

(1985) 06 CAL CK 0017
In the Calcutta High Court
Case No : Order No. 257 of 1980

Commandant 70 Battalion B. S. F. and Others

APPELLANT

Vs

Anil Bandhu Mitra

RESPONDENT

Date of Decision : 07-06-1985

Acts Referred:

Border Security Force Act, 1968 — Section 11, 14, 141, 19, 47
Constitution of India, 1950 — Article 311

Citation : 89 CWN 1072

Hon'ble Judges : S.R. Roy, J;Anil K. Sen, J

Bench : Division Bench

Advocate : S. Banerjee, for the Appellant;A.K De, for the Respondent

Judgement

Anil K. Sen, J.—This is an appeal by the Union of India and it is directed against an order dated June 26, 1979, passed by a Ld. single Judge of this Court in C. R. No. 9774(W)/76. That was a writ petition and by the order impugned the Ld. single Judge had allowed the said writ petition ex parte against the appellant since the appellant did not appear to contest. The writ petitioner is the respondent Anil Bandhu Mitra. He was enrolled as a constable in the 1st Battalion of the West Bengal Rifles which was later converted into Border Security Force. At the material time the respondent was serving as a Lance Naik. According to the respondent, on a urgent information being sent to him about his son's serious illness, he went home on September 14, 1974, intimating the said fact to the Company Commandant. Unfortunately for him, his son died within a day and he himself lost his mental balance for over a year. In such circumstances on March 17, 1975, the respondent No. 1, namely, the Commandant, 70th Battalian, B. S. F., issued a show cause notice calling upon him to show cause why he should not be dismissed from service for unauthorised absence without any leave. Since the writ petitioner-respondent was not in his senses, his wife wrote a letter to the Commandant intimating the fact that the respondent had lost his mental balance and was under medical treatment. Notwithstanding such intimation by the wife, respondent No. 1, namely, the Commandant passed an

order on March 26, 1975, dismissing the respondent from service. An appeal to the Director General failed and hence, the respondent moved this Court in the Writ jurisdiction challenging the aforesaid order of dismissal from service dated March 26, 1975, on the ground that such an order was not in accordance with law and had been passed in breach of the principles of natural justice and the provision of Article 311 of the Constitution. Since the appellant did not appear to contest and did not file any opposition in their defence, the Ld. Single Judge in allowing the writ petition held that the action taken against the respondent was by way of imposing a penalty for an offence under the Border Security Force Act but without a proper trial as envisaged by the said Act. It is the said order which is the subject-matter of challenge before us in this appeal by the Union of India.

2. After the appeal was heard in part, we decided to give an opportunity to the Union of India and the authorities of the Border Security Force to file an opposition to the writ petition instead of binding them by the ex parte order passed by the Ld. Single Judge. We did not remand the proceeding back to the Writ Court since it involves dismissal of a poor employee for over 10 years.

3. In that background the Union of India and the authorities of the Border Security Force filed an affidavit-in-opposition before us controverting the allegations made in the writ petition and a reply thereto has been filed by the writ petitioner who is the respondent before us.

4. In the affidavit-in-opposition filed by the Union of India and the authorities of the Border Security Force a stand has been taken that the writ petitioner left his duties while he was in charge of a special camp without any prior intimation and without taking any leave. Since he was absent for more than three months without any leave, a court of enquiry was held u/s 62 of the Act and a show cause notice was issued upon the writ petitioner why he should not be dismissed from service in exercise of administrative powers u/s 11 of the Act. In the affidavit-in-opposition it has been strongly disputed that any intimation was sent to the authorities by the wife of the writ petitioner informing about his mental derangement. Since there was no reply to the show cause, the writ petitioner was dismissed from service in exercise of administrative powers u/s 11 of the Act read with Rule 117 and administrative instructions incorporated in a Central Government circular dated 1.1.70.

5. In the affidavit-in-reply the writ petitioner has again challenged the plea taken by the authorities that he left his duties without any intimation. According to him, in view of the information received, he had to leave for his home immediately and he did so by intimating the Company Commander. It has further been reiterated in this affidavit-in-reply disclosing a certificate of posting that in answer to the show cause notice dated March 17, 1975, the wife of the writ petitioner intimated the authorities that the writ petitioner being mentally sick, was not in a position to show any cause.

6. Upon the pleadings thus put forward before us the basis of the judgment

under appeal is removed. It is so removed because, according to the authorities of the Border Security Force, the writ petitioner was not dismissed from service by way of imposition of a punishment on conviction for an offence as envisaged by the Act. It is the specific case of the said authorities in the affidavit-in-opposition that the writ petitioner was dismissed from service administratively and in exercise of such administrative powers u/s 11 of the Act read with Rule 117 and the Government circular dated 1.1.70. The short point which, therefore, arises for our consideration is as to whether the respondent No. 1 Commandant could dismiss the writ petitioner administratively in the manner done in the present case. Rule 14A of the Rules classifies the members of the Force into four categories, namely, officers, subordinate officers, under-officers and other enrolled persons. Lance Naik falls in the category of under officers and, therefore, the writ petitioner at the material time was an under officer in the Force. Section 11 of the Border Security Force Act provides as follows :

Dismissal, removal or reduction By the Director-General and by other officers :

(1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in sub-section (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and the Rules.

7. On the scheme of the Act it would appear that Chapter III covering sections 14 to 47 specifies what are the offences and what punishment can be meted out for those offences. Section 19 clearly specifies that absenting himself without leave is an offence for which the delinquent is liable to be punished with imprisonment for a term for three years or for such less punishment as is in this Act mentioned. Dismissal from service is undoubtedly a lesser punishment than imprisonment for three years. But such a punishment can be inflicted only after conviction of the delinquent a trial by the Security Force Court. Chapter IV covering sections 48 to 56 specifies the punishment and section 48 specifies the major punishment. Chapter V prescribes the procedure for arrest and proceedings before trial by the Security Force. Section 62 in this chapter provides that where a person is absent without any leave a court of inquiry shall as soon as practicable be appointed for adjudication and declaration of such absence as absence without leave the consequences whereof would be that the person so absent will be deemed to be a deserter and shall be liable to arrest and

apprehension in the manner prescribed. Chapter VI provides for establishment of Security Force Courts and Chapter VII prescribes the procedure for trial by the Security Force Courts. In the Act itself there is no provision for taking disciplinary proceeding except for the fact that section 141 authorises the Central Government to make Rules for the purpose of carrying into effect the provisions of the Act and one of the items in respect of which such Rules can be framed is "the constitution, governance, command and discipline of the Force."

8. Coming to the Rules, it appears that Rule 17 provides for termination of service on the ground of unsuitability while Rule 18 provides for retirement on the ground of physical unfitness. Rule 19 provides for resignation. Rules 20, 21 and 22 provide for termination of service for misconduct and the process of enquiry for imposition of such a penalty and the authority competent to impose such penalty.

9. On the scheme of the Act and the Rules it is, therefore, clear that in a given situation as in the present case it would be open to the authorities to take either of the three actions against a member of the Force who is found to be absent without any leave, namely, (i) proceeding can be initiated u/s 62 for adjudication and declaration that such a person is really absent without any leave as a consequence whereof he will be deemed to be a deserter and all further consequences would follow as prescribed by the Act and the Rules in respect of such deserter; (ii) since absence without leave is itself an offence, such a person can be charged with such an offence tried by a Security Force Court in accordance with the provisions of the Act and the Rules and then an appropriate penalty can be imposed and (iii) without taking recourse to the above processes, absence without leave may be treated as misconduct so that appropriate disciplinary action can be taken in the manner prescribed by Rules 20, 21 and 22 of the Rules.

10. Unfortunately upon the admission of the authorities of the Border Security Force in the present case neither of these three alternatives was taken recourse of. In the affidavit-in-opposition it is suggested that a fourth course was open to the said authorities, namely, such member of the Force, who is absent without leave, can be dealt with administratively and he can be dismissed from service in exercise of administrative powers vested in the Commandant as in the present case under the provisions of section 11 read with Rule 177 and the Government circular dated 1.1.70. On a very careful reading of the Act and the Rules we are unable to accept this contention or the stand taken by the authorities of the Border Security Force who dealt with the present case. We have quoted section 11 of the Act hereinbefore. That section, in our opinion, only empowers certain authorities to pass orders of dismissal, removal or reduction in rank. This is an authorising section and not a section vesting any power or authority to pass any such order independently of the other provisions of the Act or the Rules. Sub-section (4) makes it very clear that the power u/s 11 is to be exercised only subject to the provisions of the Act and the Rules. If this section be interpreted in

the manner suggested by Mr. Banerjee appearing on behalf of the appellant, namely, that this section independently gives a power to dismiss, remove or reduce a person in rank, that would constitute a unguided power in the authorities so that the service of the members of the Force would be totally within the whim of the authorities so empowered. This could not have been the intention of the legislature in promulgating section 11. On the other hand, it is clear like other Rules that this section only specifies which are the authorities competent to pass the orders of dismissal, removal or reduction in rank so that no other authority can pass such order. But the manner in which it has to be done must be as prescribed by the statute or by the Rules. Therefore, in our opinion, the authorities of the Border Security Force were not within their jurisdiction to dismiss the writ petitioner from service on the alleged ground of absence without leave in mere exercise of administrative powers without leave in mere exercise of administrative powers without following either of the three alternatives specified hereinbefore. Since it is the specific case of the said authorities that they had not followed either of the three alternatives specified hereinbefore but they dismissed the writ petitioner from service merely in exercise of their administrative powers, we must uphold the challenge of the writ petitioner that the order so passed is ultra vires the powers of the Commandant and is an order not in accordance with law. The writ petition, therefore, succeeds and the order passed by the Id. single Judge is upheld though on grounds totally different from the grounds on which the Id. single Judge allowed the writ petition.

11. The appeal, therefore, fails and is dismissed with a consolidated cost of Rs. 1,000/- (Rupees one thousand) in favour of the respondent. We further direct that the writ petitioner being restored to service, will be entitled to such pay for the period September 14, 1974 to June 26, 1979, as may be admissible to him on leave due to him so that if no leave is due for any period covered thereby, he will not be entitled to any salary or allowance. The writ petitioner must, however, be treated as on duty from June 20, 1979, and there shall be no break in service on he being restored to service.

Let operation of this order remain stayed for a period of 2 (two) months from date.

S.R. Roy, J.

I agree.