

(2010) 08 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : LPA (SW) No. 126 of 2008

Abdul Razak

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-08-2010

Acts Referred:

Border Security Force Act, 1968 — Section 11(2)

Citation : (2010) 4 JKJ 699

Hon'ble Judges : Mohd. Yaqoob Mir, J;Aftab H. Saikia, J

Bench : Division Bench

Judgement

Mohammad Yaqoob Mir, J.—By medium of instant appeal, judgment dated 18.7.2008, passed by learned Writ Court, by virtue of which

writ petition of the appellant has been dismissed, is assailed on various grounds.

2. According to the learned counsel for the appellant, learned Writ Court has skipped in addressing the grievance of the appellant as was

projected against the alleged biased attitude of respondent No. 3 (Commandant). In this connection it is contended that the appellant all along has

been fed up with the actions of the Commandant who by name has been arrayed as party/respondent in the writ petition as well as in this appeal. It

is also contended that it is the hostile attitude of the Commandant (respondent No.3) which prompted the appellant to file the writ petition bearing

SWP No.281/2001, pursuant to interim orders passed therein on 26.2.2001 and 23.7.2001 the respondents were to ensure personal safety and

also to consider the posting of the appellant with some other Commandant.

3. Learned counsel for the respondents with all vehemence opposed the contention of the learned counsel for the appellant by stating that the order

of dismissal passed by respondent No.3 has been passed strictly in consonance with law and it being so learned Writ Court has up-held the action

of respondent No.3. In support of his contention learned counsel placed reliance on the judgment reported in Union of India and others Vs. Ram

Pal, .

4. After considering the submissions as made and after perusal of the record, what emerges is that the question of bias and mala fides attributed to

respondent No.3 (Commandant) has not been taken note of. This issue will be dealt with a bit later hereinafter.

5. Respondent No.3, Shri S.S. Chatrat, Commandant 63 BN. BSF, vide order dated 29.6.2001 has opined that the appellant without leave had

absented so was given opportunity to show cause vide letter dated 17th of May, 2001 to which he did not respond. Thereafter has recorded

satisfaction to the effect that the appellant had absented with effect from 2nd February, 2001 without any reasonable cause and has observed that

retention of appellant in service is Undesirable, so dismissed the appellant.

6. The contention as was projected before the learned Writ Court that the show cause notice at all was not served upon the appellant, was

repelled as the letter had been sent under registered cover, AD had been received back to which appellant would contend that he is resident of

Rajouri, at the relevant time he was in Jammu. He has an illiterate family, may be they might have received the same but it was not to his

knowledge, otherwise he would have responded to the show cause notice. In order to buttress this submission, learned counsel would state that in

the earlier writ petition bearing SWP No.281/2001, interim orders were passed on 26.2.2001 and 23.7.2001. The order of dismissal is dated

29.6.2001. The respondents were represented by the counsel and learned counsel did not apprise the Court even on 23.7.2001 that the order of

dismissal has been passed against the appellant which would clearly indicate degree of suspicion. This aspect has not been noticed by the learned

Writ Court nor any reference has been made to the interim orders dated 26.2.2001 and 23.7.2001

7. In the judgment Union of India & others v. Ram Pal (AIR 1996 Supreme Court 1500) as relied upon by the learned counsel for the

respondents, it has been held that in terms of Rule 20 of the BSF Rules serving

of show cause notice, so as to ensure compliance with the principles of natural justice, is a requirement so is required to be adhered to while exercising power u/s 11(2) of the BSF Act.

8. In the reported case show cause notice had been issued in terms of sub-rule (1) of Rule 20 of BSF Rules. When the respondent therein had not responded, it was held that nothing further was required to be done i.e. there was no requirement of appointing the enquiry officer to conduct enquiry in the manner prescribed by Rule 21 of the BSF Rules. Finally the dismissal order was held not only to have been passed because of misconduct of absence without leave but because his further continuance in service was considered undesirable, therefore, order was passed not by way of penalty but in exercise of an independent and separate power conferred by Section 11 of the BSF Act.

9. What is clear from the judgment is that while exercising powers u/s 11(2) of the BSF Act, the procedure prescribed in terms of Rule 20 and 21 has to be observed but when a show cause notice is issued and same is not responded, the procedure prescribed is deemed to have been followed which would mean that in case appellant herein would have responded to show cause notice, then there was requirement of taking further steps as envisaged by Rule 20 and 21 of the BSF Rules. It is on the basis of this rule position, learned Writ Court has returned the finding that since show cause notice was served upon the appellant, when he did not respond, the Commandant was within his powers in terms of Section 11(2) read with Rule 177 of the BSF Rules to dismiss the appellant from service.

10. The question whether service of show cause notice upon the appellant was cogently established when the appellant was contending that he is fed up with the hostile attitude of the respondent No.3. Furthermore, when the appellant in ground No. 16(i) of his writ petition had specifically pleaded the mala fide conduct of the officers and also their ill will and personal hostility against the appellant, and the mala fide misuse of power by the authority. Then in the rejoinder it has also been pleaded by the appellant that the earlier punishments were awarded against him because of mala fide. It has been further pleaded that the deponent has filed a writ petition being SWP No.281/2001 and had claimed the relief for grant of permission to voluntarily retire and also the quashment of bad entries and had

also sought the relief of his transfer and the Writ Court has been pleased vide order dated 23.7.2001 to direct the respondents to consider the posting of the deponent with some other Commandant. It is also pleaded that the deponent has not received any show cause notice.

11. The important question which arises for consideration is as to whether it was appropriate for the respondent No.3 (Commandant) to pass the order of dismissal when the appellant had attributed mala fides and had projected hostile attitude of the respondent No.3 as against him.

12. It is true that in a disciplined force indiscipline has got no place and for ensuring discipline the authorities are clothed with the powers but exercise of such powers shall be in-keeping with the high standards so as to exclude any type of arbitrariness or impropriety.

13. The adherence to the principles of natural justice must appear to be fair not casual. The concept of hearing a person is not confined only to hearing but it takes into its sweep fairness in action. The logic of adherence to the principles of natural justice is to give chance to a person to explain as against what is alleged against him. Additionally the authority concerned while initiating the action must show exemplary fairness.

Fairness in action would also include exhibition of propriety. The power of the Commandant to dismiss is not open to question because Section

11(2) of the BSF Act read with Rule 177 of the BSF Rules clothes the Commandant with the power to dismiss but whether the Commandant

(respondent No.3) could pass the order of dismissal, was required to be addressed by the learned Writ Court which has not been done, more

particularly when it was specifically pleaded both in the writ petition as well as in the rejoinder, that the Commandant(respondent No.3) is biased.

Furthermore same was also to be looked into in the backdrop of the directions passed in SWP No.281/2001 as in terms of order dated

26.2.2001 passed therein the grant of interim relief was deferred but it was observed as under: -

However, it is made clear that respondents will ensure personal safety as well as security of the petitioner till and so long he is serving aforesaid.

The order dated 23rd July, 2001 passed thereafter reads as under:-

Petitioner has grievance not to serve under Respondent No. 3 and seeks attachment with BSF Frontier HQ, Jammu.

Heard Mr. Bhat also.

He has submitted that petitioner feels a threat to serve under Respondent No. 3. There are other Commandants also at Srinagar.

This application is accordingly disposed of directing the respondents to consider the posting of the petitioner with some other Commandant within

four weeks, if required. CMP is disposed of.

14. The direction as referred to above clearly indicates that the appellant was alleging hostility on the part of Commandant (respondent No.3). A

suspicious circumstance is noticed i.e. if the appellant was dismissed on 29.6.2001, why the learned counsel appearing for the respondents in the

earlier writ petition bearing SWP No.281/2001 did not make mention of the same on 23.7.2001 when the above direction was passed by the

Court. This aspect of the matter has remained to be looked into by the learned Writ Court.

15. In view of the stated position, we are of the considered view that the important aspect of mala fides attributed to the respondent No.3 who

was impleaded by name as party in the earlier filed petition knowing well that the appellant is attributing mala fides and hostility against him should

not have passed the order of dismissal, when propriety demanded the same. Therefore, the order of dismissal from service by the said

Commandant cannot be termed to be fair so cannot sustain.

16. For the stated reason, the judgment impugned has to be set aside so is set aside. As a necessary corollary, the order of dismissal dated

29.6.2001 passed by Commandant (respondent No.3) does not survive for the reasons as detailed above. Same is set aside leaving it open to the

authorities concerned except Shri S.S. Chatrat (Commandant) to proceed in the matter afresh and to pass appropriate orders as shall be

warranted. In the process appellant shall be given reasonable opportunity of being heard in accordance with the applicable rules.

17. Appeal accordingly succeeds and is disposed of as above.