

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.09.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.No.29724 of 2003

T.Ashokan

..Petitioner

..Vs..

1.Director General,
Boarder Security Force,
C.G.O.Complex, Lodhi Road,
New Delhi.

2.Deputy Inspector General,
Boarder Security Force,
Kashmir.

3.The Commandant,
Boarder Security Force,
56, A.P.O,
Kashmir.

4. 2nd in Commandant,
193 Bn, Boarder Security Force.

...Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records relating to the order passed by the 3rd respondent dt.4.4.2003 in his Order No: Estt/103/193/ 03/105-11 quash the same and to direct the respondents to take the petitioner into the strength of Border Security Force as Constable with all monetary benefits.

For petitioner : Mr.M.MD.Ibrahim Ali

For Respondents: Mr.J.Madana Gopal Rao, CGSC

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O R D E R

The prayer sought for herein is for a writ of certiorarified mandamus, to call for the records relating to the order passed by the third respondent, dt.04.04.2003 in his Order No.Esst/103/193/03/105-11, quash the same and to direct the respondents to take the petitioner into the strength of Border Security Force as Constable with all monetary benefits.

2. The short facts which are required to be noticed for the disposal of this writ petition are as follows :

The petitioner joined as Constable in the Border Security Force on 01.01.1984. He had served at Gujarat, Assam, Meghalaya, Punjab and Jammu & Kashmir States. After serving for 18 years, he had been issued with a show cause notice by the respondents, dated 12.03.2003 asking show cause as to why the petitioner shall not be retired compulsorily from service, in view of the unsuitability. In response to the said show cause notice, the petitioner had given his reply on 23.03.2003. Without considering the same in proper prospective, the order of retirement was passed by the fourth respondent on 04.04.2003. Challenging the same, the present writ petition has been filed.

3. Mr.M.Md.Ibrahim Ali, learned counsel appearing for the petitioner would submit that, first of all the fourth respondent does not have any jurisdiction to pass the impugned order of compulsory retirement by invoking Rules 26 of the Border Security Force Rules, 1969 (herein after referred to as "the BSF Rules"). Secondly when the show cause of the respondents had been properly replied by the petitioner on 23.03.2003, where he had specifically averred that after having 18 years of service, he shall not be sent out uncherished by invoking Rules 26 of the BSF Rules and he was the only breadwinner of the family and abruptly if the service of the petitioner is stopped by way of compulsory retirement, the whole family would be put in hardship. All these aspects mentioned in the reply to the show cause notice given by the petitioner has not been considered, but cryptic order, dated 04.04.2003 has been passed by the fourth respondent. Therefore the said order shall not stand in legal scrutiny.

4. Per contra, Mr.J.Madana Gopal Rao, learned Central Government Standing Counsel would submit that, the petitioner during his 18 years service had been punished at least for 5 times. In this regard, he relied upon the details of punishments already awarded to the petitioner and this has also been reflected in the show cause notice, which reads thus :

"Whereas, I have perused your service record for last 18 years. You were given undermentioned punishments during the above period :

S.No.	Awarded under which section	Punishment	Date of punishment
a)	u/s 19(b)	14 days RI	14.02.1992
b)	u/s 19(b)	14 days RI	20.12.1994
c)	u/s 19(b)	14 days RI	21.05.1997
d)	u/s 19(b)	07 days RI	14.12.1998

e) u/s 19(b) 07 days RI 06.12.2001

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Whereas, because of your consistent poor performance, I am tentatively of the opinion that you are unsuitable for further retention in the Force. I, therefore, tentatively propose to retire you from the service under BSF Rules-26."

5. Since he had been consistently found unsuitable for the post of Constable in the BSF, the fourth respondent invoking the provisions of Section 26 of the BSF Rules, had issued the show cause notice. Even though it was replied by the petitioner, no suitable defence has been made and no satisfactory reply had been given by the petitioner, except the mercy plea made by him. The learned counsel would further submit that, in fact in the reply of the petitioner, he has admitted his misdeeds and mistakes.

6. In view of the said position, the respondents, especially the third respondent and the fourth respondent do not have any other option except to invoke Rules 26 of the BSF Rules, which enables the Commandants to compulsorily retire the unsuitable persons on the satisfaction that the services of the individuals are no more required on the grounds of unsuitability and accordingly, the impugned order of compulsory retirement had been passed on 04.04.2003.

7. The learned counsel appearing for the respondents by relying upon the files would also submit that, pursuant to which the retiral pensionary benefits payable to the petitioner had been ordered by order, dated 29.04.2003.

8. I have considered the said submissions made by the learned counsel appearing for the petitioner as well as the respondents.

9. The first ground raised by the petitioner was that the invocation of Rule 26 shall be made only by the Commandant, i.e., the third respondent under whom the petitioner was working, but the said Rule was invoked by the fourth respondent, under whom the petitioner was not working and he is only the second-in-command and therefore such invocation of Rule 26 by the fourth respondent is without jurisdiction and therefore on that ground, the impugned order can be interfered with.

10. In order to meet the said submission, the learned standing counsel for the respondents would rely upon Rule 26 as well as Rule 16(2)(a) of the BSF Rules, which reads thus :

"26. Retirement of enrolled persons on grounds of unsuitability - Where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force the Commandant may, after giving such enrolled person an opportunity of showing cause (except where he considers it to be impracticable to give such opportunity), retire from the Force the said enrolled person.

16.Command -...

(2) (a) In the contingency of an office being unable to exercise the command, which he has been appointed, due to any reason, the command shall devolve on the second-in-command, if one has been so appointed."

11. Rule 26 makes it abundantly clear that, if the Commandant is satisfied that the enrolled person is unsuitable to be retained in the force, he may, after giving notice to such person can retire such person from the force. Therefore, Rule 26 contemplates only a summary procedure. Here the only criteria was the satisfaction of the Commandant about the suitability and unsuitability of the enrolled person to be retained in the force.

12. Here in the case on hand, as has been rightly pointed out by the learned standing counsel for the respondents, five times already the petitioner suffered with punishment consistently in all the 18 years of service. When a show cause notice under Rule 26 was issued, the petitioner has given the following reply :

"It is requested that, I felt always myself as unfortunate and due to some unavoidable reason, I was found myself compelled to commit such blunder time and again otherwise I had no intention to commit such kind of mistake repeatedly."

13. Because of the candid admission made on behalf of the petitioner that, due to compelling reasons, he had committed the blunder time and again, the respondents had invoked Rule 26 and passed the order of compulsory retirement. Even though a short order has been passed on 04.04.2003, which is impugned herein, stating the reason that the Commandant was not satisfied with the explanation offered by the petitioner, on perusal of the reply given by the petitioner, this Court satisfied that based on the said reply, no employer can decide other wise, except to retire the person compulsorily, as the petitioner's unsuitability had already been found by the Commandant to his satisfaction.

14. In so far as jurisdiction is concerned, Rule 16(2)(a) makes it very clear that, in the contingency of an officer being unable to exercise the command, the command shall devolve on the second-in-command. Here in the case on hand, admittedly the fourth respondent is a second-in-command. Therefore under Rule 16(2)(a), he can very well exercise the power to be exercised by the third respondent Commandant and therefore for the said purpose including the power to invoke Rule 26 of the BSF Rules, can very well be exercised by the second-in-command by virtue of Rule 16(2)(a).

15. Here in the case on hand, Rule 16(2)(a) has been invoked and second-in-command, i.e., the fourth respondent has invoked the power under Rule 26 and accordingly passed the order. Therefore, the said plea raised by the learned counsel for the petitioner under the ground of jurisdiction is to be rejected by virtue of the clear provision available in the Rule itself.

16. In view of the above said position, that the invocation of Rule 26 and also the invocation of Rule 16(2)(a) of the BSF Rules cannot be found fault with and since there had been no satisfactory reply given by the petitioner, it can very well be presumed that the petitioner did not have any satisfactory reply to meet out the show cause issued by the respondents and therefore the satisfaction on the part of the respondents about the unsuitability of the petitioner to continue in the force can very well be found and therefore, based on which the decision taken by the respondents to make the petitioner compulsorily retire through the impugned order is quite justifiable. Therefore, this Court feels that it does not warrant any interference.

17. In so far as the consequential benefit of retiral and pensionary benefits of the petitioner is concerned, it is heavily relied upon by the learned standing counsel for the respondents that on 29.04.2003, an order has been passed to disburse the full compensatory pension and retirement gratuity admissible on the date of compulsory retirement of the petitioner.

18. However in the counter affidavit, nothing has been stated by the respondents about the said disbursement on retirement and pensionary benefits to the petitioner. It is also argued by the learned counsel for the petitioner that the petitioner had not received any retiral and pensionary benefits so far.

19. In view of the said position, this Court is inclined to pass the following order in this writ petition :

(1) The impugned order is sustainable, hence, the writ petition fails and accordingly it is dismissed.

(2) Consequently the petitioner shall be entitled to get the compensatory pension and retiral gratuity and other benefits as admissible.

(3) Though in this regard, an order claimed to have been passed by the respondents on 29.04.2003, since it is the stand of the petitioner that he has not received anything from the respondents, the respondents are hereby directed to verify whether the retiral and pensionary benefits are paid to the petitioner and if not, the same shall be paid within a period of two months from the date of receipt of a copy of this order.

With these directions, this writ petition is dismissed. No costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

mbi / tsvn

To

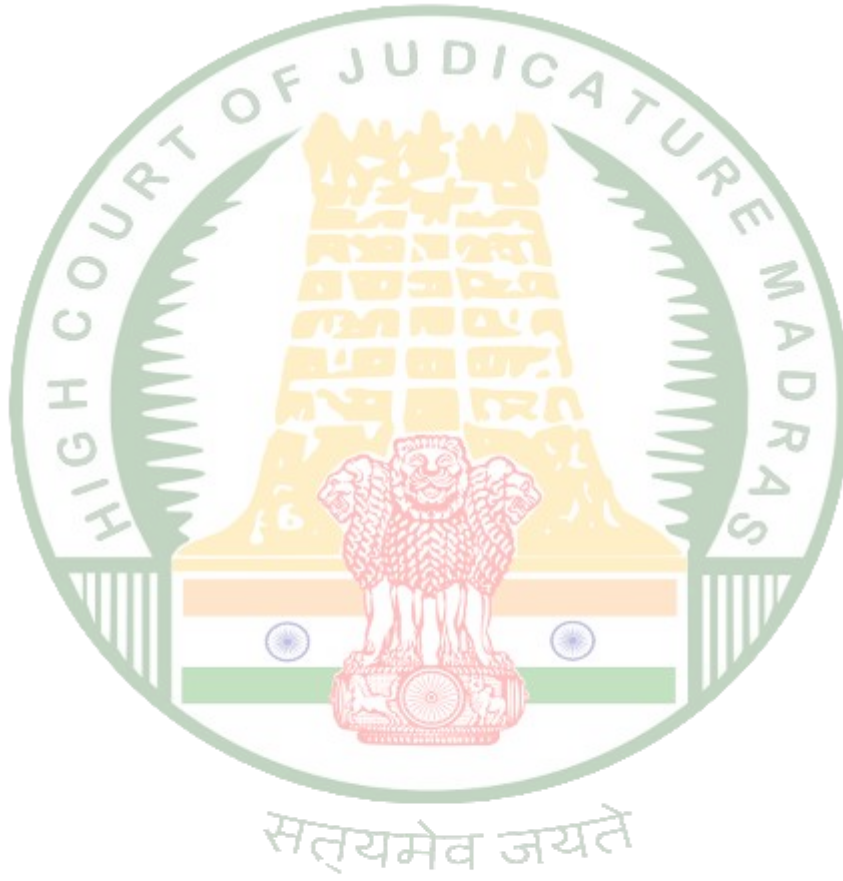
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+1cc to Mr.M.MD.Ibrahim, Advocate SR.No.66926

+1cc to Mr.J.Madanagopal Rao, Advocate SR.No.67015

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RR (CO)
GMY (09/05/2019)



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