
(2015) 10 TP CK 0035

In the Tripura High Court

Case No : W.P.(C) No. 181 of 2008 [Re-W.P.(C) No. 225 of 2009]

Emanul Islam

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

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

Citation : (2015) 10 TP CK 0035

Hon'ble Judges : Deepak Gupta, C.J. and S. Talapatra, J.

Bench : Division Bench

Advocate : A.K. Deb and T.K. Deb, Advocates, for the Appellant; A. Roy Barman, CGC, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, C.J.

1. The petitioner who was working as constable in the BSF by means of this writ petition has challenged the order dated 07.01.2006 whereby he has been dismissed from service and prayed that he may be reinstated in service with all consequential benefits.

2. The petitioner had earlier filed W.P(C) No. 318 of 2007 before the Gauhati High Court which then exercised jurisdiction over the State of Tripura challenging this very order. This petition was disposed at the motion stage on 21.09.2007 with a direction to the Inspector General of BSF to dispose of the representation filed by the petitioner. The petitioner filed detailed representation in terms of the order of the Gauhati High Court on 06.12.2007.

3. It appears that since the petition was disposed of at the motion stage it was not brought to the notice of the Court that the appeal filed by the petitioner had already been rejected. Therefore, this Court passed the aforesaid order. After the present writ petition was filed and we had set aside the appellate order and directed the Inspector General of BSF to personally examine the matter and to

pass a reasoned order on the representation of the petitioner. Thereafter a reasoned order has been passed which has been enclosed with the additional affidavit filed on behalf of the BSF and in the additional affidavit it is stated that the petitioner had deserted the unit and therefore, was not found fit to be retained in service. This order was passed on 24th December, 2014. The petitioner has not filed any application for amendment of the writ petition to challenge this order but has limited his challenge to the order dated 07.01.2006.

4. We had also call for the record of the BSF and the facts which have emerged are that the petitioner was appointed as Constable in the BSF in October-1997. It is also an admitted fact that the petitioner was admitted in BSF hospital from 24th July, 2005 to 28th July, 2005 as he was suffering from Malaria. Thereafter he was discharged. According to the petitioner on September 6, 2005 he received a message that a serious incident had taken place at his house. He, therefore, suffered a mental breakdown and left the unit without informing any one. He thereafter went to his home town. According to the petitioner, he was suffering mental depression and was treated by a doctor at Bolpur who found that the petitioner was suffering from some depressive illness. According to the claim made in the petition, the petitioner was then taken to Ranchi and admitted in the Mental Health Centre, Bariatu for mental illness. The petitioner was discharged on February 12, 2006 and then when he went to join duty he came to know that he had been dismissed from service on January 7, 2006. The petitioner made various representations but the same were rejected. Hence, the petition.

5. The stand of the respondents on the other hand is that the petitioner deserted his duty and was voluntarily absent from 06.09.2005 and despite issuance of show cause notice the petitioner did not rejoin his duty. Therefore, the employer had no other option but to hold that the petitioner was not a person fit to be retained in service.

6. We have gone through the entire record. Admittedly the petitioner did not intimate any officer, colleague or any other responsible person before leaving the unit on 6th September, 2005. According to the petitioner he received a telephonic message from his house on 06.09.2005 that a serious incident had taken place due to quarrel between his wife and his mother and as a result his wife had left the house. Therefore, the petitioner was mentally upset and suffered a mental breakdown. It is difficult to believe that only because of a dispute between the wife and the mother would the petitioner suffer from a mental breakdown. To satisfy our judicial conscience we had gone through the documents produced by the petitioner. The first document is dated 12.09.2005. It is issued by one Dr. Ashok K. Prasad and it mentions that the petitioner is suffering from mental anxiety etc. The petitioner was not advised any hospitalization. The petitioner may have been suffering from depression but this depression is not of such a nature that he would be totally unable to attend his work. All the other certificates are of private doctors and the petitioner was

treated as an outdoor patient. There is no record whatsoever produced by the petitioner that he was ever admitted in a hospital. Even if the petitioner was suffering from depression it was not that he did not know what was happening. He should have applied for leave or should have informed his employer that he was unwell and therefore, could not join duty. The certificates produced are all issued by private doctors and not of a government hospital. No reliance can be placed on them.

7. The stand of the BSF is that after the petitioner absented on 6th September, 2005 a notice was issued on 7th September, 2005 to the Station House Officer, P.S-Panisagar that the petitioner had absconded. FIR was lodged. In this notice the home address of the petitioner is correctly given. Thereafter, on 19th September, 2005 notice was sent at the home address of the petitioner informing him that he had absented himself without leave and without permission from the unit and he was directed to report to the unit immediately. Thereafter on 23rd November, 2005 show cause notice in terms of Section 11(2) of the BSF Act read with Rule 177 of the BSF Rules and Rule 22 of the BSF Rules was issued to the petitioner asking him to show cause why he should not be dismissed from service. The notice was not only sent to the residential address of the petitioner but it was also sent to the Senior Superintendent of Police, District- Birbhum, West Bengal and to the Station House Officer, P.S-Bolpur, Distt. Birbhum, West Bengal for action and for informing the petitioner, it was only thereafter that the order of termination was passed and the relevant portion of the order reads as follows:

"*** 3. Considering the matter in its entirety, I am satisfied that No. 97187058 Constable Emanul Islam "C" Coy of this unit has been illegally without sufficient cause deserted from unit campus w.e.f. 06.09.05. I am also satisfied that his aforesaid continued illegal without sufficient cause deserted is contrary to the expected norms of and is detrimental to the force discipline, which make his further retention in the force as undesirable. I, therefore, direct that the said No. 97187058 Constable Emanul Be dismissed from service w.e.f. 07 Jan 2006 (A/N).****"

The main contention raised on behalf of the petitioner is that this order was passed without holding any inquiry and, therefore, the order is liable to be set aside.

8. We are not at all in agreement with the submission. Firstly, as apparent from the facts mentioned hereinabove, the petitioner was issued notice to re-join duty and thereafter he was issued show cause notice as to why his services should not be dismissed. He did not care to reply to the notice and therefore, the employer had no option but to take further action in accordance with law.

9. According to the petitioner he had not received the notices issued. These notices have been sent by registered post and have been sent at the correct address and therefore, there is a presumption that they must have been served.

In any event, we are clearly of the view that even the employee is under an obligation to inform the employer about his whereabouts. We have perused the original records and we find that these notices were in fact sent by registered post. We also find that an inquiry was held and the statements of as many as seven witnesses were recorded and thereafter the order has been passed.

10. Sri T.K. Deb, learned counsel for the petitioner relying upon the judgment of the Apex Court in Union of India and others Vs. Ram Pal, and a judgment of the Delhi High Court in Sudesh Kumar Vrs. Union of India decided on 16th May, 1997 urges that without any inquiry being held the order of dismissal could not have been passed.

11. A Court of Inquiry was constituted to investigate the absence of the petitioner. Notice was issued to the petitioner not once but twice. First notice was issued on 7th September, 2005 when he was asked to re-join duty. Thereafter, another notice was issued on 19th September, 2005 directing the petitioner to report for duty immediately failing which action would be initiated against him as per the BSF Act and the BSF Rules. Thereafter, a Court of Inquiry was constituted and based on the report of the Court of Inquiry, show cause notice was issued to the petitioner on 23rd November, 2005. A copy of the Court of Inquiry was also sent to the petitioner along with a show cause notice. The petitioner did not care to reply to any of the three notices. His version that he did not receive any of the three notices does not appear to be correct since the notices have been sent by registered post at the address of the petitioner.

12. The judgment referred to by the learned counsel for the petitioner (Union of India and Others Vrs. Ram Pal) is not at all applicable to the facts of the case. In the case before the Apex Court the services of the petitioner was terminated in the year 1984 in terms of Rule 20 of the BSF Rules. The Apex Court held as follows:

"9.***In the present case the order of dismissal was not passed by way of penalty for the misconduct of absence from duty without leave. Though such absence was the cause and, therefore it has been referred to in the show cause notice and the order of dismissal, the respondent's service came to be terminated on the ground that his conduct had rendered his retention in service undesirable. The order of respondent's dismissal was passed not because the misconduct of absence without leave was proved but because his further continuance in service was considered undesirable. The order was passed not by way of penalty but in exercise of an independent and separate power conferred by Section 11 . Obviously, after holding that further retention of the respondent in the service was undesirable, while passing the order of dismissal it was necessary to pass some order as to how the period of absence from 21.12.83 to 5.5.84 was treated for the purposes of finalizing the dues and other benefits payable to the respondent. While ordering that period to be treated as extraordinary leave the Commandant did not knock out the basis of the order of dismissal passed by him as the basis of the order was that by remaining absent

without leave for a long period the respondent had so conducted himself that his further retention in service had become undesirable.***."

We are clearly of the view that this judgment does not support the petitioner at all and in fact supports the respondents because the Apex Court has held that where the services of an employee are terminated on the ground that his retention in service is not proper then it is not necessary to hold any inquiry.

13. As far as the judgment of the Delhi High Court judgment is concerned that has no applicability in the facts of the case specially since the judgment of the Apex Court is clear in this regard. The Delhi High Court following the judgment of the Apex Court held that if the order is passed on the ground that the retention in the services of the employee undesirable then inquiry is not necessary. The following observations of the Delhi High Court are pertinent.

"10.*** In the instant case, show cause notice was rightly issued when the Commandant formed an opinion that "because of this absence without leave for such a long period, your further retention in service is undesirable." Had the ultimately order of dismissal been based on this ground alone that the petitioner's retention in service was considered undesirable because of absence without leave for a long period there was no scope for any interference in the instant writ petition, but the impugned order passed in this case, as also on the stand taken in the counter affidavit it is made amply clear that the order of dismissal was passed by way of penalty."

The Dehli High Court has also held that if the dismissal order had been based only on the ground that the petitioner retention in service was undesirable then the there was no scope for interference in the writ petition. In the facts of that case it was held that the order was penal in nature.

14. As far as present case is concerned, in our view the order is prima facie not penal in nature but has only been passed because the authority came to conclusion that the continuous illegal absence without sufficient cause is detrimental to the force discipline which makes the retention of the petitioner in the force undesirable. This is not a case where the petitioner sent any letter justifying his absence. He remained absent and at the time when the order was passed there was no material before the authority to hold that the absence of the petitioner was justified.

15. We have even otherwise gone into the merits of the defence raised by the petitioner and we find that this defence of having suffered a mental illness is totally false.

16. In view of the above discussions, we find no merit in the petition. The same is accordingly, dismissed. No order as to costs.