicit relation with a civilian lady, taking alcohol in the house of another civilian lady in company with other persons, and mis-using the official service revolver. In other words, the allegation of killing a girl was an additional fact of mis-conduct. Be that as it may, even in the aforesaid case, the Hon'ble Supreme Court has observed that extending benefit of discharge in domestic enquiry, as a result of acquittal in criminal trial, would depend upon other facts. The relevant observations are as follows:

"We may not be understood to have laid down a law that in all such circumstances the decision of the civil court or the criminal court would be binding on the disciplinary authorities as this court in a large number of decisions points out that the same would depend upon the other factors as well....."

15. Having analysed the entire facts and circumstances of the case, I hold that the enquiry officer as well as the disciplinary officer committed manifest illegality in accepting the statements of the witnesses, recorded under Sections 161 and 164 CrPC in the criminal proceeding, as substantive evidence in the departmental proceeding and that too without furnishing copies of those statements to the delinquent, which deprived him to confront the witnesses from their previous statement. Besides this, free intervention of PW 1 Sri Manik Gogoi had also vitiated the enquiry. From the evidence of witnesses it is abundantly clear that, almost all the witnesses were thoroughly cross-examined by PW 1, who had made preliminary enquiry of the charges on behalf of the department and submitted his report, which was the basis for initiating the departmental proceeding. If the enquiry officer had at all intended to appoint a presenting officer, he had all the freedom and authority to appoint a separate and independent person to act as a presenting officer. Having not done so, the enquiry officer permitted PW 1 not only to cross-examine the witnesses but also to introduce in evidence the statements recorded by the other authorities. In my considered view, PW 1 was not a proper person to produce the statements recorded by the Investigating Officer of the criminal trial under Section 161 Cr.P.c. or

the statement recorded by the learned Judicial Magistrate under Section 164 Cr.P.C., that too in the midst of the departmental proceeding.

16. For the reasons hereinabove, I hold that the Charges No. II and III cannot sustain since these charges have been proved on the basis of the evidence not tendered before the enquiry officer in accordance with law. However, the aforesaid statements of witnesses recorded under Sections 161 and 164 Cr.P.C. had no bearing on the Charge No.IV. Hence, I find no infirmity in upholding the decision of the disciplinary authority to accept Charge No.4.

17. From the cumulative result of alleged proof of Articles II, III and IV, the disciplinary authority had inflicted the punishment of dismissal of service. Since, I have hold that Charge Nos.II & III were not proved in accordance with law the disciplinary authority shall now re-examine whether it would be just and proper to dismiss the delinquent/writ petitioner on the basis of Article- IV alone. The disciplinary authority is given discretion to take a fresh decision in this regard. At the same time, the disciplinary authority is also given liberty to hold de-novo enquiry with regard to Articles II and III, if they so desire. In that event, the disciplinary authority shall furnish all the documents, that may be relied upon in the enquiry to the delinquent and such enquiry shall be held strictly in accordance with law.

18. In the result, the writ petition stands dismissed. The disciplinary authority is directed to take appropriate steps in the light of the observations made in the preceding paragraph, as expeditiously as possible.

JUDGE