
(2008) 04 RAJ CK 0065
In the Rajasthan High Court

Rakesh Sood

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-04-2008

Acts Referred:

Citation : (2008) 04 RAJ CK 0065

Hon'ble Judges : Dinesh Maheshwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dinesh Maheshwari, J.—This writ petition is directed against the order issued by the Central Government on 30.09.2004 (Annex.26) whereby the petitioner, serving as Deputy Commandant at HQ Jaisalmer Sector, Border Security Force ("BSF"), was ordered to be compulsorily retired from service with immediate effect under Rule 21 of the BSF Rules, 1969.

2. Though the petitioner has taken various grounds in the petition seeking to question the validity of the proceedings under Rule 21; and has urged, inter alia, that his ACRs were made without application of mind and actuated by malice of respondent No. 5 but then, learned Counsel for the petitioner gave up the allegations against the respondent No. 5 and limited his submissions on challenge to the impugned order only for non-compliance of the requirements of Clause (3) of Rule 21. On 18.07.2007, while admitting this petition, this Court thus noticed the respective stand of the parties:

At the outset, learned Counsel for the petitioner submitted that the petitioner does not want to press any ground against the respondent No. 5 and his name may be permitted to be deleted from the array of the parties. Permission granted. Name of respondent No. 5 is ordered to be deleted. A note to that effect shall be put by the counsel for the petitioner in the cause title during the course of day and shall also put the same endorsement on the copy supplied to the counsel for the respondents.

The precise point raised at the time of arguments by the learned Counsel for the petitioner is with reference to Clause (3) of Rule 21 of the BSF Rules, 1969 and it is submitted that while passing the impugned order dated 30.9.2004 (Annexure-26), respondents terminated the services of the petitioner by way of compulsory retirement with pensionary benefits but the petitioner was not called upon to retire or resign as per the requirement of the said Clause (3) that reads thus:

The Central Government after considering the reports, the explanation, if any, of the officer and the recommendation of the Director General, may call upon the officer to retire or resign and on his refusing to do so, the officer may be compulsorily retired from the service with pension or gratuity, if any admissible to him.

It is also submitted that the precise ground taken in that regard in this writ petition has not been controverted in the reply.

Learned Counsel for the respondents contends that the phraseology used in the said Clause could only be treated to be directory in nature and not mandatory.

The matter does require consideration. Hence, admit. Mr. M.S. Godara waives service for the respondents.

The petitioner has filed a stay petition in this matter. Having regard to the nature of the impugned order, there does not appear any reason to pass any interim order at this stage. However, in view of a short question raised, and in the overall facts and circumstances, the present one appears to be a fit case to be taken up for final disposal at an earlier date.

Therefore, without passing any final order on stay application, it is directed that the matter be listed for final disposal at orders stage on 22.10.2007.

3. In view of the short point involved, a brief reference to the relevant facts and aspects would suffice. The petitioner was appointed in the Border Security Force as Assistant Commandant with effect from 05.10.1987 and was promoted to the rank of Deputy Commandant with effect from 13.02.1993. While posted at Sector Headquarter, Jaisalmer, he was served with a notice dated 3/4th February, 2004 for initiation of action under Rule 21 of the BSF Rules, 1969 (Annex.24) on the grounds that there had been adverse remarks in his ACRs for the years 1996-97 and 2001-2002; that he had been warned/conveyed displeasure by the concerned DIGs and DG on 23.09.1996, 10.10.1996, 08.10.2001 and 21.02.2003; and that his CR Dossier reveals consistent average/poor gradings since the year 1996-1997. It was alleged that due to his indisciplined activities, callous and casual attitude towards work/profession, physical weakness due to addiction to alcohol and overall inefficient and poor performance from 1996 onwards, his services were not useful to the organisation and he has become a liability to the Force.

4. It was also stated that the petitioner was not amenable to discipline and has

not shown any improvement in performance, discipline and conduct despite repeated advice/caution.

5. The petitioner was informed of the satisfaction of the Director General that his adverse record, unsatisfactory conduct, poor discipline and performance, carelessness and casual attitude towards duties have rendered him unsuitable for further retention in the Force and of tentative proposal to recommend for termination of his services in terms of Rule 21 of the BSF Rules, 1969 (as amended). The petitioner was put under notice that if he had anything to urge against the proposed action, he may do so within 30 days of the receipt of the notice.

6. The petitioner responded with a detailed reply (Annex.25) to the show cause notice claiming himself having performed the duties with hard work, sincerity and devotion; and making submissions of bias of respondent No. 5 against him. However, such submissions in the reply are not required to be dilated upon for the limited submission made in this writ petition and the respondent No. 5 having been deleted from the array of parties at the request of the petitioner.

7. After considering his case, it appears that the matter was submitted to the Central Government under Rule 21 of the BSF Rules, 1969 and the Central Government proceeded to pass the impugned order dated 30th September 2004 that reads as under:

Whereas, Shri Rakesh Sood, Deputy Commandant, IRLA No. 18736366 of HQ Jaisalmer Sector, BSF was served with the notice under Rule 21 of the BSF Rules, 1969 as amended, vide HQ DG BSF(Pers Dte) letter No. C 14011/5/2004/CC/Pers/BSF/259-61 dated 3rd /4th Feb 2004 calling upon him to submit in writing, his explanation and defence in favour of his retention in service against the proposed termination in terms of Rule 21 of the BSF Rules, 1969;

2. Whereas, the reply to the said notice received vide his letter No. RS/Pers/SCN/Rule-21/01 dated 5th March 2004, duly considered by the DG BSF who found the same to be unsatisfactory and;

3. Whereas, his case was submitted to the Central Government under Rule 21 of BSF Rules, 1969 as amended, alongwith the Officer's explanation/ defence and the recommendation of the Director General BSF to terminate his services under BSF Rule 21 and:

4. Whereas, the Central Government after considering all aspects of the case including the officer's explanation, defence and recommendation of DG BSF has decided to terminate his services by way of compulsory retirement with pensionary benefits;

5. Therefore, Shri Rakesh Sood, Deputy Commandant, IRLA No. 18736366 of HQ Jaisalmer Sector, BSF is hereby compulsorily retired from service with immediate effect under Rule 21 of the BSF Rules, 1969 as amended, with pensionary benefits, as admissible under Rules.

6. This order issues with the approval of the Central Government vide MHA's ID No. RF587/HS/04 dated 10th Sept 2004.

8. The only submission of the petitioner is that before passing the order aforesaid, he was not called upon to retire or resign as required by Clause (3) of Rule 21; and hence the order stands vitiated.

9. Though the respondents have submitted elaborate reply in justification of the impugned order dated 30.09.2004 and it is submitted that the reason of retiring the petitioner with pensoinary benefit was his regular and constant poor service record but such submissions, again, are not required to be noticed in detail in view of the short point urged on behalf of the petitioner. However, learned Counsel appearing for the respondents after taking instructions and examining the record candidly stated before the Court during the course of arguments that it remains a matter of fact that the petitioner was not called upon to retire or resign under Clause (3) of Rule 21. Learned Counsel for the respondents contended though that the said requirement in Clause (3) of Rule 21 remains directory in nature and not mandatory. Learned Counsel referred to the provisions of CCS (Pension) Rules and submitted that for the reason that the petitioner had not completed qualifying service of 20 years, even if he was given the option under Clause (3) of Rule 21 and he would have chosen for voluntary retirement, he would not have been entitled for pension as per Rule 48-A of the CCS (Pension) Rules. Learned Counsel, therefore, suggested that the impugned order cannot be said to be detrimental to the interest of the petitioner and calls for no interference.

10. Having given a thoughtful consideration to the matter, this Court is clearly of opinion that the impugned order dated 30.09.2004 cannot be sustained.

11. Rule 21 of the Rules of 1969 deals with termination of service of Officers by the Central Government on the grounds other than misconduct. Upon the Director General being satisfied that an Officer is unsuitable to be retained in service, the Officer is required to be so informed, is required to be furnished with particulars of all the matters adverse to him, and is required to be called upon to urge any reason which he may wish in favour of his retention in service. Of course, such requirements could be dispensed with by the Central Government for reasons to be recorded in writing when not found expedient or reasonably practicable; and the Director General may not furnish to the officer any matter adverse to him if not found in the interest of security of the State [vide Clause (1) of Rule 21]. It is not in dispute that the petitioner in the present case was informed of the satisfaction of the Director General that he was unsuitable to be retained in service and was furnished with particulars of adverse matter and called upon to put his reasons/explanation. It is also not in dispute that the Director General found the reply stated by the petitioner unsatisfactory and hence submitted the matter to the Central Government for orders together with the petitioner's explanation and Director General's recommendation. This was in compliance of the requirement of Clause (2) of Rule 21. The Central Government

thereafter proceeded to form the opinion that services of the petitioner may be terminated by way of compulsory retirement with pensionary benefits and passed the impugned order dated 30.09.2004. The order so passed is not in conformity with the requirements of Clause (3) of Rule 21. As per Clause (3) of Rule 21, the Central Government after considering the reports, explanation of the officer and the recommendation of the Director General may call upon the officer to retire or resign and it is on his refusing to do so that the officer may be compulsorily retired from service with pension or gratuity, if any admissible to him. The requirement of calling upon the officer to retire or resign in the first place, and passing of order of compulsory retirement on his refusing to retire or resign, is the composite scheme of the operation of Clause (3) of Rule 21; and such requirement, to call upon the officer concerned to retire or resign, cannot be considered directory as suggested by the learned Counsel for the respondents. On the contrary, the order for compulsory retirement could be passed by the Central Government only when the officer had been called upon to retire or resign and he has refused to do so.

12. Admittedly, the petitioner was not called upon to retire or resign and directly a decision was taken to terminate his services by way compulsory retirement with pensionary benefits. The order so passed being not in conformity with the requirement of the Rules cannot be sustained. It remains trite in law that when a thing is envisaged to be done in a particular manner, the same is necessarily required to be done in that manner and not otherwise. Moreover, as per the phraseology of Clause (3) of Rule 21 the very occasion to issue an order for compulsory retirement arises only when the officer had been called upon to retire or resign and he has refused to do so.

13. The suggestion as made on behalf of the respondents that the order of compulsory retirement with pensionary benefit has rather been in the interest of the petitioner because he had put in only 17 years of service at the time of passing of the order; and even if the option to retire or resign would have been extended and the petitioner would have exercised any such option, he would not have been entitled for pension, though sounds attractive but does not lend legal support to the impugned order. The retirement pension does not appear to be the prime consideration in the scheme of Clause (3) of Rule 21 aforesaid. Under the scheme of Clause (3) of Rule 21, the officer concerned is to be called upon ""to retire or resign"". When a choice even of resigning is left with the officer, the aspect of retirement pension loses its relevance altogether. In any case, it was for the petitioner to choose his option and the order for compulsory retirement could have been passed only after he had been called upon to retire or resign and he had refused to do so. Such a situation never occurred for the fundamental omission on the part of the respondents in not calling upon the petitioner to retire or resign; and such omission knocks the bottom out of the impugned order dated 30.09.2004

14. In the aforesaid view of the matter, the order impugned dated 30.09.2004

cannot be sustained and is required to be set aside. However, the proceedings having already been conducted under Clause (1) of Rule 21 and the Director General having formed the opinion and submitted the matter to the Central Government for orders per Clause (2) of Rule 21 and such part of the proceedings is neither in question nor is interfered with, it appears appropriate to remit the matter to the Central Government to proceed in accordance with law. At the same time even when the petitioner would otherwise be reinstated with setting aside of the order dated 30.09.2004, there does not appear any reason to allow him any payment towards salary/allowances.

15. Accordingly, this writ petition stands allowed to the extent indicated above, the impugned order dated 30.09.2004 is set aside; and the matter stands remitted to the Central Government to proceed in accordance with law. While the petitioner would be taken back on duty with setting aside of the order dated 30.09.2004 as if no order of compulsory retirement has been passed but he shall not be entitled to any payment towards salary and allowances; but any payment otherwise received by the petitioner shall not be recovered; and shall remain subject to the final orders to be passed by the Central Government.

16. There shall be no order as to costs.