

09.01.2023
DL-6
(PP)
Ct.21

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 19401 of 2022

Upendra Kumar Yadav
Vs.
Union of India & Ors.

Mr. Sandip Kumar Bhattacharyya,
Mr. Suman Basu

....for the petitioner.

Mr. Anirban Mitra

....for Union of India.

The Admitted facts which arise out of this writ
petition are as follows:-

- (a) The petitioner was appointed as a Constable
(General Duty) in the Border Security Force
(in short, "BSF") on February 27, 2012.
- (b) The petitioner has been complaining of
mental illness since 2017.
- (c) The Medical Officer of BSF found that the
petitioner has been suffering from mental
illness on May 2, 2018.
- (d) The said position has been reiterated on
January 14, 2019 by the Chief Medical
Officer, BSF.
- (e) The Chief Medical Officer recommended
avoidance of fire arm/ammunition/night
duty during the service of the petitioner.

- (f) The petitioner was on leave from June 12, 2019 till February 29, 2020 for 263 days. Such leave was approved of by the authorities concerned.
- (g) On June 7, 2020, the petitioner took casual leave for 15 days.
- (h) The petitioner was required to resume duty on June 26, 2020, but he failed to do so.
- (i) The petitioner was required to join the services immediately, by letters dated June 27, 2020, August 8, 2020 and September 15, 2020. It was categorically stated in the said letters that in default, disciplinary action would be initiated against the petitioners as per the Border Security Force Act and Rules.
- (j) The petitioner did not join the services as directed by the said letters.
- (k) Thereafter, a show-cause notice was issued to the petitioner on January 28, 2021. The petitioner was required to submit a reply to the show-cause within 30 days of the receipt of the same.
- (l) The petitioner did not respond/reply to the said show-cause notice dated January 28, 2021.

(m) Thereafter, the petitioner was dismissed from service by an order dated March 1, 2021 with effect from the said date. The said order was issued by the Commandant 179 Bn. BSF.

(n) The petitioner made a representation before the authorities concerned for reinstatement. The said representation of the petitioner was disposed of by the Inspector General, South Bengal Frontier, BSF even though the Hon'ble Allahabad High Court found writ No. 14837 of 2021 to be not maintainable for want of territorial jurisdiction.

(o) It has been, inter alia, stated in the said order of rejection that there was nothing that prevented the petitioner from intimating to his superior authority regarding his problems in respect of joining the force on scheduled date. Several opportunities were given to the petitioner and the petitioner chose not to defend himself. Therefore, under Section 22 of the BSF Rules, the petitioner was dismissed from service on the ground of misconduct.

Mr. Bhattacharyya, learned counsel appearing on behalf of the petitioner argues that the said

dismissal from service is illegal and arbitrary and since the petitioner was mentally disabled he is protected under the Rights of Persons with Disabilities Act, 2016 (2016 Act) and the Mental Health Care Act, 2017 (2017 Act). He draws the attention of this Court to Clause 3 of the schedule of the 2016 Act for consideration of the definition of the term “mental illness”. Mental illness in Clause 3 is defined as under:

“mental illness” means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, but does not include retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence.”

He contends that the said definition of mental illness is pari-materia with the definition of mental illness under Section 2(s) of the 2017 Act. He cites the non-obstante clause in Section 120 of the 2017 Act in support of his contention that the said Act would have an overriding effect on any other law for the time being in force. Therefore, the provisions of the Mental Health Care Act 2017 will have an overriding effect on the Border Security Force Act, 1968. The petitioner’s mental illness is covered under

both 2016 & 2017 Act. The benefit of the overriding effect of the 2017 Act has to be extended to the petitioner since the definition of mental illness is pari-materia in both the Acts. He submits that no person can be dispensed with or reduced in rank under Section 20 (4) of the 2016 Act. Therefore, the order of dismissal passed by the Commandant/the concerned authority was illegal and against the statutory provisions. He also draws the attention of this Court to Rule 22 of the BSF Rules. He submits that the authority who had the power to dismiss the petitioner from service was the General Security Force Court and not the Commandant under Section 2(c) of BSF Rules, 1969.

Furthermore, the provisions of Section 12 of the BSF Act has not been complied with till date. Due to the illegalities and/or infirmities in dismissing the petitioner from service his prayer for reinstatement should be allowed. He relies on a Apex Court's decision reported in (2017) 4 SCC 697 (**Ex. Gnr. Laxmanram Poonia (dead) through legal representatives Vs. Union of India & Ors.**) to contend that the respondent authorities were under an obligation to show that the petitioner/employee was suffering from a disease like schizophrenia at the time of entering into the military services. In the event

the respondent authorities are not able to show the same, it would be presumed that the petitioner was in a sound mental condition at the time of entering of the service.

He further refers to a decision reported in (2014) 11 SCC 684 (**Mahinder Dutta Sharma Vs. Union of India & Ors.**) in support of his contention that only in certain cases where there is an act of moral turpitude, business deprivation resulting in deliberate act of delinquency, the infliction of a punishment of dismissal or removal should be considered.

He also refers to Central Civil Services (Leave) Rules, 1972 for his claim that only when a medical authority is unable to see with certainty that the government servant will never be fit for service again, leave not extending twelve months may be granted and such leave should not be extended without further reference to a medical authority. In this case, no further recommendation from the medical authority was taken by the employer to consider the question whether or not leave can be further extended to the petitioner.

He submits that Sections 328 to 339 of the Code of Criminal Procedure, 1973 and Order 32 and the rules framed thereunder under Code of Civil

Procedure, 1908 have been violated by the employer in dismissing the employee/petitioner.

Mr. Mitra, learned counsel, appearing for the respondent authorities submits that there is no question of considering the provisions of 2016 or the 2017 Act since the petitioner has not been dismissed from service on account of "Mental Illness". The petitioner has been dismissed from service by an order dated March 1, 2021 only on the ground of unauthorised absence without providing for any reasons. Despite 3 letters issued prior to the show cause notice and also the issuance of the show cause notice the petitioner remained unauthorisedly absent and failed to give any reasons for the said absence. He draws the attention of this Court to pages 36 and 46 of the report on affidavit affirmed on behalf of the respondents on December 3, 2022 in support of his contention that the petitioner himself has stated that he was unable to join the duty due to an FIR lodged against him and his brother in a land dispute case and his poor health condition. The last communication made on behalf of the petitioner prior to the order dated March 1, 2021 is on October 29, 2020.

He refers to a decision reported in (2003) 3 SCC 464 (**Maan Singh Vs. Union of India & Ors.**)

support of his contention that unauthorised absence can tantamount to misconduct and a penalty of dismissal can be passed in order to maintain discipline of the force. In case where the petitioner is habitually absent for long period, such order of dismissal can be passed.

Having considered the rival submissions of the parties and the materials placed on record this Court finds:-

- (i) Admittedly, the petitioner has himself claimed that he is suffering from mental illness since 2017
- (ii) The medical report of 2018 shows that the petitioner was suffering from mental illness.
- (iii) The medical report of 2019 also recommended the petitioner to avoid fire arms, ammunition and night duty.
- (iv) Despite admittedly suffering from mental health illness, the petitioner has been rendering his service and accepting monthly wages/remuneration from the authorities concerned/employer.
- (v) The petitioner was given 263 days of leave from June 2019 till February 2020.

- (vi) Thereafter, the petitioner was again given 15 days casual leave with effect from June 8, 2020 to June 25, 2020.
- (vii) The petitioner failed to explain what necessitated the authorised leave from June 25, 2020 onwards. The petitioner was discharging his duties till June 2019 and has been receiving his regular salary.
- (viii) The petitioner was only recommended to avoid fire arms/ammunitions and night duty. The petitioner was not recommended complete rest from services after assessment of his mental health condition.
- (ix) The petitioner failed to pray for further extension of leave prior to the three notices being issued requiring him to join the services immediately.
- (x) The petitioner further failed to respond to the show-cause notice dated January 28, 2021.
- (xi) Therefore, all the allegations made by the respondents concerned remained uncontroverted.

- (xii) The petitioner also failed to bring on record the letters dated July 30, 2022 and October 29, 2022 whereby he himself has requested that he is unable to join duty due to FIR and poor health condition.
- (xiii) Such a conduct on the part of the petitioner is not appreciated by this Court. The petitioner cannot be allowed to approbate and reprobate. On one hand the petitioner cannot say that he is unable to join the duty and on the other hand cannot claim to be reinstated.
- (xiv) The case of **Laxmanram** (supra) does not come to the aid of the petitioner since in that case there was no note on the service record that the petitioner suffered from a mental disability at the time of joining the duties. In that case, it was presumed that the appellant was in a sound mental condition at the time of entering military service.
- (xv) In the present case, there is no dispute with regard to the fact that the petitioner was in a sound mental condition at the time of joining of his services.

- (xvi) Admittedly, the petitioner started suffering from mental illness in 2017 culminating into the medical reports of 2018 and 2019. Therefore, since the petitioner himself has admitted that he is suffering from mental condition and has requested the respondent authority to consider his case since he is not able to join duty there is no applicability of the decision of **Laxmanram** (supra) to the present case.
- (xvii) The decision of **Mahinder Dutt Sharma** (supra) also does not come to the aid of the petitioner since it relates to Rule 41 of the Central Services (Pension Rules) 1972. The petitioner withdrew the writ petition challenging dismissal and made a representation for compassionate allowance under Rule 41.
- (xviii) In the said case also, it has been observed that the question whether the act designed or permitted by the employee would result in personal profiteering has to be considered while inflicting the punishment of dismissal or removal from services.

- (xix) This Court cannot lose sight of the fact that the petitioner has been drawing his salary even in 2017 when admittedly he was suffering from mental illness till March 1, 2021 when he was dismissed from services. His mental condition was not such that he was unable to work from 2017 to 2020. After drawing his salary and personally praying to be considered as **unfit** from joining services, the petitioner cannot now claim protection of 2016 and 2017 Act.
- (xx) If the petitioner is allowed to do so, the same would result in personal profiteering in favour of the petitioner.
- (xxi) The decision of **Maan Singh** (supra) relied on behalf of the respondents aids them to show that long period of absence without authorized leave may tantamount to grave misconduct resulting in dismissal. In that case also, the police officer did not respond/reply to the notice issued by the authorities. He neither resumed his duties nor informed the authorities regarding his reason of absence nor

submitted any application for further medical leave.

- (xxii) This Court is of the view that the 2016 and 2017 Acts are not applicable to the fact of the case. Neither are the Central Civil Services (Leave) Rules applicable in this case. The employees to which the Civil Services Rules apply are enumerated in Rule 2 of the said Rules. The petitioner being in Para Military service is governed by the BSF Act, 1968 and BSF Rules 1969.

In the light of the discussions above, the Writ petition being **W.P.A. 19401 of 2022** is **dismissed** without any order as to costs.

All parties shall act on the server copy of this order duly downloaded from the **website** of this Court.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all the formalities.

(Lapita Banerji, J.)

