Sr. No.1

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on:-29.02.2024

Pronounced on:- 07.05.2024

Case No.:- SWP 2537/2012
IA (1/2012 [4038/2012])

Naseer Ahmad No. 963870018 **…Petitioner(s)**
Enrolled Follower Cook
S/o Late Raj Mohammad
R/o Ebkot Karnah Police Station
Tangdar District Kupwara Aged 38 Years

Through: : Mr. Sofi Manzoor, Advocate.

Vs.

1. Union of India **...Respondent(s)**
Through Commissioner/Secretary
Home Affairs, New Delhi
2. Director General, Border Security Force R K Puram, New Delhi.
3. Commandant 38 Bn BSF C/O 56 APO

Through: Mr. Hakim Aman Ali, Advocate

CORAM: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

BRIEF FACTS OF THE CASE:

1. The petitioner, through the medium of the instant petition, has called in question Order bearing No. ***Estt/Dism/7221/38BN/2008/1562-75*** dated ***4th February, 2008*** passed by Respondent No.3 and has also prayed for summoning of the record from the respondents-office. Besides, the petitioner is seeking a Writ in the nature of Mandamus directing the respondents to reinstate the petitioner in his original position and pay him all the service benefits as accrued to

him with effect from 4thFebruary, 2008 till date with all consequential benefits, which are due to him since 2007.

ARGUMENTS ON BEHALF OF THE PETITIONER:

2. It is submitted by the learned counsel for the petitioner that the petitioner was appointed as Cook in Border Security Force on 23rdMarch, 1996 and he proceeded on leave with effect from 5thJune, 2007 to 22ndJuly, 2007. The petitioner belongs to a far-flung area of Tehsil Karnah District Kupwara. It is the specific case of the petitioner that when the petitioner reached his home town, all of a sudden, the health of the petitioner deteriorated and the petitioner was accordingly, admitted to Sub District Hospital Tangdar Karnah on 15th June, 2007 and accordingly, he was advised to take bed rest.

3. The further case of the petitioner is that the Order of his dismissal, which has been issued by the Respondent No. 3 i.e. Commandant 37 BN C/O 56 APO, received by him on 9th March, 2008 was passed without issuing any show cause notice to the petitioner and without providing him an opportunity of being heard. The further case of the petitioner is that the petitioner had filed a detailed representation before the respondents, narrating therein whole situation, which has been faced by the petitioner as well as by his family members, wherein the petitioner has pleaded that he, as well as his family members, was receiving threats from the militant organizations. He further submits that the Respondent No. 3 has issued a communication to the petitioner on 7th April, 2008 through registered post, wherein Respondent No.3 has rejected the representation of the petitioner without providing any opportunity of being heard to the petitioner.

4. It is the specific case of the petitioner that the petitioner was a patient of depression and was under supervision of doctors adjacent to his native place i.e. Sub District Hospital, Tangdar, Karnah, and the petitioner was admitted in District Hospital, Tangdar, Karnah from 15thJune, 2007 to 26th February, 2008 and according to the petitioner, the doctors had declared him as a case of "OAC Depression Neurosis" and thereafter, the petitioner was discharged from the said Hospital on 26 th February, 2008.

5. The further case of the petitioner is that the petitioner had filed another representation before the Respondent No.2 for his reinstatement, which was also rejected vide communication dated 25th March, 2010 by the competent authority, being devoid of any merit.

6. It is the specific case of the petitioner that the respondents have not complied with the provisions of the Border Security Force Act, 1968 (for short the Act of 1968) and the rules framed there-under and that the order impugned has been passed is in flagrant violation of Rule 22 of the Border Security Force Rules, 1969 (for short the Rules of 1969) and that too without providing any opportunity of being heard to the petitioner and without issuing any show cause notice to the petitioner.

7. The learned counsel for the petitioner has vehemently argued that the respondents ought to have exercised the power under Section 19 of the Act of 1968 with particular reference to Section 19 (b) of the Act of 1969.

8. The learned counsel submits that Section 19 of the Act of 1968 deals with absence without leave and any person subject to this Act, who commits any of

the offence as reflected in the said Section from 19(a) to 19(g), shall suffer imprisonment for a term, which may extend to three years or such less punishment as mentioned in the Act. The learned counsel submits that the case of the petitioner falls under Section 19(b) of the Act, which deals with the offence relating to overstaying leave granted to a person. The further case of the petitioner is that the respondents without resorting to Section 19 of the Act of 1968, could not have exercised the power under Rule 22 of the Rules of 1969, which deals with the dismissal or removal of a person other than officer on account of misconduct. With a view to fortify his claim, the learned counsel for the petitioner has referred to Section 11 of the Act of 1968, which deals with the dismissal, removal or reduction by the Director General and by other officer.

9. The learned counsel has further placed reliance on Rule 177 of the Rules of 1969, which deals with the Prescribed Officer under Section 11(2), which inter alia provides that 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.

10. The specific case which has been advanced by the learned counsel for the petitioner is that the Order which is impugned in the present petition has been issued by Second-in-Command, which is an authority inferior to the Commandant and thus, the order which has been passed by the said Officer, is without jurisdiction. Although, the learned counsel for the petitioner has pleaded in the writ petition that the order impugned has been issued by the Respondent No. 3 i.e. Commandant 37 Bn C/O 56 APO but the learned counsel submits that this was an inadvertent mistake in the pleadings and while arguing the matter, he has taken

altogether a different stand, wherein he has specifically argued that the order impugned has been issued by Second in Command, which according to the learned counsel for the petitioner is inferior to the Commandant. Although, this aspect of the matter has not been pleaded in the writ petition.

11. The learned counsel with a view to substantiate his claim, has relied upon Rule 14A of the Rules of 1969, which have been framed in exercise of powers conferred by sub section 1 and 2 of Section 141 of the Act of 1968, although the said fact has not been pleaded in the petition.

12. The learned counsel has further argued that Rule 28 of the Rules of 1969, deals with power to be exercised by a superior officer or authority, which reveals that any power which has been conferred by the provisions of the said Chapter on an Officer, may be exercised by an officer or authority, who is superior in command and not an officer, who is inferior and thus, according to the learned counsel for the petitioner, Second-in-Command could not have issued the order impugned, which falls within the realm of an *'inferior authority'* and thus, the order impugned is without jurisdiction and liable to be set-aside.

13. The learned counsel for the petitioner further submits that the respondents while issuing the order impugned, has relied upon Rule 22 (2) of the Rules of 1969 and for facility of reference, same is reproduced as under:

> *"22(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."

14. According to the learned counsel for the petitioner, it is manifestly clear that the powers under Rule 22(2) can be exercised by the competent authority only in the eventuality, if the competent authority is satisfied that the trial of such person is inexpedient or impracticable after considering the reports of the misconduct of a person concerned and the competent authority is of the opinion that his further retention in the service is undesirable, it shall so inform the delinquent together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence. The learned counsel further submits that the competent authority is within its right to withhold the said disclosure, any such report or portion thereof, if, in the opinion of the competent authority its disclosure is not in the public interest. Thus, according to the learned counsel for the petitioner, the powers of dismissal or removal should have been exercised strictly in accordance with the procedure as envisaged under Rule 22 and not otherwise. According to the learned counsel, no such satisfaction has been recorded by the competent authority before resorting to said provision of law.

15. The learned counsel further submits that even before the competent authority proposes to terminate the services of a person subject to the act, even then it was obligatory on part of the competent authority to have given an opportunity to the person, to show cause in the manner specified in sub rule 2 Rule 22 against the proposed action mentioned supra. Thus, according to the learned counsel for the petitioner, the powers have been exercised by the respondents in derogation to the mandate and spirit of the procedure as envisaged under the Act of

1968 and the rules framed there-under and accordingly, the order impugned cannot sustain the test of law and is liable to be set aside.

16. The learned counsel for the petitioner further submits that insofar as the issue of overstaying is concerned, the same falls within the realm of offence under Section 19 of the Act of 1969 and the normal course, which was available with the respondents, was to subject the petitioner to trial by the Security Force Court, which in the instant case has not been done. He further submits that no such satisfaction on the basis of report as envisaged under Rule 22(2) has been arrived at by the competent authority before resorting to said provision while terminating the services of the petitioner and on this score also, the order impugned cannot sustain the test of law and is liable to be quashed.

17. It has been further argued that as per the scheme and procedure prescribed under Rule 22(2) of the Rules of 1969 read with Section 11(2), the powers to dismiss/remove a person from rank can be exercised by the competent authority only in the eventuality, if there is misconduct on the part of petitioner and if there is satisfaction recorded with respect to the trial by the Security Force Court, which in the instant case has not been done. According to the learned counsel for the petitioner, **arriving at a satisfaction with respect to the misconduct is a condition precedent for resorting to the powers under Rule 22(2) of the Rules of 1969 read with Section 11(2).** What to talk of arriving at a satisfaction with regard to misconduct, even the material which has been relied upon by the competent authority, has not been supplied to the petitioner, which renders the entire exercise contrary to the scheme and mandate of the Act of 1969 and the rules framed there-under.

18. The learned counsel has also drawn the attention of the Court to the show cause notice issued by the officiating commandant, which bears the date as 19/22 December 2007, which according to the learned counsel has been issued without application of mind. According to him, the competent authority was not aware, when the said show cause notice has been issued as there is no specific date which has been reflected in the said show cause notice. Besides, the learned counsel argued that the language which has been used in the aforesaid show cause notice is not in tune with the language which has been reflected in the impugned order, which leads to the conclusion that the aforesaid show cause notice has been issued as a matter of afterthought.

19. It is further submitted by learned counsel for the petitioner that from the perusal of the language, which has been used in the show cause notice, it is apparent that the petitioner has been overstaying from leave without sufficient cause i.e. from 16.07.2007 (FN) and after considering the reports relating to the petitioner's absence, the officiating commandant was satisfied that trial of the petitioner by a Security Force Court is inexpedient or impracticable and accordingly, he was of the opinion that his further retention in service was undesirable and accordingly, a proposal was mooted to dismiss/remove the petitioner from service under Section 11(2) of the Act of 1968.

20. The further case of the petitioner is that the show cause notice was never served to the petitioner nor the same was published in any local daily newspaper. He further submits that the language which has been used in the aforesaid show cause notice, does not even find mention in the order impugned, wherein, the only reason which has been reflected in the aforesaid order was petitioner's continued illegal absence which was contrary to the expected norms

and detrimental to the force discipline, which led to his termination as his retention in the force was undesirable. No such satisfaction as mandated under Rule 22 has been recorded by the competent authority before passing the aforesaid order and thus according to him, the order impugned cannot sustain the test of law and is liable to be quashed.

21. The learned counsel has further placed reliance upon Section 62 of the Act of 1968 and has also placed reliance upon Rule 173 (8) of the Rules of 1969, which deals with the procedure of the Courts of Inquiry. The learned counsel submits that from the conjoint reading of Section 62 read with Rule 173 (8), it is apparently clear that it was mandatory on part of the competent authority that before giving an opinion against any person subject to the Act, the said court was under an obligation to have afforded the petitioner an opportunity to know all what has been stated against him and it was obligatory on part of the authority to have given an opportunity to the petitioner to have cross examined any witnesses, who have given any such evidence against him and make a statement and call witnesses in his defence and there is proviso attached to said rule, which provides that the said provision shall not apply to all such cases which falls within the realm of absence from duty without due Authority as in the case in hand. With a view to clarify this position, the learned counsel submits that the above amendment has been carried out in the rules on 25thNovember, 2011 and the case in hand pertains to the action taken by the respondents prior to 2011 and thus, this proviso is not applicable insofar the case of the petitioner is concerned. According to him, it was obligatory on part of the competent authority to have followed the procedure as laid down in Section 62 of the Act of 1968 read with Rule 173 (8) of the Rules of 1969, which according to him has been followed in breach rather than in

compliance. On this score also, the impugned order according to the learned counsel for the petitioner cannot sustain the test of law and is liable to be quashed.

22. The learned counsel further argued that the inquiry vis-à-vis misconduct as mandated under Rule 22(2), has not been done and the satisfaction which was required to be arrived at, has also not been done by the respondents while resorting to Rule 22(2).

23. Lastly, the learned counsel submits that the respondents have also not provided the certificate of termination from his service to the petitioner, as provided under Section 12 of the Act of 1968. For facility of reference, Section 12 of the Act of 1968 is reproduced below:

> ***"12. Certificate of termination of service. A subordinate officer, or an under-officer or other enrolled person who is retired, discharged, released, removed or dismissed from the service shall be furnished by the officer, to whose command he is subject, with a certificate in the language which is the mother tongue of such person and also in Hindi or English language setting forth:-***
> ***(a) the authority terminating his service;***
>
> ***(b) the cause for such termination; and***
>
> ***(c) the full period of his service in the Force."***

24. According to the learned counsel for the petitioner, once the petitioner was dismissed from service, the Commanding Officer was under an obligation to issue a certificate to the petitioner in the language which is mother tongue of the petitioner and also in Hindu or English language as well, while specifying the authority terminating the service, the cause for such termination and the full period of his service in the force which, according to the learned counsel, has not been followed.

ARGUMENTS ON BEHALF OF RESPONDENTS

25. Mr. Hakim Aman Ali, Learned counsel appearing for the Respondents has argued that the petitioner was granted 40 days earned leave w.e.f. 06.06.2007 to 15.07.2007 and he failed to rejoin duty after expiry of the said leave by 16.07.2007 (FN) and remained absent from duties. It is submitted by the learned counsel, that petitioner was directed to rejoin duty vide 38 BN BSF registered Letter No. 8954-55 dated 09.08.2007, letter No. 6415 dated 23.08.2007 and letter No 7687 dated 17.10.2007 but petitioner didn't show any response to the aforesaid letters.

26. He further submits that a Court of Inquiry under Section 62 of BSF Act was ordered by the Commandant vide Order No 6692-95 dated 08.10.2007 to find out the circumstances of the petitioner's overstaying leave.

27. He further argued that the show cause notice for proposed dismissal from service along with copy of Court of Inquiry was issued to the petitioner on 19.12.2007, **dispatched on 22.12.2007** at his home address vide registered letter No. 9889 dated 19.12.2007 and petitioner was given reasonable time to submit his reply in defence but neither did the petitioner join his duties nor any reply was submitted by him. As such, submission of the petitioner that notice was not sent to him, is completely baseless, false and contradictory to his own pleadings.

28. Learned Counsel for the respondents further submits that service record of the petitioner reveals that he was a habitual absentee for which he has been awarded number of punishments from time to time during his short spell of service which evidently showed lack of interest on part of the petitioner towards his duties being a disciplined force of the Union.

29. In reply to allegations made by petitioner that the show cause notice bears two contradictory dates, he submitted that show cause notice has been signed on 19.12.2007 and dispatched on 22.12.2007, whereas, regarding the allegation of contradiction in signature on the foot of said notice is concerned, dealing clerk while retaining the office copy has appended his signature by mentioning the date 19.12.2007. However, no different date has been reflected in the dismissal order which is held with the department. Hence, this allegation made by the petitioner has been vehemently denied by the learned counsel appearing for the respondents that show cause notice along with Court Of Inquiry Proceedings & other documents were not served to the petitioner as per available record.

30. It has been further argued by the learned counsel appearing for the respondents that petitioner was dismissed from service in terms of Sub Rule (2) of Rule 22 of the BSF Rules, as he was admittedly absent without sufficient cause without leave and the competent authority by following the mandate of rule supra dismissed the petitioner.

LEGAL ANALYSIS

31. From the perusal of the record it is clear that the main grievance of the petitioner is that, before issuing the impugned order of dismissal, the respondents have not adhered to the principles of natural justice, which are enshrined in the provisions contained in the Border Security Force Act and the Rules framed there-under, whereas the respondents have contended that all the statutory safeguards were adhered to by them before issuing the impugned order.

32. Before proceeding further, it would be appropriate for this court to deliberate the following questions which have come for the consideration in the instant petition:

(i) Whether the proper show cause notice as required under rule 22(2) of the Rules of 1968, has been served upon the petitioner or not?

(ii) Whether arriving at a satisfaction with respect to the misconduct is a condition precedent for resorting to the powers under Rule 22(2) and under what circumstances the scheme and procedure prescribed under the aforesaid provision be exercised by the competent authority?

(iii) Whether the order impugned has been passed by the competent authority or not?

33. The first question, which this court needs to deal with, is whether the show-cause notice dated 19.12.2007 issued by the respondent no 3, has been actually served upon the petitioner or not. As per the stand of the respondents, the show cause notice was issued to the petitioner at his home address through registered post vide registered letter no. 9889 dated 19.12.2007. However, in order to find out the actual service of the show-cause notice, no postal receipt, which would determine the actual service of the show cause notice upon the petitioner, is on the record which is a clear indication of erroneous dismissal of the petitioner from the services by the respondents.

34. A perusal of the said Show Cause Notice and material on record, would reveal that along with the Show Cause Notice, no other documents (copies of Court of Inquiry proceedings and other related documents) were annexed or attached thereto have been served upon the petitioner. Though, the petitioner has denied having ever received the said Show Cause Notice, even if it is presumed that he has received the same, it would be lacking the relevant documents. This is indeed a violation of the principles of natural justice to the detriment of the petitioner.

35. The **'rule of fair hearing'** or '**Audi Altarem Partem'** is a well-recognized principle of natural justice, which has been applied to ensure that no person can be condemned or punished by a superior authority without having a fair chance of being heard. One of the components of this rule is *'issuance of notice'* upon

which receipt of the same would be assumed that proper and adequate opportunity has been given to the party concerned to enter appearance in any proceeding, be it before the court or a competent authority who could be a superior officer.

36. As observed above, the petitioner, thus, has not been served with a proper show cause notice and as such, could not present a proper defence on his part, thus the action of the competent authority to dismiss him from service can only be seen to be an act done arbitrarily and not in fair play.

37. This court is fortified in this regard by the observation of Hon'ble Apex court in ***M/S Dharampal Satyapal Ltd. Vs Deputy Commissioner Of Central Excise & Ors reported as 2015(8) SCC 519*** the relevant paras of which are reproduced as under:

> ***"21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi- judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'.***
>
> ***24. The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanizing factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.***

> ***28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.***

38. The Hon'ble Supreme Court in ***Uma Nath Pandey and Ors. Vs State of U.P. and Anr***. reported as ***2009 (12) SCC 40*** has observed as under:-

> ***''Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a 2 formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form."***

39. This court in case titled ***Dwarika Nath Mishra vs Union Of India & Ors*** reported as ***2005(1) JKJ 95*** has observed as under:-

> ***"12. However, in the present case, I find that there is a reference of the show-cause notice dated 10/12/1992 stated to have been issued to the petitioner in respect of the proposed dismissal from service and providing him an opportunity of being heard and urge his defence, and in case the petitioner has to say anything against the proposed action he may do so before 27/12/1992. A copy of the show-cause notice has been annexed with the counter affidavit filed by the respondents. This notice is stated to have been issued to the petitioner through registered A of the petitioner receipt of the registered letter has been annexed with the counter nor found on record of dismissal of the petitioner produced by the respondents. This clearly shows that the contention of the respondents with regard to the service of show-cause notice of proposed dismissal from service on the petitioner to which he did not reply remains unsubstantiated through record.***
>
> ***15. In the present case, as noticed earlier, neither the show cause notice was ever served upon the petitioner nor any material on the basis of which the Authority had come to the conclusion that his***

> ***further retention in service is undesirable, was sent alongwith the show-cause notice and, therefore, the order of dismissal is not sustainable in law being in violation of Rules 20 and 21 of the BSF Rules."***

40. From the foregoing analysis of the facts and the law on the subject, it is clear that the respondents have flouted the principles of natural justice as also mandate of the provisions contained in Act of 1968 and the Rules framed thereunder.

41. Accordingly, question No.(i) is answered.

42. In order to determine the question No.(ii), it would be pertinent to mention that the impugned order has been passed against the petitioner for overstaying leave without sufficient cause. Insofar as the issue of overstaying leave is concerned, the same falls within the realm of offence under Section 19 of the Act of 1969, which deals with the offence relating to overstaying leave and any person subject to this Act, who commits any of the offence shall suffer imprisonment for a term which may extend to three years or such less punishment as in this Act mentioned.

43. Before adverting to the issues involved in the petition, it would be appropriate and advantageous to refer to the relevant provisions of the Border Security Force Act, 1968 (for short 'Act of 1968') and Border Security Rules 1969 (for short 'Rule of 1969') being relevant and germane to the controversy involved in the petition.

> ***"19. Absence without leave. Any person subject to this Act who commits any of the following offences, that is to say:-***
>
> ***(a) absents himself without leave; or***
>
> ***(b) without sufficient cause overstays leave granted to him; or***
>
> ***(c) being on leave of absence and having received information from the appropriate authority that any battalion or part thereof or any other unit of the Force, to which he belongs, has been ordered on active duty, fails, without sufficient cause, to rejoin without delay; or***
>
> ***(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or***

(e) when on parade, or on the line of march, without sufficient cause without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer, or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there, shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned."

62. Inquiry into absence without leave.

(1) When any person subject to this Act has been absent from duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be appointed by such authority and in such manner as may be prescribed; and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof and the said deficiency, if any, and the Commandant of the unit to which the person belongs shall make a record thereof in the prescribed manner.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall for the purposes of this Act, be deemed to be a deserter.

173. Procedure of Courts of Inquiry.-

(1) The proceedings of a court of inquiry shall not be open to the public. Only such persons may attend the proceedings as are permitted by the court to do so.

(2) The evidence of all witnesses shall be taken on oath or affirmation.

(3) Evidence given by witnesses shall be recorded in narrative form unless the court considers that any questions and answers may be recorded as such.

(4) The court may take into consideration any documents even though they are not formally proved.

(5) The court may ask witnesses any questions, in any form, that they consider necessary to elicit the truth and may take into consideration any evidence, whether the same is admissible under the Indian Evidence Act, 1872 (1 of 1872) or not.

(6) No counsel, or legal practitioner shall be permitted to appear before a court of inquiry.

7) Provisions of section 89 shall apply for procuring the attendance of witnesses before the court of inquiry.

(8) Before giving an opinion against any person subject to the Act, the court will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

> ***Provided that this provision shall not apply when such inquiry is ordered to enquire into a case of absence from duty without due authority.***
> ***(9) The answers given by a witness to any question asked before the court shall not be admissible against such a witness on any charge at any subsequent occasion except a charge of giving false evidence before such court.***

44. From a bare perusal of the section 19, it is clear that overstaying leave is punishable under the aforesaid provision and the said offence has yet to be tried by Security Force Court and upon conviction by the said Court, punishment can be imposed**.**

45. Section 62 of the Act deals with enquiry into absence without leave and provides that when any person subject to the Act has been absent from duty without due authority for a period of 30 days, the Court of Inquiry has to be appointed by such authority which Court of Inquiry has to enquire into the absence of such person and if satisfied of the fact of such absence without due authority or other sufficient cause, such Court of Inquiry has to declare such absence and the period thereof and to make a record thereof in the prescribed manner. Section 62 further provides that if the person declared absent, does not afterwards surrender or is not apprehended, he has to be deemed as a deserter.

46. Moreover, Rule 173 of the Rules deals with the procedure of Courts of Inquiry and provides for a mechanism to be followed in holding of an enquiry into a matter. Sub-rule (8) of Rule 173 provides that before a Court of Inquiry gives an opinion against any person subject to the Act, the Court of Inquiry has to afford that person an opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

47. It goes without saying that in case of unauthorized absence, the authorities are under an obligation to appoint a Court of Inquiry and to hold an inquiry

with regard to the absence of the person from duty as envisaged under ***Rule 173 of the BSF Rules.*** However, as far as the facts of the present case are concerned, it is not clear as to whether the proceedings of the Court of Inquiry have been conducted in the manner prescribed under Rule 173 of the BSF Rules. Without any relevant record with respect to adherence of Rule 173, it is impracticable for this court to determine whether the said Rule was adhered to by the authorities while passing the impugned order.

48. Perusal of the record, which has been supplied to this court, would indisputably suggest that the impugned order has been passed by respondents in terms of sub-rule (2) of Rule 22. Before proceeding further, it would be convenient to reproduce Rule 22 of the BSF Rules, 1969 which is reproduced herein below:-

> ***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 be Director-General.***

49. From the import of Rule 22 (2) of BSF Rules, it is clear that the respondents can fall back on rule 22(2), only in two circumstances i.e. when there **is misconduct on part of the employee** and secondly, when **the competent authority is satisfied that the trial by the Security Force Court is inexpedient or impracticable**.

50. What can be culled out from this provision is that if the opinion of the authorities is that further retention of the petitioner in service is found undesirable. Firstly, the respondents are under legal obligation to inform him together with all reports adverse to him, which, in all probability shall include the depositions of the witnesses, the Findings of the Court of Inquiry etc, and secondly, he shall be called upon to submit, in writing, his explanation and defence.

51. This issue is no longer, *res integra*, as has already been decided by Delhi High Court in the case of **Sees Ram v. Union of India, reported in 1996 (38) DRJ 663**, it was held that:

> ***"Admittedly procedure, as prescribed under law was not followed for which it was necessary for the respondents to have tried the petitioner under Section 48 by Security Court Martial for offence under Section 19-A of the Act. Since it was not done, the petitioner's services could not have been dispensed with in exercise of powers under Section 11(2) of the Act merely on serving a show-cause notice. Consequently, the impugned orders are liable to be quashed and set aside".***

52. Further, in **Ajaib Singh v. Union of India, decided on 01.11.19936 reported in (1997) 40 DRJ 710** , the Delhi High Court has held as:

> '***9. Admittedly, no such satisfaction was recorded by the Competent Authority that the trial of the petitioner was inexpedient or impracticable. Petitioner could have and ought to have been duly tried under the provisions of Section 48 of the Border Security Act by Security Court Martial for the offence alleged against him under Section 19-A of the Act. Since it was not done the petitioner's service could not have been dispensed with in exercise of powers under Section 11(2) merely on serving a show cause notice.'***

53. In the present case, no such satisfaction as required under the said rule, has been recorded by the respondents either in the impugned order or show-cause notice and it is only the satisfaction that is to be arrived at by the respondents while exercising powers under said rule.

54. In **Sudesh Kumar v. Union of India** decided on 16.05.1997, reported in *1997 (42) DRJ 623*, Delhi High Court has observed that the authorities could record satisfaction only after complying with the provisions of law. Paras 9, 10 & 11 of the aforesaid judgment are reproduced hereinbelow:

> ***(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.***

55. The respondents are required to give cogent reasons based on material as to how they are satisfied that the trial of the petitioner by the Security Force Court is inexpedient or impracticable.

56. The Delhi High Court in **Jitender Singh (Ex. Head Const) v. Union of India & Ors. decided on 19.10.2006** has, inter alia, observed that:

> "*In the show cause notice given to the petitioner, no material was annexed and it was only stated that the petitioner was absent from 10.08.1993 and his further retention was undesirable in the Force. No opinion was formed by the competent authority as to whether it was inexpedient or impracticable to hold the trial of the petitioner by a Security Force Court. Thus, one of the basis and main/essential ingredients is absent and the authorities have failed to apply their mind to this most pertinent aspect of the case."*

57. It was further observed by the court that recourse to an administrative action is an exception to the regular trial by the Security Force Court, and thus, greater is the obligation upon the authorities concerned to specifically apply their minds and properly record such satisfaction as contemplated under the Rules. The recording of such satisfaction upon proper application of mind should not only be seen to have been arrived at, but records must depict the same, which in the present case is conspicuously absent.

58. Further, for establishing the misconduct of the petitioner, enquiry has to be held where under the petitioner is required to be supplied with all the material and documents and was required to be given opportunity of hearing. From the record and the pleadings of the parties, it is apparent that no such enquiry was ever held into the misconduct of the petitioner under Rule 22(2) following the procedure.

59. It is significant to note here that rule 22(2) (mentioned supra) while making a reference to the trial of such a person essentially refers to the provisions of Section 19 of the Act which provides that a person who absents himself or overstays leave granted to him without sufficient cause would be deemed to have committed an offence to be tried for by a Security Force Court. In the present case, there is no record to show that the petitioner has been subjected to trial of Security Force Court and his overstaying leave is an offence has, thus, not been established.

60. Thus, it can be safely held, that the case of the petitioner falls under the purview of section 19 and the respondents without resorting to Section 62 of the Act of 1968, could not have exercised the power under Rule 22 of the Rules of 1969, which deals with the dismissal or removal of person other than officer on account of misconduct.

61. Therefore, the argument raised by the petitioner that impugned order passed by the respondents without adhering to the procedure culled out under Rule 173 and sub-rule 8 of the rule, appears to be well founded as the petitioner was left unassociated with the proceedings initiated by the Court of Inquiry and no opportunity of being heard was given to the petitioner.

62. What appears to this court is that the respondents have turned a blind eye to the fact that it was obligatory upon the respondents to inform the petitioner together with all reports adverse to him and also providing an opportunity to him to submit, in writing, his explanation and defence, however the same has not been complied with by the respondents

63. From the bare perusal of the record, it is clear that no such enquiry has been held by the respondents into the alleged misconduct of the petitioner which was the mandate under Rule 22(2) of the Rules. Therefore, the respondents by no stretch of imagination can construe petitioner's overstaying leave "simpliciter" as misconduct without putting him to trial under section 19 or without conducting an enquiry under rule22(2), therefore, the impugned dismissal order violates the provisions of the Act of 1968 and rules and also violates the principles of natural justice.

64. In this regard, it may be apt to reproduce the observations made by this Court in case titled, "**Union of India Vs. Virpal Singh, 2016 (1) SLJ",** which read as under:-

> " **.....**
>
> **11.** ***In the instant case, although decision to dispense with the trial was taken besides forming the opinion that the delinquents further retention in service was undesirable and show cause notice was given and his explanation called for, however, no material has been shown for arriving at the satisfaction that it was not expedient to subject the respondent to trial nor were the reports adverse to the delinquent neither the findings of the inquiry under Section 62 of the Act supplied to the respondent.***

> ***12. The mere fact that enquiry under Section 62 was conducted or show cause notice under Rule 22(2) was given will not suffice once the procedure stipulated under Rule 22 stood violated. In the circumstances, the challenge to the judgment of the learned Single Judge has to fail.***
>
> ***13.The plea that the Court of Inquiry held u/s 62 of the Act beside other material was sufficient for the Commandant to arrive at the conclusion that trial of the delinquent was inexpedient is without any legal basis for Rule 22 stipulates that in the eventuality of a conclusion being arrived at that holding of a trial is inexpedient and further that the retention of such person in service is undesirable, the competent authority is required to inform the delinquent of the said decision together with all reports adverse to him and to give him an opportunity to give his explanation in writing. Although the Court of inquiry was held and decision taken that it was not expedient to conduct a trial and his explanation was called for as to why he should not be removed from service, yet no material has been shown for arriving at the said concludion nor were the adverse reports available with the Commandant supplied to the delinquent. In the circumstances, the mere fact that decision was taken that holding of trial was inexpedient is of no avail. Thus, the decision to remove the respondent from service was vitiated.***"

65. This Court in the case of **Manzoor Ahmad Shah vs. Union of India & Ors. 2009 JKJ[HC] 162,** while interpreting the provisions contained in Rule 22(2) of the BSF Rules, observed as under:

> ***"7.The rights of petitioner as an employee of the respondents are protected by the Constitution and by Statutory rules. The authority if satisfied on the basis of material available to him can take recourse to under sub-rule (2) of Rule 22 after recording reasons for doing the same and dismiss him from service without conducting the regular trial/enquiry.***
>
> ***8. The petitioner's status as an employee of the respondents is guaranteed under Article 311 of the Constitution and the BSF Act and Rules. The petitioner can be dismissed from service only in compliance of the mandate of Constitution and in compliance of the BSF Act and Rules."***

Furthermore, this court in ***Mohammad Shafi Khan Vs. Union Of India & Ors. SWP No.1112/2007*** decided on 26.04.2023 has observed as follows:

> ***25) The moot question which is required to be determined is whether the show cause notice dated 28th June, 2004, has been actually served upon the petitioner and whether the impugned order of dismissal has been served upon the petitioner. According to the respondents, they have sent both these documents to the petitioner through registered post. The record does not contain any postal receipt that would have raised a presumption of service of these two vital documents upon the petitioner, who has categorically denied having received the same. Even the earlier show cause notices stated to have been issued by the respondents to the petitioner have allegedly been sent through registered post without there being any postal receipts on the record of the file. The respondents issued warrant of arrest against the petitioner and sent the same to Superintendent of Police, Anantnag, for execution but they did not pursue the case so as to ascertain the fate of such warrant. The respondents also issued a communication to the Commandant of Sector Headquarter of BSF at Anantnag but did pursue the matter with him. The respondents issued show cause notices from time to time to the petitioner including the vital show cause notice dated 28th June, 2004 in terms of sub-rule (2) of Rule 22 of the BSF Rules without maintaining the proof with regard to service of the same. Same is the fate with regard to service of impugned dismissal order.***
>
> ***26) In the absence of any cogent material on record to show that the respondents have either informed the petitioner to participate in the Court of Inquiry or served the notice of show cause for dismissal in terms of Rule 22(2) of the BSF Rules, it can safely be stated that the respondents have not adhered to the principles of natural justice as are intrinsic to the provisions contained in the BSF Act pertaining to holding of Court of Inquiry and the provisions contained in the Rules relating to procedure for dismissal of its employees from service.***
>
> ***28) From the above it is clear that even where the competent authority is of the opinion that further retention of a person in service subject to BSF Act is undesirable and it is expedient or impracticable to hold trial of such a person, it is obligatory for the competent authority to inform him about the same and provide him with all the adverse reports so as to enable him to file his defence or***

explanation. Without doing so, the order of dismissal cannot be passed against such a person.

29) In the instant case, as already noted, there is nothing on record to show that the show cause notice in terms of Rule 22(2) of the BSF Rules was actually received by the petitioner. In fact, the show cause notice has been issued on 28th of June, 2004, calling upon the petitioner to file his defence within 30 days of receipt of said notice. The notice is stated to have been sent to the petitioner through registered post. The impugned order of dismissal of petitioner from service has been issued on 28th July, 2004, which is exactly after expiry of 29 days. Even if it is assumed that the petitioner did receive the show cause notice dated 28th June, 2004, it is improbable that he would have received the same on 28th of June itself. Thus, the respondents have, without even waiting for expiry of the notice period of 30 days, proceeded to pass the impugned order on 28th July, 2004, thereby rendering the same unsustainable in law.

30) From the foregoing analysis of the facts and the law on the subject, it is clear that the respondents have observed the mandate of Article 311 of the Constitution, the principles of natural justice and the mandate of the provisions contained in BSF Act and the Rules framed thereunder in breach, as a result of which the impugned order of dismissal of the petitioner from service is rendered illegal.

31) The contention of the respondents that the writ petition is liable to be dismissed on account of delay and latches, also appears to be without merit. This is so because there is no material on record to show that the impugned order of dismissal was actually served upon the petitioner. In the absence of any proof of receipt of the impugned order by the petitioner, his assertion that he did not have the knowledge of the impugned order appears to be well-founded. Thus, it cannot be stated that he has approached this Court belatedly.

32) For the foregoing reasons, the petition is allowed and the impugned order of dismissal is quashed. However, it shall be open to the respondents, if they so desire, to initiate fresh proceedings against the petitioner strictly in accordance with the BSF Act and the Rules framed thereunder and pass appropriate orders, as may be warranted under law. In case the respondents do not propose to initiate fresh proceedings against the petitioner, he shall be reinstated in service without paying him the salary for the period he has not actually worked. However, in that case, the said period shall count for pensionary and other service benefits of the petitioner."

66. In view of discussion made and the law laid down in the aforesaid judgments, **the question No.(ii) is answered, accordingly.**

67. Lastly, the question No.(iii), which falls for the consideration of this court is that whether the order impugned has been issued by the competent authority or not. In order to examine this it would be apt to refer the relevant provisions of the Act. For facility of reference section 11, rule 22 (mentioned supra), rule 177 and rule 14A are reproduced below:

> ***"11. Dismissal, removal of 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 the rules."***
>
> ***177.Prescribed officer under section 11(2) .-The Commandant may, under sub-section (2) of section 11, dismiss or remove from the service any person under his command other than a officer or a subordinate officer.***
>
> ***14-A. Ranks. -(1) The officers and other members of the Force shall be classified in accordance with their ranks in the following categories, namely:-***
>
> ***(a)Officers:***
> ***(1)Director-General***
> ***(2)special Director-General***
> ***(3)Additional Director-General***
> ***(4)Inspector-General***
> ***(5) Deputy Inspector-General***
> ***(6)Commandant***
> ***(7) Second-in-Commandant***
> ***(8)Deputy Commandant***
> ***(9)Assistant Commandant***
> ***(b)Subordinate officers:***
> ***(10)Subedar-Major***
> ***(11)inspector***
> ***(12)sub-inspector***
> ***(13)assistant Sub-Inspector***
> ***(c)Under officers:***
> ***(14)Head Constable***
> ***(15)Naik***
> ***(16)Lance Naik***
> ***(d)Enrolled persons other than under officers:***
> ***(17)Constable***
> ***(18)Enrolled followers***

58. Rule 177 of the Rules of 1969, which deals with the Prescribed Officer under Section 11(2), inter alia provides that 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. The specific case which has been advanced by the learned counsel for the petitioner is that Order which is impugned in the present petition has been issued by Second-in-Command, which is an authority inferior to the Commandant and thus, the order which has been passed by the said Officer, is without jurisdiction. Although, the learned counsel for the petitioner has pleaded that the order impugned has been issued by the Respondent No. 3 i.e. Commandant 37 Bn C/O 56 APO but the learned counsel submits that this was an inadvertent mistake in the pleadings and while arguing the matter, he has taken altogether a different stand, wherein he has specifically argued that the order impugned has been issued by Second in Command, which according to the learned counsel for the petitioner is inferior to that Commandant. This aspect of the matter has not been pleaded in the writ petition.

59. Rule 14A deals with the rank of officers and other members of the Force which have been classified in accordance with the ranks in the categories, namely:- (a) Officers: (1) Director-General and a bare perusal whereof, leads to an irresistible conclusion that the Commandant figures at Serial No. 6 in Rule 14A (1) and the Second-in- Command figures at Serial No. 7 in the hierarchy, which provides that the Second-in-Commandant is an authority who is inferior to that of the Commandant, although the said fact has not been pleaded in the petition.

60. From the record, it is clear that the order which is impugned in the present petition has been issued by Second-in-Command, who as per rule 14A is of inferior rank officer to that of Commandant. As per the provisions of the Act and

Rules thereunder, the competent authority who can dismiss the petitioner is Commandant and thus, the order which has been passed by the said Officer, is without jurisdiction.

61. **Thus, question No.(iii) is answered, accordingly.**

62. From the foregoing analysis of the facts and the law on the subject, it is clear that the respondents have flouted the principles of natural justice as also mandate of the provisions contained in Act of 1968 and the Rules framed thereunder. Thus, it becomes writ large on the face of record that there has been total non-compliance of constitutional and statutory safeguards available to the petitioner. Accordingly, the instant petition succeeds and the impugned Order No. ***Estt/Dism/7221/38BN/2008/1562-75*** dated ***04.02.2008*** is hereby quashed.

63. Resultantly, the respondents are directed to reinstate the petitioner in service with all consequential benefits w.e.f. 04.02.2008 minus monetary benefits. However, it will not preclude the respondents to hold an inquiry against the petitioner, in accordance with the provisions of the Border Security Force Act and Rules framed thereunder, after giving an opportunity of being heard to the petitioner, if they so desire.

64. Petition stands ***disposed of,*** accordingly, along with connected application(s).

65. The Registry is directed to hand over the original record to the learned counsel appearing on behalf of the respondents against proper receipt.

(Wasim Sadiq Nargal)
Judge

JAMMU
07.05 2024
GN/Secy

Whether the Judgment is reportable: Yes
Whether the Judgment is speaking : Yes.