

**In The High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**MAT 653 of 2019
With
CAN 2 of 2021**

**Purnendu Khan
Versus
Union of India & Ors.**

**Mr. Sourabh Guhathakurata,
Mr. Dip Jyoti Chakraborty,
Ms. Ipsita Ghosh,
Mr. Abhratanu Sarkar,
... for the appellant**

**Mr. Bhudeb Chatterjee,
Ms. Sarda Sha,
... for the Union of India**

The appellant, while working in the service of Border Security Force, became ill from 5th December, 1994 and was treated in the BSF Hospital. He was advised to take rest. On an application, the appellant was granted leave till 19th December, 1994. According to the appellant, he went to his native place and took treatment in the nearest hospital. He was given advise to take rest. In view of the same, he applied for extension of leave from 20th December, 1994. The said request was rejected by the respondent and appellant was asked to join duty on 20th December, 1994. The appellant did not join duty. According to him, he was diagnosed with tuberculosis and sent a request dated 3rd January, 1995 by certificate of posting for extension of leave and also a representation dated 7th April, 1995 by certificate of posting.

The respondent No. 5 issued a show-cause notice dated 27th March, 1995 calling upon the appellant to show-cause within fifteen days as to why action should not be taken for his long unauthorized absence. The respondent No. 5, on the failure of the appellant to submit any explanation, vide order dated 11th April, 1995, dismissed the appellant from service. According to the appellant, he sent a representation dated 27th July, 1995 giving reasons for not joining duty.

On the above averments, the appellant filed the present writ petition being C.O. 19767(W) of 1995. In the writ petition, the learned counsel for the appellant contended that respondent No. 5 did not comply with Rule 22 of the Border Security Force Rules, 1969 (for short, “the Rules”) as respondent No. 5 did not furnish the report of the Court of Enquiry based on which, show-cause notice was issued. Due to failure on the part of the respondent No. 5, the appellant could not submit effective explanation and prayed for allowing the writ petition. The dismissal of the appellant is vitiated for non-compliance of Rule 22 of the Rules and prayed for allowing the writ petition.

The respondent No. 5 filed affidavit-in-opposition and contended that:

- i) Appellant was called upon to join duty on 20th December, 1994 but he did not join duty.

- ii) The respondent No. 5 did not receive any request for extension of leave alleged to have been sent under certificate of posting and did not receive letter dated 7th April, 1995.
- iii) The respondent No. 5, by exercising the power under Rule 22 of the Rules, dismissed the appellant. The order of dismissal is valid and legal and prayed for dismissal of the writ petition.

The learned Judge considering the materials placed before him and Sections 19 and 82 of the Border Security Force Act, 1968 (for short, “the Act”) and Rule 22 of the Rules dismissed the writ petition holding that respondent No. 5 by informing the appellant about unauthorized absence had complied with Rule 22 of the Rules.

Against the said order of dismissal, the appellant has come out with the present appeal.

The learned Counsel for the appellant reiterated the averments made in the writ petition and grounds raised in the appeal and further contended that Section 62 of the Act and Rule 22 of the Rules must be read together. As per Section 62, a court of enquiry has to be conducted with regard to absence and the enquiry report must be furnished to the charged employee. The learned Judge erroneously held that the respondent No. 5 by informing the appellant about unauthorized absence complied with Rule 22.

The learned Counsel for appellant relied on the judgment in the case of ***Nagarjuna Construction Company Limited vs. Government of Andhra Pradesh and Others*** reported in ***(2008) 16 SCC 276*** and submitted that if any adverse report is relied on to initiate proceeding against the employee, the copy of the said report should be furnished to the employee.

Per contra, the learned counsel appearing for the respondent No. 5 submitted that the appellant did not join duty after expiry of leave granted and rejection of request for extension of leave from 20th December, 1994. Respondent No. 5 did not receive alleged letters dated 3rd January, 1995 and 7th April, 1995. The appellant has failed to prove for having sent those letters. Learned counsel submitted that appellant is a deserter as per Section 61 of the Act due to unauthorized absence. The concerned police was informed about the desertion and police was requested to arrest the appellant. The respondent No. 5 by informing the unauthorized absence in the show-cause notice complied with Rule 22. The appellant did not submit any explanation and did not even seek for document for submitting his explanation. The learned Judge has given proper and valid reason for dismissing the writ petition and prayed for dismissal of the appeal.

Heard counsels appearing for the appellant and the respondent and perused the entire materials on record.

From the materials on record, it is seen that the appellant is absent from duty from 20th December, 1994 in spite of rejection and his request for extension of leave and calling upon him to join duty on 20th December, 1994 itself. The appellant failed to prove that he sent letters dated 3rd January, 1995 and 7th April, 1995 for extension of leave as well as his alleged explanation dated 27th July, 1995. According to the appellant, he sent letters dated 3rd January, 1995 and 7th April, 1995 through certificate of posting but failed to produce any proof for having sent those letters. In the facts and circumstances of the case, the appellant ought to have sent communication through registered post so as to have proof for having served all his letters. This failure creates a doubt as to whether really the appellant sent these letters or is making such claim only for the purpose of the case.

The contentions of the learned Counsel for the appellant that a reading of Section 62 of the Act and Rule 22 of the Rules makes it clear that the respondent No. 5 failed to comply with Rule 22 is not acceptable in view of Section 61 of the Act. Section 61 deals with persons who deserted the work. When a person subject to the Act deserts, the Commandant of the unit is empowered to request the concerned civil authorities to apprehend the deserter as if a warrant is issued by a Magistrate and deliver the deserter when apprehended into the custody

of Force. The learned Counsel for respondent No. 5 submitted that the appellant was treated as deserter and steps had been taken to apprehend him. This contention is not disputed by Counsel for appellant.

The charge against the appellant is that he unauthorizedly absented himself and in the show-cause notice, it has been clearly mentioned that action is being taken for his unauthorized absence. Even though the appellant received the show-cause notice, he has not submitted any explanation.

Considering Section 61 of the Act and show-cause notice, we hold that respondent No. 5 has complied with Rule 22. The learned Judge has considered all the materials placed before him and by giving valid reasons that by informing the appellant about unauthorized absence, respondent No. 5 has complied with Rule 22. There is no reason to interfere with the impugned order.

For the above reasons, the order passed by the learned Judge does not warrant any interference by this Court.

Accordingly, the appeal fails and is dismissed.

(V.M. Velumani, J.)

(Rai Chattopadhyay, J.)