



W.A.(MD) No.1224 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.07.2024

CORAM

JUSTICE N. SESHASAYEE

and

JUSTICE P.VADAMALAI

W.A.(MD) No.1224 of 2019

and

C.M.P.(MD) No.10531 of 2019

- 1.Union of India,
Rep., by its Secretary,
Ministry of Home Affairs,
North Block, New Delhi-110 114.
- 2.The Director General,
Border Security Force,
Block No.10, CGO Complex,
Lodhi Road, New Delhi-110 011.
- 3.The Inspector General,
Border Security Force (South Bengal),
2B-Lord Sinha Road, Kolkata-700 071.
- 4.The Commandant,
123 Bn, Border Security Force,
Baishnab Nagar, Malda, West Bengal.



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5.S.N.Dubey,
Enquiry Officer,
Asst. Commandant/RO,
123 Bn, Border Security Force,
Baishnab Nagar, Malda, West Bengal.

... Appellants/
Respondents

Vs.

R.Vijayan

... Respondent/
Petitioner

Prayer: Appeal filed under Clause 15 of Letters Patent against the order dated 18.01.2019 made in W.P.(MD) No.7815 of 2009 on the file of this Court.

For Appellants : Mr.P.Subbiah
Senior Panel Counsel

For Respondent : Mr.Md. Ibrahim Ali

JUDGMENT

(Judgment of the Court was delivered by N.Seshasayee, J.)

This appeal is directed by the respondents in W.P.(MD) No.7815 of 2009 against an order passed by the learned Single Judge, dated 18.01.2019 in which he had set aside an order of dismissal passed by the fourth appellant herein against the respondent.



2. The brief facts are as below:

- (a) The respondent was serving as a Constable in the Border Security Force and at the relevant time he was posted at India's border with Bangladesh. He is stated to have absented himself unauthorizedly between 03.05.2009 and 27.06.2009. And he reported for duty on 28.06.2009, whereinafter a charge memo dated 06.07.2009 was issued to him, and after a summary enquiry as contemplated, he was dismissed *vide* order dated 22.07.2009. This order was challenged by the respondent before the learned Single Judge.
- (b) The appellants herein raised three lines of defences: (i) that this Court does not have any territorial jurisdiction, since the cause of action had arisen in West Bengal, where he was posted at the relevant time; (ii) that the respondent had willingly violated Section 40 and Section 19(a) of the Border Security Force Act, 1968 (hereinafter referred to as “the BSF Act”) and inasmuch as the nature of service requires utmost discipline, the appellants were left with little option than to dismiss him; and (iii) there is an internal appeal mechanism available and when an alternate effective remedy is available, this Court might not



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entertain the writ petition.

(c) The learned Single Judge dismissed grounds (i) and (iii) straightaway.

According to him, inasmuch as the communication dismissing the respondent was served on him within the jurisdiction of this Court, this Court will have jurisdiction based on the dictum of the Hon'ble Supreme Court in *Nawal Kishore Sharma vs. Union of India* [(2014) 9 SCC 329]. So far as availability of alternative remedy is concerned, the learned Single Judge has held that, that might have been relevant at the time when the writ petition was filed, but not after a decade when the matter was taken up for final disposal.

(d) Turning to the merit of the respondent's explanations, the learned Single Judge has noted that the respondent's wife had taken ill and was admitted in the hospital on 03.05.2009 and indeed she was hospitalised for the next 22 days. Since it was the personal emergency, the Court has taken a sympathetic view about the situation in which the respondent found himself, and chose to set aside the order of dismissal passed against him.

This order of the learned Single Judge is under challenge in this writ appeal.



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3. Heard counsel for both sides. The learned Senior Panel Counsel for the appellants canvassed heavily as to how the service in Armed Force or in Border Security Force must be considered differently from the other services. His submission is that inasmuch as the duty assigned to any personnel in Border Security Force is sensitive in character, there cannot be any let if there is a breach in their discipline. Any dilution of discipline will lead to dilution of the very character of the Force. The learned counsel also added that the respondent could have produced some evidentiary material about his wife's illness when he orally applied for leave. This apart, when he abandoned his weapons, which if caught in the wrong hands, could have been proved deadly.

4. What is not in dispute or at least could not be disputed is that on the day when the respondent abandoned his duties, his wife was admitted in the hospital. Very apparently, the respondent was overwhelmed by his emotions and had rushed to be with his wife. It is absolutely understandable for an ordinary man not trained the way personnel in army or in BSF are trained.



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But the larger issue is should it invite a punishment of dismissal from service.

Here this Court considers that the punishment meted out to the appellant is disproportionately high to the kind of charges that are levelled against him.

5. To a specific query posed to the counsel for the appellants as to whether there is any specific protocol as to how applications for leave made by a BSF personnel during peace-time are dealt with, the learned counsel has filed a note on instructions to the effect that there are no such protocol or the parameters for guiding the authorities in the matter of granting leave to a Constable in BSF. This implies, there is considerable discretion left with the authority concerned in granting or declining to grant any leave. While discipline of the BSF is paramount, at least in peace time it would be appropriate that the authority, who is vested with the discretionary power to grant leave, deal with these issues with a certain degree of sensitivity, for this is more likely to preserve, if not enhancing the sense of belongingness to the Force. Even as this Court makes this statement, it cannot overlook certain conduct of the respondent that borders on irresponsibility. First he should not have abandoned his weapons, more so when he is operating along a porous



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border with Bangladesh. This, he should have definitely avoided. Secondly after reaching Madurai, he should have at least informed the authorities as to why he has to leave in a hurry. As outlined earlier, the respondent needs to be reminded that he belongs to a different class of citizen. While this Court appreciates certain emotional upheaval which the respondent might have to endure on receiving the message of his wife's hospitalization, he could have been far more responsible in dealing with the situation. Any compromise on that may leave adverse effect on the discipline required of the BSF.

6. There is, therefore, a compelling need to balance the nature of charge levelled against the respondent and the extent of punishment imposed on him. This Court considers that imposing a minor punishment under Section 53 of the BSF Act would be most appropriate under the circumstances.

7. The choice is now left to the sensibilities of the authorities concerned. This Court expects the authority to exercise its discretion with utmost fairness and reasonableness.



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8. To conclude, this Court partially allows this appeal, sets aside the order of the learned Single Judge dated 18.01.2019 in W.P.(MD) No.7815 of 2009 and sends the matter back to the fourth appellant, who will now issue a notice on the respondent about the nature of punishment which he proposes to impose under Section 53 of the Border Security Force Act, 1968, hear him on the same and pass his order on the punishment. The entire exercise shall conclude within a period of eight weeks from the date on which this judgment is hosted in the official website of this Court. No costs. Consequently, connected miscellaneous petition is closed.

(N.S.S., J.) (P.V.M., J.)
22.07.2024

NCC : Yes/No
Index : Yes/No
Internet : Yes

ABR



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