

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7351 OF 2013

Subhash s/o Uddhavrao Rathod,
age 45 years, occ. Labour,
R/o Achari Tanda, Murum,
Taluka Omerga, Dist. Osmanabad ...Petitioner

VERSUS

- 1] The Union of India,
- 2] The Director General,
Border Security Force,
Block 10, C.G.O. Complex,
Lodhi Road, New Delhi,
- 3] Narendra Singh Dagawas Irala,
age major, occ. Service
as Inspector General,
Border Security Force Frontier,
Headquarters (North Bengal),
P.O. Kadamtala, District Darjiling,
State of West Bengal,
Residential Address :
8/36, Hari Nagar,
Near Shastri Nagar,
Logal Road, Ajmer
(Rajasthan State),
- 4] T.G.Simte,
age 48 years, occ. Service as
Commandant, 48 Battalion,
Baikunthpur, Dist. Jalpaigudi,
(North Bengal),
State of West Bengal ...Respondents

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Mr. R.B.Ade, advocate for the petitioner
Mr.S.B.Deshpande, ASG for respondent nos. 1 and 2
Respondent no.3 served

CORAM : S.V.GANGAPURWALA & SUNIL K.KOTWAL, JJ.

DATE OF RESERVING THE JUDGMENT : 16.7.2018

DATE OF PRONOUNCEMENT OF JUDGMENT : 24.8.2018

J U D G M E N T (Per Sunil K. Kotwal, J.)

Rule. Rule is made returnable forthwith.
With the consent of the learned counsel for the parties, the petition is taken up for final hearing.

2. This petition is filed for quashment of the order, dated 30.4.2010, passed by respondent no.4, dismissing the petitioner from the service of Border Security Force (BSF).

3. Learned counsel for the petitioner submits that petitioner joined service in BSF as constable on 23.1.1990. Initially he married with one Fulshree alias Alka on 28.5.1996. However, on account of

matrimonial dispute, petitioner was constrained to file divorce petition in the Court of Civil Judge, Senior Division, Osmanabad against his wife Fulshree on 25.7.1997. As a counter blast, even Fulshree filed FIR against the petitioner, which resulted into registration of offence against the petitioner under Section 498 A of the Criminal Procedure Code. Even proceeding under Section 125 of the Criminal Procedure Code was filed against the petitioner by his first wife Fulshree.

4. Next submission of learned counsel for the petitioner is that on 3.1.1999 petitioner received telegram at his head quarter which was sent by the brother of Fulshree that Fulshree died in accident. Therefore, petitioner rushed to the parental home of Fulshree and he was informed that Fulshree was no more. Being satisfied that Fulshree was dead, the petitioner performed second marriage with Gauri daughter of Hamla Pawar on 9.5.1999. After marriage,

petitioner got recorded name of his second wife in his service record.

5. Next contention of learned counsel for petitioner is that subsequently on 24.8.2003 the first wife of petitioner submitted written complaint to respondent no.3 regarding second marriage of the petitioner. In the result, petitioner was suspended. Subsequently, his suspension was revoked by respondent no.3. However, because petitioner made certain complaints against respondent no.3 regarding fake encounter, with mala fide intention show cause notices were served to the petitioner for termination of his service.

6. Learned counsel for the petitioner submits that without holding departmental inquiry against the petitioner and without giving opportunity of hearing the petitioner was dismissed from service on 30.4.2010. He submits that the order of dismissal

being passed in violation of principles of natural justice is illegal and deserves to be set aside.

7. Learned Additional Solicitor General for respondent nos. 1 and 2 submits that in the case at hand the second marriage of the petitioner during the subsistence of his first marriage with Fulshree alias Alka is an admitted fact and even petitioner has admitted the same by submitting application at his head quarter on 25.8.2003. His contention is that under Rule 21 (1) of the Central Civil Services (Conduct) Rules, 1964 (CCR) government servant cannot enter into or contract a marriage having his first wife living. He has drawn our attention to Rule 7 (1) of the Border Security Force Rules, 1969, which indicates that performing second marriage by member of BSF during the subsistence of his first marriage amounts to disqualification.

8. His next submission is that before passing

order of dismissal show cause notice as mandated under Rule 22 BSF Rules was served on the petitioner. Opportunity of submitting explanation was given to him. Therefore, obviously there is no violation of principles of natural justice while passing the order of dismissal.

9. For clarification Rule 21 of CCR and Rule 7 BSF Rules are reproduced as under :-

" 21. Restriction regarding Marriage-

(1) No Government servant shall enter into, or contract, a marriage with a person having a spouse living; and

(2) No Government servant, having a spouse living, shall enter into, or contract, a marriage with any person:

Provided that the Central Government may permit a Government servant to enter into, or contract, any such marriage as is referred to in clause (1) or clause(2), if it is satisfied that-

(a) such marriage is permissible under the personal law applicable to such Government servant and the other party to the marriage; and

(b) there are other grounds for so doing.

(3) A Government servant who has married a person other than of India Nationality shall forthwith intimate the fact to the Government."

" 1[7.Disqualification.—

(1) No person—

(a) who has entered into or contracted a marriage with a person having a spouse living, or

(b) who having a spouse, has entered into or contracted a marriage with any person, shall be eligible for appointment into Force : Provided that the Central Government may if satisfied that such marriage is permissible under the personal law applicable to such person and the other party to the marriage and that there are other grounds for so doing, exempt any person from the operating of this rule.] "

10. In the case at hand, after hearing learned counsel for the parties and after going through the record placed before this Court by both the rival parties, it reveals that admittedly during the subsistence of first marriage of Fulshree and during her life time petitioner performed second marriage with one Gauri on 9.5.1999. Even petitioner has admitted the performance of second marriage by submitting application dated 25.8.2003 to his Commander (Annexure R-3). In view of these admitted facts, question of holding fresh inquiry regarding the second marriage of the petitioner does not arise.

11. The only defence raised by the petitioner is that on 3.1.1999 he received telegram at his head quarter regarding accidental death of his wife Fulshree, sent by brother of Fulshree. According to the petitioner, after getting knowledge of the said mishap, he rushed to his native place and to the parental home of Fulshree and he was informed that Fulshree was no more and, therefore, he performed second marriage with Gauri on 9.5.1999. However, such plea raised by petitioner is not at all acceptable. On the contrary, it must be observed that the petitioner did not hesitate even to make false statement before this Court regarding the above said telegram. Respondents placed on record the said telegram (Annexure R-1) which shows that it was received at the head quarter of petitioner on 10.10.2000 and it was sent by brother of the petitioner namely Shri Vasant Rathod. Thus, obviously after performance of second marriage on 9.5.1999 petitioner has tried to create such false

defence by managing to issue the above said telegram dated 10.10.2000 through his brother, with intent to absolve himself from the charge of misconduct. This conduct of the petitioner is absolutely objectionable.

12. Thus, we have no hesitation to hold that the defence raised by the petitioner regarding performance of his second marriage on account of receipt of news of death of his first wife is not at all acceptable. On the other hand, the above circumstances on record indicate that the petitioner knowingly performed second marriage during the subsistence of his first marriage and during the life time of his wife Fulshree.

13. In view of this undisputed second marriage of the petitioner during the subsistence of first marriage and during the life time of his first wife, certainly the petitioner is guilty of misconduct

under Rule 21 of CCR and disqualified under Rule 7 (1) of BSF Rules.

14. Record shows that as mandated under Rule 22 of the BSF Rules, show cause notices of termination were served on the petitioner on 13.4.2009, 17.12.2009 and 3.3.2010. In response to these notices, explanation was also submitted by the petitioner. The impugned order, dated 30.4.2010, passed by respondent no.4 Commandant indicates that the explanations submitted by the petitioner were considered by the competent authority and as those explanations were not satisfactory the order of dismissal was passed on 30.4.2010.

15. After service of order of dismissal dated 30.4.2010, representations were submitted by the petitioner to the Director General, BSF on 10.5.2010, 3.5.2010 and 3.6.2010. All representations were rejected by competent authority on 29.9.2010. Again

last representation was submitted by petitioner to the Director General on 12.9.2011, which was also rejected on 8.11.2011 by assigning detailed reasons for rejection. Thus, by no stretch of imagination, it can be held that opportunity of hearing was not given to the petitioner or there was violation of principles of natural justice. On the other hand, we are satisfied that the disciplinary authority has duly followed proper procedure under BSF Rules and after giving sufficient opportunity of hearing to the petitioner passed well reasoned impugned order dated 30.4.2010.

16. Last submission of learned counsel for the petitioner is that considering the young age of the petitioner and his responsibility, the punishment of dismissal is disproportionate and some lesser punishment be imposed. However, in view of "Chief Executive Officer Krishna District Co-operative Central Bank Ltd. and another Vs K. Hanumantha Rao

and asnother (2017 (4) Mh.L.J. 484)" while exercising their powers of judicial review over such matters, Courts do not sit as appellate authority. Decision qua the nature and quantum is the prerogative of the disciplinary authority. It is not the function of the High Court to decide the same. Court can interfere only when the punishment is shockingly disproportionate to the extent that it shakes the conscience of the Court. In the case at hand, considering the over all conduct of the petitioner and gravity of the misconduct, we are satisfied that the punishment of dismissal from service is absolutely appropriate punishment and it needs no interference by this Court. It follows that this Writ Petition fails. Writ Petition is dismissed. Rule is discharged. No costs.

[SUNIL K.KOTWAL, J.] [S.V.GANGAPURWALA, J.]

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