

26.
20.3.2023
S.D.

W.P.A. 4277 of 2023

**Simonta Borah
Vs.
Union of India & Ors.**

Mr. Soumen Kumar Dutta

Mr. Soumadip Saha

... For the Petitioner

Mr. S. Nandy

Mr. Debapriya Samanta

...For the B.S.F. Authority

The writ petitioner was recruited as a Constable in the Border Security Force (BSF). The writ petitioner prayed for earned leave for 45 days. He was granted Casual Leave of 15 days with effect from June 22, 2020 till July 9, 2020. Without praying for extension of leave, the writ petitioner continued being on leave. By a notice dated July 16, 2020 issued by the Commandant, the writ petitioner was asked to join his service immediately. It was intimated to him that strict disciplinary action will be initiated against him under the BSF Act and Rules unless he immediately joins his service. Again by a notice dated September 23, 2020 issued by the Commandant, the petitioner was directed to immediately report to duty. In default, it was intimated that strict disciplinary action will be initiated against him. By a further notice dated September 30,

2020, the petitioner was again directed to report immediately and was intimated that disciplinary action will be initiated against him, in default. The petitioner chose not to reply to the said notices. He neither joined his service.

Thereafter a show-cause notice was issued on March 4, 2021 whereby it was recorded that the petitioner has been illegally overstaying his leave with effect from September 13, 2020, without any sufficient cause. As per the enquiry proceeding held in accordance with Section 62 of the BSF Act, it was found that there was no sufficient cause for overstaying the leave. The petitioner's case was considered to be one of continued illegal absence from duty. It was clearly stated that further continuation of petitioner's service was considered to be undesirable. Under Rule 177 of BSF Rules and in conformity of Rule 22(2) of the Rules, the petitioner was called upon to show-cause why he should not be dismissed from service.

The petitioner was required to show-cause within 30 days from the date of the receipt of the show-cause notice to make a statement in defence against the proposed dismissal from service. In default, it would be assumed that the petitioner has nothing to urge in his defence against the action proposed to be taken by the authorities. The petitioner

chose not to show-cause within 30 days. Thereafter, by an order dated April 10, 2021, the petitioner was dismissed from service with effect from April 10, 2021. His name was struck off from the unit with effect from April 10, 2021. The petitioner made a representation on May 9, 2022 and the said representation was disposed of by an order dated October 21, 2022. By the impugned order dated October 21, 2022, the Inspector General was of the opinion that there is no reason to interfere with the order of dismissal dated April 10, 2021.

Mr. Dutta, learned counsel appearing on behalf of the petitioner submits that the petitioner is governed by Article 311 of the Constitution of India. Under Article 311 (2), no person shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

He refers to various judgments. He refers to a decision reported in **(2017) 2 SCC 308 (Allahabad Bank vs. Krishna Narayan Tewari)**. Next, he refers to a decision reported in **AIR 1994 SC 1074 (Managing Director, ECIL, Hyderabad & Ors. vs. B. Karunakar & Ors.)**. He also refers to a decision reported in **(1999) 1 CHN 521 (Arun Kumar Hait vs. State of West Bengal & Ors.)**. Lastly, he relies on a judgment

reported in AIR 2013 SC 1513 (**Nirmala J. Jhala vs. State of Gujarat & Anr.**). He submits that the petitioner is a holder of a civil post and, therefore, cannot be discharged from service without following Article 311.

Mr. Nandy, learned counsel appears on behalf of the respondent authorities and hands over his written instruction in Court today. He submits that the petitioner was granted 81 days of Earned Leave with effect from June 24, 2022 to September 12, 2022 by cancelling 15 days of Casual Leave that was granted earlier. Despite being granted 81 days of Earned Leave, the petitioner still continued to overstay unauthorisedly without any prayer for leave made before the authorities concerned. Several notices were issued whereby the petitioner was informed that disciplinary proceedings will be initiated against him in the event he does not immediately report to duty. Still then there was no response from the petitioner. When the petitioner did not respond to the show-cause notice, the Officer-in-Charge of the concerned police station submitted a report that the said show-cause notice was pasted at his residence. Even thereafter, the petitioner neither replied to the show-cause nor joined his service. Only, after the petitioner was dismissed from service, he made a petition for reinstatement on May 9, 2022

more than a year after his dismissal. Since the petitioner has acted in a way unbecoming of a member of a Force, the petitioner's order of "**dismissal**" should not be interfered with.

Considering the rival submissions of the parties and the materials placed on record, this Court is of the opinion that Article 311 is only applicable to the holders of civil posts and not to the members of the Force. Article 310 is applicable to members of defence service as well as members of civil service, but Article 311 is only applicable in case of persons employed in civil capacities under the Union or State.

The petitioner being a member of Force is clearly governed by the BSF Act, 1968 and the BSF Rules, 1969.

In **Krishna Narayan Tewari** (supra), the writ petitioner was employed with a bank and as such was in civil employment. The writ petitioner also pleaded not guilty to the charges framed by the enquiry officer. In such a case, it was held that the non-application of mind by the enquiry officer or the disciplinary authority, non-recording of reasons in support of conclusion arrived at by them, are grounds on which a Writ Court is justified in interfering with an order of punishment. The said case has no manner of application in

the context of the present case. Here, neither the petitioner is a civil post holder, nor has he replied to the show-cause.

In **B. Karunakar** (supra), again the petitioner was a civil post holder. The basic question that fell for consideration that whether the report of the enquiry officer who is appointed by the disciplinary authority was required to be furnished to the employee to enable him to make a proper representation to the disciplinary proceedings. In the present case, the question of the report of the enquiry officer being furnished to the petitioner does not and cannot arise since the petitioner chose not to represent himself by responding to the show-cause notice. In any event, the said case relates to a civil post holder.

Arun Kumar Hait (supra) is a case, which relates to the West Bengal Board of Secondary Education Act. The case related to the Headmaster of an Institution. The facts of that case have no manner of application to a member of the Force. The case of **Nirmala J. Jhala** (supra) relates to the writ petitioner being a member of judicial service. The principles applicable to her case cannot be held to be applicable to the member of a Force where discipline is of primary concern and the prescribed procedure for dismissal not on account of misconduct is laid down in Rule 22(2) of the BSF Rules. On

facts, the petitioner failed to either reply to the several notices which were issued to him from time to time or the show-cause notice. He challenged the order of dismissal after one year of passing of the same. The conduct of the petitioner shows extreme indiscipline and no respect for his service.

This Court is of the view that the petitioner had no interest in continuing with his service giving his inaction/lackadaisical conduct.

In the circumstances, **W.P.A. 4277 of 2023** is **dismissed** as being **misconceived**, frivolous and being a complete waste of judicial time.

The written instructions handed over in Court today is retained with the records.

Since no affidavits have been called for in this writ petition, all the allegations contained in the petition are deemed not to have been admitted by the parties.

All parties shall act on the server copy of this order duly downloaded from the **website** of this Court.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all the formalities.

(Lapita Banerji, J.)

