

(2014) 05 DEL CK 0004

Delhi High Court

Case No: W.P. (C) 16560/2004 and CM No. 3789/2014

Vijay Kumar

APPELLANT

Vs

UOI and Another

RESPONDENT

Date of Decision: May 19, 2014**Acts Referred:**

- Border Security Force Act, 1968 - Section 11, 62

Hon'ble Judges: Pradeep Nandrajog, J; Jayant Nath, J**Bench:** Division Bench**Advocate:** Shakeel Ahmed, Advocate for the Appellant; Pulkit Sharma, Mr. M.K. Bhardwaj and Mr. Prasouk Jain, Advocate for the Respondent**Final Decision:** Dismissed

Judgement

Pradeep Nandrajog, J.

The writ petition had reached for final hearing on March 13, 2014 and since none appeared for the petitioner Court notice was directed to be issued and served upon learned counsel for the petitioner informing him that the writ petition would be taken up for final hearing on May 05, 2014. Learned counsel for the petitioner was served. Before May 05, 2014, he filed CM No. 3789/2014 praying that additional documents filed along with the application may be taken on record. On March 20, 2014 it was directed that said application would be taken up along with the writ petition on May 05, 2014.

2. On May 05, 2014, the learned counsel for the respondent stated that since the issue is short he would like to place on record written submissions on behalf of the respondent. Learned counsel for the petitioner agreed to give his written submissions within a week. Both learned counsel consented that the matter could be decided on the basis of the written submissions. Accordingly, the matter was reserved for judgment.

3. Order dated May 05, 2014 records the consent of the parties.

4. Regretfully, in spite of the Court Master of this Court, having twice telephonically informed learned counsel for the petitioner that written submissions have not been received, learned counsel for the petitioner has not bothered to file the written submissions till May 17, 2014.
5. Accordingly after considering the pleadings in the writ petition and the original record of the respondent, the judgment was dictated in chamber and pronounced in Court on May 19, 2014.
6. The petitioner was enrolled as a Constable in BSF on December 26, 2000 and after basic training at Tekanpur (M.P.) was on July 06, 2002 posted with the 30th Bn. BSF which was deputed at Khajuwala, District Bikaner, Rajasthan.
7. The petitioner proceeded for 35 days' earned leave on August 26, 2002 and was thus required to report back in the afternoon on September 29, 2002.
8. On September 28, 2002 the petitioner sent a letter seeking leave to be extended giving the reason that he was suffering from swollen intestines. The same was rejected on October 11, 2002 with a direction that he should report immediately for duty failing which disciplinary action would be initiated.
9. Another application dated October 28, 2002 was received by the Commandant of the Battalion on November 02, 2002. The petitioner sought leave to be extended claiming medical unfitness concerning his intestines, but before petitioner's application dated October 28, 2002 could be received by the Department on November 02, 2002, on October 30, 2002 the petitioner was required to report back immediately.
10. Concerning petitioner's second application for leave dated October 28, 2002 received by the Department on November 02, 2002, on November 23, 2002 the petitioner was directed to report to the Commandant with all medical papers which he possessed.
11. No response being received from the petitioner, on December 04, 2002 a notice was sent to the petitioner informing him that he should join immediately failing which a Court of Inquiry as per Section 62 of the BSF Act, 1968 would be initiated.
12. The petitioner did not respond. On December 19, 2002 the petitioner was informed that a Court of Inquiry has been constituted. He was also requested to join back.
13. On December 17, 2002 the petitioner sent a third letter for leave to be extended on medical grounds, and for the first time under cover of said letter he sent photocopies of three OPD cards and eleven cash memos recording purchase of medicines. The petitioner also enclosed photocopies of three medical certificates purportedly issued on September 27, 2002, October 27, 2002 and November 21, 2002 by one Dr. A.K. Chaudhary the Medical Officer of Primary Health Centre,

Manglaur, District Haridwar. The certificate dated September 27, 2002 and the certificate dated October 27, 2002 records that the petitioner has been diagnosed with "Amoebic Colitis". The certificate dated November 21, 2002 records that the petitioner was diagnosed with URTI and having fever. Each certificate records that the petitioner has been advised bed rest for thirty days.

14. Rejecting the application, on January 27, 2003 the petitioner was directed to report to the Unit and if his case was that he was not fit to travel, he could do so with the help of a family member.

15. On January 13, 2003 the Commandant of the Battalion forwarded the photocopy of the papers purportedly issued by the Medical Officer of the Primary Health Centre, Manglaur, District Haridwar for verification. It appears that no reply thereto was received.

16. Court of Inquiry report was submitted on February 21, 2003 opining that it was apparent that the petitioner was deliberately not joining back and that the absence was unauthorized. The reason for the prima facie opinion as recorded is that the photocopy of the OPD cards would evidence that if at all the claim is correct, the petitioner was not so seriously sick, because had he been so, he would have been admitted as an In Patient.

17. On March 03, 2003 a show cause notice was issued to the petitioner to enable him to respond to the allegation against him that on account of unauthorized absence why should the power u/s 11 of the BSF Act read with Rule 177 of the BSF Rules be not invoked to dismiss him from service without inquiry. In other words the power of administrative dismissal was intended to be used and was so conveyed.

18. No reply being received within thirty days to the show cause notice dated March 03, 2003, vide order dated April 10, 2003 the petitioner was dismissed from service and the period from September 30, 2002 to April 10, 2003 was treated as dies-non.

19. The petitioner thereafter filed a statutory appeal on June 30, 2003 and along therewith he filed photocopies of a medical certificate and a fitness certificate both dated April 29, 2003, the former recording that the petitioner was suffering from Sciatica and was advised bed rest from April 02, 2003 for 27 days i.e. up to April 28, 2003 and the latter that on April 29, 2003 the petitioner was certified fit. The two certificates were purportedly issued by the Chief Medical Superintendent of JNSM Government Joint Hospital, Roorke.

20. On August 31, 2003, concerning the medical certificate sent by the petitioner pertaining to the Primary Health Centre, Manglaur, information was sent by the Chief Medical Officer of the Primary Health Centre, Manglaur confirming that the petitioner was examined by Dr. A.K. Chaudhary and have been prescribed medicines. As regards the medical certificates relied upon by the petitioner issued by the doctor of JNSM Government Hospital, Roorke, on March 22, 2004 intimation

was sent by the Medical Superintendent that the petitioner has obtained the certificates by misleading the Medical Officer.

21. On April 21, 2004 the Statutory Appeal filed was rejected. Above captioned writ petition was filed.

22. Under cover of CM No. 3789/2014 the petitioner has filed photocopies of an OPD card issued to him by the Public Health Services Centre Manipur. A clinical report from a laboratory at Churachandpur. A discharge summary purportedly issued by BSF Hospital showing petitioner admitted with jaundice on October 23, 2000 and discharged on November 01, 2001. Photocopies of some medical prescriptions have also been filed.

23. The issue is short. Whether the petitioner was compelled by circumstances beyond his control to not report for duty when his leave expired on September 29, 2002?

24. It would not be out of place for us to highlight that the petitioner after completing his basic training commenced duty for the first time on July 06, 2002 when he was attached to the 30th Bn. BSF. Within less than two months of having served, he requested for and was granted 35 days' earned leave on August 26, 2002.

25. Along with cover of CM No. 3789/2014 the petitioner has filed a discharge summary purportedly issued by BSF Hospital (which one is not indicated in the discharge summary slip). It records date and time of admission of the petitioner as a patient of jaundice on October 23, 2000 and date of discharge as November 01, 2001.

26. Now, either the date October 23, 2000 is incorrect or the date November 01, 2001 is incorrect. The reason being that it would be impossible for a patient of jaundice to be continued to be sick for more than one year and remain hospitalized for over a year. The petitioner was enrolled as a Constable on December 26, 2000 and thus he could not be admitted to any BSF Hospital on October 23, 2000. It is thus apparent that the date October 23, 2000 should actually read October 23, 2001.

27. The petitioner completed basic training at the Tekanpur Academy before July 06, 2002. Thus petitioner being unwell between October 23, 2001 till November 01, 2001 would be when he was undergoing training and this period has no concern with the period of unauthorized absence, which commenced on September 29, 2002.

28. But the certificate filed by the petitioner would bring out that the petitioner is capable of procuring documents at his leisure and pleasure. The petitioner has also filed, along with the Civil Miscellaneous Application, a clinical laboratory report dated November 01, 2001 from a laboratory at Churachandpur.

29. If the petitioner was under treatment at the BSF Hospital up to November 01, 2001 while he was undergoing training, the place has to be Tekanpur.

30. Reverting to the photocopy of the documents filed by the petitioner before the Authorities on which he relied for proof of he being unwell, it strikes us at the forefront that the petitioner is shown as a patient at the OPD and not an In Patient. If a person is serious, any reasonable doctor would admit him. A patient is treated medically at the OPD if the problem is of a kind where one can rest in the house but move around to visit the doctor.

31. As noted above, the Commandant of the petitioner informed the petitioner that he could report to the Unit along with his medical papers in the company of a relative. The reason is obvious. The Commandant had wanted to ensure by getting the petitioner medically examined at a BSF Hospital to find out the truth. The petitioner did not do so.

32. We concur with the view taken by the Authorities that there is sufficient circumstantial evidence to take a view that the petitioner was failing a sickness. It is in this context that it assumes importance to note that enrolled as a Constable on December 26, 2000 after basic training the petitioner joined duty on July 06, 2002 and after working for less than two months, was sanctioned leave on August 26, 2002 and thereafter the petitioner did not report back for duty in spite of sanctioned leave being finished by September 29, 2002.

33. As regards the medical certificates filed by the petitioner along with the appeal, we find that the same concerns the period April 02, 2003 till April 28, 2003, with which we are not concerned because the order of administrative dismissal was passed on April 10, 2003 for unauthorized absence till when the show cause notice dated March 03, 2003 was issued. But the same yet again brings out the propensity of the petitioner to obtained medical certificates at his pleasure. He got hold of a convenient doctor who certified that the petitioner was suffering from the Sciatica pain. Thus what we have is certificates pertaining to the petitioner suffering from jaundice to Amoebic Colitis to Sciatica.

34. On the legal front, the exercise of the power of administrative dismissal u/s 11 of the BSF Act, 1968 read with Rule 177 of the BSF Rules, 1969, has been upheld by a Division Bench of this Court in the decision dated March 21, 2006 in W.P. (C) No. 6577/2002 Ex. Const. Akhilesh Kumar Vs. DG, BSF & Anr.

35. This Bench has recently on April 16, 2004, in W.P. (C) No. 5440/2002 Suresh Kumar Vs. BSF & Anr., taking note of the decision pronounced by the Supreme Court reported as [Gouranga Chakraborty Vs. State of Tripura and Another](#),. as also the decision reported as [Union of India and others Vs. Ram Pal](#), held that the legal view which could be culled out from the two decisions would be that if in response to a show cause notice as to why power of administrative dismissal be not invoked, the BSF employee submits a response and raises an issue of fact which warrants an

inquiry to be held, resort to administrative dismissal cannot be made without an inquiry. But if no response is filed to the show cause notice and because of said fact, no question of fact warranting inquiry to be held surfaces, the power of administrative dismissal can be exercised.

36. We dismiss the writ petition but without any orders as to costs.

37. Since we have dealt with CM No. 3789/2014 while dealing with the writ petition and have discussed the documents filed under cover of said application, CM No. 3789/2014 is formally disposed of as Infructuous.