HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

SWP No. 2256/2003

Hem Raj .....Petitioner(s)/Appellant(s)

Through: Mrs. Surinder Kour, Sr. Advocate with
Ms. Manpreet Kour, Advocate.

Vs

Union of India and others .....Respondent(s)

Through: Mr. Vishal Sharma, DSGI with
Mr. Eishaan Dadhichi, CGSC.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
04.05.2023

(ORAL)

01. Through the medium of instant petition filed under Article 226 of the Constitution of India, the petitioner has sought the following reliefs:-

> *"(i) to quash Order No., Estt/161Bn/Dis/HK/99/1/3362-561 dated 23.10.1999 issued by the Commandant 161 Bn BSF by which the petitioner has been dismissed from service and treated the period from 3.3.1999 to 23.10.1999 as 'Dies Non' and also to quash the departmental proceedings (if any done) against the petitioner by issuance of writ of Certiorari; and*
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> *(ii) to issue direction to the respondents to consider the case of the petitioner for re-instatement and to allow the petitioner to join and perform his duties on the post of Constable on which the petitioner was working prior to his dismissal from service and to release the salary and to give all other consequential benefits to the petitioner for which the petitioner is entitled and also to treat the*

period from the date of dismissal to the date the petitioner re-joins the duty as 'on duty' by issuance of writ of mandamus; and

(iii) to issue direction to the respondents restraining them to implement the Order No. Estt/161Bn/Dis/HK/99/1/3362-561 dated 23.10.1999 and restraining the respondents to fill up the post of petitioner by making appointment or adjustment and also restraining the respondents to treat the period w.e.f. 3.3.1999 to the date the petitioner rejoins the duty as 'break in service' by issuance of writ of prohibition; and

(iv) to issue direction to the respondents to produce all the record of departmental proceedings (if any done) before this Hon'ble Court by issuance of writ of mandamus;

(v) to declare the Order No. Estt/161Bn/Dis/HK/99/1/3362-561 dated 23.10.1999 and departmental proceedings (if any done) against the petitioner, as unconstitutional ultra-vires and contrary to the provisions of BSF Act and Rules by issuance of writ of mandamus."

02. The reliefs aforesaid are being sought on the premise that the petitioner while working in the Border Security Force (for short 'BSF') after having been appointed on 01.08.1999 as Constable had applied and was granted leave for one month w.e.f. 06.02.1999 to 03.03.1999 by the respondents on account of the ailment of his parents. The petitioner states to have overstayed the said leave him owing to the death of his mother on 11.02.1999 followed by the death of his father on 11.03.1999. The petitioner thereafter states to have approached the

respondents to allow him to resume his duties which the respondents declined, compelling the petitioner to file SWP No. 2826/2002 before this Court praying therein that the respondents be directed to allow him to resume his duties as also be restrained from terminating his services. The said writ petition is stated to have been responded by the respondents by filing objections indicating therein that the service of the petitioner stands terminated in terms of order dated 23.10.1999 i.e. the order impugned in the instant petition while treating the period w.e.f 03.03.1999 to 23.10.1999 as 'Dies Non'. Upon coming to know about the said termination order, the petitioner states to have instituted the instant petition.

03. The instant petition is being maintained *inter alia* on the grounds that impugned order is against law and rules and that the petitioner was never served with any show cause notice or the order of termination and that the impugned order is against the provisions of the BSF Act and Rules as the respondents did not conduct any enquiry in the matter under the said Act and Rules and did not follow the provisions of the said Act and the Rules.

04. **Reply/counter** to the petition has been filed by the respondents wherein it is being admitted that the petitioner was sanctioned 15 days casual leave on 06.02.1999 while the petitioner was posted at Tripura and that he failed to resume his duties on 03.03.1999 resulting into addressing of a letter dated 06.03.1999 at his home address calling upon him to resume his duties forthwith or else

disciplinary action would be initiated against him. The said letter is stated to have been responded by the petitioner on 13.03.1999 stating therein that his wife was suffering for long illness. The letter dated 06.03.1999 is stated to have been followed by letter dated 15.03.1999 address to the petitioner by the respondents in response to which a letter dated 22.03.1999 is stated to have been addressed by the petitioner to the respondents seeking the extension of his leave whereafter the petitioner is stated to have been called upon by the respondents to submit medical documents for disposal of his over staying leave case in terms of letter dated 14.04.1999. On 14.05.1999, the respondents is stated to have sent a registered letter to the petitioner with a direction to resume his duties stipulating therein that in the event of his failure to join his duties, disciplinary action would be taken against him as per the BSF Act and Rules. On 11.06.1999, a letter without any supporting documents is stated to have been received from the petitioner by the respondents wherein it had been stated that he is seriously taken ill and is admitted in Govt. S.M.G.S. Hospital, Jammu. A registered letter again is stated to have been addressed to the petitioner on 11.06.1999 by the respondents at his home address requiring the petitioner to join duties and the petitioner, however, is stated to have neither resumed his duties nor submitted any reply to the letter dated 11.06.1999.

05. A court of inquiry is stated to have been constituted by the respondents vide order dated 11.06.1999 for enquiring into the over staying leave case of the petitioner which court of inquiry is stated to

have been held on 05.09.1999, and after examining four witnesses, the court of inquiry is stated to have returned findings that the petitioner failed to give any reasonable cause of his over stay of leave and consequently the said court of enquiry opined that severe disciplinary action is required to be taken against the petitioner and also that the period of over stay of leave be treated as 'Dies Non'.

After that the respondents state to have issued a show cause notice to the petitioner herein in terms of Section 62 of the Act requiring the petitioner to respond to the proposed punishment of dismissal from services within a period of 30 days and upon failure of the petitioner to respond to the said show cause notice, the petitioner is stated to have been dismissed from service under Section 11(2) of the BSF Act read with Rule 22 and Rule 177 of the BSF Rules in terms of the impugned order claimed to have been received by the petitioner.

It is being lastly stated that the petitioner has questioned the impugned order in the petition without availing the statutory remedy provided under Rule 28-A of the BSF Rules.

Heard learned counsel for the parties and perused the record.

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

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

Rule 173 of the Rules deals with the procedure of Courts of Inquiry and provides for a mechanism to be followed in holding of an enquiry into a matter.

Sub-rule (8) of Rule 173 provides that before a Court of Inquiry gives an opinion against any person subject to the Act, the Court of Inquiry has to afford that person an opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

Rule 22 of the Rules deals with dismissal and removal of the persons other than officers on account of misconduct providing that when it is proposed to terminate the services of a person subject to the Act other than an officer, such person has to 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.

Sub-rule (2) contemplates that 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, however, is of the opinion that the further retention of such person in the service is undesirable, the competent authority has to inform the said person together with all reports adverse to him requiring him to submit in writing, his explanation and defence.

It is significant to note here that Sub-rule (2) while making a reference to the trial of such a person essentially refers to the provisions of Section 19 of the Act which provides that a person who absents himself or overstays leave granted to him without sufficient cause would be deemed to have committed an offence to be tried for by a Security Force Court.

08. Keeping in mind the aforesaid provisions of the Act and the Rules *supra* and reverting back to the case in hand, it is not in dispute that the petitioner overstayed the leave granted to him by the respondents. It is also not being denied by the respondents that the petitioner sought extension of his leave.

09. Perusal of the record indisputably would suggest that the respondents have proceeded against the petitioner owing to his overstaying of leave and while on one hand proceeded against the petitioner by constituting a Court of Inquiry envisaged under Section

62 of the Act and followed the procedure as contained in Rule 173 supra, yet have fallen back upon Rule 22 of the Rules. As to whether the said Court of Inquiry could have been initiated and conducted by the respondents against the petitioner in his absence in *ex-parte* or not need not to be gone into owing to the fact that upon conclusion of such an enquiry, the respondents were bound to provide an opportunity to the petitioner before giving any opinion against him in such an inquiry to know all that has been stated against him, cross-examining the witnesses who have had given evidence against him as also providing him a chance to make a statement and call witnesses in his defence as provided under sub-Rule (8) of Rule 173 supra. So much so, even if it is assumed that the respondents could proceed against the petitioner under Rule 22 supra while opining that it is inexpedient or impracticable to subject the petitioner to the trial for having overstayed leave, yet in terms of sub-Rule (2) of the Rules 22 supra, the respondents were mandatorily required to inform the petitioner together with all reports adverse to him besides providing an opportunity to him to submit in writing his explanation and defence.

10. Perusal of the record of the petition as also the enquiry record related to the case of the petitioner produced by the respondents *per se* would reveal that the respondents before terminating the services of the petitioner issued only the show cause notice of proposed punishment to the petitioner served upon him on 14.09.1999 which show cause notice on a deeper examination would demonstrate that the respondents have neither followed the provisions of sub-rule (8) of the Rule 173 supra

nor sub-rule (2) of Rule 22 supra Rules before proceeding to dismiss the petitioner from services.

11. The respondents admittedly have observed the aforesaid statutory provisions as contained in sub-rule (2) of the Rule 22 and with sub-rule (8) of the Rule 173 supra in breach and in the process violated the principles of natural justice.

12. Doctrine of principles **of natural justice-Audi Alteram Partem** and its application in judicial, quasi judicial and administrative system is not new. It no doubt is a procedural requirement, but it ensures a strong safeguard against any juridical or administrative order or action adversely affecting the substantive rights of an individual.

The first principle of natural justice is that there should be no bias and the rule against the bias is expressed in maxim that **"no one must be judge in his own cause."**

The second broad principle of natural justice is that **"no party should be condemned unheard."** This right to be heard precisely would mean that the party must know the case he has to meet. The party must have reasonable opportunity to present his case. The requirement of a show cause notice flows directly from the above second principle.

A reference in regard to above herein to the judgment of the Apex Court in case titled as ***"Dharampal Satyampal Limited Vs. Deputy Commissioner of Central" reported in 2015 (8) SCC 519,***

would be advantageous and appropriate, wherein at paras 21, 24 and 28 following has been laid down:-

> *"21. In common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as "natural justice". The principles of natural justice developed over a period of time and which is still in vogue and valid even today are: (i) rule against bias i.e. nemo debet esse judex in propria sua causa; and (ii) opportunity of being heard to the party concerned i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a "reasoned order".*
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> *"24. The principles have a sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide a*

great humanizing factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take an administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision-making that a decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong."

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

mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not."

13. For what has been observed, considered and analyzed hereinabove, the petition succeeds the impugned Order No. Estt/161Bn/Dis/HK/99/1/3362-561 dated 23.10.1999 is quashed as corollary of which, the respondents are commanded to take the petitioner back in service with liberty to conduct an enquiry in accordance with law against the petitioner qua the overstaying of the leave if they choose so within a period of six weeks from today.

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

(JAVED IQBAL WANI)
JUDGE

Jammu
04.05.2023
Bunty

Whether the order is speaking: Yes

Whether the order is reportable: Yes