S.No. 149

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on:- ***13.08.2024***
Pronounced on:- ***20.09.2024***

Case No. :- SWP No. 1102/2004
IA No. 01/2017

Kishan Tukaram Gavade ....Petitioner(s)
S/o Sh. Tukaram Souba Gavade,
R/o Village Gokhali, Tehsil Flatan,
District Satara, Maharashtra,
Age 32 years.

Through: Mrs. Surinder Kour, Sr. Adv. with
Ms. Mandeep Kour, Advocate.

Vs

1. **Union of India Th.** ..... Respondent(s)
Home Secretary, Ministry of
Home Affairs, Govt. of India, New
Delhi;
2. **Director General of BSF,**
CGO Complex, Lodhi Road, New
Delhi;
3. **Inspector General of BSF,**
Frontier Headquarter Paloura
Camp, Jammu;
4. **Dy. Inspector General of BSF,**
Sector Headquarter C/o 56 APO;
5. **Commandant, 66Bn BSF C/o 56**
APO.

Through: Mr. Vishal Sharma, DSGI.

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

JUDGMENT

01. Through the medium of instant petition, the petitioner has called in question the order of dismissal from service dated 12.12.2002, which has been passed on account of overstay of leave, besides seeking quashment of

all the departmental proceedings initiated against him. The petitioner has also prayed for issuance of a direction against the respondents to consider his case for reinstatement by allowing him to join and perform his duties on the post of Constable, which the petitioner was working prior to his dismissal from service and also to release his salary and other consequential benefits for which the petitioner was entitled by treating the period of dismissal as on duty.

02. The petitioner has also sought a direction to restrain the respondents from implementing the order of dismissal, which has been issued against him besides seeking other directions.

FACTUAL MATRIX OF THE CASE

03. With a view to decide the controversy in question, it would be apt to give a brief factual background of the case. The petitioner was appointed as a Constable on 21.01.1994. After undergoing the training, he was posted in 66 Bn. BSF Jodhpur, Jaisalmer and thereafter, he was transferred to I.S. duty Akhnoor and was subsequently transferred to 66 Bn. BSF at Akhnoor.

04. The genesis of the controversy in the instant petition originates in May of 2000, when the petitioner was granted leave for seven days on the ground that his father had passed away. Pursuant thereto, it is the specific case of the petitioner that he had fallen ill and this was brought to the knowledge of the respondents by way of telegram.

05. It is averred by the petitioner that he remained under treatment of the Medical Superintendent CI-1 Rural Hospital, Rui, Tehsil Baramati, District Pune. The Superintendent certified that the petitioner was examined by him for treatment from 09.06.2002. Accordingly, it has been certified that petitioner

was suffering from evening rise of temperature, loss of appetite, reduced weight and enlarged left side Neck Lymph Nodes.

06. It is further averred that the petitioner took continuous treatment for a period of one year and he recovered from the said illness on 09.05.2004. It is the specific case of the petitioner that he was under treatment from 09.06.2002 to 09.05.2004 i.e., for approximately two years and thereafter, he recovered from tuberculosis and mental illness on 09.05.2004, which can be corroborated from the bare perusal of Medical Certificate that has been placed on record.

07. The further case of the petitioner is that after recovering from illness endeavored to resume his duties on 15.05.2004 at Kupwara, where his Battalion was located at that relevant point of time and also submitted his Medical Certificate dated 10.05.2004 issued by Medical Superintendent, Rural Hospital with the respondents. However, despite submitting the medical certificate, the respondents did not allow the petitioner to join his duty and it was conveyed to him that he has already been dismissed from service on account of overstay of leave while being posted at Akhnoor.

08. It is the specific case of the petitioner that he requested the respondents to provide him a copy of the order of dismissal, however, the same was not provided to him. It is also the case of the petitioner that he came to know about the order of dismissal only when the objections were filed by the respondents. The copy of the said order of dismissal has been annexed with the objections, wherefrom he came to know that the said order of dismissal has been passed against the petitioner. According to the petitioner, the respondents have not conducted an enquiry, as envisaged under the provisions of Section 62

of the Border Security Force Act, 1968 (*hereinafter referred to as the "**BSF Act**"*).

ARGUMENTS ON BEHALF OF THE PETITIONER

09. Mrs. Surinder Kour, learned Senior counsel for the petitioner has placed reliance on Section 62 of the BSF Act, which deals with the enquiry into the absence without leave. For facility of reference, Section 62 of the BSF Act is reproduced as under: -

> ***"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 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."***

10. Thus, according to her, the inquiry into the absence was required to be done strictly in conformity with Section 62 of the BSF Act. It is the specific case of the petitioner that no such enquiry, as envisaged under the aforesaid statutory provision has been conducted, which could be made the basis for dismissing the petitioner.

11. Learned senior counsel for the petitioner has also placed reliance on Rule 173 (8) of the Border Security Force Rules, 1969, (*hereinafter referred to as the '**BSF Rules')*,* a perusal whereof reveals that before giving an opinion

against any person subject to the Act, the Court 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. For facility of reference, Rule 173(8) of the BSF Rules is reproduced as under:-

> ***"Before giving an opinion against any person 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."***

12. The specific case of the petitioner is that the procedure, as envisaged under Rule 173(8) of the BSF Rules has not been followed, as no opportunity of being heard, which is mandated under Rule 173(8) of BSF Rules has been given to the petitioner. Thus, the required procedure has not been followed by the respondents before dismissing the petitioner.

13. She has also drawn the attention of this Court to Rule 170 of the BSF Rules, which deals with the Court of Inquiry and provides that a Court of Inquiry may consist of one or more members with a view to investigate the matters of a specialized nature and when the officers subject to the Act with specialist qualifications are not available to be members.

14. With a view to buttress her arguments, learned counsel for the petitioner has further drawn the attention of this Court to the procedure laid down in the said Court of Inquiry, which finds mention in Rule 173 (1) to (9) of BSF Rules, a perusal of the same, reveals that before giving an opinion against any person subject to the Act, it is mandated on the part of the respondents to afford an opportunity of being heard to the petitioner and to know all what has been stated against him, besides providing an opportunity to

cross-examine the witnesses, who have given evidence against him and also to make a statement by calling the witnesses in his defence.

15. The further case of the petitioner is that no such material has been provided to the petitioner by the respondents and the procedure, as envisaged under Rule 173 of the BSF Rules has not been followed. Thus, the order impugned does not sustain the test of law and is liable to be quashed.

16. In support of her arguments, she has also drawn the attention of the Court to Rules 20, 21, 22 & 22(2) of the BSF Rules. For facility of reference, Rule 22 of the BSF Rules is reproduced as under:-

> ***"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."***

17. From a bare perusal of the aforesaid Rule, dealing with the dismissal or removal of persons other than the officers on account of misconduct, it is apparently clear that when the authorities propose to terminate the service of a

person subject to the Act other than an officer like the petitioner, who is a Constable, the respondents are mandated to provide an opportunity by the authority, who is competent to dismiss or remove and to show-cause in the manner specified in Sub-Rule (2) against such proposed action.

18. She further submits that even the procedure prescribed under Rule 22 of the BSF Rules has also not been followed by the respondents in the instant case. It is further submitted that two conditions were required to be satisfied by the respondents before issuing notice to the petitioner. She further submits that after considering the reports on the misconduct of a person concerned, the competent authority is satisfied that the trial of such person is inexpedient or impracticable and the authorities are of the opinion that his further retention in the service is undesirable**,** the authorities are under a legal obligation *qua* the person concerned to inform him together with all reports adverse to him. In that eventuality, the person concerned shall be called upon to submit in writing his explanation and defence. Thus, the satisfaction to the extent mentioned hereinabove was required to be drawn by the authorities before issuing the proposed notice for terminating the petitioner. In the present case, the same has not been done and consequently, the order impugned suffers from procedural irregularity and illegality and the same is liable to be quashed.

19. The specific case of the petitioner is that no adverse material has ever been provided to the petitioner with a view to submit his explanation, as required under Rule 22(2) of the BSF Rules and in absence of the same, the action of the respondents in dismissing the services of the petitioner cannot sustain the test of law and is liable to be quashed. It is also a case of the

petitioner that he was suffering from chronic illness and remained under treatment for two years and with a view to substantiate his claim, all the medical documents have been submitted to the respondents. However, the respondents have not accorded due consideration to the same and instead have issued the order impugned.

20. The further case of the petitioner is that an enquiry, as envisaged under law has not been conducted by the respondents nor any show cause notice with respect to the proposed penalty was ever served upon him, which rendered the entire action of the respondents as nullity in the eyes of law. Accordingly, the action of the respondents cannot sustain the test of law and is liable to be set aside.

21. It has also been pleaded in the instant petition, though not pressed during submissions, that the petitioner has not committed any offence which amounts to misconduct and could be made the basis for ousting the petitioner from service. The further case of the petitioner is that the punishment, which has been awarded to him is disproportionate and not commensurate to the gravity of offence, if any committed by the petitioner.

SUBMISSION ON BEHALF OF THE RESPONDENTS

22. ***Per contra***, reply has been filed on behalf of the respondents. The respondents while filing a detailed reply have taken a specific preliminary objection regarding the maintainability of the instant petition, as the petitioner has not availed the statutory remedy of preferring a statutory petition as envisaged under Rule 28-A of the BSF Rules. Thus, according to the

respondents, the instant petition is not maintainable and is liable to be dismissed.

23. Respondents have taken a specific stand in the reply affidavit, that though the petitioner had initially proceeded on 7 days casual leave w.e.f. 8.06.2002 to 16.06.2002 due to his father's demise, yet he overstayed for the period w.e.f 17.06.2022. The respondents have taken a specific stand that all the measures, which were in their domain and provided under law, were taken for securing the presence of the petitioner, however, the petitioner neither reported nor sent any information regarding his whereabouts.

24. The respondents with a view to fortify their claim have placed on record some communications, a perusal whereof, reveals that the petitioner was informed with regard to overstaying from leave. The record reveals that first notice was issued to the petitioner on 19.06.2002, followed by another notice dated 26.06.2002 and apprehension roll dated 27.07.2002. Lastly, a show cause notice dated 10.09.2002 also came to be issued. All the notices mentioned *supra* have been placed on record while filing detailed reply.

25. It is the specific stand of the respondents that despite protracted correspondence made with the petitioner and the SP concerned, the petitioner did not report for duty. Furthermore, after completion of Court of Inquiry under Section 62 of the BSF Act, 1968, a show cause notice was served to the petitioner through registered letter dated 10.09.2002. Thus, according to the respondents, the stand of the petitioner that the notice was not served to him stands contradicted as the said notice was served upon the petitioner through a registered letter. Despite the issuance of show cause notice, no response was

received either from the Police or from the petitioner and considering his prolonged, continuous and illegal over stay, which is against the norms of BSF and detrimental to the standards of disciplinary force, his further retention in the force was considered undesirable. Therefore, after following due procedure as envisaged under law, the competent authority has issued the order impugned dated 12.12.2002 strictly in conformity with the provisions of Section 11(2) of the BSF Act read with Rule 177 of BSF Rules and Sub-Rule 2 of Rule 22 of BSF Rules.

26. Thus, according to the learned counsel for the respondents the allegation of the petitioner that the procedure as envisaged under law has not been followed, is contrary to record and denied specifically.

27. Learned counsel for the respondents, Mr. Vishal Sharma, learned DSGI with a view to advance his arguments has submitted that it is an admitted case of the petitioner that he initially went on casual leave for 7 days and over stayed for two years and thus, nothing was required to be inquired into by the Court of Inquiry in the light of the admission on part of the petitioner. Once the petitioner had admitted that he had over stayed for two long years without any authority of law, then the respondents had no other option but to have proceeded in tune with the provisions of the BSF Act and Rules and thus, after following due procedure of law and after affording an opportunity of being heard, the order impugned has been issued.

28. He further submits that the satisfaction as required under Rule 22(2) of the BSF Rules, 1969 has also been recorded before proceeding further in the matter. The record reveals that the competent authority has accorded due

satisfaction that the trial of the petitioner is inexpedient as well as impracticable and since the retention of the petitioner in service was undesirable, the petitioner was informed with all the reports adverse to him with a view to call upon him to submit in writing his explanation and defence. Thus, according to the learned counsel, the stand taken by the petitioner that the said satisfaction has not been recorded, is contrary to record, when, in fact, such satisfaction has been recorded before proceeding against the petitioner under Rule 22(2) of the BSF Rules, 1969. The contention of the petitioner that the order of dismissal has been passed without conducting any inquiry or providing an opportunity of being heard to the petitioner is baseless and contrary to record.

29. The specific stand of the respondents is that proper enquiry as envisaged under Section 62 of the BSF Act, 1968 was conducted and after completion of inquiry, the petitioner was given an opportunity of being heard through a show cause notice dated 10.09.2002 alongwith the complete set of inquiry proceedings which was forwarded to the SSP concerned. Thus, what was required under law has strictly been followed in its letter and spirit before issuing the order impugned. Learned counsel has also drawn the attention of this Court to the proviso to Rule 173(8) of BSF Rules, 1969 which has come into force on 25.11.2011, which provides that the provisions of Rule 173(8) of BSF Rules, 1969 shall not apply when such inquiry is ordered to enquire into a case of absence from duty without due authority.

30. He submits that although, the said amendment has come into force from 25.11.2011, the same is applicable to the case of the petitioner

retrospectively, because the said amendment is not something new, which has been added in the aforesaid statutory provision rather, it is reiteration of what was already existing in Rule 173(8) of BSF Rules, 1969. As such, the learned counsel for the respondents submits that the same is by way of clarification to remove the doubt.

31. Learned counsel for the respondents in support of his contention has relied on a judgment passed by the Hon'ble Apex Court in case titled ***"Union of India and others vs. Mudrika Singh"***, reported in ***(2022) 16 SCC 456***, wherein in similar facts and circumstances, the Hon'ble Supreme Court has made a similar provision applicable retrospectively. Thus, the principle of law which has been laid down in the said judgment is applicable to the instant case as well. It would be apt to reproduce para 23 of the aforesaid judgment.

> ***23. An amendment to a statute or to statutory rules may often be clarificatory in nature. It is clarificatory in the sense that it expressly recognizes a power that already vests in the authority. In those circumstances, when an amendment is purely clarificatory or declaratory in nature, it is deemed to operate retrospectively. For instance, a Constitution Bench in Shyam Sunder v. Ram Kumar (2001) 8 SCC 24 held that an amending act or a declaratory act need not explicitly mention its declaratory nature to be operative retrospectively. Speaking on behalf of the Constitution Bench, Justice V.N. Khare (as he then was) noted:***
>
> > ***39. Lastly, it was contended on behalf of the appellants that the amending Act whereby new Section 15 of the Act has been substituted is declaratory and, therefore, has retroactive operation. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word "declaration" in an Act explaining what was the***

> ***law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective. Conversely where a statute uses the word "declaratory", the words so used may not be sufficient to hold that the statute is a declaratory Act as words may be used in order to bring into effect new law."***

32. In "***Zile Singh v. State of Haryana*** reported in ***(2004) 8 SCC 1"***, Chief Justice R.C. Lahoti, speaking for a three-judge Bench elaborated on the principle of retrospective operation application to clarificatory statutes, has observed as under:-

> ***"13…. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only– "nova constitutio futuris forman imponere debet non praeteritis" – a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438.). It is not necessary that an express provision to be made to make a statute retrospective and the presumption against retrospectively may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p.440).***
>
> ***14. The presumption against retrospective operation is not applicable to declaratory statutes.. In determining, therefore, the nature of the Act, regard must be had to be substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act must be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).***
>
> ***16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectively is inapplicable to such legislations as are explanatory and declaratory in nature.***
>
> ***22. The Court has often recognized amendments to service rules as clarificatory in nature, thereby having a retrospective operation. In our view, the power to order additional RoE is incidental to realize the purpose of Rules 48 and 51. In any event, residual powers under***

> ***Rule 6 would protect this action. Since the express power to direct additional RoE under Rule 51 was incidental to the exercise of the existing powers, the amendment to Rule 51 which was brought in 2011 must be construed to be clarificatory. In fact, the High Court proceeded on this line of analysis by observing that the amendment is clarificatory. However, it chose to not take it to its logical conclusion on the tenuous ground that no submission had been put forth by either side to throw light on the relevant provision.***
>
> ***23. In our view, and for the reasons that we have indicated, the fact that the incident took place in the present case prior to the date of the amendment, i.e., 25 November 2011, would make no difference once the amendment, in the true sense of the expression, is construed to be clarificatory in nature. Against this backdrop, the Commandant was acting within his jurisdiction in ordering an additional RoE to clarify the date of the incident. As we have seen earlier, strictly speaking, this is not a case of insufficient evidence. During the course of the RoE, the respondent himself stood by the complainant's version of the date and time on which the alleged incident took place, which was the night when the respondent was detailed to Naka duty as Head Constable. The only issue for which additional RoE was warranted was in regard to the confusion in regard to the precise date on which the incident took place, considering the confusion caused by the incident having occurred on the intervening night of 16 and 17 April 2006. Save and except for this, the RoE which was prepared initially was comprehensive in nature and contained all necessary details of the incident, which were sufficient to sustain the final conclusion."***

33. The specific case of the respondents is that despite issuing notices from time to time, the petitioner has neither bothered to respond to the notices nor appeared before the Authorities and thus, in the aforesaid backdrop, whatever action has been taken by the respondents is strictly in tune with Rule 177 and Rule 22(2) of BSF Rules as well as Section 62 & 11(2) of the BSF Act and after following due procedure as envisaged under law, the order impugned has been issued. Thus, the challenge thrown by the petitioner to the order impugned is ill founded and the writ petition according to the respondents is devoid of any merit and deserves dismissal at the very threshold.

34. Lastly, learned counsel for the respondents has argued that the petitioner has merely produced some medical documents which have not been submitted before the authorities at appropriate stage. Thus, no right is accrued to the petitioner to overstay for almost two years and even the medical documents which have been relied upon by the petitioner have no legal sanctity and cannot be relied for justification of two years of over stay. With a view to draw the attention of the Court, learned counsel for the respondents has referred to a Medical Certificate of the petitioner dated 10.05.2004, which has been placed on record as Annexure-A with the writ petition, the same reads as under: -

> ***"This is to certify that Shri Kisan Tukaram Gavade Age 32 yrs R/o Gokhali is examined by me for treatment on 9.6.2002. He is suffering from evening rise of temperature, loss of apatite, reduced weight and enlarged left side Neck lymph nodes. His basic investigations are done and patient was diagnosed as tubercular Lymphadenitis. He was put on antitubercular treatment and he primarily respond well. Later on patient could not tolerated the antikoch's drug and he had some side effects. Hence patient discontinued the drugs on his own in between. He had financial and family problems, and also because of his chronic illness, he had sudden mental breakdown, and he thus suffered from anxiety Neurosis with depression. After some period he again consulted me and he was again given treatment for tuberculosis and mental illness. Thereafter he took continuous treatment for further period of one year and then he became completely well on 9.5.04. Thus he was under treatment from 9.6.02 to 9.5.2004 i.e. for two year and this period is to be treated as period of illness. Now he is completely recovered from tuberculosis & mental illness and fit for his normal and usual work again from 10.05.2004."***

35. The respondents while filing their detailed reply have even challenged the said medical certificate by taking a specific stand in the reply affidavit which is reproduced as under:-

> "***That the reply averment of para 20 of the writ petition is that the present writ petition is not maintainable rather reserved to be dismissed with cost. The medical certificate***

issued by medical superintendent CI-1, Rural Hospital, Rui is challengeable being not predominant on the grounds that: -

a) The petitioner was not bed ridden.
b) It was not clear whether he was an indoor or outdoor patient.
c) No clinical/prophylactic reports diagnosed by the doctor.
d) No periodical prescription slips were sent to the respondents.
e) The medical certificates as required under CCS leave rules not sent.
f) When patient was under treatment w.e.f 09.06.2002, the reasons for not sending any intimation to the respondents till date is not only an after though preparation but also the superintendent has prepared the M C after contemptuous.
g) Super special treatment facilities are available with Army/BSF and petitioner took treatment from Rural hospital. Besides this the petitioner never reported to the respondents till date. Hence his claim is wonky, undefined and wittingly misleading the Hon'ble Court. The dismissal order was sent to his home town through registered post with a copy to SSP Satara (Maharashtra) the case does not arise he has not received the show cause notice. Hence being, a delayed case this WP is not maintainable."

36. Thus, the certificate relied upon by the petitioner, according to the respondents, has no legal sanctity and cannot be made basis for justification of such inordinate absence.

37. As per the stand of the respondents, the petitioner was afforded full opportunity by way of show cause notice and it was only when the petitioner failed to put forward his defence, the order of dismissal has been sent to his last known address as per his service record, through Registered Post. Insofar as, the stand of the petitioner that the punishment which has been imposed upon him is disproportionate to the gravity of offence, the respondents have specifically pleaded in their reply that the order of dismissal under Section 11(2) read with Rule 177 under the confirmatory provision of Sub-Rule 2 of Rule 22 of the BSF Rules was proportionate and commensurate to the gravity of offence in the instant case, wherein the petitioner has admittedly remained absent from duty from a disciplinary force for more than two years. Thus,

according to the respondents, the order is perfectly legal, justified and commensurate to the gravity of offence and there is no violation of Article 14 and 16 of the Constitution, as alleged in the instant petition by the petitioner.

LEGAL ANALYSIS

38. This Court has analyzed the rival submissions made by both the parties and perused the record minutely.

39. Essentially, the controversy in the instant case boils down to two essential issues. The same are reproduced as follows:

I. ***Whether the extended period of overstay by the petitioner is justified or not?***

II. ***Whether the respondents have followed the mandate of the Border Security Forces Act 1969 and rules framed therein, while proceeding with inquiry and dismissal of petitioner from service?***

ISSUE I:

Whether the extended period of overstay by the petitioner is justified or not?

40. Firstly, it is apt to consider the controversy of overstaying of leave by the petitioner, the outcome of which would enable this court to adjudicate the latter issue.

41. It is the admitted case of the parties that the petitioner initially went for a casual leave of 07 days w.e.f. 08.06.2002 on account of his father's demise and the petitioner further overstayed for two years w.e.f. 17.06.2002. Pertinently, from bare perusal of the record, it is evident that after the expiry of initial seven days casual leave, the petitioner neither sought any permission for extension of leave nor did he made any effort to provide his whereabouts to the respondents, which would have enabled them to communicate with him. Be

that as it may, the petitioner has admitted that he was absent from his duty for two years without seeking any extension of leave.

42. In this regard, reference may be made to the decision in ***Union of India v. Ghulam Mohd. Bhat,*** reported in ***(2005) 13 SCC 228,*** wherein the Apex Court, while dealing with a case of a Constable serving with the CISF, who overstayed leave for 315 days, held as under:-

> ***"8. This Court had occasion to deal with the cases of overstay by persons belonging to disciplined forces. In State of U.P. v. Ashok Kumar Singh (1996) 1 SCC 302 : AIR 1996 SC 736 the employee was a police constable and it was held that an act of indiscipline by such a person needs to be dealt with sternly. It is for the employee concerned to show how that penalty was disproportionate to the proved charges. No mitigating circumstance has been placed by the appellant to show as to how the punishment could be characterized as disproportionate and/or shocking. (See Mithilesh Singh v. Union of India (2003) 2 SCR 377. It has been categorically held that in a given case the order of dismissal from service cannot be faulted. In the instant case the period is more than 300 days and that too without any justifiable reason. That being so the order of removal from service suffers from no infirmity. The High Court was not justified in interfering with the same. The order of the High Court is set aside."***

43. Having considered the submissions of learned counsel for the parties and perused the record, this Court finds that there is no denial by the petitioner to the fact that though he was required to join duty after casual leave of 07 days w.e.f. 08.06.2002. However, he did not report back and therefore, on the said basis, he was dismissed from service. The petitioner has sought to justify his absence from duty on the basis of a medical certificate dated 10.05.2004 issued by Medical Superintendent CI-1 Rural Hospital, Rui, Tehsil Baramati District Pune. However, the mere production of a medical certificate at the end of two years does not justify the absence sans any communication/correspondence

with the force. It is imperative to note that members of uniformed forces in particularly, having regard to the nature of the duties enjoined upon them, are expected to observe a higher duty of care in case of abstention from duty. As such, in light of these circumstances, the extended period of overstay by the petitioner cannot be justified by taking a mere plea of a medical condition at the end of two years.

44. In this regard, this court draws support of the judgment passed by the Hon'ble Apex Court in ***Union of India v. Datta Linga Toshatwad***, reported in ***(2005) 13 SCC 709***, the relevant para of which is reproduced as under:

> ***"The present case is not a case of a constable merely overstaying his leave by 12 days. The respondent took leave from 16-6-1997 and never reported for duty thereafter. Instead he filed a writ petition before the High Court in which the impugned order has been passed. Members of the uniformed forces cannot absent themselves on frivolous pleas, having regard to the nature of the duties enjoined on these forces. Such indiscipline, if it goes unpunished, will greatly affect the discipline of the forces. In such forces desertion is a serious matter. Cases of this nature, in whatever manner described, are cases of desertion particularly when there is apprehension of the member of the force being called upon to perform onerous duties in difficult terrains or an order of deputation which he finds inconvenient, is passed. We cannot take such matters lightly, particularly when it relates to uniformed forces of this country. A member of a uniformed force who overstays his leave by a few days must be able to give a satisfactory explanation. However, a member of the force who goes on leave and never reports for duties thereafter cannot be said to be one merely overstaying his leave. He must be treated as a deserter. He appears on the scene for the first time when he files a writ petition before the High Court, rather than reporting to his Commanding Officer. We are satisfied that in cases of this nature, dismissal from the force is a justified disciplinary action and cannot be described as disproportionate to the misconduct alleged."***

45. Without any intimation from petitioner, the respondents could not be expected to wait for indefinite time for the petitioner to join back his services.

As such, the overstay of leave w.e.f. 17.06.2002, by the petitioner cannot be legally justified.

Accordingly, the issue no.1 stands answered in favour of the respondents and against the petitioner.

ISSUE II:

Whether the respondents have followed the mandate of the Border Security Forces Act 1969 and Rules of 1969, while proceeding with inquiry and dismissal of petitioner from service?

46. Before dwelling into the records and rival submissions made by the parties, the overview of rules mandating the procedure for inquiry and dismissal from the service is required to be considered. Accordingly, Section 62 of the BSF Act is reproduced as under:-

> ***"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 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."***

47. Another Rule which requires consideration is Rule 173(8) of the BSF Rules and the same is reproduced as under :-

> ***173. Procedure of Courts 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."]

Inserted by S.O 2628(E), dated 25 November, 2011 (w.e.f) 25.11.2011

48. Also, Rule 22 of the BSF Rules is reproduced as under:-

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 –

(c) 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

(d) 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.

(3) 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.

49. The Rule 177 of the BSF Rules is reproduced as under:

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.

50. The issue of breach of Section 62 of the BSF Act read with Rule 177 and Rule 22 and the procedure prescribed under Rule 173(8) of BSF Rules are the main contentions of the petitioner. According to petitioner, non-compliance of these statutory provisions of BSF Act and rules renders the order of dismissal as invalid. Therefore, it would be apt for this court to scrutinize the record in order to determine as to whether any breach as alleged by the petitioner is present in instant case or not.

51. A bare perusal of the record reveals that petitioner was firstly issued a notice dated 19.06.2002 at his residential address in District Satara, Maharashtra, whereby, he was directed to report back to his headquarters. Another notice dated 26.06.2002 was issued to the petitioner, followed by an apprehension roll dated 20.07.2002 under Section 60 and 61 (1) of BSF Act, 1968, whereby the concerned Senior Superintendent of Police was requested to apprehend and handover petitioner to the Commandant 30 5BN BSF for taking disciplinary action against him. Lastly, a show cause notice dated 10.09.2002 was issued to the petitioner, whereby he was provided with an opportunity to raise his defence and along with it, a copy of the Court of enquiry was provided to the petitioner.

52. From the perusal of the record, it is clear that after issuance of notices on 19.06.2002 and 26.06.200, the respondent conducted a proper enquiry under Section 62 of the BSF Act and after completion of said enquiry, the petitioner was given an opportunity, through a show cause notice vide No. ESTT/07/66/02/12166–16 dated 10.09.2002, along with which the complete copy of the court of enquiry proceedings was annexed. As such, it is clear that

the mandate as per the Section 62 of the BSF Act was followed in its letter and spirit.

53. Further the record reveals that the satisfaction, as required under Rule 22(2) of the BSF Rules has also been recorded before proceeding further in the matter. The competent authority has accorded due satisfaction to the fact that the trial of the petitioner is inexpedient as well as impracticable and since the retention of the petitioner in service was undesirable, the petitioner was informed with all the reports adverse to him with a view to call upon him to submit in writing his explanation and defence.

54. Even otherwise, while it is true that there could be several material or reports, which would lead to the decision for dismissal of a person, but the instant case is such, in which action has been proposed for leave without sanction for a prolonged period w.e.f. 16.06.2002. Therefore, there is no other material except the absence of the petitioner itself and statement of witnesses which could be relied upon by the department to proceed in terms of Section 62 of the BSF Act. Accordingly, the copy of the court of enquiry proceedings is sufficient material and the same has been provided to the petitioner.

55. This Court is of the considered opinion that in case of voluntary and deliberate absentia, notice is required to be issued to the person concerned, in the instant case the same was issued to petitioner at the first instance on 19.06.2002. Another notice dated was issued on 26.06.2002, followed by apprehension roll to the SSP, Satara, Maharashtra under Sections 60 & 61(1) of the BSF Act, was also issued to the petitioner and lastly, a show cause notice was also issued on 10.09.2002. However, the petitioner did not reply to any of

the aforesaid communications/notices issued to him. Therefore, the requirement of Rules 22 and 62 of the BSF Rules stood complied with by the respondents.

56. Insofar as Rule 173 of the BSF Rules is concerned, the same is not applicable in the instant case. Pertinently, the petitioner was overstaying from leave and never reported, despite giving him repeated opportunity, he failed to respond the correspondence, as such, keeping in view his willful overstay w.e.f 17.06.2002, respondents have taken all actions under Section 62, 11 (2) read with BSF Rule 177 and confirmatory Rule 22(2) which are applicable to the enrolled person of BSF. Besides this, before his dismissal, the petitioner was afforded an opportunity through a valid show cause notice vide registered post No.12615-16 dated 10.09.2002 in which the court of inquiry proceedings were enclosed. Since, he did not report to the unit, despite providing various opportunities including issue of apprehension roll and show cause notice, as such his trial by Security Force not only was inexpedient but also impracticable. Thus, it can safely be concluded that all the provision of BSF Act and rules framed therein were followed by the respondents while issuing the order of dismissal of petitioner.

Accordingly, the Issue No. II stands answered in favour of respondents and against petitioner.

57. Another ground raised by the petitioner which is required to be considered by this court is the proportionality of the punishment which has been imposed on the petitioner. From the perusal of record, it reveals that the petitioner was imposed with the order of dismissal under Section 11(2) read

with Rule 177 and Sub-Rule 2 of Rule 22 of the BSF Rules for admittedly remaining absent from duty from a disciplinary force of BSF for more than two years. With regard to the scope of intervention by the Courts in the proportionality of punishment imposed, the same has been settled in various legal pronouncements.

58. The Apex Court in the case of ***Union of India and others vs. P.Gunasekaran***, reported in ***(2015) 2 SCC 610*** held that under Article 226/227 of the Constitution of India, the High Court shall not go into the proportionality of punishment, unless it shocks its conscience and provided various parameters for intervention by the High Court. The relevant paras of which has been reproduced as under:

> ***13. Under Articles 226/227 of the Constitution of India, the High Court shall not:***
>
> ***(i) reappreciate the evidence;***
>
> ***(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;***
>
> ***(iii) go into the adequacy of the evidence;***
>
> ***(iv) go into the reliability of the evidence;***
>
> ***(v) interfere, if there be some legal evidence on which findings can be based.***
>
> ***(vi) correct the error of fact however grave it may appear to be;***
>
> ***(vii) go into the proportionality of punishment unless it shocks its conscience.***

59. Recently, a Division Bench of the Delhi High Court, in ***Palyam Delhi Prasad vs Union of India and Others***, reported in ***2024 SCC OnLine Del. 5886*** has observed the following in a similar fact situation: -

> ***"9. Having considered the submissions of learned counsel for the parties and perused the record, we find that there is no denial by the petitioner to the fact that though he was required to join duty on 03.10.2012, he did not report back and therefore, on the basis of a validly held COI, was***

> ***dismissed from service on 10.06.2013 from service. There is also no denial by him that, both he and his father had submitted applications clearly stating that the petitioner did not want to continue with his service in the BSF. In fact, there is also no denial to the fact that despite the dismissal order dated 10.06.2013, having been served on the petitioner, he did not make any representation till 25.07.2019.***
>
> ***10. The only submission of the learned counsel for the petitioner is that the punishment of dismissal is disproportionate and the petitioner, who is still a young man, ought to be granted an opportunity to serve in the BSF. Taking into account the factual position, which as noted herein above, is undisputed, we find absolutely no merit in the petitioner's plea that the penalty imposed on him was disproportionate. The petitioner, who was a member of an Armed Force, was not expected to overstay leave for such a long period, and that too without any justifiable reason."***

60. In the instant case, petitioner has admittedly remained absent from duty from a disciplinary force of BSF for more than two years. Accordingly, the respondents have chosen to impose the punishment of dismissal from service. In addition, the respondents have placed on record various notices issued to the petitioner and thus, the respondents cannot be expected to wait indefinitely for the petitioner. Thus, this Court finds no error or infirmity in the order impugned dated 12.12.2002.

CONCLUSION

61. In view of what has been discussed, considered and analyzed hereinabove and also keeping in view the aforesaid principles of law laid down by the Apex Court, this Court is of the view that the order of dismissal of the petitioner from service does not suffer from any legal infirmity and the same has been passed by the respondents in consonance with the relevant provisions

of BSF Act and Rules framed therein. Therefore, the instant writ petition, challenging the order of dismissal dated 12.12.2002, being bereft of any merit, is ***dismissed*** all alongwith connected application(s).

62. Registry is directed to handover the record of the case to Mr. Vishal Sharma, learned DSGI against proper receipt.

(Wasim Sadiq Nargal)
Judge

JAMMU
20.09.2024
Mihul

Whether the judgment is speaking? ***Yes***
Whether the judgment is reportable? ***Yes***