

PETITIONER:
GOURANGA CHAKRABORTY

Vs.

RESPONDENT:
STATE OF TRIPURA AND ANR.

DATE OF JUDGMENT 31/03/1989

BENCH:
RAY, B.C. (J)
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RAY, B.C. (J)
PANDIAN, S.R. (J)

CITATION:
1989 AIR 1321 1989 SCR (2) 271
1989 SCC (3) 314 JT 1989 Supl. 86
1989 SCALE (1) 793

ACT:

Border Security Force Act 1968/Border Security Force Rules 1969. Section 4(2), 10, 11, 19, 48 and 50/Rules 6 and 177 Constable-Dismitted from service by commandant for overstaying leave--Validity of dismissal order--Whether Security Force Court--Should award punishment.

HEADNOTE:

The appellant was enrolled as a Constable in the BSF and was serving as such since 1966. He was confirmed in the said post. In 1971, he was granted leave from October 25, 1971 to October 30, 1971 on account of the death of his father. As the Shrad ceremony could not be performed within the aforesaid time, and he was suffering from serious illness he made an application requesting for extension of leave supported by a medical certificate. On December 12, 1971, the appellant received a communication from the Commandant stating that as he was absent without leave from October 31, 1971, that because of such absence without leave for a long period his further retention in service was undesirable, and that it was proposed to dismiss him from service. He was asked to submit his explanation against the imposition of this penalty. The appellant sent a telegram on December 21, 1971, but without any redress. On January 5, 1972 he received an order of the Commandant informing him that he had been dismissed from service. On January 10, 1972, the appellant again sent an application requesting that he may be permitted to join his service, but he was not allowed to do so. The appellant preferred an appeal to the Inspector General, BSF on February 1, 1972 but no relief was granted.

The appellant after serving a notice under section 80 of the Code of Civil Procedure filed a civil suit for a declaration that the order of dismissal from service was illegal and he was still in service. The respondent contested the suit and pleaded that the appellant was absent from duty from October 31, 1971 without any leave at a critical time when India was at war with Pakistan, and that the Commandant by his notice dated 15 December 1971 intimated: that his retention in service was undesirable because of his absence for a long period, that he was given an opportunity to urge his defence which he did not avail of by sending

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any reply, and that the Commandant had therefore dismissed him from service by his order dated January 5, 1972. The Munsiff held that the appellant had been given a reasonable opportunity before the Commandant dismissed him from service, and dismissed the civil suit.

The appeal filed by the appellant was allowed by the Additional District Judge and the suit was decreed. It was held that the order of dismissal from service was illegal and bad, as the same was not made by the Security Force Court and no such court had been constituted. The Order passed by the Commandant under section 11(2) of the Border Security Force Act and read with rule 177 of the Rules could not therefore be upheld. It was further held that the order was bad as it was contrary to the constitutional mandate embodied in Article 311 of the Constitution, as no opportunity of hearing was given, and the procedural safeguards contained in Chapters VII to XI of the Border Security Rules were not followed.

The High Court decreed the second appeal preferred by the respondents, reversed the judgment and decree of the lower appellate court, and dismissed the suit. It was held that the order of dismissal of the appellant from service had been made in accordance with the powers conferred on the Commandant, BSF under the provisions of section 11(2) and (4) of the Border Security Force Act, 1968 read with rule 177 of the Border Security Forces Rules, 1969. It was further held that this was an independent power conferred upon the Commandant apart from the power conferred upon the Security Force Court under section 28 for imposition of the punishment for dismissal from service in respect of offences specified in section 19 of the Act.

In the appellant's appeal to this Court, it was contended that unless and until the offence of absence without leave or overstaying leave granted to a member of the service, without sufficient cause is tried by the Security Force Court and punishment is awarded therefor as provided in sections 48 and 50 of the Act, the order of dismissal from service by the Commandant is illegal and as such it is liable to be quashed and set aside.

Dismissing the appeal, it was,

HELD: 1. The Prescribed Authority i.e. the Commandant is competent to exercise the power under section 11(2) of the BSF Act and to dismiss any person under his command as prescribed under Rule 177 of the BSF Rules. [281E-F]

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2. The Border Security Force Act, 1968 has been enacted with a view to provide for the constitution and regulation of an armed force of the Union for ensuring the security of the borders of India and for matters connected therewith. The services of the enrolled persons under the Act are governed by the provisions of the Act as well as the Rules framed thereunder. [276D-E]

3. All the offences mentioned under sections 14 and 19 of the Act are to be tried by the Security Force Court, which will punish the offenders with sentences as provided in the Act. A procedure has been provided by the BSF Rules for trial of the offences by the Security Force Court and for awarding of punishment. [279E; 280B]

4. The power under Section 11(2) empowering the Commandant who is the Prescribed Authority to dismiss or remove from service any person under his command other than an officer or a subordinate officer read with rule 177 of the Rules is an independent power which can be validly exercised by the Commandant as a Prescribed Officer, and it has noth-

ing to do with the power of the Security Force Court for dealing with the offences, such as absence from duty without leave or overstaying leave granted to a member of the Force without sufficient cause and to award punishment for the same. [281B-D]

5. Rule 6 of the Rules has specifically provided that in regard to matters not specifically provided in the Rules it shall be lawful for the Competent Authority to do such thing or take such action as may be just and proper in the circumstances of the case. [281F]

In the instant case, though any procedure has not been prescribed by the Rules, still the Commandant duly gave an opportunity to the appellant to submit his explanation against the proposed punishment for dismissal from service for his absence from duty without any leave and overstaying leave without sufficient cause. The appellant did not avail of this opportunity and he did not file any show cause to the said notice. Thus the principle of natural justice was not violated as has been rightly held by the High Court. [281G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2106 of 1989.

From the Judgment and Order dated 15.7.1987 of the Gauhati High Court in Second Appeal No. 22 of 1981.

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N.D. Garg and Rajeev Garg for the Appellant.

Anil Dev Singh, Ms. Indu Goswami, P. Parmeshwaran and Ms. Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

RAY, J. Special leave granted. Heard arguments of both the parties.

This appeal on special leave is against the judgment and decree passed by the Gauhati High Court on July 15, 1987 in Second Appeal No. 22 of 1981 reversing the judgment and decree dated July 24, 1981 made by the Additional District Judge, West Tripura District, Agartala setting aside the judgment and decree passed by the Munsiff, Sadar, Tripura in Title Suit No. 33 of 1973 dismissing the Suit without costs.

The plaintiff-appellant was enrolled as a Constable No. 66922 189 under 92 Bn, BSF in Tripura and he was serving as such since 1966. He alleged to have been confirmed in the said post while so posted to B.O.P. at Ajar Rahamanpur being a member of the 6th platoon under B. Company Commander Radhanagar. In 1971, he was granted leave from 25.10.71 to 30.10.1971 on account of the death of his father. As the Sradh ceremony could not be performed within the aforesaid time and he was suffering from serious illness he made an application requesting for extension of leave supported by a medical certificate. On December 12, 1971 the appellant received a communication from the Commandant stating that as he was absent without leave from 31.10.1971 so he (the Commandant) was of the opinion that because of this absence without leave for a long period his further retention in service was undesirable. He proposed to dismiss him from service. The appellant was asked to submit his explanation against the imposition of this penalty before December 25, 1971. The appellant sent a telegram on December 21, 1971 but without any redress. On January 5, 1972 he received an order from the Commandant, 92 Bn. BSF informing him that he had been dismissed from service. On January 10, 1972 the appellant again prayed for permitting him to join his service but

he was not allowed to do so. The appellant preferred an appeal to the Inspector General, BSF (Police), Government of Tripura on February 1, 1972 which was received by him on February 3, 1972. No relief was granted to him.

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The appellant as plaintiff after serving a notice under Section 80 of the Code of Civil Procedure and as no redress was given to him, filed Title Suit No. 33 of 1973 in the Court of Munsiff, Sadar, Tripura for a declaration that the order of dismissal from service was illegal and he was still in service.

The defendants-respondents contested the Suit and pleaded that the plaintiff was absent from duty from 31.10.1971 without any leave at a critical time when India was at war with Pakistan. The Commandant, 92 Battalion, BSF by notice dated December 15, 1971 intimated him that his retention in service was undesirable because of his absence for a long period and as such it was proposed to dismiss him from service. He was given opportunity to urge anything in his defence but he did not avail of it by sending any reply. He was therefore, dismissed from service by the Commandant by order dated January 5, 1972 in accordance with the provisions of Border Security Force Act, 1968 and the Rules framed thereunder.

The Munsiff held that the plaintiff was given reasonable opportunity before the Commandant dismissed him from service. The suit was, therefore, dismissed.

Against the said judgment and decree the plaintiff filed an appeal which was registered as Title Appeal No. 7 of 1979 in the Court of Additional District Judge, West Tripura District Agartala. The said appeal was allowed and the suit was decreed. It was held that the impugned order of dismissal from service was illegal and bad as the same was not made by Security Force Court and no such Court was constituted. The order passed by Commandant under Section 11(2) of the Act read with Rule 177 of the Rules of 1969 cannot be upheld. It was also held that the impugned order was bad as it was contrary to the constitutional mandate embodied in Article 311 of the Constitution of India as no opportunity of hearing was given and the procedural safeguards as contained in Chapters VII to XI of the Rules were not followed for arriving at a decision of guilt against the appellant by Security Force Court.

Feeling aggrieved by the said judgment and decree the respondents preferred a second appeal being S.A. No. 22 of 1981 in the Gauhati High Court. On July 15, 1987 the High Court decreed the said appeal on reversing the judgment and decree of the lower appellate court and dismissing the suit holding inter alia that the order of dismissal from service-in-question had been made in accordance with the

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powers conferred on the Commandant, B.S.F. under the provisions of Section 11(2) and (4) of Border Security Force Act, 1968 read with Rule 177 of Border Security Force Rules, 1969. It was also held that this was an independent power conferred upon the Commandant apart from the power conferred upon the Security Force Court under Section 48 of the said Act for imposition of punishment of dismissal from service in respect of the offences specified in Section 19 of the said Act.

The plaintiff-appellant filed the instant appeal on special leave against the said judgment and decree passed by the High Court in the said Second Appeal.

The only challenge to the judgment in appeal is that the order of dismissal dated January 5, 1972 passed by the

Commandant is illegal and unwarranted in as much as there was no order made by the Security Force Court for passing the impugned order of dismissal for an offence made under Section 19 of the Border Security Force Act, 1968 following the procedure contained in chapters VII to XI of the Rules framed under Section 141 of the Border Security Force Act. The Border Security Force Act has been enacted with a view to provide for the constitution and regulation of an armed force of the Union for ensuring the security of the borders of India and for matters connected therewith, by the Parliament and the same has been enforced by Notification No. S.O. 732 dated the 20th February, 1969.

Section 4 of Border Security Force Act to be referred to hereinafter in short as BSF Act provides that:

"There shall be an armed force of the Union called the Border Security Force for ensuring the security of the borders of India."

Sub-Section (2) further provides that:

"Subject to the provisions of this Act, the Force shall be constituted in such manner as may be prescribed and the conditions of service of the members of the Force shall be such as may be prescribed."

Section 10 says that:

"Subject to the provisions of this Act and the rules, the

Central Government may dismiss or remove from the service any person subject to this Act."

Section 11 which is very relevant for the decision of the instant case is quoted hereinbelow:

"(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 subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and the rules."

Chapter III specifies the offences under the BSF Act. Section 19 of the said Chapter states that:

"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

.....
..... etc. etc.

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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."

All the offences incorporated in Chapter III are convictable by the Security Force Court.

Chapter IV which starts from Section 48 provides for punishment to be awarded by the Security Force Courts in respect of the offences specified therein as under:

"(a) death;

(b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody;

(c) dismissal from the service;

.....
..... etc. etc."

Section 50 further provides that:

"A sentence of a Security Force Court may award in addition to, or without any one other punishment, the punishment specified in clause (c) of sub-section (1) of Section 48, and any one or more of the punishments specified in clauses (e) to (1) (both inclusive of that sub-section.)"

Chapter VII deals with the procedure of Security Force Courts.

Chapter IX prescribes the procedure to be followed by Security Force Courts for that of offences.

The Central Government has framed Rules in exercise of powers conferred by sub-section (1) and (2) of Section 141 of the BSF Act, 1968 (Act 47 of 1968). These Rules are known as BSF Rules, 1969. Rule 177 prescribes that:

"The Commandant may, under sub-section (2) of Section 11, dismiss or remove from the service any person under his

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command other than an officer or a subordinate officer."

On a consideration of the provisions of the BSF Act, it is evident that the services of the enrolled persons under the BSF Act are governed by the provisions of the Act as well as the Rules framed thereunder. It is also evident that Chapter III which starts with Section 14 of the said act specifies the various offences under the Act. Section 19 of the said Chapter refers amongst others the following offences:

"(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

..... etc. etc."

All these offences are to be tried by the Security Force Court which will punish the offenders with sentences as provided in the Act.

Section 48 specifically provides that the Security Force Court may inflict punishment in respect of the following offences committed by the person subject to the said Act according to the following scale:

"(a) death;

(b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody;

(c) dismissal from service

..... etc. etc."

Section 50 further provides that:

"A sentence of a Security Force Court may award in addition to, or without any one other punishment, the punish-

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ment specified in clause (c) of sub-section (1) of Section 48....."

A procedure has been provided by BSF Rules for trial of the offences by the Security Force Court and for awarding of punishment. The order of dismissal of the appellant from service was assailed mainly on the ground that it was not made in accordance with the provisions of the Act and the Rules framed thereunder in as much as there was no trial by the Security Force Court nor any order of punishment was awarded by the Security Force Court as required under the provisions of the Act. Section 11(2) of the Act empowers the Commandant who is the Prescribed Officer to dismiss or remove from service any person under his command other than an officer or a subordinate officer of such rank or ranks subject to the provisions of the said Act and the Rules. It has been urged that unless and until the offence of absence without leave or overstaying leave granted to a member of the Service, without sufficient cause is tried by the Security Force Court and punishment is awarded therefore as provided in Section 48 and Section 50 of the said Act, the impugned order of dismissal from service by the Commandant for absence without leave and for overstaying leave without sufficient cause, is illegal and as such it is liable to be quashed and set aside. It has been further submitted that the power of the Commandant as a Prescribed Officer under Section 11(2) being subject to sub-section 4 of Section 11 i.e. the exercise of this power is subject to the provisions of the Act and the Rules, that is the Commandant is not competent to dismiss the appellant from service unless the Security Force Court has tried the appellant and awarded punishment in accordance with the procedure prescribed by the Act and the Rules framed thereunder. The power of the Commandant to order a member of the Force other than an Officer or Subordinate Officer from service as provided under the Act read with Rule 177 of the Rules is subject to the limitation that unless the Security Force Court passes an order of conviction and sentence on the delinquent member of the Force following the procedure prescribed, such an order cannot be made and enforced. It has, therefore, been

submitted that the impugned judgment rendered by the High Court which held that the power under Section 11(2) read with Rule 177 of the said Rules was an independent power conferred on the Prescribed Authority i.e. the Commandant, is not in accordance with law and as such the same requires to be set aside.

It has, however, been urged on behalf of the State that the power conferred on the Commandant as Prescribed Authority under Section

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1(2) to dismiss any person under his command from the service read with Rule 177 of the said Rules is an independent power as held by the High Court and as such the impugned order of dismissal from service of the appellant passed by the respondent is not at all arbitrary or illegal.

We have scrutinised the relevant provisions of the BSF Act as well as the BSF Rules framed thereunder and we have no hesitation to hold that the power under Section 11(2) of the Act empowering the Prescribed Authority i.e. the Commandant to dismiss or remove from service any person under his command other than an officer or a subordinate officer read with Rule 177 of the said Rules is an independent power which can be validly exercised by the Commandant as a Prescribed Officer and it has nothing to do with the power of the Security Force Court for dealing with the offences such as absence from duty without leave or overstaying leave granted to a member of the Force without sufficient cause and to award punishment for the same. The provision of subsection 4 of Section 11 which enjoins that the exercise of the power under the aforesaid Section shall be subject to the provisions of the Act and the Rules does not signify that the power to dismiss a person from service by the Commandant for his absence from duty without leave without any reasonable cause or for overstaying leave without sufficient cause and holding him as undesirable cannot be exercised unless the Security Force Court has awarded punishment to that person in accordance with the procedure prescribed by law. The Prescribed Authority i.e. the Commandant is competent to exercise the power under Section 11(2) of the said Act and to dismiss any person under his command as prescribed under Rule 177 of the BSF Rules. It is also to be noticed in this connection that Rule 6 of the said Rules has specifically provided that in regard to matters not specifically provided in the Rules it shall be lawful for the Competent Authority to do such thing or take such action as may be just and proper in the circumstances of the case. In this case though any procedure has not been prescribed by the Rules still the Commandant duly gave an opportunity to the appellant to submit his explanation against the proposed punishment for dismissal from service for his absence from duty without any leave and overstaying leave without sufficient cause. The appellant did not avail of this opportunity and he did not file any show cause to the said notice. Thus the principle of natural justice was not violated as has been rightly held by the High Court. No other point has been urged before us by the learned counsel appearing on behalf of the appellant.

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In the premises aforesaid, we do not find any merit in this appeal which is accordingly dismissed without costs. The judgment and decree of the High Court in S.A. No. 22 of 1981 is confirmed.

N.V.K.
missed.

Appeal dis-

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JUDIS