

(2024) 05 J&K CK 0019
In the Jammu And Kashmir High Court
Case No : Service Writ Petition No. 87 Of 2005

Sita Devi

APPELLANT

Vs

UOI And Others

RESPONDENT

Date of Decision : 03-05-2024

Acts Referred:

Border Security Force Rules, 1969 — Rule 6, 21, 22, 22(2), 177

Border Security Force Act, 1968 — Section 11, 11(2), 11(4), 18, 19(a), 19(b), 62

Citation : (2024) 05 J&K CK 0019

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Surinder Kour, Sunil Kumar, Vishal Sharma

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1 The petitioner has challenged order No. 15389-405 dated 12.10.2000 issued by respondent No.5 whereby the husband of the petitioner, namely Gopal Ram has been terminated from service. A further direction has been sought upon the respondents to fix and release family pension in favour of the petitioner.

2 As per case of the petitioner, her husband Sh. Gopal Ram was appointed as Constable in BSF in the year 1987. He was posted in 102nd Battalion BSF in the year 1998. He was granted two months leave and after availing the leave period, he went back to R.S.Pura, Jammu to resume his duty. However, the petitioner received an information from the Battalion in the year 1998 that her husband is absent from duty. The petitioner is stated to have corresponded with the Commandant of the Battalion seeking information regarding the whereabouts of her husband. A representation was also made by the petitioner on 05.05.1999 to the Commandant wherein it was stated that a constable from the Unit had come to seek information regarding the whereabouts of her husband and it was also informed that the whereabouts of her husband are not known. According to the

petitioner, the Unit did not conduct any investigation, nor did it publish any notification in the newspaper. In the meanwhile, the petitioner is stated to have received a phone call on 21.09.2003 from a Hospital at Dholpur. The petitioner went to the Hospital at Dholpur where her husband was lying admitted in a precarious condition. The husband of the petitioner is stated to have died on 22.09.2023. According to the petitioner, she had no knowledge regarding whereabouts of her husband from the year 1998 to 21.09.2003.

3 After death of her husband, the petitioner is stated to have approached the respondents seeking settlement of family pension in her favour, but she was informed that her husband had been terminated from service in terms of the impugned order dated 12.10.2000 and that she is not entitled to any family pension.

4 The petitioner has challenged the impugned action of the respondents on the ground that the procedure prescribed under the Border Security Force Act, 1968 ('the Act' for short) and the Rules framed thereunder has not been followed by the respondents before terminating the services of her husband. It has been submitted that no enquiry was conducted by the respondents in terms of Section 62 of Act, nor the procedure prescribed under Rules 21 and 22 of BSF Rules, 1969 ('the Rules' for short) has been followed. It has been contended that neither the petitioner, nor her husband was given an opportunity of putting forth defence by the respondents before terminating his services.

5 The respondents have contested the writ petition by filing their objections. In their objections, the respondents have submitted that the husband of the petitioner was sanctioned leave w.e.f 12.03.1998 to 25.05.1998, but he did not report back upon expiry of the leave. Vide communication dated 01.06.1998, the husband of the petitioner was asked to report back to the Unit, but he did not respond, as a consequence whereof, a Court of enquiry in terms of Section 62 of the Act was ordered and finalized on 20.08.1998, on which date, the petitioner's husband reported back to duty. Thereafter, the husband of the petitioner was charged under Section 19(b) of the Act in terms of office order dated 05.09.1998 copy whereof was handed over to him. However, on 05.09.1998, the husband of the petitioner again absented himself from duty without any permission from the competent authority. According to the respondents, the petitioner's husband deserted the Unit on his own without any permission in order to avoid disciplinary action and thus, committed 2nd offence punishable under Section 19(a) of the Act.

6 The husband of the petitioner was again issued a notice dated 13.10.1998, but no response was received. Another Court of Inquiry, in terms of Section 62 of the Act, was ordered and the same was finalized on 20.11.1998. Thereafter, an apprehension roll was issued through District Magistrate, Churu, Rajasthan vide letter dated 21.11.1998, but in spite of this, petitioner's husband was neither apprehended, nor handed over to the BSF Unit.

7 A show cause notice was issued to petitioner's husband vide communication dated 22.12.1998. When nothing was heard from the petitioner's husband, again an apprehension roll was issued to DM Churu vide communication dated 24.04.1999. Thereafter, the petitioner was requested to lodge FIR with the local police and a representative was sent to the native village of petitioner's husband to find out his whereabouts.

8 It was found that the petitioner's husband had not reported to his home. On 02.06.1999, the petitioner was approached to lodge an FIR, but no reply was received from her. Collector and DM of Churu and SSP Jammu were requested to lodge FIR regarding missing Constable Gopal Ram. The police authorities intimated that the constable Gopal Ram could not be traced out and the search/enquiry was kept in progress.

9 A letter was received from SP, Churu on 14.12.1999 in which it was stated that Constable Gopal Ram had visited his home and left his home on the pretext that he would join his duty, but he did not resume his duty. A show cause notice dated 11.09.2000 was served upon the petitioner's husband, but when no reply was received, the respondents issued the impugned order of dismissal against the petitioner's husband.

10 I have heard learned counsel for the parties and perused record of the case.

11 The factual aspects of the matter in this case are more or less admitted by the parties. It is the admitted case of the parties that husband of the petitioner has not attended his duty with his Unit since 05.09.1998. According to the respondents, the husband of the petitioner was neither granted any leave, nor was he permitted by the competent authority to leave the unit. It is not even the case of the petitioner that her husband was granted any such leave. It is admitted by both the parties that after 05.09.1998, whereabouts of Constable Gopal Ram were not known either to the Unit where he was serving or to his family members. The petitioner is stated to have received a phone call on 21.09.2003 that her husband is lying admitted in the Hospital at Dholpur. But prior to the said date, the respondents had already passed the impugned order dated 12.10.2000 whereby the services of husband of the petitioner had been terminated. On this ground, it has been claimed by the respondents that the petitioner is not entitled to family pension.

12 The contention of the petitioner is that the respondents have not followed the procedure prescribed under law before passing the impugned order dated 12.10.2000. According to her, neither any show cause notice was issued to her husband, nor any enquiry was conducted by the respondents before passing the impugned order. It has also been contended that the punishment of dismissal could have been imposed by the respondents only if her husband had been convicted by a Security Force Court which admittedly has not been done in the present case.

13 A perusal of the record produced by learned DSGI appearing for the

respondents reveals that after the abscondence of husband of the petitioner from duty, a Court of Inquiry was held by the respondents by following the procedure prescribed under Section 62 of the Act. The said provision contemplates holding of an inquiry into the absence without leave when a person has been absent from duty without permission for a period of 30 days.

14 The record further shows that the proceedings of the Court of Inquiry have been held in ex parte as the notice sent to Constable Gopal Ram at his residential address did not evoke any response from him. As per the findings of the Court of Inquiry, Constable Gopal Ram had absented himself from the Unit without permission on 05.09.1998 and a recommendation was made that he may be treated as 'deserter' w.e.f 05.09.1998. After the Court of Inquiry, apprehension roll has been issued for apprehending Constable Gopal Ram, but he could not be traced, as a result of which, he was declared 'deserter'. So the respondents have followed the procedure prescribed under Section 62 of the Act while dealing with the case of Constable Gopal Ram.

15 Even after holding of Court of Enquiry and issuance of apprehension roll against Constable Gopal Ram, he continued to remain absent, therefore, the respondents, as is evident from the record produced, initiated the proceedings under Section 11 of the Act read with Rule 22 (2) of the Rules. In order to understand the power and procedure laid down in Section 11 of the Act and Rule 22 of the Rules, which are relevant to the context, it would be apt to refer to the said provisions.

"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 below the rank of Deputy InspectorGeneral 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 rules.

22. Dismissal or removal of person other than officer on account of misconduct:

(1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in

sub-rule (2) against such action:

Provided that this sub-rule shall not apply:

(a) where the service is terminated on the ground of conduct which has led to his conviction by a Criminal Court or a Security Force Court;

or (b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.

(2) When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence:

Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion its disclosure is not in the public interest;

(3) The competent authority after considering his explanation and defence, if any, may dismiss or remove him from service with or without pension:

Provided that a Deputy Inspector-General shall not dismiss or remove from service, a subordinate officer of and above the rank of a Subedar;

(4) All cases of dismissal or removal under this rule, shall be reported to the Director-General"

16 From a perusal of the provisions contained in Section 11 of the Act, it is clear that an officer not below the rank of Deputy Inspector General or any prescribed officer is competent to dismiss or remove from the service any person other than an officer or subordinate officer under his command. However, the said power is subject to the provisions of the Act and the Rules. Rule 177 of the BSF Rules provides that the Commandant is the prescribed officer under sub-section (2) of Section 11 to dismiss or remove from service any person under his command other than an officer or a subordinate officer. Thus, a Commandant of a Unit is competent to issue an order of dismissal of a constable working in his Unit. In the instant case, the impugned order has been passed by respondent No.5, the Commandant and, as such, the same has been passed by a competent authority.

17 The next question that arises is whether the procedure prescribed under the Act and the Rules has been followed by respondent No. 5 in the instant case. As is clear from Rule 22 (1) and (2) quoted above, an opportunity has to be given by the competent authority to the affected person before dismissing him or removing him and the said show cause notice has to be in the manner as specified in sub-rule (2) of Rule 22 which provides that if the competent authority is satisfied that trial of the person concerned is inexpedient or

impracticable, but retention of such person is undesirable, such person has to be informed about the same along with adverse reports calling upon him to submit his explanation and defence.

18 In the present case, the record shows that a show cause notice dated 22.12.1998 was sent to the residential address of petitioner's husband. In the said show cause notice, it was clearly recorded that a Court of Inquiry under section 62 of the Act was conducted and absence of Constable Gopal Ram was treated as unauthorized and he was declared as 'deserter'. Respondent No.5 in the said show cause notice has also recorded that he is satisfied that the trial of constable Gopal Ram by the Security Force Court for offence of desertion under Section 18 of Act is inexpedient and impracticable and that he is of the opinion that retention of the afore-named constable in service is undesirable. Along with the show cause notice, copies of inquiry report and the statements of witnesses and the nature of allegations were annexed. The said show cause notice has been sent through registered post at the residential address of petitioner's husband.

19 There is no dispute to the fact that petitioner's husband had not returned to his home and his whereabouts were not known, but that does not mean that the respondents should have undertaken search of the absconding constable throughout the world in order to serve him the show cause notice. The respondents were only obliged to serve the show cause notice at the address which was available with them. They have not only adhered to the said requirement, but they have also launched a search of the absconding constable by filing missing reports with the police and the concerned District Magistrate. Therefore, it cannot be sated that the respondents have not served show cause notice upon the constable, who at the relevant time, was admittedly alive.

20 Learned counsel for the petitioner has submitted that it was incumbent upon the respondents to serve upon the constable the material on the basis of which the respondent No.5 had come to a conclusion that it was not practicable to try the said constable before the Security Force Court. In this regard, it is to be noted that along with the show cause notice dated 22.12.1998, copy of report of court of inquiry, statements of witnesses and the nature of allegations were also sent to the concerned Constable. Therefore, the contention of the petitioner in this regard is without any substance.

21 In any case, the constable was admittedly absconding and his whereabouts were not known, therefore, it was obvious that the respondents could not have put him to trial before the Security Force Court. The satisfaction recorded by respondent No.5 in this regard, cannot be termed either perverse or based on no material.

22 It has also been contended by the petitioner that as per sub-Section (4) of Section 11 of the Act, her husband could not have been imposed the penalty of dismissal from service without his conviction by the Security Force Court.

23 In the above context, it is to be noted that power of the Commandant under Section 11(2) of the Act read with Rule 177 of the Rules to dismiss a person other than an officer or subordinate officer is an independent power and it is not dependent upon the conviction of the concerned person by the Security Force Court. The only requirement is that the provisions contained in Rule 22 of the Rules have to be followed. In this regard, I am supported by the judgment of the Supreme Court in the case of Gouranga Chakraborty vs. State of Tripura, AIR 1989 Supreme Court 1321 wherein the Supreme Court, after considering the provisions contained in Section 11 of the Act, held as under:

"We have scrutinized 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 under Section 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 validity 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 Section 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 Section 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 duly 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"

21 From the aforesaid enunciation of law on the subject, it is clear that even though in the present case the husband of the petitioner was not tried by the Security Force Court and was not convicted by the said Court, still then, respondent No.5, the Commandant in exercise of his powers under Section 11 of

the Act, was competent to pass the impugned order of termination of service of the Constable Gopal Ram.

The only requirement that was to be adhered to was that he had to issue a show cause notice to the concerned constable and record a satisfaction that it was not practicable to hold trial of the said constable for offence of desertion against him, which, in the instant case, has been done by respondent No.5. Thus, the requirement of Rule 22 of the Rules and the principles of natural natural have been adhered to by respondent No.5 before passing the impugned order.

22 Even otherwise it is nobody's case, that the petitioner's husband was either prevented by any sufficient cause from attending his duty or that he had actually attended his duty, but was not marked present by the respondents. The facts in this regard are admitted, therefore, there was no need to hold a regular departmental enquiry to ascertain the facts in these circumstances.

22 For the foregoing reasons, I find no ground to interfere in the order of termination issued by respondent No.5 against husband of the petitioner. Consequently, the petitioner is not entitled to family pension.

The writ petition lacks merits and is dismissed, accordingly