
(2011) 12 DEL CK 0333

In the Delhi High Court

Case No : Writ Petition (C) No. 3515 of 1997 and CM No's. 16761-62 of 2011

Ex.SI Lakhwinder Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-12-2011

Acts Referred:

Border Security Force Act, 1968 — Section 11, 11(2), 19A
Border Security Force Rules, 1969 — Rule 177, 22
Constitution of India, 1950 — Article 226
Delhi Police Act, 1978 — Section 65
Limitation Act, 1963 — Section 5

Citation : (2012) 1 ILR Delhi 766

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

Bench : Division Bench

Advocate : Suresh Kumari, for the Appellant; Barkha Babbar, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.

CM Nos.16761 & 16762/2011

1. These are the applications by the petitioner/applicant seeking setting aside of order dated 3rd May, 2011 dismissing the writ petition in default of appearance of petitioner and his counsel and for condonation of delay of 120 days in filing the application for restoration, u/s 5 of the Limitation Act.
2. The petitioner/applicant has contended that the writ petition was filed through his counsel Sh. V.P. Sharma, Advocate, who had been perusing his case diligently.
3. The petitioner/applicant asserted that his counsel Sh. V.P. Sharma expired in June, 2003. Though the son of Sh. V.P. Sharma, Sh. Yogesh Sharma, had contacted him seeking instructions, however, the petitioner/applicant could not meet Sh. Yogesh Sharma as he was not keeping well and, consequently, he could not travel to Delhi, as he is a resident of Punjab.

4. In the circumstances, it is asserted that on 3rd May, 2011, when the matter came up for hearing, neither he nor his counsel could appear because Sh. V.P. Sharma had already died and he could not engage another counsel leading to dismissal of the writ petition in default of appearance of the petitioner/applicant and his counsel.

5. The petitioner/applicant has contended that non-appearance on his part is neither intentional or deliberate and is attributable to his ill health and the demise of his counsel Sh. V.P. Sharma. In the circumstances, there is sufficient cause as contemplated in law and in the facts and circumstances for setting aside the order dated 3rd May, 2011 dismissing the writ petition in default of appearance of the petitioner and his counsel and for condonation of 120 days delay in filing the application for restoration.

6. The notice of the application was issued to the respondents on 31st October, 2011 and four weeks time was granted to the respondents to file the replies. Despite the time given by this Court, replies have not been filed nor any cogent reason disclosed for not filing the replies.

7. In the facts and circumstances, the averments made by the petitioner/applicant for setting aside the order dated 3rd May, 2011 dismissing the writ petition in default of appearance of the petitioner/applicant and his counsel and for condonation of 120 days delay in filing the application for restoration have remained un rebutted.

8. Considering the entirety of the facts and circumstances, the petitioner/applicant has been able to make out sufficient cause for setting aside the order dated 3rd May, 2011 dismissing the writ petition in default of appearance of the petitioner/applicant and his counsel and for condonation of 120 days delay in filing the application for restoration.

9. Therefore, the applications are allowed. Delay of 120 days in filing the application for restoration is condoned, and the order of dismissal dated 3rd May, 2011 is set aside and the writ petition is restored to its original number.

W.P. (C) No. 3515/1997

10. With the consent of the parties, the matter is taken up for hearing for disposal. The petitioner had been dismissed from service on account of his unauthorized absence for 99 days and considering his profile. The action was taken u/s 11 of the BSF Act read with Rule 22 of the BSF Rules, and the trial was dispensed with and the petitioner was dismissed from service holding that trial was impractical and further retention of petitioner in service was undesirable.

11. The petitioner has challenged the order of his dismissal on the ground that no inquiry was held to find out the truthfulness of the allegation and the competent authority did not apply his mind for coming to the conclusion that it was inexpedient or impracticable to hold the inquiry u/s 19A of the BSF Act.

12. According to the petitioner, he remained absent from duty as he was sick for a long period and after recovery from sickness he contacted a large number of legal practitioners of his district to take legal assistance for taking steps against the order passed by the competent authority. The petitioner contended that he could file the petition challenging the order of dismissal dated 7th July, 1993 only in the year 1997, as he did not have enough money for litigation and he also sought condonation of delay in filing the writ petition. In the circumstances, the petitioner sought quashing of order dated 7th July, 1993 dismissing the petitioner from service and he has also sought a declaration that show cause notice dated 29th April, 1993 issued to him before his dismissal was illegal, unjust and against the principle of natural justice and against the mandatory provision of law. In the circumstances, the petitioner has sought reinstatement in the service along with all service benefits.

13. This has not been disputed by the petitioner that show cause notice dated 29th April, 1993 was issued to him detailing that he has been absent from duty from 5th November, 1990 to 12th February, 1991 and from 1st January, 1992 to 22nd April, 1992 without leave. What is contended is that the show cause notice was not served on him. The petitioner was asked to show cause as to why his service should not be terminated as his further retention in service is undesirable.

14. The petitioner did not reply to the show cause notice dated 29th April, 1993 and therefore, after considering the facts and circumstances and considering the material which was before the authorities, the order of dismissal dated 7th July, 1993 was passed.

15. Against the order of the dismissal dated 7th July, 1993, the petitioner filed an appeal dated 15th October, 1994 to the Director General, Border Security Force contending that he fell sick on 5th November, 1990 and remained sick up to 12th February, 1991. The petitioner asserted that he had informed the concerned authority regarding the grant of sick leave, as he had not fully recovered. He contended that he fell sick again on 1st January, 1992 and remained sick up till 22nd April, 1992. However, despite his request he was not granted medical leave and he has been dismissed from service without holding any enquiry.

16. Regarding the show cause notice dated 29th April, 1993, the petitioner pleaded that notice was sent to his village address, however, at that time the petitioner was living at Delhi and therefore, he could not reply to the show cause notice dated 29th April, 1993. Along with the appeal, the petitioner did not file anything to show that in April, 1993 he was not living at address Village & Post Jallowal Colony, Bhogpur Sirwal, PS Bhogpur, District Jalandhar (Punjab) and was living at Delhi. No documents were filed to show that the petitioner was sick from 5th November, 1990 up till 12th February, 1991 and thereafter again from 1st January, 1992 to 22nd April, 1992. The petitioner also did not disclose the fact that he was not living in District Jalandhar (Punjab) and has been living at Delhi and that this fact was communicated by the petitioner to the respondents. The appeal filed by the petitioner against his order of dismissal was also dismissed

17. The writ petition is contested by the respondents contending, inter-alia, various facts pertaining to the conduct of the petitioner which are enumerated hereinafter as under:-

a) while posted at Bhandosi Camp during Sept.89, the petitioner drove away the water tanker unauthorizedly outside the premises. The petitioner was given verbal warning by Commandant 25 Bn. BSF.

b) again on 25th Jan 1990 at Bhondsi Range he drove the Govt. (Tata 7 Ton) unauthorizedly out of Bhondsi Camp. A C.O.I. was ordered in which the petitioner was found guilty and given a written warning by the Commandant.

c) On 2nd July, 1990 he unauthorizedly and improperly brought a girl of ill-repute to his room in SO's Mess at Chhawla Camp and kept her for the night. For this act of indiscipline he was severely reprimanded by the Commandant.

d) During the absence of the SO w.e.f 05th Nov 90 Frontier HQ BSF Jalandhar informed the unit that Sub Inspector Lakhwinder Singh was arrested by a CRPF Bn. at Jalandhar on 14.11.1990 on the charge of possessing an un-licensed mouser pistol. However, FTr HQ Jalandhar vide their Sig No.0/4578 dated 28.1.91 informed that the case against SI Lakhwinder Singh was dropped.

e) During his absence w.e.f 01.01.92 to 22.4.92 Addl. Commissioner of Police (Central Distt.) Delhi informed vide their letter dated 15.1.92 that the petitioner was apprehended in a drunken state from a brothel house at G.B.Road, Delhi. Further he had abused/misbehaved with a beat Const. of Delhi Police who was there on duty. A report was lodged vide DD No.80B dated 01.01.92 U/ Section 65 of D.P. Act at P.S. Kamla Market, Delhi.

f) In addition to the above, on various occasions the SO remained absent unauthorizedly from duty which was subsequently regularized by Comdt 25 Bn. BSF by treating the said period as "dies non".

18. Regarding dispensing with trial, it has been contended that the petitioner absented on 5th November, 1990 and reported back on 12th February, 1991. A Court of Inquiry/ROE was completed and the case was referred to higher Headquarter to convene a GFSC. The petitioner, however, absented on 1st January, 1992 to avoid disciplinary proceedings and reported back to the Unit on 22nd April, 1992. The disciplinary proceedings were started against him, however, the petitioner again absented himself and in the circumstances the competent authority was left with no option except to dismiss the petitioner from service administratively under the BSF Rules after providing all possible opportunities to urge anything he had to say against the proposed action.

19. The respondents also relied on a decision dated 21st March, 2006 in W.P. (C) No. 6577/2002, "Ex. Constable Akhilesh Kumar v. The Director General, BSF & Ors.", holding that if a Govt. servant is absent from duty for long period without intimation to the Govt., the authorities are entitled to invoke provision of Section 11(2) of the BSF Act. It was further held that once a show cause notice is issued

regarding the tentative opinion as required, nothing further was required to be done as reply to the notice was not given. The observations of the Coordinate Division Bench in Ex. Constable Akhilesh Kumar (supra), are as under:-

Being aggrieved of the aforesaid action this writ petition is filed on which we have heard the learned counsel appearing for the parties. Counsel for the petitioner has submitted before us that the petitioner was on leave and he was receiving medical treatment for a head injury. On going through the record we find that the petitioner had undergone surgery for Arachnoid Cyst Temporal Lobe. However after the said period the petitioner joined 30 Bn. BSF on 27th October, 1995. The petitioner for the said period i.e. from 1st June, 2000 to 16th July, 2000 was found to be roaming here and there as stated by his own father. It is also indicated from the said report submitted by the police that the petitioner was not interested to rejoin duties. The petitioner belongs to a disciplined force and therefore it was incumbent upon him to inform the respondents regarding his absence even if there was any difficulty for the petitioner to rejoin the duties. He ignored all notices issued to him by the respondents directing him to rejoin his duties. Having no other alternative, action has been taken against the petitioner in accordance with the provision of Section 11 of the BSF Act. Under similar circumstances actions taken by the respondents exercising power under the same provision of law have been upheld. In that regard our attention is drawn to a Division Bench decision of this Court in Ex.Ct. Raj Kishan v. Union of India and Others - CWP No. 7665/2001, disposed of on 4th September, 2002. In the said decision also a similar issue came up for consideration before this Court. It was held in the said decision that since the show cause notice issued to the petitioner was in accordance with law and incorporated the opinion of the Commandant that retention of the petitioner in service was undesirable and since his trial by security force court was held to be inexpedient and impracticable and therefore there is no illegality or irregularity in passing the impugned order. Similar is the situation in the present case also. Competent authority in the show cause notice recorded that retention of the petitioner in service was undesirable and his trial by security force court was inexpedient and impracticable. Cases of Gouranga Chakraborty Vs. State of Tripura and Another, and Union of India v. Ram Pal reported in 1996 (2) SLR 297 were also referred to wherein it was held that the power exercised by a Commandant u/s 11(2) read with Rule 177 was an independent power which had nothing to do with the power exercisable by a security force court and once show cause notice was issued in terms thereof, no further inquiry was required to be held if the delinquent person failed to reply to the notice and to deny the allegations in the process. Our attention is also drawn by the counsel appearing for the petitioner to a medical certificate dated 4th February, 2001 which is placed on record in support of his contention that the petitioner was indisposed during the entire period during which he was allegedly absent unauthorisedly. The said medical certificate is issued by CMO, Fategarh. On going through the said medical certificate we find that he was advised rest for the period from 12th

July 2000 to 4th February 2001 which is the period during which he was unauthorisedly absent. The said certificate does not state that the petitioner had undergone any surgery in the said hospital of the CMO Fategarh. It was only a certificate stating that he was suffering from post operative arachnoid cyst with epileptic seizure and advised rest for the aforesaid period. The said operation as already indicated was done in the year 1992 and we do not find any reason given in the said certificate for advising rest to the petitioner for such a long period. Except for that medical certificate no other contemporaneous record is placed on record to show that he was ever admitted to any hospital nor any document is placed on record to show and indicate that he was purchasing medicines or he was even examined as an out door patient around the same time. We have already referred to the report of the police from which it is indicated that the petitioner was not in the hospital for the father of the petitioner would have definitely given such a statement to the police if it would have been so. Therefore the aforesaid medical certificate does not inspire confidence and cannot at all be relied upon. Considering the facts and circumstances of this case we are of the considered opinion that ratio of the aforesaid decisions of this Court as also of the Supreme Court are squarely applicable to the facts and circumstances of this case as in the present case also the independent power vested in the Commandant u/s 11(2) read with Rule 177 was exercised after issuing show cause notice to the petitioner in terms thereof. Therefore we hold that no further inquiry was required to be held in view of the fact that the petitioner has failed to file any reply to the show cause notice and to deny the allegation in the process. In a recent decision of the Supreme Court in *State of Rajasthan and Another v. Mohammed Ayub Naz* reported in 2006 I AD (SC) 308 the Supreme Court after referring to many other precedents has held that absenteeism from office for prolong period of time without prior permission by the Government servant has become a principal cause of indiscipline which have greatly affected various Government services. It is also held that in order to mitigate the rampant absenteeism and willful absence from service without intimation to the Government the Government has promulgated a rule that if the government servant remains willfully absent for a period exceeding one month and if the charge of willful absence from duty is proved against him, he may be removed from service. The Supreme Court held that the order of removal from service passed in the said case was the only proper punishment to be awarded in view of the fact that Government servant was absent from duty for long period without intimation to the Government. *Ram Pal* (supra) is also a case where action was taken by the respondents under the provisions of Section 11(2). In the said decision it was held that once a show cause notice is issued recording tentative opinion as required, nothing further was required to be done in the said case as the employee did not reply to the notice. Therefore it was held that as there was no denial of the allegation nor was there any request for holding an inquiry, therefore the action taken is justified.

20. This Court has heard the learned counsel for the parties. The learned counsel

for the petitioner, Ms. Suresh Kumari, has primarily contended that the show cause notice dated 29th April, 1993 was not served on the respondent as he was not living in District Jalandhar, Punjab at that time and, therefore, on the basis of the said show cause notice the petitioner could not have been dismissed. Learned counsel for the petitioner, however, has not denied that the address given in the show cause notice dated 29th April, 1993 is the address of the petitioner in the record of the respondents. Nothing has been produced by the petitioner to show that the petitioner had intimated to the respondents that he would not be available or living at his address at District Jalandhar, Punjab, and he had shifted to Delhi. In the circumstances, notice sent at the said address cannot be denied by the petitioner on the ground that at the time when the show cause notice dated 29th April, 1993 was issued, he was not living at the said address. The burden was on the petitioner to rebut that notice could not have been received by him in 1993 at the said address. Petitioner has not produced anything to show where the petitioner was living in April/May 1993. The petitioner in the circumstances has failed to rebut the presumption that the notice sent to him at his address as given in the official record could not be served on him. The plea of the petitioner that the show cause notice was not served on him cannot be accepted and is repelled in the facts and circumstances.

21. Though the petitioner has alleged that he was sick and undergoing treatment, however, no details have been given by him about his alleged ailments and which clinic/hospital he was undergoing treatment. Merely on the bald allegation of the petitioner that he was sick and confined to the bed, it cannot be inferred that he could not do his duties or was unable to come and join the duty. No documents such as medical certificates, medical prescriptions or any other relevant documents have been produced by the petitioner which would reflect any semblance of truthfulness of his allegation that he was ill and incapable of joining and performing his duties. Even on earlier occasions, the petitioner had been absent without leave. From the facts disclosed by the respondents which have not been amply denied by the petitioner, it is apparent that he is a chronic defaulter. The petitioner had allegedly driven away the water tanker unauthorizedly outside the premises. On 25th January, 1990, he had again repeated the same act. He was given a written warning. The petitioner had improperly brought a girl of ill-repute to his room in SO's Mess at Chhawla Camp and he had kept her for the night and for this action he was severely reprimanded by the Commandant. The petitioner was also arrested at Jalandhar on the charge of possessing an unlicensed "mauser" pistol and he was apprehended in a drunken state from a brothel house at G.B.Road, Delhi and he had abused/misbehaved with a beat Constable of Delhi Police who was on duty.

22. In the entirety of the facts and circumstances, if it has been held that the trial of the petitioner by a Security Force Court is impracticable and his further retention is undesirable, the same cannot be faulted in the facts and circumstances. Learned counsel for the petitioner has also not raised any other ground except that the show cause notice was not received by the petitioner, as

he was not living in April/May, 1993 in District Jalandhar, Punjab but had shifted to Delhi. This fact has not been established by the petitioner, nor anything has been produced which would show that the petitioner could not be served with the show cause notice. In the totality of the facts and circumstances, the petitioner has failed to make out any perversity or such illegality or irregularity in the order dated 7th July, 1993 passed by the respondents which would require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

23. The writ petition, in the facts and circumstances, is without any merit, and it is, therefore, dismissed. The parties are, however, left to bear their own costs.