IN THE GAUHATI HIGH COURT

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

ITANAGAR BENCH

WRIT PETITION NO. 253(AP)2010

Sri Rima Taipodia
S/o Shri Tari Taipodia
Permanent resident of Liru Village, P.O. & P.S. – Likabali,
District – West Siang, Arunachal Pradesh.

……Petitioner

- Versus –

1. The State of Arunachal Pradesh represented by the Chief Secretary, Government of Arunachal Pradesh, Itanagar.
2. The Commissioner(Finance), Government of Arunachal Pradesh, Itanagar.
3. The Aruanchal Pradesh Public Service Commission(APPSC), Itanagar, represented by its Chairman.

…….Respondents

Advocates for the petitioner :- Mr. K. Ete
Mr. M. Kato
Mr. N. Ratan
Mr. K. Tasso
Mr. D. Padu
Mr. G. Kato
Ms. S. Appa

Advocate for the respondents :- Ms. G. Deka, Addl. Senior Govt. Advocate
Mr. N. Tagia

P R E S E N T
THE HON'BLE MR. JUSTICE A. C. UPADHYAY

Date of hearing :- **15.03.2011**
Date of Judgment & order :- **15.03.2011**

JUDGMENT AND ORDER(ORAL)

Heard Mr. K. Ete, learned counsel for the petitioner. Also heard Ms. Geeta Deka, learned Addl. Senior Government Advocate, for the State respondents, and Mr. N. Tagia, learned

standing counsel for respondent Aruanchal Pradesh Public Service Commission (hereinafter APPSC).

2. The writ petitioner has challenged the termination order 14.07.2010, issued by the respondent Chief Secretary to the Government of Aruanchal Pradesh.

3. The facts leading to filing of this writ petition may be stated, in brief, as follows:

The petitioner is a physically challenged person, having orthopaedic disability certificate and identity card as well as Pass Book issued by the Deputy Commissioner, West Siang District, Aalo, on 19.02.2003. The petitioner applied in the selection process conducted by the APPSC, as per advertisement dated 25.07.2006, under 3% reserved quota for physically challenged person. On completion of the selection process, the petitioner was finally selected and was placed at serial no. 99 of the result notified on 18.01.2009 by the APPSC and subsequently, he was appointed as Sub-Treasury Officer (STO) on probation vide order dated 23.03.2009 and accordingly, he was posted at Kurung Kumey District of Aruanchal Pradesh.

4. One Sri Ojing Siram, by filing a writ petition before this court being WP(C) 78(AP)2009, challenged the appointment of the petitioner as Sub-Treasury Officer(STO) on the grounds that the petitioner had not submitted the required disability certificates except submitting the Identity Card. The learned Single Judge after hearing the learned counsel for the parties, observing therein that the State Medical Board did not include any orthopaedic specialist, passed an order directing the petitioner to appear before the State Medical Board of Aruanchal Pradesh within a period of 4(four) weeks from the date of passing of the order and the Medical Board was also directed to include one Orthopaedic

Specialist to certify whether the petitioner was physically disabled person or not. The operative portion of the order passed in WP(C) 78(AP)2009 reads as follows :

> ***"8. Situated thus, it would be just and proper to direct respondent No. 3 to appear before the State Medical Board of Aruanchal Pradesh within a period of 4(four) weeks from today and on such appearance, the said Medical Board would include one Orthopaedic Surgeon/Specialist to certify whether respondent No. 3, namely, Sri Rima Taipodia, is a physically disabled person or not, as defined under Section 2(o) of the Persons with Disabilities(Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It is further made clear that the State Medical Board shall send its report/certificate directly to the APPSC and on receipt of such report/certificate, the APPSC shall reconsider the candidature of the respondent No. 3 for his selection, to the post of Sub-Treasury Officer, under the reserved quota."***

5. The petitioner preferred a writ appeal being WA 12(AP) 2009 against the order passed by the learned single judge on the ground that at the time of issuance of disability certificate in the year 2003, there was no absolute requirement of a specialist to be a member of the State Medical Board. However, in the said writ appeal, a Division Bench of this court vide order dated 18.12.2009, while upholding the order passed by the learned Single Judge, directed completion of the medical examination of the petitioner within 4 weeks from the date of passing of the order in terms of the direction issued by the learned Single Judge. The operative portion of the order passed by the Division Bench in WA 12(AP) 2009 is depicted hereinbelow :

> ***"Though, it is pointed out on behalf of the appellant, that the office memorandum, dated 19.12.2005, was not applicable to the relevant certificate, which was granted to the appellant, in the year 2003, by the Medical Board, the fact remains that even the Part-B Certificate was not furnished by the present appellant to the APPSC. In such circumstances; when the learned Single Judge has taken a view that the appellant needs to be examined by a State Medical Board, which shall consist of persons, who can determine if the appellant really suffers from such disability, as would place him in the status of a physically disabled person, we are of the view that the direction for re-examination by an appropriate Medical Board is not bad in law.***
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> ***It is however, in the interest of justice and in the attending circumstances of the present case, made clear that if the medical examination of the appellant, as***

> ***directed, goes against the interest of the appellant, the appellant shall have the liberty to take recourse to such provision of law as may be permissible. The medical examination, as directed, shall be completed within a period of 4(four) weeks from today."***

6. Accordingly, the petitioner approached and presented himself before the Chief Medical Officer (CMO), General Hospital, Naharlagun, for medical examination but the Chief Medical Officer (CMO) refused to examine him citing that personal request of an applicant cannot be entertained. The order of the Division Bench was also furnished before the CMO, even thereafter, the medical examination of the petitioner was not carried out. Realizing that time was running out, the petitioner appeared before the District Medical Board of Aalo. The Medical Superintendent of the District Hospital, Aalo, constituted the Medical Board on 21.04.2010 with 3(three) members including an orthopaedic surgeon. The Medical Board issued the disability certificate holding the petitioner as having permanent physical disability of 60%. The petitioner submitted the same before the APPSC on 26.04.2010. However, a notice was issued by the APPSC to the petitioner for inordinate delay in submitting the medical report/certificate. Though the petitioner submitted reply to the said notice to APPSC, however, in the meantime, the State Government issued the impugned termination order dated 14.07.2010, thereby terminating the service of the petitioner.

7. Mr. Ete, learned counsel for the petitioner, submits that the basic reason for termination of service of the petitioner was delayed submission of medical certificate before the APPSC. Though the State respondents did not file any affidavit-in-opposition in the matter but the affidavit-in-opposition filed by the respondent APPSC reveals that the reason for termination of the petitioner from service was his belated submission of the medical certificate exceeding the prescribed time as stipulated by this Court.

8. Learned counsel for the petitioner further submits that the petitioner presented himself for medical examination before the State Medical Board within the time prescribed by the court. Therefore, if any delay has occasioned, it is not due to the fault on the part of the petitioner, but due to non-constitution of State Medical Board by the Chief Medical Officer, General Hospital, Naharlagun, despite several efforts made by the petitioner and therefore, the termination order dated 14.07.2010, for non-submission of the medical certificate belatedly is illegal and violative of Article 14 of the Constitution of India.

9. The admitted position being the petitioner was found to be orthopaedically disabled person and he was selected by the APPSC under 3% reserved quota, as per rules and recommended him for the post of STO. After his appointment, on the direction issued by the court, in WP(C) No.78 (AP) of 2009, the petitioner was directed to be re-examined by a State Medical Board. The report of re-examination was directed to be placed before the APPSC directly. The petitioner after having made himself available for medical examination in terms of the direction of the court, has substantially complied with the direction so issued by the court. Apparently, if delay has occasioned for belated submission of the medical report either for non-constitution of the Medical Board or for any other reason, the petitioner cannot be made the scapegoat.

10. Learned counsel for the petitioner submitted that though the appointment letter issued by the State respondents confers power to terminate service of a probationer employee, by issuing notice with payment of a month’s salary, without assigning any reason or any opportunity of being heard, but such termination cannot be made without complying with the principles of natural justice in appropriate cases. In support of his contention, learned counsel for the petitioner has relied on the

decision reported in ***(1986) 4 SCC 337, O.P. Bhandari –vs- Indian Tourism Development Corporation Ltd. & Ors.,*** wherein the Hon'ble Apex Court has observed that the provision for termination of service of an employee by giving such notice or notice pay, as may be prescribed in the contract of service, is violative of Articles 14 and 16(1) of the Constitution of India. The Hon'ble Apex Court in the aforesaid decision, discussed the validity of *Rule 31(v)* of the *ITDC* Rules, which reads as follows :

> ***"31. Termination of services.- The services of an employee may be terminated by giving such notice or notice pay as may be prescribed in the contract of service in the following manner :***
> ***(v) of an employee who has completed his probationary period and who has been confirmed or deemed to be confirmed by giving him 90 days' notice or pay in lieu thereof."***

11. The Hon'ble Apex Court while examining the rationality of the ITDC Rules, observed that Rule must die so that the fundamental rights guaranteed by the Constitution of India remains alive. For better appreciation, the relevant extract is quoted hereunder:

> ***"This Rule cannot co-exist with Articles 14 and 16(1) of the Constitution of India. The said rule must therefore die, so that the fundamentals guaranteed by the aforesaid constitutional provisions remain alive. For, otherwise, the guarantee enshrined in Articles 14 and 16 of the Constitution can be set at naught simply by framing a rule authorizing termination of an employee by merely giving a notice. In order to uphold the validity of the rule in question, it will have to be held that the tenure of service of a citizen who takes up employment with the State will depend on the pleasure or whim of the competent authority unguided by any principle or policy. And that the services of an employee can be terminated though there is no rational ground for doing so, even arbitrarily or capriciously. To uphold this right is to accord a "magna carta" to the authorities invested with these powers to practice uncontrolled discrimination at their pleasure and caprice on considerations not necessarily based on the welfare of the organization but possibly based on personal likes and dislikes, personal preferences and prejudices."***

12. In ***V. P. Ahuja –vs- State of Punjab, (2000) 3 SCC 239,*** the Hon'ble Apex Court held that a probationer like a temporary servant is entitled to certain protection and his services

cannot be terminated arbitrarily or punitively without complying with the principles of natural justice. The relevant extracts of the decision, reads as follows:

> ***"6. Learned counsel for the respondents has contended that the appellant, after appointment, was placed on probation and thought the period of probation was tow years, his services could be terminated at any time during the period for probation without any notice, as set out in the appointment letter. It is contended that the appellant cannot claim any right on the post on which he was appointed and being on probation, his work and conduct was along under scrutiny and since his work was not satisfactory, his services were terminated in terms of the conditions set out in the appointment order. This plea is not accepted.***
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> ***7. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice."***

13. In ***Tabong Pasar –vs- State of Aruanchal Pradesh & Ors., 1999(3) GLT 90,*** a Division Bench of this court held that when the termination of a probationer is not on ground of unsatisfactory performance but an imputation of misconduct, it can be only passed after affording an opportunity of hearing. The relevant extract of the decision reads as follows :

> ***"11. From the perusal of the decisions referred to above, it clearly emerges out that in a case where the performance of a probationer is found to be not satisfactory during the period of probation, his services are liable to be dispensed with, without any legal obligation to provide him any opportunity of hearing. But in case the order terminating the services of a probationer is not based on his unsatisfactory performance during the period of probation, but on an alleged act of misconduct which has direct nexus with the action taken by the authorities, it would be punitive in nature which will require opportunity of hearing before passing of the order."***

14. Mr. Tagia, learned standing counsel for the respondent APPSC, submits that this writ petition is required to be disposed of together with other writ petition wherein the appointment of the present petitioner has been challenged. However, I do not find any rationale in the contention made by the learned standing counsel since this petition has been filed by the petitioner against

the impugned termination order dated 14.07.2010 issued by the State respondents and therefore, the question of other case having any kind of relationship with the case of the petitioner, cannot be accepted.

15. Ms. Geeta Deka, learned Addl. Senior Government Advocate, submits that though the State respondents did not file any affidavit-in-opposition, but as per the instruction received by her, the petitioner's service was terminated in terms of condition No. 7 as laid down in the appointment order. That takes us now to the contention of the learned Addl. Senior Government Advocate that since the termination of the petitioner was based on the ground of unsuitability in terms of Clause 7 of the appointment letter, the same being discharge simpliciter, therefore, the order of termination with one month's notice was just, legal and proper, and in that view of the matter, it was not necessary to give any hearing to the petitioner who was purely on probation. Now, once again, it is quite true that if we look at the impugned order of termination, there is nothing on face of it, which discloses that the services of petitioner came to be terminated by way of any punishment. But the impugned order as such looks quite innocuous. However, if we peruse para-12 of the affidavit filed on behalf of respondent No.3, Arunachal Public Service Commission, then the mask of artificial virtue on the face of impugned order stands itself self-exposed, and the real truth about the termination comes out. This admission in the affidavit

filed on behalf of respondent No.3, Arunachal Public Service Commission clearly goes to show that the impugned order of termination in unmistakable terms was based on the alleged belated submission of medical certificate and not on account of any other motive of the authority, and accordingly, the same cannot be treated as discharge simpliciter, as asserted by the learned Addl. Senior Government Advocate .Not only that but from the record, it also appears that the petitioner was in service and at no point of time, he had given any cause for issuing any Memo or Notice justifying the order of termination on the ground of unsuitability. When such is the factual position, it is indeed difficult to agree with the submission made by the learned Addl. Senior Government Advocate saying, "that the order of termination against the petitioner being the discharge simpliciter and not by way of punishment, there was no question of giving any opportunity of hearing". Rather, the facts emerging from the record clearly fall within the ambit of the Supreme Court decision rendered in the case of ***Anoop Jaiswal v. Government of India and Anr., reported in (1984)2SCC 389,*** wherein it has been observed as under :

> ***".....As observed by Ray, C.J. in Samsher Singh's case (supra) the form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case established that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2).***

12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

13. In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the Gymnasium and acting as one of the ring leaders on the occasion and his explanation was obtained. Similar explanations were called for from other probationers and enquiries were made behind the back of the appellant. Only the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ring leaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed, then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution."

16. In view of the aforesaid decision of the Supreme Court, though the impugned order of termination outwardly appears to be in form of an order of discharge simpliciter, on screening the same minutely, that appears to be a camouflage hiding the real intention of punishing the petitioner and in that view of the matter, no such order of termination could ever be passed without affording the petitioner a reasonable opportunity of being heard. If the termination is a disciplinary action, the Govt. may initiate appropriate proceedings against the petitioners, in accordance with law.

17. The Hon'ble Supreme Court while considering similar controversy in the matter of ***Shridhar S/o Ram Dular v. Nagar Palika, Jaunpur and Ors. : AIR 1990 (SC) 307*** pleased to observe that the order of appointment confers a vested right to hold the post and the same cannot be taken away without affording opportunity of hearing to the concerned employee. The relevant para reads as under:

> ***"8. The High Court committed serious error in upholding the order of the Government dated 13.02.1980 in setting aside the appellant's appointment without giving any notice or opportunity to him. It is an elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principles of natural justice is rendered void. There is no dispute that the Commissioner's Order had been passed without affording any opportunity of hearing to the appellant, therefore the order was illegal and void. The High Court committed serious error in upholding the Commissioner's Order setting aside the appellant's appointment. In this view, Orders of the High Court and the Commissioner are not sustainable in law."***

18. Similarly in the case of ***Shrawan Kumar Jha and Ors. v. State of Bihar and Ors. : 1991 Supp (1) SCC 330*** ,the Apex Court observed that the holders of appointment orders are entitled to opportunity of hearing before cancelling their appointment. The relevant observation reads as under:

> ***"3. …It is not necessary to go into all these questions. In the facts and circumstances of this case, we are of the view that the appellants should have been given an opportunity of hearing before cancelling their appointments. Admittedly, no such opportunity was afforded to them. It is well settled that no order to the detriment of the appellants***

> ***could be passed without complying with the rules of natural justice. We set aside the impugned order of cancellation dated November 3, 1988 on this short ground. As suggested by learned Solicitor General, we direct that the Secretary (Education), Government of Bihar or to other person nominated by him should give an opportunity of hearing to the appellants and thereafter give a finding as to whether the appellants were validly appointed as Assistant Teachers. He shall also determine as to whether any of the teachers joined their respective schools and for how much duration. In case some of them joined their schools and worked, they shall be entitled to their salary for such period."***

19. From the aforesaid study, it is evident that the petitioner has been deprived of the opportunity in utter violation of principles of natural justice and the respondents have taken away the valuable vested rights of the petitioner, without giving any opportunity. The impugned termination order dated 14.07.2010 by which the petitioner was terminated from service, deserves to be quashed.

20. Accordingly, the writ petition is allowed and the termination order dated 14.07.2010 issued by the State respondents is hereby set aside and quashed.

21. There shall be no order as to costs.

JUDGE