

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2140 of 1991(O&M)
Date of Order:14.11.2023

Gurmit Singh

.Appellant

Versus

Union of India and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Rajeshwar Thakur, Advocate, for the appellant.

Mr. Sunil Kumar, Advocate and
Mr. Lalit Kumar, Advocate,
for the respondents.

ANIL KSHETARPAL, J

1. In this regular second appeal, the correctness of the concurrent findings of fact arrived at by the courts below is assailed by the plaintiff.
2. In order to comprehend the issue involved in the present case, the relevant facts, in brief are required to be noticed.
3. At the relevant time, the appellant was serving as a Constable in 22 Battalion of Border Security Force (BSF), Shillong-6. He applied for the sanction of leave which was not accepted by the appropriate authority. However, without the permission of his superiors, he came back to Naraingarh (Tehsil Dasuya, Punjab). He remained absent from duty for a period of more than 3 months. The competent authority took note of his continuous absence from duty, and sent him a show cause notice on 11.04.1987 (Ex.D1) permitting him to file reply upto 17.04.1987. However, within the prescribed time, no reply was received which led to constitution

of the Court of Inquiry under the Border Security Force Act, 1968 (hereinafter referred to as 'the 1968 Act'). Ultimately, the services of the appellant were terminated on 21.04.1987. It is the case of the appellant that he went back to join the duty on 08.04.1987, however, he was not permitted to join the duty. The plaintiff filed a suit claiming that he fell ill in December, 1986 and applied for sanction of leave which was not accepted, therefore, he came to Naraingrah in order to recover from the illness.

4. The defendants while filing the written statement contested the suit and submitted that two applications were received from the appellant for sanction of leave on the ground that he had to leave the Unit due to acute family circumstances.

5. Both the courts on appreciation of the evidence have found that the case pleaded by the plaintiff is at variance with the applications submitted by the plaintiff to the authorities for the sanction of leave. Both the courts further held that the plaintiff has failed to prove that he had a sufficient cause to leave the Unit without permission of his superiors or sanction of the leave.

6. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paper book.

7. The learned counsel representing the appellant while drawing the attention of the court to the order dated 21.04.1987, passed by the Commandant, Border Security Force, submits that the absence of the appellant from 03.01.1987 to 20.04.1987 i.e. 108 days was regularised as an extra-ordinary leave. He submits that therefore the absence of the appellant stood condoned. He further submits that the procedure laid down in Rules 170 and 173 for holding the Court of Inquiry has not been followed and the

services of the appellant could not be dispensed with as he was not a deserter. He submits that Section 62 of the 1968 Act is not applicable.

8. This Court has considered the submissions of the learned counsel representing the parties.

9. On 21.04.1987, the commandant passed an order to the effect that further retention of the appellant in service is not permitted. At that stage, the period of absence i.e. 108 days was regularized only for the purpose of the record. In fact, an identical issue came up for consideration before the Supreme Court in *State of Punjab and others vs. Charanjit Singh 2003 (8) SCC 458*. The Supreme Court after considering its previous judgment in *State of Punjab and others vs. Bakshish Singh 1999 AIR (SC) 2626*, explained that the order of the sanction of leave is passed in order to regularize the leave and it does not amount to the condonation of misconduct. Paragraph 5 of the judgment passed in *Charanjit Singh's case (supra)* is extracted as under:-

“5. In the State of Punjab and ors vs. Bakshish Singh JT 1998 (7) SC 142 : [1998 (5) SLR 625 (SC)] which was relied upon by the courts below in holding that the misconduct stood condoned, was explained in Maan Singh (supra). No law has been laid down in Bakshish Singh (supra) to the effect that only in the event, leave without pay is directed to be granted while passing an order of punishment, the leave having been regularized the order of punishment also becomes bad in law and void ab initio. While deciding Bakshish Singh (supra), this Court had not taken into consideration an earlier binding precedent in State of Madhya Pradesh vs. Harihar Gopal, 1969 SLR 274 (SC) wherein it has clearly been stated that such order is passed only for the

purpose of regularizing the leave and thereby the effect of punishment is not wiped out.

In Maan Singh (supra), it was held that the period of absence when treated as leave without pay, was with a view to regularize the leave and not for condonation of misconduct.”

10. As regards the second argument of the learned counsel representing the appellant, it may be noted that on a Court question, the learned counsel representing the appellant admits that the proceeding of the Court of Inquiry was not challenged before the courts below on the ground that the procedure as laid down in the rules has not been followed.

11. While entertaining the regular second appeal, the court is not expected to permit the appellant to take up a new point which was never pressed before the courts below.

12. The last argument of the learned counsel representing the appellant is based on Section 62 of the 1968 Act, which is extracted as under:-

62. Inquiry into absence without leave.

(1) When any person subject to this Act has been absent from duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be appointed by such authority and in such manner as may be prescribed; and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessities; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof and the said deficiency, if

any, and the Commandant of the unit to which the person belongs shall make a record thereof in the prescribed manner.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall for the purposes of this Act, be deemed to be a deserter.

13. On a careful reading of Section 62, it is evident that the competent authority is entitled to draw a statutory presumption if the person subject to the provisions of the Act has been absent from duty without due authority for a period of 30 days. The argument of the learned counsel representing the appellant is based on sub-section(2) of Section 62 of the 1968 Act. He contends that the appellant reported back for duty on 08.04.1987 and therefore, he could not be declared a deserter. It may be noted here that sub-section (1) of Section 62 of the 1968 Act provides that if the period of absence from duty is 30 days or more than that, he shall be deemed to be absent from duty. Sub-Section (2) of Section 62 of the 1968 Act is applicable if the person after having been declared absent does not surrender or is being apprehended. This is not applicable to the facts of the present case. The services of the appellant has been dispensed with on account of the unauthorised absence. Moreover, the learned counsel representing the appellant did not challenge the correctness of the findings of the courts below on the grounds that the reasons given in the applications submitted by the appellant in February, 1987 are different from the reasons given in the suit.

14. Keeping in view the aforesaid facts and discussion, no ground to interfere is made out.

15. Dismissed.

16. All the pending miscellaneous applications, if any, are also disposed of.

November 14, 2023

(ANIL KSHETARPAL)

nt

JUDGE

Whether speaking/reasoned :YES/NO

Whether reportable :YES/NO