

## Moatemsu AO Vs State of Nagaland and Others

**Court:** Gauhati High Court (Kohima Bench)

**Date of Decision:** May 27, 1993

**Acts Referred:** Constitution of India, 1950 " Article 226  
Nagaland Armed Police Act, 1966 " Section 7, 9

**Citation:** (1994) 2 GLR 248

**Hon'ble Judges:** W.A. Shishak, J

**Bench:** Single Bench

**Advocate:** Maniher Singh, for the Appellant; Govt. Advocate, for the Respondent

### Judgement

W.A. Shishak, J.

In this petition the Petitioner challenges the order of dismissal on ground of desertion issued by the Superintendent of

Police vide No. MDP/RO-15/90-91/1993 dated 20th December 1991, on the ground that the impugned order was issued without affording an

opportunity of being heard to the Petitioner.

2. The Petitioner was appointed as Constable w.e.f. 15.1.83. Thereafter he successfully completed training and remained in service for about eight

years. While serving at Changtongya Police Station in Mokokchung District, the Petitioner took leave (out pass) on 18 and 19 October, 1991

from O.C. of Changtongya Police Station on ground of some domestic affairs, It is contended that as the Petitioner was facing some problems at

home he could not report back for duty in time. It appears the Petitioner had overstayed his leave (out pass), The manor was reported by O.C. to

Supdt. of Police, Mokokchung on 19.11.91. The Supdt. of Police directed on the same day i.e. 19.11.91 that seven days notice be served upon

the Petitioner to report back for duty, Obviously notice was served on 21.11.91. According to the Petitioner he duly reported to R.O. at S.P.'s

office but he was informed verbally by R.O. that he was dismissed from service. It appears the Petitioner had not persisted in the matter and had

simply gone home and stayed on with his family.

3. It is staled however, after some time the Petitioner realised that he could not remain at home without service and he began to look for a means

to get back his service. When he was advised to gel necessary orders by which his service had been terminated, he approached the S.P.'s office

on 9.11.92 for furnishing him a copy of the order of dismissal which he came to know had been issued on 20th December, 1991 as he learnt it

from reliable source. It was on 9.11.92 that he obtained a copy of the impugned order of dismissal. Thereafter he contacted a local lawyer at

Mokokchung to examine his case and to do the needful for him, It is stated by the learned Counsel for the Petitioner that after obtaining some

relevant materials this petition was presented before this Court.

4. The first submission made on behalf of the Petitioner is that the impugned order of dismissal on ground of desertion is Impermissible in the

circumstances of this case in as much as the fact that the Petitioner was physically available in Mokokchung was known to the office of S.P. The

proof that the Petitioner was at all times available in Mokokchung Town is that notice to report back for duty within seven days was duly received

by the Petitioner on 21.11.91. It is also contended that being a local person residing near Fazl Ali College of Mokokchung the question of

desertion in a manner stated in the order cannot be sustained. Another submission made on behalf of the Petitioner is that in the event of desertion

also the manner in which the dismissal order is issued is illegal in as much as no enquiry was made. There is absolutely no material to show that the

Petitioner deserted. It is also submitted as stated above that the Petitioner in fact reported to R.O. but it was simply told not to come for duty. The

other submission of the learned Counsel for the Petitioner is that having put in eight years service as Constable the Petitioner could not have been

dismissed in the manner sought for to be done by the impugned order. The Petitioner claims that he had right to be heard before such drastic action

was taken in dismissing the Petitioner from service. It is also contended on behalf of the Petitioner that no copy of impugned order of dismissal

dated 20th December, 1991 was ever served. As stated above only when the Petitioner approached the office of S.P. on 9.11.92, that a copy of

the said order of dismissal was furnished to the Petitioner. It is also submitted that there is nothing to show that any effort was made to find out

whether the Petitioner was available in his residence with his family. According to the counsel, the Petitioner has four minor children. It is the case

of the Petitioner that since no enquiry was made he had absolutely no opportunity of explaining how he had over stayed leave obtained by him

from O.C.

5. Mr. E.Y. Renthungo learned Jr. Govt. Advocate submits that the Petitioner being in uniformed service, is not in fact fit person to remain in

service in as much as by his conduct in the facts and circumstances of the case specially the fact that he over stayed and never made any effort to

come back for duty. It is submitted that to retain the service of such a man would only be to the detriment of the society in as much as no good

service is likely to be rendered by such a man who does not seem to care much for discipline and duty. He draws my attention to Section 7(h) and

also Section 9 of the Nagaland Armed Police Act of 1966 to say that the punishment meted out to the Petitioner is warranted under such

provision, Let me not say more than this that although punishments for various offences are clearly set out in these provisions, the basic question is

whether the Petitioner had been put on trail for any of the charges. Punishments are to be inflicted only on finding that the Petitioner has been found

guilty on some of the charges. Obviously no proceeding was drawn up against the Petitioner. No case was ever tried by any competent court in

respect of any of the offences enumerated in the aforesaid provisions of law. It may be stated that desertion could be a very serious offence but it

should be proved. As stated above he was asked to report back within seven days, Assuming and also not believing that he actually reported to

R.O. as stated by him, what would have prevented the competent authority to make an enquiry against him. The fact that the Petitioner does not

appear to behave himself does not entitle the competent authority to behave like the Petitioner. Competent authority must act in accordance with

the provisions of law. In the present case it appears the Petitioner has been condemned un-heard. This cannot be allowed.

6. It has also been submitted by the learned Jr. Govt. Advocate that there is a delay in approaching this Court under Article 226 of the Constitution

and delay has nowhere been explained and therefore the petition should be dismissed on this score alone. Although I would have liked to examine

relevant record file concerning this case, as it was made clear in my order dated 18.5.93 that record would be extremely helpful for me, no such

record has been made available to me, And in view of this it cannot be ascertained whether the order of dismissal dated 20th December 1991 was

actually served upon the Petitioner earlier than 9.11.92 as contended by the Petitioner himself. It is stated by learned Jr. Govt. Advocate that

although record was called for it has not been received by him till today. However, I have seen a parawise comment sent by the S.P.'s office. It is

nowhere stated that the order of dismissal was at any time communicated or served upon the Petitioner. If that is so the contention of the Petitioner

that only on 9.11.92, by making an application, the order of dismissal was obtained, has to be accepted. If that is so, it could not be said that the

delay is to be attributed to the Petitioner. Even assuming that the Petitioner knew of the issuance of the order of dismissal on 20th December 1991

the delay of one year in approaching this Court challenging the illegality of order of dismissal from service of the Petitioner cannot be said to be

undue delay, In other words to dismiss the petition on the ground of delay in the circumstances of the present case would defeat justice. I am

therefore unable to accept the submission made in this regard on behalf of the Government.

7. Since the Petitioner had served eight years as Constable the service of the Petitioner cannot be said to be a temporary one also. However, in all

fairness it must be stated that the Petitioner does not appear to me to be a diligent and careful person. But that part of it has to be taken care of by

the Competent authority. It is for the competent authority to see that a member of the armed force behaves himself. It may, however, be stated that

the fact that the Petitioner simply stayed home for several months without making any effort to go back to service is simply very hard to

understand. However, it hurts the conscience of this Court to see that the Petitioner would lose his service for life on alleged ground of desertion as

stated on behalf of the Government. After all service of the Petitioner would mean reasonable livelihood of the members of the family, this humane

part of it has played some role in my thinking after hearing learned Counsel of both sides.

8. In the facts and in the light of the circumstances and findings in the foregoing paras, the petition is allowed. The order of dismissal dated 20th

December, 1991 is quashed. The Petitioner shall be taken back to service forthwith. It is, however, made clear that in the facts and circumstances

that I have narrated above, the Petitioner shall not be entitled to any back wages from the date of dismissal i.e. from 20th December, 1991 till the

date of reinstatement. However, the past service of eight years shall be counted in his service for all other service benefits.

With the above direction and observation the petition is disposed of. No costs.