

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

ITANAGAR PERMANENT BENCH

WP(C) NO. 181(AP) OF 2010

Shri Nani Grayu

S/o Late Nani Tailyang,
Residence of Village : Reru,
P.O. & P. S.: Ziro,
District : Lower Subansiri
Arunachal Pradesh.

..... *Petitioner*

- Versus -

1. The State of Arunachal Pradesh represented by the Commissioner(Home), Government of Arunachal Pradesh, Itanagar.
2. The Inspector General of Police, Arunachal Pradesh, Itanagar.
3. The Deputy Inspector General of Police(BN0, Arunachal Pradesh, Itanagar.
4. The Commandant, 2nd APP Bn, BHQ, Aalo.
5. The Superintendent of Police(HQ), Arunachal Pradesh, Itanagar.
6. The Enquiry Officer,
Shri T. Konia(Inspector),
Police Station : Daporijo, District : Upper Subansiri,
Arunachal Pradesh.

..... *Respondents*

Advocates for the petitioner :- Mr. D. Lazi
Mr. H. R. Obing
Mr. L. Tama
Ms. Y. Nani

Advocate for the respondents :- Ms. G. Deka, Addl. Sr. Government Advocate

P R E S E N T
THE HON'BLE MR. JUSTICE P. K. MUSAHARY

Date of hearing :- **01.12.2010**

Date of Judgment & order :- **01.12.2010**

JUDGMENT AND ORDER(ORAL)

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Heard Mr. D. Lazi, learned counsel for the petitioner. Also heard Ms. G. Deka, learned Addl. Senior Government Advocate, for State respondents.

2. The petitioner challenges the office order No. DE-OI8/2NDBN/NG/07 dated 21.08.2008 issued by the Commandant, 2nd APP Bn, BHQ, Aalo, whereby the petitioner has been dismissed from service.

3. The facts leading to the aforesaid dismissal are that the petitioner was appointed as Constable Driver in the 2nd APBN under the Department of Arunachal Pradesh Police. He joined in his service on 19.09.2005. While he was directed to join at Nacho and he was preparing to join thereat, he fell sick suddenly and he proceeded to his native place at Ziro for medical treatment. When he was undergoing medical treatment, his father expired in the month of February, 2007 and the petitioner had to perform the rituals. He returned and re-joined in his duties on 01.10.2007. His joining report was accepted but subsequently, he was placed under suspension w.e.f. 10.10.2007 on contemplation of departmental proceeding and he was directed not to leave the Headquarter. Thereafter, memorandum of charges dated 11.10.2007 was served upon the petitioner asking him to file written statement of defence within 10 days. The petitioner filed the written statement (Annexure-

V to the writ petition). Thereafter, the respondents initiated the departmental proceeding against the petitioner by appointing an Enquiry Officer under the provision of Rule 7 of the Arunachal Pradesh Police(Discipline & Appeal) Rules, 1999. The petitioner participated in the departmental proceeding. The Enquiry Officer submitted inquiry report and a copy of the same was furnished to the petitioner vide forwarding letter dated 09.07.2008 followed by show-cause notice dated 30.07.2008 on proposed imposition of penalty. The petitioner could not submit the reply to the show-cause notice but he requested for extension of time by one month vide his letter dated 08.08.2008. But before granting time, the impugned punishment order dated 21.08.2008 was issued. On receipt of the impugned dismissal order, the petitioner preferred an appeal on 26.09.2008 before the Deputy Inspector General of Police, Bn, Itanagar, under the provision of Rule 26(1) of the Arunachal Pradesh Police(Discipline & Appeal) Rules, 1999 (Annexure-IX to the writ petition). The said appeal was rejected vide order dated 07.11.2008 by the DIGP, APP, confirming the punishment order. Thereafter, the petitioner again filed a revision petition on 29.12.2008 before the Inspector General of Police, Itanagar, but the said revision petition was rejected vide order dated 08.05.2009 (Annexure-X to the writ petition). Having no other alternative, the petitioner approached this court by filing the present writ petition.

4. Mr. Lazi, learned counsel for the petitioner, submits that the respondent authorities violated the principles of natural justice in proceeding against the petitioner inasmuch as no

Presenting Officer was appointed and the petitioner was not given an opportunity to appoint a Defence Assistant which is his constitutional right. The failure to appoint the Presenting Officer and providing the opportunity to engage Defence Assistant to the petitioner is a serious procedural lapse vitiating the order of dismissal. According to him, once the respondent authority initiates departmental proceeding, it must follow the procedures laid down in the rules and follow the principles of natural justice. In the present case, according to him, the Presenting Officer having not been appointed, the Inquiry Officer has acted as prosecutor as well as judge which is not permissible under the law. The delinquent being a low paid employee in the lowest rank in the post of Constable Driver needs Defence Assistant to defend his case effectively and by way of not providing him any opportunity to engage a Defence Assistant, the respondent authorities have denied the opportunity of effective defence in the departmental proceeding. In this regard, to law relating to appointment of Presenting Officer, he has cited the following cases :

(1) 2009 (5) GLT 543

(2) 2009 (5) GLT 460

(3) 2005 (3) GLT 154

(4) (2008) 8 SCC 236

(5) 2005 (1) GLT 413

(6) (2001) 1 SCC 610

(7) (1998) 7 SCC 84

(8) (2010) 2 SCC 772

In respect of appointment of Defence Assistant, he has cited the following cases :

(1) 2005 (3) GLT 543

(2) 2005 (3) GLT 460

(3) (2008) 8 SCC 236

(4) 2005 (3) GLT 154

(5) 2005 (3) GLT 413

Besides, it has been submitted by Mr. Lazi, learned counsel for the petitioner that the respondent authorities did not take into account the fact that the petitioner was suffering from illness for which he had to undergo medical treatment at his native place viz. Ziro for a long period of time and could not join the duties. Moreover, the respondent authorities relied upon a document namely Medical Board's Expert report which was mentioned in the memo of charges, list of documents and which were not even shown to him. The petitioner was not provided with opportunity to cross-examine the witnesses produced by the disciplinary authority particularly witnesses produced in connection with Medical Board Expert report and thereby, he has been denied a fair opportunity of defence. According to learned counsel, the punishment of dismissal from service is disproportionate to the gravity of offence alleged against him and as such, the punishment of dismissal from service is liable to be quashed and set aside. It is under such circumstances, Mr. Lazi, learned counsel for the petitioner submits that the impugned order of dismissal and the consequential orders be quashed and set aside and a direction may be issued to the respondent authorities to make a *de novo inquiry* providing all the opportunities to the petitioner including the appointment of

Presenting Officer, Defence Assistant and opportunity to cross-examine the witnesses including the Medical Board Expert Report.

5. It has been submitted by Ms. G. Deka, learned Addl. Senior Government Advocate that in the Arunachal Pradesh Police (Discipline & Appeal) Rules, 1999, there is no provision for appointment of Presenting Officer and as such, the respondent authorities are not bound to appoint any Presenting Officer. As regards the Defence Assistant, the delinquent has to make a request for providing him opportunity to engage a Defence Assistant. In the present case, the petitioner, according to Ms. G. Deka, learned Addl. Senior Government Advocate, made no such request and there is no question of denial of opportunity to him. The petitioner participated in the departmental proceeding to defend himself and during the departmental proceeding, he never made any complaint that due to absence of Presenting Officer and Defence Assistant, he was prejudiced. He did not make any complaint regarding prejudice for not appointing Presenting Officer and Defence Assistant in the appeal as well as revision petition filed by him. Such complaint has been made only in this writ petition.

6. Ms. Deka, learned Addl. Senior Government Advocate, relies on **(2009) 3 SCC 97**, with regard to question of appointment of Presenting Officer and **(2008) 4 SCC 406** with regard to question of appointment of Defence Assistant. The petitioner having failed to raise the aforesaid questions before or during the departmental proceeding, is estopped from raising this question before this court

inasmuch as he has been provided with an a fair and reasonable opportunity to defend himself and as such, there is no infirmity in the order passed by the authorities concerned, dismissing him from service and rejecting his appeal and revision petition. Placing the records maintained by the Department, she also submits that the petitioner is a habitual absentee he having remained absent on an earlier occasion without authority or leave, which has been reflected in Article No. 1 of memorandum of charges, communicated to him. Such allegation has not been refuted by the petitioner in his written statement. Ms. G. Deka, learned Addl. Senior Government Advocate, further relies on **(2009) 13 SCC 102** wherein it has been held that a delinquent employee remaining absent from duty without justification or leave on several occasions and during pendency of inquiry, taking into consideration past conduct, an order of removal from service, can be made, since indiscipline is intolerable so far as disciplined force is concerned.

7. I have given due considerations to the submissions made by the learned counsel for the parties. There is no dispute on the established position of law that even a delinquent employee, on probation, is entitled to opportunity of fair treatment in the matter of departmental proceeding by way of giving him opportunity of principles of natural justice and protection under the established procedure of law. The real question is whether the present petitioner is entitled to observance of principles of natural justice and can raise the question of illegality of the departmental proceeding and the punishment for not appointing the Presenting Officer and/or

Defence Assistant. Also, it is to examine as to whether any prejudice has been caused to him for not appointing the Presenting Officer and the Defence Assistant.

8. To answer this question, it is necessary to see the nature of appointment of the petitioner. The petitioner was appointed as Constable Driver by order dated 19.09.2005 on probation, for a period of 2 years. Regularization of his appointment would be dependent on completion of probation period and terminable at any time without issuing any reasons thereof. The alleged misconduct was committed by the petitioner during the probation period. In his written statement, it is mentioned that he remained absent from his duties without the leave of the officer concerned and/or he intimated his employer about his illness and treatment during the absent period. He remained absent w.e.f. 05.01.2007 to 30.09.2007 and he reported to his duties only on 01.10.2007. His absent period without authority is 278 days. Moreover, from the statement of article of charges, it has been clearly stated that ***“As per record, after completion of basic training from PTC Banderdewa, CT(D) N. Grayu was transferred from PTC Banderdewa to Daporijo vide DIGP(HQ) order No. PHQ/WT/MT/12/TP/99/PT-II dated 28.02.12006 and during his 20(twenty) months service, he was also found unauthorized absent from duty w.e.f. 21.07.2006 to 26.11.2006, total 129 days, which clearly indicates that he is habitual absentee from duty.”*** There is no explanation in the written statement of the petitioner on the aforesaid absence. In other words, the petitioner has not denied the allegation that he remained absent unauthorizedly during this period. It is also not denied that he was appointed on probation of 2

years and during this probation period of 2 years, his appointment was regularized.

9. What is to be noted that if the allegation of unauthorized absence is not rebutted or denied, if the departmental proceeding was conducted even following the established principles of natural justice by appointing Presenting Officer or Defence Assistant, as demanded by the petitioner, it would lead to same result i.e. establishment of charge that he was without any leave or authority from the competent authority. In my considered view, a court of law cannot be persuaded to insist on compliance of useless formality. In the present case, the demand of the petitioner for compliance with the principles of natural justice by conducting the departmental proceeding by appointing Presenting Officer and Defence Assistant is nothing but a hollow formality.

10. I have gone through the decisions placed by the learned counsel for the petitioner. the principle laid down there are no doubt undisputed but the same are to be applied on the similar facts and circumstances but I do not find any similarity in the facts and circumstances of the present case for strictly adhering to the principles of natural justice in case of the petitioner. There are cases where the principles of natural justice can be excluded or avoided. Before application of principles of natural justice, the petitioner has to show that he is entitled to certain rights. The petitioner admittedly was serving on probation and his service having not been regularized, in my considered view, cannot claim

the equal right of an employee whose service has been regularized. The principles of natural justice depends on the given facts and circumstances of the case. Here is a case where the petitioner had admitted his absence without leave or authority. After all, what has to be found in the departmental proceeding is whether he was remaining absent from 268+129 days without leave or authority and once, it is established that he was remaining absent unauthorisedly, it would certainly attracts indiscipline and the net result would be termination from service as per the terms of appointment. In this regard, I may refer to ***Dwarka Nath Reddy -vs- Chaitanya Bharti Educational Society***, reported in **(2007) 6 SCC 130** wherein it has been held that persons demanding must be shown to be entitled to certain rights on the basis of which the demand was made. In the present case, it has become crystal clear that the petitioner could not established such right. Further, ***in Ashok Kr. Sankar -vs- Union of India***, reported in **(2007) 4 SCC 54**, the Apex Court held that no one should be condemned unheard and whenever possible, the principles of natural justice should be followed but this principle may not be applied in a given case unless a prejudice is shown and it is not necessary whether it would be a futile exercise. As already stated earlier that the petitioner has not denied his absence without leave or authority and in such case, the departmental proceeding observing all the principles of natural justice and established procedures would be a futile exercise. In such a case, the petitioner, in my considered view, cannot insist on the principles of natural justice.

11. A person in uniform is considered to be a member of disciplined force and he is not expected to violate the principle and discipline. At one stage, submission has been made by learned counsel for the petitioner that the petitioner being an employee of the lowest rank like Driver, is ignorant about the law and the procedure for which he could not demand appointment of Presenting Officer and/or Defence Assistant before or during the departmental proceeding. This is really not an acceptable submission because any employee is aware about the result or consequence of remaining absent without leave or authority. However, I find that the punishment of dismissal of petitioner from service is disproportionate considering the fact that he could be terminated from service on violation of the terms of appointment. Interest of justice would be served if the order of dismissal is converted to termination so that the petitioner can seek employment elsewhere as he is still in the age of employment.

12. For the above discussions and reasons, this writ petition stands dismissed with modification to the punishment of the petitioner from dismissal to termination.

13. There shall be no order as to costs.

JUDGE