
(2000) 08 GAU CK 0021
In the Gauhati High Court
Case No : Civil Rule No. 6128 of 1998

Parama Nanda Deka

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-08-2000

Acts Referred:

Border Security Force Act, 1968 — Section 11

Citation : (2003) 96 FLR 710 : (2001) 2 GLT 190

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : K.N. Choudhury, P. Bhowmik and B.C. Das, for the Appellant; D. Sur, for the Respondent

Judgement

J.N. Sarma, J.—This writ petition depicts the highhanded and cavalier attitude on the part of the Commandant in throwing out the petitioner from service treating him as if he is a bonded labour or as if the petitioner is his personal employee. The petitioner herein joined Border Security Force (in short "BSF") on 29.6.1981 as a Sepoy in 63 Bn BSF and he to the rank of Naik in 1993 and his last place of posting was a Khemkoran in the State of Punjab. The petitioner applied for 60 days leave in April, 1997 and his leave for those period was sanctioned by the authority on 4.5.1997 and pursuant thereto, petitioner handed over charges to his reliever. Sanctioning of the leave is admitted by the authority in para 7 of the affidavit-in-opposition. Para 7 is quoted below :

"7.That with regard to the statement made in para 3 of the writ petition the deponent beg to state that the petitioner had applied for 60 days leave on 30.04,97 which was sanctioned by the competent authority on 1.5.1997. But the petitioner without, depositing his clearance certificate with the office of 63 BN B.S.F. and obtaining leave certificate, deserted himself at his own from Unit line on 7.5.1997. It is further submitted that though the petitioner was sanctioned leave by the competent authority on his leave application but he could avail the same only after getting proper leave certificate from the Unit office which he

should have obtained before leaving unit Head quarter."

2. This allegation is also inasmuch as Annexure-I to the writ application shows as follows:

"HANDING/TAKING OVER CHARGE CERTIFICATE

It is certified that we the undersigned have jointly handed/ taken over the charge of all Arms/Ammns/Accessories and other control I/instruments and their documents held on charge of "HQ" Coy Kote is physically checked and found correct as per ledger charge.

No deficit may or surplus.

Sd/-Illegible Counter Sig Sd/-illegible Handed over by Sd/-Illegible Taken over by NO.8185501G No.80002945 Rank NK RankNK."

3. This was countersigned by the Assistant Commandant as quoted above. Thereafter, the petitioner received the notice dated 21.6.1997 (Annexure-II). That is quoted below :

"No . Estt/Desert/63/97 Read HQ 63 BSF Khamkaran (PB) Dist Amritsar(PB) Dated 21 June, 97 To

The Superintendent of Police Dist Nalbari(Assam)

Sub: Desertion of Force Personnel apprehending thereof, Sir,

It is to inform you that No. 81855016 NK permand Deka of this unit belongs to vill Kathalmura.P.S.Tihu/Dist Nalbari (Assam) has deserted from this Unit on 7.5.1997(BN) without leave,

2. You are, therefore, requested to kindly apprehend above Naik and intimate to this Officer accordingly. So that a Apprehension Party can be sent to collect the defaulter at the earliest.

3. Your co-operation in this regard will be highly appreciated,

Yours faithfully Sd/-Illegible Commandant

63 BN BSF

Copy to :

(1) Officer Incharge - for info and similar action BS : Tihu. Dist Nalbari(Assam)
(2) No.81855016 NK Parmand Deka You are hereby Vill Kathal Mura directed to join duty PO Jalkhana forthwith failing which Dist Nalbari(Assam) strict disciplinary will (By Regd/AD) be taken against you."

4. On receipt of the notice he went to Khamkaran (Pb) and wanted to join, but he was not allowed to join. That is available at para 7 of the writ application. That is quoted below :

"That immediately on receipt of letter dated 21.06.1997 he went to Khemkaran to ascertain the reason as to why he has been declared to be a deserter as admittedly he came home on the strength of 60 days leave granted to him on 4.05.1997. But at Khamkaran he met with a cold response inspite of moving from pillar to post. Surprisingly, the BSF authorities at Kharokaran did not apprehend the petitioner as Indicated in letter dated 21.06.1997. Moreover, by the communication dated 21,06,97 the petitioner was also directed to join the duty,"

5. In para 11 of the affidavit-in-opposition filed by the respondent reply has been given to that para 7 of the writ application as follows :

That the averments made in paragraph 7 of the writ petition are denied by the deponent being false. The petitioner did not join duty at Khemkaran." If the petitioner ever reported at Khemkaran though not admitted and did not get any response from unit authorities, he could have approached the Dy. Inspector General office at Ferozpur instead of going back."

6. The petitioner could not join in the post without being allowed by the authority. The authority did not allow him because before that the authority made up its mind to throw out the petitioner from service and on 2nd Aug" 97 the authority issued the following notice.

That is quoted below:

"No. ESTT/Disc/NK-PND/63Bn/97/12 3 79

REGD/AD HQ 63 Bn BSF Khenlkaran (PB) Dated, the 02 Aug" 97

To

No. 81855016 NK

Parmanand Deka Vill Kathaimura, PO Jalkhana. Dist Nalbari(Assam)

Sub: SHOW CAUSE NOTICE

You have been absent without leave from 07.05.97 after considering the report relating to your absence, I am satisfied that your trial by security force court is in expedient but 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 30 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.

Sd/-Illegible (GURBAX SINGH)AC 63 Bn BSF for Commandant."

7. Thereafter, impugned order was passed which is at annexure-III to the writ application. That is quoted below :

"OFFICE OF THE COMMANDANT : 63 BN BSF KHEMKARA

ORDEER

Whereas I have gone through the case of absence from leave in respect of No. 81855016 NK Parmanand Deka of "P" Coy 63 Bn BSF He was given opportunity to show cause vide this office letter No. Estt/Dispo/NK-PND/63 97/12379 dated 2 Aug" 97 which he has-not availed of. I am satisfied that his further retention in the service is undesirable I therefore, dismiss him from service with effect from 5/9/97(BN).

2. The absence period from 7.5.1997 to 4.9.1997 (AM) will be treated as "DUES NON". He is hereby struck off strength from this unit with effect from 5.9.1997 (BN)

3. A sum of Rs. 2340-28 Ps (Rupees two thousand three hundred forty and twenty eight paise) only being the cost of deficient Govt kit/clothing items be recovered from his pay and allowances lying in the unit and deposited into Govt Treasury.

Sd/ -Illegible (S.S. Chatrath) Commandant, 63 BN BSF No. Estt/63 Bn/Disc/NK-PMD/97 Dated 6th Sept" 97."

8. The order suffers from another infirmity, the order passed., on 6th Sept" 97, but it was given retrospective effect from 5.9.1993. Be that as it may, this is not relevant for the disposal of this matter, but I have only mentioned this only to show the non-application of mind on the part of the authority. Thereafter this writ application has been filed. The petitioner herein also denied the receipt of show cause at Annexure-B quoted earlier. No record has been produced before me to show that this was sent to the petitioner. As a matter of fact, the learned CGSC Mr. D Sur failed to produce any record, save and except filing an affidavit-in-opposition on behalf of respondents.

9. Admittedly the order of dismissal has been Issued in exercised of the power u/s 11 of the Border Security Force Act. Section 11 of that Act is quoted below :

"11. Dismissal, removal or reduction by the Director General and by other officers-

(1) The Director-General of any Inspector General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an Officer.

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in Sub-section(2) may reduce a lower grade or rank or the ranks any person under his command except an officer or a

subordinate officer.

(4) The exercise of any power under this section shall be subject to the provision of this Act and the rules."

10. Section 11 of the Act as aforesaid came up for consideration before the Apex Court in Gouranga Chakraborty Vs. State of Tripura and Another, where the person absented from duty without any leave and overstayed leave period without sufficient cause. A show cause was issued and the delinquent official did not avail this opportunity and he did not file any reply to the show cause and on that background the Apex court considered Section 11, 19, 48 and in para 24 the law has been laid down as follows ;

"24. 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 3, 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 under 3, 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 duty 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."

11. Learned counsel for petitioner places reliance on The Commandant, 70 Battalion, Border Security Force and others v. Anil Bandhu Mitra, Respondent

1985 LAB.I.C. 1738. That was a division Bench judgment of Calcutta High Court and in para 10 the Division Bench has laid down the law as follows :

"On a, very careful reading of the Act and the Rules we are unable to accept this contention or the stand taken by the authorities of the Border Security Force who dealt with the present case, We have quoted Section 11 of the Act hereinbefore. That section, in our opinion, only empowers certain authorities to pass orders of dismissal, removal or reduction in rank. This is an authorising section and not a section vesting any power or authority to pass any such order independently of the other provisions of the Act or the Rules. Section (4) makes it very clear that the power u/s 11 is to be exercised only subject to the provisions of the Act and the Rules. If this section be interpreted in the manner suggested by Mr. Banerjee appearing on behalf of appellant, namely that this section Independently gives a power to dismiss, remove or reduce a person in rank, that would constitute a ungulded power in the authorities so that the service of the members of the Force would be totally within a whim of the authorities so empowered. This could not have been the intention of the Legislature in promulgating Section 11, On the other hand, it is clear like other Rules that this section only specifies which are the authorities competent to pass the orders of dismissal/removal or reduction in rank so that no other authority can pass such order. But in the matter in which it has to be done must be as prescribed by the statute or by the Rules. Therefore, in our opinion, the authorities of the Border Security Force were not within their jurisdiction to dismiss the writ petitioner from service on the alleged ground of absence without leave in mere exercise of administrative powers without following either of the three alternatives specified herein before. Since it is the specific case of the said authorities that they had not followed either of the three alternatives specified hereinbefore but they dismissed the writ petitioner from service merely in exercise of their administrative powers, we must uphold the challenge of the writ petitioner that the order so passed is ultra vires the powers of the Commandant and is an order not in accordance with law. The writ petition, therefore, succeeds and the order passed by the learned Single Judge is upheld though on grounds totally different from the grounds on which the learned single Judge allowed the writ petition."

12. But in view of the decision of the apex court this law laid down by the Calcutta High Court cannot be deemed to be good law, but the matter does not end there. The question in this case is that the petitioner was granted leave for a period of 60 days as is admitted by the authority and it has been stated that he absented without leave with effect from 7.5.1997. That is factually incorrect as will be evident from the facts quoted above and in view of that matter, the power was not available with the authority to pass the impugned order as the petitioner was not absented from duty without leave. Nothing has been produced before me to show that there is any necessity to obtain a leave certificate and failure to obtain a leave certificate, does not amount to hold a person as deserter in the eye of law after the leave is granted by the authority itself. That will be a hyper-technical approach to the whole matter. Desertion as such has not been defined

in the Act. In Black's Law Dictionary desertion has been defined as follows :

"Desertion, The Act by which a person abandons and forsakes, without justification or unauthorized, a station or condition of public, social, or family life, renouncing its responsibilities and evading its duties. A willful abandonment of an employment or duty in violation of a legal or moral obligation."

13. The conduct of the petitioner in this particular case also does not come within the meaning of desertion as quoted above.

14. The meaning of desertion can also be gathered from Section 18. That shows that any person subject to this Act who deserts or attempts to desert the service. That is not the position in the case in hand.

15. For all the reasons quoted above. I hold that the impugned order of termination is bad in law and the same is liable to be set aside which I hereby do. The petitioner shall be reinstated in service with all backwages. The reinstatement shall be made within a period of 3 months from the date of receipt of this order. The petitioner may obtain a certified copy of this order and shall produce the same before the authority to do the needful in terms of this order. No cost.

16. Heard Mr. K. N. Choudhury, learned counsel for petitioner and Mr. D. Sur, learned CGSC for respondents.