

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

% *Judgment Reserved on: February 09, 2015*
Judgment Delivered on: February 12, 2015

+ **W.P.(C) 1038/2006**

ACHAL SINGH Petitioner
Represented by: Dr.Sumant Bharadwaj, Advocate with
Mr.Mridula Bharadwaj, Advocate

versus

UOI Respondent
Represented by: Ms.Saroj Bidawat, Advocate with
Mr.Arvind Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The writ petitioner had joined service as Constable (GD) with the Border Security Force on a date not disclosed in the pleadings of the parties but it appears that it was around the year 1989 for the reason the pleadings of the parties would show that when the petitioner was dismissed from service on April 04, 2003, he had rendered service for 14 years.
2. Granted casual leave for five days on compassionate grounds commencing from July 15, 2002 till July 19, 2002, requiring the petitioner to resume duty at the transit camp of BSF in Jammu in the Forenoon of July 20, 2002, the petitioner did not join the duty and for which letters were sent at the permanent address given by the petitioner and as entered in the service record, on July 24, 2002, July 29, 2002, August 20, 2002 and September 26, 2002.
3. Since the petitioner did not join back, but had sent a letter on August

09, 2002 praying for 60 days leave being sanctioned to him for the reason, as stated in the letter, he was having domestic problems, a Court of inquiry was ordered by the Commandant to report into the circumstances leading to the absence of the petitioner. Assistant Commandant S.S.Rathore was appointed to conduct the Court of inquiry. He gave an opinion that there was no cause for the petitioner not to report back for duty. Therefore, an apprehension roll was issued requiring the Superintendent of Police, District Dholpur, for the reason the petitioner resided in a Village in District Dholpur, Rajasthan, to apprehend the petitioner and produce him before the Commandant of the nearest BSF Battalion. The apprehension roll could not be executed by the police authorities because the petitioner successfully evaded apprehension.

4. On October 06, 2002, after overstaying leave of 79 days, the petitioner reported at the BSF Transit Camp at Jammu and submitted, in the Tac HQ, a certificate regarding he and his wife Nirmala being unwell. The one pertaining to him was issued by Bhagwan Devi Hospital and Research Centre, Gwalior Road, Agra which was dated September 12, 2002, and the one pertaining to his wife dated August 09, 2002 was issued by Bansal Hospital, Agra. The Commandant sent the certificates pertaining to medical treatment claimed to be availed by the petitioner and his wife to the two institutions wherefrom they were issued and the response received was that the documents were genuine.

5. Forming an opinion that the matter needed proper inquiry for the reason the medical papers were issued by private institutions and were suspect for the reason the petitioner never took any medical treatment from a Government hospital for himself or his wife in spite of being entitled to do so, the Commandant of the Battalion to which the petitioner was attached took cognizance of an offence report as per Rule 43 of the BSF Rules, 1969.

He heard the petitioner with respect to the offence report, as required by Rule 45, and in respect of which proceedings were drawn up on October 10, 2002. As per sub-Rule 2 of Rule 45, the Commandant had three options. To dismiss the charge. To award a summary punishment. To remand the petitioner for preparing of Record of Evidence. The Commandant chose the third option and drew up the charge in respect of which Record of Evidence had to be drawn up. The charge was of having committed an offence punishable under Section 19(b) of the BSF Act, 1968, which makes it an offence to overstay leave granted without a sufficient cause. In the charge it was indicated that having been granted five days casual leave from July 15, 2002 to July 19, 2002, the petitioner failed, without sufficient cause, to rejoin duty on the expiry of the leave and that there was 79 days unauthorised absence from July 20, 2002 to October 06, 2002. The tentative charge drawn up on December 12, 2002 was served upon the petitioner. Deputy Commandant of the Battalion Sh.Chiter Pal was appointed as the officer to prepare the Record of Evidence. Ct.Anand Kumar Singh, ASI Clerk S.Banerjee, HC K.G.S.Babu, HC Rajender Singh of the D Coy and HC Jai Kumar of the C Coy were examined by him as witnesses No.1 to 5 in the presence of the petitioner.

6. The evidence recorded during Record of Evidence was placed before the Commandant as required by Rule 51 of the BSF Rules, 1969. Since the genuineness of the medical papers submitted by the petitioner was not in doubt, but the authenticity of the contents thereof was under a cloud, on December 13, 2002 the Commandant directed Additional Record of Evidence to be prepared, observing that the focus would be the medical papers submitted by the petitioner. Deputy Commandant Chiter Pal recorded additional evidence and placed the same before the Commandant as required by Rule 51 of the BSF Rules, 1969 who took a decision that as

per the evidence case was made out to try the petitioner before a Summary Security Force Court. He drew up a charge-sheet on March 06, 2003 as under:-

“CHARGE SHEET

The accused, No.89141131 Constable Achal Singh of 72 Bn. BSF, is charged with :-

BSF ACT

SECTION -19(b)

WITHOUT SUFFICIENT CAUSE
OVERSTAYING LEAVE GRANTED
TO HIM

*in that he,
having been granted 05 days Casual
leave wef 15.07.2002 to 19.07.2002
failed without sufficient cause to
rejoin duty at BSF Transit Camp,
Jammu on the expiry of the said leave.*

*Total period of absence = 79 days
wef. 20.07.2002 to 06.10.2002.”*

7. On March 06, 2003 itself he drew up the convening order. The convening order and the charge-sheet was served upon the petitioner informing him that the trial would be held at the Tac Headquarters of the 72nd Bn. BSF on March 17, 2003 at 10:00 hours.

8. The petitioner made a request for the trial to be deferred. The trial was deferred accordingly for April 04, 2003. At the trial 2 IC B.S.Rawat acted as friend of the accused. At the arraignment the petitioner pleaded not guilty and thus evidence was recorded.

9. At the trial ASI Clerk Radhey Shyam appeared as PW-1. Ct.Karambir Singh appeared as PW-2, HC Birender Singh appeared PW-3, HC Kuldip Singh appeared as PW-4, ASI Clerk S.S.Bora appeared as PW-5. Opportunity of cross-examination was given and was exercised. The

petitioner was given an opportunity to make a statement in defence, which he did, and needless to state claimed that the reason for the absence was he and his wife falling sick and in respect of which he relied upon the medical papers submitted by him when he rejoined duty, truthfulness whereof had been ascertained by the department, in that, the doctors issuing the same confirmed that they had treated the petitioner and his wife and had issued the certificate in question.

10. We note that the witnesses examined proved the various letters to which we have noted hereinabove as having been sent to the petitioner. The apprehension roll issued. The inquiry held into the circumstances concerning petitioner's absence. The medical papers submitted by the petitioner and having been received by the department.

11. Evidence concerning petitioner's character was also led in the form of various documents being proved, pithily stated the same would be that on October 08, 2001 the petitioner was tried by a Summary Security Force Court for having committed an offence punishable under Section 16(d) of the BSF Act i.e. leaving the duty post without permission of the superior officers, for which he was levied penalty to undergo rigorous imprisonment in force custody for 80 days and forfeiture of two years service for purposes of promotion. Further relevant material qua character of the petitioner was, he being awarded seven other punishments for offences punishable under Section 19(a), Section 19(b), Section 20(c), Section 30(b) and Section 40 of the BSF Act. Pithily put, the same would be as under:-

(i) Awarded 14 days Extra guard duty w.e.f. 21.05.1990 to 03.06.1990 for committing offence under Section – 19(b) of BSF Act by the Commandant 73 Bn. BSF for 16 days OSL (Overstaying leave).

- (ii) Awarded 28 days Rigorous Imprisonment in Force Custody w.e.f. 17.09.1991 to 14.10.1991 for committing offence U/S 19(a) of BSF Act by the Commandant 73 Bn. BSF for 52 days AWL (Absent without leave).
- (iii) Awarded 28 days Rigorous Imprisonment in Force custody w.e.f. 12.12.1995 to 08.01.1996 for committing offence U/S 30(b) of BSF Act i.e. dishonestly using Ist Class Railway Warrant for his own use and travelled alongwith his wife between Ahmedabad to Bhuj, for which he was not authorized, by the Commandant 72 Battalion BSF.
- (iv) Awarded 28 days Rigorous Imprisonment in Force Custody w.e.f. 12.04.1997 to 09.05.1997 for committing offence U/S 19(a) of BSF Act by the Commandant 72 Bn. BSF for 39 days AWL.
- (v) Awarded 20 days Rigorous Imprisonment in Force custody w.e.f. 12.05.2001 to 31.05.2001 for committing offence under Section 19(b) of BSF Act by the Commandant 72 Bn. BSF for 10 days OSL.
- (vi) Tried by Summary Security force Court on 08-10-2001 and awarded sentence to suffer rigorous imprisonment for 80 days in force custody and forfeiture of 02 years service for the purpose of promotion for committing offence under Section – 16(d) and Sec 20(c) of BSF Act i.e. leaving his patrol party and using insubordinate language to his superiors.
- (vii) Awarded 28 days Rigorous Imprisonment in force custody w.e.f. 14.12.2002 to 10.01.2003 for committing offence U/S 40 and Section 19(a) of BSF Act i.e. “An act prejudicial to good order and discipline of the force” and “absenting himself without leave” by the Commandant 72 Bn. BSF.

12. Additionally, concerning the propensity of the petitioner to overstay leave and in respect of which the department did not take any action while W.P.(C) 1038/2006

regularizing the leave, put in a tabular form, the same would be as under:-

a.	08 days OSL wef. 14.03.1994 to 21.03.1994	By granting 08 days EL.
b.	29 days OSL wef. 15.04.2000 to 11.05.2000	29 days EL.
c.	12 days AWL wef. 26.06.2000 to 07.06.2000	12 days EL.
d.	07 days AWL wef. 29.07.1993 to 04.08.1993	07 days EL.
e.	02 days OSL wef. 05.08.1996 to 06.08.1996	02 days EL.
f.	15 days AWL wef. 07.10.1998 to 21.10.1998	From Sri (f) to (i) period have been regularized in one go by granting 59 days EL.
g.	05 days AWL wef. 30.11.1998 to 05.12.1998	
h.	10 days AWL wef. 25.01.1999 to 02.02.1999	
i.	04 days AWL wef. 11.02.1999 to 14.02.1999	
j.	06 days AWL wef. 07.04.1999 to 12.04.1999	
k.	19 days AWL wef. 07.05.1999 to 25.05.1999	

13. We need to highlight that the aforesaid evidence pertaining to the character of the petitioner would show that he had been repeatedly

committing offences punishable under Section 19(a) which is absent without leave, Section 19(b) overstaying leave without sanction, Section 19(d) which is not reporting at the duty place as per schedule of duties given, Section 20(b) which is using threatening language against superior officers, Section 20(c) which is using insubordinate language and Section 30(b) which is dishonestly conversion of a property for one's own use. Besides, the petitioner has shown a propensity of repeatedly overstaying leave.

14. The testimony of the five witnesses, cumulatively read would be that the petitioner was a habitual offender i.e. in his 14 years service he had overstayed leave 13 times, due to which on 3 occasions, when the leave was excessive, he was tried for offences punishable under Section 19(b) and was convicted. Twice he had simply abandoned the Battalion and came back after 52 days and 39 days respectively. Once, he committed an offence punishable under Section 30(b) of the BSF Act i.e. used a railway warrant which entitled him to travel by second class to travel in the first class. On one occasion he left the duty post without permission of the superior officer and when confronted used insubordinate language. The testimony of the witnesses and the authorised documents would establish that with respect to the medical papers submitted by the petitioner which were exhibited as M, M-1, M-2 and M-3, the department was of the view that the possibility of the same being procured could not be ruled out.

15. The Court held the petitioner guilty and levied the penalty of being dismissed from service against which appeal preferred by the petitioner was rejected by the Appellate Authority.

16. A two-fold contention was advanced at the hearing of the appeal. The first was that there was no reason to disbelieve the medical certificates Ex.M, Ex.M-1, Ex.M-2 and Ex.M-3. The second was that the penalty of dismissal from service for overstaying leave was shockingly

disproportionate.

17. From the statement of facts noted above, it is apparent that the petitioner showed a propensity of overstaying leave. He showed disobedience by leaving the duty post. He showed the propensity of using insubordinate language against the superior officers. He showed the propensity of misusing his railway warrant which entitled him to travel by second class.

18. It is trite that past conduct of a person's holding a civil post under the Government would be a relevant consideration on the subject of quantum of the penalty levied.

19. During arguments, learned counsel for the petitioner failed to give any rational explanation as to why did the petitioner not get himself and his wife treated at a Government Hospital to which they were entitled to, free of cost, and what was the reason for the petitioner to spend money from his pocket by getting himself treated as also his wife at a private hospital. The answer given by learned counsel was that the petitioner and his wife had confidence in private doctors, a plea which would be worthy of consideration if the past conduct of the petitioner was not of a person who was habituated to repeatedly either overstaying the leave or simply abandoning his Battalion and returning at his will. But more than that, we have evidence that when the apprehension roll was issued the police authorities could not locate the petitioner in his house, meaning thereby, the petitioner was not so unwell that he had to remain confined in his house. It is apparent that the petitioner was moving about.

20. It thus cannot be said that the subjective satisfaction formed by the Security Force Court that the medical papers submitted by the petitioner were suspect is sans any objective foundation. This Court exercising writ jurisdiction, will not substitute the subjective satisfaction recorded by a

statutory authority which is based on objective facts.

21. A fact of relevance on this aspect also needs to be noted. After he was dismissed from service, on August 17, 2003, the petitioner was apprehended by the police of Thana Phoop while selling one SAF Carbine Machine bearing No.15224185 along with the magazine and 68 rounds to a gang of dacoits for a sum of ₹2 lacs. This fact was brought by the notice of the police authorities to the BSF authorities and it transpired that the weapon was issued to one Nk.Om Prakash of the Water Wing of BSF and it went missing from the armoury of the Battalion HQ Bhuj on March 29, 1995. In the month of March 1995, the petitioner was performing duty at the Battalion HQ, Bhuj.

22. Thus, we repel both the contentions advanced.

23. The petition is dismissed but without any orders as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 12, 2015

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