

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 443 of 2018

Date of Decision: 11.04.2023

Shri. Shashi Kumar Rajak Vs. Union of India & 4 Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Chakrawarty, Legal Aid Counsel with
Ms. E. Slong, Adv.

For the Respondent(s) : Mr. R. Debnath, CGC.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. The petitioner being aggrieved by the Office Order No. 1408/Estt/36 Bn/Disc-CT(GD)SKR/2015/16090-105, dated 12.10.2015 (Annexure-1 of the petition) issued by the Commandant, 36 Bn. BSF whereby, he was dismissed from service and the subsequent rejection of his appeal conveyed vide order No. F/No.26/11/2011-Estt/Shg/2016/12111-15 dated 29.07.2016 (Annexure-4 of the petition) have now approached this Court with this petition under Article 226 of the Constitution of India for setting aside of the same.

2. From what has been averred in the petition as well as from the

record available, it is seen that the petitioner has joined the Border Security Force(BSF) as a Constable (General Duty) on 20.04.2013.

3. On 20.02.2015 his marriage was solemnized. However soon after, due to some marital discord leading to the filing of an FIR on 07.09.2015, the financial and physical condition of the petitioner was affected as he was compelled to fulfill his obligations towards his family. During such period, he was suffering from mental depression leading to cardiac nervosa anxiety neurosis, followed by hospitalization of his sister on 12.07.2015. All this led to his abstention from duty which was not intentional.

4. On his absence from duty beyond the period of leave applied for, the competent authority had instituted a Court of Inquiry at the Battalion Headquarters and holding that the petitioner was absent during such inquiry, vide an administrative Office Order No. 1408/Estt/36 Bn/Disc-CT(GD) SKR/2015/16090-105 dated 12.10.2015 (impugned herein) had dismissed the petitioner from service.

5. The petitioner, in due course preferred an appeal before the competent authority against the said dismissal order dated 12.10.2015, however, the same was rejected vide order F/No.26/11/2011-Estt/Shg/2016/12111-15 dated 29.07.2016, the same being communicated to the petitioner through his counsel vide Order No. Estt/LN-80/36 Bn/2016/13555-59 dated 16.09.2016 (Annexure-5 of the petition).

6. Ms. E. Slong, learned counsel vice Mr. S. Chakrawarty, learned

Legal Aid Counsel for the petitioner has submitted that the proceedings initiated by the respondent authorities against the petitioner are violative of his fundamental rights, particularly Article 21 of the Constitution as his right to life in the form of right to livelihood was denied to him, inasmuch as, the proceedings before the Court of Inquiry was conducted without due notice to the petitioner and without affording any opportunity to him to take recourse to legal aid as mandated under Article 39 A of the Constitution and also that the proceedings against him was carried out without following due procedure in accordance with the provision of the BSF Act, 1968 as well as the relevant BSF Rules of 1969.

7. The learned counsel has reiterated that reference of the respondent authorities to the letters dated 07.07.2015, 13.07.2015 and 20.07.2015 were never received by the petitioner. Even the said Show Cause Notice said to have been issued upon the petitioner on 27.08.2015 was also not received by him and any alleged signature of his on the AD Card/receipt does not belong to him.

8. It is also the contention of the learned counsel for the petitioner that the petitioner being a member of the Scheduled Caste, therefore he is entitled to Legal Aid to defend his case before the Court of Inquiry, however, this opportunity was also not given to him, coupled with the fact that the said Court of Inquiry should have been conducted at his place of residence for effective recording of the evidence which was not done so by the authority

concerned.

9. On coming to know of his dismissal from service as a consequence of the findings of the Court of Inquiry, the petitioner has filed a Departmental Appeal before the Director General, Assam Rifles on 20.12.2015, but on not receiving any response for a long time, the petitioner has caused issuance of a Notice dated 18.07.2016, through his Advocate calling upon the respondent authority to decide on his appeal, the respondent authority vide order F/No.26/11/2011-Estt/Shg/2016/12111-15 dated 29.07.2016 has dismissed the appeal which was accordingly conveyed to the Advocate of the petitioner through Order No. Estt/LN-80/36 Bn/2016/13555-59 dated 16.09.2016.

10. It is therefore prayed that for violation of the principle of natural justice, the impugned order of dismissal dated 12.10.2015 and the rejection of the appeal vide order dated 29.07.2016 are liable to be set aside and quashed and the respondent authorities be directed to re-instate the petition in service.

11. Per contra, Mr. R. Debnath, learned CGC submitting on behalf of the respondents, has pointed out that the petitioner was enrolled in BSF as a Constable (GD) on 19.04.2013 and after completion of his Basic Recruit Training from STC BSF Bangalore, he was posted at 36 Bn. BSF on 12.04.2014.

12. The petitioner had availed earned leave of 30(thirty) days with effect from 04.06.2015 to 03.07.2015 and he was required to resume duty on

04.07.2015, but he never joined duty on the said date.

13. The competent authority vide various correspondences being letter dated 07.07.2015, 13.07.2015 and 20.07.2015 had called upon the petitioner to resume his duty, but he failed to do so. In fact, vide letter dated 13.08.2015, the authority had issued an Apprehension Roll which was addressed to the Superintendent of Police, North-24 Parganas, West Bengal with a request to apprehend the petitioner and to hand him over to 36 Bn BSF or any nearest BSF Unit in West Bengal, however, no response was received from the concerned police authorities.

14. The BSF authorities, on the failure of the petitioner to respond to the recall letters aforementioned and his failure to resume duty in his unit, accordingly, constituted a Court of Inquiry as mandated under Section 62 of the BSF Act, 1968, to be presided over by Shri. Shobhit Sharma, Assistant Commandant. The Court of Inquiry has found that the petitioner had overstayed his leave with effect from 04.07.2015 without sufficient cause following which the said letter dated 13.08.2015 was issued upon the Superintendent of Police, North-24 Parganas, West Bengal to apprehend the petitioner.

15. On the failure of the petitioner to be apprehended, the respondent authorities have issued a show cause notice to the petitioner vide correspondence dated 27.08.2015 calling upon him to show cause as to why he should not be dismissed from service for having illegally and without

sufficient cause overstayed his leave with effect from 04.07.2015. Copy of the said show cause notice was also issued to the Superintendent of Police, North-24 Parganas, West Bengal and the SHO, Police Station, Nawapara District, North-24 Parganas, West Bengal.

16. The learned CGC has further submitted that on the petitioner failing to submit any reply to the said show cause notice, the competent authority who is the Commandant 36 Bn. BSF after coming to the conclusion that the continued illegal absence of the petitioner is contrary to the expected norms and is also detrimental to force discipline, therefore his further retention in the force becoming undesirable, the petitioner was accordingly dismissed from service with effect from 12.10.2015.

17. The learned CGC has again submitted that the petitioner has filed an appeal against the said dismissal order dated 12.10.2015 addressing the same to the Director General, Border Security Force 10 C.G.O. Complex, New Delhi dated 20.12.2015, wherein he has clearly stated that due to prolong illness and acute weakness in his body and mental depression, he was neither in position to join his duty in time or to reply to any of the notices served upon him including the show cause notice dated 27.08.2015. This is a contradiction to the assertion of the petitioner that he has not received any of the letters issued to him calling upon him to rejoin duty and also denial of ever having received the show cause notice.

18. The Inspector General HQ Meghalaya FTR, Shillong vide order

dated 29.07.2016 has disposed the petition (sic appeal) dated 20.12.2015 preferred by the petitioner and finding no merit in the same, had accordingly rejected the same as devoid of merit. This decision was also conveyed to the Advocate of the petitioner, Shri. Sandip Kumar Bhattacharya vide letter dated 16.09.2016. It may be mentioned that the petitioner through the said Advocate had issued letter dated 18.07.2016 addressed to the Director General, BSF calling upon such authority to dispose of the appeal preferred by the petitioner.

19. Finally, the learned CGC has submitted that the petitioner being a member of a disciplined force, it is incumbent upon him to maintain strict discipline and to adhere to the rules and procedures as such member, however by his own conduct and indiscipline, he has disqualified himself from being a member of the force and the dismissal order and the subsequent rejection of his appeal is justified, the same may not be interfered by this Court.

20. In support of his case, the learned CGC has relied upon the following decisions:

- i) ***State of UP & Ors v. Ashok Kumar Singh & Anr: (1996) 1 SCC 302, para 8;***
- ii) ***Union of India & Ors v. Debashish Ghosh: (2009) 16 SCC 621, para 9 and***
- iii) ***Gouranga Chakraborty v. State of Tripura & Anr: (1989) 3 SCC 314, para 24.***

21. Facts and circumstances having been noted hereinabove, the main issue to be decided is whether there has occasioned a travesty of justice by the notification of the impugned order of dismissal from service of the petitioner and the subsequent rejection of his appeal while considering the case of his alleged overstay of leave.

22. The parties being governed by the Border Security Force Act of 1968 and the relevant Rules of 1969, the disciplinary procedure in case of any misdemeanor committed by a BSF personnel Officer or otherwise, can be found in the said Act and Rules.

23. On being convinced that the petitioner has overstayed his sanctioned leave, the respondent authority has convened a Court of Inquiry as per the provision of Section 62 of the BSF Act. Vide Convening Order dated 05.08.2015, Shri Shobhit Sharma, Asstt Comdt was authorized to conduct the said enquiry. Records would show that the Court assembled on 13.05.2015 where 5(five) witnesses were examined and a number of documents were exhibited. The findings were returned on the same day, inter alia, finding that the petitioner was required to re-join his duty, but was unable to do so even after recall letters were issued to him. The opinion of the Presiding Officer, after taking into account the statement of witnesses and documents exhibited is that strong disciplinary action be initiated against him.

24. The Commandant 36 Bn. BSF in agreement with the findings and

opinion of the Court of Inquiry, dated 13.08.2015, then resorted to the provision of Sub-Rule (2) of Rule 22 of the BSF Rules to cause issuance of a Show Cause Notice upon the petitioner (Annexure R 7 of the Affidavit-in-Opposition) calling upon him to present his defence within 30(thirty) days from the date of issue of the show cause notice. It was also pointed out that the petitioner acknowledge receipt of the said notice.

25. Before proceeding further, it would be convenient to reproduce the provision of Sub-Rule 2 of Rule 22 of the BSF Rules, 1969 which is done so herein below:

“22. Dismissal or removal of persons other than officer on account of misconduct. –

(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.

26. From the materials on record and from the pleadings placed by the respective parties herein, what can be seen is that from the time when the Court of Inquiry was convened, the Presiding Officer has examined 5(five) witnesses who in turn have also exhibited a number of documents etc. This obviously means that the provision of Rule 173(8) of the said BSF Rules was complied with. The said provision reads as follows:

“173. Procedure of Courts of Inquiry. –

(8) Before giving an opinion against any person subject to the

Act, the Court will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

27. The above provision clearly provides that the Court of Inquiry before giving an opinion will ensure that the delinquent be given an opportunity to cross-examine any witnesses who have given evidence against him. In the case of the petitioner, this has not been followed. Even if the argument of the respondents is taken that the petitioner has, inspite of letters/notices issued upon him to response to the proceedings has remained absent, the petitioner has contended that he has not received any such letters. In the Findings of the Presiding Officer, this fact that the petitioner was absent from the proceedings before the Court of Inquiry was never noted, thus, prejudice caused to the petitioner can be assumed. Therefore, while applying the principles of natural justice, adverse inference can be drawn against the respondent authority in this regard.

28. Coming to the Show Cause Notice dated 27.08.2015, the same was issued in line with the provision of Sub-Rule 2 of Rule 22 of the BSF Rules. What can be culled out from this provision is that if the opinion is that further retention of the petitioner in service is found undesirable, firstly, he shall so be informed of the same and secondly, along with such information, all reports adverse to him, which, in all probability shall include the depositions of the witnesses, the Findings of the Court of Inquiry etc, which shall be supplied to him to enable him to present his defence.

29. A perusal of the said Show Cause Notice and materials on record, would reveal that along with the Show Cause Notice, no other documents were annexed or attached thereto have been issued upon the petitioner. Though the petitioner has denied having ever received the said Show Cause Notice, even if he has received the same, it would be sans the relevant documents. This is indeed a violation of the principles of natural justice to the detriment of the petitioner.

30. In the case of Ashok Kumar Singh(supra) cited by the respondents, the Apex Court has differ in opinion with the findings of the High Court on the quantum of punishment meted out to the respondent therein on the ground that absence without leave of a police constable serving in a disciplined force cannot be wither down. However, this case has no relevance here as this Court is not on the question of quantum, but on fair or unfair procedure adopted in the proceedings against the petitioner herein. A similar proposition was evident in the case of Debashish Ghosh(supra), again, with due respect, no relevance can be found with the case in hand.

31. In the case of Guoranga Chakraborty(supra) the only question answered by the Apex Court is that there is no bar for the prescribed Authority, that is, the Commandant to exercise the power under section 11(2) of the BSF Act and to dismiss any person under his command as prescribed under Rule 177 of the BSF Rules. This is not the issue in this case as the question here is whether issuance or non-issuance of the Show Cause Notice

has violated the rules of natural justice as far as the petitioner herein is concerned.

32. The 'rule of fair hearing' or 'Audi Altare Partem' is a well-recognized and oft repeated principle of natural justice which has been applied to ensure that no person can be condemned or punished by a superior authority without having a fair chance of being heard. One of the component of this rule is 'issuance of notice' upon which receipt of the same would be assumed that proper and adequate opportunity has been given to the party concerned to enter appearance in any proceeding, be it before the court or a competent authority who could be a superior officer.

33. As observed above, the petitioner has not been served with a proper show cause notice and as such, could not have present a proper defence on his part, the action of the competent authority to dismiss him from service can only be seen to be an act done arbitrarily and not in fair play. The same cannot be condoned by this Court.

34. Accordingly, this Court is persuaded to allow the prayer made in the petition, the impugned order No. 1408/Estt/36 Bn/Disc-CT(GD)SKR/2015/16090-105 dated 12.10.2015 issued by the Commandant 36 Bn. BSF is hereby set aside and quashed.

35. The order dated 29.07.2016 which is the order rejecting the petition filed by the petitioner dated 20.12.2015 which could be termed as an appeal would also stand dismissed in view of the fact that the original order of

dismissal being set aside vide this order.

36. Any disciplinary action contemplated to be taken by the BSF authority has to be done in accordance with proper procedure after affording the best opportunity to the petitioner to defend himself.

37. The official records of the respondent authorities which were produced before this Court in course of the proceedings are hereby directed to be returned forthwith to the learned CGC.

38. Petition disposed of. No costs.

Meghalaya
11.04.2023
"D. Nary, PS"



Judge