
(2006) 10 DEL CK 0182

In the Delhi High Court

Case No : Writ Petition (C) No. 4796 of 1998

Sat Pal Singh (Ex. Head Constable)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-10-2006

Acts Referred:

Border Security Force Act, 1968 — Section 11(2), 11(4), 122, 19, 62
Border Security Force Rules, 1969 — Rule 14, 17, 177, 22, 22(1)
Central Civil Services (Pension) Rules, 1972 — Rule 24, 49
Constitution of India, 1950 — Article 226

Citation : (2006) 10 DEL CK 0182

Hon'ble Judges : Swatanter Kumar, J;G.S. Sistani, J

Bench : Division Bench

Advocate : Bishram Singh, for the Appellant; Rekha Palli and Saroj Bidawat, for the Respondent

Final Decision : Disposed Off

Judgement

Swatanter Kumar, J.—The petitioner was dismissed from service vide order dated 14.3.1996, which reads as under:

I have personally gone through the case of absence from leave against No. 84209006 HC Satpal Singh of this unit. He was given an opportunity to show cause vide Registered letter No. Estt/Absence/44/95/15255-56 dated 28 December"1995 which he has not availed of. I am satisfied that he is absent from leave without any reasonable cause and that his further retention in service is not desirable.

2. I, Therefore dismiss him from the service w.e.f. 14.03.1996.

3. The absence period from 17 Oct"95 to 14 March"96 (AN) will be treated as "Dies Non". He is struck off strength from this unit w.e.f. 14.03.1996 (AN)

4. A sum of Rs. 471.86 (Rupees four hundred seventy one and eighty six paisa) only being the cost of clothing items be recovered out of his UD amount of his

pay and allowances and deposited into Govt. treasury .

2. Aggrieved from the said order of dismissal, the petitioner preferred an appeal praying for reinstatement, however, the said appeal was also dismissed by a two-line order dated 29.12.1997 stating that there was no merit in the contentions raised in the application/appeal and the same was devoid of any merit. Having failed to get any relief at the hands of the respondents, the petitioner has questioned the correctness of the above two orders before this Court in the present writ petition under Article 226 of the Constitution of India.

3. On 20.9.1984, the petitioner was enrolled as Lance Naik in the Border Security Force (hereinafter referred to as "the Force") in the Sports Quota. The petitioner performed his duties sincerely and to the satisfaction of all concerned. Subsequently, he was promoted to the rank of Naik on 20.9.1988 and keeping in his distinguished service, he was even promoted to the rank of Head Constable on 30.1.1999. The petitioner was initially posted to 04 Battalion, BSF at Karim Ganj, Assam, where after he was posted to the 44 Battalion, BSF in Gurdaspur, Punjab in the year 1995. The petitioner claims to have participated in the BSF Inter Frontier All India Wrestling Team at 25 Bn, Chhawla Camp, Delhi from 13.9.2005 to 20.9.1995. The petitioner along with the other participants in sports was sanctioned special leave. He proceeded to his home station in Bam Loni, District Rohtak on 6.9.2005 and was to report back for his duty on 17.10.1995. The petitioner fell sick when he was on leave and was under the treatment of Dr. Kuldeep Singh, who advised him further treatment in the Government Hospital, Jodhpur between 30.9.1995 to 6.12.1995. On 7.12.1995, the petitioner, with an intention to join his duties, took lift in a civil truck, but the said truck met with an accident and the petitioner was evacuated to the Government Hospital Amrit Kaur Byawar and was admitted there. An FIR No. 198/1995 dated 8.12.1995 was lodged by Sh. Narender Singh on 31.12.1995. The petitioner was discharged from the said hospital due to shortage of bed. The petitioner remained under treatment of Dr. Kuldeep Singh as an out-patient for the fracture injury which he had suffered in the said accident. During this period he could not report to his Unit and was really surprised on receiving an order of dismissal from service dated 14.3.1996 passed by the Commandant 44 Bn BSF intimating that the petitioner was given an opportunity to show cause vide notice dated 28.12.1995 and the petitioner had failed to avail that opportunity. Aggrieved from the said order, the petitioner had filed an appeal, which as already noticed, was also dismissed. On these facts, the petitioner has approached this Court praying for grant of the relief afore-noticed. According to the petitioner, the respondents have not exercised the powers vested in them in accordance with the procedure prescribed under BSF Rule 22 read with Section 11(4) of the Border Security Force Act (hereinafter referred to as "the Act") which was inserted vide SO 436 (E) dated 29.5.1990. The petitioner prays for quashing of the said order and his reinstatement in the service.

4. The respondents while praying for dismissal of the writ petition in the Counter

Affidavit stated that he had proceeded on 10 days special leave and 10 days Earned Leave from 24.9.1995 to 06.10.1995, but he overstayed the leave with effect from 07.10.1995 and remained absent thereafter till even passing of the order of termination. According to the respondents on completion of 30 days regular absence, a unit level Court of Inquiry was conducted and the same was finalised on 27.12.1995. Since no intimation was received from the petitioner, he was informed to join the Unit vide letters No. 13366 dated 3.11.1995 and 31/Estt/44195/4125 dated 28.11.1995. As he failed to join the duty in spite of letters, a show cause notice dated 27.12.1995 was served upon the petitioner to which he neither filed a reply nor he joined his duties. Having left with no alternative, the order of termination was passed terminating the services of the petitioner. The appeal filed by him was also dismissed. It is averred that the order of dismissal had been passed under the provisions of Rule 22 and 177 of the BSF Rules read with Section 11(2) of the said Act, as the trial by a Security Force Court was impracticable. According to the respondents, the dismissal of the petitioner from service also entails forfeiture of past service in terms of Rule 24 of the CCS Pension Rules, 1972. It is stated by the respondents that Rule 49 has no application and the petitioner is also not entitled to any pensionary benefits.

5. The petitioner has primarily raised three contentions. Firstly, that the respondents ought to have taken recourse to a regular trial by the Security Force Court as the offence relating to unauthorised absence is a punishable offence and as such the respondents could not adopt or have taken recourse to administrative action in accordance with the provisions of Rule 22; Secondly, the respondents have not complied with the provisions of Rule 22 and no subjective satisfaction had been recorded by the competent authority in the show cause notice or even otherwise in relation to the essential ingredients of the said Rule and Lastly, that the order is punitive as well as in violation of the principles of natural justice, as the show cause notice was not served upon the petitioner as he was sick and was admitted to the hospital while the show cause notice had been allegedly sent at his village address.

6. As far as the first contention of the petitioner is concerned, it need not detain us any longer as this point is squarely covered against the petitioner, as has been decided in various judgments of this Court as well as the Supreme Court whereby it was clearly held that the respondents can take recourse to administrative action even if an alleged offence was punishable under the provisions of the Act or the Rules by the Security Force Court. The only requirement is that they should act in accordance with the Rules and the procedure specified therein. Reference can be made in this regard to a recent judgment of this Court in the case of Jitender Singh (Ex. Head Const.) v. Union of India and Ors. W.P.(C) No. 1151/2000 of the even date and judgment of the Supreme Court in the case of Romesh Kumar Sharma v. Union of India and Ors. 2006 VII AD (S.C.) 100 . In both the afore-stated judgments, while rejecting the first contention raised on behalf of the petitioner, the Courts have clearly settled the law that there is an obligation upon the respondent-authorities to act strictly

in compliance with the provisions of Rule 22 of the BSF Rules and record proper satisfaction as are contemplated in terms of these provisions. The case of Ajaib Singh Vs. Union of India, as well as the case of Sudesh Kumar Vs. Union of India, , against which the SLP filed by the respondents (being SLP No. 5078/1998 in the case of Union of India v. Sudesh Kumar) was dismissed, unambiguously state this principle. The present case does not fall under Rule 22 (1) and thus, the proviso to that Rule is of no consequence as according to the stand taken by the respondents, the show cause notice was served upon the petitioner. In accordance with the provisions of Rule 22 (2), the authorities, after considering the reports of the misconduct of the concerned person have to record a satisfaction that the trial of such a person is inexpedient or impracticable and also that the retention of the said person in Force is not proper. In the present case, the show cause notice dated 27.12.1995 has been placed on record, which is annexed to the counter affidavit filed by the respondents as Annexure R3. The same reads as under:

Subject : SHOW CAUSE NOTICE

You have deserted from unit since 17th Oct'95, I am the opinion that because of this desertion, your further retention in service is undesirable. I Therefore, tentatively propose to terminate your services by way of dismissal . If you have any thing to urge in your defense or against the proposed action, you may do so before 11th Jan'96. In case no reply is received by that date it will be presumed that you have no defense to put forward.

Sd/- XXX 27 Dec'95.

COMMANDANT

44 BN BSF.

7. A bare reading of the above show cause notice shows that they had treated the petitioner as a deserter for which independent proceedings were to be held and the notice to show cause does not even exhibit the satisfaction recorded by the respondents, as contemplated under Rule 22. Furthermore, even the records which were produced during the course of hearing do not show that the authorities had recorded any reason-based satisfaction or any satisfaction even otherwise, in regard to the non-desirability of the petitioner in service or had recorded that it was not expedient or practical to hold a regular Security Force Court trial of the petitioner. The show cause notice, as already noticed and as claimed by the respondents, was not responded to by the petitioner, resulting in passing of the order of dismissal. The order of dismissal shows non-application of mind and also appears to be punitive. The order states that authorities have satisfied themselves that the petitioner had absented himself without reasonable cause and that the petitioner's retention in service is not desirable. The show cause notice does not even include with it a copy of the report of misconduct or any other material or details thereof which the petitioner was required to meet. According to the petitioner, he was not even served with the show cause notice

as he was admitted in the hospital at the relevant time. At this stage, we may refer to the judgment in the case of Jitender Singh's (supra) where the Court, in somewhat similar circumstances, held as under:

8. u/s 19(a) of the BSF Act, "absent without leave" is an offence which on conviction by a Security Force Court can be punished with imprisonment which may extend up to 3 years. Besides this judgment, the petitioner could even be dismissed from service. This is the disciplinary action which the authorities can take for "unauthorised absence" and it is also open for the authorities to take an administrative action in its discretion but subject to compliance of the Rules. The administrative action in a given case excludes recourse to a regular process of trial by a Security Force Court and once the authorities decide to take recourse to administrative action upon due application of mind, it necessarily implies that the competent authority has chosen not to subject the person to a regular trial by the Security Force Court. Various judgments referred above as well as a recent judgment of the Supreme Court in the case of Romesh Kumar Sharma v. Union of India and Ors. 2006 VII AD (S.C.) 100 , judgment of this Court in the case of Ex.Const. Akhilesh Kumar v. The Director General, BSF & Ors. W.P. (C) No. 6577/2002 decided on 21.3.2006 and Sudesh Kumar (supra) has also taken the view that recourse to administrative action is permissible even if the offence is punishable by the Security Force Court, but the authorities have to record reasons as to why it was not expedient or reasonably practicable to comply with the provisions of the main Rules. The Supreme Court in the case of Union of India and Others Vs. Harjeet Singh Sandhu etc., enunciated the principle that the departmental action is not prohibited even after a court martial is held. The Court in that case answered as under:

Having thus explained the law and clarified the same by providing resolutions to the several illustrative problems posed by the learned ASG for the consideration of this Court (which are illustrative and not exhaustive), we are of the opinion that the expiry of period of limitation u/s 122 of the Act does not ipso facto take away the exercise of power u/s 19 read with Rule 14. The power is available to be exercised though in the facts and circumstances of an individual case, it may be inexpedient to exercise such power or the exercise of such power may stand vitiated if it is shown to have been exercised in a manner which may be called colourable exercise of power or an abuse of power, what at times is also termed in administrative law as fraud on power. A misconduct committed a number of years before, which was not promptly and within the prescribed period of limitation subjected to trial by court martial, and also by reference to which the power u/s 19 was not promptly exercised may cease to be relevant by long lapse of time. A subsequent misconduct though less serious may aggravate the gravity of an earlier misconduct and provide need for exercise of power u/s 19. That would all depend on the facts and circumstances of an individual case. No hard and fast rule can be laid down in that behalf. A broad proposition that power u/s 19 read with Rule 14 cannot be exercised solely on the ground of court martial proceedings having not commenced within the period of limitation prescribed by

Section 122 of the Act, cannot be accepted. In the scheme of the Act and the purpose sought to be achieved by Section 19 read with Rule 14, there is no reason to place a narrow construction on the term "impracticable" and Therefore on availability or happening of such events as render trial by court martial impermissible or legally impossible or not practicable, the situation would be covered by the expression-the trial by court-martial having become impracticable.

9. Thus, recourse to an administrative action is an exception to the regular trial by the Security Force Court, and hence, greater is the obligation upon the authorities concerned to specifically apply their minds and properly record such satisfaction as contemplated under the Rules. The recording of such satisfaction upon proper application of mind should not only be seen to have been arrived at, but records must depict the same.

10. As already noticed, the show cause notice is totally silent about this aspect, no specific averments have been made in the counter affidavit and even in the Record produced before us, it is not reflected that the authorities had applied their minds and came to the conclusion that it was inexpedient or impracticable to hold the Security Force Court's trial of the petitioner. The view expressed by a Bench of this Court in the case of Sudesh Kumar (supra) has attained a kind of finality, as the SLP bearing No. 5078/1998 (in the case of Union of India v. Sudesh Kumar) preferred against the said judgment was dismissed by the Supreme Court vide its order dated 7.9.2005. In the case of Sees Ram (supra) the Division Bench of this Court in somewhat similar circumstances, even took the view that in case the order of dismissal passed by way of penalty of misconduct of absence from duty without leave, administrative action may not be the proper course to be adopted by the authorities particularly without due application of mind in relation to the essential ingredients of Rule 22.

11. Having considered the legal aspect of the case, now we may revert back to the relief that the petitioner may be entitled to get in the present writ petition. The show cause notice issued by the respondents does not satisfy the requirements of Rule 22 (2), in addition to the inherent defect in it and as stated in various judgments of this Court. This is violation of the statutory Rules as well as principles of natural justice. There is no proof on record to show that the said show cause notice was served upon the petitioner within the stipulated period and the petitioner had a fair chance to submit his reply to the show cause notice. Thus, the show cause notice dated 1.11.93 as well as the impugned order dated 19.11.1993 are liable to be set aside. Ordered accordingly.

8. We may also notice here that Section 62 of the Act requires the authorities to conduct a Court of Inquiry when any person subject to the Act has been absent from duty without authority for a period of more than 30 days. This report, thus, would be the foundation for the competent authorities to decide whether to take a disciplinary or an administrative action in consonance with the provisions of the Act. In the present case, the authorities have opted to take administrative action as postulated under Rule 22 of the Rules and required the petitioner to be

dismissed from service. The administrative action in terms of Rule 22 is an exception to the regular trial by the Security Force Court and proper application of mind and recording of the requisite satisfaction would be a condition precedent to invoke such provisions. The casual manner in which the respondents have dealt with the case of the petitioner can hardly fall within the category of administrative action supported by proper reasons and proper application of mind. In fact, it fails to satisfy the basic ingredients which form the very foundation of such an administrative action.

9. The learned Counsel appearing for the respondents had relied upon the judgment of the Supreme Court in the case of Romesh Kumar Sharma (*supra*) to argue that the action of the respondents is completely in conformity with law and is not required to be interfered with by the Court. In that judgment, the Supreme Court noticed the contention of the respondents in paragraph 8 to say that no reason or satisfaction was recorded as to why the authorities were of the view that it was not expedient or reasonably practicable to comply with the requirements of Rule 17, however, such a contention was not rejected in law, but on facts. In paragraph 13 of the said judgment, the Supreme Court observed that the records which were perused showed that the Chief of the Army Staff had followed the requisite procedure and the certificate as contemplated in the proviso to Rule 17 of the Rules had been given. This judgment has no application to the facts of the present case where neither of the three essential ingredients nor any record produced before us shows that there was any application of mind by the authorities, any subjective satisfaction recorded as contemplated under the statutory provisions, or that there was due compliance to the provisions of the Rule 22 read with Rule 177 of the BSF Rules.

10. In the show cause notice, the respondents had stated that retention of the petitioner in service is undesirable. It was nowhere recorded that it was reasonably not practicable or inexpedient to hold the regular trial. In the order of dismissal passed by the respondents, the ground of desertion was given, while in the show cause notice a new ground was written that the authorities were satisfied that the petitioner had absented himself from duty and remained on "leave without a reasonable cause" and that his further retention in service was not desirable. Either way, it is violation of principles of natural justice, in as much as the petitioner was never given an opportunity, much less a fair opportunity to meet the ground on which the service of the petitioner was considered to be undesirable. The show cause notice contained one ground while the order of dismissal was passed on another ground. This act of the respondents is arbitrary, in violation of principles of natural justice and in any case is in violation of Rule 22 of the relevant Rules. The authorities are obliged to comply with the provisions in its true spirit. It is not a mere formality but substantive rights and protections have been given to a delinquent against such an action. The power to take administrative action is a wide power with serious consequences, thus, greater is the obligation upon the authorities to act with greater responsibility and upon due application of mind.

11. For the reasons afore-stated, we have no hesitation in setting aside the orders dated 14.3.1996 and 29.12.1997, which we hereby do, and allow the writ petition filed by the petitioner.

12. We make it clear that in view of the law afore-referred, while setting aside the order of dismissal as well as the order rejecting the appeal filed by the petitioner, we grant liberty to the respondents to commence the Departmental proceedings, if they so desire, by serving a fresh show cause notice upon the petitioner and after giving him opportunity, pass such appropriate orders as they deem fit and proper and as is permissible in law within a period of three months from the date of passing of this order. If the respondents choose not to take or no steps are taken within the period afore-noticed i.e. a period of 3 months, then the petitioner shall stand reinstated after lapse of such period.

13. Accordingly, the writ petition is disposed of in the above terms, while leaving the parties to bear their own costs.