

* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 09.01.2023

Pronounced on: 24.02.2023

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W.P.(C) NO. 2692/2021

EX-CT/GD BASAVARAJ KOTRAPPAVAR Petitioner

Through: Mr.C.K. Bhatt, Mr.Himanshu
Gautam & Mr.Ayush Bhatt, Advs.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr.Siddharth Khatana, SPC for
UOI. Sh.Paramveer Singh, AC
(LAW) BSF.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. A writ petition under Article 226 of the Constitution of India has been filed on behalf of the petitioner seeking directions for quashing of the Orders dated 20.03.2019, 14.08.2019/12.09.2019 and 11.02.2020 whereby the petitioner was dismissed from the service and for directions to re-instate the petitioner along with consequential benefits.
2. The factual narration in brief, is that the petitioner was enrolled as a

Constable (GD) with the respondents on 15.07.2012 and after the completion of his training, was posted with the 33Bn BSF. On 30.09.2018, the petitioner applied for 30 days of earned leave and 15 days of Paternity leave which was duly sanctioned from 01.10.2018 till 14.11.2018. However, unfortunate turn of family events at home prevented him to join back the battalion, when his sanctioned leave got over on 14. 11.2018. One day before, i.e. on 13.11.2018, his wife who was pregnant and was suffering from anemia and uncontrolled hypertension, went into acute labour pain. She was admitted in the hospital and was blessed with twin children. The medical condition of both the children was not stable and they were shifted to the Intensive Care Unit of the hospital.

3. In the interim, the respondent issued a re-joining Notice dated 28.11.2018 which was received by the petitioner on 07.12.2018. However, because of the circumstances as narrated above, he also started losing his health. He, on receipt of the Joining Notice, telephonically informed the Battalion about his family condition and about his new born children being admitted in the ICU and was allowed some time to join back. However, the medical condition of one child improved while the other

child died on 24.12.2018. The petitioner's wife being a psychiatric patient, couldn't bear the loss of the newly born child and completely lost her mental capabilities. Moreover, she remained admitted in the hospital.

4. In the meanwhile, another Joining Notice dated 06.12.2018 was served upon the petitioner on 26.12.2018 but the petitioner had to perform the last rites of his child and also take care of his wife. Since there was no other person in the family to look after them, he was unable to reply to the said Notice.

5. In the meanwhile, the surviving child was detected with Perineal Dermoid Cyst and was advised a surgical operation. The child was discharged on 31.12.2018 and was prescribed medication.

6. The miseries of the petitioner did not end there as on 31.12.2018, the grandfather of the petitioner had a massive cardiac arrest and was admitted in the hospital; he expired on 06.01.2019. Despite the poor health of the petitioner and his family circumstances, he booked his air tickets on 16.01.2019 to resume his duties but because of his poor physical and mental health, he was advised a few days rest by the doctor.

7. The petitioner thereafter got his train tickets booked on 24.03.2019 for 26.03.2019 and reached the Battalion on 28.03.2019 but was not

allowed to rejoin his duties by the Authorities. He was informed that he has been dismissed from service vide Order dated 20.03.2019 which was served upon him only on 12.05.2019.

8. The petitioner preferred statutory Appeal challenging the Dismissal Order on the ground that the observations made in the Order were misleading as the petitioner was never served either any Show Cause Notice or the copy of COI proceedings. However, the appeal was rejected vide Order dated 14.08.2019/12.09.2019 stating therein that the Show Cause Notice as well as the copy of Court Of Inquiry (COI) proceedings that were sent to the petitioner, were refused by him.

9. The petitioner then preferred a Representation dated 21.11.2019 before the Director General, BSF which was again rejected by a non-speaking and unreasoned Order dated 11.02.2020.

10. The Orders of dismissal, statutory appeal as well as the Representation have been challenged on the ground that they have been dismissed in violation of principles of natural justice and are contrary to Section 19 (b) of the Border Security Force Act, 1968 (*hereinafter referred to as the 'BSF Act'*). It is asserted that the petitioner's services could not have been dispensed with by exercise of powers under Section

11 (2) of the Act by merely serving a show cause notice for which reliance has been placed on Sees Ram Vs Union of India, 1996(63) DLT 890, Sat Pal Singh Vs. Union of India W.P. (C) 4796 of 1998 and Jitender Singh Vs. Union of India, W.P.(C) No. 1151/2000 decided on 19.10.2006, Sudesh Kumar Vs. Union of India, 1997(42) DRJ 623, and in Ajaib Singh Vs. Union of India 1997(40) DRJ 710.

11. Likewise, the impugned dismissal Order dated 20.03.2019 is challenged on the ground of being in complete violation of the Section 11 of the BSF Act and Rule 22 of the Border Security Force Rules, 1969 Rules (*hereinafter referred to as the 'Rules, 1969'*). In the impugned Order of dismissal, it has been observed that the absence of the petitioner from service was without any sufficient cause which in itself renders it as a penal order making it obligatory on the respondents to comply with the mandate of the Section 48 of the BSF Act which provides that an “*Officer not below the rank of Deputy Inspector General or any prescribed officer may dismiss or remove any person under his command other than an Officer or a subordinate Officer of such rank or ranks as may be prescribed*”.

12. The dismissal of the petitioner could thus, be by an Officer of the

rank of a Deputy Inspector General and no other officer. However, the dismissal Order has been passed by the Commandant who is an incompetent Authority as per the mandate of Section 11 of BSF Act read with Rule 22 of the BSF Rules, 1969. It is further asserted that the impugned Dismissal Order observes that further retention of the petitioner in service was felt undesirable since he had overstayed his leave w.e.f 15.11.2018 without any reasonable cause. The Administrative Powers conferred under Rule 22 of the Rules, 1969 could not have been exercised without complying with the requirements of Rule 22 (2) of the BSF Rules, 1969 which states that upon consideration of the report on misconduct of the person concerned, the Competent Authority is of the opinion that his further retention in service is undesirable and is satisfied that the trial of such a person is inexpedient or impracticable, **it shall so inform the person concerned together with all the reports adverse to him and the person concerned shall be called upon to submit, in writing, his explanation and defense.** Admittedly, no such satisfaction of the Competent Authority for dispensing with trial of the petitioner in accordance with the provisions of Section 48 of the BSF Act has been recorded by Security Court Martial for the offence alleged against the

petitioner under Section 19 (b) of the BSF Act. The termination of petitioner's service in violation of the procedure prescribed under Rule 22 of the BSF Rules, 1969 is bad in law.

13. It is asserted that recourse to an administrative action is an exception to the regular Rule of trial by the Security Force Court and hence a greater obligation has been casted upon authorities concerned to specifically apply their mind and properly record such satisfaction as contemplated under the Rules. It is submitted that the impugned Orders dated 20.03.2019, 14.08.2019/12.09.2019 and 11.02.2020 are completely silent on this aspect.

14. The petitioner has submitted that the overstay of leave was not without sufficient cause in view of the circumstances that were beyond his control, as has already been explained. His absence was neither wilful nor intentional. A prayer is therefore made that his dismissal Order dated 20.03.2019 be set aside and he be re-instated with all consequential benefits.

15. **The respondents by way of their counter-affidavit** have explained that the petitioner proceeded on 30 days of Earned Leave w.e.f 06.04.2015 to 05.05.2015 but he reported to the Unit after overstaying for

32 days. However, taking a lenient view, the Competent Authority regularized his Overstaying from leave (OSL) by granting him 32 days Earned Leave. The petitioner again proceeded on 45 days of Earned Leave w.e.f 18.04.2016 to 01.06.2016 and extended his Earned Leave by 15 days upto 16.06.2016 but again overstayed from the sanctioned leave by 63 days. The Competent Authority again took a lenient view and regularized his OSL period from 17.06.2016 to 18.08.2016 by granting him 41 days Earned Leave and 22 days Half Pay Leave.

16. The petitioner, yet again in the year 2017, took 30 days Earned Leave w.e.f 14.03.2017 to 12.04.2017 and after completion of his leave, overstayed for 63 days upto 14.06.2017. He was tried summarily on 30.06.2017 by the Commandant, 33 Bn BSF under Section 53 of the BSF Act, 1968 and was awarded the punishment of a fine of his '7 days pay'.

17. During the year 2018, the petitioner proceeded on 30 days Earned Leave along with 15 days paternity leave w.e.f 01.10.2018 to 14.11.2018 but again overstayed and failed to resume his duties on 15.11.2018. He neither submitted any letter/request expressing his inability to re-join his duties nor sought for extension of the leave. Accordingly, as per procedure, a Letter No. 14926-27 dated 28.11.2018 was sent to the

petitioner at his last known home address with the directions to report back on duty immediately. The said Letter was also sent to the Gram Panchayat Pradhan of his village. However, the petitioner did not report back to the duty or reply to the Letter.

18. Another Letter no. 15174/75 dated 06.12.2018 was sent informing him to either join or face disciplinary action but again no response was elicited from the petitioner. A registered Letter No. 15419-20 dated 15.12.2018 was again sent but to no avail.

19. Since the petitioner was absent from duty for more than 30 days, a Court of Inquiry (COI) as mandated under Section 62 of the BSF Act, 1968 was ordered vide Order No. 15756-58 dated 24.12.2018 to ascertain the circumstances of prolonged overstay by the petitioner. The COI was completed and it was opined that the overstay of the petitioner w.e.f 15.11.2018 was wilful and without any sufficient cause and further initiation of disciplinary action against him was recommended.

20. An Apprehension Roll was issued to the Superintendent of Police, Distt- Haveri (Karnataka) vide Registered Letter No. 381-383 dated 18.01.2019 with the request to apprehend the petitioner and to arrange for his production to 33 Bn BSF or nearest BSF Unit/HQ in terms of

provisions contained in Section 61 of the BSF Act. A copy of the Apprehension Roll was sent to Station House Officer (SHO) of PS-Shiggaon, Distt- Haveri (Karnataka) for similar action. Neither any reply was received from the Police Authorities nor the petitioner reported to the Unit.

21. A Show Cause Notice dated 2/4.02.2019 was sent under Rule 22 of the BSF Rules, 1969 vide Letter No. 617-19 dated 02/04 Feb 2019 along with a copy of COI Proceedings indicating that the Competent Authority was satisfied that his trial before a Security Force is not only inexpedient but also impracticable and his further retention in the Force is undesirable and his termination from service was tentatively proposed to the Competent Authority. He was given an opportunity to urge his defences within 30 days from the date of receipt of the Show Cause Notice. A copy of Show Cause Notice was also sent to the Superintendent of Police, Distt- Haveri (Karnataka) and SHO PS- Shiggaon with the request to hand over the same to the petitioner through the representative of the Police.

22. The Show Cause Notice sent through registered AD Letter, was received back un-delivered with the remarks of the postal authority on the envelop as "*Refused and Return to Sender*". Since, the Show Cause

Notice was refused and the petitioner also did not report on duty even after a lapse of considerable time, he was dismissed from service on 21.03.2019 by the Commandant vide Order No. Estt/33 Bn/OSL-BMK/BSF/2019/1624-41 dated 20.03.2019 in exercise of the powers vested with him under Section 11 of the BSF Act read with Rule 22 and Rule 177 of the BSF Rules, 1969. The Dismissal Order was sent to the home address of the petitioner but the same was again returned with the remarks "*Refused and returned to sender*". The copy of the Dismissal Order was then sent to the Superintendent of Police District- Haveri (Karnataka) vide Letter No. 4563-64 dated 23.04.2019 with the request to hand over the same to the petitioner as well as his father. The Police Authority then handed over the copy of the Dismissal Order dated 12.05.2019 and forwarded the receipt to the 33 Bn BSF vide Letter dated 27.05.2019.

23. On the Representation of the petitioner, his case was examined under Rule 28 A of the Rules, 1969 and after consideration of overall facts and circumstances, the Inspector General BSF, Kashmir Frontier rejected the representation as being devoid of merit and the outcome of the same was intimated to the petitioner vide Letter dated 14.08.2019.

24. On 20.08.2019, the petitioner personally appeared before the DIG (RR), FHQ, BSF (Adm Dte), New Delhi for interview and also submitted his representation with the request to re-instate him in BSF on the grounds of mercy. The said Representation was forwarded to Ftr, HQ, BSF Kashmir vide Letter dated 22.08.2019 for consideration, the same was examined and a suitable reply dated 12.09.2019 was sent to the petitioner.

25. Again, the petitioner submitted a Representation dated 21.11.2019 addressed to the Hon'ble Prime Minister of India but the said representation was again examined in detail by the Director General, BSF and his request was not acceded to, being devoid of merits and out of purview of governing Rules. The outcome was conveyed to the petitioner through Letter dated 11.02.2020.

26. It is asserted that sufficient time and opportunity was given to the petitioner to re-join his duty before passing the Order of Dismissal, but he has failed to avail the opportunity. The due procedure as prescribed under the BSF Act and Rules thereunder has been followed before dismissing the petitioner. The averments made by the petitioner that the procedure followed by the respondents was violative of any legal or statutory right of the petitioner, is wrong and denied. It is further stated that if the petitioner

was having any problems as has been alleged by him now, he could have made a request for extension of his leave but he failed to do so.

27. The respondents have relied upon Union of India Vs. Dutta Linga Toshatwad (2005) 13 SCC 709 to support its assertion that absence without intimation is indiscipline of the magnitude which in appropriate cases may even warrant dismissal.

28. It is further stated that the Commandant was competent to take action under Section 11 (2) of the BSF Act read with Rule 22 of the Rules. A due procedure has been followed but the petitioner has intentionally refused to receive the notices. It is further asserted that the claim of the petitioner is based on flimsy grounds and the petition is liable to be dismissed as it is devoid of any merit.

29. The respondents have placed reliance on Gouranga Chakraborty Vs. State of Tripura and Ors. Civil Appeal No. 2106/1989 decided on 31.03.1989 to assert that the Commandant is the competent authority as per the Rules to take disciplinary action.

30. **The petitioner in its rejoinder** has re-asserted his assertions as made in the petition.

31. **Submissions heard.**

32. The petitioner has sought directions for quashing his Dismissal Order dated 20.03.2019 and subsequent Orders dated 14.08.2019, 12.09.2019 and 11.02.2020 vide which his appeal and representation against the Dismissal Order have also been dismissed.

33. The undisputed facts are that the petitioner who was enrolled as Constable in BSF on 15.07.2012 had been sanctioned 30 days Earned Leave and 15 days paternity leave from 01.10.2018 to 14.11.2018. It is claimed that his wife who was pregnant, went into labour on 13.11.2018 and delivered twins but they were critical and had to be admitted in the I.C.U. His wife in the interim was also in the hospital and suffered mentally on account of the traumatic turn of events. Her condition was aggravated by the fact that the petitioner and his wife had lost their first child in the earlier pregnancy in the year 2017. The petitioner claimed that one of the twin children died on 24.12.2018 further aggravating their trauma. Thereafter his grandfather who was the only elder member taking care of the family died on 06.01.2019, which led to further mental trauma to the petitioner and his family. It is asserted by him that he had got air tickets booked on 16.01.2019 but because of his own falling health and fever, he was unable to report to the department. He again booked the

train tickets for 26.03.2019 and reported to his Battalion on 28.03.2019 but was not permitted to join his duty.

34. While the petitioner has claimed sympathy based on the afore-narrated facts, he has significantly failed to support them with any corresponding documents. The petitioner has not placed on record the medical discharge slips of his wife or the medical records of the wife or the children in support of their medical condition. The petitioner has asserted that his wife had gone into labour on 13.11.2018 but significantly not a single medical paper has been placed on record in respect of the same. A death certificate of the child dated 24.12.2018 has been placed on record lending some credibility to the assertions made by the petitioner.

35. The petitioner, in detail has explained his family circumstances which not only prevented him from resuming his duty but even prevented him to inform the Battalion. At no time has he claimed that he was suffering from fever which became a cause of his absence. However, it is significant to note that he has placed on record the copies of his Medical Certificates issued by Government Hospital, Hulgur. The first Medical Certificate certifies that he was suffering from viral fever from 13.11.2018 to 17.11.2018 and a Medical Fitness Certificate dated 16.11.2018 was

issued that he was fit to resume duties from 18.11.2018. He has filed another Medical Certificate certifying that he was suffering from viral fever, back pain and weakness from 18.11.2018 to 18.03.2019 and was fit to resume his duties from 19.03.2019. These Medical Certificates as produced by the petitioner are totally contrary to his own averments made in the Petition. His allegations were that because of his family circumstances, and demise of his child and grandfather, he was suffering mentally and was unable to resume the duties. However, the Medical Certificates filed by the petitioner himself tell a different story, which lends total non-credence to his circumstances which prevented him to report back. The conduct of the petitioner is doubtful in procuring his Medical Certificates to justify his absence

36. Further, the petitioner himself has asserted that he had informed his Battalion about his circumstances and that he was unable to join but conspicuously, he fails to disclose any details of the person to whom he gave telephonic information. Mere passing reference has been made bereft of any specific details. Further, he has claimed that he had purchased an Air Ticket dated 16.01.2018. It is striking that the petitioner was fit enough to purchase the air ticket but was unfit to inform the Department

about his inability to re-join his duty. Moreover, the last extenuating circumstance was the sad demise of his grandfather on 06.01.2019. What prevented him thereafter, especially when he even purchased his Air ticket for 16.01.2019, has been left unexplained.

37. Another significant aspect is that he was served with Notice dated 28.11.2018 and 06.12.2018 directing him to resume his duties but there is no explanation forthcoming as to what prevented him from responding to the same. He may be having difficult family situation but was definitely not incapacitated from at least responding to the Notices and the reminder. Rather, all the Notices, letters and Show Cause Notice were refused by him, which has neither been countered nor ever explained.

38. When the petitioner failed to resume his duties even after a period of 30 days from the expiry of his leave period, a Court of Inquiry was constituted vide Order dated 24.12.2018 and Sh. Naveen Singh, Assistant Commandant, 33 Battalion, BSF was detailed as the Presiding Officer to conduct the One Man Inquiry to investigate the circumstances under which the petitioner, Basavaraj, who had proceeded on leave for 30 days of Earned Leave and 15 days Paternity Leave, overstayed his leave. The apprehension Order of the petitioner was issued on 18.01.2019 to be

executed by Superintendent of Police, District Haveri, Karnataka but unfortunately no response was received. Only after the petitioner failed to respond to the Notices and Show Cause Notice issued, the COI concluded that the overstay was without sufficient cause.

39. A Show Cause Notice enclosing the Court of Inquiry opinion, in accordance with the prescribed procedure under the Rules, 1969, was sent to the petitioner at his residential address again giving an opportunity to explain his absence from duty, which unfortunately met with the same fate of refusal by the petitioner vide endorsement dated 14.02.2019.

40. Thereafter, the Order of Dismissal dated 20.03.2019 was passed which was again sent to the petitioner vide registered AD but was again refused on 29.03.2019. The Department in an earnest attempt, thereafter forwarded the Dismissal Order vide Letter dated 23.04.2019 to the Superintendent of Police, District Haveri, Karnataka for it being served upon the petitioner.

41. The petitioner has provided no explanation for his inaction to respond to the letters requesting him to re-join his services. Despite the petitioner's recalcitrant behaviour of repeated refusal to receive the Show Cause Notice and the Dismissal Order, his appeal and representation

which followed thereafter were duly considered by the Department but finding no merit, the same were dismissed.

42. The appellant had challenged the authority of the Commandant to order dismissal of the petitioner. However, the Apex Court in Gouranga Chakraborty Vs. State of Tripura and Ors. Civil Appeal No. 2106/1989 decided on 31.03.1989 held:

“the power under section 11(2) of the Act empowering the Prescribed Authority, i.e. the Commandant to dismiss or remove from service any person under his command other than an officer or a subordinate officer read with Rule 177 of the said Rules is an independent power which can be validly exercised by the Commandant as a Prescribed Officer and it has nothing to do with the power of the Security Force Court for dealing with the offences such as absence from duty without leave or overstaying leave granted to a member of the Force without sufficient cause and to award punishment for the same”.

43. The cases relied by the petitioner to state that the due procedure of a trial by the Security for court had not been followed by the respondents is not tenable. This court in Sees Ram Vs Union of India, 1996(63) DLT 890 and Sat Pal Singh Vs. Union of India W.P. (C) 4796 of 1998 and Ajaib Sing Vs. Union of India 1997(40) DRJ 710 dismissal by the Security Court on the sole ground of absence from duty was not found acceptable as competent authority had not recorded in the Inquiry proceedings that

the retention of the constable in service was undesirable in the dismissal order. This precedent has no relevance to the case of the petitioner as the respondents in their Show Cause Notice have clearly recorded the satisfaction that the retention of the petitioner was undesirable.

44. There is no violation of the principles of natural justice in the present case and hence the judgements in Jitender Singh Vs. Union of India, W.P.(C) No. 1151/2000 decided on 19.10.2006 and Sudesh Kumar Vs. Union of India, 1997(42) DRJ 623 are of no assistance to the case of the petitioner.

45. Though the petitioner had claimed his family situation ie., the precarious health of his wife and the deteriorating health of his second child, and also his mental trauma, but no documents whatsoever has been filed in support of these contentions. Rather, the petitioner has filed his own medical certificates which on the face of it does not appear to be genuine. There was nothing which prevented the petitioner in today's day and age of technology, to have informed the Commandant about his inability or his family circumstances which despite due service of two Notices and also the Show Cause Notice, he did not deem it necessary to provide his reply.

46. In this context, it may also be observed that the petitioner after joining his service in 2012 had proceeded on leave for 30 days w.e.f. 06.04.2015 to 05.05.2015 but has overstayed for 32 days which was regularised. He again overstayed for 63 days in the year 2016 which again was treated with compassion and regularised by the Department. In 2017 again, he overstayed for 63 days and was punished with a fine. Though his conduct in the previous years may not be significant and relevant for considering his absention in the year 2018-2019, but for the reasons stated above, the petitioner has not been able to provide any reason for his absence atleast from mid-January to March,2019. His non-responsive and evasive conduct in refusing the Show Cause Notice and Dismissal Orders further reflects his obstinacy and misconduct.

47. It would be pertinent here to refer to the observations made in Union of India Vs. Dutta Linga Toshatwad (2005) 13 SCC 709, where the Apex Court had held that :

“....Members of the uniformed force cannot absent themselves on frivolous pleas, having regard to the nature of the duties enjoined on these forces, such indiscipline, if it goes unpunished, will greatly affect the discipline of the forces. In such forces desertion is a serious matter. Cases of this nature, in whatever manner described, are cases of desertion particularly when there is apprehension of the member of the force

being called upon to perform onerous duties in difficult terrains or an order of deputation which he finds inconvenient, is passed. Such matters cannot be taken lightly, particularly when it relates to uniformed forces of this country”.

48. The Armed Forces is a disciplined force where such kind of wilfulness and disregard for the duty, only broods indiscipline which cannot be accepted. We therefore, conclude that petitioner has not been able to give any cogent explanation or reasons for his absence without intimation. He has also not been able to show any procedural deficiency in holding the Court of Inquiry or in the findings leading to his dismissal.

49. We find no reason to interfere in the Dismissal Order and the petition is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

FEBRUARY 24, 2023
PA