
(2010) 05 P&H CK 0206
In the Punjab And Haryana At Chandigarh

Gurdip Singh Bath

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 14-05-2010

Acts Referred:

Border Security Force Act, 1968 — Section 18, 62

Citation : (2010) 05 P&H CK 0206

Hon'ble Judges : Augustine George Masih, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Augustine George Masih, J.—The prayer in the present writ petition is for quashing of the Order of termination dated 22.03.1995 (Annexure-P-2) and for issuance of direction to respondent to release the pension and other pensionary benefits to the petitioner.

2. Counsel for the petitioner contends that the petitioner was appointed with the Border Security Force and joined on 02.05.1961. In the year, 1992, while the petitioner was serving in SB-II Btn. BSF, his young son aged about 311/2 years died in a road accident on 30.12.1992. The petitioner applied for leave and was granted 15 days earned leave with effect from 01.01.1993 to 15.01.1993. At that time, the petitioner was serving as Assistant Commandant. He applied for extension of leave and was sanctioned 90 days leave upto 30.03.1993. The petitioner realised that on account of sudden and sad demise of the petitioner's son, the petitioner both mentally and physically felt adverse affect thereof and was, thus, not in a position to properly discharge his duty. Accordingly, he submitted three months notice for voluntary retirement to be effective from 01.05.1993 with a request that the same be accepted with effect from 31.07.1993, i.e., on expiry of three months. The petitioner did not receive any intimation regarding acceptance or decline of the same from respondent. The petitioner continued in service and submitted another three months voluntary retirement notice dated 17.07.1993 with a request that the same be accepted

with effect from 31.10.1993. The petitioner was informed by respondent that no action on the notice for voluntary retirement could be taken because of non issuance of No Demand Certificate from the office of DD (A/Cs) PAD BSF, New Delhi. For the third time, the petitioner submitted request for voluntary retirement by giving three months notice with effect from 15.11.1993 to 15.02.1994.

3. Since no action was being taken by respondent on his request for voluntary retirement, the petitioner approached this Court by filing CWP No. 3931 of 1994, seeking direction to respondents to accept his voluntary retirement notice and for quashing of the inquiry proceedings initiated against him for his absence from duty. In the said writ petition, respondents filed written statement, wherein a stand was taken by respondents that the petitioner has been dismissed from service, vide Order dated 22.03.1995 (Annexure-P-2). The said writ petition was rendered infructuous in the light of the stand taken by respondents and accordingly, the Order dated 04.01.1996 was passed by this Court with liberty to the petitioner to challenge the said order of termination. An appeal was preferred by the petitioner on 22.09.1997 (Annexure-P-4). Since no action was taken thereon, a reminder dated 09.03.1998 was sent by the petitioner and thereafter, another reminder dated 30.06.1998. Since no action was taken by respondents on the said appeal, the petitioner was forced to file present writ petition, challenging the Order of termination dated 22.03.1995 (Annexure-P-2) and for release of retiral benefit.

4. Counsel for the petitioner submits that the order of termination passed by respondents could not have been passed in the case of the petitioner as the petitioner had submitted his first voluntary retirement notice on 01.05.1993 because of his domestic problems, in which the notice period of three months expired on 31.07.1993. Since no response was received from respondents either accepting request of the petitioner for voluntary retirement or rejecting the same, the petitioner shall be deemed to have been voluntarily retired in the light of Rule 48-A of the Central Civil Services (Pension) Rules, 1972, which provides that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period. Since the petitioner stood voluntarily retired from service on expiry of three months period, i.e., 31.07.1993, no order terminating his services could have been passed thereafter. In support of this contention, he relies upon the judgment of Hon'ble the Supreme Court in the case of Union of India v. Sayed Muzaffar Mir, AIR SC 176.

5. His further submission is that the petitioner had to his credit more than 32 years of service and in the peculiar facts and circumstances of the case of the petitioner, the Authorities should have taken a lenient view. That apart, he contends that as per the allegations levelled against the petitioner, the petitioner had absented himself from duty without leave and therefore, had committed an

offence under Section 18 of the Border Security Force Act, 1968, (hereinafter referred to as "the BSF Act") because he was declared a deserter. For such serious allegations as levelled against the petitioner, the principles of natural justice demand that inquiry should have been held against the petitioner to prove the allegations. No inquiry was held against the petitioner and it was said that the Director General, Border Security Force, is satisfied that it is in-expedient and impracticable to hold the trial of the petitioner by General Security Force Court (hereafter referred to as "GSFC"). On account of the said casual and arbitrary approach adopted by the Authorities, the petitioner had suffered a serious prejudice because of which he was denied a fair opportunity to defend himself. He on this basis contends that the impugned Order dated 22.03.1995 (Annexure-P-2) deserves to be quashed and since the petitioner stood voluntarily retired with effect from 31.07.1993, therefore, the petitioner is entitled to pension as well as other retiral benefits from the said date.

6. On the other hand, counsel for respondent has argued that the petitioner had not disclosed true facts in his petition before this Court. The petitioner at each stage was conveyed the reasons why his application for voluntary retirement could not be processed. In the first voluntary retirement notice, the petitioner was intimated that the same could not be processed because of non attachment of necessary documents. The petitioner submitted second voluntary retirement notice, to which again he was informed could not be processed because of non receipt of No Demand Certificate and service verification certificate. Thereafter, the petitioner had submitted voluntary retirement notices at various intervals, but all during the leave period, which could not be considered without his personal presence as the formalities could not be completed. At all stages, the petitioner was informed that his request could not be processed and accepted. After expiry of his leave on 15.10.1993, the petitioner was required to re-join his duty with effect from 16.10.1993. The petitioner did not join his duty after expiry of his leave and thereafter, various communications were sent to him to join his duty, but he failed to do so because of which disciplinary proceedings were initiated against him for absence from duty without leave.

7. The Court of Enquiry was ordered u/s 62 of the BSF Act and on the basis of the evidence both oral and documentary, the petitioner was held guilty. During the course of the said inquiry, it came to the notice of the respondents that the petitioner had proceeded to United States of America (USA) without obtaining proper permission/No Objection Certificate from the competent authority and thus had violated the Conduct Rules. The Competent Authority on consideration of the recommendations of the Court of Enquiry issued a show cause notice to the petitioner. The application for extension of leave was not accepted by respondents and the petitioner was directed to join his duty, which he failed to do so. The respondents came to know about the USA address of the petitioner through his communication and accordingly, notices were served on the petitioner at his address in USA, to which also the petitioner failed to respond. He on this basis contends that the principles of natural justice and the Rules were

properly complied with and the conclusion drawn by the Recommending Authority and the Disciplinary Authority was in accordance with law and does not call for any interference by this Court, especially when the absence of the petitioner from service was without leave as is apparent from the records and Border Security Force being a disciplined force, such conduct of an Officer cannot be condoned and, thus, order of termination dated 22.03.1995 (Annexure-P-2) is in accordance with law, which does not call for any interference by this Court. Thereafter, the Appeal preferred by the petitioner was duly considered by the Competent Authority and finding no merit in it, the same was dismissed.

8. I have heard counsel for the parties and have gone through the records of the case.

9. The petitioner applied for earned leave, which was sanctioned to him for 15 days with effect from 01.01.1993 to 15.01.1993. Thereafter, he sought extension of leave, vide his application dated 11.01.1993, which was sanctioned upto 30.03.1993. He joined his duty on expiry of leave and again proceeded on leave with effect from 25.04.1993 to 13.05.1993. During this leave period, the petitioner submitted his voluntary retirement notice from service dated 01.05.1993. The petitioner resumed his duties on expiry of his leave. It was brought to his notice that as the notice dated 01.05.1993 was not accompanied by necessary documents, such as service verification certificate and long term outstanding certificate, his application could not be processed. The petitioner did not take any steps in this regard and served another notice dated 17.07.1993 for voluntary retirement. The notice was processed, but the request was turned down by the Competent Authority for want of service verification certificate and No Dues Certificate from the Pension and Accounts Department (PAD). The petitioner again proceeded on leave with effect from 19.07.1993 to 16.09.1993. He further requested for extension of leave, vide his application dated 02.09.1993, which was extended, vide letter dated 23.09.1993 upto 15.10.1993 with a direction to join his duty on 16.10.1993 with a further rider that no further extension in leave shall be granted. The petitioner was informed, vide letter dated 12.10.1993 (Annexure-R-2) that his voluntary retirement notice cannot be accepted, while he was on leave. The petitioner did not join his duty on expiry of extended leave period. A telegram dated 10.11.1993 was sent to the petitioner asking him to immediately join his duty. Instead of joining his duty, the petitioner submitted a fresh voluntary retirement notice and also requested for extension of leave, vide his application dated 15.11.1993. The request of the petitioner was not accepted and he was directed to join his duty to complete the required formalities, vide letter dated 24.11.1993 (Annexure-R-4). No response was received from him and, therefore, he was further directed, vide letters dated 19.01.1994 and 18.02.1994 to join his duty. Despite repeated requests and directions, the petitioner continued to absent himself from duty without leave, a one man Court of Enquiry was ordered u/s 62 of the BSF Act, vide order dated 18.11.1993. During the inquiry proceedings, it came to the notice of respondents that the petitioner had proceeded to USA without obtaining proper permission/No

Objection Certificate from the Competent Authority. After examining all the witnesses and relevant documents, the Court of Enquiry declared the absence as unauthorised and also declared that the Officer be deemed to be a deserter from service for the purpose of BSF Act and recommendations for dismissal from service was also made.

10. Instead of joining duty, the petitioner served another notice dated 20.03.1994 from the USA for voluntary retirement, which was received by respondent/Department on 06.04.1994, wherein request was made that his retirement be accepted with effect from 30.06.1994. In response to this notice, he was informed, vide letter dated 16.05.1994 to join his duty since his voluntary retirement notice has not been accepted in view of the disciplinary proceedings being pending against him. Similar information was sent to him, vide letter dated 21.05.1994 (Annexure-R-5). The petitioner did not respond to the said communications. Finally, the case was referred to Force Headquarters, BSF, New Delhi, vide letter dated 20.06.1994 for taking further disciplinary action against the petitioner. A show cause notice was issued to the petitioner, vide letter dated 28.10.1994 (Annexure-P-3) under Rule 20 (2) of the Border Security Force Rules, 1969 (hereinafter referred to as the "BSF Rules"), to explain/submit his defence by 30.11.1994. Neither any reply was received from the petitioner nor did he join his duty. Consequently, the Director General, Border Security Force, being satisfied that the trial by the General Security Force Court for offence of desertion was in-expedient and impracticable as the petitioner had gone out of the country, i.e., USA without obtaining proper permission/No Objection Certificate from the Competent Authority, referred his case to the Ministry of Home Affairs for approval of termination of service of the petitioner as per Rule 20 (3) and (4) of the BSF Rules, 1969. The Central Government after considering the report and recommendations made by the Director General, BSF, ordered termination of service of the petitioner by way of dismissal without pension under Rule 20 (5) of the BSF Rules, vide Order dated 22.03.1995 (Annexure-P-2). The Appeal preferred by the petitioner was also considered by the Competent Authority and dismissed the same.

11. The above sequence of events shows that the petitioner was duly informed after issuance of the first notice for voluntary retirement, when he joined his duty on 13.05.1993, after expiry of his leave that the notice could not be processed because of non attachment of necessary documents. The second notice dated 17.07.1993 submitted by the petitioner for voluntary retirement was processed, but the same was turned down by the Competent Authority for want of service verification certificate and No dues Certificate from PAD. The petitioner proceeded on leave with effect from 19.07.1993 to 16.09.1993. He submitted an application dated 02.09.1993 for extension of leave, which was accepted and vide letter dated 23.09.1993, the petitioner was informed about extension of leave upto 15.10.1993, but was directed to join his duty on 16.10.1993. It was made clear in the said letter that no further extension in leave would be given to him. The petitioner was, vide letter dated 12.10.1993,

i.e., much before the expiry of period of notice for voluntary retirement, which was to be effective from 31.10.1993, has not been accepted by the Competent Authority. Thereafter, the petitioner failed to join his duty on expiry of his extended leave upto 15.10.1993. He absented himself from duty with effect from 16.10.1993. A telegram dated 10.11.1993 was sent to him. Instead of resuming his duty, the petitioner submitted yet another voluntary retirement notice with effect from 15.11.1993 to 15.02.1994. In response to this, the Department again informed the petitioner, vide letter dated 24.11.1993 that for completion of the formalities, his presence would be essential. He was intimated, vide this letter that his notice for voluntary retirement has not be accepted by the Competent Authority due to non availability of some documents and his case for voluntary retirement can be forwarded only on arrival at this location. Paras 3, 4, and 5 of the letter dated 24.11.1993 read as follow:

3. It is also informed that your Notice for Voluntary retirement has not been accepted by competent authority due to non availability of following documents:

(i) Service verification certificate duly signed by PAD BSF N/Delhi is required. The same is required to be obtained by Officer concerned before submission Notice of Voluntary Retirement. Also as per instructions, only attested copy of the same to be enclosed alongwith notice of Voluntary retirement,

(ii) Long term dues only signed by PAD.

4. Your voluntary retirement case can be forwarded to Higher Hqrs only on your arrival at this location due to above reasons.

5. In view of the above your are requested to join your duty immediately. Further overstaying of leave will invite violation of BSF Act and Rules.

Sd/- (P.J. RAO, 2IC) Offg. Commandant, 55 Bn. BSF

11. The petitioner was further directed to join his duty, vide letters dated 19.01.1994 and 18.02.1994 and thereafter, the disciplinary proceedings were initiated, which were duly held in accordance with the Rules, governing the service. Therefore, it cannot be said that the petitioner was not intimated the non acceptance of his notices for voluntary retirement. Rules 48-A of the Central Civil Service (Pension) Rules, 1972, reads as follow:

48-A. Retirement on completion of 20 years" qualifying service. - (1) At any time after a Government servant has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service:

Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is-

(i) on assignments under the Indian Technical and Economic Cooperation (ITCE) Programme of the Ministry of External Affairs and other aid programmes,

(ii) posted abroad in foreign based offices of the Ministries/Department,

(iii) on a specific contract assignment as a foreign Government, unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under sub- rule (1) shall require acceptance by the appointing authority;

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the reinstatement shall become effective from the date of expiry of the said period.

(3) Deleted.

[(3-A) (a) A Government servant referred to in Sub-rule (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor.

(b) On receipt of a request under Clause (a), the appointing authority subject to the provisions Sub-rule (2), may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the Government shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.]

(4) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:

Provided that the request for withdrawal shall be made before the intended date of his retirement.

(5) The pension and retirement gratuity of the Government servant retiring under this rule shall be based on the emoluments as defined under Rules 33 and 34 and the increase not exceeding five years in his qualifying service shall not entitle him to any notional fixation of pay for purposes of calculating pension and gratuity.

(6) This rule shall not apply to a Government servant who -

(a) retires under Rule 29, or

(b) retires from Government service for being absorbed permanently in an autonomous body or a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.

Explanation.- For the purpose of this rule the expression "appointing authority" shall mean the authority which is competent to make appointments to the service or post from which the Government servant seeks voluntary retirement.

12. In the light of the above, since the petitioner has been duly informed about non acceptance/non processing of his voluntary retirement notices as also the reasons, the contention of counsel for the petitioner that he had not been intimated about the action taken on his application for voluntary retirement cannot be accepted.

13. The judgment relied upon by counsel for the petitioner, i.e., Sayed Muzaffar Mir (supra), thus, would not be applicable to the facts of the present case and the petitioner cannot take any benefit thereof.

14. As regards the contention of counsel for the petitioner that the principles of natural justice have not been complied with, while terminating the services of the petitioner as trial of the petitioner was held by the General Security Force Court as required under the Border Security Force Act as the allegation against the petitioner was for an offence committed u/s 18 of the BSF Rules, suffice it to say that the Competent Authority on the basis of the evidence collected during the Court of Enquiry held in the month of November, 1993 and thereafter, the conduct of the petitioner for not responding to the show cause notice sent to him by the Competent Authority, was rightly satisfied that the trial of General Security Force Court for the offence of desertion committed by the petitioner u/s 18 of the BSF Rules, was in-expedient and impracticable. This opinion was not without any basis. Firstly, the petitioner's prolonged overstay of leave and despite various reminders, directions and requests to join his duty, he not joining the same, rather absented himself from duty. Secondly, during the Court of Enquiry, it came to the notice of the respondents that the petitioner had proceeded to USA without obtaining proper permission/No Objection Certificate from the Competent Authority for visiting outside India. On coming to know the address of the petitioner in USA, the petitioner was sent communications time and again to join his duty, but he failed to do so. Thereafter, on 16.05.2004 (Annexure-R-5), he was again asked and advised to join his duty, wherein again it was mentioned that the voluntary retirement notices served by the petitioner from USA, could not be processed, as his presence was required here for completing the formalities. A show cause notice dated 28.10.1994 (Annexure-P-3) was also duly sent to the petitioner at the address of USA. In the said show cause notice, the petitioner was called upon to explain his conduct. He was also intimated that his presence was required for processing his case for voluntary retirement. He had shifted to USA with effect from 30.12.1993 alongwith his family and that too without intimation or permission of the Competent Authority. Various communications sent to him at the address in USA have been referred to without any response on behalf of the petitioner. No response to the show cause notice dated 28.10.1994 (Annexure-P-3) was received from the petitioner. The satisfaction of the Competent Authority with regard to holding of trial of General

Security Force Court being in-expedient and impracticable is fully justified.

15. The petitioner, who was a member of disciplined armed force of this country, is expected to act in responsible and disciplined manner. Faced with this conduct of the petitioner, the respondents proceeded to recommend the case of the petitioner to the Central Government for consideration and appropriate orders alongwith the recommendations of the Director General. The Competent Authority considered the report and recommendations of the Director General as per Rules 20 (3) and (4) of the BSF Rules and on consideration of the same ordered termination of service of the petitioner by way of dismissal without pension under Rule 20 (5) of the BSF Rules. In view of the above, it cannot be said that the principles of natural justice have not been complied with.

16. The principles of natural justice primarily is a principle, where a delinquent employee, whose civil rights are to be affected by the proposed action of the Disciplinary Authority is required to be intimated and made aware of the action to be taken against him, so that he is able to explain his conduct, reasons or put forth his defence, if any. The intent and purpose of the said principle is to give proper opportunity to the person, whose civil rights have to be affected. In the present case, such principles have been duly complied with and, therefore, the contention of counsel for the petitioner that the principles of natural justice have been violated, cannot be sustained. Thus, the order of termination dated 22.03.1995 (Annexure-P-2), passed by the respondents is in accordance with law and does not call for any interference by this Court.

17. In view of the above, finding no merit in the present writ petition, the same stands dismissed.