

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

LPA(SW) No:442/2002

Date of decision: **29 -03-2011**

Union of India & ors.

Vs

Jeet Singh

Coram:

Mr. Justice F. M. Ibrahim Kalifulla, Judge

Mr. Justice Mohammad Yaqoob Mir, Judge

Appearing counsel:

For the Appellant(s):

Mr. Ajay Sharma, CGSC.

For the Respondent(s):

Mrs. Surinder Kour.

i) Whether to be reported
in Digest/Journal:

YES

PER M. YAQOOB, J:

1. Instant Letters Patent Appeal is directed against the judgment dated 26.4.2002 passed by learned Writ Court in SWP No.409/2000 captioned Jeet Singh Vs. Union of India & ors, where-under order of dismissal has been quashed and the respondent Jeet Singh (writ petitioner) has been directed to be reinstated in service and has also been held entitled to all consequential benefits including monetary benefits. The appellants have been left free to hold enquiry against the respondent (writ petitioner) in accordance with the procedure provided under B.S.F Act and the rules.

2. The respondent (writ petitioner) was working as Driver Constable in Border Security Force, he had proceeded on leave but overstayed with effect from 26.5.1994 without any permission so was informed vide communication dated 29th of June, 1994 to report back for duty immediately failing which disciplinary action will be initiated. The writ petitioner did not report back as a result thereof vide communication dated 8th of August, 1994 show cause notice has been served upon the respondent (writ petitioner), same is reproduced here-under:-

**“No.Estt/AWL/COI/77/94/8702
77 Battalion BSF
C/O 56 APO**

To, Dated, the 8 Aug’ 94

**No.90004901 Const
Jeet Singh
Vill : Kangwala camp,
Post: Bhangdhour
Distt:Samba Tehsil (Jammu – Distt)
Jammu & Kashmir.**

Sub : SHOW CAUSE NOTICE

You have been absent without leave from 26-05-94. After considering the reports relating to your absence, 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 propose 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 issue of this letter. In case no reply is received within the stipulated period, it would be presumed that you have no defence to put forward and ex-parte decision will be taken into the matter.

**(Y. Banerjie)
Commandant
77 BN BSF”.**

3. In response thereto, writ petitioner moved an application on 22.8.1994. On considering the same application, petitioner vide communication dated 26th of August, 1994 has been directed to report for duty within 15 days on receipt of the letter, same is reproduced here-under:

To, 26 Aug’ 94

**No.90004901 CT
Jeet Singh
Vill : Kangwala camp,
Post: Bhangdhour
Samba Tehsil,
Jammu District.**

Sub : OVERSTAYAL OF LEAVE

Ref: Your application dated 22.8.94.

**You are directed to report Bn. HQ
for duty within 15 days on receipt of
this letter, failing which you will be
dismissed from service.**

**(Y. Banerjie)
Commandant
77 BN BSF”.**

4. Writ petitioner seems to have failed to report back to the duty, resultantly he has been dismissed from service with effect from 19.9.1994 vide order dated 29th of September, 1994 which is reproduced herein-below:-

***“No.Estt/AWL/COI/77/94/9996-
10025
77 Battalion BSF
C/O 56 APO
Dated, the 29 Sept, 94***

To,

***No.90004901 Const
Jeet Singh
Vill : Kangwala camp PO Bhangdhour
Tehsil Samba District Jammu.***

Sub : Dismissal from service.

Whereas, I have gone through the case of absence without leave against you. You were given an opportunity to show cause vide this office letter No.Estt/AWL/77/94/8702 dated 8.8.1994 and letter No.Estt/AWL/COI/77/94/9308 dated 26.8.1994, which you have not availed of. I am satisfied that you are absent without leave without any reasonable cause and that your further retention in the service is undesirable. I, therefore, dismiss you from service with effect from 19 Sept. 94(A).

2. Your absence period from 26.5.94 to 19.9.94 will be treated as ‘dies non’.

3. You have been struck off from the strength of this unit w.e.f. 19.9.94.

Sd/-

***(Y. Bannerjee)
Commandant
77 BN BSF”***

5. It is the said order which has been impugned in the writ petition. Learned writ court has opined that procedure envisaged under Rules 20 and 21 of the BSF Rules was required to be followed but same has not been done, therefore, order impugned could not sustain.

6. Learned counsel for the appellants at the very outset highlighted that in the impugned order reference has been made to Rule 20 and 21 of un-amended rules when Rule 20 and 21 is not applicable to the respondent (writ petitioner) because Rule 20 and 21 of the B.S. F Rules are applicable only vis-à-vis service of an officer. Rule 14(A) of the BSF Rules clearly indicate that the Constable does not fall within the rank of officer but is covered by clause (d) of Rule 14(A) which reads as under:

“(d) Enrolled persons other than Under Officers:

(15) Constables

(16) Enrolled followers

7. So the proper procedure as was required to be followed is prescribed in Rule 22 of the Border Security Force Rules.

8. The submission is well founded as the amended Rules 20 and 21 of the BSF Rules relate to termination of services of officers not other persons such as Constables.

9. In the classification of rank as detailed in Rule 14(A) of the BSF Rules, Constable falls within the category of “other persons”, so clearly Rule 22 was to be followed. Now the question is as to ‘whether same has been followed or not?’

10. Section 11(2) of the BSF Act empowers the prescribed authority to 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.

11. Rule 177 of the BSF Rules reveals as to who is the prescribed officer under Section 11(2), which in categorical terms shows that Commandant under sub-section (2) of Section 11 is the prescribed authority to dismiss or remove from service any person under his command other than an officer or a subordinate officer. So admittedly the Commandant is competent to pass the order of dismissal.

12. Learned counsel for the appellants would contend that there has been strict compliance to Rule 22 of the BSF Rules. The show cause notice, as was required to be issued, has been

issued by the Commandant and the respondent (writ petitioner) has responded to the same by filing an application, based on which vide communication dated 22.8.1994 he has been asked to report for duty within 15 days. When he failed to do so, the authority concluded vide its order dated 29.9.1994 that the retention of petitioner in service is undesirable so has been dismissed with effect from 19th of September, 1994 and the period of absence with effect from 26.5.1994 to 19.9.1994 has been treated as dies non.

13. Learned counsel for the appellants while supporting his contention has placed reliance on the judgment captioned **Union of India & ors Vs. Ram Pal (AIR 1996 Supreme Court 1500)**, wherein similar situation has been dealt with. Para 8 of the judgment is relevant to be quoted

“8. The first sentence in the notice that “you have been absent without leave with effect from 21st Dec. 83” satisfied the requirements 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 enquiry 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 and it was not in accordance with the provisions of Act and the Rules”.

(Emphasis added)

14. While applying the principle as has been laid down to the facts and circumstances of the instant case, show cause notice dated 8.8.1994 would indicate that the writ petitioner has been informed that he was absent without leave with effect from 26.5.1994 and then the application as has been filed by the writ petitioner in response thereto has also been dealt with and writ petitioner has been given an opportunity to resume duty which he failed. The requirement of giving an opportunity before passing the order of dismissal as required in terms of sub-rule (1) of Rule 22 has been fully complied with, which in turn would mean that the authority concerned after considering the conduct of the writ petitioner has opined that it shall be undesirable to retain the petitioner in service, so has proceeded in terms of sub-rule (3) of Rule 22.

15. Learned writ court firstly has referred to un-amended rules i.e. Rule 20 and 21 which were not applicable to the case of the writ petitioner, secondly has concluded that the copy of show cause notice dated 8th August, 1994 was not enclosed with the reply while as copy of the notice dated 26th of August, 1994 was enclosed with the supplementary affidavit which on its reading would not constitute as a show cause notice, instead it is simply a communication.

16. We are not inclined to agree with what has been concluded in the impugned judgment. Firstly Rules 20 and 21 were not applicable, secondly show cause notice dated 8th of August, 1994 is clear in its contents, then the communication dated 26th of August, 1994 is clearly an intimation to the respondent (writ petitioner) to resume the duties. All such letters/communications i.e. show cause notice dated 8th of August, 1994 and letter dated 26th of August, 1994 would indicate that the writ petitioner has not availed the opportunity. Under such circumstances the prescribed authority had no other option but to observe that the retention of petitioner in service is not desirable.

17. Learned counsel for the appellant would contend that the principles of the nature justice have been fully adhered. It was for the writ petitioner to co-operate which he has not, enquiry was ordered to be conducted into the circumstances in which the writ petitioner had overstayed the leave with effect from 27.5.1994, the Court of Enquiry has submitted its opinion wherein disciplinary action has been recommended against the writ petitioner under BSF Act and the rules framed there-under. It is only thereafter on 29th of June, 1994 notice has been served upon the writ petitioner to report back

otherwise disciplinary action will be initiated but when he failed to respond, show cause notice for dismissal from service was issued to which the writ petitioner responded by filing an application, which appears to have been sympathetically considered and has been again directed to resume duty which he again failed to, so what else was required to be done by the prescribed authority.

18. On scrutiny of the records, the same contention is found to be correct, so there is no violation of principles of natural justice. The principle as laid down in the judgment as referred to by the learned counsel for the respondent captioned **Satwati Deswal Vs. State of Haryana & ors (2010) 1 Supreme Court Cases 126**) has been fully satisfied.

19. The judgment rendered by the Hon'ble Apex Court in **Sri Gouranga Chakraborty Vs. State of Tripura & anr. (AIR 1989 SC 1321)** also supports the case of the appellants. In the said judgment it has been held as under:-

“In this case though any procedure has not been prescribed by the Rules still the Commandant duly gave an opportunity to the appellant to submit his explanation against the proposed punishment for dismissal from service for his absence from duty

without any leave and overstaying leave without sufficient cause. The appellant did not avail of this opportunity and he did not file any show cause to the said notice. Thus the principle of natural justice was not violated as has been rightly held by the High Court. No other point has been urged before us by the learned counsel appearing on behalf of the appellant.”

20. Similar position is in the instant case as the writ petitioner has been given full opportunity which he has not availed, therefore, there is no question of violation of principles of natural justice.

21. While applying the principle as has been laid down by the Hon’ble Apex Court in the judgment captioned **Union of India & others Vs. Ram Pal (AIR 1996 SC 1500)**, the only conclusion which can be drawn is that the order of dismissal as passed by the prescribed authority is not interfereable so is maintained. The judgment impugned passed by the learned writ court is set aside and the writ petition filed by the respondent shall stand dismissed.

(Mohammad Yaqoob Mir)
Judge

(F. M. Ibrahim Kalifulla)
Judge

Jammu,
29.03.2011
“Mohammad Altaf”

