

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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**CWP-1261-2016 (O&M)
Date of decision:05.04.2018**

Bikram Masih

...Petitioner

Versus

Union of India and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Arun Walia, Senior Advocate with
Mr. Mrinal Sharma, Advocate for the petitioner.

Ms. Anita Balyan, Advocate for respondent-UOI.

P.B. BAJANTHRI, J. (ORAL)

In the instant writ petition, petitioner has challenged show cause notice dated 28.10.2013 and consequential orders passed by the disciplinary authority in respect of dismissal from service and order of the appellate authority. The petitioner while working as Constable he had applied for leave for certain period i.e. up to 26.07.2013. Thereafter, he over stayed. In view of his over stay show cause notice was issued on 28.10.2013 while invoking sub-Rule 2 of Rule 22 of the Border Security Force Rules, 1969 (for short 'BSF Rules') read with Rule 177 of the BSF Rules and in confirmity of sub-Rule 2 of Rule 22 of BSF Rules while granting 30 days

time to submit his explanation. This was communicated to the petitioner on 28.11.2013 and the order of dismissal was passed on 29.11.2013. Petitioner had exhausted departmental remedies against the order of dismissal which were against the petitioner. Hence the present petition.

2. Learned counsel for the petitioner submitted that remaining over stay from leave amounts to misconduct. Therefore, respondents should have resorted to holding of inquiry. There is no reasons assigned to the extent that there is impracticability to hold an inquiry. It was also submitted that respondent-disciplinary authority should have waited 30 days from the date of receipt of the show cause notice dated 28.10.2013 which was served on the petitioner on 28.11.2013. In other words, hurriedly disciplinary authority imposed the penalty of dismissal on 29.11.2013. Such order would be arbitrary and illegal. It was also pointed out that when the disciplinary authority invoking Rule 22 read with sub-Rule 2 of Rule 22 of BSF Rules which empowers the competent authority to impracticability of holding trial, competent authority is required to satisfy that the trial of such person is inexpedient or impracticable but is of the opinion that further detention in the service is undesirable. In other words, sub-Rule 2 of Rule 22 of BSF Rules has not been complied while passing order of dismissal. Therefore, order of dismissal and consequential orders passed by the official respondents are liable to be set aside.

3. Per contra, learned counsel for the respondents while resisting the contentions of the petitioner submitted that having regard to the conduct of the petitioner that he over stayed for which show cause notice was issued on

28.10.2013 and it has been sent through post. Further special messenger has been sent to serve a copy of the show cause notice on 13.11.2013 for which petitioner refused to accept. Thereafter, special messenger has also informed the petitioner over telephone relating to issuance of show cause notice. Since there was no response from the petitioner on the show cause notice dated 28.10.2013. Respondents have resorted to impose the penalty of termination on 29.11.2013 i.e. on completion of 30 days stipulated in the show cause notice. Therefore, there is no infirmity in the order of dismissal. It was further contended that inquiry need not be held against the petitioner having regard to the conduct of the petitioner as he over stayed and he did not submit his explanation to the show cause notice. Therefore, there is no infirmity in the order of dismissal. Since Sub-Rule 2 of Rule 22 of BSF Rules, provides for dispensing of inquiry if the competent authority is of the opinion. Thus, petitioner has not made out a case so as to interfere with the order of dismissal and consequential orders.

4. Heard learned counsel for the parties.

5. Having regard to the conduct of the petitioner that he over stayed he being in disciplined force he should have informed the higher officers relating to his over stay due to the illness suffering from conjunctivitis. Learned counsel for the petitioner submitted that he had applied for extension of leave. Same had been rejected. In the show cause notice respondents have not stated anything about application of leave made by the petitioner and its rejection and further directing the petitioner to report for duty and other events. Rule 22 of BSF Rules reads as under:-

22. Dismissal or removal of persons other than officer 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 person concerned an opportunity of showing cause.

(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.

(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 a Subedar.

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

Perusal of Sub-Rule 2 of Rule 22 of BSF Rules, 1969 competent authority while exercising power he is required to form opinion in respect of inexpedient or impracticable of subjecting of employee for trial. Perusal of show cause notice as well as order of dismissal it is evident that there is no compliance to sub-Rule 2 of Rule 22. Further disciplinary authority's action in issuance show cause notice dated 28.10.2013 and dismissing the petitioner on 29.11.2013, it is evident that on 31st day respondent dismissed the petitioner from service. Therefore, there is mala fide action on the part of the disciplinary authority that some how the petitioner is to be get rid of from the Department. When the disciplinary authority was aware that show cause notice dated 28.10.2013 could not be communicated to the petitioner as he had sent messenger on 13.11.2013 even if the 30 days is required to be taken into consideration for the purpose of taking further action pursuant to the show cause notice the disciplinary authority in all fairness should have waited at least up to 14.12.2013 the date on which messenger had communicated the show cause notice to the petitioner. These events shows that order of dismissal has been passed in hurriedly manner. Moreover there is no compliance to sub-Rule 2 of Rule 22. Therefore, the order of dismissal and consequential orders passed in the departmental appeal are set aside.

6. Petition stands allowed. Respondents are directed to extend all

service and consequential benefits including monetary benefit within a period of 4 months from today. Reserving liberty to the respondents to hold inquiry for the alleged over stay if it is warranted and in accordance with law.

05.04.2018

pooja saini

**(P.B.BAJANTHRI)
JUDGE**

Whether speaking/reasons

Yes/No

Whether Reportable:

Yes/No