

**(2020) 08 DEL CK 0108**

**In the Delhi High Court**

**Case No :** Civil Writ Petition No. 4697 Of 2020

Rakesh Kumar Jilowa

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

**Date of Decision :** 20-08-2020

**Acts Referred:**

Constitution Of India, 1950 — Article 226

Border Security Force Rules, 1969 — Rule 26, 28(A), 30

**Citation :** (2020) 08 DEL CK 0108

**Hon'ble Judges :** Rajiv Sahai Endlaw, J;Asha Menon, J

**Bench :** Division Bench

**Advocate :** Alok Singh, Vinay Kumar, Akshay Makhija, Seerat Deep Singh, Sahil Sharma

## Judgement

Rajiv Sahai Endlaw, J

1. On 29th July 2020, when this petition came up first before us, the following order was passed: -

3. The petitioner impugns the order dated 20th July, 2020 of the Deputy Inspector General of the respondents Border Security Force

(BSF) retiring the petitioner, a Constable (GD) of the respondents BSF, from service, under the provisions of Rule 26 of the BSF Rules,

1969, with effect from 31st July, 2020 (A.N.).

4. We have enquired from the counsel for the petitioner, whether the petitioner has no departmental remedies.

5. Counsel for the respondents appearing on advance notice draws attention to the foot of page 32, being the impugned order dated 20th

July, 2020, where the petitioner has been informed that if he felt aggrieved therefrom, he had an opportunity under Rule 28 (A) of the BSF

Rules, to submit a representation to IG, BSF, Ftr. HQ (Spi.Ops.) Odisha, within three months from the date of receipt of the order.

6. Counsel for the petitioner states that the present petition has been preferred since the petitioner is being retired with effect from 31st July,

2020 and before which time, the representation, which the petitioner is permitted under Rule 28 A, would not be decided.

7. We find it strange that the respondents BSF is compulsorily retiring the petitioner, without giving any time to the petitioner to avail of the

statutory remedies. Rule 30, defining "effective date of retirement", provides that the effective date shall be the date mentioned in the

order of retirement and if no such date is mentioned, the date on which the order is signed or the date on which the person concerned is

relieved from duties, whichever is later.

8. We have thus enquired from the counsel for the respondents BSF, that once there is a statutory remedy provided against the impugned

order, whether not the effective date of the order of compulsorily retirement should be the date expiring with the period prescribed for

preferring the statutory remedy, which vide proviso to Rule 28(A) is of three months or of the date of the decision of the statutory remedy, if

against the petitioner.

9. Counsel for the respondents BSF states that if the petitioner succeeds in the statutory remedy, he would be reinstated with full benefits.

10. We are however of the opinion that a break in service, till the decision of the statutory remedy, has other consequences and which

cannot perhaps be compensated.

11. Counsel for the petitioner, on enquiry states that the petitioner has three more years of service left before his due date of retirement.

12. List on 31st July, 2020.

13. The name of the petitioner be not struck off from the strength of SHQ BSF Koraput till the hearing on 31st July,

2020.

2. Thereafter, on 31st July 2020, the following order was passed: -

2. The counsel for the respondents Border Security Force (BSF) has cited (i) Dinesh Kumar Vs. Union of India &Ors.

MANU/DE/0513/2010; (ii) Ajmer Singh Vs. Union of India &Ors. MANU/DE/9181/2006; (iii) Mahesh Kumar Vs. Union of India

MANU/DE/1343/2001; and (iv) Satbir Singh Vs. Union of India &Ors. MANU/DE/0834/2001, to show that as per the Scheme of Chapter IV

of the BSF Rules, 1969, the provision for statutory remedy under Rule 28A is after the order of termination of service and the petitioner in

all the said cases coming up before the Court, post the decision of the statutory authority, had already stood discharged from service.

3. However what perturbs us is that once the statute governing the employment provides for a remedy against the decision of termination of

service, whether the employee, till the said remedy is availed of or decided, should be terminated from service. Prima facie it appears that till

the final decision under the statutory regime is taken the employee should not be inflicted the harsh consequence of termination. The

parameters of grant of interim stay during the legal regime, of challenge to the ultimate decision of the statutory authority, before the courts

and the tribunals, cannot be applied during the pendency of the statutory regime. It cannot be lost sight of that punishment like termination

from service has an element of finality and if an employee, before even has had an opportunity to have examined his case by the highest

authority permitted, should not be inflicted the said punishment. Rule 30 also indicates that it is within the power of the dismissing authority

to fix any other date for termination/discharge to come into effect. It prima facie appears that unless the continuation of the employee in the

organization even for one day is detrimental to the organization, the date so fixed should be either the last date for preferring the statutory

remedy or date of the outcome of the statutory remedy.

4. The said question, which is a pure question of law, requires consideration.

5. Issue notice.

6. Notice is accepted by the counsel for the respondents BSF, who on enquiry states that counter affidavit is required to be filed and seeks

two weeksâ?? time for filing counter affidavit.

7. The counter affidavit may deal with aforesaid legal aspect in relation, not only to Rules of BSF but to Rules of other Central Armed Police

Forces (CAPFs) and Armed Forces.

8. Since it is a purely a legal question, no rejoinder will be required to be filed.
9. List on 20th August, 2020. Till then, the name of the petitioner be not struck off from the strength of SHQ, BSF Koraput.
10. The petitioner to however, on or before the said two weeks, if so desires, prefer the statutory remedy under Rule 28A supra and if by the next date of hearing has not preferred the statutory remedy, it will be presumed that the petitioner is not interested in pursuing the same.
- Upon the statutory remedy being preferred, the respondents BSF to deal therewith in accordance with law, without waiting for the outcome of the present petition.
3. The counsel for the respondents Border Security Force (BSF) has filed a counter affidavit but the need to refer thereto is not felt as counsel for the respondents BSF has yesterday forwarded to us a copy of the appeal/representation dated 28th July, 2020 preferred by the petitioner against the order dated 20th July, 2020 impugned in this petition, before the Inspector General, BSF as well as the order dated 18th August, 2020 on the said appeal/representation, dismissing/rejecting the departmental remedy availed of by the petitioner.
4. The counsel for the respondents BSF states that thus, now the departmental remedy preferred by the petitioner also stands disposed of and this court may consider, whether it desires to adjudicate the legal question framed in the order dated 31st July 2020.
5. The counsel for the petitioner states that the petitioner, after the order dated 31st July 2020 in this petition, on 13th August, 2020 preferred a departmental appeal, which was not accepted.
6. The counsel for the respondents BSF states that since the representation dated 28th July, 2020 earlier made by the petitioner had been treated as a departmental appeal, the appeal tendered by the petitioner on 13th August, 2020 was not accepted and now as aforesaid, on 18th August, 2020 the departmental remedy preferred on 28th July, 2020 already stands disposed of.
7. The counsel for the petitioner states that he has in this writ petition filed an application for placing additional documents, i.e. the appeal preferred by him on 13th August, 2020, on record but which has not been listed.
8. We do not feel the need to await the application claimed to have been filed by petitioner for placing additional documents on record, since the

respondents BSF on 18th August, 2020 have already dismissed the appeal preferred by the petitioner, bringing to a closure the departmental remedies available to the petitioner.

9. We have enquired from the counsel for the respondents BSF, whether there is any further departmental remedy available to the petitioner.

10. Counsel for the respondents BSF states that no further departmental remedy is available and now the petitioner, if so desires, has the remedy only of Article 226 of the Constitution of India.

11. This petition was filed impugning the earlier order dated 20th July, 2020, which now stands superseded/merged by/with the order dated 18th August, 2020 and the petitioner, if so desires, will have to challenge the same.

12. Be that as it may, since in the facts of the present case the question as had been framed in the order dated 31st July, 2020 is no longer relevant we deem it appropriate to leave it open for consideration in any other appropriate matter and dispose of this petition as infructuous in view of subsequent events and with liberty to the petitioner to take remedies against the order dated 18th August, 2020.