

21

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 2699/2012 and CM Nos.5808-10/2012

%

Date of decision: 27th July, 2012

RADHEY SHYAM PANDEY Petitioner
Through : Mr. K.K. Mishra, Adv.

versus

UNION OF INDIA AND ORS Respondents
Through : Mr. Himanshu Bajaj, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The instant writ petition assails the order dated 24th November, 1993 passed by the Commandant, 163 Battalion (respondent No.3 herein) and the order dated 27th December, 2005 passed by the Director General, Border Security Force, Lodhi Road, New Delhi (respondent No.2 herein).

2. The facts giving rise to the instant petition to the extent necessary are briefly noticed hereafter. In the year 1990, the petitioner was appointed as a Constable in Border Security Force (BSF). In the year 1993 while he was posted with 163 Battalion of the BSF at Shillong, he proceeded on 45 days earned leave with effect from 13th May, 1993 to 29th June, 1993 for the reason of his sister's marriage. The petitioner has

claimed that there was a spate of bereavements in his family between 13th May, 1993 and July, 1995. In the writ petition, it is urged by the petitioner that real uncle of the petitioner died on 17th May, 1993; his father died in June, 1993; his grandmother died in July, 1995 and wife of his elder brother died on 2nd January, 1995. The petitioner also claims that he was suffering from a number of diseases between 10th July, 1993 and 24th September, 1993. The fact of the case is that the petitioner did not return to duty and rejoin his battalion despite expiry of his sanctioned leave. He was required by the respondents to join his duty by the letter dated 8th July, 1993 but he neither responded to the letter nor returned for duty. As a consequence, in terms of Section 62 of the BSF Act, a Court of Inquiry was conducted to investigate the reasons under which the petitioner was overstaying the leave.

3. The respondents took action on the findings of the Court of Inquiry. A show cause notice was issued to the petitioner by the letter dated 3rd November, 1993 giving him a time of 15 days up to 18th November, 1993. A direction was also given to the petitioner to urge his defence against the proposed action of dismissal for his absence without leave. The petitioner did not care to avail even this opportunity.

4. In this background, the Commandant of 163 Battalion, BSF after having satisfied that the petitioner was overstaying the leave with effect from 30th July, 1993 without sufficient cause has found that his further retention in the force was undesirable. Therefore, by an order passed on 24th November, 1993, the petitioner was dismissed from service with immediate effect under Rule 177 of the BSF Act, 1968. It was further directed that his period of absence would be treated as 'Dies Non' and he was struck off the strength from the unit. It is noteworthy that as on the date of passing of the last order, the petitioner had been absent from duty without sanctioned leave for a period of 148 days (almost 5 months).

5. A perusal of Rule 28A of the BSF Act would show that inasmuch as the petitioner was dismissed when he was posted at Shillong, his appeal would lay to the Inspector General who was having jurisdiction over the Shillong area. No appeal was preferred by the petitioner against the said order to the competent authority.

6. It appears that instead, after expiry of almost one year of passing of the dismissal order, the petitioner preferred a non-statutory representation dated 4th November, 1994 to the Office of the Director General. The same has not been placed before this court. The petitioner appears to have met in the

office of the Director General. No copy thereof is forthcoming on the available record.

7. The petitioner, however, placed before this court a copy of the representation dated 11th September, 1996 made by him to the Director General of the BSF. He has urged that he was from the financially backward area, referred to his family structure and that he had suffered fever on 22nd June, 1993 resulting in weakness, anaemia and deterioration digestive system. The copies of the medical certificates have been annexed thereto. This was the explanation which he tendered to the Director General and prayed that his service be not terminated on humanitarian grounds.

8. Inasmuch as no action was taken on his non-statutory representation, the petitioner appears to have invoked the jurisdiction of the High Court Adjudicature of Allahabad by way of W.P.(C)No.67665/2005. This writ petition was disposed of by an order dated 25th October, 2005 with a direction to the Director General of the BSF to consider and decide the petitioner's representation dated 4th November, 1993 by means of reasoned and speaking order.

9. It appears that the reference to the representation dated '4th November, 1993' was typed by mistake in the order of the court instead of '4th of November 1994'. In the order which

was passed by the Director General on 22nd December, 2005, the Director General has found that the petitioner had not cared to inform the battalion about his absence and made no correspondence with the unit in this regard. It has been noticed that no response was received to the notice to show cause served on him on 3rd November, 1993.

10. It may be noted that in the representation made on 4th November, 1994, the petitioner refers to death of one uncle, accident of another uncle in 1993, death of his mother, his younger brother's wife and elder uncle during 1994. The petitioner was absent without leave after 29th June, 1993. Certainly, the deaths which have occurred thereafter could not have contributed to his overstaying of leave w.e.f. 29th June, 1993. The Director General has also noticed that he has failed to even provide in the representation specific dates of the deaths of his relatives so that there could be any linkage established with the overstaying of leave period.

11. In this background, the representation dated 4th November, 1994 was rejected by the Director General who found that the order of dismissal of the petitioner was issued in accordance with the provisions of the BSF Act and the Rules thereunder.

12. Learned counsel for the respondents before us has also urged delay and laches as an objection to the maintainability of the writ petition. Learned counsel for the petitioner has contended before this court that the action of the respondents is illegal being violative of principles of natural justice. It is contended that no adequate notice to show cause was served upon the petitioner. In response to the objection based on delay and laches in filing of the writ petition, learned counsel has submitted that the petitioner was dependent on legal advice and submits that he had tried his best and had run from pillar to post to find out whether his petition had been filed. He submits that he had approached a counsel in Allahabad to file the matter but the appeal was not filed. He also submits that he had received legal advice to file an appeal against the order of the High Court of Allahabad dated 3rd August, 2006 which has dismissed his writ petition also on the ground of want of jurisdiction.

13. We also find that there are unexplained delay and laches for challenging the decision of the Commandant which was dated 24th November, 1993.

14. An objection has also been taken on the ground of territorial jurisdiction. The above narration of facts would show that the petitioner has hopelessly failed to establish any case

on merits which could entitle him to relief in the present proceedings. The impugned order of termination of service was passed at Shillong as noticed hereinabove. The petitioner had a statutory remedy of appeal to the Inspector General of the Shillong area which he failed to invoke.

15. So far as the order of the Director General dated 27th December, 2005 is concerned, the same has been passed on a non-statutory representation made by the petitioner to comply with the order dated 3rd August, 2006 passed by the High Court of Allahabad in the previous writ petition.

16. So far as compliance with the principles of natural justice is concerned, the respondents conducted a Court of Inquiry and only thereafter took a prima facie view and gave an opportunity to the petitioner to show cause by issuance of the notice to 'show cause'. The petitioner failed to respond to the same. It is an admitted position before us that the first representation made by the petitioner was also inordinately delayed and made by him only on 4th November, 1994. None of the objections sought to be urged in the petition has ever been urged by the petitioner before.

17. For all the foregoing reasons, we do not find any merit in the writ petition. The writ petition and applications are hereby dismissed.

GITA MITTAL, J

JULY 27, 2012
aj

J.R. MIDHA, J