

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

SWP No. 2247/2002

Date of Order: 02-01-2009

Mohinder Singh

Vs. Union of India & Ors.

Coram:

Hon'ble Mr. Justice Sunil Hali, Judge

Appearing counsel

For the petitioner(s) : Mrs. Surinder Kour, Advocate

For the respondent(s) : Mr. Ajay Sharma, Advocate

i)	Whether to be reported in Press, Journal/Media	Yes/No
ii)	Whether to be reported in Journal/Digest	Yes/No

The petitioner has called in question order dated 31-1-2001 removing him from service. For facility of reference the said order is quoted below:

“I have personally gone through the case of overstaying against No. 831030028 HC Mohinder Singh ‘C’ coy of this unit who is overstaying himself without leave with effect from 01.11.1999. He was giving an opportunity through show cause Notice vide this office letter No. Ett/71/Bn/SCN/2000/2126-28 dated 07.9.2000 and No. Estt/71 Bn/SCN/2k/01 dated 01.1.2001 which he has not availed of. I am satisfied that he is overstaying himself without any reasonable cause and that his further retention in service is not

desirable. I, therefore, dismiss him from service with effect from 31st Jan' 2001 (AN) in terms of Section 11 (2) of BSF Act 1968 read with Rule 177 of BSF Rule 1969, since it was not possible to try in BSF Court to his absence.

2. The period of absence of the U.O. w.e.f. 01.11.99 to 31.1.2001 is hereby treated as "Dies Non" for all purpose.

3. He is struck off strength of this unit with effect from 31st Jan' 2001 (AN)."

The order of dismissal dated 31.1.2001 was preceded by a show notice which was issued on 1.1.2001. The extracts of show cause notice are also quoted hereinbelow:

"Sub: SHOW CAUSE NOTICE"

You have been overstaying from leave w.e.f. 1st Nov' 99 (FN). After considering the reports relating to your overstayal from leave. I am satisfied that your trial by a Security Force Court is impracticable but am of the opinion that your further retention in service is undesirable. I, therefore, tentatively purpose to dismiss you from the service. If you have anything to urge in your defence against the imposition of the proposed penalty, you may do so within 30 days of the receipt of this letter or by 30 Jan 2001, whichever is earlier. In case no reply is received within the stipulated period, it would be presumed that you have no defence to put forward and exparte decision will be taken into matter."

This show cause notice is stated to have been served upon petitioner by registered post on the following address:

“ Mohinder Singh,
House No. 642-A, P.O. Gandhi Ngr.
District Jammu(J&K)”

On petitioner's failure to submit reply to the show cause notice, the order of his removal from service was passed.

The grievance of the petitioner in the writ petition are :

- a) that show cause notice has not been served to him as required under Rule -22 of the BSF Rules.
- b) that no Court of Inquiry in accordance with section 62 of the BSF Act has been held in the present case.
- c) that petitioner had given sufficient cause for having over stayed, which was not taken into account by the respondents.

The petitioner proceeded on 15 days casual leave with effect from 11-10-1999 to 30-10-1999 and was required to resume his duty on Ist November, 1999. The petitioner did not join his duty and overstayed his leave. He was directed to resume his duty vide following 71 BN BSF registered letters :

- i) Estt/71 Bn/OSL/99/1211 dated 4-11-99.
- ii) Estt/71 Bn/OSL/99/1235 dated 18-11-99
- iii) Estt/71 Bn/OSL/99/1297 dated 7-12-99

After 30 days of absence of the petitioner, Court of Inquiry under section 62 of the BSF Act 1968 was constituted vide 71 BN BSF Order No. Estt/71/BN/COI/99/26513-15 dated 7-12-1999 and the same was completed by the Presiding Officer on 30-12-1999. The petitioner has shown his inability to join the enquiry because of pain in his left leg. He was informed by the respondents that he can come to Base Hospital, Jammu for treatment since he is located in Jammu town. The petitioner did not response to this also. It is also found on fact that petitioner has shown his inability to get himself examined at the Base Hospital, Jammu while he had been attending the OPD and Physiotherapy Section of Government Medical College, Jammu from 9-12-1999 to 20-12-1999 . After having failed to procure the presence of petitioner, he was declared as deserter under section 62 sub clause -2 of the BSF Act 1968. Before imposing penalty of removal from service, recourse to Rule-22 was taken by issuing show cause notice to the petitioner. Show cause notice was issued to the petitioner on 1-1-2001 through registered post on the address indicated supra. The report on the registered envelope states that the addressee has left his residence without address. The registered letter is returned back. Since the addressee is not traceable, there is no signature

of the addressee on the acknowledgement. It is also averred that having failed to procure the presence of petitioner, the order of removal from service was passed. Petitioner filed an appeal against the order of removal before the Director General, BSF. Without waiting for the out come of the appeal, the present writ petition has been filed.

I have heard the learned counsel for the parties and perused the record.

Petitioner states that he has not been served copy of the show cause notice. It is further stated in the petition that petitioner was living in H. No. 642 alongwith his brother situated at Gandhi Nagar. The said residential house stood in the name of his brother who sold it on 9-5-2000. He placed copy of the sale deed alongwith the petition. The notice was served to the petitioner on the same address, when admittedly he was not living there. As such it should be presumed in law that no show cause notice has been served on the petitioner and the order of dismissal has been passed in violation Of Rule 22 of the BSF Rules. On the other hand the contention of the respondents is that address given by the petitioner at the time of his joining his service, is the one on which notice has been served. The petitioner has not informed the respondents

regarding the change of his address. It is further contended that there are three modes of imposing penalty under the BSF Act and Rules. Under Section 48 of the BSF Act, the petitioner can be awarded punishment by a Security Force Court, which includes dismissal from service. Under Section 53 of the BSF Act minor punishment can be awarded by the Commandant. Independent of the aforesaid provisions, the petitioner can also be dismissed from service under Section 11 of the BSF Act which is construed as an administrative action.

Section 62 of the BSF Act can be invoked once a person remains absent from duty without any authority for a period of 30 days. On his being absence, court of inquiry is required to be conducted. The said court of inquiry on being satisfied of the fact of such absence being without any authority or other sufficient cause, shall make declaration of such absence and the period thereof, and the Commandant of the unit to which the person belongs shall make a record thereof in the manner prescribed .

Sub Clause 2 of the Act provides that if the person declared absent does not afterwards surrender or is not apprehended, he shall be deemed to be deserter.

Under sub Rule 11(2) of Rule 177 of the BSF Rules, the Commandant may, under Sub section (2) of section 11, dismiss or remove from the service any person under his command other than an officer or a subordinate officer. Before the order of dismissal of such person is passed, procedure as prescribed under Rule -22 of the aforesaid Rules, is required to be followed. Rule -22 is quoted below:

“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 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, writing, this 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 be Director-General.”

In order to sustain the order of dismissal, rule-22 is to be complied with, which envisages issuance of show cause notice.

There is no dispute that notice has been served to the petitioner on the address given by him at the time of joining the service, which was House No. 642- Gandhi Nagar, Jammu . It is also not in dispute that the petitioner has not informed the respondents regarding the change of his address. But the fact remains that show cause notice admittedly has not been served on the petitioner. To this extent, the endorsement on the registered envelope clearly shows that the addressee has left without address. Mode of service has not been provided under the BSF Act or Rules. One has to resort to the Civil Procedure

Code in this regard. Order-5 Rule 17 of the CPC says that in case the respondent/defendant cannot be found, copy of the notice must be affixed on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. This procedure has not been adopted by the respondents. The case of the petitioner was that the house was sold by his brother where he was living prior to said sale. The new occupier of the said house could have informed the petitioner once the notice was affixed on some other conspicuous part of the house. To sum up, it is clear that no show cause notice has been served to the petitioner, which has resulted in non-compliance of Rule 22 of the BSF Rules. There might have been fault of the petitioner not to inform the respondents about the change of his address, but the fact remains that no effort was made by the respondents to locate the new address of the petitioner. The effect of non-compliance of this procedure, has denied the petitioner to reply to the show cause notice, which has resulted in his removal from service. I accordingly, hold that there has not been sufficient compliance of Rule-22 of the BSF Rules.

I therefore, allow this writ petition and quash the impugned order and direct the respondents to serve the

petitioner fresh show cause notice on the address to be provided by him. Respondents will, after hearing the petitioner, proceed in the matter.

(Sunil Hali)
Judge

Jammu: 02-01-2009.
RSB,Secy.*