

(2008) 08 GAU CK 0037

Gauhati High Court (Agartala Bench)

Case No: None

Union of India (UOI) and Others

APPELLANT

Vs

Mohanlal Das

RESPONDENT

Date of Decision: Aug. 5, 2008

Acts Referred:

- Army Act, 1950 - Section 91
- Border Security Force Act, 1968 - Section 104, 105, 106, 18, 19
- Constitution of India, 1950 - Article 311

Citation: (2009) 1 GLR 297 : (2008) 3 GLT 812

Hon'ble Judges: Mutum B.K. Singh, J; B.K. Sharma, J

Bench: Division Bench

Final Decision: Allowed

Judgement

B.K. Sharma, J.

This writ appeal is directed against the judgment and order dated 09.07.2002 passed by the learned Single Judge allowing the writ petition being Civil Rule No. 587/1996, which the respondent herein had filed challenging his dismissal from service under the BSF.

2. The writ petition was filed in the year 1996 challenging the order dated 28.08.1996, by which the petitioner was dismissed from service. He was working in the capacity of Lance Naik. The petitioner entered into services of BSF as Constable on 02.04.1986. In the month of April, 1996 the petitioner was posted at Panisagar in the State of Tripura, which was the Head Quarter of the 200 Bn., BSF to which the petitioner was attached. In the writ petition it was stated that sometime in April, 1996 the wife of the petitioner was at advanced stage of pregnancy and so the petitioner required leave since there was nobody to look after her at that point of time.

3. In the aforesaid circumstances, the petitioner submitted an application for leave of two months. According to the petitioner, same was neither granted nor refused. It was stated that the petitioner did not retain any copy of the leave application as he was in a hurry. The petitioner left his place of duty, which according to the petitioner, was in the aforesaid compelling circumstances. He reached his wife on 11.04.1996. It was contended that before departure, the petitioner had informed the Sub-Inspector, Motor Transport of the Bn. under whom he was serving and that the said Sub-Inspector was kind enough to ask the petitioner to write an application for leave addressed to the Commandant and then to leave the station.

4. After reaching his residence at Ranir Bazar, the petitioner found his wife to be a precarious condition for which he had to arrange her immediate treatment. According to the petitioner, he had sent a letter dated 28.05.1996 requesting the Commandant to sanction leave as was prayed for by him. The petitioner could not join his duty even after expiry of the leave, he had prayed for, as according to him, he also fell ill, which forced him to submit another application on 10.06.1996 praying for leave for another 60 days.

5. In May, 1996 the wife of the petitioner gave birth to a child and, therefore, the petitioner's presence by her side was necessary, it was contended by the petitioner. Although in the writ petition, the petitioner stated about submitting several representations but the copies of the same were not annexed to the writ petition. It was on 04.08.1996, the petitioner reported for duty at Panisagar to the Deputy Commandant-in-Charge. The Deputy Commandant asked the petitioner to go to Kashmir where, in the meantime, the Battalion Head Quarter was shifted. The petitioner stayed at Panisagar upto 14.08.1996. Thereafter, the petitioner started for Kashmir and reached the transit camp at Jammu and thereafter, he started for Anantnag. According to the petitioner, the road condition was not conducive for journey and was closed and consequently, the petitioner had to come back to transit camp at Head Quarter. He remained there upto 01.09.1996. Thereafter, the petitioner again started for Anantnag via Srinagar on 02.09.1996. After arrival at Anantnag at the Battalion Head Quarter, the petitioner reported for duty but he was told that he was already dismissed from service by an order of the Commandant of the Battalion.

6. Referring to the various provisions of the BSF Act, 1968 and the BSF Rules, 1969, it was contended by the petitioner that there was gross violation of the principles of natural justice and so also Article 311(2) of the Constitution of India towards his dismissal from service. Referring to the order of dismissal, it was contended by the petitioner that although it was stated that the petitioner was given opportunity to show cause but no such show cause notice was either dispatched or received by the petitioner. Thus, according to the petitioner, the order of dismissal was passed behind his back and he was not provided with any opportunity of being heard.

7. In the counter affidavit filed by the respondents, the contentions raised in the writ petition were denied. It was stated that on earlier occasion also the petitioner was awarded "Severe Reprimand" on 08.01.1996 for his unauthorized absence of leave from 28.12.1995 to 03.01.1996 u/s 19(a) of the BSF Act, 1968. It was also pointed out that during the tenure of the petitioner as Lance Naik upon his promotion on 13.08.1993, he had over stayed leave on four occasions.

8. The respondents in their counter affidavit denied the plea of the petitioner that he had applied for two months leave in connection with his wife's pregnancy. According to the respondents, since there was no prayer in writing for leave, there was also no question of sanctioning the same. According to the respondents, the petitioner deserted from the unit lines with effect from 11.04.1996 without any permission/leave from the competent authority. Neither any application before his desertion from the unit was submitted by the petitioner, nor he approached his controlling officer as was stated in the writ petition. It was also contended that the Sub-Inspector in question was not the authority to sanction leave or allow any BSF personnel to leave station.

9. It was also contended by the respondents that registered letter was sent to the petitioner asking him to join duty. Such registered letter bearing No. Estt./611/AWL/200/ Bn./96/3195 was sent on 13.04.1996. Since the petitioner did not join the unit for the next 30 days, a Court of enquiry was ordered vide order dated 14.05.1996 and thereafter, the apprehension roll had also been issued addressed to the Superintendent of Police, Tripura, (South) to apprehend the petitioner by the police Officer vide office letter dated 15.04.1996. The Court found the petitioner deserting from the unit line. Thereafter, a show cause notice was sent to the petitioner on 31.05.1996 by registered post.

10. In the counter affidavit, it was denied that the petitioner had submitted any application dated 28.05.1996 for leave. As against the plea of the petitioner that he had 100 days of earned leave to his credit, it was pointed out that at that relevant point of time he had leave of only 58 days. It was also contended that had the petitioner been serious about his service matter, he could have approached the 200 Bn., BSF through the unit near his home place or SHQ, BSF, Tripura (North), Teliamura, which is stated to be approximately 25-30 Kms. from Ranir Bazar where the petitioner stayed with his wife.

11. Further stand of the respondents in their counter affidavit was that the unit did not receive any application dated 10.09.1996 from the petitioner praying for 60 days earned leave. As regards the plea of the petitioner that no communication was made to him, same was denied by the respondents stating that whenever any BSF personnel overstays leave, a letter is sent to his home address as per his service record informing him of either sanctioning or non sanctioning of the leave and asking him to report back to duty immediately if the leave is not sanctioned.

12. As regards the plea of the petitioner that he had gone to Jammu and thereafter, to Anantnag, the stand of the respondents was that there was no question of allowing the petitioner to go to Anantnag specially when he was a deserter. Referring to Section 18(a) of the BSF Act, it was also contended that a member of the force deserting while on active duty is liable to be punished. It was further contended that one cannot presume that after desertion if he rejoins, he will be sanctioned leave. It was stated that leave cannot be claimed as a matter of right and that the petitioner avoided the operational duty by his act of desertion willfully.

13. Further stand of the respondents in their counter affidavit was that the stand of the petitioner that he proceeded to Anantnag on 14.08.1996 was false. Such a stand was taken on the basis of the actual diet receipt furnished by the HQ, MESS NCO of 29 Bn., BSF on 11.08.1996. Thus, according to the respondents, the plea of the petitioner that he could not reach Anantnag due to blockade of road etc. was a false statement.

14. As regards the dismissal of the petitioner from service, it was stated that he was so dismissed after following the law laid down in the BSF Act and the Rules and the copy of the dismissal order was sent to his home address with copy to his local police station. It was categorically denied that no opportunity was given to the petitioner before passing the order of dismissal. It was pointed out that the petitioner was issued a letter dated 13.04.1996 asking him to join duty forthwith. Subsequently, show cause notice dated 31.05.1996 was sent to him asking him to explain if he had anything to urge in his defence for the proposed action, but the petitioner failed to reply anything in his defence.

15. In paragraph 19 of the counter affidavit, it was stated that show cause notice was issued to the petitioner by registered post in his home address, as was furnished by the petitioner and recorded in the service book. Thus, in a nutshell, it was the case of the respondents that since the petitioner deserted from service, he was declared deserter and thereafter, proceeding was initiated against him in conclusion of which the order of dismissal was passed against him.

16. The learned Single Judge has set aside the order of dismissal on the ground that there was violation of the principles of natural justice. According to the learned Single Judge, the petitioner did not get any opportunity to defend him in the proceeding. By the impugned judgment and order, the learned Single Judge while setting aside and quashing the order of dismissal dated 28.08.1996 directed the respondents to reinstate the petitioner in service with all service benefits. Hence, this writ appeal. Be it stated here that the impugned judgment and order is under order of stay.

17. We have heard Mr. P.K. Biswas, learned Assistant Solicitor General of India appearing for the respondents/appellants. We have also heard Mr. A.C. Bhowmik, learned Counsel for the petitioner, who is the respondent in the appeal.

18. While Mr. Biswas, learned Assistant Solicitor General of India submitted that the fact of desertion and absence from duty being an admitted position, there was nothing wrong in dismissing the petitioner from service, Mr. Bhowmik, learned Counsel for the petitioner/respondent submitted that the petitioner could not have been dismissed from service without affording him any opportunity of being heard.

19. We have considered the rival submissions and have given our anxious consideration to the same. We have also considered the materials on record.

20. From the materials on record and as per the own stand of the writ petitioner, there is no dispute that he left the unit for his hometown without any permission or authority. Admittedly, he was not granted any leave. It was stated in the writ petition that he did not possess a copy of the leave application. The stand of the respondents in their counter affidavit was that the petitioner never applied for leave and deserted the unit. The respondents also denied submission of further leave application by the petitioner.

21. The petitioner being a member of the disciplined force and even otherwise also could not have deserted his unit without any authority in violation of rule. His plea that he was permitted to go by the in-charge, even if is correct, same is of no consequence in as much as, his controlling authority was the Commandant, who is also the officer responsible for granting or non-granting of leave.

22. The petitioner could not have left the unit unauthorized. Not only that, he also did not report back to duty for months together on the plea of his wife's illness and on his own illness. There is nothing to show that the petitioner had ever produced any medical documents pertaining to such illness.

23. After declaring the petitioner deserter, the proceeding against him was initiated for absence from duty without any leave. On conclusion of the proceeding, he was imposed with the penalty of dismissal from service vide order dated 28.08.1896. As regards the plea of the petitioner that he was not provided with any opportunity of being heard, the respondents in their counter affidavit categorically stated that due notice was sent to him in his home address and such notice was sent by registered post. The proceeding was preceded by the letter dated 13.04.1996 sent to his home address directing him to rejoin duties. Admittedly the intimation was sent by registered post.

24. After the aforesaid intimation dated 13.04.1996, the BSF Authority sent the letter dated 15.04.1996 to the Superintendent of Police, Tripura (South) with the request to apprehend the petitioner immediately and to dispatch him under escort to the Head Quarter. Copy of the same was also sent to the jurisdictional police station. Such intimation was relating to desertion of service by the petitioner.

25. Once the petitioner was declared deserter he was taken up for further proceeding and was issued with the show cause notice dated 31.05.1996. In the

notice, it was stated that since the petitioner was absent from duty without leave with effect from 11.04.1996, the authority was of the opinion that his further retention in service was undesirable. The tentative proposal of terminate the service of the petitioner was also conveyed. The letter was sent to the home address of the petitioner, which he himself had furnished and also entered in the service record. The letter was sent by registered post.

26. It was too much on the part of the petitioner to contend that he did not receive any notice. He deserted from his duty and thereafter, remained unauthorisedly absent for months together without any intimation to the authority. In such a situation, the BSF Authority had no other option than to declare him deserter and to request the jurisdictional police authority to apprehend him. As regards the proceeding initiated against him, due notice was sent to him in his home address. Thus, it will be seen that all efforts were made to trace out of the petitioner. As has been held by the Apex Court in *Gujarat Electricity Board and Anr. v. Atmaram Sungomal Poshani* reported in (1989) 3 SCC 602, there is presumption of service of a letter sent under registered cover. The burden to rebut the presumption lies on the party challenging the factum of service. Mere denial is not sufficient to rebut the presumption relating to service of the registered letter. In the instant case, there is no manner of doubt that the petitioner acted in an irresponsible manner unbecoming of the member of the disciplined force. He could not have left the place of duty without any permission and or authority and stayed back from the unit maintaining complete silence.

27. The fact that the petitioner remained unauthorisedly absent months together is an admitted position. Only explanation furnished in the writ petition was that the petitioner could not resume his duties because of purported illness of his wife and the petitioner himself. In his purported representations the petitioner purportedly prayed for leave. The respondents have denied existence of such representations. Even assuming, that the petitioner had made the said representations, there was no explanation as to why he did not report for duty upon expiry of the leave prayed for. After long absence for months together, it did not lie on his mouth to say that he was not informed anything by the BSF Authorities.

28. The very fact that the petitioner remained unauthorisedly absent from duty for months together itself speaks of his desertion of duty. In such circumstances, there was nothing wrong in declaring him a deserter with consequential dismissal from service. As has been held by the Apex Court in *Channabasappa Basappa Happali Vs. The State of Mysore*, there is no distinction between admission of fact and admission of guilt. As in the instant case, in that case also the police officer remained absent without leave. His prayer for extension of leave was not granted. Thereafter, charge was framed against him. From the materials on record, it appeared that the petitioner did not take part in the enquiry. It was contended that the enquiry was in breach of the principles of natural justice. The Apex Court

noticing that the fact of remaining unauthorisedly absent being an admitted one, held that there was no violation of the principles of natural justice. It was observed thus:

...We do not see any distinction between admission of facts and admission of guilt. When he admitted the facts, he was guilty. The facts speak for themselves. It was a clear case of indiscipline and nothing else. If a police officer remains absent without leave and also resorts to fast as a demonstration against the action of the superior officer, the indiscipline is fully established. The learned Single Judge in the High Court was right when he laid down that the plea amounted to a plea of guilty on the facts, on which the petitioner was charged and we are in fully agreement with the observations of the learned Single Judge.

29. In the instant case also, the fact speaks for itself. At the first instance, the petitioner deserted his unit without any authority and/or leave and thereafter, all throughout remained absent. This being the position, nothing more was required to be established that he deserted the unit of BSF. The plea of violation of principles of natural justice will have to be considered in that context. Needless to say that natural justice is not based on any straight-jacket formula. It cannot be stretched that far, in which, nothing could be established beyond what has been established even without any notice.

30. Section 91(a) of the Army Act provides for penal deduction of all pay and allowances for every day of absence either on desertion or without leave. Section 106 provides for holding enquiry in case of absence from duty without the authority for a period of 30 days. Further, if a person declared absent does not afterwards surrender or if not apprehended, he shall, for the purposes of the Act be deemed to be a deserter. Rule 183 of the Army Rules, provides the methodology for holding the Court of Inquiry u/s 106. Such Court of Inquiry is conducted only when the army personnel remains absent, as in the instant case. Sections 104 and 105 of the Act, provide for arrest of the personnel by the civil authorities and furnishing of written information/desertion to such civil authorities. A deserter may be arrested by the civil authorities for his production to the unit. Desertion itself is a serious offence as indicated in Section 38 and 39 of the Act.

31. The learned Single Judge has allowed the writ petition by setting aside and quashing the impugned order of dismissal, which in our considered view, by way of stretching the principles of natural justice too far. In the case in hand, upon desertion of the unit by the petitioner, the BSF Authority had no other option than to send the notice by registered cover to his home address.

32. As regards the fact of desertion of duty, same was intimated to the jurisdictional police authorities with the request to apprehend the petitioner. There is nothing to show that the show cause notice issued to the petitioner under registered cover returned un-served. Further the fact of remaining absent unauthorisedly being an

established one, nothing more was required to be proved. After deserting the unit, the petitioner never rejoined his duties for months together. He also did not make any attempt to inform his own superior officer or other officer showing the cause for not joining the duty. Being a member of the disciplined force, the petitioner could not have remained absent for months together without informing the authority. As was rightly contended by the respondents in their counter affidavit, the petitioner at least could have intimated the local unit, which he did not do.

33. The matter will have to be considered keeping in mind all the above aspects of the matter, which the learned Single Judge failed to do so. In the case of Mithilesh Singh v. Union of India reported in 2000 (3) GLT 62 affirmed by the Apex Court in Mithilesh Singh Vs. Union of India (UOI) and Others, the Apex Court upheld the order of removal from service of the petitioner a member of RPF, who like that of the petitioner in the present case, left the place of duty without any leave and/or permission of the Authority. As in the instant case, in that case also, the petitioner was posted with a particular unit but he left the station on the ground of urgent necessity as in the instant case. In that case also he was not sanctioned with any leave and was also not permitted to leave the station. Considering the same to be serious offence on the part of the petitioner, a member of the disciplined force, it was held that in such circumstances, the penalty of removal from service was proper.

34. For all the aforesaid reasons, we are of the considered opinion that the writ petitioner is not entitled to any relief. Consequently, we set aside and quash the impugned judgment and order dated 09.07.2002 passed by the learned Single Judge in Civil Rule No. 587/1996. Resultantly, the order of dismissal dated 28.08.1996 is upheld and the writ petition is dismissed.

35. Writ appeal is allowed, without, however, any order as to costs.