



W.A.(MD)No.1058 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

DATED : 04.11.2024

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MS.JUSTICE R.POORNIMA**

W.A.(MD)No.1058 of 2019

and

C.M.P(MD)No.9663 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 Raod,
New Delhi – 110 011.
- 3.The Inspector General,
Border Security Force,
Head Quarters AM Frontier,
Shillong, Meghalaya.
- 4.The Commandant,
21 BN, Border Security Force,
Prahari Nagar (Upper Damalgiri),
Tura, Mehalaya.

... Appellants / Respondents



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Vs.

R.Rajkumar

... Respondent / Petitioner

Prayer : Writ Appeal filed under Clause XV of Letters Patent, to set aside the order dated 14.03.2019 made in W.P.(MD)No.3041 of 2010 by allowing this writ appeal.

For Appellants : Mr.P.Subbiah

For Respondent : Mr.M.Md.Ibrahim Ali

JUDGMENT

(Judgment of the court was delivered by G.R.Swaminathan, J.)

This intra-Court appeal is directed against the order dated 14.03.2019 made in W.P.(MD)No.3041 of 2010 filed by the respondent herein.

2.The writ petitioner was appointed as a Constable in Border Security Force on 23.12.1988. He was sanctioned 60 days earned leave from 09.10.2004. He ought to have rejoined duty on 07.12.2004. He did not do so. This was on account of his implication and arrest in a criminal



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case on 10.11.2004. He was released on bail on 18.11.2004. He was suspended from service on 29.11.2004. He was acquitted on 07.02.2008. The writ petitioner thereafter wrote to the disciplinary authority (fourth appellant) on 12.02.2008 seeking revocation of the suspension order.

3.The fourth appellant issued show cause notice dated 19.02.2008 proposing dismissal from service. The writ petitioner was given time till 25.03.2008 to offer his defence. The writ petitioner submitted his apology and sought extension of time. This request was accepted and the respondent was given further time till 25.04.2008. Thereafter, the writ petitioner was placed on apprehension roll. Vide show cause notice 26.12.2008, the writ petitioner was called upon to urge his defence on or before 25.01.2009 against the proposed dismissal. The writ petitioner submitted his reply dated 19.01.2009 and sent it through registered post on 21.01.2009. Before it was received on 05.02.2009, the jurisdictional Commandant (fourth appellant) directed dismissal of the writ petitioner from service vide order dated 29.01.2009 with effect from the said date. The period of unauthorised absence was also directed to be treated as “dies-non”.



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4. Aggrieved by the dismissal order, the writ petitioner submitted appeal before the appellate authority (third appellant). Vide order dated 02.07.2009, the appeal was dismissed. Challenging the same, W.P.(MD)No.3041 of 2010 was filed and it was allowed on 14.03.2019. Questioning the order passed by the learned Judge, this appeal has been filed.

5. The learned standing counsel for the appellants submitted that the dismissal order passed against the writ petitioner was justified. He pointed out that the writ petitioner was a member of an unformed force. Relying on the decision of the Hon'ble Supreme Court reported in **(2005) 13 SCC 709 (Union of India Vs. Datta Linga Toshatwad)**, he argued that if indiscipline as the one exhibited by the writ petitioner goes unpunished, it will greatly affect the discipline of the forces. He faulted the line of reasoning adopted by the learned Judge. According to him, there is no violation of the principles of natural justice. He called upon this Court to set aside the order impugned in the writ appeal.



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6.We are not swayed by the said submissions. The show cause notice dated 26.12.2008 reads that the writ petitioner had been illegally absent from duty with effect from 07.12.2004. It is seen from the records that the writ petitioner was implicated in Crime No.264 of 2004 on the file of the Sub Inspector of Police, Asaripallam and he was also arrested on 10.11.2004. This was during the leave period which commenced on 09.10.2004. The factum of registration of criminal case and arrest was communicated to the authorities concerned. The writ petitioner was suspended on 29.11.2004 by the fourth appellant. Since the writ petitioner was placed under suspension, he cannot be said to have been illegally absent from duty.

7.Be that as it may, as per Rule 22(1) of Border Security Force Rules, 1969, before removing or dismissing a person other than officer on account of misconduct, the delinquent must be given an opportunity to show cause in the manner specified in sub-rule 2 against such action. Sub-rule 2 of Rule 22 is as follows:-

“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



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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.”

8.A careful reading of the aforesaid rule indicates that the competent authority must consider the reports on the misconduct of the delinquent. He must be satisfied that the trial of such person is inexpedient or impracticable. He must form an opinion that the delinquent's further retention in the service is undesirable. The delinquent must be informed about the proposal to terminate. The show cause notice must be accompanied by the adverse reports. Of course, if the disclosure is not in public interest, it can be withheld either partly or wholly. The competent authority should then call upon the delinquent to submit in writing his explanation and defence.



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9. In the case on hand, the show cause notice dated 26.12.2008 reads that the writ petitioner has been illegally absent from duty with effect from 07.12.2004 and that the proceedings of the court of inquiry held in accordance with Section 62 of the Border Security Force Act, 1968 had also declared that the noticee had been illegally absenting without leave with effect from 07.12.2004. The competent authority did not furnish the adverse reports or the proceedings of the court of inquiry to the writ petitioner along with the show cause notice.

10. The competent authority has nowhere adverted to the factum of the writ petitioner's suspension of service with effect from 29.11.2004. As already stated above, a person placed under suspension cannot be said to be illegally absent from duty. So long as the suspension remains unrevoked, he obviously cannot report for duty.

11. A member of BSF who is not an officer can be dismissed from service under Rule 22(3) without an inquiry only if the competent authority is satisfied that the trial of the delinquent is inexpedient or impracticable. The Hon'ble Supreme Court in the decision reported in



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(1985) 2 SCC 412 (*Chief of Army Staff Vs. Major Dharam Pal*

Kukrety) quoted the Shorter Oxford English Dictionary defining the word “*inexpedient*” as meaning “disadvantageous in the circumstances, inadvisable, impolitic”. It was therefore incumbent on the part of the competent authority to record his satisfaction that inquiry into the charges of misconduct is not expedient or practicable. This satisfaction cannot be the *ipse dixit* of the authority. It has to be grounded on relevant materials. The authority must give reasons as to why inquiry is impractical or inexpedient. It is such reasons that must give rise to the satisfaction set out in the Rule. Without arriving at such satisfaction, the authority cannot give a go-by to the process of inquiry. The show cause notice dated 26.12.2008 no doubt reflects the satisfaction of the competent authority that trial by a Security Force Court is not inexpedient and impracticable. But it is a mere repetition of the statutory rule. The authority has nowhere delineated the basis on which such satisfaction was arrived at. We fail to understand as to why inquiry could not have been held. After all it was the delinquent who represented to the authority for revocation of the suspension after the criminal case ended in acquittal. It was not as if the writ petitioner had willfully deserted the



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service. When he was on sanctioned leave, due to family dispute with his brother, he came to be implicated in a criminal case and arrested. This was communicated to the competent authority by the jurisdictional police. The writ petitioner was under suspension. The suspension was also periodically extended. After the case ended in acquittal, the writ petitioner sought reinstatement. Without referring to any of these factual aspects, a mechanical notice was issued as if the writ petitioner had deliberately overstayed his leave. This was a fit case in which inquiry by the Security Force Court ought to have been conducted. The authority had proceeded on the premise that in response to the show cause notice, the writ petitioner had not offered any defence. Actually, the delinquent had time till 25.01.2009. He sent his reply through registered post on 21.01.2009 itself. This was within the time given to him. Unfortunately, the reply reached the authority after the dismissal order was passed. The petitioner was under suspension and he must have received the show cause notice dated 26.12.2008 within probably a week or two thereafter. The writ petitioner cannot be said to have delayed the matter.



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12. That is why, the learned Judge rightly concluded that there has been a breach of statutory procedure and violation of the principles of natural justice and that the petitioner was not given sufficient opportunity to defend himself. If a proper inquiry had been held, it would have been concluded that it was not a case of unauthorised absence at all. We do not find any ground to interfere with the order passed by the learned Judge allowing the writ petition. The case law relied on by the standing counsel for the appellants is also distinguishable on facts. In that case, the Constable concerned did not report for duty ever after the leave period expired. Even an arrest warrant was issued against him. Finally, after holding inquiry, he was dismissed from service. The High Court interfered with the punishment on the ground of proportionality. In the case on hand, the facts are different. The delinquent was under suspension and inquiry was not held. It is for this reason, we hold that the precedent pressed into service by the appellants is of no avail. We also notice that back wages have been denied. The suspension period can be treated as such and the question of paying any further sum for the said period would not arise.



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13.This writ appeal stands dismissed. No costs. Consequently,

connected miscellaneous petition is closed.

**(G.R.S. J.) & (R.P. J.)
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NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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