

Sudesh Kumar Vs. Union of India

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Court : Delhi

Decided On : May-16-1997

Reported in : 1997(42)DRJ623

Judge : Devinder Gupta and; K.S. Gupta, JJ.

Acts : [Border Security Force Act, 1968](#) - Sections 62

Appeal No. : Civil Writ Appeal No. 2412 of 1995

Appellant : Sudesh Kumar

Respondent : Union of India

Advocate for Pet/Ap. : R.P. Sharma and; B. Babbar, Advs

Judgement :

Devinder Gupta, J.

(1) Order, Annexure P-3/A, dated 27.1.1993 dismissing the petitioner from service with effect from 16th January, 1993 is under challenge in this petition.

(2) The petitioner while posted as a Constable in Border Security Force proceeded on 30 days Earned Leave w.e.f. 9th May, 1992. After availing of leave he did not report for duty though he ought to have reported for duty on 9.6.1992. Petitioner's case is that he had applied for extension of leave due to his sickness whereas

respondents case is that extension of leave was not sought. Respondents' version that on 16.7.1992 an intimation was sent to the petitioner to rejoin duty immediately, failing he was apprised that disciplinary action would be taken against him. Thereafter a Court of Inquiry under Section 62 of the [Border Security Force Act, 1968](#) was ordered to inquire into the absence of the petitioner, but without awaiting the outcome thereof, it appears that the Deputy Inspector, Border Security Force, Jammu proposed to dismiss the petitioner from service administratively for which show cause notice (annexure P-3) was sent to the petitioner under registered post, which reads:

'You have been absent without leave with effect from 9th June 1992. 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, thereforee, propose to dismiss you from service. If you have anything to urge in your defense or against the imposition of this penalty, you may do so before 14 January 1993. In case no reply is received by that date, it would be inferred that you have no defense to put forward.'

(3) Petitioner state that a reply was sent by him on receipt of the aforementioned show cause notice explaining the cause of his delay that he was still bed-ridden and sought extension of leave but the Commandant on 7.1.1993 proceeded to pass in the impugned order annexure P-3/A, which reads:

'WHEREAS, I have personally gone through the case of absence without leave in respect of No. 85005244 Const (Dvr) Sudesh Kumar of this HQ. He was given an opportunity to show cause vide this HQL/No. 0124/Estt.I/Leave/92/3029 dated 30 Dec. 92 without any reasonable cause and his further retention in the service is undesirable. I, thereforee, dismiss him from service w.e.f. 16 Jan. 1993 (AN) under Bsf Act, 1968 read with Rule 177 of Bsf Rule 1969. The period of unauthorised absence from duty from 9 June 1992 to 16 Jan. 1993 be treated as 'dies non'. The individual is struck off the strength of this Hq w.e.f. 16 Jan. 1993 (AN). 2. A sum of Rs. 329.82 (Rupees three hundred twenty nine and paise eighty two only) as Govt. dues on account of deficient kit/clothing items be recovered from his pay and allowances due/payable to him.'

(4) The aforementioned order is under challenge on the ground that before reaching the conclusion that the petitioner was unauthorisedly absent, it was mandatory to hold a Court of Inquiry in terms of Section 62 of the Bsf Act read with Rule 173 of the Border Security Force Rules. Only on Court of inquiry declaring the absence to be unauthorised that action could be initiated against the petitioner for being committing an offence under Section 19(a) or (b) of the Act. There has been gross violation of the provisions of the Act by dismissing the petitioner by resorting to administrative action.

(5) Respondents in their reply filed on the affidavit of K.S. Vohra, Deputy Inspector General, BSF. Jammu stated that when the petitioner failed to resume duty after availing 30 days earned leave, due intimation was sent on 16.7.1992 to rejoin duty forthwith. Petitioner did not respond. As such a Court of Inquiry under Section 62 of the Act was ordered to inquire into the absence of the petitioner. he was served with a show cause notice dated 30.12.1992 to give reasons in his defense on or before 14.1.1993, as it was proposed to terminate his service for his long absence. The petitioner did not respond. therefore, he was dismissed from service w.e.f. 16.1.1993. It is stated that dismissal from service is under Section 11(2) of the Bsf Act read with Rules 177 and 22 of the Bsf Rules. It is also stated that petitioner's representations against the order of dismissal were rejected by the Director General and there has been no violation in the procedure adopted for dismissal.

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

(7) Learned counsel for the petitioner has placed reliance upon two decisions of this Court, namely, Sees Ram v. Union of India, : 63(1996)DLT890 and Ajaib Singh v. Union of India and Another, Cw 3001/95 decided on 1.11.1996.

(8) Learned counsel for the respondents has in support of his submission that the dismissal is perfect and in consonance with the Act and the Rules, relied upon three decisions of the Supreme Court, namely, Chief of the Army Staff and others v. Major Dharam Pal Kukrety. : 1985 CriLJ913 , Sri Gouranga Chakraborty v. State of Tripura and another, : [1989]2SCR271 and Union of India and others v. Ram Pal, : [1996]2SCR1144 .

(9) There is no manner of doubt that independent and separate power conferred by Section 11(2) of the Act read with Rule 22 of the Bsf Rules can be exercised in dismissing a member of the Force after complying with necessary requirements of serving a show cause notice informing the person concerned of the reports, which are adverse to him and calling upon him to submit in writing his defense and such power does not depend upon awarding of punishment by Security Force Court. It is the cumulative ratio of the three decisions of the Supreme Court aforementioned. In Ram Pal's case (supra), legal position has been amplified by the Supreme Court that an order of dismissal by way of discharge, not by way of penalty for misconduct of absence from duty without leave, though such an 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. But, in case the order of dismissal is passed by way of penalty or 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 the relevant provisions of the Act and on proof of misconduct of absence from duty without leave after holding due inquiry. Order of dismissal in the exercise of independent and separate power conferred under Section 11(2) of the Act 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.

(10) The question that whether the order of dismissal is in exercise of independent and separate power conferred under Section 11(2) of the Act or is an order passed by way of penalty of misconduct of absence from duty without leave can be decided only on examining the show cause notice and the order of dismissal. This exercise was also done in the case Sis Ram (supra) as also in the case of Ajaib Singh (supra). In the instant case, show cause notice was rightly issued when the Commandant formed an opinion that 'because of this absence without leave for such a long period, your further retention in service is undesirable.' Had the ultimate order of dismissal been based on this ground alone that the petitioner's retention in service was considered undesirable because of absence without leave for a long period there was no scope for any interference in the instant writ petition, but the impugned order passed in this case, as also on the stand taken in

the counter affidavit it is made amply clear that the order of dismissal was passed by way of penalty.

(11) In the counter affidavit it is stated that the petitioner was dismissed from service for his long absence. The order of dismissal also states that 'I am satisfied that he is absent without leave with effect from 09 Jun 1992 was without any reasonable cause and his further retention in service is undesirable'. In other words, the Commandant says that not only he was satisfied that the petitioner's further retention in the service was undesirable but he was also satisfied that the petitioner was absent without leave without any reasonable cause. Such satisfaction could not have been recorded without complying with the provisions of law. The manner in which the order was passed by the Commandant makes the impugned order of dismissal to be penal one wherein it is recorded that the Commandant was satisfied that the petitioner was absent without leave without any reasonable cause.

(12) Following the ratio of the decision in Sis Ram and Ajaib Singh cases (supra), the writ petition is allowed. The impugned order annexure P-3/A of dismissal is set aside directing the respondents to allow the petitioner to join his duty forthwith with all consequential benefits as regards his pay and continuity in service. Arrears of pay etc.. if any, will be worked out and paid to the petitioner within a period of six weeks from the date of receipt of the writ order from this Court. Costs on parties.

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