
(2006) 08 DEL CK 0200

In the Delhi High Court

Case No : Writ Petition (C) No. 5297 of 2003

Ex. Const. Bijender Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-08-2006

Acts Referred:

Border Security Force Rules, 1969 — Rule 26, 28A
Constitution of India, 1950 — Article 226, 227

Citation : (2006) 08 DEL CK 0200

Hon'ble Judges : Swatanter Kumar, J;G.S. Sistani, J

Bench : Division Bench

Advocate : C.M. Khanna, for the Appellant; Anjana Gosain and Sanjay Katyal, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—The petitioner who was enrolled in the Border Security Force (hereinafter referred to as "Force") on 23 September, 1992, was retired from service under BSF Rule 26 on 20 August, 2002, against which the petitioner preferred an appeal under Rule 28 (A) before the Appellate Authority on 27 September, 2002. This statutory appeal was also rejected by the Competent Authority vide Order dated 21 April, 2003. The petitioner challenged the correctness and legality of these two Orders in this petition under Article 226 and 227 of the Constitution of India.

2. The petitioner who was serving as a constable rendered some help to one constable Mr. Manjit Singh in the same Battalion, in the case which Mr. Manjit Singh had filed in the High Court of Jammu & Kashmir, and as a result of which the petitioner was subjected to arbitrary action by the respondents. On 18 August, 2000, the petitioner was served with the notice under BSF Rule 26 to show-cause why he should not be retired from service. According to the petitioner, these proceedings were dropped but again on 03 July, 2002, after a lapse of nearly 2 years, the petitioner was served with another notice to show-

cause under Rule 26, to which the petitioner submitted his reply. The respondents then passed the Order retiring the petitioner from service. According to the petitioner, he had also submitted reply to the first show-cause notice and was interviewed by some Officers of the Battalion including the Second-in-Command of the Unit. The petitioner gave his Explanation, and thereafter, the proceedings were dropped against him. The issuance of the second show-cause notice and passing of the retirement Order were totally without cause and, in fact, such a course of action was not even available to the respondents in accordance with law.

3. The respondents, upon notice, have filed detailed counter-affidavit praying that the Writ filed by the petitioner be dismissed as the respondents have passed the impugned Orders in accordance with law and after following the prescribed procedure. It is specifically stated that even after issuing the first show-cause notice, the proceedings were kept in abeyance and three different letters/warnings were issued to the petitioner to improve himself which he failed. These letters were issued on 13 September, 2001, 30 May, 2002 and 23 August, 2002 respectively (Copies of which are annexed to the counter-affidavit filed by the respondents). As there was no sign of improvement, the Authorities were compelled to issue the second show-cause notice on 03 July, 2002. The Screening Board then considered the service record of the petitioner and he was found unfit to be retained in service which resulted in passing of the Order dated 20 August, 2002. The appeal of the petitioner has also been rejected for good and valid reasons.

4. The learned Counsel appearing for the petitioner, while relying upon the Division Bench judgment of this Court in the case of *Rajesh Kumar v. Union of India and Ors.* in Civil Writ Petition bearing No. 5642/2002, decided on 08 December, 2004, contended that adequate opportunity was not given to the petitioner to put forward his defense or Explanation and the show-cause notice did not contain certain entries which have been used against the petitioner. As such the entire proceedings as well as the Order retiring the petitioner from service is vitiated in law and petitioner is entitled to reinstatement with all back benefits.

5. In order to examine the merit of this contention in the light of the Division Bench judgment, we may refer to the show-cause notice which was issued to the petitioner on 18 August, 2000 requiring him to show-cause why he be not retired from service. The notice reads as under:

Whereas, I have gone through your service record over the past 7-1/2 years. You have got the following punishments during the said period:

S. No. Year u/s Punishment Awarded Awarded By

1 1995 19 (a) & 26 14 days RI Comdt. 105 BN BSF 2 1995 19 (a) 14 days RI -do- 3 1998 19 (b) 28 days RI -do- 4 1999 19 (d) 28 days RI -do- 5 1999 19 (a) 28 days RI -do- 6 2000 40 07 days detention in line -do- 7 2000 26 07 days

detention in line -do- 8 2000 19 (b) 14 days RI -do- 9 2000 19 (a) 07 days detention in line -do-

2. Whereas, in view of your consistent poor performance, I am of the opinion that you are unsuitable for further retention in the Force. I, Therefore, tentatively propose to retire you from the service under BSF Rule 26.

3. Whereas, if you have anything to urge against the proposed action, you may do so within 15 days of the receipt of this Notice. If no reply to this Notice is received from you within the stipulated period, it shall be presumed that you have nothing to put forward in your defense against the proposed action and an ex-parte decision shall be taken in this regard.

Place: Field. (KAILASH CHAND) COMMANDANT 105" BN BSF Dated, the Aug, 2000 Copy to:

1.SHQ BSF RJR - for information please.

2.Coy Comdr "F" Coy do.

6. The petitioner admittedly had received this show-cause notice and as per the averments made in the Writ Petition, the petitioner had even appeared before the Battalion Officers. Thereafter, the respondents had served three letters upon the petitioner issuing warnings to him that he had not improved despite issuance of show-cause notice as well as the warning letters which included the letters dated 13 September, 2001, 30 May, 2002 and 23 August, 2002 respectively. In the letter dated 30 May, 2002, it was clearly stated "You are once again advised to improve your conduct and behavior failing which necessary legal action will be initiated against you." Similar advice was contained in the other two letters issued to the petitioner as well as the complaint and conduct of the petitioner was also referred in these letters. These are, however, of course, in addition to the show-cause notice issued on 18 August 2000 as well as confidential advice issued to the petitioner on 13 September, 2001. In the advice letter dated 13 September, 2001, the respondent had mentioned that nine punishments have been imposed on the petitioner so far and also that he was callous, negligent and indisciplined. Despite all these warnings, the petitioner did not improve which resulted in the issuance of the show-cause notice dated 03 July, 2002. The petitioner did not even care to reply to the said show-cause notice and the respondents, after the matter was considered by the Screening Board, retired the petitioner from service.

7. The learned Counsel appearing for the respondent has relied upon the decision of another Division Bench of this Court in the case of Ganga Singh Sengar v. Union of India and Ors. in WP (C) No. 1577/1985, decided on July 13, 2006, wherein the Court discussed the scope and ambit of interference by this Court in exercise of the powers under Article 226 of the Constitution of India in an Order passed under Rule 26 of the Rules. He relied upon the following paragraphs of the judgment:

The power of the authorities to retire the petitioner compulsorily is not questioned. The show cause notice itself was served upon the petitioner while referring to Rule 26 of the B.S.F Rules. The petitioner had submitted a reply to the said show cause notice and had taken no such objection as has now been taken in the rejoinder filed in this Court. Once a show cause notice was served upon the petitioner to which he has submitted a reply and thereafter the authorities have passed the order dated 5.7.84, apparently, there is compliance to the provisions of natural justice. The petitioner has not been condemned unheard. The authorities have looked into his entire service record and then passed the impugned order. In the cases of Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, and State of Orissa and others Vs. Ram Chandra Das, the Supreme Court had clearly held that the entire service record of the employee has to be considered for taking a proper decision whether an employee should or should not be retained further. Reference can also be made to the judgment of SI Tara Chand v. State of Haryana and Ors. in CWP No. 5254/02 decided on 11.4.02 where the Court in somewhat similar circumstances held as under:

This is not even the pleaded case of the petitioner that the nine punishments mentioned in the impugned order over a long span, were ever subjected to such consideration and any order removing the said disqualification for empanelment of petitioner in lists A, B or C was passed. In any case, this provision would have no relevancy for a case of compulsory retirement inasmuch as the Hon"ble Apex Court in the case of State of Orissa and others Vs. Ram Chandra Das, has clearly held that the entire service record of an employee has to be considered by the competent authority while passing an order of the present kind. Further more, it has also been held by the Apex Court that promotion of an employee by itself will not have the effect of wiping out the adverse entries. The entire service record would have to be considered by the competent authority subjectively. Even the reliance placed by the petitioner on the case of Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, is entirely ill-founded. Even in that case the Hon"ble Apex Court has held that the entire service record has to be considered and more importance is to be given to the record of later years.

Conclusion of an authority for pre-mature retirement of an employee is a subjective decision which is arrived at by objective considerations merely on the basis of the service record of the employee. The Courts do not sit in appeal over such decisions. The High Court would interfere in such decisions only if the order was patently unfair, unjust or vocative of principles of natural justice. In this regard, reference can be made to the case of S.I. Nanak Singh v. State of Haryana 1997 (3) R.S.J.299.

Lastly, the learned Counsel for the petitioner had contended that the details mentioned by the petitioner in the reply to the show cause notice have not been properly, considered by the competent authority. This argument again has no

merit. The impugned order is based upon records which obviously includes the service record of the petitioner. The petitioner was admittedly given a show cause notice to which he replied. The facts noticed in the impugned order can hardly be disputed. Nine punishments have been inflicted upon the petitioner.

From the above enunciated principles of law, it is clear that the entire service record of the petitioner could be examined by the authorities in order to arrive at a conclusion whether the petitioner could or could not be continued in service. This is a satisfaction which falls in the domain of the authorities and the Court would not sit as an Appellate Authority and substitute its view with the view taken by the authorities unless the decision was ex-facie arbitrary and contrary to the record or was in violation to the specific rules framed by the concerned authorities. In the present case the case pleaded by the petitioner in the writ petition even lacks bonafides. As already noticed, the pleas taken in the rejoinder are apparently an afterthought as they were not even remotely indicated either in the departmental appeal filed by the petitioner against the impugned order or even in the writ petition. The service of the petitioner shows that seven different punishments were inflicted upon the petitioner on reprimand and severe reprimand. These included misappropriation in dealing with the property of the Government, disobeying lawful command and unauthorised absence from duty. No such special or equitable circumstances exist in the present case which would persuade the Court to set aside the order of the authorities impugned in the present writ petition. The order of the Appellate Authority may not be reasoned one but certainly is not unjustified. The decision of the authorities can be interfered by the Court normally when the order would suffer from vice of arbitrariness or malafides which is not the case here.

8. The judgment of the Court in the case of Rajesh Kumar v. Union of India and Ors. (Supra) is not of much help to the petitioner, inasmuch as in that case the Court had come to a finding of facts that the petitioner was not given adequate opportunity to put forward his defense or Explanation. The Bench also recorded that the letters which have been stated in the show-cause notice were considered by the Authorities in passing the final Orders. Thus, on facts, the judgment is not applicable to the present case. Sufficient opportunity had been granted to the petitioner and despite an admitted position that petitioner had been awarded nine punishments, the respondents still kept on issuing warnings/ advice to the petitioner to improve, which he failed.

9. The respondents have stated in paragraph 3 of the preliminary submissions as well as specifically in paragraph 11 of the counter-reply on merits that the warning letters, advice and the other show-cause notice were issued to the petitioner. This fact has not been disputed by the petitioner except a vague denial and reiteration of the corresponding paragraphs of the Writ Petition. In the entire rejoinder, there is no specific denial that these letters/advice were not served upon the petitioner. There is nothing on the record of the Court file to show that these letters were not received by the petitioner. Not only this, the

respondents have also produced in Court the Minutes of the Screening Committee which was held on 04 June, 2002. The Minutes show that the meeting was presided over by the Chairman 2/IC and Deputy Commandant and Assistant Commandant as its members. The Committee has applied its mind on all aspects and then has taken the decision that petitioner is unfit to be retained in service. It is for the Authorities concerned to arrive at a subjective satisfaction, though objectively, as to whether the petitioner has outlived his utility for the Department. The Authorities concerned have arrived at the conclusion which apparently does not suffer from element of bias and arbitrariness. It no way offends the principles of natural justice.

For the reasons afore-stated, we find no merit in the Writ Petition. The same is dismissed, however, leaving the parties to bear their own costs.