

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
Constitutional Writ Jurisdiction
Appellate Side

W.P.A. No. 797 of 2021

Indrajit Barman

VS

The Union of India & Ors.

Before : The Hon'ble Justice M.V. Muralidaran

Mr. Swarup Das,

Mr. Satyajit Paul,

----- for the petitioner.

Mr. Sudipto Kumar Mazumder, Ld. DSGI,

Mr. Ajoy Kumar Singhania,

Mr. Sudip Kumar Paul,

----- for the Union of India.

Hearing concluded on :

11.01.2024

Judgment On :

30.01.2024

M.V. Muralidaran, J.:

Heard learned counsel for the petitioner and the learned Deputy Solicitor General for the respondents.

2. The prayers made in the writ petition reads thus:

"A) A Writ in the nature of Mandamus commanding the respondent B SF authority, for taking appropriate steps upon immediately ensuring the reinstatement of the petitioner in his earlier post of constable (GD) in Border Security Force upon setting aside and/or quashing purported and impugned dismissal order vide No. Estt/1273/B/54/2011/8642- 762 dated 03.11.2011 as well as the order vide letter No-Estt-III/Rectt-II/Re-Ins/13/795- 98, dated 15.01.2013 passed by the; Assistant Commandant (MIN) For Inspector General, FTR, HQ,BSF, Jodhpur, Rajasthan forth withcompensate the petitioner with exemplary monetary amount with regard to his salary and other service related benefit.

B) A Writ of and/or writs in the nature of Mandamus be issued commanding/ directing the respondent BSF authorities to set aside/quash the impugned order being order dated 19.08.2020and also letter No-Estt-

III/Rectt-II/Re-Ins/13/795-98, dated 15.01.2013 passed by the; Assistant Commandant (MIN) For Inspector General, FTR, HQ,BSF, Jodhpur, Rajasthan towards setting aside the said impugned order of dismissal and to re-instate in service of your petitioner towards condoning the petitioner's overstaying without leave during his service;

C) A writ in the nature of Certiorari directing the respondents BSF authority to produce, submit and/ or authenticate all the relevant records papers and/ or documents relating to the petitioner's service as well as impugned dismissal proceedings before the Hon'ble Court so that conscionable justices may be rendered upon hearing all the parties;

D) Rule NISI in terms of prayers (A), (B) and (C), made herein above;

E) Interim order in terms of prayer (A) and (B)made herein above."

3. Brief facts are as follows:

The petitioner has been selected and appointed to the post of Constable/GD on 19.11.2008 in the Border Security Force (BSF) and had been performing duty with utmost sincerity since the first posting. In the month of March, 2011, the petitioner took leave from his duty and was

suffering a viral disease like hepatitis and anemia for which the petitioner's physical plight gradually deteriorate to an unable stage. On 18.6.2011, the petitioner received a show cause notice from the office of the Commandant as to why he should not be dismissed from the service for his illegal absent from his duties. When the petitioner approached the Commandant on 6.8.2011, Jodhpur along with his wife and explained the cause for his unauthorized absence from service, the same ended vain. The BSF authority declined to adhere the petitioner's verbal prayer and ultimately respondent No.5 issued the dismissal order dated 3.9.2011.

3.1. Aggrieved by the dismissal order, the petitioner has preferred an appeal before the appellate authority on 24.11.2011. When the said appeal was kept in prolong abeyance, the petitioner has filed W.P.No.9386 (W) of 2013 challenging the order dated 3.9.2011 and to re-instate him in service. According to the petitioner, after filing the said writ petition, he had lost the contact details of his advocate and after a lapse of few months of 2016, the petitioner finally came to the order of the Court that the advocate has not taken steps and the writ petition was dismissed for default on 10.6.2013. After getting the change of vakalat from the earlier advocate, the petitioner engaged a new advocate and

had filed application for restoration of the said order of dismissal dated 10.6.2013 in CAN 11311 of 2016 with delay condonation application in CAN 11312 of 2016. However, both the applications have been dismissed by this Court vide order dated 28.7.2017.

3.2. Aggrieved by the order dated 28.7.2017, the petitioner filed an appeal in MAT No.21 of 2018 along with application for condonation of delay in CAN No.512 of 2018. By the order dated 14.11.2018, the appeal stands disposed of with certain direction. In compliance of the direction issued in MAT No.21 of 2018, the petitioner has submitted a revision dated 27.12.2018 to reconsider the order dated 15.1.2013. Since the said revision has not been considered and kept the same in prolong abeyance, the petitioner had filed WPA No.206 of 2020. By the order dated 17.2.2020, the said writ petition was disposed of directing the Director General, BSF to consider and dispose of the revision preferred by the petitioner in accordance with law within a period of five weeks from the date of receipt of the copy of the order. In compliance of the order dated 17.2.2020, the respondent authority has passed an order dated 19.8.2020 rejecting the prayer for reinstatement of the petitioner. Challenging the orders dated 3.9.2011, 15.1.2013 and 19.8.2020, the petitioner has filed the present writ petition.

4. The respondents filed affidavit-in-opposition stating that the service company of the petitioner was deployed in Bihar/Jharkhand for Assembly Election Duty and the petitioner was detailed for IS Duty in Jharkhand State, but he was absent without leave from the Unit lines on 22.11.2010. He was searched in nearby areas of BSF Campus, Railway Station, Bus Stand etc. at Jaisalmer, but could not be traced out. An FIR was lodged in Jaisalmer Police Station, Rajasthan on 23.11.2010 and a letter directing him to join duty at 54 Bn BSF was also issued on 23.11.2010. However, the petitioner reported at 54 Bn BSF on 20.12.2010 after 29 days of absent without leave period. On arrival, he was heard by the Commandant under Rule 45 of the BSF Rules, 1969 on 30.12.2010.

4.1. It is stated that the Commandant remanded the petitioner for Record of Evidence (ROE). After completion of ROE, he appeared before the Commandant and requested for leave on the plea of his mother's illness. The petitioner was sanctioned 30 days earned leave with effect from 6.1.2011 to 4.2.2011 on compassionate ground, keeping the trial pending. On the expiry of the said leave, the petitioner failed to join. He was directed to join the Bn immediately by letters dated 11.2.2011,

18.2.2011 and 28.2.2011 respectively sent at his home address. The petitioner neither reported on duty nor sent any reply. Thereafter, as per the provision of Section 60 of BSF Act, a Court of Inquiry (COI) was ordered vide order dated 7.3.2011 to investigate the circumstances under which the petitioner overstayed from leave. After completion of the COI, the petitioner has voluntarily joined duty on 26.3.2011 after an overstay of 50 days.

4.2. It is further stated that again on 27.3.2011, the petitioner absented himself from the Unit lines and he could not be traced out and an FIR was lodged at Jaisalmer Police Station and letters were also sent asking him to join the duty. An apprehension roll was also sent to the Superintendent of Police, Coochbehar District on 24.5.2011 to apprehend the petitioner and make arrangements to hand over him to the nearest BSF Bn or to inform 54 BnBSF. In response to the apprehension roll dated 24.5.2011, the Inspector-in-Charge, Mathabhanga, vide letter dated 29.5.2011, intimated that the petitioner had left for Jaisalmer i.e. his place of posting on 19.5.2011 and reached there on 22.5.2011, but neither the petitioner joined the duty nor any intimation regarding his whereabouts received by the Unit. Accordingly, on 8.6.2011, an intimation was conveyed to Mathabhanga Police Station. After

completion of COI, the petitioner was issued a show cause notice on 18.6.2011 calling upon him to submit his explanation in respect of the proposed dismissal from the service within 30 days from the date of receipt of the notice. But the petitioner neither joined his duty nor submitted any word for his defense. Thereafter, it was requested the police to search the petitioner from their end and his whereabouts be intimated at the earliest. In reply, Mathabhanga Police Station intimated that petitioner left for Jaisalmer but returned back to his home and again left for Jaisalmer on 8.7.2011.

4.3. It is stated that on 22.7.2011,, an application was made by the petitioner with medical documents stating that he absented himself without leave and thereafter fallen ill and requested the authority to call him back into the Unit again. After going through the correspondence, the petitioner was issued a show cause on 16.8.2011 directing him to urge in his defense against the proposed dismissal from service and he was given time till 31.8.2011, failing which it is presumed that he has nothing to say in his defense and action be taken accordingly. But the petitioner did not report to 54 Bn till 3.9.2011. The continued illegal absence from duty was considered by the authority detrimental to discipline of the Force and his further retention in the Force also consider

undesirable. Accordingly, as per Rule 22(2) of BSF Rules, the petitioner was dismissed from service with effect from 3.9.2011.

4.4. After the dismissal from service, the petitioner has submitted a petition to the DG BSF, New Delhi requesting to reinstate him in service and the said petition was dealt with by IG, BSF, Rajasthan Frontier and disposed of the same under Rule 28A of the BSF Rules and the result of the same was conveyed to the petitioner on 15.1.2013. Thereafter, the petitioner has filed W.P.No.9386 (W) of 2013 before this Court. However, due to non-prosecution, the writ petition was dismissed for default on 10.6.2013. The restoration application filed by the petitioner along with delay condonation petition was also dismissed. Aggrieved by the same, the petitioner has preferred MAT No.21 of 2018 and the same has also been disposed of by a Division Bench of this Court on 14.11.2018 with liberty to challenge the appellate order dated 15.1.2013 before the appropriate forum. Thereafter, the petitioner has filed WPA No.206 of 2020 before this Court. By the order dated 17.2.2020, the said writ petition was disposed of directing the DG BSF to consider and dispose of the representation in accordance with law. The representation of the petitioner was considered by the DG BSF taking into consideration of all the facts and circumstances and in the light of the governing rules and

rejected the same vide order dated 19.8.2020. Hence, the writ petition is liable to be dismissed.

5. Assailing the impugned orders, the learned counsel for the petitioner submitted that in WPA No.206 of 2020 this Court directed the first respondent therein to consider and dispose of the revisional application filed by the petitioner. In order to comply the said direction of this Court, the respondent authority passed the impugned order dated 19.8.2020 thereby sticking to their self-same arbitrary, whimsical, biased observation towards once again rejecting the petitioner's prayer for reinstatement of his service.

6. The learned counsel further submitted that the petitioner who was severely encountered with hepatitis and anemia disease which constrained the petitioner to laid on bed for a quite considerable time which ultimately resulted his unauthorized absence from duty and leads to the dismissal from service by virtue of impugned order dated 3.9.2011. In fact, challenging the said order, the petitioner has preferred a petition to the DG BSF on 24.11.2021, however, no reply was received by the petitioner. On the other hand, an order dated 15.1.2013 came to

be passed by the respondent authority rejecting the said petition after a prolonged period.

7. The learned counsel for the petitioner would submit that this Court in an earlier order granted the petitioner a fresh cause of action to canvass his grievance through a revision application, if available. Despite receiving such revision application on behalf of the petitioner, the respondent authority being the Confirming Authority by virtue of the BSF Act and Rules has remained completely inactive with the shadow full reason best known to them. In fact, the respondents are in hand in glove in indulging the inaction as well as the illegal activities in utter violation of the settled provision of law. That apart, the respondent authorities failed to conduct the open, proper and independent proceedings into the matter. Thus, a prayer has been made to set aside the impugned orders and reinstate the petitioner into service.

8. Per contra, supporting the impugned orders, the learned Deputy Solicitor General submitted that the petitioner was unauthorisedly on leave and had repeatedly absent without sanction. He did not join his post despite repeated warnings. Before the issuance of the dismissal order dated 3.9.2011, the petitioner was given a show cause directing

him to submit his say. However, the petitioner has not submitted any reply and continued his illegal absence from duty, which necessitated the respondent authority in issuing the dismissal order dated 3.9.2011 as per Rule 22(2) of the BSF Rules.

9. The learned Deputy Solicitor General would submit that after issuance of the impugned order dated 3.9.2011, the petitioner has submitted a petition to DG BSF, New Delhi requesting reinstatement in service, which was forwarded to the FHQ BSF and the same was dealt with by the IG, BSF, Rajasthan Frontier and rejected the same vide order dated 15.1.2013. According to the learned Deputy Solicitor-General, when the petitioner filed W.P.No.9386 (W) of 2013 challenging the order of dismissal, the same was allowed to dismiss for default for non-prosecution and the petition filed to restore the same with delay condonation application was also dismissed by this Court. Aggrieved by the same, the petitioner has filed MAT 21 of 2018 and a Division Bench of this Court vide order dated 14.11.2018 granted liberty to the petitioner to challenge the order dated 15.1.2013. Pursuant to the liberty granted, the petitioner has filed application for revision. Since the same was not considered by the concerned authority, the petitioner has filed W.P.A.No.206 of 2020 and, by the order dated 17.2.2020, W.P.A.No.206

of 2020 was disposed of directing the respondent No.2 therein to consider and dispose of the revision. Pursuant to the said direction, the Director General, BSF considered the revision and rejected the same vide order dated 19.8.2020, which is also under challenge in the present writ petition.

10. The learned Deputy Solicitor General further submitted that since all the acts of the respondent authorities are as per the provisions of the BSF Act and BSF Rules, there is no reason to interfere with the same and no arbitrary exercise done by the respondent authorities as alleged by the petitioner. Thus, a prayer has been made to dismiss the writ petition.

11. This Court considered the rival submissions and also perused the materials available on record.

12. The matter has chequered history. The petitioner was a member of the BSF. He was dismissed from service on 3.9.2011.

13. The petitioner was detailed for IS duty in Jharkhand State, but he was absent without leave from the Unit lines on 22.11.2010. Despite

search made, the BSF authorities could not be traced out. On 23.11.2010, a letter was addressed to the petitioner directing him to join duty at 54 Bn BSF and he reported duty on 20.12.2010. After hearing the petitioner, the Commandant remanded the petitioner for preparation of ROE. After completion of the ROE, the petitioner applied for leave and 30 days earned leave was sanctioned from 6.1.2011 to 4.2.2011 pending trial. On the expiry of the leave, the petitioner has failed to report duty. Despite several letters sent to the petitioner, he failed to report duty nor sent any reply.

14. As per Section 60 of the BSF Act, COI was ordered to investigate the circumstances under which the petitioner overstayed from leave. After completion of COI, the petitioner voluntarily joined duty on 26.3.2011 and again from 27.3.2011, the petitioner absented himself from the Unit lines. On 18.6.2011, a show cause notice was issued to the petitioner calling upon him to submit his reply against the proposed dismissal from service. The petitioner neither joined his duty nor submitted any word of defense. He was again issued with a show cause notice on 16.8.2011 directing him to urge in his defense against the proposed dismissal from service by 31.8.2011. Since the petitioner failed

to report at 54 Bn till 3.9.2011, he was dismissed from service with effect from the said date as per Rule 22(2) of the BSF Rules.

15. It appears that after the dismissal from service, the petitioner has submitted a petition to the DG BSF requesting reinstatement in service and the said petition was dealt with by the IG BSF, Rajasthan Frontier and disposed of the same on 15.1.2013. Subsequently, challenging the dismissal order dated 3.9.2011, the petitioner has filed W.P.No.9386 (W) of 2013 before this Court. But due to non-prosecution, the said writ petition was dismissed on 10.7.2013. Thereafter, the petitioner has taken an application for restoration of the writ petition with an application to condone the delay. Both applications were numbered as CAN 11311 and 11312 of 2016 respectively. By the order dated 28.7.2017, this Court, declined to condone the delay and dismissed CAN 11312 of 2016 and consequently the application for restoration being CAN 11311 of 2016 also dismissed as infructuous. The operative portion of the order reads thus:

“The application for condonation of delay being C.A.N. 11312 of 2016 is dismissed on merit. Consequently, the application for restoration being C.A.N. 11311 of 2016 has become infructuous and the same is also dismissed.

16. Aggrieved by the dismissal of the application for condonation of delay, the petitioner has filed an appeal with delay condonation application and this Court while condoning the delay, disposed of the appeal being MAT No.21 of 2018 vide order dated 14.11.2018. While disposing of the appeal, a Division Bench of this Court observed as under:

"In our view, the appellate order furnishes the appellant a fresh cause of action to move the appropriate forum for redress, i.e., a revision if available or the appropriate court of law. We, accordingly, dispose of the appeal with the observation that the appellant shall be at liberty to challenge the appellate order dated January 15, 2013 before the appropriate forum in accordance with law.

Since a copy of the appellate order has been made over to Mr. Misra, learned advocate for the appellant in Court today by Mr. Chakraborty, learned advocate for the respondents, question of limitation of belated approach, if any, would have to be decided by the appropriate forum bearing in mind late service of the order and in accordance with law.

We make it clear that although the final order of punishment was under challenge in the writ petition and such writ petition has not been decided on merits, it would be open to the appellant to take all points that are available to him in law to have the order of dismissal

from service as well as the appellate order upturned and for re-instatement in service. All points are left open.

Copy of the appellate order produced by Mr.Chakraborty shall be retained with the records.

The appeal stands disposed of. There shall be no order as to costs."

17. Pursuant to the direction given by the Division Bench, the petitioner has filed revision petition/representation dated 27.12.2018 challenging the appellate order. Since the said petition has not been considered and disposed of, the petitioner has again approached this Court by filing W.P.A.No.206 of 2020. The said writ petition came to be disposed of on 17.2.2020. The operative portion of the order reads thus:

"In view of the fact that the revision preferred by the petitioner has been kept pending for a considerable period of time, no useful purpose will be served by keeping the writ petition pending.

The same is accordingly, disposed of by directing the respondent no.2 being the Director General, Border Security Force to consider and dispose of the revision preferred by the petitioner strictly in accordance with law, within a period of five weeks from the date of communication of a copy of this order and to pass a

reasoned order and communicate the same to the petitioner within a fortnight thereafter.

It is made clear, that this court has not gone into the merits of the case and all points are left open to be decided by the said respondent at the time of consideration of the application of the petitioner.

W.P.A. 206 of 2020 is disposed of.”

18. Pursuant to the direction given in W.P.A.No.206 of 2020, DG BSF considered the representation dated 27.12.2018 of the petitioner and rejected the same under order dated 19.8.2020. The operative portion of the order dated 19.8.2020 reads thus:

“12. Now, therefore, in respectful compliance of order dated 17.02.2020, passed by the Circuit Bench Calcutta High Court at Jalpaiguri in WPA No.206 of 2020, filed by the petitioner against UOI and Others, the representation dated 27.12.2018 has been carefully considered by the DG, BSF and taking into consideration all the facts, circumstances and governing rules as stated above and commission of repeated offences of Absent without leave and overstaying leave in his very short service i.e. less than 3 years, the representation of the petitioner has been rejected by DG BSF being devoid of merit.”

19. When the writ petition was taken up for hearing on 10.1.2024 this Court posed a question to the learned counsel for the petitioner that once the original order of dismissal dated 3.9.2011 was confirmed in W.P.No.9386 (W) of 2013, how can the petitioner challenge the very same order dated 3.9.2011 in the present writ petition. Since the learned counsel for the petitioner sought time, the matter was adjourned to 11.1.2024. On 11.1.2024 when the matter was taken up for hearing, the learned representing counsel for the petitioner sought time on the ground that the senior counsel is going to argue the matter. As the learned counsel for the petitioner has been heard at length on 10.1.2024, this Court reserved the matter for orders.

20. As stated supra, the petitioner was dismissed for service on 3.9.2011 and challenge made to the said order in W.P.No.9386 (W) of 2013. The said writ petition was dismissed for non-prosecution. The restoration application to restore W.P.No.9386 (W) of 2013 was dismissed as infructuous while dismissing the application for condonation of delay in filing the said restoration application. When the petitioner filed an appeal being MAT No.21 of 2018 against the order of the dismissal of the delay condonation application, the Division Bench of this Court made an observation that "*although the final order of punishment was under*

challenge in the writ petition and such writ petition has not been decided on merits, it would be open to the appellant to take all points that are available to him in law to have the order of dismissal from service as well as the appellate order upturned and for re-instatement in service. All points are left open". Pursuant to the direction of the Division Bench of this Court and the direction of the learned Single Bench of this Court in another writ petition, being W.P.A.No.206 of 2020, the DG BSF has considered the merits of the dismissal order as well as the appellate order. In fact, by an elaborate order, the said authority has rejected the representation/revision petition of the petitioner under the order dated 19.8.2020, which is also impugned in the present writ petition.

21. On a perusal of the order dated 19.8.2020, it is seen that the DG BSF has narrated the sequence of events and held that the petitioner has started misconduct from very early period of his service. The leave record of the petitioner indicates that during the short span of service i.e. 2 years 8 months and 19 days, he has absented from service on the following occasions:

- i) 88 days OSL – 14 days RI.

- ii) 7 days OSL period w.e.f. 9.11.2010 to 15.11.2010 regularized by granting 7 days leave without pay.
 - iii) 29 days AWL w.e.f. 22.11.2010 to 20.12.2010.
 - iv) 50 days OSL w.e.f. 5.2.2011 to 26.3.20211
 - v) 161 days AWL w.e.f. 27.3.2011 to 3.9.2011
- which resulted in dismissed from service.

22. As rightly observed by the DG BSF, the Government has given mandate to BSF to guard the National Border, which is very sensitive. Every SeemaPrahari has to be punctual, disciplined and dedicated to the duty assigned to him. Personnel missing these traits is not fit for the Force.

23. The petitioner absented unauthorisedly on several occasions as is evident from various records that have been produced by the respondents. Despite issuance of show cause notices to explain and report for duty, the petitioner has not responded properly nor reported for duty within time. More so, the record of proceedings proves that the disciplinary authorities have followed all the procedures as the BSF Act

and the Rules framed thereunder before dismissing the petitioner from service.

24. Absent without leave and overstaying leave in the short span of service by the petitioner is highly condemnable. Such a person is also unfit to guard the National Border. Discipline is a non-negotiable condition of service in the Border Security Force. In other words, the discipline is the implicit hallmark of the Border Security Force.

25. It is settled law that for long unauthorized absence from duty, the punishment of dismissal of the personnel cannot be held to be *per se* disproportionate.

26. The Hon'ble Supreme Court in the case of *Union of India v. SardarBahadur*, (1972) 4 SCC 618, held that there are limits of the powers which can be exercised by the Single Judge of the High Court under Article 226 of the Constitution of India and similarly there are limits to the powers of a Division Bench while sitting in appeal over the judgment of a Single Judge. Where there are relevant materials which support the conclusion that the officer is guilty, it is not the function of the High Court to arrive at an independent finding. It has been held that

if an enquiry has been properly held, the question of adequacy or reliability of evidence cannot be canvassed before the High Court.

27. It is reiterated that, in the present case, the service of the petitioner was terminated with effect from 3.9.2011 after observing the procedure prescribed under BSF Act and the Rules framed thereunder. Prior to the dismissal, procedure prescribed under the BSF Act and BSF Rules was followed, in which several letters were sent for reporting duty and, in fact, show cause notices were issued to the petitioner. However, the petitioner has failed to respond to the proposed action. The Unit Commandant himself satisfied that the petitioner was illegally absenting without leave and that the absence was contrary to the expected norms and detrimental to the Force discipline and the competent authority also satisfied that the trial of the petitioner was inexpedient and his further retention in service being undesirable. Accordingly, the petitioner was dismissed from service on 3.9.2011 on the ground of misconduct.

28. At this juncture, it is to be pointed out that it is within the jurisdiction of the competent authority to decide what punishment is to be imposed and the question of punishment is outside the purview of the

High Court's interference unless it is so disproportionate to the proved misconduct as to shock the conscience of the Court.

29. It is trite that members of the uniformed forces 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.

30. At all the stages of the proceedings, the petitioner has been afforded reasonable opportunity to put forward his defense. The petitioner was unauthorisedly on leave and had repeatedly absented without sanction. He did not join his post despite repeated warnings. When such being the attitude of the petitioner, he cannot expect any indulgence from the Court on sympathy. That apart, such indiscipline person cannot be allowed to continue in the BSF Force, which is a disciplinary Force. Therefore, there is no perversity and/or infirmity in

the impugned orders. Moreover, no valid grounds have been made for interference of this Court to exercise the jurisdiction under Article 226 of the Constitution of India. Thus, the writ petition fails and the same is liable to be dismissed.

31. In the result, WPA 797 of 2021 is dismissed. No costs.

(M.V. Muralidaran, J.)