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**(2012) 02 GAU CK 0056**  
**In the Gauhati High Court**  
**Case No : Writ Appeal No. 51 of 2011**

Shri Aswini Kumar Das

APPELLANT

Vs

Government of Assam and others

RESPONDENT

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**Date of Decision :** 07-02-2012

**Acts Referred:**

**Citation :** (2012) 2 GLD 393

**Hon'ble Judges :** P.K. Musahary, J; Iqbal Ahmed Ansari, J

**Bench :** Division Bench

**Advocate :** N.C. Barooah and Mr. U.C. Rabha, for the Appellant; P.S. Deka, Government Advocate, None for the respondent No. 5, for the Respondent

**Final Decision :** Dismissed

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## Judgement

R.K. Musahary, J.—Compulsory retirement; one of the major penalties, was handed down to the appellant on conclusion of departmental proceedings. The order was challenged in the writ proceedings, namely, W.P(C) No. 1376 of 2008, which was dismissed by the impugned judgment and order, dated 22.12.2010. The appellant prefers the present appeal. We have heard Mr. N.C. Barooah, learned counsel for the appellant, and Mr. P.S. Deka, learned Government Advocate, Assam, appearing for the respondents No. 1 to 4. None has appeared for the respondent No. 5, Assam Public Service Commission.

2. Mr. Barooah, learned counsel, submits that the appellant was not absent from duties without authority inasmuch as he, initially, went on days" casual leave with due permission to leave the Headquarter and intimated the authorities concerned about his illness and treatment in the Gauhati Medical College & Hospital, at Guwahati, with request to grant him earned leave.

3. Mr. Barooah's first submission is that although the leave, applied for, was not granted, the appellant's absence from duty cannot be termed as unauthorized absence. Secondly, it was unwarranted on the part of the department to initiate departmental proceeding against the appellant on alleged charges of gross

negligence and dereliction of duty. Thirdly, the principle of natural justice was violated in conducting the departmental proceeding inasmuch as no presenting officer was appointed and thereby the Inquiry Officer acted both as Inquiry Officer and Presenting Officer, which is not permissible under the law. In support of this submission, Mr. Barooah relies on the case of Kumaon Mandal Bikash Nigam Ltd. v. Girija Shankar Pant and others, reported in (2001) 1 SCC 182. Fourthly, the findings of the Inquiry Officer are based on no evidence and he failed to take into consideration the relevant documents, particularly, the medical certificates issued by the Hospital Authorities in favour of the appellant. Last of all, Mr. Barooah submits that since the period of alleged absence from duty has been regularized and converted into leave without pay by the competent authority, the charge of absence from duty, during the relevant period, would not survive any longer and it is fallacious to award punishment of compulsory retirement from service. In support of this submission, Mr. Barooah relies on the case of State of Punjab and others v. Bakshish Singh, reported in 1998 5 SLR 625.

4. Mr. P.S. Deka, learned Government Advocate, appearing for the State-respondents, places the official record, namely, file No. PROC.CELL/XXVH/1/2002 relating to departmental proceeding drawn up against Inspector (UB) Aswini Kr. Das LI, Police Training Centre, Dergaon. He submits that the appellant availed casual leave for three days from 23.9.2002 and he was supposed to report back on 23.9.2000, but he overstayed without prior sanction from the authorities. The appellant sent his application only on 20.10.2000 for 60 days earned leave on medical ground, with effect from 23.9.2000, followed by other applications requesting for extension of earned leave from time to time. For the purpose of granting leave, the appellant was directed to appear before the departmentally constituted medical board on two occasions, but he did not turn up, whereupon the department issued show-cause notice to the appellant and as his written statement was not found satisfactory, a departmental proceeding was initiated against him, the appellant participated, in the departmental proceeding, by submitting the documents on which he wanted to rely upon, he remained present during departmental proceeding, but he chose not to cross-examine the witnesses examined by the department nor did he examine any witness in his defence.

5. Mr. Deka also points out that during proceeding, the department, before recording of evidence, allowed the appellant to inspect the official documents as desired by him and at no point of time, the appellant made any request for appointment of presenting officer or made any grievance to the effect that he was prejudiced due to non-appointment of presenting officer. Relying on the decision of the Supreme Court, in the State of Punjab Vs. Dr. P.L. Singla, , Mr. Deka, learned Govt. Advocate, submits that grant of leave is not something that can be inferred or presumed and it could have, therefore, been held by the enquiry officer that the appellant remained absent in an unauthorized manner inasmuch as the authority concerned had not granted him leave. The appellant,

according to the learned Government Advocate, failed to explain the unauthorized absence satisfactorily. Under such circumstances, grant of leave, without pay after imposition of penalty, as a consequential step to avoid break in service cannot be treated as waiving the misconduct committed by the delinquent.

6. We have considered the rival submissions of the learned counsel for the parties. We have also gone through the record placed before us.

7. On perusal of the impugned judgment and order, we find that the learned Single Judge recorded the following findings and decisions :

(i) The disciplinary authority constituted the medical board twice, but the appellant did not appear before the Medical Board on flimsy grounds.

(ii) The documents, exhibited during enquiry, revealed gross negligence and dereliction of duty on the part of the appellant, because he ignored the communications sent to him asking him to re-join his duties.

(iii) The writ Court would not sit as an appellate authority except where mala fide, illegality or perversity is committed during the enquiry by the inquiry officer and no such infirmity has been found in the instant case.

(iv) The disciplinary authority and the appellate authority exercised their powers within their ambits and there is no ground for interference with the impugned finding and consequential penalty.

8. In his writ petition, the appellant pleaded that on being transferred, he reported at the Police Training Centre (in short PTC) on 17.9.2000 and availed three days" casual leave, w.e.f. 23.9.2000, as granted by the authority with permission to leave the Head quarters. While availing the casual leave, he fell sick at Guwahati and apprised the PTC authority of his illness by sending a message, on 28.9.2000, followed by an application, made, on 20.10.2000, seeking grant of earned leave on medical ground for 60 days w.e.f. 23.9.2000 and for conversion of casual leave granted earlier to earned leave, but his sickness persisted and so he sent applications, dated-

(i) 22.11.2000, for extension of earned leave for 30 days.

(ii) 22.12.2000, for extension of earned leave for 30 days.

(iii) 22.1.2001, for extension of earned leave for 30 days.

(iv) 24.2.2001, for extension of earned leave for 30 days.

(v) 27.6.2011, for special leave on medical ground for 180 days.

(vi) 31.12.2001 for special leave for 105 days.

9. The aforesaid leave were sought on medical ground as the appellant claims that he was attacked by viral hepatitis requiring hospitalization in Gauhati

Medical College & Hospital from 28.9.2000 to 12.10.2000 followed by intestinal T.B. requiring domiciliary treatment for a prolonged period. In paragraph 7 of the writ petition, the appellant stated that he received messages from time to time from the Principal, PTC, Dergaon, directing him to resume duties, but his physical condition prevented him from resuming his duties. He also stated that he was directed to appear before the Medical Board at Central Police Hospital, Dergaon, on 16.7.2001 and 20.8.2001, but he could not appear before the said medical board, on 16.7.2001, due to short notice and, on 20.8.2001, due to his physical incapacity. Thereafter, on 28.9.2000 and 2.11.2000, he was, again, treated for Lambago pain in support of which he produced three medical certificates, dated 10.12.2000, 22.1.2001 and 23.2.2001. From all those five medical certificates, it is found that the appellant was treated as an outdoor patient only from 28.9.2000 to 24.3.2001. He was never hospitalized, in the Gauhati Medical College & Hospital, for treatment.

10. Subsequently, the appellant was reportedly suffering from extra pulmonary tuberculosis (intestinal T.B.) for which he was under- going treatment as a domiciliary patient under Dr. J.N. Talukdar of L.G.B. Chest Hospital, Guwahati, since 21.3.2001 and he was declared fit for duty, w.e.f. 1.1.2002, as per medical certificate, dated 31.12.2001, issued by the Superintendent, LGB Chest Hospital. This certificate was produced by the appellant himself during the departmental proceeding and the same was exhibited as Ext. XXVI. From this certificate, it appears that he was treated, in the Chest Hospital, as an outdoor patient only. It is difficult to accept or believe that a patient/person suffering from some ailments, but undergoing treatment as an out door patient in a hospital, would not be able to undertake a journey from Guwahati to Dergaon to see and apprise the principal of the PTC, at least, once, about his illness and request for leave. The applicant never cared to do so. He did not even care to apprise the authorities, in the police headquarter, at Guwahati, of his physical incapacity to move to Dergaon. What prevented him from approaching the police headquarter, at Guwahati, is beyond anybody's comprehension. The appellant was, time and again, asked to report to rejoin his duty through various letters delivered to him through Dispur Police Station, but he maintained silence and did not give any response to the letters received from the PTC. His explanation for failing to appear before the first medical board, on 16.7.2001, due to short notice may be accepted; but his failure to appear before the next medical board, on 20.8.2001 is not acceptable at all.

11. What is disturbing the conscience of the Court is that although he was declared fit by the hospital authority to resume duties with effect from 1.1.2002, he did not turn up before the principal PTC even after the show-cause notice was issued on 2.4.2002. He could have shown his bona fide by appearing before the principal, PTC, just after he was declared fit by the hospital authority. The appellant has shown a conduct unbecoming of a responsible police officer by not reporting to the PTC authority, immediately, after he was declared fit to resume duties.

12. As regards the grievance of the appellant that departmental proceeding is vitiated for violation of principle of natural justice for not appointing a presenting officer, we are unable to accept the submissions of Mr. Barooah, learned counsel, based on Kumaon Mandal Bikash Nigam's case (supra). That was a case, where as many as 13 allegations were brought against the delinquent without documentary support and without furnishing him with copies of the documents on which the enquiry authority relied upon. Causing of prejudice to the delinquent is quite natural in such a case. But in the instant case, the charges are based almost on admitted facts. The medical certificates/documents were submitted by the appellant himself, which were in his possession. Moreover, on his application made, the appellant was allowed to inspect the other documents, which were in the possession of the department. There is no complaint from the appellant's side that he was not furnished with any copy of relevant documents or he was not allowed to inspect the relevant documents. He had no grievance, in the writ proceeding, that he was prejudiced due to non-appointment of presenting officer. This grievance has been made only at this appellate stage. How and in what manner, he has been prejudiced is not explained. We are not bound to accept the grievance of causing prejudice as no such case has been made out that appointment of Presenting Officer is mandatory and if any departmental proceeding is proceeded without appointing a presenting officer and ends with awarding of major penalty, it is liable to be declared void and illegal. The learned counsel, for the appellant, has failed to place any authority in this regard. Of course, such a grievance can be examined and accepted if any prejudice has been caused to the delinquent in real sense.

14. We have, as stated earlier, not been apprised by the appellant as to how prejudice has been caused to him. On perusal of the record and also on the face of the pleadings of the appellant, we are satisfied that the necessary legal procedure, in the departmental proceeding drawn against the delinquent, has been observed. The appellant was served with a show-cause notice to explain his alleged misconduct vis-a-vis unauthorized absence without being granted leave. He replied to the show-cause notice and the same being found un-satisfactory, departmental proceeding was drawn up by appointing an enquiry officer. Admittedly, the appellant was allowed to inspect the documents he desired to examine. He fully participated in the proceeding without raising any objection to the non-appointment of presenting officer. Whatever documents, the appellant filed, were brought on record by the Enquiry Officer at the time of recording the evidence of witnesses. He was given full opportunity to cross-examine the witnesses, but he declined to do so. There is no complaint from his end that the documents, filed by him or sought to be relied upon by him, were not brought on record by the Enquiry Officer at the time of recording the evidence; hence, the appellant is, now, in our considered opinion, precluded from raising the question of prejudice and making a grievance of the departmental proceeding having been vitiated on ground of non-appointment of a presenting officer.

14. The appellant has taken a ground that the Enquiry Officer as well as the

disciplinary authority did not take into consideration the documents placed by him during the enquiry proceeding. This ground is in contradiction to the former ground i.e. vitiation of the proceeding due to non-appointment of presenting officer. By taking the later ground, the appellant has admitted the position that the Enquiry Officer had honestly brought on record the documents filed and relied upon by the appellant.

15. We, now, examine the allegation of non-consideration of the documents filed by the appellant. First of all, it should be noted that the documents, referred to and relied upon by the appellant, are mainly applications submitted by him on different occasions requesting the authorities to grant casual leave, earned leave, etc, and medical documents supporting the fact of his treatment in the Gauhati Medical College & Hospital for viral hepatitis and lambago pain as an outdoor patient and his treatment for extra pulmonary intestinal T.B. in the LGB Chest Hospital, Guwahati, too, as an outdoor patient. His application for leave, addressed to Principal, PTC, Dergaon along with medical certificates., were sent to the higher authorities in the police headquarters, at Guwahati, for consideration and granting of the leave. The factual position, regarding making of application with medical certificates, are not in dispute. The only dispute is in regard to the manner in which the appellant remained absent from duties without being granted leave by the authorities concerned by disregarding directions issued from the College Principal to report to his duties and even refusing to appear before the medical board, on two occasions, to ascertain his physical condition. The Enquiry Officer, as we find from the enquiry report, incorporated and reflected every aspect of the matter in his report. The enquiry report, on being placed, was considered and accepted by the disciplinary authority and the same resulted into awarding of punishment after giving opportunity of showing cause to the appellant as required under the existing rules and established procedure. For the same reason, we could not persuade ourselves to accept the submissions of the learned counsel for the appellant that the punishment was awarded without taking into consideration the documents filed by the appellant and the findings of the learned Single Judge is based on no evidence.

16. We, now, refer to Rule 4 of the Leave Rules, 1934 (revised), which provides that leave cannot be claimed as of right. It also provides that discretion is reserved to the authority empowered to grant leave to refuse or revoke leave at any time according to the exigency of public service. What has transpired from the pleadings of the appellant is that he has been asking for leave as a matter of right and as if the department is bound to grant him leave as and when it is asked for. The department, admittedly, for good reasons, asked the appellant to appear before the medical board, at least, on two occasions, so that his illness could be examined and ascertained. The bona fide of the department to constitute medical board cannot be questioned by the delinquent. The physical fitness is the prime necessity for retaining police personnel in service, because of the nature of duties and responsibilities attached to them. When police personnel

reports himself sick or that he is suffering from serious disease like intestinal T.B. for a long period, it is quite natural, on the part of the department, to get him examined by a medical board and find out as to whether he is physically fit to be retained in the police service. The department might have taken into consideration that T.B. is an infectious disease and it was quite risky to allow such a police official to resume duties unless he is found fully cured. There is no doubt that by his conduct in not appearing before the medical board, the appellant demonstrated extreme arrogance, disobedience and insubordination, which cannot be ignored by the authorities concerned. At the same time, we find no relevance and justification in referring to the decision of the Apex Court in Bakshish Singh's case (supra) inasmuch as it was a case, where the delinquent remained absent for nearly five years in an unauthorized manner by simply sending applications by post seeking leave and received no refusal and he presumed that the leave had been granted. The enquiry officer, in the said case, accepted the explanation given by the delinquent and concluded that the absence was under compelling circumstances, but the disciplinary authority did not agree with the enquiry report and held him guilty of charges and imposed punishment of withholding of five increments with cumulative effect. In the said judgment, it was held that unauthorized absence (or overstaying leave) is an act of indiscipline and whenever there is an unauthorized absence, two courses are open to the employer-

(i) to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of unauthorized absence and, in such an event, the misconduct stands condoned; or

(ii) to treat the unauthorized absence as misconduct, hold an inquiry and impose punishment for the misconduct.

It has been held further that an employee, who remains unauthorizedly absent for some period (or who overstays the period of leave), may, on reporting back to duty, apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or overstay after the expiry of leave), the employer may condone the act of indiscipline and sanction leave ex post facto and if the leave is so sanctioned and the unauthorized absence is condoned, it will not be open for the employer to initiate disciplinary proceeding with regard to the said misconduct.

17. It is, therefore, clear that it is the discretion of the employer to condone the unauthorized absence on application made by the delinquent and the employer can take appropriate decision. The correctness of the decision, in either way i.e. to condone the absence or to award punishment after making enquiry through departmental proceeding in accordance with the established procedure, is within the domain of the executive authority and the Court is not authorized to interfere with the same unless the decision is found to be mala fide, bias and/or against the principles of natural justice and/or against the provisions of the relevant

rules. Because of the aforesaid accepted provisions of law, we are not inclined to interfere with the decision of the disciplinary authority and also the conclusions, arrived at by the learned Single Judge, in the impugned judgment and order.

18. The learned counsel for the appellant made an attempt to make out a case that the punishment of compulsory retirement, as imposed by the respondent-authorities, is harsh and disproportionate to the charge of misconduct brought against the appellant. This submission is not supported by any mitigating circumstance. There is no denial of the fact that discipline is the main requirement in the case of an employee in uniform. In the case of *Mithilesh Singh Vs. Union of India (UOI) and Others*, , the Apex Court has held that mere making of an application for leave cannot be construed to be of any consequence in the background of strict requirement of giving proper intimation. Much stress has been given on the expression "proper" meaning thereby that the intimation should be given in the required manner, fit, suitable and apt. The above cited case relates to removal of a constable, in the Railway Protection Force, from service, who left the place of posting without proper intimation and permission leaving his arm and ammunitions unguarded and not in proper custody. The punishment of removal from service, in the said case, was held to be not disproportionate. The Apex Court refused to interfere with the said punishment for want of mitigating circumstances and held that Court has limited scope to interfere with the penalty or punishment in judicial review and unless the punishment appears to be shockingly disproportionate, the Court cannot interfere with the same.

19. In the instant case, by the time the punishment of compulsory retirement was awarded on 28.4.2004, the appellant had attained the age of 54 years and by the time, he filed writ petition, on 4.4.2008, he had attained the age above 58 years and also retired by the time the impugned judgment and order was passed on 22.12.2010. As provided in the punishment order, the appellant would be entitled to retiral and other benefits legally due to him.

20. Taking into account the entire facts and circumstances of the case, we find the punishment imposed is not shockingly disproportionate to the gravity of misconduct warranting interference with the same. So also, we find no infirmity and/or illegality in the impugned judgment and order passed by the learned Single Judge. We, therefore, uphold the same. Consequently, this appeal stands dismissed. The parties shall bear their own cost.