

\$~5

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of Decision: February 02, 2015

+

W.P.(C) 6123/2013

JITENDRA NATH SINGH

..... Petitioner

Represented by: Mr.Karan Johri, Advocate

versus

UNION OF INDIA & ORS

..... Respondents

Represented by: Ms.Barkha Babbar, Advocate for UOI

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J. (Oral)

CM No.13491/2013

Allowed.

W.P.(C) 6123/2013

1. Exercising power under Section 11(2) of the BSF Act, 1968 read with Rule 122 and Rule 177 of the BSF Rules, 1969, the petitioner has been dismissed from service vide order dated February 26, 2004.
2. Relevant facts would be that the petitioner was posted at the Sector Headquarters of BSF in Guwahati. He was transferred to the 137th Bn. stationed at Mawapat in Shillong. He was relieved by the Sector Headquarters in Guwahati on March 04, 2003 (AM). Granted admissible joining time, the petitioner was to report to the Commandant 137th Bn. BSF in the afternoon of March 14, 2003. He did not report to the Commandant of 137th Bn. BSF in afternoon of March 14, 2003. Letters sent at his

permanent address given by him when petitioner was enrolled as a Constable in BSF, on May 22, 2003 and June 15, 2003 remained unresponded; the latter letter being received back with the postal remark that the individual had already proceeded for his duties.

3. On June 19, 2003 the petitioner reported to the Commandant of the 137th Bn. BSF and verbally told him that he had fallen sick in his house and this was the reason why he could not join on time. The Commandant told the petitioner to produce valid medical documents concerning the period of his absence and required him to resume duties pending consideration of a decision to be taken as to in what manner the period of absence needed to be treated, but the petitioner absconded on June 19, 2003 itself. He did not even record his arrival in the general duty register. Thereafter two letters were received from the petitioner in which he claimed to be having pain below the waist in his right leg. The letters were addressed by the petitioner to the IG Frontier Headquarters. They were forwarded to the unit. The petitioner met the Commandant on June 20, 2003 who sent him to the Sector Patgaon but he absconded. Letters were sent to the petitioner on June 26, 2003, July 17, 2003, August 27, 2003 and September 18, 2003 requesting him to report to the Commandant of his unit and bring along with him his medical papers. In between, two telegrams dated June 17, 2003 and June 20, 2003 were also sent. The petitioner did not respond.

4. On September 20, 2003, an apprehension roll was issued requiring the Superintendent Police Azamgarh to apprehend the petitioner and produce him before the nearest Battalion of BSF, for the reason, the petitioner's permanent address is in a village in District Azamgarh, U.P. The police could not apprehend the petitioner as he was not found in his house.

5. Proceeding under Section 62 of the BSF Act 1968, a Court of inquiry

was conducted to investigate into the circumstances under which the petitioner was absent without leave. On the basis of the findings of the Court of inquiry a show cause notice dated November 15, 2003 was issued to the petitioner under Section 11(2) read with Rule 22(2) and Rule 177 of the BSF Rules to show cause why he should not be dismissed from service and in which show cause notice the petitioner was given 30 days' time to respond to the notice. The notice which was sent by a registered letter was received back with the remark by the postal authorities that on December 04, 2003 the addressee had refused to accept the postal docket. Since no response was received from the petitioner to the show cause notice dated November 15, 2003, the Commandant of the 137th Bn. BSF passed an order on February 26, 2004 noting that the petitioner was illegally absent, having not been sanctioned any leave, and had failed to respond to the show cause notice dated November 15, 2003. He was dismissed from service with effect from February 26, 2004 and the period from March 15, 2003 to February 26, 2004 (348 days) was treated as dies non.

6. The writ petitioner filed W.P.(C) No.47675/2003 in the High Court of Judicature at Allahabad seeking directions against the BSF authorities to allow him to join the battalion to which he was attached, which writ petition was disposed of on May 11, 2007 directing the petitioner to avail the remedy under Rule 28A of the BSF Rules, 1969 by approaching the DG BSF. The petitioner thereafter submitted a representation dated nil to the DG BSF which was considered on merits. The photocopy of the medical papers submitted by the petitioner were considered. On July 17, 2007, the DG BSF rejected the representation submitted by the petitioner, which has also been challenged by the petitioner in the writ petition.

7. The petitioner filed W.P.(C) No.48382/2007 before High Court of

Judicature in Allahabad which was dismissed on February 20, 2013 on the ground that since no cause of action accrued within the territorial jurisdiction of the State of Uttar Pradesh, the High Court had no territorial jurisdiction to entertain the writ petition. Thereafter, the instant writ petition was filed praying that the order dated July 17, 2007 passed by the DG BSF be quashed and the petitioner be reinstated in service.

8. The service record of the petitioner would evince that he joined service as a Constable in BSF on December 01, 1989 and served approximately for 18 years till when he was dismissed from Service on February 24, 2004. He had 13 good entries and has been awarded three punishments on December 17, 1994, June 23, 1995 and January 24, 2003 being severely reprimanded twice and reprimanded once.

9. From the conspectus of the facts above noted, which are not in dispute it is apparent that the petitioner was absent without leave for a continuous period of 348 days from March 15, 2003 till February 26, 2004. The petitioner claims that the reason for his absence was he suffering from pain below his waist, and the documents on which the petitioner places reliance are the recommendations of one Dr.Zubair Ahmad at the Primary Health Centre, Azamgarh prescribing medicine to the petitioner and advising rest. The same record that the petitioner was suffering from sciatica.

10. The petitioner has not explained as to why he went to Azamgarh when he was relieved on March 04, 2003 in the afternoon from the Sector Headquarter at Guwahati for him to report to the Commandant of the 137th Bn. BSF in the afternoon of March 14, 2003. The petitioner has not explained why he refused to receive the show cause notice dated November 15, 2003. The petitioner has not explained he not being found in his house by the police authorities when the apprehension roll dated September 20,

2003 was sought to be executed. Concededly, the petitioner did not respond to the show cause notice dated November 15, 2003.

11. Relying upon the decision reported as (1996) 7 SCC 546 UOI & Ors. Vs. Ramphal, it is urged that for exercising power under Section 11 (2) of the BSF Act, 1968 an inquiry is required to be held and merely giving a show cause notice cannot be regarded as sufficient compliance with the principles of natural justice. It is urged that since no inquiry was conducted by the Commandant the order dismissing petitioner from service deserves to be quashed.

12. In dealing with the said contention advanced by the petitioner, it would be most relevant to note Section 11 of the BSF Act, 1968 and the same reads as under:-

“11. Dismissal, removal or reduction by the Director-General and by other officers – (1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in sub-section (2) may reduce to a lower grade or rank or ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any person under this section shall be subject to the provisions of this Act and rules.”(Emphasis Supplied)

13. In exercise of powers conferred upon it by sub-sections (1) and (2) of the BSF Act, 1968 the Central Government has framed BSF Rules, 1969.

Rule 177 whereof reads as under:-

“The Commandant may, under sub-section (2) of Section 11, dismiss or remove from the service any person under his command other than an officer or a subordinate officer.”

14. In the decision reported as (1989) 3 SCC 314 Gouranga Chakraborty vs. State of Tripura & Another the appellant therein, enrolled as a Constable with BSF, was dismissed by his Commandant in exercise of the power under Section 11(2) of the BSF Act, 1968 for having remained unauthorizedly absent from duty for a prolonged period. The order dismissing the appellant from service was assailed mainly on the ground that said order was not made in accordance with the provisions of BSF Act and Rules framed thereunder, inasmuch as the appellant was neither tried nor awarded punishment by the Security Force Court as required under the BSF Act. It was contended that unless and until the offence of absence without leave or overstaying leave granted to a member of the Force, without sufficient cause, is tried by the Security Force Court and punishment is awarded therefore as provided in Sections 48 and 50 of the BSF Act, the impugned order of dismissal from service of the appellant passed by the Commandant is illegal and liable to be quashed. It was further contended that the power of Commandant under Section 11(2) of the Act read with Rule 177 of the Rules is subject to sub-section (4) of Section 11 i.e. the exercise of this power is subject to the provisions of the Act and Rules, that is to say, the Commandant is not competent to dismiss a member of Force from service unless the Security Force Court has tried him and awarded punishment in accordance with the procedure prescribed by the Act and Rules framed thereunder.

15. The aforesaid contention(s) were repelled by the Supreme Court in the following terms:-

“We have scrutinized the relevant provisions of the BSF Act as well as the BSF Rules framed thereunder and we have no hesitation to hold that the power under Section 11(2) of the Act empowering the Prescribed Authority, i.e. the Commandant to dismiss or remove from service any person under his command other than an officer or a subordinate officer read with Rule 177 of the said Rules is an independent power which can be validly exercised by the Commandant as a prescribed officer and it has nothing to do with the power of the Security Force Court for dealing with the offences such as absence from duty without leave or overstaying leave granted to a member of the Force without sufficient cause and to award punishment for the same. The provision of sub-section (4) of Section 11 which enjoins that the exercise of the power under the aforesaid section shall be subject to the provisions of the Act and the Rules does not signify that the power to dismiss a person from service by the Commandant for his absence from duty without leave any reasonable cause or for overstaying leave without sufficient cause and holding them as undesirable cannot be exercised unless the Security Force Court has awarded punishment to that person in accordance with the procedure prescribed by law. The Prescribed Authority i.e. the Commandant is competent to exercise the power under Section 11(2) of the said Act and to dismiss any person under his command as prescribed under Rule 177 of the BSF Rules....In this case though no procedure has been prescribed by the Rules still the Commandant duly gave an opportunity to the appellant to submit his explanation against the proposed punishment for dismissal from service for his absence from duty without any leave and overstaying leave without sufficient cause. The appellant did not avail of this opportunity and he did not file any show cause to the said notice. Thus the principle of natural justice was not violated as has been rightly held by the High Court.”(Emphasis Supplied)

16. Then came the decision of Supreme Court reported as (1996) 7 SCC 546 Union of India vs. Ram Phal. In said case, the respondent was enlisted as a Constable in BSF. On December 21, 1983 respondent was found absent in the Coy Roll. He was not to be found in the Unit lines as well. When he

did not report for duty for a prolonged period, on January 01, 1984, a notice was sent to him directing him to report for duty forthwith but he did not turn up. One more notice was sent to respondent but there was no response from him. Thereafter, an inquiry was ordered under Section 62 of the BSF Act and ultimately respondent was declared to be a deserter. On account of his continuous absence, on April 20, 1984, a show cause notice was issued to the respondent calling upon him to show cause why he should not be dismissed as his further retention in service was considered undesirable, which notice was not responded to by the respondent. Thereafter, on April 05, 1984, the Commandant passed an order under Section 11(2) of the BSF Act dismissing respondent from service. The order of dismissal was essentially challenged by respondent on the ground that it was not within the competence of the Commandant to pass dismissal order and that the penalty of dismissal from service could not have been imposed without holding a trial by the Security Force Court in the manner prescribed by the Act and the Rules. After noting its earlier decision in Gouranga's case (supra), the Court held that the contentions advanced by respondent that order of dismissal could not have been passed without first holding a trial by the Security Force Court and that the Commandant had no authority to pass an order dismissing respondent under Section 11(2) of the BSF Act, 1968 are fallacious.

17. Thereafter, the Court noted that earlier there was no provision in the BSF Act and Rules indicating the circumstances and manner in which power conferred under Section 11(2) of BSF Act is to be exercised, but in the year 1996 such a provision was incorporated in Rule 20 of the BSF Rules. The Court then proceeded to note the relevant portion of Rule 20. Significantly, the relevant portion of Rule 20 quoted by Supreme Court reads as under:-

“(1) Where in the opinion of Director General a person subject to the Act has conducted himself in such manner

18. In view of provisions of Rule 20 noted by it, particularly clause 7 thereof, Supreme Court held that *‘after introduction of Rule 20 in the Rules it cannot be validly contended that no inquiry be held while exercising the power under Section 11(2)’*.

19. The Supreme Court then proceeded to consider whether the procedure prescribed for exercising power under Section 11(2) was followed by the Commandant in said case. In said regards, it would be most apposite to note the following observations made by the Court:-

“We will now examine if the prescribed procedure was followed in this case. The show-cause notice clearly appears to have been issued in terms of sub-rule 1 of Rule 20. It reads as under:- ‘

“You have been absent without leave with effect from 21-12-1983. I am of the opinion that because of this absence without leave for such a long period, your further retention in service is undesirable. I, therefore, tentatively propose to terminate your service by way of dismissal. If you have anything to urge in your defence or against the proposed action, you may do so before 4-5-1984. In case no reply is received by that date, it will be inferred that you have no defence to put forward.”

8. *The first sentence in the notice that “You have been absent without leave with effect from 21-12-1983” satisfied the requirements of sub-rule (3). When it further stated that “I am of the opinion that because of this absence for such a long period, your further retention in service is undesirable” it complied with the requirement of sub-rule (1) and as required by sub-rule (2) it was further stated therein that “I, therefore, tentatively propose to terminate your service by way of dismissal”. The respondent was called upon to show cause within seven days as required by sub-rule (6). No further inquiry was held; but we find that nothing further was required to be done in this case. The respondent did not reply to the notice. There was no denial of the allegations and no request to hold an inquiry. Therefore, it was not incumbent upon the*

Director General to appoint an inquiry officer to conduct an inquiry in the manner prescribed by Rule 21. Thus the prescribed procedure was followed before passing the dismissal order. The courts below have failed to appreciate the correct position of law and the facts. It was therefore wrongly held that the order of dismissal was illegal as it was not in accordance with the provisions of the Act and the rules.” (Emphasis Supplied)

20. In a nutshell, the ratio laid down by the Supreme Court in Ram Phal’s case (supra) is as follows: It is incumbent upon a prescribed officer to conduct an inquiry before dismissing/removing a person in exercise of his power under Section 11(2) of the BSF Act, 1968 only when the concerned person had responded to the show cause notice issued to him and denied the allegations levelled against him. (The aforesaid ratio is based upon the premise that Rule 20 of the BSF Rules, 1969 as noticed by Supreme Court envisaged conduct of an inquiry in case where the person issued with show cause notice denies the allegations levelled against him).

21. As already noted hereinabove, in exercise of his power under Section 11(2) of the BSF Act, 1968 the Commandant dismissed the petitioner from service vide order dated February 26, 2004.

22. On the date of dismissal of petitioner from service i.e. February 26, 2004, the procedure for exercise of power under Section 11(2) of the BSF Act, 1968 was laid down in Rule 22 of BSF Rules, 1969, which reads as under:-

“22. Dismissal or removal of persons other than officers on account of misconduct – (1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in sub-rule (2) against such action:
Provided that this sub-rule shall not apply-

(a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or

(b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the persons concerned an opportunity of showing cause.

(2) Where 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 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 public interest.

(3) The competent authority after considering his explanation and defence if any may dismiss or remove him from service with or without pension:

Provided that a Deputy Inspector-General shall not dismiss or remove from service, a Subordinate Officer of and above the rank of Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to the Director-General.”

23. Rule 22 of BSF Rules, 1969 noted above or any other provision under the BSF Act or Rules envisage conduct of inquiry for exercise of power under Section 11(2) of BSF Act, 1968. The ratio laid down by Supreme Court in Ram Phal's case (supra) that it is incumbent upon a prescribed officer to conduct an inquiry before dismissing/removing a person in exercise of his power under Section 11(2) of the BSF Act is premised upon the fact that Rule 20 of the BSF Rules, 1969 as noticed by Supreme Court envisaged conduct of an inquiry in case where the person issued with show

cause notice denies the allegations levelled against him, which is not the case with Rule 22 applicable in the instant case. In view thereof, the submission advanced by the petitioner that the Commandant ought to have conducted an inquiry before dismissing the petitioner from service in exercise of his power under Section 11(2) of the BSF Act is clearly fallacious and therefore rejected.

24. At this stage we need to highlight that when the decision was pronounced by the Supreme Court in Ram Phal's case (supra) Rule 20 as it existed before it was substituted on May 29, 1990 was noted by the Supreme Court. As of today, the substituted Rule reads as under:-

“20. Termination of service of officers by the Central Government on account of misconduct-

(1) When it is proposed to terminate the service of an officer under section 10 on account of misconduct, he shall be given an opportunity to show cause in the manner specified in sub-rule (2) against such action:-

Provided that this sub-rule shall not apply:-

(a) Where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or

(b) Where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(2) When after considering the reports on an officer's misconduct, the Central Government or the Director General, as the case may be, is satisfied that the trial of the Officer by a Security Force Court is in-expedient or impracticable, but is of the opinion, that the further retention of the said officer in the service is undesirable, the Director General shall so inform the officer together with particulars of allegation and report of

investigation (including the statements of witnesses, if any, recorded and copies of documents if any, intended to be used against him) in cases where allegations have been investigated and he shall be called upon to submit, in writing, his explanation and defence:

Provided that the Director General may withhold disclosure of such report or portion thereof if, in his opinion, its disclosure is not in the interest of the security of the State.

(3) In the event of explanation of the Officer being considered unsatisfactory by the Director-General, or when so directed by the Central Government, the case shall be submitted to the Central Government with the Officer's defence and the recommendations of the Director-General as to the termination of the Officer's service in the manner specified in sub-rule (4).

(4) When submitting a case to the Central Government under the provision of sub-rule (2) or sub-rule(3), the Director-General shall make his recommendation whether the Officer's service should be terminated, and if so, whether the officer should be-

- (a) dismissed from the service; or*
- (b) removed from the service; or*
- (c) retired from the service; or*
- (d) called upon to resign.*

(5) The Central Government, after considering the reports and the officer's defence, if any, or the judgement of the Criminal Court, as the case may be, and the recommendation of the Director-General, may remove or dismiss the officer with or without pension, or retire or get his resignation from service, and on his refusing to do so, the officer may be compulsorily retired or removed from the service with pension or gratuity, if any, admissible to him."

25. There is thus no merit in the said contention advanced.
26. As regards the justification by the petitioner that he was suffering from sciatica and for which some medical papers are relied upon by the

petitioner, we find from the record that the petitioner never submitted the same to the Commandant. They were submitted for the first time when petitioner made a representation to the DG BSF somewhere in the year 2007. The fact that the petitioner was able to move about is evident from the fact that the police authorities could not locate him in his house when the apprehension roll dated September 23, 2003 was sought to be executed. The petitioner did reach the 137th Bn. BSF on June 19, 2003, which shows that he was mobile, but has not explained why he did not produce the medical documents on said date and why did he abscond on said date itself once again without making any entry of his arrival in the general duty register.

27. There is thus no merit in the writ petition which is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 02, 2015
mamta