Supreme Court of India
Union Of India And Others vs Ram Phal on 28 February, 1996
Equivalent citations: 1996 AIR 1500, 1996 SCC (7) 546
Author: N G.T.
Bench: Nanavati G.T. (J)

PETITIONER:
UNION OF INDIA AND OTHERS

Vs.

RESPONDENT:
RAM PHAL

DATE OF JUDGMENT: 28/02/1996

BENCH:
NANAVATI G.T. (J)
BENCH:
NANAVATI G.T. (J)
AGRAWAL, S.C. (J)

CITATION:
1996 AIR 1500 1996 SCC (7) 546
JT 1996 (3) 276 1996 SCALE (2)503

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T NANAVATI. J.

The respondent, a constable in the BSF, filed a suit for declaration that the order of his dismissal from service was illegal and void and for a mandatory injunction directing the appellants to take him back in service. The suit was partly decreed. The declaration as prayed for was granted but mandatory injunction was refused. Both the parties filed appeals against the said judgment. The appeal filed by the respondent was allowed and that of the appellant was dismissed. The appellant then filed a second appeal in the Delhi High Court but that was also dismissed. The appellant has therefore filed this appeal after obtaining special leave.

The relevant facts are that the respondent was enlisted as a constable in the BSF. On 21.12.83 he was found absent in the Coy Roll Call. He was also not found in the lines. He remained absent thereafter also. So on 21.1.1984, a notice was given to him to report for duty forthwith but he did not turn up.

One more notice was given to him but there was no response from him. Thereafter, an enquiry was ordered under Section 62 of the BSF Act. Ultimately he was deemed to be a deserter. On 20.4.1984 because of his continuous absence, a show cause notice was given calling upon him to show cause why he should not be dismissed as his further retention in service was considered undesirable. The respondent did not reply to the said notice. Therefore, on 5.5.1984 Commandant Vikram Singh passed an order dismissing him from service. An appeal was filed against that order but that was rejected.

On 6.11.1986 he filed a suit challenging the said order of dismissal. His case was that on 18.12.1983, sometime before mid-night, while he was proceeding to perform Sentry duty he was given 'pan' by his colleague. After eating it, he felt giddy and became semi-conscious. He was taken to the Sub-Inspector who thought that he had consumed liquor. He was man handled by that S.I. and thrown out of the barrack. Some unknown persons took him to his native place. He thereafter suffered from mental illness and could not resume his duty nor could he reply to the notice dated 20.4.1984. He recovered after a year and then he came to know that an order dismissing him was already passed. The order of dismissal was challenged on the ground that it was not within the competence of the Commandant to pass such an order and that the penalty of dismissal could not have been imposed without holding an enquiry in the manner prescribed by the Act and the Rules. The appellant defended the action on the ground that after the respondent was deemed to be a deserter his service came to be terminated in exercise of the power available under Section 11 of the Act and that according to Rule 177 of the BSF Rules the commandant is a competent officer for taking action under Section 11 (2).

The learned trial Judge held that after a person is deemed to be a deserter he has to be tried by a Security Force Court under Section 19 of the Act after he surrenders and is arrested and only thereafter penalty can be imposed upon him. The learned Judge also held that the impugned action cannot be supported under Section 11(2) of the Act as the power under that section can be exercised by the Director General or the prescribed officer and there was nothing on record to show that Commandant Vikram Singh was competent to pass the impugned order. The learned Judge also held that power under Section 11 could be exercised only after holding an enquiry in accordance with the principles of natural justice. According to the learned Judge, as neither any court was constituted as required for awarding punishment for the offence alleged to have been committed by the respondent nor any chargesheet was issued as required by the prescribed procedure, the order of dismissal has to be regarded as illegal. The learned Judge did not grant the mandatory injunction as he was of the opinion that the respondent had to first surrender and then it was open to the authorities to take action against him. The learned Additional District Judge dismissed the appeal filed by the appellant not only agreeing with the findings recorded by the lower court but also on the ground that the order of dismissal itself discloses that the period of absence of the respondent was treated as extra ordinary leave and that amounted to regularizing his absence and, therefore, no order of dismissal could have been lawfully passed on the ground of continuous absence. The High Court summarily dismissed the second appeal as it was of the view that no substantial question of law was involved and on the facts there were concurrent findings of both the courts. As stated earlier the High Court summarily dismissed the appeal filed by the appellant.

Mr. Tulsi, learned Additional Solicitor General, contended that the courts below have failed to appreciate that the order of dismissal was passed not by way of penalty for any offence committed by the respondent but in exercise of the power available to the authorities under Section 11(2) of the Act. Under that provision any officer not below the rank of Deputy Director-General or any prescribed officer has the power to dismiss or remove from service any person under his command other than an officer or a subordinate officer of such rank or ranks as prescribed by the Rules. He then submitted that this power is separate and independent of the power to punish for an offence. He also drew our attention to Rule 177 of the Rules under which the Commandant is authorised to take action under Section 11(2) of the Act against any person under his command other than an officer or a subordinate officer and submitted that the respondent was not an officer or subordinate officer and, therefore, Commandant was competent to pass the impugned order of dismissal. He further submitted that before exercising that power no enquiry was required to be held and as the respondent was given a show cause notice the principles of natural justice were also satisfied. On the other hand the learned counsel for the respondent contended that as no inquiry was held before passing the dismissal order, it was rightly held by the courts below as illegal.

In Gouranga Chakraborty Vs. State of Tripura and Another [1989 (3) SCC 314], this Court has held 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 and 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. Though in the order of dismissal it was not stated under which provision of law it was passed, the appellant had disclosed in the written statement that it was passed under Section 11(2) of the Act. Therefore, the view taken by the courts below that the order of dismissal could not have been passed without first holding an enquiry by the Security Force Court and that the Commandant had no authority to pass such an order under Section 11(2) of the Act is clearly erroneous.

We are, however, not able to agree with the contention raised by the learned Additional Solicitor General that for exercising power under Section 11(2) of the Act no enquiry is required to be held and considering the nature of the Force and the utmost necessity of maintaining discipline giving a show cause notice should be regarded as sufficient compliance with the principles of natural justice. Section 11 is silent in this behalf and it appears that earlier there was no Rule indicating the circumstances and the manner in which that power was to be exercised. But now we find that the Rules contain such a provision. Rule 20 provides for termination of service for misconduct. The relevant part of the rule reads as under :

> "(1) Where in the opinion of the Director General a person subject to the Act has conducted himself in such manner whether or not such conduct amounts to an offence, as would render his retention in service undesirable and his trial by Security Force Court inexpedient, the Director-General may inform the person concerned

accordingly.

(2) The Director General shall further inform the person concerned that it is proposed to terminate his services either by way of dismissal or removal. (S.11) (3) The Director General shall furnish the particulars of allegations and the report of investigation (including the statement of witnesses, if any, recorded and copies of documents, if any intended to be used against him) in cases where allegations have been investigated:

Provided that where the allegations have not been investigated, the Director-General shall furnish to the person concerned the names of witnesses with a brief summary of the evidence and copies of documents, if any, in support of the allegations.

(4) ..... (5) ..... (6) The person concerned shall within seven days from the receipt of information furnished to him under subrule (3) inform, in writing, the Director-General :

(a) his acceptance or denial of the allegations;

(b) any material or evidence he wishes to be considered in his defence;

(c) names of witnesses whom he wishes to cross examine; and

(d) names of witnesses whom he wishes to examine in his defence. (7) Where the person concerned has expressed a wish to cross-examine any witness or to produce witnesses in defence, the Director General shall appoint an enquiry officer who shall be an officer superior to the person against whom it is proposed to take action and had not taken any part previously in the investigation into the matter."

Rule 21 provides for appointment of an enquiry officer and the procedure to be followed by him. Rule 22 provides for imposition of penalty. Sub Section 4 of Section 11 makes the exercise of any power under that section subject to the provision of the Act and also the Rules. Therefore, after introduction of Rule 20 in the Rules it cannot be validly contended that no enquiry need be held while exercising the power under Section 11(2). We will now examine if the prescribed procedure was followed in this case. The show cause notice clearly appears to have been issued in terms of subrule 1 of Rule 20. It reads as under :

"You have been absent without leave with effect from 21st Dec.,83. I am of the opinion that because of this absence without leave for such a long period. Your further retention in service is undesirable. I, therefore, tentatively propose to terminate your service by way of dismissal. If you have anything to urge in your defence or against the proposed action, you may do so before 4.5.84. In case no reply is received by that date, it will be inferred that you have no defence to put forward."

The first sentence in the notice that you have been absent without leave with effect from 21st Dec.,83" satisfied the requirement of sub-rule (3). When it further stated that "I am of the opinion that because of this absence without leave for such a long period, your further retention in service is undesirable it complied with the requirement of sub-rule (1) and as required by sub-rule (2) it was further stated therein that "I therefore, tentatively propose to terminate your service by way of dismissal". The respondent was called upon to show cause within seven days as required by subrule 6. No further inquiry was held; but we find that nothing further was required to be done in this case. The respondent did not reply to the notice. There was no denial of the allegations and no request to hold an enquiry. Therefore, it was not incumbent upon the Director General to appoint an enquiry officer to conduct an enquiry in the manner prescribed by Rule 21. Thus the prescribed procedure was followed before passing the dismissal order. The courts below have failed to appreciate the correct position of law and the facts. It was therefore wrongly held that the order of dismissal was illegal as it was not in accordance with the provisions of the Act and the Rules.

It was, however, contended by the learned counsel for the respondent, relying upon the decision of the High Court of Punjab in State of Punjab Vs. Channan Singh [1988 (3) All India Services Law Journal 216] that once the absence from duty without leave is condoned or regularized by treating it as extraordinary leave no order of removal of dismissal can thereafter be passed on the ground of absence from duty without leave. The learned counsel drew our attention to the second paragraph of the dismissal order wherein it is stated that "the absence period from 21 Dec. 83 to 05 May 84 (FN) is hereby treated as EOL". He submitted that as the period of respondent's absence from 21st December, 1983 to 5th May, 1984 was treated as extra ordinary leave, it could not have been, without being inconsistent, treated as absence without leave for the purpose of passing the order of dismissal. In Channan Singh's case (supra), the high Court of Punjab referred to the decisions in Tito Francisco Pereira Vs. Administrator of Goa Daman and Diu and others 1978 SJL 614, G. Papaiah Vs. Assistant Director, Medical Services, Secunderabad AIR 1976 AP 75 and Bhursinh Hamsinh Rajput Vs. The State of Gujarat and another 1982 (1) SLJ 697 and observed that the consensus of the decisions is that once the period of absence is treated as leave of any kind whatsoever, the fact that the person remained absent no more survives and the charge of absence from duty cannot be sustained after the person has been treated on leave of whatsoever kind it may be. In all those cases a departmental action was initiated for imposition of penalty upon the delinquent employee for the misconduct of remaining absent without leave and on completion of enquiry, while Passing an order of penalty, it was further ordered that the absence should be treated as leave of some kind. As absence was treated as leave of whatever kind, it ceased to be a misconduct and, therefore, it could not thereafter have survived as a basis for imposing penalty. For that reason it was held in those cases that as the very basis for the charge was knocked out no order of dismissal could have been passed thereafter. In the present case the order of dismissal was not passed by way of penalty for the misconduct of absence from duty without leave. Though such absence was the cause and, therefore it has been referred to in the show cause notice and the order of dismissal, the respondent's service came to be terminated on the ground that his conduct had rendered his retention in service undesirable. The order of respondent's dismissal was passed not because the misconduct of absence without leave was proved but because his further continuance in service was considered undesirable. The order was passed not by way of penalty but in exercise of an independent and separate power conferred by Section 11. Obviously, after holding that further

retention of the respondent in the service was undesirable, while passing the order of dismissal it was necessary to pass some order as to how the period of absence from 21.12.83 to 5.5.84 was treated for the purposes of finalizing the dues and other benefits payable to the respondent. While ordering that period to be treated as extraordinary leave the Commandant did not knock out the basis of the order of dismissal passed by him as the basis of the order was that by remaining absent without leave for a long period the respondent had so conducted himself that his further retention in service had become undesirable. We do not think that by treating the period of absence as extraordinary leave the Commandant had made his order of dismissal inconsistent. Therefore, without deciding the contention of the learned Additional Solicitor General that the said decisions do not lay down correct law, we hold that the ratio laid down in those cases cannot apply to a case of this type.

We, therefore, allow this appeal, set aside the judgment and order passed by the Delhi High Court in Regular Second Appeal No.1 of 1991 and dismiss the suit filed by the respondent. In the facts and circumstances of the case, there shall be no order as to costs.