

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(Proceedings conducted through video conferencing on account of
Covid-19 Pandemic)

CWP-10517-2001 (O&M)
Date of Decision: 30.09.2020

Raghubind Paswan

... Petitioner

vs.

Union of India and others

.. Respondents

CORAM: HON'BLE MR. JUSTICE VIVEK PURI

Argued by : Mr. Ravi Badyal, Advocate
for the petitioner.

Mr. Shivoy Dhir, Sr. Panel Counsel for UOI.

VIVEK PURI, J.

The petitioner has assailed the impugned order of dismissal dated 27.03.1997 (Annexure P-5) passed by respondent No.3 and order dated 21.10.1997 (Annexure P-7) passed by respondent No.2 rejecting his appeal on the averments that he joined as Constable in the Indo Tibetan Border Police Force on 07.04.1988 and had put in 09 years of service as on the date of dismissal. In June, 1996, the petitioner was granted 15 days casual leave from 06.06.1996 to 22.06.1996 and was required to report back in the unit on 23.06.1996 (AN). During the leave period, the petitioner suffered an attack of acute mental imbalance and he was taken to Kanke (Ranchi) for psychiatric treatment at Mansik Aroghshala, where he remained under treatment from 20.06.1996 to 25.08.1997. On account of his illness, he could not rejoin his unit at Panchkula. After the recovery, petitioner returned to his home place and was shocked to receive that impugned order dismissing him from service on account of having overstayed his leave. The

Court of Inquiry had declared the petitioner as deserter. No efforts were made to trace out the petitioner, who had overstayed his leave for a period of over one year.

2. The petitioner had preferred a statutory appeal against the order of dismissal but the same has been rejected. The petitioner had filed a petition i.e. CWP-10595-1997 in Patna High Court as he was residing in the territorial jurisdiction of that High Court where dismissal order has been served. The said CWP was dismissed on the ground of jurisdiction being not maintainable. The petitioner had approached the respondents for supply of the documents, but to no effect. The impugned orders have been alleged to be illegal, violative of principles of natural justice and liable to be quashed.

3. The respondents through reply have raised preliminary objections alleging that the petitioner has been dismissed solely on the ground that he had absented from duty for 09 months and 04 days without any sanction, authority and information to the competent authority. The petitioner being a member of disciplined force cannot take advantage of his own wrong. The procedure as laid down in Section 74 (2) read with Section 21 (b) of Indo-Tibetan Border Police Force Act, 1992 (for short 'the Act') was followed, proper inquiry was conducted and the petitioner was declared deserter from force with effect from 24.06.1996. It was specifically mentioned in the leave certificate that extension of leave was not permissible and time limit was to be strictly followed. The petitioner chose to remain absent for 09 months and 04 days without sending any communication. Consequently, the petitioner was declared as deserter.

4. On merits, the material averments put forth by the petitioner has been controverted. It has been admitted that the petitioner was recruited

as Constable on 07.04.1988 and had put in 09 years of service. The petitioner had neither joined duty on 23.06.1996 (AN) nor sent any intimation with regard to his absence. There was no request for sanctioning of the leave. The petitioner failed to join the duty despite sending several letters and he has been dismissed in terms of the impugned order. A show cause notice was sent to the petitioner at his home address but the same was received back with the remarks "recipient is out from home without any address given". The office of the respondents had approached the Superintendent of Police of District Patna to trace the whereabouts of the petitioner vide letters dated 06.08.1996, 27.09.1996 and 30.10.1996, but no response was received. Again a request was made for secret enquiry to Senior Superintendent of Police of District Patna to find out the circumstances under which the petitioner had absented himself without prior permission of the competent authority vide letter dated 09.11.1996. The Senior Superintendent of Police, vide letter dated 28.05.1997 informed that the petitioner was staying with his wife, who is serving as a Nurse in Government hospital Norwa in a rented house. By the time, the information was received, the petitioner had already been dismissed from service. The appeal was received in the office after the stipulated period as specified in Rule 28 of the Indo-Tibetan Border Police Force Rules, 1994 (for brevity 'the Rules'). However, the appellate authority after going through the complete record conveyed the reply to the petitioner vide letter dated 21.10.1997. With regard to the request of the petitioner for supply of documents, it has been alleged that the writ petition was pending in Patna High Court. The impugned orders have been alleged to be legal and valid.

5. The petitioner, through replication, has reasserted his

allegations.

6. I have heard learned counsel for the parties and perused the record.

7. While assailing the impugned orders, it has been mainly contended by the learned counsel for the petitioner that overstayal of leave was not intentional but on account of his ill health. Consequently, it was inappropriate to pass harsh order of dismissal from service. To substantiate his arguments, learned counsel for the petitioner has placed reliance upon *Narayan Mishra vs. Union of India and others*, 1998 LIC 2935 (Calcutta) and *Chhel Singh vs. M.G.B. Gramin Bank Pali and others*, 2015 (1) SLR 20 (Supreme Court). Furthermore, by placing reliance upon *Parwati Devi and another vs. Union of India and others*, 2005 (3) SLR 569 (Himachal Pradesh), it has been argued that no action was initiated against the petitioner as per the provisions of Section 73 of the Act to capture the deserter. The petitioner had made a request for supply of documents, but no document has been supplied and the action of the respondents is in violation of Rule 177 of the Rules. The impugned order has been passed without affording any opportunity of hearing to the petitioner and the same is in violation of principles of natural justice. The overstayal from leave is a distinct offence and no trial of the petitioner has been conducted by the Force Court. Lastly, it has been pointed out that the impugned order has been passed with retrospective effect and the same is in violation of Rule 29 (2) of the Rules.

8. While refuting the arguments put forth on behalf of the petitioner, it has been contended by learned counsel for the respondents that the petitioner was enrolled as Constable in a disciplined force. In the event,

any ailment being suffered by the petitioner prevented him from joining the duties, it was incumbent upon him to inform the respondents and seek extension of leave. No exercise was carried out by the petitioner in this regard. Furthermore, even the family members of the petitioner never informed the respondents with regard to the ailment allegedly being suffered by the petitioner. The letter was also written to the Senior Superintendent of Police to conduct a secret inquiry in the matter and it was informed that the petitioner is residing with his wife, who was working as Nurse in Government hospital, Norwa, District Sasa Ram (Bihar), in a rented house. The information was received after the dismissal order had already been passed. The documents as sought by the petitioner in terms of his letters dated 11.09.2000 and 09.10.2000 (Annexures P-9 and P-11, respectively) were not supplied on account of pendency of the writ petition in the Patna High Court. The show cause notice as contemplated under Rule 20(1) of the Rules was issued to the petitioner at the home address as furnished by him and mentioned in the service record but the same was received back undelivered as the petitioner was not found to be residing there. The show cause notice and the communications were addressed to the petitioner at the address as mentioned in the official record. Consequently, it cannot be said that no opportunity of hearing was afforded to the petitioner. Furthermore, merely because the petitioner has not been tried by Force Court cannot be termed to be a circumstance to absolve the petitioner of his liability in the disciplinary proceedings. The prosecution in the Force Court is an additional action which could have been initiated against the petitioner. However, the petitioner was traced out after passing of the dismissal order and consequently, he was not tried by the Force Court. There is lack of

medical record to indicate that petitioner suffered from any illness during the period of leave or immediately thereafter.

9. At the very outset, it may be mentioned here that there is no dispute between the parties to the effect that the petitioner was recruited as Constable (General Duty) in the Indo Tibetan Border Police Force on 07.04.1988. Admittedly, the petitioner was granted casual leave for 15 days with effect from 06.06.1996 to 22.06.1996. The petitioner was required to report back on 23.06.1996 (AN). It has also been specifically and categorically mentioned in the leave certificate dated 05.06.1996 (Annexure P-1) that extension of leave was not permissible and time will be strictly followed. It has not been disputed that the petitioner failed to report back to his duty on 23.06.1996 (AN) and had overstayed from leave.

10. A perusal of the impugned order dated 27.03.1997 indicates that the petitioner had absented from duty since 24.06.1996. Consequently, the memorandum was sent at his home address to report for duty but the same was received back undelivered. The Court of inquiry was conducted as per the provisions of Section 74 of the Act and the petitioner was declared as deserter with effect from 24.06.1996. A show cause notice was issued to the petitioner through registered post to explain his position as to why he should not be dismissed from service due to his continuous absence from leave. The petitioner was required to explain his position within a period of 30 days from the receipt of show cause notice. However, the show cause notice was received back undelivered. The petitioner neither submitted any reply nor reported for his duties. It was concluded that the petitioner had absented himself without leave with effect from 24.06.1996 and accordingly, he was dismissed from service with effect 24.06.1996. The

period of unauthorized absence was treated as 'dies non' for all purposes and nothing was to be paid for the said period.

11. The petitioner had preferred an appeal against the order of dismissal. Although, the appeal was presented after the expiry of the prescribed period of limitation but the appellate authority had considered the matter and rejected the appeal in terms of the impugned order dated 21.10.1997.

12. At the earlier instance, the petitioner had filed a writ petition in Patna High Court, but the same was dismissed being not maintainable in terms of the order dated 06.03.2000 by observing that the petitioner was employed outside the State in Panchkula in the State of Haryana during the relevant period when he had absented from duty. No findings were recorded on merits and subsequently, the petitioner has preferred the present writ petition seeking quashing of the impugned orders.

13. The Court is not to sit in appeal and is not to reappraise the evidence in the departmental proceedings. The impugned orders can be declared to be bad in the eyes of law in the event the material on record indicates that there is non-compliance of rules which may have resulted in prejudice to the petitioner or the principles of natural justice have not been followed.

14. The contention of learned counsel for the petitioner to justify the absence of the petitioner is not tenable. The petitioner had proceeded on casual leave for 15 days with effect from 06.06.1996 to 22.06.1996. The case of the petitioner is to the effect that during the period of leave, he suffered an attack of acute mental imbalance and remained under the treatment of Dr. Arun Kumar Gupta. To substantiate his version, the

petitioner has placed on record prescription slips Annexure P-2 and P-3 alongwith medical certificate Annexure P-4. The prescription slip (Annexure P-2) is dated 17.12.1996 i.e. after a period of about 06 months from the date on which the petitioner was required to report back for his duties. In terms of prescription slip (Annexure P-3) and medical certificate (Annexure P-4), which are dated 25.08.1997, the petitioner was declared fit to rejoin the duties. There is no medical record to indicate that the petitioner had suffered any ailment during the period of leave or immediately thereafter which may have prevented him from reporting back to his duties. The record produced by the petitioner is indicative of the fact that the treatment afforded to the petitioner was after a period of 06 months from the date he was to resume back for his duties. No certificate to indicate that the petitioner was declared unfit to join duty has been produced on record. There is nothing to suggest as to when the petitioner became unfit to join duty. No medical record in close proximity with the period of leave has been produced by the petitioner. Even the family members of the petitioner had displayed inaction. There is nothing to suggest that either the petitioner or any of his family members ever reported with regard to the illness and unfitness on the part of the petitioner to join the duty to the respondents. There is lack of material to indicate that the petitioner was suffering from any ailment which prevented him from joining the duty after the expiry of the leave period. The impugned order also indicates that several letters were written to the petitioner to join duty. It is not a case of the petitioner that notices/letters were not sent at his address as mentioned in the service record. It implies that the overstayal from leave was intentional and not due to his ill health. The conduct of the petitioner is evident of the fact that there

was no intention to join the duty and there was intentional abandonment of the service.

15. The ratio of the decisions relied upon by the learned counsel for the petitioner are distinguishable and not applicable to the facts of the present case. In Narayan Mishra' case (supra), it was observed that there were compelling circumstances for overstayal from leave which were not considered by the authority concerned. The supporting documents were also ignored. However, in the instant case, no such compelling circumstances to justify overstayal from leave are made out.

16. Furthermore in Chhel Singh's case (supra), the employee had submitted a list of seven defence witnesses to justify his absence from duty. The inquiry Officer had without any justifiable reason disallowed the prayer to summon five important witnesses. In the said case, the inquiry stood vitiated on account of disallowing the request of the employee to summon the witnesses. However, in the instant case, a show cause notice and letters were issued to the petitioner at his residential address, but no response was received from him. Consequently, it cannot be said that any opportunity to the petitioner to place on record the material to justify his absence was wrongly denied to him.

17. Learned counsel for the petitioner has relied upon Parwati Devi' case (supra) to argue that no action under Section 73 of the Act was initiated to capture the deserter. In this regard, it may be mentioned here that Section 73 of the Act contemplates that the Commanding Officer shall give an information of desertion to the civil authorities so that necessary steps could be initiated for his apprehension. Significantly, it has been specifically and categorically mentioned by the respondents in the reply that the letters were

also written to the Senior Superintendent of Police, Patna and a request was also made to conduct a secret inquiry. After the passing of the order of dismissal, it was informed that the petitioner was residing with his wife, who was serving as Nurse in government hospital, Norwa. Moreover, in Parwati Devi' case (supra), it was *inter alia* observed that absence of an employee was absolutely necessary for restoration of his health. Furthermore, it was observed that the authorities were well aware that the employee was undergoing treatment in the hospital for a serious ailment as he has submitted the bills and repeated applications for grant of leave. In such circumstances, it was observed that there were compelling circumstances and it cannot be concluded that the petitioner had absented from duty with an intention not to join back. Moreover, in the instant case, the matter was also reported to the police authorities of the district where the petitioner had been residing.

18. As per the provisions of Rule 177, the petitioner was required to be supplied with the copies of the court of inquiry proceedings. It is significant to note that the letters dated 11.09.2000 and 09.10.2000 (Annexures P-9 and P-11) were submitted by the petitioner subsequent to the institution of the writ petition in the Patna High Court. Consequently, it cannot be said that the petitioner had suffered any prejudice on account of non-supply of the documents which prevented him in approaching the Court seeking redressal of his grievance. As the petitioner had already approached the Court by filing writ petition, it cannot be said that he was handicapped, in any manner, in seeking legal recourse on account of non-supply of any document.

19. The departmental action has been taken against the petitioner as

per the provisions of Rule 20 of the Rules which is extracted here-in-
below:-

“Termination of service of persons, other than officers 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 of a Force Court: or

(b) where the authority as specified in rule 17 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 authority as specified in rule 17 is satisfied that the trial of such a person by the Force Court 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 authority as specified in rule 17 may withhold from disclosure any such report or portion thereof, if in his opinion, its disclosure is not in the interest of security of the state.

(3) The authority as specified in rule 17 after considering his explanation and defence, if any, or the judgment of the Criminal Court, as the case may be, may dismiss or remove him from the service.

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

20. The petitioner remained absent without leave and he had overstayed the leave granted to him without any sufficient cause. Consequently, the Court of inquiry was convened and the petitioner was declared as deserter. A show cause notice was also issued to him at the address specified in the service record but he failed to respond to the notice. Accordingly, the impugned order dated 27.03.1997 was passed dismissing the petitioner from service. In such circumstances, it cannot be said that the impugned order has been passed without affording opportunity of hearing to the petitioner or the same is in violation of the principles of natural justice .

21. Furthermore, the impugned order cannot be interfered on the

score that the petitioner was not tried by the Force Court. It may be mentioned here that the petitioner had approached the respondents by way of filing an appeal after the passing of the dismissal order. In consequence of the passing of the dismissal order, the petitioner ceased to be a member of force. Moreover, the proceedings before the departmental authorities and the Force Court are distinct and separate. Merely because the petitioner has not been tried by the Force Court, it will not mitigate the gravity of allegations of wilful absence from duty and exonerate him from the liability to face consequences in the departmental proceedings.

22. The impugned order has been passed on 27.03.1997 and the petitioner has been dismissed from service with effect from 24.06.1996 i.e. the date on which his period of absence had commenced. It was also observed that the period of absence shall be treated as dies non. There is nothing to suggest that the petitioner was to derive any benefit during the period of his wilful absence from duty. Even no prejudice has occurred to the petitioner in passing the dismissal order with effect from 24.06.1996. The petitioner was a member of a disciplined force. He was required to display high standard of devotion and dedication in discharge of his duty. The long intentional absence speaks volume about the misconduct on the part of the petitioner. The same is indicative of intentional abandonment of job on his part. The wilful absence from duty or overstayal of leave without sufficient cause cannot be gauged lightly and is liable to be fraught with serious consequences. The impugned orders have been passed in conformity with the procedural requirement as laid down in the Rules and in compliance of the principles of natural justice. No departure from rules and procedure is made out which have resulted in any prejudice to the petitioner

and consequently could have vitiated the impugned orders. There is lack of material to substantiate any justified reason for the petitioner in having remained absent from duty for a long period of 09 months and 04 days. In these set of circumstances, no illegality or irregularity is made out in the impugned orders.

23. With the aforesaid observations, the writ petition is dismissed.

30.09.2020
smriti

(VIVEK PURI)
JUDGE

Whether speaking/reasoned	: Yes/No
Whether Reportable	: Yes/No