
(1993) 01 CAL CK 0022
In the Calcutta High Court
Case No : C.O. No. 12677 (W) of 1991

Rejaul Ali

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-01-1993

Acts Referred:

Border Security Force Act, 1968 — Section 11, 11(2), 11(4), 62, 62(2)

Citation : 97 CWN 630

Hon'ble Judges : Paritosh Kumar Mukherjee, J

Bench : Single Bench

Judgement

Paritosh Kumar Mukherjee, J.—The petitioner, Rejaul Ali has challenged in the instant writ petition, show cause notice dated May 21, 1991 (Annexure "C" to the writ petition) issued by the Commandant, Headquarters 71 Battalion, Border Security Force, Parua Camp, Tejpur. Assam. By the said notice, the Commandant was of the view that because of the absence of the petitioner, he tentatively proposed to terminate the service by way of dismissal.

2. At this stage of issuance of show cause notice, when the writ petition was moved before this Court, M.R. Mullick, J, on October 9, 1991, had directed that the matter will appear after the long Puja Vacation after completion affidavits.

3. As no interim order was granted by His Lordship, the respondents authorities decided to dismiss the petitioner from service by order dated November 22, 1991, issued by the Officiating Commandant. 71 Battalion, Border Security Force. The said order is set out hereinbelow.

Whereas I have personally gone through the records of the case of absence without leave against No. 880074547 Const. Rejaul Ali of this unit. He was given an opportunity to show cause vide this office registered letter No. ISD/TEX/71/91/1216 dated 21 May 1991, which he has not availed satisfied (hat he is absent without leave w.e.f. 23,4.91 At case without reasonable cause and that his any further retention in the service is undesirable. I therefore, dismiss him

from the BSF service w.e.f. 22.11.91 under the provision of Sec. II (2) of B.S.F.Act 1968 read with Rule 177 of B.S.F. Rules 1969. His absence period w.e.f. 23.4.91 to 22.11.91 be treated as "Dies non". The individual struck off strength of this unit w.e.f. 22.11.91 (A/N)

A sum of Rs. 33.44 (Rupees thirty three and paise forty four only) as mess dues of individual will be deducted from his Mess Security Advance and remaining amount be refunded to individual. A sum of Rs. 660.00 (Rupees Six hundred sixty only) being the cost of the deficient clothing and equipt items issued to him be recovered from the pay and allowances of the individual lying unpaid with the accounts branch for further deposing into Govt. Treasury.

4. A substantive application for bringing subsequent events on records having been affirmed on August 31, 1992. The writ petition appeared before me on September 3, 1992, for the first time and was heard in part.

5. Subsequently on September 16, 1992. when this Court heard this matter, this court was of the view that the order of desertion of the petitioner dated August 14, 1991 which was passed by the Deputy Commandant, 71 Battalion, could not be sustained in law.

6. This Court, further, after hearing the submissions of Mr. Dipak Kumar Mukherjee, learned Advocate for the respondents was of opinion that the order of dismissal should not have been passed during the pendency of the writ petition when the show cause notice itself was the subject matter of challenge.

7. This writ petition ultimately came up for final hearing before me on December 15, 1991, and was heard in part, and it was adjourned by this court in order to enable the learned Advocate appearing for the Border Security Force to produce the records. Records are produced to court to-day at the hearing.

8. Mr. Ram Anand Agarwala, learned Advocate, appearing with Mr. Raja Tarafdar, for the petitioner submits that the order of dismissal dated November 22, 1991 cannot be sustained to law, in view of the fact that the provisions of Section 11(2) of the Border Security Force Act. 1968, read with Rule 177 of the Border Security Force Rules, do not give such power to the respondents authorities, until the respondents authorities exercise such power to conformity with Section 11(4) of the said Act.

9. Since the order of dismissal has been passed u/s 11(2) of the said Act, it will be convenient for me to quote the provisions of section 11 of the Act, which run as follows :-

11. Dismissal, removal or reduction by the Director General and by other officers : (1) The Director -General or 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 (sic) 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 to 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 provisions of this Act and the Rules.

10. In this connection, Mr. Agarwala has relied on a Division Bench judgment of this court delivered by Anil Kumar Sen and S.R.Roy, JJ, in the case of commandant 70 Battalion Border Security Force vs Anil Bandhu Mitra reported in 89 C.W.N. 1072, wherein Their Lordships after having quoted section 11 and subsection (2) observed as follows :-

11. Unfortunately upon the admission of the authorities of the Border Security Force in the present case neither of these three alternatives was taken recourse of. In the affidavit-in-opposition it is suggested that a fourth course was open to the said authorities, namely such member of the Force, who is absent without leave, can be dealt with administratively and he can be dismissed from service in exercise of administrative powers vested in the Commandant as in the present case under the provisions of Section 11 read with the Rules 177 and the Government circular dated 1.1.70. 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. Subsection (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 the appellant, namely, that this section independently gives a power to dismiss, remove or reduce a person in rank, that would constitute a unguided power in the authorities so that the service of the members of the Force would be totally within the 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 the manner 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 hereinbefore. Since it is the specific case off 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 1d. single Judge is upheld though on grounds totally different from the grounds on which the 1d. single Judge allowed the writ petition.

12. ***

13. We further direct that the writ petitioner being restored to service, will be entitled to such pay for the period September 14, 1974 to June 26, 1979, as may be admissible to him on leave due to him so that if no leave is due for any period covered thereby, he will not be entitled to any salary or allowance. The writ petitioner must, however, be treated as on duty from June 26, 1979, and there shall be no break in service on he being restored to service.

11. After placing the aforesaid judgement, Mr. Agarwala submits that the power of dismissal could not be exercised u/s 62(2) of the said Act. Section 62 of the said is set out hereinbelow :

62. Inquiry into absence without leave : (1) When any person subject to this Act has been absent from duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be appointed by such authority and in such manner as may be prescribed; and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care or in any arms, ammunition, equipment, instruments, clothing or necessities; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof and the said deficiency, if any, and the Commandant of the unit to which the person belongs shall make a record thereof in the prescribed manner.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall for the purpose of this Act. be deemed to be a deserter.

12. He further submits that a copy of the writ petition having been received by the respondents authorities on October 28, 1991, and the order of dismissal having been passed on November 22, 1991, the respondent authorities had deliberately decided to dismiss the petitioner, although the writ petition challenging the show cause notice was kept pending before this Hon"ble Court, and as such, he submits that the order of dismissal cannot be sustained in law, both in view of the observation of the Division Bench in the case of Commandant, 70 Battalion, Border Security Force vs. Anil Bandhu Mitra, referred to above, as well as for not paying respect to the pending writ petition before this Hon"ble Court.

13. Mr. Dipak Kumar Mukherjee, learned Advocate appearing on behalf of Border Security Force Authorities, after producing the records, submits that the show cause notice was issued before inflicting final punishment of dismissal, and the petitioner did not reply to the show cause notice, which, however, is disputed by Mr. Agarwala, appearing for the petitioner.

14. Mr. Mukherjee further submits that if it appears to this court that the order of dismissal was passed due to communication gap, this Court may set aside the order of dismissal, and allow the respondents authorities to proceed from the stage of show cause notice against the petitioner afresh, and in accordance with law.

15. He further submits that the provisions of section 62 of the said Act, having been complied with, this Court is not entitled to scrutinise the validity of the proceedings, at this stage.

16. Having heard the rival submissions of both the parties at length, I am of the view that for absents from duty without leave, punishment of dismissal is undoubtedly too harsh, and as such, cannot be sustained in law, and should be set aside.

17. Further, this Court is of the view that the punishment being disproportionate, the respondents authorities not being empowered under the provision of Section 11(2) of the said Act, are not competent to pass an order of dismissal in the facts of the present case, like the case of Commandant, 70 Battalion, Border Security Force -v- Anil Bandhu Mitra, referred to above.

18. In that view of the matter, the order of dismissal dated November 22, 1991, which is annexed to the substantive application for bringing in subsequent events, is set aside, and the respondents are given liberty to take a lenient view against the petitioner by awarding warning or censuring, for doing justice to the petitioner, in the facts of the present case, the petitioner has merely absented himself, because of the circumstances beyond his control, being lightning shock in the ancestral house of the petitioner, and serious injuries to the inmates of the house.

19. The respondents authorities are directed to reinstate the petitioner in service within a period of fortnight from communication of this order, as if the order of dismissal has never been passed.

20. The petitioner will be entitled to such pay as may be admissible to him, after regularizing his leave for the period from May 21, 1991 till the date of his joining. The writ petition is allowed, to the extent, indicated above. There will be no order as to costs. Let a xerox copy of this order be supplied to the learned Advocate of the petitioner, on usual undertaking. Writ petition allowed in part.