

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

M.A.T. 559 of 2024

Sanjay Jaiswal

VS.

Union of India & Ors.

For the Appellant : Mr. Shambhunath Ray
Ms. Amrita Tewari
Ms. Tuhina Parvin
Ms. Munmun Das

For the Respondents : Mr. Debapriya Gupta
Mr. Sourav Mondal

Heard on : July 16, 2024

Judgment on : July 16, 2024

DEBANGSU BASAK, J.:-

1. Appeal is at the behest of a writ petitioner and directed against an order dated January 24, 2024 passed in W.P.A. No. 11780 of 2021. Appellant as the writ petitioner assailed the order dated April 26, 2021 passed by the DIG/PSO for Inspector General, Ftr HQ BSF, Meghalaya, confirming an order of

dismissal from service of the appellant passed by the Commandant, 11th Battalion of BSF at Shillong, in the writ petition. By the impugned order the writ petition of the appellant was dismissed.

2. Learned advocate for the appellant submits that the, appellant was unfairly treated by the authorities. He refers to the earlier order of dismissal from services and submits that, the same was set aside by the High Court. Authorities failed before the Supreme Court also. He submits that, the authorities although allowed the appellant to rejoin his duties, did not take into account the medical condition of the appellant and his wife while passing the fresh order of dismissal from services. He refers to the conduct of the parties and the orders of the writ Court passed from time to time.

3. Learned advocate appearing for the appellant refers to Rule 173 of the Border Security Force Rules, 1969 and submits proviso to Rule 173 (8) takes away the power of the Court of Enquiry to decide on unauthorized absence. He also refers to Section 19 of the BSF Act, 1968 and submits that in respect of absence without leave, Security Force Court is required to be constituted. Therefore, the order of dismissal passed on the basis of the order of the Court of Enquiry was wholly without jurisdiction.

4. Learned advocate appearing for the BSF authorities draws the attention of the Court to Section 62 of the BSF Act, 1968. He submits that, enquiry into absence without leave can be made by a Court of Enquiry which was done.

BSF authorities proceeded in accordance with law in dismissing the appellant from his services. He submits that, the provisions of the Statute will prevail over the Rules.

5. Learned advocate appearing for the BSF authorities submits that the Act and the Rules read together allows the authorities to invoke Rule 22 for dismissal or removal of person other than an officer on account of misconduct. In the present case, Rule 22 was invoked read with Section 11 of the Act.

6. An order of dismissal from service was initially passed against the appellant on July 4, 1998. Such order was challenged in a writ petition being W.P. No. 10019 (W) of 2000. The learned Single Bench allowed such writ petition by an order dated June 13, 2002. Division Bench upheld the order of the learned Single Judge on July 6, 2015. Special Leave Petition directed against the order dated July 6, 2015 was dismissed on July 7, 2017. Appellant was reinstated in service by a letter dated October 13, 2017. He resumed duties on October 2, 2017. Appellant was granted extra ordinary leave from January 3, 2019 to January 18, 2019. Appellant applied for extension of such leave which was rejected. He was asked to resume duties by several letters. Appellant made repeated representations for extension. However, a Court of Inquiry proceeding was instituted against the appellant for overstaying the leave granted. A Show Cause Notice was issued to the appellant on May 10,

2019. Thereafter, appellant joined his services on May 31, 2019. Appellant came on leave on August 10, 2019. Appellant became ill and applied for grant of resignation. Appellant filed a second writ petition being W.P. No. 17061 (W) of 2019 which was disposed of by an order dated November 25, 2019 directing the authorities to consider the representation of the appellant. Appellant submitted a representation dated December 2, 2019. A second show cause notice was however issued on November 30, 2019. Appellant filed the third writ petition being W.P. No. 24031 (W) of 2019 which was disposed of by an order dated January 24, 2020. Authorities disposed of the representation dated December 2, 2019 on February 27, 2020. Authorities issued office memos dated April 4, 2020 and June 3, 2020. Appellant made a representation dated July 20, 2020 for being relieved from the services along with all retired benefits. Authorities passed an order of dismissal from services on July 9, 2020. Such order of dismissal was challenged in a writ petition being W.P.A. 7354 of 2020. Such writ petition was disposed of by an order dated October 20, 2020 upholding the order of dismissal from services and permitting the appellant to prefer an appeal therefrom. Appellant preferred an appeal against the order of dismissal from services, before the appellant authority on November 30, 2020. Such appeal was dismissed by an order dated April 26, 2021.

7. Appellant challenged the order of the appellate authority dated April 26, 2021 in a writ petition remitting in the impugned order of dismissal of the writ petition.

8. Few provisions of the BSF Act, 1968 as also the BSF Rules, 1969 as referred to by the learned Advocate for the parties, fall for consideration in the present appeal.

9. Sections 2(u), 11, 19, 62 & 64 of the BSF Act, 1968 which are as follows:-

“2(u) “Security Force Court” means a court referred to in section 64”

“11. Dismissal, removal or reduction by the Director-General and by other officers.”---(1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in sub-section (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and rules.”

“19. Absence without leave. – Any person subject to this Act who commits any of the following offences, that is to say, -

(a) absents himself without leave: or

(b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from the appropriate authority that any battalion or part thereof or any other unit of the Force, to which he belongs, has been ordered on active duty, fails, without sufficient cause, to rejoin without delay; or

- (d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or
- (e) when on parade, or on the line of march, without sufficient cause, or without leave from his superior officer, quits the parade or line of march; or
- (f) when in camp or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or
- (g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there,

shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned."

"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."

"64. Kinds of Security Force Courts. – For the purposes of this Act there shall be three kinds of Security Force Courts, that is to say, -

- (a) General Security Force Courts;
- (b) Petty Security Force Courts; and
- (c) Summary Security Force Courts."

10. It would also be appropriate to set out relevant provisions of the BSF Rules, 1969, namely rules 22 and 173.

“22. Dismissal or removal of persons other than officer on account of misconduct.—(1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in sub-rule (2) against such action;

Provided that this sub-rule shall not apply—

(a) Where the service is terminated on the ground of conduct which has led to his conviction by a criminal court of a Security Force Court; or

(b) Where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.

(2) When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence:

Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion, its disclosure is not in the public interest.

(3) The competent authority after considering his explanation and defence if any may dismiss or remove him from service with or without pension.

Provided that a Deputy Inspector-General shall not dismiss or remove from service, a Subordinate Officer of an above the rank of a Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to be Director-General.”

“173. Procedure of Courts of inquiry.---(1) The proceedings of a Court of inquiry shall not be open to the public. Only such persons may attend the proceedings as are permitted by the Court to do so.

(2) the evidence of all witnesses shall be taken on oath or affirmation.

(3) Evidence given by witnesses shall be recorded in narrative form unless the Court considers that any questions and answers may be recorded as such.

(4) The court may taken into consideration any documents even though they are not normally proved.

(5) The court may ask witnesses any question, in any form, that they consider necessary to elicit the truth and may take into consideration any evidence, whether the same, is admissible under the Indian Evidence Act, 1872 (1 of 1872) or not.

(6) No counsel, ort legal practitioner shall be remitted to appear before a Court of inquiry.

(7) Provisions of section 89 shall apply for procuring the attendance of witnesses before the Court of inquiry.

(8) Before giving an opinion against any person subject to the Act, the Court will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

[Provided that this provision shall not apply when such inquiry is ordered to enquire into a case of absence from duty without due authority.]

(9) The answers given by a witness to any question asked before the Court shall not be admissible against such a witness on any charge at any subsequent occasion except a charge of giving false evidence before such Court."

"11. Dismissal, removal or reduction by the Director-General and by other officers.---(1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in sub-section (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and rules."

11. Section 2 (u) defines a Security Force Court which means a Court referred to in Section 64. Provisions of Section 64 were not invoked in the facts and circumstances of the present case.

12. Section 19 of the Act of 1968 deals with absence without leave. It specifies that any person who commits seven offences enumerated therein shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as mentioned in the Act of 1968. Security Force Court procedure was not adopted so far as the appellant is concerned.

13. Section 62 of the Act of 1968 allows an enquiry into absence without leave to be made. Sub-Section (1) allows a Court of Enquiry to be appointed to enquire regarding the absence of the persons and the deficiencies if any in the property of the Government entrusted with the delinquent. Such Sub-Section also allows the Court of Enquiry if satisfied of the facts that the absence was without due authority or other sufficient cause to declare such absence of the period thereof to make a record in the prescribed manner. Sub-Section (2) provides that if the person declared absent does not

afterwards surrender or is not apprehended, he shall be deemed to be a deserter for the purpose of Act of 1968.

14. In the facts of the present case, a Court of Enquiry was held to enquire into the absence of the appellant. Such Court of Enquiry found the appellant to be in unauthorized absence from January 18, 2019. Court of Enquiry declared the appellant as deserter with effect from January 18, 2019. Court of Enquiry directed that if the appellant is found guilty and dismissed from service, his Identity Card and an amount of Rs.34,819/- be recovered from him.

15. Appellant did not join his duties subsequent to the order of the Court of Inquiry.

16. The disciplinary authority thereafter passed an order dated July 9, 2020. The disciplinary authority took into account that a show-cause notice dated November 30, 2019 was issued to the appellant. It also noted that the appellant neither joined his duties nor made any correspondence even after receipt of the speaking order dated February 27, 2020. Time to join the duties was extended. Appellant was given an option to report the Headquarters in his home town if he found difficulty in joining his Unit at Shillong. Appellant did not join his duties and not made any correspondence with the Unit. Therefore, disciplinary authority proceeded to hold that appellant after being afforded opportunity to join the battalion illegally overstayed his leave

since 2019 without sufficient cause. In view of such continued illegal absence in excess of 10 months and in view of the fact that such conduct was detrimental to the discipline of the Force, he was found to be undesirable for further retention in the post. Consequently, disciplinary authority in exercise of powers under Rule 22 (2) of the Rules of 1969 read with Section 11(2) of the Act, 1968 dismissed the appellant from his services.

17. Appellant preferred an appeal before the appellant authority as provided under the Service Rule. The Appellate authority concurred of the view with the disciplinary authority.

18. Quantum of punishment to be imposed is within the domain of the disciplinary authority. Appellant belonged to the BSF which is a disciplined force. He was absent without sufficient cause over an expansive period. He was allowed opportunities to rejoin his battalion. He was even allowed to report before the Headquarters which is close to his home town. He did not avail of such opportunities. He did not reply to the correspondence issued despite receipt of the notices.

19. Quantum of punishment imposed cannot be held to be disproportionate to the charges established. Impugned decision of the appellate authority cannot be held to be perverse. Principles of natural justice were not violated.

20. In such circumstances, we are of the view that the appellant was removed from his services in a process prescribed by law.

21. We find no merit in the present appeal.

22. **M.A.T. 559 of 2024** along with connected application, if there be any are dismissed without any order as to costs.

(Debangsu Basak, J.)

23. I agree

(Md. Shabbar Rashidi, J.)

S.D.