
(1993) 05 GAU CK 0010

Gauhati High Court (Kohima Bench)

Case No: Civil Rule No. 24 (K) 1993

Moatemsu AO

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

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 stated 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 get 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 unheard. 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 parasewise 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.