

HIGH COURT OF CHHATTISGARH AT BILASPUR**WRIT PETITION (SERVICE) NO. 280 OF 2016**

- Ajay Kumar Jatav, S/o Shri Roshan Lal, aged 36 years, R/o Village & Post Kathumar, District Alwar, Rajasthan. **... Petitioner**

Versus

1. Border Security Force, through its Director General, New Delhi.
2. Commandant, Tac Headquarters, 41 Bn, Border Security Force, Koyalibeda (CG), District Kanker (CG) **... Respondents**

For Petitioner	:	Mr. Ajay Kumar Jatav, Petitioner in person.
For Respondents	:	Mr. Raj Kumar Gupta, Advocate.

Hon'ble Shri Justice P. Sam Koshy**"ORDER"****Reserved on 23/02/2021****Pronounced on 13 /04/2021**

1. Aggrieved by Order dated 20.9.2014, Annexure P-1, by which the Petitioner has been ordered to be retired from service of the Border Security Force invoking the provisions of Rule 26 of the Border Security Force Rules, 1969 (hereinafter referred to as, "the Rules of 1969").
2. Brief facts relevant for the adjudication of the present Writ Petition are that the Petitioner was appointed on the post of Constable in October, 2005 under the Respondents. Having put in more than 9 years of service, he was issued with a Show Cause Notice dated 10.7.2014 under Rule 26 of the Rules of 1969. The said Show Cause Notice was issued seeking explanation from Petitioner as to why he should not be retired from service considering his service record. To the said Show Cause Notice, the Petitioner submitted his reply on 13.8.2014. Immediately, thereafter, yet another Show Cause Notice dated 14.8.2014 was issued to Petitioner again calling for his explanation as to why he should not be retired from service considering his record, to which also the Petitioner gave his reply on 17.8.2014. Considering the contentions that the Petitioner raised in his reply, after due consideration of his entire service record, the Respondents have issued the impugned Order, Annexure P-1, dated 20.9.2014, retiring the Petitioner from services of the Border Security Force, which is under challenge in the present Writ Petition.

3. Contention of Petitioner assailing the order of retirement is that the order has been passed with a vindictive approach as the superior officers are not happy with Petitioner. Likewise, the order again is an illegal and arbitrary order which has been passed without application of mind. According to Petitioner, there was no strong substantial material available for Respondents to have retired him prematurely. According to him, there was no strong case available with Respondents against him by which he could have been declared unsuitable so as to invoke Rule 26 of the Rules of 1969 for retiring him from service.

4. Per contra, learned Counsel for Respondents, opposing the Writ Petition submits that the plain reading of the Show Cause Notices which were issued to Petitioner on 10.7.2014 and 14.8.2014 would clearly reflect that there were a large number of acts of misconduct and indiscipline on the part of Petitioner and for which he was penalized on various occasions and taking all these facts and grounds, the authorities having decided to retire the Petitioner, the same does not warrant interference.

5. Learned Counsel for Respondents further submits that it is a case where in fact a lenient view was taken by Respondents or else considering the track record that Petitioner has it was a fit case where he could have been terminated from service. According to learned Counsel for Respondents, in the past, the Petitioner was in fact terminated vide order dated 25.2.2006, however, on an appeal, the said order of termination was sympathetically considered and he was reinstated in service after modifying the punishment of termination into one of Rigorous Imprisonment in Force Custody instead of termination, which would further strengthen the case of Respondents to establish that the Petitioner's track record was not satisfactory.

6. Learned Counsel for Respondents also submits that apart from the fact that the Petitioner was terminated in the year 2006, the service career of Petitioner right from the time of his appointment, that is right from the initial period of his one year of training, itself the Petitioner had been subjected to disciplinary action at

regular intervals and he has been inflicted with a large number of punishments and thus, for all the reasons, learned Counsel for Respondents prayed for dismissal of the present Writ Petition.

7. Learned Counsel for Respondents in support of his contentions has relied upon the decision of this Court in the case of *Mangal Singh Markam v. State of Chhattisgarh & Ors.*, decided on 12.3.2020 in WPS No. 3072/2011, reported in MANU/CG0517/2020.

8. Having heard the contentions put forth on either side and on perusal of record, the admitted factual position as it stands is that the Petitioner was appointed as a Constable under the Respondents vide Order dated 18.10.2005. Upon being appointed, the Petitioner was required to undergo one year of training. During the training period itself, the Petitioner was found of remaining absent without leave on two occasions; first for the period of 24 days with effect from 5.12.2005 to 29.12.2005 and then for the period of 15 days between 8.2.2006 to 22.2.2006. For this misconduct, the Petitioner was dismissed from service on 25.2.2006. To which the Petitioner preferred an appeal and the dismissal was commuted by the Appellate Authority into "30 days of Rigorous Imprisonment in Force Custody".

9. Respondents in their return have cited 13 instances where the Petitioner has been subjected to disciplinary proceedings. For ready reference, the said 13 instances are being reproduced herein under:-

"1. Committed offence under Section 19(a) of the BSF Act, 1968 for "without sufficient cause absents without leave i.e. for 24 days w.e.f. 5.12.2005 to 29.12.2005 again for 15 days w.e.f. 8.2.2006 to 22.2.2006 for which he was tried by Summary Security Force Court on 25.2.2006 and awarded punishment of "To be dismissed from service" under the provisions of Rule 51 of the BSF Rules, 1969. However, the punishment awarded to the Petitioner was later commuted by the authorities into "30 days Rigorous Imprisonment in Force Custody".

2. Committed offence under Section 19(a) of the BSF Act, 1968 for "absenting himself without leave for 33 days" for which he was tried summarily by his Commandant on 13.3.2008 and awarded punishment of "28 days" Rigorous Imprisonment in Force Custody" under the provisions of Section 53 of the BSF Act, 1968.

3. Committed offence under Section 19(b) of the BSF Act, 1968 for “without sufficient cause overstaying leave granted to him for 20 days” for which he was tried summarily by his Commandant on 23.5.2008 and awarded punishment of “14 days' Rigorous Imprisonment in Force Custody” under the provisions of Section 53 of the BSF Act, 1968.
4. Committed offence under Section 40 of the BSF Act, 1968 for “an act of prejudicial to good order and discipline of the Force” for which he was tried summarily by his Commandant on 28.5.2011 and awarded punishment of “14 days' extra guard duty” under the provisions of Section 53 of the BSF Act, 1968.
5. Committed offence under Section 19(b) of the BSF Act, 1968 for “without sufficient cause overstaying leave granted to him for 25 days” for which he was tried summarily by his Commandant on 2.9.2013 and awarded punishment of “7 days' pay fine” under the provisions of Section 53 of the BSF Act, 1968.
6. Committed two offences under Section 19(b) of the BSF Act, 1968 for “absenting himself without leave for 26 days” and under Section 21(2) of the BSF Act, 1968 for “disobeying the lawful command given by this superior officer” for which he was tried summarily by his Commandant on 11.7.2014 and awarded punishment of “28 days' Rigorous Imprisonment in Force Custody and 14 days' pay fine” under the provisions of Section 53 of the BSF Act, 1968.
7. Committed offence under Section 40 of the BSF Act, 1968 for “an act prejudicial to good order and discipline of the Force” for which he was tried summarily by his Commandant on 20.9.2014 and awarded punishment of “7 days' pay fine” under the provisions of Section 53 of the BSF Act, 1968.
8. Warning issued to Petitioner on 16.11.2017 by the DIG/Commandant, STC BSF Kharkan Camp (Punjab) for overstaying leave for one day.
9. Warning issued to Petitioner on 10.12.2018 by the Commandant, 74 Bn BSF Kharkan for committing indisciplined activities.
10. Warning issued to Petitioner on 3.11.2011 by the Commandant, 74 Bn BSF for overstaying leave for 5 days.
11. Warning issued to Petitioner on 2.1.2013 by the Commandant, 41 Bn BSF for overstaying leave for 5 days.
12. Warning issued to Petitioner on 25.5.2013 by the Commandant, 41 Bn BSF for overstaying leave for 12 days.
13. Advice issued to Petitioner on 16.1.2014 by the Commandant, 41 Bn BSF for availing 15 days' Casual Leave mischievously twice in a calendar year whereas only 15 days' Casual Leave is admissible to a BSF person in a calendar year.”

10. The plain reading of the aforesaid list of misconducts and the punishments which the Petitioner has been inflicted with in the past, speaks volumes in respect of his conduct, behaviour and discipline. In addition, it also reflects the dedication, commitment and sense of responsibility towards the nature of employment that he has undertaken.

11. It is at this juncture Rule 26 of the Rules of 1969 becomes relevant and needs to be considered. For ready reference, Rule 26 is also quoted herein under:-

“26. Retirement of enrolled persons on grounds of unsuitability.— Where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force, the Commandant may, after giving such enrolled person an opportunity of showing cause (except where he consider it to be impracticable or inexpedient in the interest of security of the State to give such opportunity), retire such enrolled person from the Force.”

12. The service in Uniformed Forces cannot be compared with the service rendered under the Public Sector Undertakings or a Government or a Semi-Government establishments. The employment under the Uniformed Force has its own inbuilt discipline and which has to be strictly adhered to. The person who has obtained employment under the Uniformed Force cannot take his employment for granted or, for that matter, lightly. There are serious responsibilities which are reposed upon the Forces by the Government and that these responsibilities are discharged by the persons appointed in these Forces, which all the more enhances the requirement of maintaining discipline in discharging of duties.

13. Hon'ble Supreme Court in the case of *state of Punjab v. Dr. P.L. Singla*, reported in 2008 (8) SCC 469, in paragraphs 11 to 14, has held as follows:

“11. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

12. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline.

13. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that as it may.

14. Where the employee who is unauthorizedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence.”

14. Madhya Pradesh High Court in a similar case, that is the case of *Druv Kumar Sharma v. The Union of India & Ors.*, decided on 6.7.2017 in WP No. 1169/2010(S), in paragraphs 22 to 24, has held as under:-

“(22) The petitioner, a member of disciplined force has not overstayed the leave for few days but for 168 days without any justifiable, sufficient cause. Reliance placed on the decisions in *Syed Zaheer Hussain Vs. Union of India and others* [(1999) 9 SCC 86], *State of Uttar Pradesh and others Vs. Ram Daras Yadav* [(2010) 2 SCC 236] and *Krushnakant B. Parmar Vs. Union of India and another* [(2012) 3 SCC 178] are of no assistance to the petitioner in the given facts of present case. In *Syed Zaheer Hussain (supra)* the employee was a Security Assistant. The case of *Ram Daras Yadav (supra)* was not of unauthorized absence. The case of *Krushnakant B. Parmar (supra)* was also of a Security Assistant in a civilian department, as 12 Writ Petition 1169/2010(s) would help the petitioner to draw any parity. Similarly, decision in *Balu Singh s/o Bheraji Maida Vs. State of M.P. and others* [2011(4) MPLJ 423], *Raj Kumar Gautam Vs. State of M.P. and others* [2014 (3) MPLJ 113], *Santosh Bharti Vs. State of M.P. and others* [2016(4) MPLJ 311], *Munni Singh Vs. State of M.P. & Others* [WP(s) 2489/2004 decided on 26.06.2012], *Kaushlendra Singh Jatav Vs. Union of India & Ors* [WP 4566/2006 decided on 23/09/2016], *Mansukhlal Govindbhai Tank Vs. State of Gujarat and another* [2014 LAB. I.C.510 (Guj)] and *Sunil Kumar Vs. UOI and others* [2011(5) SLR 719 (Delhi)(DB)] are also of no assistance to petitioner as they turn on their respective facts.

(23) In *Maan Singh Vs. Union of India and other* (2003) 3 SCC 464 dwelling upon the case of a member of Delhi Police Force remaining absent unauthorizedly, it is held by the Lordships:

"5. In *Harihar Gopal* case this Court noticed that the delinquent officer in failing to report for duty and remaining absent without obtaining leave had acted in a manner irresponsibly and unjustifiedly; that, on the

finding of the Enquiry Officer, the charge was proved that he remained absent without obtaining leave in advance; that the order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service and adjustment of leave due to delinquent officer and for regularising his absence from duty. This Court's attention was not invited to any rule governing the respondent's service conditions under which an order regularising absence from duty subsequent to termination 13 Writ Petition 1169/2010(s) of employment had the effect of invalidating termination. Thus, this Court concluded that it could not be held that the authority after terminating the employment of delinquent officer intended to pass an order invalidating that earlier order by sanctioning leave so that he was to be deemed not to have remained absent from duty without leave duly granted.

9. The instant case fully falls within the ratio of the decision of this Court in Harihar Gopal case and following the said decision, we uphold the view taken by the High Court. Hence, this appeal stands dismissed."

(24) In Union of India and others Vs. Gulam Mohd. Bhat [AIR 2005 SC 4289], the Apex Court has observed, thus:

"9. This Court had occasion to deal with the cases of overstay by persons belonging to disciplined forces. In State of U.P. v. Ashok Kumar Singh (1996 (1) SCC 302) the employee was a police constable and it was held that an act of indiscipline by such a person needs to be dealt with sternly. It is for the employee concerned to show how that penalty was disproportionate to the proved charges. No mitigating circumstance has been placed by the appellant to show as to how the punishment could be characterized as disproportionate and/or shocking. (See Mithilesh Singh v. Union of India and Ors. (2003 (3) SCC 309). It has been categorically held that in a given case the order of dismissal from service cannot be faulted. In the instant case the period is more than 300 days and that too without any justifiable reason. That being so the order of removal from service suffers from no infirmity. The High Court was not justified in interfering with the same. The order of the High Court is set aside. The appeal is allowed but under the circumstances there shall be no order as to costs."

15. Hon'ble Supreme Court as early as in the case of *State of U.P. & Ors. v. Ashok Kumar Singh & Anr.*, reported in 1996 (1) SCC 302, has held as under in paragraph 8:-

“8. We are clearly of the opinion that the High Court has exceeded its jurisdiction in modifying the punishment while concurring with the findings of the Tribunal on facts. The High Court failed to bear in mind that the first respondent was a police constable and was serving in a disciplined force demanding strict adherence to the rules and procedures more than any other department. Having noticed the fact that the first respondent has absented himself from duty without leave on several occasions, we are unable to appreciate the High Court's observation that 'his absence from duty would not amount to such a grave charge'. Even otherwise on the facts of this case, there was no justification for the High Court to interfere with the punishment holding that 'the punishment does not commensurate with the gravity of the charge' especially when the High Court concurred with the findings of the Tribunal on facts. No case for interference with the punishment is made out.”

16. Given the judicial pronouncements discussed in the preceding paragraphs and also taking note of the large number of acts of indiscipline/misconduct on the part of Petitioner for which he has also been penalized in the past, if the Respondent authorities have invoked the provisions of Rule 26 and have retired him from service of the Border Security Force, it cannot be said that there was no strong reasons available on record against the Petitioner. It also cannot be said that the decision of the Respondents in retiring the Petitioner is highly disproportionate or harsh.

17. Thus, for all the aforesaid reasons, this Court does not find any strong case made out by Petitioner calling for an interference with the impugned Order dated 20.9.2014.

18. Writ Petition is dismissed accordingly.

Sd/-
(P. Sam Koshy)
JUDGE

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