

(2023) 12 J&K CK 0077

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 1163 Of 2003(O&M)

P. K. Sunil

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 30-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Border Security Rules, 1969 — Rule 43, 45, 48, 48(3), 48(8), 99, 142(1), 149, 177

Border Security Force Act, 1968 — Section 11(2), 19(b), 62, 117(2), 177

Citation : (2023) 12 J&K CK 0077

Hon'ble Judges : Rajnesh Oswal, J

Bench : Single Bench

Advocate : Surinder Kour, Dalwinder Kumar, Vishal Sharma

Final Decision : Dismissed

Judgement

Rajnesh Oswal, J

1. The petitioner, while working as a Constable, was sanctioned fifteen days" leave with effect from 14.08.2000 to 06.09.2000, but the petitioner overstayed the leave and by virtue of order dated 18.06.2002, he was dismissed from service with effect from 15.06.2002. The petitioner assailed the order dated 18.06.2002 by way of a petition before respondent No. 2 and the said petition was rejected vide order dated 02.12.2002 issued by the Chief Law Officer.

2. The petitioner has filed the present petition, thereby challenging the order dated 02.12.2002, whereby the Chief Law Officer rejected the petition of the petitioner preferred against the order of dismissal dated 18.06.2002 and also for quashing the order dated 18.06.2002 issued by the Commandant, by virtue of which, the Commandant has awarded the punishment of dismissal from service to the petitioner with effect from 15.06.2002 and also for quashing para (a) of order dated 20.06.2002 issued by the Commandant, 123 Bn BSF, whereby the absence of the petitioner from the service with effect from 07.09.2000 to 11.01.2001 (127 days) was treated as dies non and simultaneously the petitioner

has sought the directions to the respondents to consider the case of the petitioner for reinstatement and to allow him to perform his duties on the post of constable.

3. It is stated that during the leave period as mentioned above, the mother of the petitioner became serious and the petitioner being the only son was looking after his ailing mother. The respondents issued a show cause notice dated 05.12.2000 to the petitioner, which was dispatched on 20.12.2000 and received by him on 29.12.2000. After the receipt of the notice, the petitioner replied the same and also sent a telegram that the petitioner would join on 15.01.2001. In reply to the show cause notice on 29.12.2000, it was stated by the petitioner that his mother was suffering from cancer and the petitioner being the only son was looking after his seriously ailing mother. As absence of the petitioner was not wilful, so the petitioner also requested them for extension of leave. It is further stated that prior to that also the petitioner had sent the medical certificate of his mother, whereby it was certified that the mother of the petitioner was suffering from serious disease and the Doctor had mentioned that the period of absence of the petitioner with effect from 19.09.2000 was necessary for the restoration of health of the mother of the petitioner. The reply to the show cause notice as well as medical certificate was received by the respondents on 12.01.2001, whereas the telegram was received on 09.01.2001 that the petitioner would join the Unit on 15.01.2001. Despite that, the respondent No. 5 without following the provisions of Border Security Force Act, 1968 (for short "the BSF Act") and the Border Security Rules, 1969 made thereunder (for short "the BSF Rules") and without affording any opportunity of hearing, vide ex parte order dated 11.01.2001 dismissed the petitioner with effect from 11.01.2001 and also treated the period of absence of the petitioner from 07.09.2001 to 11.01.2001 as dies non.

4. The petitioner filed the petition before the Higher Authorities and the respondent No. 2 vide order dated 23.10.2001 set aside the order of dismissal dated 11.01.2001 and in compliance to order dated 23.10.2001, the petitioner rejoined the Unit on 12.11.2001. Even after joining the Unit, the petitioner submitted all the medical documents of his mother and also the certificate from the President Nedubathoor Grama Panchayat wherein it was stated that the mother of the petitioner was ill and he was the only earning member. The petitioner further claims to have submitted the certificate issued by the Medical Officer dated 14.03.2001 thereby certifying that the mother of the petitioner was undergoing treatment and her treatment continued for short period for complete restoration of the health. Despite that, the Commandant on 08.06.2002 framed a charge sheet against the petitioner under section 19(b) of the BSF Act on the allegations that the petitioner overstayed the leave without any sufficient cause. It is further stated that the respondents neither conducted any proceedings in presence of the petitioner nor afforded him an opportunity to cross examine any witness and further that the petitioner was not having the knowledge in respect of any proceedings conducted by the respondents. Thereafter, the Commandant-

respondent No. 5 vide order dated 18.06.2002 awarded the punishment of dismissal from service to the petitioner and thereafter, vide order dated 20.06.2002, the period of absence of the petitioner with effect from 07.09.2000 to 11.01.2001 was treated as dies non and the absence from the date of dismissal till his reinstatement was also treated as dies non. The petitioner filed an appeal against the order impugned, with respondent No. 2, but the Chief Law Officer vide order dated 02.12.2002 dismissed the petition of the petitioner being devoid of any merit without giving any cogent reason and without affording opportunity of hearing to the petitioner.

5. The petitioner has assailed both the orders on the ground that the respondents had not prepared any offence report as required under Rule 43 of the BSF Rules and the respondents neither called the petitioner nor prepared the record of evidence as required under Rule 48 of the BSF Rules. The petitioner has further urged that the respondents without following the mandate of the BSF Act and Rules framed thereunder have held the petitioner guilty and dismissed him from service. The petitioner has also alleged that the respondents have passed the non-speaking order and have not considered that because of circumstances beyond the control of the petitioner, the petitioner could not immediately join after the expiry of sanctioned leave, as his mother was ill.

6. The respondents have filed the response, stating therein that the petitioner was sanctioned leave with effect from 14.08.2000 to 06.09.2000, but after the expiry of leave, the petitioner neither reported for duty nor applied for any extension of leave. Two call letters were issued to the petitioner vide letters dated 19.09.2000 and 25.09.2000, but the petitioner did not respond to the same. Due to the continuous absence of the petitioner, the Court of Inquiry was ordered under section 62 of the BSF Act. An apprehension roll was also issued and addressed to the Superintendent of Police, District Kollam (Kerala) vide letter dated 09.11.2000 and when the petitioner did not report, a show cause notice dated 05.12.2000 was issued to him, thereby tentatively proposing to terminate his service by way of removal and was given chance to reply before 05.01.2001 but the petitioner did not report for duty. The Competent Authority therefore, dismissed the petitioner with effect from 11.01.2001 under section 11(2) of the BSF Act read with Rule 177 of the BSF Rules.

7. The respondents have given the details of earlier unauthorized absence of the petitioner on five occasions. The petitioner, however, was reinstated with a direction to take a disciplinary action afresh for overstaying leave by 127 days i.e. with effect from 07.09.2001 without sufficient cause.

8. The petitioner reported for duty in the Unit on 12.11.2001. When the petitioner reported in the Unit, he was heard by respondent No. 5 on the offence report on 14.01.2002. During the hearing to the petitioner under Rule 45 of the BSF Rules, an opportunity to cross-examine the witnesses was granted to the petitioner but the petitioner did not opt to cross-examine the witnesses. The record of evidence was ordered vide order dated 14.01.2002. During the

preparation of record of evidence, three prosecution witnesses were examined and the petitioner was given an opportunity to cross-examine all the prosecution witnesses. Further, the petitioner was also provided an opportunity to produce any witness/document in his defence, but he declined to produce any witness/document before the Recording Officer. During the preparation of record of evidence, the petitioner was allowed to make a statement, which right he availed and made a statement. After going through the record of enquiry, the Commandant decided to go for a Summary Security Force Court (SSFC) trial of the petitioner as prima facie case was made out against the petitioner. The copy of the charge-sheet and record of evidence was provided to the petitioner vide communication dated 08.06.2002 prior to the commencement of trial on 15.06.2002. During the trial, the petitioner cross-examined the first and the third prosecution witness and after the trial of the petitioner was over, the petitioner was called upon for his defence and the petitioner made a statement. After considering entire facts, evidence and circumstances of the case, the SSFC found him guilty and dismissed him from service. The petitioner thereafter submitted a statutory petition against the conviction by the SSFC. After the detailed consideration and careful scrutiny of all facts and circumstances of the case, the Director General BSF rejected the petition being devoid of merit and dismissal order dated 02.12.2002 was communicated to the petitioner. The respondents have stated that the show cause notice could not be dispatched immediately due to Post and Telegraph (P&T) strike and was sent through registered letter on 20.12.2000. Since the petitioner neither reported on duty before 05.01.2001 nor any communication was received from him till 05.01.2001, therefore, the competent authority dismissed the petitioner from service with effect from 11.01.2001 in terms of section 11(2) of the BSF Act read with Rule 177 of the BSF Rules. The respondents have admitted that the telegram was received on 09.01.2001 and an unsigned letter was received on 12.01.2001 forwarding a photo copy of medical certificate issued by Dr. N. K. Chandra Babu in respect of mother of the petitioner stating that she was suffering from diabetes mellitus and hypertension, whereas the petitioner had intimated that his mother was suffering from serious cancer disease which itself is a contradictory and false statement. The disease of the mother of the petitioner did not warrant the requirement of an attendant since it was a common ailment of every elderly person which requires continuous medication.

9. The respondents have denied that the receipt of any other medical certificate/document in respect of the mother of the petitioner. The respondents have admitted that the earlier order of dismissal was cancelled as there were some shortcomings. The respondents have denied that there is any provision for personal hearing, while examining the petition preferred against the order of dismissal. It is also averred by the respondents that during the preparation of record of evidence and trial by the SSFC, the BSF Act and the Rules framed thereunder were strictly followed. The petitioner had pleaded not guilty before the SSFC and his trial was conducted as per the rule, where the delinquent

employee pleads "not guilty" of the charge. The petitioner did not answer, when the Court questioned the petitioner in respect of the charge and remained silent but still, the Court in the interest of justice, SSFC recorded the plea of "not guilty" as per the provisions of BSF Rules 142(1) and proceeded ahead with the trial as if the petitioner had pleaded not guilty of charge.

10. The petitioner was also afforded opportunity to produce defence witnesses and thereafter only the Court arrived at a finding and finally awarded sentence. During the trial, the petitioner was provided with a friend of the accused, namely, Sh. Bharat Chand AC(T) on the request of the petitioner. In nutshell, the stand of the respondents is that all the provisions have been followed during preparation of record of evidence and during the course of trial.

11. Ms. Surinder Kour, learned Senior Counsel appearing for the petitioner has vehemently argued that the respondents had not followed the provisions as contained in the BSF Act and the Rules made thereunder, while preparing record of offence and during the course of trial by the SSFC. She laid much stress that unreasoned order has been passed by the SSFC despite the fact that the petitioner had submitted the medical record in respect of ailment of his mother and had also sent the telegram as well as the letter demonstrating his willingness to join the Unit on 15.01.2001 but the respondents dismissed the petitioner initially 11.01.2001 ignoring the fact that though the show cause notice was dated 02.12.2000 but the same was sent to the petitioner on 20.12.2000 and received by him on 29.12.2000. Without granting reasonable time, the respondents had dismissed the petitioner earlier and committed the mistake which the respondents realised later and subsequently, the order of dismissal was cancelled. She further submitted that the absence of the petitioner was not wilful but due to circumstances beyond his control.

12. On the contrary, Mr. Vishal Sharma, learned DSGI appearing for the respondents has vehemently argued that the petitioner is a habitual offender as earlier also he had overstayed the sanctioned leave number of times. He further stated that so as the present case is concerned, contradictory reasons were shown by the petitioner for remaining absent. In reply to the show cause notice, it was stated by the petitioner that his mother was suffering from serious cancer disease whereas in the medical certificate annexed with the application, it was stated that the mother of the petitioner was suffering from diabetes mellitus and hypertension, which clearly demonstrates the falsity of the cause projected by the petitioner for his absence. Mr. Sharma has also produced the record of SSFC proceedings.

13. Heard and perused the record.

14. This is evident from the record that the petitioner was sanctioned fifteen days" leave with effect from 14.08.2000 to 06.09.2000 and the petitioner did not join at the Battalion Headquarter on the expiry of above mentioned leave. This is admitted in the reply by the respondents that Show Cause Notice dated

05.12.2000 could be sent only on 20.12.2000 as there was Post and Telegraph (P&T) strike. The petitioner though has admitted that he received the notice 29.12.2000, but annexure-"C" placed on record by the petitioner himself demonstrates that it was received by him on 27.12.2000. By virtue of notice dated 05.12.2000 (exhibit -R-5) annexed with the record of the respondents, the petitioner was asked to submit his defence against the proposed action of termination of his service by way of removal. Simultaneously, it was stated that if no reply was received by 05.01.2001, it shall be presumed that the petitioner has no defence to put forward against the proposed action. The date of show cause notice is 05.12.2000 and the petitioner was asked to reply by 05.01.2001 but as mentioned above, the notice could be sent only on 20.12.2000 and received by the petitioner on 27.12.2000 as admitted by him in his reply dated nil. The respondents have admitted that the telegram was received from the petitioner on 09.01.2001 and an unsigned letter was received on 12.01.2001 along with the medical certificate issued by Dr. N. K. Chander Babu. Though the petitioner was dismissed from the service earlier as well vide order dated 11.01.2001 but the same was cancelled vide order dated 23.10.2001. The order dated 23.10.2001 provided for fresh disciplinary action after the reinstatement of the petitioner.

15. After the petitioner joined on 12.11.2001, the offence report was prepared under Rule 43 of the BSF Rules and he was heard on charge by respondent No. 5 on 14.01.2002. After examining three witnesses and documentary evidence on 14.01.2002, the respondent No. 5 directed the preparation of record of evidence by Sh. C. P. Trivedi, Deputy Commandant. During the hearing of charge, the petitioner did not opt to cross examine the witnesses as is evident from order dated 14.01.2002. This Court does not find any violation of Rules 43 and 45 of the BSF Rules. Sh. C. P. Trivedi, Deputy Commandant thereafter prepared the record of evidence ordered by respondent No. 5 in presence of the petitioner. During preparation of record of evidence, three witnesses, namely, Sub/Head Clerk M. N. Shenoy, PW-2 Constable Ashraf Ali and PW-3 Constable, S. M. Bhagat were examined by the Recording Officer on 15.02.2002 and the petitioner cross examined PW-1 Sh. M. N. Shenoy and PW-3, Constable S. M. Bhagat but the petitioner did not cross-examine PW-2 Ashraf Ali. The petitioner in acknowledgment of the recording of the statements of the witness, signed the statements as well. Thereafter, in compliance of Rule 48(3) of the BSF Rules, the petitioner was cautioned and after caution, the petitioner made a statement duly signed by him on 16.02.2002. Thereafter, the petitioner was also granted opportunity to produce the evidence in his defence but the petitioner declined to produce any witness in defence. The Recording Officer thereafter on 16.02.2002 issued the certificate in compliance to Rule 48(8) of the BSF Rules. This Court finds that there is no violation of Rule 48 as the record of evidence has been prepared by C. P. Trivedi, Deputy Commandant in accordance with Rule 48 of the BSF Rules.

16. After the record of evidence was prepared and submitted before the

respondent No. 5, the respondent No. 5 vide order dated 08.06.2002 ordered for trial of the petitioner by Summary Security Force Court SSFC) on 12.06.2002 and the petitioner was also asked to intimate name of one person from 123 Bn. BSF to act as a friend of the accused during the trial by 09.06.2002. In response to order dated 08.06.2002, the petitioner opted Sh. Bharat Chand AC(T) to represent him during SSFC trial. The proceedings of SSFC were held on 15.06.2002 by Sh. G. S. Sharma, Commandant, 123 Bn. BSF and Sh. Shakti Singh, AC 123 Bn. BSF and SI (Cipher) C. S. Rawat, 123 Bn. BSF attended the trial. Sh. G. S. Sharma, Commandant 123 Bn. BSF, himself acted as interpreter. Sh. Bharat Chand AC(T), 123 Bn. BSF acted as a friend of the accused and the trial commenced at 1900 hours. The petitioner was brought and Sh. G. S. Sharma was duly affirmed and also affirmed as an interpreter. Sh. Sunil Kumar was affirmed as short hand writer and all the witnesses were directed to withdraw from the Court and the charge sheet was read over and explained to the petitioner.

17. The record further depicts that the proceedings in respect of the plea of guilty were conducted and the record of evidence was read over and explained to the petitioner but the petitioner did not respond and remained silent and the silence of the petitioner was recorded as "not guilty" by the SSFC in terms of Rule 142(1) of the BSF Rules. After recording the plea of not guilty, statements of witnesses, three in number were recorded. The petitioner was given an opportunity to cross-examine the witnesses and like during the record of preparation of evidence, the petitioner crossed examined only PW-1 Head Clerk M. N. Shenoy and PW-3 S. M. Bhagat during trial also. The petitioner did not opt to cross-examine PW-2 Ashraf Ali. After the conclusion of the prosecution evidence, the petitioner was asked as to whether he wanted to call any witness in defence, which the petitioner declined. However, the petitioner made his statement and stated that because of the sickness of his mother, he could not join the duty on time. He admitted the receipt of two warning letters and the show cause notice. He further submitted that he sent a telegram that he shall join the duty on 16.11.2000. He further stated that his mother was suffering from Breast Cancer and she was operated upon. It is further stated by him that she was also suffering from hypertension therefore, he produced the certificate. He further wanted to produce the certificate about the disease of the cancer but he did not have the certificate at that time. He admitted that he had committed a mistake and sought minimum punishment as he was the only son of his family totally dependent upon him. After recording the statement of the defence of the petitioner, the SSFC recorded as under:"

"I am of the opinion on the evidence before me that the accused No. 942540866 constable P. K. Sunil of 123 Bn. BSF is guilty of the charge."

18. Thereafter, the SSFC took note of the past conduct of the petitioner and the previous punishment, decoration or reward and sentenced the petitioner with "dismissal from service".

19. It was contended by the petitioner that a non-speaking order has been passed by the SSFC. In this context, it would be appropriate to note the relevant part of Rule 149 of the BSF Rules, which read as under:

"149. Finding-(1) The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of "Guilty" or of "Not Guilty".

(2).....

(3).....

(4).....

(5)....."

20. A perusal of this Rule would reveal that the finding on every charge is required to be recorded simply as a finding of guilty or of not guilty. The reasons are not at all required for returning such finding. In this context, it would be appropriate to take note of the judgment of the Hon"ble Supreme Court in Union of India and another v Dinesh Kumar, 2010(3) SCC 161, wherein it has been observed as under:

"12. On this backdrop, it is clear that the provisions for the SSFC and the appellate authority are para materia, more particularly in case of Rule 149 and Section 117(2) of the Act, with the provisions which were considered in both the above authorities. Therefore, there cannot be any escape from the conclusion that as held by the Constitution Bench, the reasons would not be required to be given by the SSFC under Rule 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the Legislature has chosen not to amend Rule 149, though it has specifically amended Rule 99 w.e.f. 9.7.2003. It was pointed out that inspite of this, some other view was taken by the Delhi High Court in the decision in Nirmal Lakra Vs. Union of India & Ors. [2003 DLT(102) 415]. However, it need not detain us, since Rule 149 did not fall for consideration in that case. Even otherwise, we would be bound by law declared by the Constitution Bench in the decision in S.N. Mukherjee Vs. Union of India (cited supra)."

(emphasis added)

21. In view of this, this Court does not find that recording of reasons for returning a finding of guilty, was at all the requirement of law. Though it was vehemently argued by the learned Senior Counsel for the petitioner that the petitioner had informed the respondents through telegram as also through the reply that his mother was ill, but equally true is that in the reply, it was stated by the petitioner that his mother was suffering from cancer disease whereas in the medical certificate annexed with the reply to the show cause notice, it was mentioned that she was suffering from diabetes mellitus and hypertension.

22. During recording of his statement by the SSFC, the petitioner admitted that

he wanted to produce the certificate of disease of cancer but he did not have it. Thus there is nothing on record to demonstrate that the mother of the petitioner was suffering from cancer. The documents annexed as Annexure- "H and J" were never produced during the course of proceedings before the SSFC and even the certificate of Doctor annexed as annexure J demonstrates that the mother of the petitioner was suffering from hypertension.

23. The SSFC has returned a finding after forming an opinion on the basis of evidence that the petitioner was guilty. This Court, while examining the validity of proceedings conducted by the SSFC, cannot appreciate the evidence and come to the conclusion other than the one formed by the SSFC on the similar set of facts.

24. In *Union of India and others v P. Gunasekaran*, (2015) 2 SCC 610, the Apex Court has explained the scope of judicial review and interference in disciplinary matters and it has been held as under:

The High Court can only examine as to whether:

- "a. the enquiry is held by a competent authority;
- b. the enquiry is held according to the procedure prescribed in that behalf;
- c. there is violation of the principles of natural justice in conducting the proceedings;
- d. the authorities have disabled themselves from reaching a fair conclusion by some consideration extraneous to the evidence and merits of the case;
- e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
- f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
- g. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
- h. the disciplinary authority had erroneously admitted admissible evidence which influenced the finding;
- i. the finding of fact is based on no evidence,

Under Article 226/227 of the Constitution of India, the High Court shall not;

- (i) Re-appreciate the evidence;
- (ii) Interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
- (iii) go into the adequacy of the evidence;
- (iv) go into the reliability of the evidence;

- (v) interfere, if there be some legal evidence on which findings can be based.
- (vi) Correct the error of fact however grave it may appear to be;
- (vii) go into the proportionality of punishment unless it shocks its conscience.”

25. In its latest pronouncement, in *Union of India and others v Subrata Nath*, 2022 SCC Online 1617, the Hon’ble Supreme Court of India after taking note of its earlier judgments in the case of *P. Gunasekaran*(supra) and *Union of India v Ex. Constable Ram Karan* (2022) 1 SCC 373, has held as under:

“22. To sum up the legal position, being fact finding authorities, both the Disciplinary Authority and the Appellate Authority are vested with the exclusive power to examine the evidence forming part of the inquiry report. On finding the evidence to be adequate and reliable during the departmental inquiry, the Disciplinary Authority has the discretion to impose appropriate punishment on the delinquent employee keeping in mind the gravity of the misconduct. However, in exercise of powers of judicial review, the High Court or for that matter, the Tribunal cannot ordinarily reappraise the evidence to arrive at its own conclusion in respect of the penalty imposed unless and until the punishment imposed is so disproportionate to the offence that it would shock the conscience of the High Court/Tribunal or is found to be flawed for other reasons, as enumerated in *P. Gunasekaran* (supra). If the punishment imposed on the delinquent employee is such that shocks the conscience of the High Court or the Tribunal, then the Disciplinary/Appellate Authority may be called upon to reconsider the penalty imposed. Only in exceptional circumstances, which need to be mentioned, should the High Court/Tribunal decide to impose appropriate punishment by itself, on offering cogent reasons therefor.”

26. This Court also finds that the order dated 02.12.2002 was passed by the respondent No. 2 after perusing the relevant record of the proceedings and no reasons in fact were required to be furnished for rejecting the statutory petition of the petitioner in terms of section 177 of the BSF Act.

27. This Court has also examined the proportionality of the punishment vis a vis act of misconduct of the petitioner and after perusing the record, this Court finds that the punishment awarded to the petitioner is not shockingly disproportionate to act of misconduct on the part of the petitioner, which may warrant interference by this court.

28. In view of all what has been said and discussed above, the instant writ petition has no merit and the same is, accordingly, dismissed.

29. Record of the SSFC proceedings be returned back to the learned counsel for the respondents.