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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 24th July, 2020**

+ **W.P. (C) 4532/2020**

JADHAV ARJUN **Petitioner**

Through: Mr. Manoj Kumar and Mr. Ajay
Kumar Bhargava, Advocates

versus

DG, BORDER SECURITY FORCE & ORS. **Respondents**

Through: Mr. Ruchir Mishra, Advocate

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

ASHA MENON, J.

C.M. Appln.16351/2020 (Exemption)

1. Allowed, subject to just exceptions and as per the extant rules.
2. The application is disposed of.

W.P. (C) 4532/2020

3. This petition has been filed under Article 226 of the Constitution of India by the petitioner, who had joined the Border Security Force (BSF) on 3rd October, 1992, and served in it till he was dismissed from service on 31st May, 2018, with the following prayers: -

“a) Issue a writ of Mandamus for Re-installation in service on the same Rank i.e. HC/GD of the Petitioners as well as deployments to the same location and unit, the period of absence shall be regularized and he shall be paid fully pay and allowances.

b) Issue a writ of Mandamus or any other writ/order or direction in the nature of Mandamus directing the Respondents 1 & 2 to provide the all the benefits from the date of unlawful Dismissal, and the court of law has power to put a cost on the that Commandant for instant relief to the petitioner for impugn dismissal order.

c) Issue a writ of Mandamus or any other writ/ order or direction in the nature of Mandamus quashing the impugned dismissal decision of the Competent Authority dated 31.05.2018 and Resulting impugned dismissal order in respect of the Petitioner being arbitrary, discriminatory against Article 14, Article 21 & Article 311 of the constitution.

d) Grant any other order or direction which this Hon'ble court may deem fit to pass in the present matter to meet the ends of justice.”

4. The brief facts, as are relevant for the disposal of the present petition, are that the petitioner was serving as a Head Constable/GD in the 29th Battalion, BSF at the International Border and was asked to perform duty at the Border Outpost (OP). On 15th January, 2018, the Offg. Coy. Comdr. of the 'F' Coy Inspector Ashiq Ali directed him to attend to the First HIT, i.e., 18:30 PM to 00:30 AM., but the petitioner

refused to attend the same claiming that he had been on continuous duty from 6:30 AM to 12:30 PM that day and secondly, his health card reflected that his medical category exempted him from staying out in the cold night of the winter. According to the petitioner, he also told the Offg. Coy. Comdr. that he had severe pain over his body and was having fever and had just taken medicine from the First Aid Box and due to giddiness, he was not able to go for the duty and, therefore, to allow him the second or the third shift. According to the petitioner, while disregarding his request, the Offg. Coy. Comdr. made a representation against the petitioner on 15th January, 2018 and sent him to the Unit Headquarter for disciplinary action.

5. The petitioner claims to have been under anxiety on account of his wife's ill health as he had received a call from his elder son on 17th January, 2018, at about 21.30 p.m. that his wife's condition had become worse and that she had been admitted at the Samarth Navjeevan hospital till 28th January, 2018. According to the petitioner, he had applied for 40 days earned leave in the month of December, 2017 to proceed on leave from 25th January, 2018 and after the leave was sanctioned, had obtained the Railway Warrant for the journey.

6. According to the petitioner, in view of the information received about the hospitalization of his wife, he sought permission from the Unit officers for being relieved early but not only was he not allowed to leave but his sanctioned leave was also cancelled. Thus, losing patience, he decided to escape from the Unit on 23rd January, 2018 at midnight, i.e., 02:20 AM, and he purchased a new Railway ticket for emergency journey dated 24th January, 2018. On 25th January, 2018, 29th Battalion, BSF

lodged an FIR against him at the Police Station Mamdot, District Ferozepur, Punjab for deserting the Unit.

7. The petitioner claims that after his wife was discharged on 28th January, 2018, he posted an application on 30th January, 2018 to DG, BSF and also informed the Superintendent of Police, District Latur on 30th January, 2018 about all the facts. Thereafter, he returned to the Unit on 23rd February, 2018 to join duty after completing AWL (Absent Without Leave), along with his unwell wife, as recorded in the General Diary (GD) of the Unit, 29th Bn., BSF.

8. Mr. Manoj Kumar, learned counsel for the petitioner, submitted that the Court of Inquiry (COI) had been constituted for three charges as mentioned in Annexure P-1 at page-39, which are reproduced as under: -

<u>FIRST CHARGE</u> <u>BSF ACT</u> <u>Sec 24(b)</u>	<u>MALINGERING OR FEIGNS</u> <i>In that he,</i> <i>while at BOP on 15/01/2018, denied to perform HIT duty under the pretext of LMC and argued that he is exempted from such kind of duty. Whereas, as per his health card, he was not exempted to do so.</i>
<u>SECOND CHARGE</u> <u>BSF ACT</u> <u>Sec-19 (a)</u>	<u>ABSENTING HIMSELF WITHOUT LEAVE</u> <i>In that he,</i> <i>while at BN HQ Mamdot, 29 Bn BSF, made himself absent without leave at about 0700 hrs on</i>

	25/01/2018. Thereafter, he voluntarily reported to Bn HQ Mamdot at 1830 hrs on 23/12/2018. Total Period of ansence = 30 days
THIRD CHARGE BSF ACT Sec-34 (a)	<u>MAKES A FALSE ACCUSATION AGAINST ANY PERSON SUBJECT TO THIS ACT, KNOWING OR HAVING REASON TO BELIEVE SUCH ACCUSATION TO BE FALSE.</u> <i>In that he,</i> <i>on 30/01/2018, addressed an application to the DG BSF levelling therein allegations of harassment by Coy Comdr 'F' Coy of 29 Bn BSF. The allegations as levelled were investigated into by a duly constituted Departmental COI and found to be false and fabricated. He misused the channel of reporting in Force for self gain and also tried to malign the image of 29 Bn BSF.</i>

9. He submitted that the record of duties placed at Page 139 of the petition established the fact that the petitioner had in fact performed his assigned duties in the morning of 15th January, 2018 and his refusal to perform additional duties in the evening/night could not be viewed as disobedience since the medical category, as reflected in the medical/health card (Annexure P-2 to the petition) and the medical

guidelines (placed at Page 141 of the petition), exempted him from doing such night duty in the cold and, therefore, the first charge was not substantiated.

10. With regard to the second charge, the learned counsel submitted that the medical papers brought on the record as Annexure P-6 would establish the fact that the wife of the petitioner was hospitalized between 18th January, 2001 and 28th January, 2018. Further, the very fact that the Railway tickets (Annexure P-3) showed that it was at zero cost, supported his claim that the leave had been duly sanctioned. He also submitted that the petitioner had joined after 29 days of absence and it was absence of 30 days that attracted penal consequences. Therefore, the dismissal was against the Rules and the Guidelines placed on the record as Annexure P-15.

11. The third charge was that he had given a false complaint against the Company Commander 'F' Coy. of 29th Battalion, BSF, but according to learned counsel, the denial of permission to leave when the petitioner's wife was unwell and the duties unfairly assigned to him had compelled the petitioner to file the complaint against Mr. Aashiq Ali. Moreover, the entire departmental COI and the Summary Security Force Court (SSFC) were not properly conducted as the defence of the petitioner was not properly considered. Lastly, it was also urged that in other cases involving similar facts, lesser punishments had been awarded whereas the petitioner was given the extreme punishment of demotion and dismissal and had been discriminated against.

12. Learned counsel for the respondents, Mr. Ruchir Mishra appearing on advance notice, however submitted that the action taken against the

petitioner was fully justified as he did not belong to a medical category that suggested a disability to perform night duty and he had remained away without permission for 30 days and moreover, he had made false allegations against his superiors. He submitted that the charges had been duly proved against the petitioner and he had been found guilty under three Sections of the BSF Act, 1968, i.e., Section 19(a), punishable with imprisonment for three years or a lesser punishment; Section 24(b), punishable with imprisonment of upto seven years or a lesser punishment; and Section 34(a), punishable with imprisonment for three years or a lesser punishment, and since no term of imprisonment had been imposed that there was no ground to interfere with the punishment of reduction in rank and dismissal, as awarded.

13. We have heard learned counsel for the parties and have perused the record. It may be noticed at the outset that, as per the medical/health card of the petitioner, there is no observation to the effect that the petitioner is unable to or should not be put on night duties particularly, in winter months. The observation in Annexure P-2 is to the following effect:-

“Obesity with HTN

Adv- Reduce wt., Regular physical exercise, low salt diet, low fat diet, Regular BP monitoring.”

Therefore, the claim of the petitioner that he was justified in refusing to perform duty at the Border Outpost from 1830 hours to 0030 hours, is not tenable. The medical guidelines cannot come to the rescue of the petitioner as the advice given was to take regular exercise and reduce weight. Moreover, the mere fact that the petitioner had performed his duties in the morning shift, cannot be a reason to exempt him from further

duty if the need arose. That is to be determined by the Unit/Commanding Officers. Admittedly, the petitioner had refused to perform his duties, even as per the case of the petitioner and when his explanation has been found wanting, the SSFC rightly held that the first charge was duly proved against him. However, it may be noted that while disposing of the Statutory Petition, it has been noticed that “while countersigning the SSFC trial proceedings, DIG SHQ BSF Ferozepur set aside the finding on first charge and countersigned the findings on 2nd & 3rd charges and the sentence on 17.10.2018”.

14. It is the very version of the petitioner that he had “escaped” from his Unit on 23rd January, 2018 at midnight, i.e., 02:20 AM, and had purchased a Railway ticket for emergency journey on 24th January, 2018. It is his own case that he returned to the post on 23rd February, 2018 and as per the entry made in the Register, he entered his return at 1830 hours. It may be noticed that he has dated his absence from 25th January, 2018, which was the date of registration of the FIR against him for deserting the Unit. It is thus clear that the petitioner joined the Unit after 30 days. Thus, the second charge was also rightly found proved against him. It may be also significant to note that though his wife was discharged on 28th January, 2018, yet the petitioner did not choose to return immediately to the Unit and took his own time doing so. That action of his was clearly at his own peril.

15. As to the third charge, it was conclusively held that the accusations made against Mr.Aashiq Ali were false and the petitioner was found guilty under this charge too. In order to cover up his own misdemeanors, the petitioner levelled allegations of bias against his Commanding Officer

knowing that these were false and such action would be detrimental to the overall discipline in the Unit. Nothing has been pointed out for us to conclude otherwise.

16. As regards the claim that he was not given adequate opportunity during the SSFC, the records do not bear out this claim. The order disposing of the Statutory Petition, filed at Page 217 of the petition, records that the petitioner had been given the opportunity to cross-examine all the witnesses examined and allowed to make his statement, which he did by filing an unsworn one and despite opportunity, did not examine any witness in his defence. While awarding the sentence, his previous convictions, character and rewards were duly considered. While rejecting the Statutory Petition, the DG, BSF has once again considered the evidence that has come against the petitioner in detail.

17. With regard to the quantum of punishment, we do not find any reason to interfere with the same. As noticed hereinbefore, all the offences under Section 19(a), Section 24(b) and Section 34(a) of the BSF Act, with which the petitioner was charged, all entail imprisonment for periods ranging from a maximum of three years to a maximum of seven years or a lesser punishment. Section 48 of the BSF Act provides for punishments that may be inflicted by Security Force Courts according to scale with each of the punishments prescribed being inferior in degree to every punishment preceding it and dismissal from service is listed below imprisonment for a period exceeding three months. Considering that the petitioner has been found guilty of three offences punishable by varying periods of imprisonment, the order of reduction in rank and dismissal from service do not appear to be disproportionate or unduly harsh.

18. Another fact to be noticed is that there is no explanation as to the reason for the delay in approaching this Court against the order of dismissal dated 31st May 2018. Though the learned counsel claimed that the petitioner had been repeatedly making representations, it is borne from the record that the Statutory Petition was rejected on 2nd April, 2019 and the petitioner had also been duly informed on 22nd April, 2019 that his representations, including to the Chief Minister of Maharashtra, for reinstatement, dated 24th June, 2018 and 26th February, 2018, had been rejected vide Annexure P-18 and, therefore, the contention that he was making other efforts for reconsideration of his dismissal, are not convincing.

19. In these circumstances, this Court does not find that the order of dismissal was excessive or disproportionate.

20. There is no merit in the present petition, which is accordingly dismissed.

ASHA MENON, J.

RAJIV SAHAI ENDLAW, J.

JULY 24, 2020

s/ak