

(2011) 07 DEL CK 0327

In the Delhi High Court

Case No : Writ Petition (C) 581 of 2005

Laxman Chandra Sarkar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Border Security Force Act, 1968 — Section 19, 21(2)

Citation : (2011) 07 DEL CK 0327

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : K. Venkataraman, for the Appellant; Ankur Chhibber, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.

1 Enrolled on 20.12.1973 as a Constable (Radio Mechanic) in BSF, Petitioner was attached with the 173rd Bn.

2 On 14.6.1997 he was transferred to the 127th Bn. which was then deployed at Kolkata.

3 Vide signal dated 13.6.1998 Petitioner was transferred to the 49th Bn. which posting he challenged by and under W.P.(C) No. 12979/1998 before the Calcutta High Court and an ex-parte stay against transfer was passed by the Court in his favour. Accordingly, the department cancelled the order transferring Petitioner from the 127th Bn. to the 49th Bn.

4. In October 1999 the 127th Bn. as a whole was moved to Srinagar.

5. Taking an obstinate stand that his transfer was stayed; ignoring that the transfer stayed was the Petitioner's posting from the 127th Bn. to the 49th Bn., which movement had been withdrawn by the department and since the 127th Bn. as a whole was transferred to Srinagar and thus he could take no benefit of

the exparte Court order obtained by him, Petitioner refused to join at Srinagar by moving along with the battalion.

6. Petitioner started absenting himself and filed an application in the pending writ petition before the Calcutta High Court. In the pending application he stated that his transfer being stayed, the department could not send him to Srinagar. Needless to state the application was found to be misconceived and was dismissed. It was found that the writ petition had become infructuous and the same was dismissed.

7. Being absent, a Court of Inquiry was convened and it was opined that action should be taken against the Petitioner.

8. Petitioner realized that action would be taken against him and thus he reported at the Battalion Headquarters of the 127th Bn. in Bareilly on 31.5.2001 i.e. after 558 days unauthorized absence. On 2.6.2001 he was directed to join the unit at Srinagar. The Petitioner disobeyed the order.

9. The Petitioner never joined Srinagar and in the meanwhile he underwent the senior supervisory course. A charge sheet was issued alleging the following charges:

1st charge BSF Act 1968

Section 21(2)

DISOBEYING A LAWFUL COMMAND GIVEN BY HIS SUPERIOR OFFICER

In that he,

at Bn.HQ Bhitaura on 2nd June 2001 between 1100 hrs when ordered by Sub (Comn) N.C. Dey now posted at 11 Bn BSF) Sh.S.G. Goel, DC (the then OC Bn HQ, 127 Bn) to proceed to Tac HQ 127 Bn BSF did not proceed to the Tac HQ Srinagar.

2nd charge BSF Act 1968

Section 19(a)

ABSENTING HIMSELF WITHOUT LEAVE

In that he,

At 1800 hrs on 20.11.99 absented himself without permission from unit lines at Tagorvilla (Kolkata) till 2015 hrs on 31.5.2001 when he voluntarily rejoined the unit, 127 Bn BSF at Bhitaura Camp (Bareilly)

3rd charge

BSF Act 1968

Sec 21(2)

WITHOUT SUFFICIENT CAUSE FAILING TO APPEAR, AT THE TIME FIXED, AT THE PLACE APPOINTED FOR PARADE.

In that he,

At Bn HQ Bhituara on 2nd June 2001 failed without sufficient cause to attend at 0600 hrs the Adm parade at unit parade ground for Arms Cleaning.

10. After conducting proceedings pertaining to the hearing of the charge the Commandant directed the Deputy Commandant to prepare the Record of Evidence, information whereof was given to the Petitioner. Record of Evidence was completed and in view of the evidence recorded the re-framed charge sheet was served upon the Petitioner and he was tried by a General Security Force Court on 11th November 2002. Petitioner was found guilty and penalty of dismissal from service was inflicted without any pensionary benefits.

11. After the penalty was levied, on 21.11.2002 Petitioner requested by way of a mercy petition that the sentence awarded to him be commuted to one of voluntary retirement with financial benefits. The mercy petition was dismissed.

12. Learned Counsel for the Petitioner urges that the Petitioner was a loyal and an obedient employee. Unfortunate personal events in his life overtook him. His wife died. He had a minor daughter. His 80 years old mother was blind. Being a resident of the State of West Bengal he wanted to remain in West Bengal. He was ill advised not to move with the unit when the unit was transferred from Kolkata to Srinagar. He thought that he had a stay restraining the department to transfer him from the 127th Bn. to the 149th Bn. He thought that till the stay endured the department could not post him outside. He forgot that the department had withdrawn the order transferring him from the 127th Bn. to the 49th Bn. He remained under an illusion when he did not join at Srinagar even after the writ petition filed by him was dismissed.

13. We find that the Petitioner has led no such evidence either at the Record of Inquiry or at the trial. He has led no evidence of any mitigating circumstance vis-a-vis the penalty levied.

14. Not disputing that there is sufficient evidence wherefrom it can be gathered that the Petitioner was unauthorizedly absenting himself from duty, learned Counsel makes an alternative prayer. Counsel prays that in view of the past service rendered, the competent authority be directed to sanction compassionate allowance as per the proviso to Sub-Rule 1 of Rule 41 of the CCS (Pension) Rules.

15. Since Petitioner had never made a request for compassionate allowance to be paid and noting that the discretion is of the competent authority, while dismissing the writ petition and declining to quash the penalty imposed upon the Petitioner, we observe that if the Petitioner were to file a representation before the competent authority praying that compassionate allowance be sanctioned to him, the said representation shall be decided by the competent authority as per law.

16. For the benefit of the competent authority we may highlight that as per the proviso to Sub-Rule 1 of Rule 41 of the CCS (Pension) Rules, if the competent authority finds the case to be deserving or meriting a special consideration, notwithstanding a government servant being dismissed or removed from service, compassionate allowance or gratuity or both can be sanctioned at such rates as would be permissible under the proviso to Sub-Rule 1 of Rule 41 of the Pension Rules.

17. No costs.