
(2004) 03 J&K CK 0035

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1579 of 2003

Yash Paul

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-03-2004

Acts Referred:

Border Security Force Act, 1968 — Section 19
Border Security Force Rules, 1969 — Rule 45
Constitution of India, 1950 — Article 226

Citation : (2004) 2 JKJ 401

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : Surinder Kour, for the Appellant; Ravinder Gupta, for the Respondent

Final Decision : Allowed

Judgement

Permod Kohli, J.—Petitioner came to be recruited as a Follower (Water Carrier) in the Border Security Force in the year 1988. He

remained posted at different places and in different Battalions of Border Security Force from time to time. Petitioner proceeded on leave for seven

days which was granted vide order dated 18-4-2002. He was to re-join the duties after the expiry of the leave. However, according to the

petitioner he was taken ill and was able to resume the duty on 19-5-2002 in 73 Bn BSF. Respondents did not allow him to rejoin the duty and a

charge-sheet dated 7-9-2002 was served upon him. Petitioner was asked to show cause for over-staying the leave granted to him. Petitioner was

kept in close arrest vide order dated 12-9-2002 till the finalization of the Summary Security Force Court (SSFC). On constitution of the SSFC

trial was conducted and consequently the petitioner was awarded sentence, ""to be dismissed from service"" on the same day i.e. 12-9-2002. An

appeal was preferred by the petitioner before the D.I.G. Border Security Force on 5-12-2002 in accordance with the rules 167/168 of the Border

Security Force Rules, 1969. The appeal also came to be dismissed vide order dated 9-4-2003.

2. It is under these circumstances that the petitioner has approached this Court seeking quashment of order dated 9-4-2003 issued by DIG,

Border Security Force by which the appeal filed by the petitioner has been dismissed and order dated 12-9-2002 issued by the Commandant, 71

Bn whereby the petitioner was dismissed from service and is also seeking a direction for his reinstatement into service and release of salary etc.

The main ground of challenge in the petition is that the procedure prescribed under the Border Security Force Act, 1968 and the rules framed

there-under has not been followed. In as much as the petitioner was not provided any opportunity to properly defend himself. The quantum of

punishment has also been challenged on the ground that the same is disproportionate to the offence alleged to be committed by the petitioner.

3. In response to the writ petition, the respondents have filed a detailed counter. It is stated that the petitioner is a habitual offender. He has

suffered number of punishments during his service career right from 1990 till the date of dismissal. In respect to the incident in question, it is stated

that the petitioner was allowed leave for seven days w.e.f. 19-4-2002 to 27-4-2002. He failed to rejoin his duties after the expiry of leave and

over stayed for 27 days. The Commandant, 71 Bn, BSF ordered for an Abstract of Evidence and on the basis of abstract of evidence

proceedings and other related documents, the Summary Security Force Court trial was conducted on 12-9-2002. Before the Summary Security

Force Court, the petitioner pleaded guilty to the charge and the Commandant found him guilty and awarded sentence, ""to be dismissed from

service"". The appeal preferred by the petitioner was dismissed on 9-4-2003 being devoid of merit. In respect to allegations of non-observance of

the procedure prescribed under rules, it is stated that the petitioner was charged u/s 19(b) of the Border Security Force Act, 1968 for over-staying

the leave without any sufficient cause. He was brought before the Commandant for preliminary hearing on offence report under Rule 45 of BSF

Rules 1969 for committing offence u/s 19(b) of BSF Act 1968. During the hearing he pleaded guilty and after hearing and observing the past

discipline profile/ records of the petitioner, the Commandant ordered for Abstract of Evidence and served him charge-sheet under Rule 53 (2) on

11-8-2002. During the Abstract of Evidence he was given full opportunity to defend himself and make his statement, but he declined to make any

statement. He was given all opportunities as provided under Rule 63 of the B.S.F Rules 1969 and was allowed for proper communication, friend

of the accused was detailed. The Summary Security Force Court was conducted in presence of the accused, his friend Sh Mohinder Singh, Dy.

Commandant and two Subordinate Officers in accordance with the procedure. The petitioner was given full opportunity to defend himself. He

pleaded guilty and was accordingly dismissed from service.

4. The record of the case was summoned. From the record it is evident that the procedure prescribed under Rule 45 of the BSF Rules 1969 has

been followed. Petitioner was served with a charge-sheet and he appeared before the SSFC where he pleaded guilty. The procedure for recording

the plea of guilt as prescribed under Rule 142 has also been followed. Petitioner has also produced defence Witness regarding his character. From

the material on record, it is evident that the procedure prescribed has been duly followed. It is lastly argued by the learned counsel for the

petitioner that the punishment imposed upon the petitioner is too harsh and disproportionate. It is admitted fact that the petitioner over stayed for a

period of 22 days only. His contention is that he was taken ill and was unable to report back immediately after the expiry of period of leave.

Punishment of 'dismissal from service' appears to be harsh and dis-proportionate to the offence said to be committed by the petitioner. While

appearing before the Commandant, the petitioner accepted his mistake and pleaded for forgiveness with an undertaking that he shall not repeat it.

This plea of the petitioner has not weighed with the respondents. It is unimaginable that for over-staying leave for a period of 22 days, the services

of the petitioner have been dispensed with without taking into consideration his long service rendered in the Force under hazardous circumstances

as the petitioner had served at various places. I am unable to accept the quantum of punishment awarded to the petitioner which is too harsh and

dis-proportionate to the charge. In a similar matter the Apex Court in case Union of India and others Vs. Giriraj Sharma, held as under:

x x x x The incumbent while admitting the fact that he had over-stayed the period of leave had explained the circumstances in which it was inevitable for him to continue on leave as he was forced to do so on account of un-expected circumstances. We are of the opinion that the punishment of dismissal for over-staying the period of 12 days in the said circumstances which have not been controverted in the Counter is harsh since the circumstances show that it was not his intention to willfully flout the order, but the circumstances forced him to do so. In that view of the matter the learned counsel for the respondent has fairly conceded that it was open to the authorities to visit him with a minor penalty. If they so desired, but a major penalty of dismissal from service was not called for. We agree with this submission.

5. In view of the above, I hereby allow the writ petition and quash the order of dismissal from service and direct the respondents to re-consider the award of punishment and the petitioner be visited with a lesser punishment than the dismissal from service.