

(2002) 10 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 464 of 2001

Balwan Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-10-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 1 JKJ 104

Hon'ble Judges : S.K. Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.K. Gupta, J.—By means of this petition, the petitioner sought issuance of writ of certiorari to quash the show cause notice No.

Esttt/33/BS/73/ 2001/798 dated 5.2.2001 by which it is tentatively proposed to terminate the services of the petitioner by way of dismissal with

further direction to the respondents to allow the petitioner to join duties and release the salary.

2. The case of the petitioner projected in the writ petition is that he was enrolled in Border Security Force as Constable with effect from 26.8.1997

and after basic training posted in 73 Battalion, B.S.F on 3.1.99. The petitioner had proceeded on five days earned leave with effect from

10.11.2000 due to domestic problem. The petitioner, however, did not join back for duty after the expiry of leave and over stayed, is stayed that

he sent telegram on 15.11.2000 for extension of leave on account of his ailment. Another telegram was also sent by him for further extension of

leave on 30.12.2000 as the petitioner is stated to have remained under treatment. The petitioner, however, remained under treatment on account

of his ailment from 10.11.2000 to 13.2.2001.

3. A show cause notice was issued by the respondents intimating the petitioner that because of his absence without leave for such a long period, his

further retention in service is undesirable and proposed to terminate the services by way of dismissal and asking the petitioner to set his defence, if

any, against the proposed action before 20.2.2001. It is also stated that this show cause notice was received by the petitioner on 1.3.2001 though

posted on 24.2.2001, as is revealed from the postal summons. It is further stated that the show cause notice is illegal and

against rules which became the subject matter of challenge in this writ petition.

4. The stand taken by the respondents in their counter is that the petitioner without exhausting the statutory remedy provided u/s 117 of the Border

Security Force Act 1968 read with rule 22 of the Border Security force Rules, 1969, which provides that a person aggrieved by a finding or

sentence of any security force court may put up one petition to the confirming authority before confirmation and one petition after confirmation to

the central government, approached the court by way of writ petition, which is pre-mature. It is also stated that no procedural irregularity has been

disclosed in the petition, which requires judicial review of the order of dismissal by the court. It is further stated that in short service career, the

petitioner has been awarded with three punishments on accounts of unauthorised absence from duty.

5. In the present case, the petitioner proceeded on five days earned leave on domestic ground with a promise to return back in time without

extension of leave on any ground. The petitioner however, over stayed and despite various letters issued in requiring him to report for duty,

remained without any positive response even apprehension roll issued to the Superintendent of Police, Jammu did not bear any fruitful results. The

respondents left with no option but to issue show cause notice and accordingly issued show cause notice dated 04.1.2001 under registered cover

requiring his reply/explanation with regard to his over-stay/ unauthorised absence from duty. However, another attempt was made by the

respondents to secure explanation/reply from the petitioner to show cause notice issued but this opportunity was also not availed, which ultimately

led to the passing of dismissal order on 20.2.2001. That the petitioner

overstayed. With effect from 16.11.2000. He, however, neither re-joined the duty nor any communication was received from his, despite registered letter dated 30.11.2000 addressed to him. A court of inquiry was held on completion of period of 30 days absence. An opportunity was also provided to either reply or to present himself by issuing a show cause notice dated 4.1.2001, as envisaged. Under the provision of rule 22 of the Border Security Force Rules. It is also stated that all statutory requirements were observed by the respondents viz issuing various letters to the petitioner for re-joining conducted court of inquiry, giving an opportunity to reply to the petitioner, which he did not avail and finally he was dismissed from service on account of his persistent over staying and bad record of service by order dated 20.2.2001. Rejoinder filed by the petitioner is nothing more than what has been stated in the petition and reintegrating the pleas raised therein.

6. I have heard the learned counsel appearing for the respective parties and perused the record of the file.

7. On going through the record of the file, it is clearly discernible that the respondents have strictly complied with the procedure before passing

order of dismissal in conformity with the Border Security Force Act and the Rules on the subject, details where of are explicitly given in para 4 of

the counter, which reads as under:-4. That the contents of para 4 are wrong and misconceived, hence denied. It is stated that the individual

dismissal order was issued once all the courses/action preceding to his dismissal were adhered to as per BSF Act and Rule by taking following

actions:-

a) On 30.11.2000 he was issued a letter No 14222-25 dated 30.11.2000 but the petitioner did not give any response to this letter.

b) An apprehension roll was also issued to SP Jammu with a copy to SHO, RS Pura, Jammu vide No. Estt/Disc/73/2000/14292-94 dated

02/12/2000 by efforts to apprehend individual could not succeed.

c) A court of inquiry was ordered after waiting for 36 days for return of individuals vide office order no Estt/cor/2000/3781-82 dated 21.12.2000

where court recommended for his dismissal from service due to prolonged overstay and being a habitual offender.

d) A show cause notice as per provision of BSF rule 22 was issued to petitioner

on 4.1.2001 giving him an opportunity to either reply or present himself by 3rd Feb., 2001 but the petitioner failed to reply to the show cause notice.

e) Keeping in view of petitioner's short span of service, another show cause notice was issued to the petitioner on 5.2.2001 though it was not required nor was obligatory on the unit as per BSF Rules, which was also not responded by the petitioner. Hence petitioner's dismissal order were issued after a period of 45 days from first show cause notice of 4th Jan. 2001 after considering all aspect of BSF Act and Rules vide which he could have been dismissed even after 15 days of issuance of notice.

8. It is also borne out from the record that in short period of services career, the petitioner had earned as many as three bad entries during last three years of having remained absent from duty without leave and ultimately became basis for the respondents to form opinion that the petitioner has become a most indisciplined soldier to be retained in service. The petitioner has challenged the show cause notice dated 4.1.2001 by which the Commandant had tentatively proposed to terminate his services by way of dismissal. This opinion was formed because of the absence of the petitioner without leave for a long period and his further retention in service is undesirable. It is this show cause notice, which has been challenged by the petitioner in this writ petition.

9. It is also gatherable from the record more particularly from the order of dismissal dated 20.2.2001 when the petitioner did not avail opportunity afforded to him by issuing a show cause notice to file reply or render his explanation or raising any defence against the proposed action and thus entailed passing of the order of dismissal by the respondents. This order of dismissal has not been challenged by the petitioner in this petition. So has also been admitted by Mrs. Surinder Kour, learned counsel appearing for the petitioner during arguments.

10. It is not the case of the parties that the Commandant had no power to issue show cause notice dated 4.1.2001. Show cause notice was sent by registered post, as is born out from the record of the file. When a show cause notice has been issued by the competent authority, who had the power in law to issue the said notices, it would not be open to the petitioner to approach the court under Article 226 of the constitution at the stage

of notice only and in such an event writ petition could be said to be premature, as has been held by the Apex Court in case titled Chief of Army

Staff and Others Vs. Major Dharam Pal Kukrety, .

11. Relying on the ratio of the aforesaid judgement of the Apex Court, the present writ petition having been filed against the show cause notice is

pre mature and unsustainable in law. More so, when the final order of dismissal has been passed by the respondents in pursuance of show cause

notice, challenged in writ petition, has merged into final order, which having not been assailed by the petitioner, the writ petition is rendered

infructuous and not maintainable.

12. In the facts and circumstances of the case discussed above, the petition against the show cause notice is held not maintainable particularly when

the final order of dismissal has been passed by the respondents, which is not subject matter of challenge in this petition and is accordingly

dismissed. The petitioner is, however left free, if so advised, to file fresh petition against the order dismissal passed against him.