

Sees Ram Vs. Union of India

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Court : Delhi

Decided On : Sep-01-1996

Reported in : 63(1996)DLT890; 1996(38)DRJ663

Judge : Devinder Gupta and; M.S.A. Siddiqui, JJ.

Acts : [Border Security Force Act, 1968](#) - Sections 11(2)

Appeal No. : Civil Writ Appeal No. 1809 of 1993

Appellant : Sees Ram

Respondent : Union of India

Advocate for Pet/Ap. : B.P. Ojha,; Keshav Dayal and; Jyoti Singh, Advs

Judgement :

Devinder Gupta, J.

(1) The petitioner has sought the quashing of order of dismissal from service dated 6.3.1991 passed by the Commandant, 67 Bn., Border Security Force in exercise of powers conferred under Section 11(2) of (he [Border Security Force Act, 1968](#) (hereinafter referred to as 'the Act') along with all consequential reliefs.

(2) The petitioner was enlisted as Constable (Messenger) on 23.2.1961 in Punjab Police and later on embodied in Border Security Force (for short BSF) with effect

from 1.3.3966. The petitioner remained posted in Punjab, Nagaland, Tripura and New Delhi. On 17.2.1989 he was attached from his Unit 67 Bn. Bsf Ferozepur to Bsf Signal Regiment, Delhi for 3 months for the treatment of his only son, who had got fractured his leg in an accident. He was ordered to return back to his unit at Ferozepur on 31.3.1989, i.e., before the expiry of the said period of 3 months' leave. The petitioner represented against the premature recall and on 4.5.1989, it is alleged by him, that he was stopped from entering the unit and from marking his presence. He again is alleged to have represented to the authorities but of no avail. On 28.5.1989 the petitioner filed a civil suit for injunction against the respondents, inter alia, praying for mandatory injunction directing the respondents to permit him to mark his attendance and assign duty in the unit at Delhi and for payment of his salary. It is further alleged that on 20.6.1990 a show cause notice, annexure A-2 was served upon him by the respondents to show cause against the proposed termination of his service. On 27.7.1990 a reply was submitted, inter alia, stating that the matter was still subjudice in a civil court and it would be illegal to dismiss him administratively during the pendency of the suit. The petitioner in reply stated that he was readily available for his trial by a Security Force Court, He had been residing in Government allotted quarter at Delhi along with his family. His whereabouts were also fully known to the authorities and as such no Departmental administrative action for his dismissal ought to be taken on the basis of show cause notice. He denied that he was absent without leave. Despite this reply, on 6.3.1991 the impugned order of dismissal was passed, which the petitioner has alleged, was never served upon him, nor brought to his notice, except on 28.8.1992, when the counsel for the respondents in the civil suit, which had been filed by him, dies closed about the same. Civil suit in view of the subsequent events was withdrawn as infructuous. Accordingly this petition was preferred on 30.3.1993 for redressal of his grievance, after having served a notice on 4.2.1993.

(3) In nutshell the submission made on behalf of the petitioner is that the impugned dismissal from service for the alleged absence without leave is illegal and void ab initio. Absence without leave is an offence under Section 19-A of the Act and is punishable by Security Force Court under Section 48 of the Act. Only in those cases where trial by Security Force Court is not expedient or is impracticable that an order of dismissal from service by an administrative order

can be passed and that also on compliance with the requisite provisions of the Act and the Rules. In the instant case it is alleged, the trial of the petitioner by Security Force Court, for the alleged offence of absence without leave was neither inexpedient, nor impracticable and as such his dismissal by an administrative action, only on serving a show cause notice is bad in law. Reliance is placed by the learned counsel for the petitioner on the decision of the Supreme Court in Major Radha Krishan v. Union of India & Ors. : [1996]3SCR836 .

(4) Respondents in their reply, filed on the affidavit of P.S. Gill, Ips, working as Deputy Inspector General in Sector Headquarter, Bsf, stated that the petitioner joined 67 Bn. on promotion on 24.1.1989 and was sent to Signal Regiment, Bsf, New Delhi on 14.2.1989 for attachment duty up to 31.3.1989. He was relieved by the Commandant, Signal Regiment, Bsf, New Delhi on 1.5.1989 with direction to report 67 Bn., BS. The petitioner did not report in the unit. Accordingly a Court of Inquiry was ordered on 5.9.1989 by the Commandant, 67 Bn. BSF. On the basis of the result of Court of Inquiry proceedings show cause notice annexure 'A' was issued to the petitioner on 20.6.1990. Reply to show cause notice was duly considered which was not found to be satisfactory by the Competent Authority. Accordingly he was dismissed from service on 6.3.1991, after observing all procedural formalities. The impugned order of dismissal, according to respondents, was passed by the Commandant, in exercise of powers conferred upon him under Section 11(2) of the Act. The order was duly served upon the petitioner under registered cover on 8.3.1991. The action as such is lawful and valid in law.

(5) After the respondents filed their reply it was noticed that there was a statutory remedy available to the petitioner of making a representation under Rule 28-A, which had not been availed of by him. The legal notice of the petitioner dated 4.2.1993 was directed to be treated as a statutory representation. It ultimately was rejected and the order of rejection now is also under challenge by the petitioner on filing an additional affidavit on the ground that the rejection order dated 13.3.1995 by Director General, Bsf is also illegal and bad in law and the same is liable to be quashed and set aside in as much as the Court of Inquiry under Section 62 of the Act could be held only, if the whereabouts of the absentee soldier are not known

for continuously 30 days and that also with a view to declare him a deserter.

(6) The contention on behalf of learned counsel for the respondents has been that the order of dismissal was not passed by way of penalty for misconduct of absence from duty without leave. Absence was the cause and the same was referred to in the show cause notice and in the order of dismissal. The petitioner's services were terminated on a different ground that his retention in service was felt undesirable. In other words, the order was passed after the Commandant had formed an opinion that the petitioner's further retention in service was undesirable. The same was done after serving a show cause notice on the petitioner informing him of, the reports which were adverse to him and calling upon him to submit in writing his Explanationn in defense, which on receipt was not found satisfactory and accordingly order was passed which was not by way of penalty but in exercise of an independent and separate power conferred by Section 11(2) of the Act read with Rule 22 of Bsf Rules applicable in the instant case. Reliance is placed by counsel for the respondents on the decision of the Supreme Court in Union of India v. Ram Phal, : [1996]2SCR1144 .

(7) We have heard counsel for the parties and have been taken through the record.

(8) In Ram Phal's case (supra) the legal position has been amplified that an order of dismissal by way of discharge, not by way of penalty for misconduct of absence from duty without leave, though such absence may be the cause and might have been referred to in the show cause notice as also in the order of dismissal, can be passed on the ground that his conduct had rendered his retention in service undesirable. In other words, order of dismissal, in exercise of independent and separate power conferred under Section 11(2) can be passed by serving a show cause notice and on coming to a conclusion that conduct of an individual had rendered his retention in service undesirable. In case the order of dismissal is passed by way of penalty of misconduct of absence from duty without leave, power under Section 11(2) cannot be exercised, since the same has to be done only on complying with relevant provisions of the Act and on proof of the misconduct of absence from duty without leave, after holding due enquiry.

(9) What has been submitted on behalf of the counsel for the respondents in the light of the decision in Ram Phal's case 'would be acceptable only in case it is found from the record that the order of dismissal was not passed by way of penalty for misconduct of absence from duty without leave but because the petitioner's further retention in service was considered undesirable. In case reference is made to the impugned order of dismissal from service it may be noticed that it is not an order passed dismissing the petitioner on the ground that his continuance in service was considered undesirable but it is an order passed by way of penalty for the misconduct of absence from duty without leave. Though the show cause notice issued on 20.6.1990 had called upon the petitioner to show cause why his service be not dispensed with since his further retention in service was considered to be undesirable but the Commandant while passing the impugned order of dismissal annexure I, considered it to be a case of misconduct of absence without leave and concluded that the petitioner had been absent without leave without any reasonable cause and it was on that ground alone that he was dismissed from service and not on the ground that petitioner's continuance in service was considered undesirable. Show cause notice reads:

'WHEREAS, you have been absent without leave with effect from 04th May 1989. I am of the opinion that because of this absence without leave for such a long period, your further retention in service is undesirable. I therefore, tentatively propose to terminate your service by way of dismissal. 2. Whereas, if you .have anything to urge in your defense against the proposed action, you may do so before 10th July, 1990. In case no reply is received by that date, it shall be presumed that you have no defense to put forward against the proposed action and an ex-parte decision shall be taken in this regard.'

Had the impugned order of dismissal proceeded on the line in which show cause notice was issued there would have been no difficulty in following the ratio of the decision in Ram Phal's case and to negative the contention raised on behalf of the petitioner. But the manner in which the case was further proceeded by the Commandant makes the impugned order of dismissal to be a penal one because of misconduct of absence from duty without leave. The impugned order of dismissal reads:

'I have personally gone through the case of absence without leave in respect of No.68577168 ASI/RO Sees Ram of 47 Bn. Bsf, who has been absenting without leave wef 4.5.1989. 2.He was given an opportunity to show cause for his illegal absence vide this Hq Letter No. Estt/SCOI-SEES RAM/67/SHQ/90/3894 dated 20.6.1990. The reply of show Cause Notice given by the absentee is not satisfactory and I am of the opinion that he does not want to serve in the force. I am further satisfied that his absence without leave wef 4.5.1989 is without any reasonable cause. I, therefore, dismiss him from service wef 06th Mar' 1991, under the powers conferred upon me vide Section 11(2) of Bsf Act,1968. 3.The absence period from 4.5.89 to 6.3.91 (AN) will be treated as 'Dies non'.

(10) Admittedly procedure, as prescribed under law was not followed for which it was necessary for the respondents to have tried the petitioner under Section 48 by Security Court Martial for offence under Section 19-A of the Act. Since it was not done, the petitioner's services could not have been dispensed with in exercise of powers under Section 11(2) of the Act merely on serving a show cause notice. Consequently, the impugned orders are liable to be quashed and set aside.

(11) Resultantly, the writ petition is allowed and the impugned orders are quashed and set aside directing the respondents to allow the petitioner to join his duty forthwith with all consequential benefits as regards his pay and continuity of service. Arrears of pay etc., if any, will be worked and paid within a period of six weeks from today.

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