

Sunil Kumar Misra Vs. Union of India (Uoi) and ors.

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Court : Jammu and Kashmir

Decided On : May-27-2005

Reported in : 2005(3)JKJ159

Judge : Permod Kohli, J.

Acts : [Border Security Force Act, 1968](#) - Sections 10, 11, 11(2), 11(3), 11(4), 19 and 62; ;Border Security Rules, 1969 - Rules 20, 20(1), 20(2), 20(3), 20(6), 21, 22, 22(2), 28A, 48, 49, 167, 168, 170 to 176 and 177; ;Border Security Force Rules, 1968 - Rules 20, 21, 22(2) and 177

Appeal No. : SWP No. 2115/2000

Appellant : Sunil Kumar Misra

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Ajay Sharma, Adv.

Advocate for Pet/Ap. : Surinder Kour, Adv.

Disposition : Petition dismissed

Judgement :

Permod Kohli, J.

1. Dismissal of the petitioner vide order dated 10-3-2000 and treating the period of absence from 2-8-1999 to 9-3-1999 (221 days) as Dies Non is under challenge in the present petition. While working as Constable in 105 Bn. Of the Border Security Force, petitioner left for his home in 1999. It is alleged that he applied for leave which was orally sanctioned by the Assistant Commandant. Leave was sought on receiving information from his home that his house, animals and other property has been washed away in floods. It is further alleged that the petitioner applied for extension of leave through post. Petitioner received a show cause notice No. Estt/105 Bn/99-2000/482 dated 27th January 2000 asking him to report on 28-2-2000. It is alleged that he joined the Unit on 28-2-2002 and also submitted affidavit as also the certificate issued by the Panchayat Sewak regarding the damage caused to his house in Floods. However, he was not permitted to join and the joining report was sent by him through registered post on 29th Feb 2000. Petitioner was informed that he has been dismissed vide the impugned order dated 10-3-2000 and his period of alleged absence from 2-8-1999 to 9-3-1999 has been treated as Dias non. This order has been challenged on the ground that no inquiry under Section 62 of the [Border Security Force Act, 1968](#) read with rules 170 to 176 of the Border Security Rules, 1969 was held against him. He was not afforded an opportunity of being heard though he sent a number of representations for extension of leave, but the same have not been taken into consideration. It is further stated that Rules 48 and 49 of the BSF Rules while recording the evidence, have also not been complied with. A petition was made under Rule 167 and 168 of the BSF Rules, 1969 which has not been decided. Finally, it is stated that the punishment awarded to the petitioner is harsh and disproportionate.

2. Case of the petitioner is resisted by the respondents. Preliminary objection is raised that the petitioner has not exhausted the statutory remedy provided under Rule 28-A of BSF Rules, 1969. Regarding the absence of the petitioner, it is stated that on 2-8-1999 the petitioner absented himself from duty from TAC HQ 105 Bn BSF. He was informed at his home town through letter dated 21-8-1999 to join the duties immediately, but he did not do so. On expiry of 30 days of his absence a Court of Inquiry under Section 62 of the Act was ordered by the Commandant vide his No. Estt/ 105/ COI-OSL/ 99/ 9985-87 dated 8-10-1999 to investigate the

circumstances under which the petitioner absented without leave. The opinion of the Court of Inquiry is that the petitioner has absented without authority/permission. It is further stated that since the petitioner continued to remain absent action was initiated against him under Section 11 of BSF Act read with Rule 22(2) and 177 of the BSF Rules, 1969 on the administrative side. A show cause notice was served on the petitioner at his home address through registered post vide letter No. Estt/105/99-2000/482 dated 27-1-2000 whereby he was directed that if he had anything to urge in his defence against the proposed action, he may do so before 28-2-2000. Petitioner did not avail the opportunity given to him vide the afore-said communication. Accordingly, after the completion of the stipulated period in the notice he was dismissed from service under Section 11(2) of the BSF Act, 1968 read with Rule 22(2) and 177 of the BSF Rules, 1968 and the period of absence has been treated as Dias Non. It is further alleged that earlier also the petitioner earned adverse entries. He was awarded punishment of 14 days rigorous imprisonment in Force Custody under Section 19(a) of the BSF Act 1968 for remaining absent without leave for 42 days w.e.f. 22-5-1991 to 2-7-1991. He was also awarded 28 days rigorous imprisonment in Force Custody for remaining absent without leave for 72 days w.e.f. 19-11-1992 to 29-1-1993. Further he was awarded 28 days rigorous imprisonment in Force Custody under Section 19(b) for without sufficient cause over staying leave granted to him for 27 days w.e.f. 19-10-1994 to 14-11-1994. Petitioner is said to be an indiscipline soldier. A show cause notice No. Estt/ 105-Bn/99-2000/482 dated 27-1-2000 was served upon the petitioner asking him to reply which opportunity he did not avail. It is denied that the petitioner reported on duty on 26-2-2000 and was denied rejoining.

3. Rejoinder affidavit has been filed by the petitioner wherein the grounds urged in the writ petition have been reiterated. It is further-submitted that Rules 20, 21 & 22 of the BSF Rules have not been followed and no opportunity was given to the petitioner to show cause.

4. Section 62 of the BSF Act 1968 provides for holding of inquiry into the absence without leave when a person has been absent from duty without due authority for a period of thirty days. Rule 172 prescribe procedure for holding the Court of Inquiry.

As far as Rule 20 is concerned, it deals with the termination of service of officers by the Central Government on account of misconduct, whereas Rule 22 deals with the dismissal or removal of persons other than officer on account of misconduct. Admittedly the petitioner is not an officer. Therefore, Section 10 of the BSF Act 1968 and Rules 20, 21 of the BSF Rules have no application to the case of the petitioner. Section 11 of the BSF Act 1968 empowers the Director General and an officer not below the rank of Dy Inspector General to dismiss or remove from service or reduce to a lower grade or rank or the ranks any person other than an officer. Rule 22 prescribes the procedure for passing an order under Section 11(1). Section 11 and Rule 22 are re-produced as under:-

'Section 11: Dismissal, removal or reduction by the Director-General and by other Officers - (1) The Director General or any Inspector General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An Officer not below the rank of Deputy Inspector General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in Sub-section (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and Rules.'

Rule 22. Dismissal or removal of persons other than officer on account of misconduct-

(1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in Sub-rule (2) against such action: Provided that this sub-rule shall not apply-

(a) Where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or

(b) Where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.

(2) 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 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;

(3) The competent authority after considering his explanation and defence, if any may dismiss or remove him from service with or without pension.

Provided that a Deputy Inspector General shall not dismiss or remove from service, a subordinate officer of and above the rank of a Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to the Director General.'

5. It is specifically stated in the reply that when the petitioner absented himself without authority a Court of Inquiry was constituted under Section 62 of the Act to investigate the circumstances. The Inquiry officer recommended that the disciplinary action be initiated against the petitioner. The petitioner continued to remain absent and thus administrative action was initiated against the petitioner in terms of Section 11 read with Rules 21, 22 and 177. As far as requirement of Section 11 of the Act is concerned Director General or Inspector General or an officer not below the rank of Dy Inspector General has the power to dismiss or remove any person under his command except an officer or a subordinate officer. Where action is proposed under Section 11 the concerned officer is required to serve a show cause notice of the proposed action. Sub-Rule (2) of Rule 22

prescribe where after considering the report of the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but is 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.

6. In the present case though a Court of Inquiry was ordered and report received, petitioner continued to remain absent and consequently procedure under Section 11 read with Rule 22 (2) was initiated. A copy of the show cause notice dated 27-1-2000 is on record. In this notice it is specifically stated that the petitioner remained absent without leave and the Officiating Commandant is of the opinion that because of absence without leave for a long period further retention in service of the petitioner is undesirable and it was tentatively proposed to terminate the service of the petitioner by way of dismissal. Petitioner was further asked to urge his defence before 28-2-2000 and in case no reply is received, it shall be presumed that he has no defence to put forward against the proposed action. It is positive case of the respondents in the reply that despite the afore-said notice, the petitioner did not submit his defence which resulted in passing of the termination order dated 10-3-2000. It is important to notice that the petitioner in his writ petition has placed on record copy of the show cause notice and in para 4 of the writ petition admitted to have received this show cause notice. It is stated that the petitioner submitted an affidavit and a certificate. A copy of the affidavit has been placed on record which is not even attested by any authorized officer or Notary Public. The blanks in the stamp are un-filled. There is no averment in the writ petition that the petitioner submitted his defence in response to the show cause notice.

7. The only point that needs consideration is whether it was obligatory upon the respondents to have tried the petitioner by following the procedure prescribed under Rules 48, 49 of BSF Rules or administrative action contemplated by Section 11 read with Rule 22 (2) could have been initiated. The Act and the Rules prescribe different remedies to deal with such a misconduct. Rule 22(2) clearly indicate that where the authority is satisfied that the trial of such a person is inexpedient or impracticable and in his opinion his further retention in the service is

undesirable, he shall so inform him together with all reports adverse to him and seek his explanation and defence in writing. The remedy of initiating administrative action under Section 11 read with Rule 22(2) is independent of the regular trial as is held by the Apex Court in : [1989]2SCR271 as also : [1996]2SCR1144 . In the latter judgment : [1996]2SCR1144 Union of India and Ors. v. Ram Pal, the Apex Court considering the applicability of Rule 21 and 22 held as under:-'7. We are, however, not able to agree with the contention raised by the learned Additional Solicitor General that for exercising power under Section 11(2) of the Act no enquiry is required to be held and considering the nature of the Force and the utmost necessity of maintaining discipline giving a show cause notice should be regarded as sufficient compliance with the principles of natural justice. Section 11 is silent in this behalf and it appears that earlier there was no Rule indicating the circumstances and the manner in which that power Was to be exercised. But now we find that the Rules contain such a provision. Rule 20 provides for termination of service for misconduct. The relevant part of the Rule reads as under:

(1) Where in the opinion of the Director General a person subject to the Act has conducted himself in such manner whether or not such conduct amounts to an offence, as would render his retention in service undesirable and his trial by security force Court inexpedient. The Director General may inform the person concerned accordingly.

(2) The Director general shall further inform the person concerned it is proposed to terminate his services either by way of dismissal or renewal (S.II).

(3) The Director General shall furnish the particulars of allegations and the report of investigation (including the statement of witnesses, if any, recorded and copies of documents, if any intended to be used against him in cases where allegations have been investigated. Provided that where the allegations have not been investigated, the Director General shall furnish to the person concerned the names of witnesses with a brief summary of the evidence and copies of documents, if any, in support of the allegations.

(4) x x x

(5) x x x x

(6) The person concerned shall within seven days from the receipt of information furnished to him under sub-rule (3) inform in writing, the Director General-

(a) his acceptance or denial of the allegations;

(b) any material or evidence he wishes to be considered in his defence.

(c) Names of witnesses whom he wishes to cross-examine; and

(d) Names of witnesses whom he wishes to examine in his defence.

(7) Where the person concerned has expressed his wish to cross-examine any witness or to produce witnesses in defence, the Director General shall appoint an enquiry officer who shall be an officer superior to the person against whom it is proposed to take action and had not taken any part previously in the investigation into the matter.'

Rule 21 provides for appointment of an enquiry officer and the procedure to be followed by him. Rule 22 provides for imposition of penalty. Sub-Rule (4) of Section 11 makes the exercise of any power under that section subject to the provisions of the Act and also the Rules. Therefore, after introduction of Rule 20 in the Rules it cannot be validly contended that no enquiry need be held while exercising the power under Section 11(2). We will now examine if the prescribed procedure was followed in this case. The show cause notice clearly appears to have been issued in terms of sub-rule (1) of Rule 20 It reads as under:-

'You have been absent without leave with effect from 21st Dec 1983. 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. If you have anything to urge in your defence or against the proposed action you may do so before 4-5-1984. In case no reply is received by that date, it will be inferred that you have no defence to put forward'.

8. The first sentence in the notice that, 'You have been absent without leave with effect from 21st Dec 1983' satisfied the requirement of sub-rule (3) When it further stated that 'I am of the opinion that because of this absence without leave for such a long period, your further retention in service is undesirable' it complied with the requirement of sub-rule (1) and as required by sub-rule (2) it was further stated therein that 'I therefore, tentatively propose to terminate your service by way of dismissal'. The respondent was called upon to show cause within seven days as required by sub-rule (6). No further inquiry was held, but we find that nothing further was required to be done in this case. The respondent did not reply to the notice. There was no denial of the allegations and no request to hold an enquiry. Therefore, it was not incumbent upon the Director General to appoint an enquiry officer to conduct an enquiry in the manner prescribed by Rule 21. Thus the prescribed procedure was followed before passing the dismissal order. The Courts below have failed to appreciate the correct position of law and the facts. It was therefore, wrongly held that the order of dismissal was illegal as it was not in accordance with the provisions of the Act and the Rules.'

8. The facts of the present case are similar to above case where the delinquent official failed to reply the show cause notice, it is presumed that the procedure has been complied with. In the present case also no reply was given by the petitioner to the show cause notice, which admittedly was received by him, and copy placed on record, it is presumed that the procedure prescribed has been followed. I do not find any ground to interfere with the impugned order. Petition is accordingly dismissed.