HIGH COURT OF TRIPURA
AGARTALA

WP(C) 643 of 2017

Shri Nabajit Debbarma
son of late Sunil Debbarma,
resident of vill Gamchakobra para,
P.O. Bodhjungnagar, P.S. Lefunga,
District: West Tripura, PIN-799210

…….Petitioner (s)

Versus

1. Union of India
   to be represented by the Secretary,
   Ministry of Home Affairs, Government of India,
   Central Secretariat, New Delhi: 110001

2. The Director General,
   Border Security Force,
   Adm Dte (Gr Cell),
   New Delhi: 3

3. The Inspector General,
   FTR HQ BSF, Punjab, Jalandar

4. The Commandant,
   70 Battalion BSF, Ajnala,
   District: Amritsar, Punjab:143102

…….. Respondent (s)

For petitioner(s)	:	Ms P Dhar, Adv.
For Respondent(s)	:	Mr. H Deb, Asst. SG

HON'BLE MR. JUSTICE S. TALAPATRA

Judgment & Order (Oral)

07.09.2020

Heard Ms P Dhar, learned counsel appearing for the petitioner as well as Mr. H Deb, learned Asst. SG appearing for the respondents.

2. The petitioner was serving as the Head Constable (Ministerial) in the 70 Bn BSF and he had been sanctioned leave for 13

days w.e.f. 17.12.2014 which, according to the sanction order, was found to expire after 31.12.2014. But the petitioner did not join the battalion till 08.01.2015. Consequentially, the Commandant, 70 Bn BSF (the respondent No.4) issued a letter on 09.01.2015 asking the petitioner to join his duty. He was also cautioned by that letter that his failure to join the duty would invite disciplinary action against him under the BSF Act and Rules. The said letter (Annexure-2 to the writ petition) has clearly mentioned that overstaying of the petitioner was 'without sufficient cause'. Similar request was also made by the respondent No.4 by the subsequent letter dated 29.01.2015 (Annexure-3 to the writ petition). It appears from the records that, thereafter, on perusal of the report of the Court of Inquiry the petitioner was asked to show cause why he should not be dismissed from the service for his overstaying the leave from the period from 01.01.2015 to till date on issuance of the show cause notice. The relevant part of the show cause notice is extracted hereunder:

> **"……**
> **02. Having considered the matter of your said continued OSL from duty, I am satisfied that your trial by a Security Force Court is not only inexpedient but also impracticable and that your further retention in the service is undesirable. Accordingly, in the exercise of the powers vested in me by Sub Sec (2) of Sec 11 of the BSF Act read with Rule 177 of the BSF Rules and in conformity with the Sub Rule (2) of Rule 22 of the BSF Rules you are hereby called upon to show cause why you should not be dismissed from the service for your aforesaid act.**
> **……"**

3. The petitioner was also afforded an opportunity to represent against the proposed action within a period of 30 days. It was also cautioned that if no reply had reached the respondent No.4 within the time, as stipulated, the further decision in the matter would be taken. In the said show cause notice dated 24.04.2015 (Anneuxre-4 to the writ petition) it has been noted that a copy of the report of the Court of Inquiry, as referred to in para (1) of the said show cause notice, has been enclosed.

4. But, the petitioner, in para 5 of the writ petition, has categorically denied the said fact and succinctly averred that as the petitioner was pre-occupied on account of hospitalization of his wife, he was unavailable in his residence. His mother, who is 'uneducated and unaware' of the procedures of the administration, had received the show cause notice dated 24.04.2015 and while receiving the same she failed to scrutinize that despite there being mentioned of an enclosure in the letter, the copy of the report of the Court of Inquiry was not actually enclosed with the show cause notice which she received.

5. The respondents, however, denied the said averment by stating in their consolidated counter affidavit, in the following manner:

> **".... The petitioner was given 30 days time in the show cause notice to urge anything in his defence against proposed action of dismissal from the service. However, the petitioner neither reported to the Battalion nor replied to the Show Cause notice. Further, it is also submitted that at para 04 of the said Show Cause notice dated 24 April 2015 (Annexure-'R-8'), it is clearly mentioned that a copy of Court of Inquiry is enclosed, as such, the plea of the petitioner**

that he did not receive the copy of Court of Inquiry with the Show Cause notice, has no merit."

6. Pursuant to that show cause notice, the final order dated 12.06.2015 (Annexure-5 to the writ petition) had been issued by the Commandant, 70 Bn BSF, the respondent No.4 herein, by dismissing the petitioner forthwith w.e.f. 12.06.2014, i.e. the date of the order. But the period of absence w.e.f. 01.01.2015 to 12.06.2015 (AN), in aggregate 163 days, had been treated as "*dies non*". The petitioner's name had accordingly been struck off from the strength w.e.f. 12.06.2014 (AN).

7. The petitioner, however, made the representation for his reinstatement depicting the circumstances under which he failed to report to duty, such as: (a) the illness of his wife due to advanced stage of pregnancy and her ailments; (b) no male member was available to look after his wife while admitting at the time of her delivery; and (c) his mother aged 55 years was suffering from various ailments.

8. However, the said representation was placed before the Inspector General, FTR HQ BSF, Punjab and he had rejected the same on observing that the petitioner was dismissed from service on 12.06.2015 after observance of the due procedure as per BSF Act and Rules. He has also observed that he had carefully considered the relevant facts and circumstances. According to him, all the

opportunities were given to the individual before dismissal from service, but he did not avail. Only after a delay of more than one year, he had filed the said representation dated 11.07.2016. The reasons given by the petitioner, as afore-stated, did not find favour, as according to the Inspector General, the respondent No.3 herein, those were not convincing.

9. Mr. Deb, learned Asst. SG has submitted that a Court of Inquiry was instituted under Section 62 of the BSF Act and the Court of Inquiry was carried out in terms of Rule 173 of the BSF Rules, 1969. Sub-rule (8) of Rule 173 of the BSF Rules, 1969 has been exempted by the proviso below sub-rule (8) which was inserted on 25.11.2011. Sub-Rule (8) of Rule 173 of the BSF Rules, 1969 provides that before giving an opinion against any person subject to the Act, the Court of Inquiry will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence. True it is, that by the added proviso, it has been made as follows:

> **"Provided that this provision shall not apply when such inquiry is ordered ton enquiry into a case of absence from duty without due authority."**

10. The officer who held the court of inquiry only summoned the persons from the battalion. The court of inquiry was carried out by the Officer Commanding, namely, Rajesh Kr. Yadav of 70 Bn BSF. He had examined six witnesses, all were holding various subordinate

posts. It can be gathered from the records that they had only stated about the absence of the petitioner. It appears further that there had been no attempt to inquire into the other circumstances leading to overstayal by the court of inquiry. The cryptic finding that has been reported by the court of inquiry is that "*after going through the statements of witnesses, examining the relevant documents, the court is of the opinion that No.131302583 HC/M Nabajit Debbarma of HQ Coy 70 Bn BSF has been proceeded 13 days E/Leave wef 17 Dec 2014. Individual is OSL wef 31 Dec 2014(AN) till to date. Despite of notices directing to join duty immediately to his home town but individual neither responded nor reported to unit till to date. ….*"

Thereafter, the court of inquiry recommended disciplinary/administrative action against the petitioner.

11. On the basis of that, the said show cause notice was issued and thereafter, the final order of dismissal was passed by the respondent No.4. Even the representation made by the petitioner was rejected by respondent No.3. In the representation, the petitioner had laid down the circumstances which prevented him from either informing the respondent No.4 in respect of extension of leave or the circumstances which prevented him from giving the response to the letters or the show cause notice which were sent to him.

12. Ms P Dhar, learned counsel has submitted that when the records were thoroughly examined before filing of the writ petition, the

report of the court of inquiry was not available for reason that the same was supplied with the show cause notice. At the instance of this Court, the records were produced by the respondents. From there, a copy was supplied to the petitioner. Having received the report of the court of inquiry, the writ petition was amended.

13. But Mr. Deb, learned Asst. SG has sought to repel the said statement by contending that the position taken by the petitioner was not correct. The report was sent to the petitioner with the show cause notice dated 24.04.2015 (Annexure-4 to the writ petition).

14. It is apparent on the basis of the records that the petitioner has taken a stand that letters dated 01.09.2015 (Annexure-2 to the writ petition), 29.01.2015 (Annexure-3 to the writ petition) and the show cause notice dated 24.04.2015 (Annexure-4 to the writ petition) were received by his mother who is uneducated and unaware of the administrative procedure. His mother did not hand over the letters and the show cause notice to him when he had returned from the hospital with his ailing wife. As such, he could not give the reply to the show cause notice proposing dismissal from service within the time as stipulated therein.

15. Fairness in an action always demands a person who is going to be condemned shall be afforded reasonable opportunity. In this case, it cannot be stated that the respondents did not give the petitioner the opportunity. The petitioner's case is that he was

prevented by that circumstances, as noted before, to send any response even to the show cause notice. Even though this Court is not satisfied about why the petitioner could not send a letter seeking extension of leave showing reason, as adverted by him, that his wife was unwell. This is, however, not determinative observation on merit.

16. In view of proviso added below sub-rule (8) of Rule 173 of the BSF Rules, 1969, even though the petitioner was not entitled any opportunity to have his say in respect of his absence in the court of inquiry.

17. The controversy which occupies pertinence is that whether the report of the court of inquiry was supplied to the petitioner or not. It is hardly possible to decide that issue on the basis of the materials placed on records. It remains within penumbra whether the report of the court of inquiry was furnished with the show cause notice dated 24.04.2015 (Annexure-4 to the writ petition). As the matter relates to dismissal from service, this Court should take a lenient view in order to afford an opportunity to the petitioner so that he can place his defence even though those were placed in the representation which had been decided by the respondent No.3.

18. The petitioner is entitled to an opportunity in terms of Rule 22, sub-rule (2) of the BSF Rules, 1969 which provides that after considering the report 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. Proviso below sub-rule (2) of Rule 22 of the BSF Rules has no relevance in the present controversy as the respondent No.4 did not demonstrate any reservation in making disclosure of the report of the court of inquiry.

19. It surfaces from reading the order of the respondent No.3 that he had passed the said order mechanically without looking into the medical documents produced with the said representation. Even though the petitioner might have omitted to discharge his obligation, but it cannot be said, on the face of the records, that the reason as shown is entirely unsatisfactory.

20. Confronted as such, this Court is of the opinion that for giving a fair opportunity to the petitioner to place his explanation or defence, the petitioner should be given an opportunity to file his reply to the show cause notice dated 24.04.2015 (Annexure-4 to the writ petition) within 30 days from today. The respondent No.4, thereafter, shall take the final decision on considering the explanation or defence, as would be projected by the petitioner within another period of one month from the date of receipt of the said representation. It is ordered accordingly.

21. As this Court has directed the respondent No.4 to consider the explanation or the defence of the petitioner in response to the show cause notice dated 24.04.2015, the order of dismissal dated 12.06.2015 under No. Estt/70 Bn/OSL-Dismiss/15/9652-64 (Annexure-5 to the writ petition) is quashed. The order dated 02.09.2016 under No. Estt-II/Re-Inst/PB/2016/3204-9 (Annexure-8 to the writ petition) passed by the Inspector General, FTR HQ BSF PB, the respondent No.3 herein, rejecting the representation of the petitioner as well stands quashed for the same reason.

22. But this Court has not made any observation on merit of those orders dated 12.06.2015 and 02.09.2016 except what has been observed in respect of the order dated 02.09.2016.

23. In terms of the above, the writ petition stands partly allowed. Pending application(s), if any, also stand disposed of.

Copy of this order be served to the counsel for the parties forthwith.

JUDGE

lodh