

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 05.09.2019

CORAM :

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.5056 of 2010

P.Palani

... Petitioner

Vs

1. Union of India,
Represented by its Secretary to Government,
Department of Home Affairs,
New Delhi.
 2. The Director General of Police,
Border Security Force,
No.10, CGO Complex,
Lodhi Road, New Delhi - 110 003.
 3. The Commandant,
Border Security Force,
47th Battalion,
C/o.56th APO Sri Nagar,
Jammu and Kashmir.
- ... Respondents

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus to call for the records relating to the order passed by the 2nd respondent dated 26.02.2009 in his order No.6/16/03/SP/CLO(D&L)/1003-04 and quash the same and to direct the 2nd respondent to reinstate the petitioner as constable in the BSF with all monitory benefits by disposing of the appeal dated 09.08.1999 submitted to the 2nd respondent.

For Petitioner : Mr.Mohammed Ibrahim Ali
For Respondents: Mr.V.Balasubramanian

O R D E R

The instant writ petition challenges the order dated 26.02.2009 passed by the 2nd respondents affirming the order dated 31.12.1998 passed by the Commandant, Border Security Force.

2.The petitioner was a constable in the Border Security Force. He was granted leave on 28.07.1997 and he was to report back on 16.08.1997 AN. The petitioner failed to rejoin the duty in time. The petitioner applied for extension of leave which was not granted. He reported for duty on 31.12.1997 after overstaying 137 days and again absented himself without leave for 304 days w.e.f. 08.01.1998 to 07.11.1998. The petitioner was arrested in connection with Crime No.629 of 97

of Veppamkuppam Police Station on 24.01.1998 for offences under Section 376, 341, 342 and 506(ii) of IPC. The petitioner was remanded on 24.1.1998 and he was released on conditional bail on 30.03.1998. Since the petitioner had been arrested, he had been put under suspension w.e.f. 24.1.1998. His suspension was later revoked.

3. Thereafter, the petitioner got a show cause notice on 17.09.1998. The show cause notice stated that the authorities were of the opinion that further retention of service of the petitioner is undesirable and therefore, tentatively proposed to dismiss the petitioner from the service. The petitioner was called upon to give his version against the proposed order of dismissal from service.

4. The petitioner was tried by the Summary Security Force Court (SSFC) for committing the offence under Sections 19(a) and 19(b) of the Border Security Force Act 1968 and the Court awarded the sentence "to be dismissed from service" on 31.12.1998. Recording the order of the Summary Security Force Court, the Commandant, 47th Battalion, Border Security Force passed an order, stating that the unauthorized period of absence from 17.08.1997 to 31.12.1997 and 08.01.1998 to 07.11.1998 to be treated as "DIES NON" under Rule-25 of Central Civil Services (Leave) Rules-1972 as applicable to Border Security Force vide GSR-849 dated 16.06.1979.

5. There is nothing on record to show as to when this order was served on the petitioner. Nevertheless a reading of the writ petition would show that the petitioner filed W.P.No.10962 of 2003 against the order of dismissal and the same was dismissed on 01.10.2004. The said order is also not on record.

6. The petitioner thereafter made a representation on 01.12.2009 to the 1st respondent with a request of reinstatement. The 1st respondent by the order impugned herein dismissed the appeal by observing that during the trial, the petitioner had pleaded 'guilty' for both the charges after due compliance of the Border Security Force Rules 142(2), evidence was recorded and the Court sentenced the petitioner "to be dismissed". It is recorded in the appellate order that, aggrieved by the sentence, the petitioner had submitted his statutory petition dated 27.01.2003 to the DG, Border Security Force who had considered the petition and rejected on the ground of delay in filing the petition and the decision was communicated to the petitioner by registered post vide Letter No.06/16/2002/BSF/CLO(D&L)/2130-34 dated 28.03.2003. The appellate order further states, under Rule 167 of Border Security Force Rules, a person subject to be covered under the Border Security Force Rules and who had been tried by the Summary Security Force Court (SSFC) is allowed to put only one petition to any of the officers mentioned in Section 117 of the Border Security Force Act and since the petitioner had

already filed a statutory petition dated 27.01.2003, which was duly considered and rejected by the DG, Border Security Force, being time barred, there is no provision to entertain another petition at a belated stage. It is this order which is challenged in the instant writ petition.

7.The respondents have filed their counter. In the counter affidavit, it is stated that the petitioner was tried by Summary Security Force Court (SSFC) for an offence under Sections committed 19(a) and 19(b) respectively. Disciplinary proceedings were initiated against the petitioner for overstaying 137 days and absents from duty without permission for 304 days. The petitioner admitted to the charges punishable under Section 19(a) and 19(b) of the Border Security Force Act. It is stated that all the procedure contemplated over the Border Security Force Rules were followed and after hearing, Record of Evidence was prepared by an officer in the presence of the petitioner. The prosecution witness deposed before the officers and the Record of Evidence was signed by the petitioner and was submitted to the Commandant and the Commandant passed the orders recommending dismissal from service. The counter affidavit states that the procedure contemplated under Rule 45 of the Border Security Force Rules had been complied with completely. The counter also states that the petitioner did file a appeal on 21.07.2003 which had been dismissed as time barred.

8.Heard, the learned counsel for the parties.

9.Mr.Mohammed Ibrahim Ali appearing on behalf of the petitioner states that the petitioner has been dismissed from service and states that the dismissal of the petitioner is contrary to Section 19(a) and 19(b) of the Border Security Force Act. The learned counsel for the petitioner would state that there was sufficient cause for the petitioner not to report for duty and the authorities have not considered this aspect of the case. The counsel for the petitioner would state that the petitioner was arrested on 24.01.2018, for a false case foisted on him and the trial Court by its order dated 29.11.2002, had acquitted him, since, the complainant himself turned hostile. During the course of trial, he was unable to report to duty and hence, it was not a deliberate and willful absence from duty. The learned counsel for the petitioner would place reliance on a judgment of the Hon'ble Supreme Court in Krushnakant B. Parmar v. Union of India [Civil Appeal No.2106 of 2012 dated 15.02.2012], wherein, the Hon'ble Supreme Court states that, absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean willful. The Hon'ble Supreme Court, in the said judgment has further stated that there may be many eventualities due to which, an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of

devotion to duty or behaviour unbecoming of a Government servant. Relying on the above judgment, the learned counsel therefore submits that in view of the fact that the petitioner was arrested, he could not report for duty .

10.The learned counsel further submitted that if the period from the date of arrest till the date of bail is excluded, then the period of absence from duty is negligible and the petitioner need not be awarded an extreme penalty of dismissal from service and could have remained in service in the Border Security Force.

11.Section 19(a) and 19(b) of the Border Security Force Act reads as follows:

19. Absence without leave.—Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) absents himself without leave; or
- (b) without sufficient cause overstays leave granted to him; or
- (c) being on leave of absence and having received information from the appropriate authority that any battalion or part thereof or any other unit of the Force, to which he belongs, has been ordered on active duty, fails, without sufficient cause, to rejoin without delay; or
- (d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or
- (e) when on parade, or on the line of march, without sufficient cause without leave from his superior officer, quits the parade or line of march; or
- (f) when in camp or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or
- (g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there, shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

12.In this case, the petitioner had left his Batalion on 1998 without permission. Once the person absents himself without leave, then there is no question of enquiry into sufficiency of cause, as to why the employee was absent. Sufficiency of cause is to be seen only in those case where the employee goes by availing valid leave and overstays the leave granted to him.

13.The petitioner has accepted his guilt. Once the person has accepted his guilt, then it is unnecessary for department to further proceed and enquire into sufficient cause. The petitioner has given a representation on 27.01.2003 and the same stood dismissed. The order dated 27.01.2003 made by the Director General of Police, Border Security Force, is not under challenge in the present writ petition. What is under challenge is the order made on the 2nd representation, which was not maintainable in law. The petitioner belongs to the uniformed Service, where discipline is to be maintained. When leave is not granted by the authorities in a disciplined force, the personnel is expected not to leave his post. In this case there has been unauthorized absence from duty on two occasions, firstly from 17.08.1997 to 31.12.1997 and second from 08.01.1998 to 07.11.1998. The petitioner therefore has committed serious act of indiscipline and therefore does not deserve any indulgence of this Court.

14.This Court does not find any merit in this writ petition and this petition is liable to be dismissed and therefore, stands dismissed. No costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

ssr

To

1. The Secretary to Government
Union of India,
Department of Home Affairs,
New Delhi.
2. The Director General of Police,
Border Security Force,
No.10, CGO Complex,
Lodhi Road, New Delhi - 110 003.
3. The Commandant,
Border Security Force,
47th Battalion,
C/o.56th APO Sri Nagar,
Jammu and Kashmir.

+1cc to Mr.M.Mohammed Ibrahim Ali, Advocate, S.R.No. 76911
+1cc to Mr.V.Balasubramanian, Advocate, S.R.No. 76694

W.P.No.5056 of 2010

BS (CO)

GN (20/11/2019)

<https://hcservices.ecourts.gov.in/hcservices/>