

(2012) 02 DEL CK 0007

In the Delhi High Court

Case No : Writ Petition (C) No. 5831 of 1999

Ex. Ct. Sanjay Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Border Security Force Act, 1968 — Section 11, 11(2), 11(4), 19A
Border Security Force Rules, 1969 — Rule 177, 20, 20(3), 6
Constitution of India, 1950 — Article 226

Citation : (2012) 02 DEL CK 0007

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : Rajesh Sharma, for the Appellant; Ankur Chhibber, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner has sought quashing of dismissal order dated 2nd December, 1997 pursuant to show cause notice dated 10th December, 1995 and has sought his reinstatement with all the consequential benefits.

2. Brief facts to comprehend the controversies are that the petitioner alleged that he is a resident of Village & Post- Khera Khurad, Delhi and he hails from a very poor family. The petitioner contended that on account of his poverty he could not even continue his study and that in order to earn some livelihood, he had enrolled in the Border Security Force as a Constable and was allotted the service No.91477328.

3. After completing his training in the force successfully, he was posted in the operational Unit of the BSF.

4. In August, 1995, the petitioner was granted leave and he went home. After the expiry of the leave, the petitioner alleged that he had fallen sick and therefore, he could not report to his Unit on 24th August, 1995 and was

compelled to stay at his home.

5. The petitioner disclosed that by order dated 28th August, 1995 he was asked to report for duty and that in his reply to the notice dated 28th August, 1995 he had informed the Commandant that he was suffering and was consequently unable to reach the Unit. According to the petitioner, his representation was received by the Commandant on 29th August, 1995. The petitioner further contended that he had sent another reminder regarding his sickness, however, the Commandant sent another notice dated 17th September, 1995 & thereafter the notice dated 4th October, 1995.

6. Consequent thereto, a show cause notice dated 10th December, 1995 was issued to the petitioner. The notice issued to the petitioner stipulated as under:-

You have been absenting without leave from 24.8.1995. After considering the reports relating to your absence, I am satisfied that your trial by a Security Force Court is impracticable but I am of the opinion that your further retention in service is undesirable. I therefore, tentatively propose to dismiss you from the service. If you have anything to urge in your defence against the imposition of the proposed penalty, you may do so within 15 days of the receipt of this letter. In case no reply is received within the stipulated period, it would be presumed that you have no defence to put forward and ex-parte decision will be taken into the matter.

7. According to the petitioner, his health was such that he could not reply to the show cause notice given to him.

8. Later on, by letter dated 6th June, 1997 the petitioner was informed that he has been discharged from service.

9. The petitioner, consequently, made a representation dated 23rd August, 1997 to the Director General, BSF. The plea of the petitioner is that inspite of his representation made on 23rd August, 1997 he had not received any reply from respondent no.2.

10. The petitioner disclosed that he had filed a C.W.P. No.4387 of 1997, titled as "Ex. Ct. Sanjay Singh v. Union of India & Anr.", which was decided by order dated 20th October, 1997 directing the Director General, BSF to dispose of the appeal/representation of the petitioner within a period four weeks from 20th October, 1997. The petitioner was also granted liberty to revive his petition in case his representation/appeal was not decided within stipulated period of four weeks.

11. According to the petitioner, his representation/appeal was decided by order dated 2nd December, 1997 rejecting his appeal. The petitioner asserted that his appeal/representation was disposed of mechanically without any application of mind.

12. Since the representation/appeal of the petitioner had not been disposed of

within four weeks of order dated 20th October, 1997 passed in CWP No.4387/97, the petitioner, therefore, filed an application being CMP No. 5914/1998 for the revival of his civil writ petition No.4387/1997 which application was dismissed, however, the petitioner was granted liberty to file a fresh writ petition against the order dated 2nd December, 1997 passed by the respondents.

13. Aggrieved by the order dated 2nd December, 1997 rejecting the appeal/representation of the petitioner and discharging him from the service, the petitioner has filed the above noted writ petition contenting, inter-alia, that the show cause notice dated 10th December, 1995 and consequent thereto the order of discharge dated 2nd December, 1997 are illegal since they had been passed mechanically without any application of mind and it could not have been held at the time that it was inexpedient or impracticable to hold the inquiry under the BSF Act, 1968 and therefore, the order is liable to be set aside. According to the petitioner, there were no such records available with the respondents, for them to have held that it was inexpedient or impracticable to hold an inquiry. The petitioner contended that the offence alleged against him is absence without leave which is punishable u/s 19-A of the BSF Act, 1968 and is to be tried by the Security Force Court and that only in those cases where trial by the Security Force Court is not expedient, or is impracticable, can an order of dismissal from the service be passed. In order to substantiate his plea the petitioner relied on a decision of the Supreme Court in the case of Major Radha Krishnan v. Union of India & Ors., JT 1996 (1) SC 650.

14. Along with the writ petition, the petitioner filed the copies of notices dated 28th August, 1995; 31st August, 1995; 17th September, 1995 & 24th October, 1995 which were received by the petitioner directing him to report for duty failing which it was stipulated that the petitioner would be arrested by the Civil Police and that the appropriate proceedings would be initiated against him. Though, the petitioner has alleged that he had sent the representations, however, copies of alleged representations are not filed with the writ petition. The petitioner has also filed a copy of the medical certificate dated 31st October, 1995 from Nigam Clinic & Nursing Home, T-113, Indra Colony, Narela, Delhi-40.

15. The petitioner also filed postal receipts dated 22nd January, 1996; 7th September, 1995; 18th September, 1995 & 25th October, 1995.

16. The writ petition is contested by the respondents contending, inter-alia, that the petitioner had absented himself from 24th August, 1995 from the STC BSF, Kharidan Camp. The respondents also disclosed that they had received a letter from the petitioner on 28th August, 1995 in which the petitioner had stated that since his grandfather was sick, he had come to his home without leave and thereafter, his brother had expired, therefore, he may be granted one month leave. The respondents also produced a copy of the letter dated 2nd November, 1995 appointing Sh. R.K. Basatta, Assistant Commandant to conduct a Court of Inquiry and to submit the report by 15th November, 1995. A copy of the show cause notice dated 10th December, 1995 was also produced by the respondents

pursuant to which the dismissal order dated 16th January, 1996 was passed holding that the petitioner is dismissed from service w.e.f. 16th January, 1996 (A/ N) under Rule 177 read with Section 11(2) of the BSF Act, 1968 without any pensionary benefit and that his absence period w.e.f. 24th August, 1995 to 16th January, 1996 shall be treated as "dies non". The order further stipulated that a sum of Rs.851/- being the cost of the deficient kit, clothing & equipments and Rs.40/- and Rs.90/- being the outstanding mess dues also be recovered from the petitioner. The respondents also produced the copy of the order dated 2nd December, 1997 rejecting his petition dated 21st August, 1997 addressed to the Director General, B.S.F. which was disposed of pursuant to the order dated 20th October, 1995 in CWP No. 4387 of 1997.

17. Learned counsel for the respondents have relied on *Gouranga Chakraborty Vs. State of Tripura and Another*, , holding that the power of the Commandant u/s 11(2) of the BSF Act, 1968 to dismiss or remove from service any person under his command other than an officer or sub-ordinate officer read with Rule 177 of the BSF Rule, 1969 is an independent power which can be validly exercised by the Commandant as the prescribed officer and it has nothing to do with the power of the Security Force Court for dealing with the offences such as absence from duty without leave or over staying leave granted to a member of the force without sufficient cause and to award punishment for the same. Reliance has also been placed by the respondent on another decision of the Supreme Court in the case of *Union of India and others Vs. Ram Pal*, .

18. This Court has heard the learned counsel for the parties. The admitted facts are that the petitioner did not report for duty after leave on 24th August, 1995. Though the petitioner has alleged that he had sent the representations after 24th August, 1995, followed by many reminders, however, copies of none of the said representations have neither been produced nor filed with the writ petition. The stand of the petitioner appears to be rather contradictory. The petitioner has produced the photocopies of the postal receipts dated 7th September, 1995, 18th September, 1995 and 25th October, 1995 and have also produced a copy of the medical certificate dated 31st October, 1995 from the Nigam Clinic & Nursing Home. However, what was sent with the postal receipts dated 7th September, 1995, 18th September, 1995 and 25th October, 1995 has not been explained by the petitioner. It is also evident that the medical certificate dated 31st October, 1995 could not have been sent along with these three postal receipts produced by the petitioner as the said certificate is pertaining to a later date. When was the alleged medical certificate sent to the respondents has not been clarified, nor have any documents been produced in this regard. The alleged certificate also shows that the petitioner is alleged to be suffering from T.B. of the lungs. However, nothing else has been produced by the petitioner to show as to when he was detected with the alleged disease or for how long he continued with the treatment.

19. The respondents have rather admitted that the petitioner had sent the

representation dated 28th August, 1995 after he had failed to report at STC BSF, Kharldan Camp after the expiry of his leave on 24th August, 1995. The petitioner had rather disclosed that his grandfather is sick and that his brother had expired. Nothing has been produced by the petitioner in respect of the alleged plea raised by him in the representation dated 28th August, 1995 verifying that his grandfather was sick or that his brother had expired. Rather, no such averment has even been made in the writ petition challenging the order dated 2nd December, 1997, dismissing his representation. Though the petitioner was dismissed from service by order dated 16th January, 1996 passed u/s 11(2) of the BSF Act, 1968 read with Rule 177 of the BSF Rules, however, in the writ petition the said order has not been challenged and what is challenged is the show cause notice dated 10th December, 1995 and the rejection of his appeal dated 24th August, 1997 by order dated 2nd December, 1997 pursuant to the order dated 20th October, 1997 passed in the writ petition bearing CWP No.4387/1997, titled as "Ex. Ct. Sanjay Singh v. Union of India & Ors.".

20. In the facts and circumstances as noted above, it is apparent that the petitioner has taken contradictory stands and has not given any satisfactory explanation as to why the petitioner did not join his duty after 24th August, 1995. This is also not disputed that the notices were given to him repeatedly to report for duty failing which the respondents were entitled to take action against the petitioner.

21. The petitioner despite the notices did not join the duty, nor had he disclosed any cogent or sufficient reasons for not joining the duty.

22. From 24th August, 1995 till 16th January, 1996 when the order of dismissal was passed, the petitioner did not join the duty. If the petitioner remained absent without any cause or reason, his conduct made his retention in the service undesirable. If that be so, u/s 11 of the BSF Act, 1968 read with Rule 177 of the BSF Rule, 1969 the respondents were entitled to pass the dismissal order, not because of the misconduct of the absence without leave, but because his further continuance in the service was held to be undesirable. Thus, the order was passed in exercise of an independent and separate power conferred on the respondents u/s 11 of the BSF Act, 1968.

23. It is also pertinent to note that in any case, the procedure as prescribed under Rule 20 of the BSF Rules, 1969, for termination of service for unauthorized absence had been duly complied with by the Competent Authority. In the notice dated 10th December, 1995, it was stipulated that the petitioner had absented himself without leave from 24th August, 1995, thereby satisfying Sub Rule 3 of Rule 20. Also the petitioner was given 15 days time to represent against the allegations framed against him, thereby satisfying Sub Rule 6. However, the petitioner did not avail the same nor was any request made to hold an inquiry. In the circumstances, the respondents were justified in concluding that the petitioner's retention in the services is not desirable and therefore, his dismissal by order dated 16th January, 1996 is not arbitrary but after due compliance of

the prescribed procedure under law. In *Gouranga Chakraborty (supra)*, the delinquent was a constable who was granted leave from 25th October, 1971 to 30th October, 1971 on account of the death of his father. The said delinquent had not joined on 31st October, 1971 and on 12th December, 1971 he had received a communication that he had been absent without leave and on that basis the opinion was formed that his retention in the service was undesirable and it was consequently proposed that he be dismissed from the service. The delinquent was also asked to submit his explanation against the imposition of the penalty. In the instant case, though the delinquent had sent a telegram explaining his difficulty, however, the plea was not accepted. Thereafter on 5th January, 1997 the delinquent was dismissed from the service. In these circumstances, the delinquent had challenged his dismissal on the ground that a procedure has been provided under the BSF Rules, 1969 for trial of offences by the Security Force Court and for awarding of the punishment. The order of dismissal was also challenged on the ground that it was not made in accordance with the provisions of the Act and the Rules framed thereunder as no trial by the Security Force Court was conducted, nor was any order of punishment awarded by the Security Force Court as required under the provisions of the Act. It was held that Section 11(2) of the Act empowers the Commandant, who is the prescribed officer, to dismiss or remove from service any person under his command other than an officer or a sub-ordinate officer of such rank or ranks, subject to the provisions of the said Act and Rules. The Supreme Court after considering the ambit and scope of the Section 11 had held u/s 11(2) of the BSF Act, 1968 read with Rule 177 of the said Act, the prescribed authority i.e. the Commandant is empowered to dismiss or remove from the service any person under his command other than an officer or sub-ordinate officer of such rank or ranks as may be prescribed. This power is an independent power which can be validly exercised by the Commandant as a prescribed officer and it has nothing to do with the power of the Security Force Court for dealing with offences such as absence from duty without leave or overstaying leave granted to a member of the force without sufficient cause and to award punishment for the same. It was further clarified by the Supreme Court that the provisions of Sub Rule 4 of Section 11 which enjoin that the exercise of the power under the aforesaid section shall be subject to the provisions of the Act and Rules does not signify that the power to dismiss a person from service by the Commandant for his absence from duty without leave any reasonable cause or for overstaying leave without sufficient cause and holding him as undesirable cannot be exercised unless the Security Force Court has awarded the punishment to that person in accordance with the procedure prescribed by law. It was held that the prescribed authority i.e. the Commandant is a competent authority to exercise the power u/s 11(2) of the said Act and to dismiss any person under his command as prescribed under Rule 177 of the BSF Rules, 1969. The relevant observations made by the Supreme Court in para 27 at pages 320 and 321 of the *Gouranga Chakraborty (supra)* are as under:-

27. We have scrutinised the relevant provisions of the BSF Act as well as the BSF

Rules framed thereunder and we have no hesitation to hold that the power u/s 11(2) of the Act empowering the Prescribed Authority, i.e. the Commandant to dismiss or remove from service any person under his command other than an officer or a subordinate officer read with Rule 177 of the said Rules is an independent power which can be validly exercised by the Commandant as a Prescribed Officer and it has nothing to do with the power of the Security Force Court for dealing with the offences such as absence from duty without leave or overstaying leave granted to a member of the Force without sufficient cause and to award punishment for the same. The provision of Sub-section (4) of Section 11 which enjoins that the exercise of the power under the aforesaid Section shall be subject to the provisions of the Act and the Rules does not signify that the power to dismiss a person from service by the Commandant for his absence from duty without leave without any reasonable cause or for overstaying leave without sufficient cause and holding him as undesirable cannot be exercised unless the Security Force Court has awarded punishment to that person in accordance with the procedure prescribed by law. The Prescribed Authority i.e. the Commandant is competent to exercise the power u/s 11(2) of the said Act and to dismiss any person under his command as prescribed under Rule 177 of the BSF Rules. It is also to be noticed in this connection that Rule 6 of the said Rules has specifically provided that in regard to matters not specifically provided in the Rules it shall be lawful for the Competent Authority to do such thing or take such action as may be just and proper in the circumstances of the case. In this case though" any procedure has not been prescribed by the Rules still the Commandant duly gave an opportunity to the appellant to submit his explanation against the proposed punishment for dismissal from service for his absence from duty without any leave and overstaying leave without sufficient cause. The appellant did not avail of this opportunity and he did not file any show cause to the said notice. Thus the principle of natural justice was not violated as has been rightly held by the High Court. No other point has been urged before us by the learned Counsel appearing on behalf of the appellant.

24. Similarly, in *Ram Phal* (supra), it was held that holding an inquiry by the Security Force Court is not a condition precedent for the prescribed officer i.e. Commandant to pass an order of dismissal on account of the continuing absence of an officer from the duty u/s 11(2) of the BSF Act, 1968 as long as there is sufficient compliance of the principles of natural justice.

25. In the facts and circumstances, therefore, the petitioner has not been able to make out a sufficient cause for his absence without leave. It is not disputed that the petitioner had remained absent without any sufficient cause from 24th August, 1995 till 16th January, 1996 when the order of dismissal was passed u/s 11(2) of the BSF Act, 1968 read with Rule 177 of the BSF Rules, 1969 after the show cause notice dated 10th December, 1995 was given to the petitioner which was also not replied by the petitioner and consequently, no illegality, irregularity or perversity has been made out by the petitioner in the order of dismissal passed against him.

26. No illegality, irregularity or perversity has even been made out in the order dated 2nd December, 1997 passed on the appeal/representation dated 21st August, 1997 rejecting the representation and upholding the orders of dismissal.

27. For the foregoing reasons, there are no grounds to interfere with the order of dismissal of the petitioner and to exercise its power by this Court under Article 226 of the Constitution of India. The writ petition is without any merit, and it is, therefore, dismissed.