

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 15.04.2013

+ **W.P.(C) 20/2001**

EX.-CT. SURYA KUMAR Petitioner
Through : Ms. Jyoti Singh, Sr. Advocate
with Ms. Tinu Bajwa and Ms. Deepali
Dwivedi, Advocates.

versus

UNION OF INDIA AND ORS. Respondents
Through : Dr. Ashwani Bhardwaj with Ms.
Saroj Bidawat, Advocates.
Sh. Bhupinder Sharma, Dy.
Commandant/OIC, BSF.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The present petition under Article 226 of the Constitution seeks directions to take back the petitioner into service as a Constable in the Border Security Force ("BSF") which he had originally joined.

2. The petitioner, Surya Kumar, was a Constable in the operational units of the BSF. While serving in the BSF Academy at Tekanpur, he was granted, on 05.09.1995 (through order), Earned Leave for ten days to allow him to return to his village which was experiencing heavy floods. Subsequently, he requested for an extension of leave on 15.09.1995, stating that the flood situation had worsened since his return home. As the original leave of ten days was

to expire, the Commandant in charge issued a show cause notice on 15.09.1995 for failing to join his duties. Later the Commandant issued a telegram on 23.09.1995, which was received by the petitioner on 27.09.1995. The telegram from the Commandant accepted the petitioner's resignation tendered by a letter sent on 28.08.1995. The Commandant's communication was in the following terms:

*"No.3092/Tek/95/941
Tek Wing, Border Security Force Academy,
Takenpur, Gwalior (MP)
Dated: 28 Sept 95*

Copy To:

*No.871436788
Ct. Surya Kumar, S/o Sh. Jai Singh Yadav
Vill-Singapur, Post. Tapukla,
Distt. Alwar (Raj)*

Sub: Absence from duty

Ref: Your letter dated NIL

2. I am directed to inform you that your resignation has been considered by the competent authority and the same has been accepted wef 30 September 95. Hence your above letter cannot be accepted (this being the letter for extension of earned leave) and you are directed to report for duty at once

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3. You should report on duty on receipt of this letter.

*Sd/-
Commandant Officer Tack Wing"*

3. The petitioner then replied on 28.09.1995 stating that he had

never tendered any resignation, and accordingly, the acceptance of this alleged resignation was incorrect.

4. It is this question of whether Surya Kumar tendered a resignation, and the communication back and forth between the two parties subsequently, which gives rise to the present writ petition. To delve further into the facts, during the period of the petitioner's overstay (after the sanctioned Earned Leave), the BSF, on 19.09.1995 sent a letter to him to return to his post, to which a reply was received on 20.09.1995 for a further extension of leave for 30 days. However, through its letter dated 28.09.1995, the petitioner was informed that his request for extension of leave was denied, as his resignation had been accepted with effect from 30.09.1995. This led to the petitioner's above letter stating that the acceptance of resignation was not acceptable.

5. Essentially, the petitioner claims that the alleged resignation letter tendered by him is false and fabricated, and does not bear his signature. In the alternative, he argues that his letter to the BSF withdrawing any alleged resignation before the date on which it was to come in effect constitutes a withdrawal in the eyes of the law.

6. To the contrary, the BSF claims that the resignation letter is true. The BSF's stance is as follows:

“COUNTER AFFIDAVIT ON BEHALF OF THE RESPONDENTS

6. *[t]hat the petitioner was informed vide Tactical Wing letter NO. 997 dated 21.10.1995 (Annexure: P 3) to*

rejoin duty immediately and the petitioner finally rejoined duty on 16.11.1995(FN). The petitioner submitted an application dated 20.11.1995 after rejoinder duty on 16.11.1995 that acceptance of resignation submitted by him on 29.8.1995 was acceptable to him. Thereafter vide letter NO 3744 dated 22.11.1995. Adjutant BSF Academy Tekanpur was asked to amend the date of resignation to 30.11.1995 instead of 30.9.1995 and the same was done vide letter dated 27.11.1995.

7. That the individual had sent an application dated 14.11.1995 regarding pay and allowances with a request that Bank draft may be prepared for SBI Bhiwani, Distt Alwar(Rajasthan) or Punjab National Bank Tapukada Distt. Alwar (Rajasthan). The said application was forwarded to the Accounts Officer BSF Academy Tekanpur vide letter NO 8030/Tac/95/180 dated 8.1.1996 regarding any balance amount if due to him for the period of September 01, 1995 to 07.01.1996 before 31.1.1996 otherwise he will file a case in the Hon'ble High Court by 1.2.1996 . The said application was also forwarded to the Accounts officer, BSF Academy vide ION NO 8030/Tac/96/71-72 dated 18th January 1996 under intimation to the individual.

8..... an amount of Rs. 16,509.00 as final withdrawal of GPF has been sent to the individual to his home address vide Bank draft NO 102375 dated June 5,2000. Statement of pay Bonus and Education allowances along with bank draft of Rs 1400.00 was sent to the petitioner by the Accounts officer vide letter NO 7104/Acctts/pay/96/2362-63 dated 22.1.1996. Pre receipt in triplicate of CGEIS was sent to the petitioner for his signature vide letter dated 24th January 1996.”

7. The BSF, therefore, claims that all procedural requirements to discharge Surya Kumar were undertaken, and that the resignation letter tendered by him became operative. Aggrieved by the order of termination by the BSF, the petitioner had approached this Court, in W.P. (C) 1089/97, claiming the quashing of the order of discharge, and for reinstatement. In an order dated 13.03.1997, this Court dismissed the Writ Petition, asking the BSF to consider the matter afresh and reach a decision. Consequently, the matter was considered by the BSF and the following order dated 25.04.1997 was issued (No. 13/46-97-Rectt/BSF):

“1. Please refer to your petition dated 15.4.96, addressed to the Director General, Border Security Force, for re-instatement in the service and direction of the Hon’ble High Court of Delhi dated 13.3.97 in the Writ Petition No. CW 1089/97.

2. After carefully considering all the points raised by you in your petition and all the facts and circumstances of the case, the Director General, has rejected your petition being devoid of merit.”

8. The present writ petition prays to quash this order of the BSF.

9. Learned counsel for the petitioner argued that the impugned order is liable to be quashed on three grounds: *first* that the alleged resignation letter was a forgery, and that Surya Kumar never resigned. It is urged that he had returned home on earned leave, and in fact, requested for extension of leave, an act which does not go together with an individual who has requested to be discharged. *Secondly*, it is argued that even if the alleged resignation letter is attributed to Surya

Kumar, the subsequent denial of its acceptance by the BSF constitutes withdrawal, which may take place at any time before the date on which the resignation is to take effect. In this case, it is argued that the resignation was to take effect from 30.09.1995, whereas the withdrawal was sent a day before on 29.09.1995. For this, learned counsel places reliance on the decision of the Supreme Court in *Union of India and Anr. v. Wing Commander T. Parthasarathy*, 2000 (7) SCALE 442. Finally, learned counsel argues that the impugned order of the BSF is a non-speaking order that does not provide cogent and clear reasons for Surya Kumar's discharge from service. Accordingly, learned counsel claims that the BSF has treated Surya Kumar in an arbitrary manner by discharging him from service, and accordingly, reinstatement with back wages is prayed for.

10. To address first Surya Kumar's argument that under the ruling in *Wing Commander T. Parthasarathy* (supra), that in cases of resignation effective from a future date (as is the case in the present case), there exists a general right to withdraw such resignation until the time it becomes effective, it is necessary to quote the relevant extracts of the judgment at length and in context. There, the Supreme Court, relying on the decision in *Union of India (UOI) and Ors. v. Gopal Chandra Mishra and Ors.*, (1978) 2 SCC 301, noted as follows:

“6. *It will bear repetition that the general principle is that in the absence of a legal contractual or constitutional bar a "prospective" resignation can be withdrawn at any time before it becomes effective, and it*

becomes effective when it operates to terminate the employment or the office-tenure of the resignor. This general rule is equally applicable to Government servants and constitutional functionaries. In the case of a Government servant or functionary who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office, normally, the tender of resignation becomes effective and his service/or office-tenure terminated, when it is accepted by the competent authority.....

8. So far as the case in hand is concerned, nothing in the form of any statutory rules or any provision of any Act has been brought to our notice which could be said to impede or deny this right of the appellants. On the other hand, not only the acceptance of the request by the Headquarters, the appropriate Authority was said to have been made only on 20.2.86, a day after the respondent withdrew his request for pre-mature retirement but even such acceptance in this case was to be effective from a future date namely 31.8.86. Consequently, it could not be legitimately contended by the appellants that there was any cessation of the relationship of master and servant between the Department and the respondent at any rate before 31.8.86. While that be the position inevitably the respondent had a right and was entitled to withdraw or revoke his request earlier made before it ever really and effectively became effective.

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11. Therefore, while it is the *general* rule that the resignation may be revoked as of right before it comes into effect, this is not non-derogable, provided that a contrary service rule exists. In the present case, the petitioner is governed by the Border Security Force Rules, 1969, framed in exercise of the powers conferred under Section 141

of the Border Security Force Act, 1963. Rule 19 (2) is crucial, as it clearly deviates from the general doctrine in *Parthasarathy*, and negates any *right* to withdraw a resignation even before the date from which it is to come into effect. Rule 19 enables the Central Government to allow a person to resign from BSF; Rule 19 (2) reads as follows:

“19. Resignation - (2) The Central Government may accept the resignation under sub-rule (1) with effect from such date as it may consider expedient.”

12. Accordingly, the petitioner’s argument that this right was vitiated by the arbitrary action of the BSF is unfounded and lacks in merit.

13. On the second question, on whether the Petitioner tendered a resignation at all, before entering the details of the present case, it is useful to mention that given the dispute arising as to whether the resignation letter of 28.08.1995 bore his signature, or whether it was forged, the Court, on a previous occasion, had ordered for an examination to be conducted of the signatures by the Central Forensic Science Laboratory, of which the Court is aware presently, and which returned inconclusive findings stating the specimen and test signatures could not be matched.

14. What is important to note here is the *substantial* delay and indolence on the part of the Petitioner to agitate this question before the Court. While the original dismissal traces back to 28.09.1995, against which ultimately a writ petition was filed in this Court in

W.P.(C) 1089/1997; the present impugned order – which resulted from the directions issued in the above mentioned writ petition – dates to 25.04.1997. Subsequently, as noted above, various pension payments, education allowance and other arrears due from the BSF to Surya Kumar were released and the process has been concluded. From April, 1997 to the filing of the present writ petition on 21.12.2000 (in itself a period of 3 years where *no* action was taken by the petitioner to regain his employment, or agitate the question of arbitrary conduct by the BSF), and subsequently, various adjournments requested by the counsel and attendant delays, a period of almost 13 years has elapsed. Writ jurisdiction under Article 226 is an equitable jurisdiction that requires the exercise of discretion by this Court. Indeed, as the Supreme Court noted in *New Delhi Municipal Council v. Pan Singh*, (2007) 9 SCC 278:

“XXXXXX XXXXXX XXXXXX

.....It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the Court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction.

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15. Thus, while the fact of delay or laches will not, in all cases, negate a remedy, these are important considerations to be kept in mind, as is demonstrated by the decision in *State of Orissa v. Pyarimohan Samantaray*, (1977) 3 SCC 396, where the writ petition was dismissed on similar grounds of delay and laches without entertaining the merits of the petition. This was further explained by

the Supreme Court in *Karnataka Power Corporation Limited through its Karnataka Power Corpn. Ltd. Thr. Its Chairman and Managing Director and Anr. v. K. Thangappan and Anr.*, (2006) 4 SCC 322, where the Court noted:

“6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court..... Of course, the discretion has to be exercised judicially and reasonably.

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16. In this case, the petitioner did not agitate his grievance relating to his reinstatement for more than a decade. In such cases, where grievances are not agitated for a substantial period, and in the interim the other party (as in this case, the BSF has) taken steps to its prejudice (payment of allowances, arrears etc.), it would be highly inequitable to allow the petitioner to turn back the clock and gain the benefit of the equitable remedies available through the writ jurisdiction of this Court. In fact, agreeing to Petitioner’s claim would not only entitle him to reinstatement as of today, but also create a claim of payment of back-wages for the period since the impugned order. To acquiesce in this claim, given the indolence displayed by the petitioner, is inequitable, to say that least. Indeed, the Court is aware

that some delays are plausible and even inevitable, but to allow the present petitioner to roll back to a situation that existed thirteen years back, having acquiesced to the *status quo* and indeed, having delayed the proceedings in this Court himself, would be contrary to the principles that guide the exercise of discretion by this Court under Article 226 as noted above.

17. Accordingly, the writ petition is to be dismissed. No order as to costs.

S. RAVINDRA BHAT
(JUDGE)

SUDERSHAN KUMAR MISRA
(JUDGE)

APRIL 15, 2013