



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 1251 of 2018

Date of Decision: 06.10.2025

Mahender SinghPetitioner
Versus
Union of India & others ... Respondents

Coram:
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? ¹ Yes.
For the Petitioner: Mr. Vipinder Roach, Advocate.
For the Respondents: Mr. V.B.Verma, Central Government Counsel.

Sandeep Sharma, Judge(oral):

Petitioner herein is aggrieved of order dated 07.11.2016 (Annexure P-16), whereby representation having been filed by the petitioner in terms of order/judgment dated 28.04.2016 passed by this Court in CWP No. 177 of 2009, titled **Mahender Singh vs. Union of India and others**, came to be rejected.

2. Precisely, the facts of the case, as emerge from the pleadings adduced on record by the respective parties, are that on 10.12.1988, petitioner joined the Indo-Tibetan Border Police Force (ITBP) as Constable General Duty. On 13.12.2005, petitioner, while on active duty, met with an accident, while travelling from Barsar to Head Office at Ludhiana, as a result of which, he remained admitted

¹Whether the reporters of the local papers may be allowed to see the judgment?

in the Hospital at Ludhiana for treatment of Neuro problem. Besides above, petitioner was also diagnosed as a patient of Tuberculosis, for which he was subsequently treated in the Army Hospital, Dehradun. On 13.01.2006, petitioner proceeded on 30 days' sanctioned leave w.e.f. 13.01.2006 to 10.02.2006. Vide communication dated 10.02.2006 (Annexure P-2), petitioner applied for extension of leave beyond 30 days, but such prayer of him was not considered. Since petitioner failed to join duty within the stipulated time, respondents issued office memorandums, thereby cautioning the petitioner to join his duty at the first opportunity, but despite his having received office memorandums, as have been placed on record as Annexures P-4 & P-5, petitioner failed to join duty. Consequently, the respondents issued show cause notice dated 20.05.2006 to the petitioner (Annexure P-7), thereby informing that on account of continuous absence from the service, he had been declared as "deserter" from service w.e.f. 15.02.2006, however, one more opportunity is afforded to him to report back on duty at 13th ITBP Police Force, P.O. Barsar, West Siyang (Arunachal Pradesh) within 15 days of publication of the notice in the daily newspaper, failing which, he would be dismissed from the service under the provisions of ITBP Rules and Act. Since despite issuance of aforesaid show cause notice, petitioner failed to resume duty, respondents vide office memorandum dated 12.06.2006

(Annexure P-8) again called upon him to report for duty within a period of 15 days from the date of receipt of notice, but fact remains that petitioner failed to join, as a result whereof, the disciplinary authority vide order dated 10.07.2006 (Annexure P-9), dismissed the petitioner from the service.

3. After passing of order dated 21.06.2006, petitioner, vide communication dated 12.07.2006 (Annexure P-10), apprised the authorities that on account of his ill-health, he was unable to report before the authority and, vide aforesaid communication, he requested the authorities to constitute a Medical Board for his examination. However, such request of him was rejected vide communication dated 02.08.2006 (Annexure P-11) on the ground that petitioner is no longer employee of ITBP, as he stands dismissed from the service and as such, there was no occasion, if any, to constitute Medical Board.

4. Petitioner, being aggrieved and dissatisfied with the order of dismissal, preferred an appeal under Section 168/169 Chapter XIII of the ITBP Rules, 1994 before the Director General, I.T.B.P. (Annexure P-13), but same was dismissed vide order dated 18.11.2008 (Annexure P-14). In the aforesaid background, petitioner approached this Court by way of CWP No. 177 of 2009, titled **Mahender Singh vs. Union of India and others**, whereby this Court, while setting aside the order dated 18.11.2008 passed by Appellate

Authority, directed the said authority to decide the case afresh within a period of three months from the date of receipt of copy of the decision made available by the authorities to the petitioner. Pursuant to the aforesaid direction issued by this Court, Appellate Authority passed order dated 07.11.2016, thereby again rejecting the case of the petitioner. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for following main reliefs:-

- “(i) That writ in the nature of certiorari may very kindly be issued, whereby quashing and setting aside the impugned order dated 07.11.2016, Annexure P-16, issued by the respondent No.4, being illegal and arbitrary and against the rules and facts of the case;
- (ii) That writ in the nature of mandamus may kindly be issued directing the respondents to re-instate the petitioner in active service of the ITBP Force with all consequential benefits as well as emoluments including salary and other increments due and permissible under law, keeping in view that the petitioner has served the Force for a period of 18 years with unblemished record of service since there was no requirement for the petitioner to desert the Forces, when he has an alternative remedy to seek voluntarily retirement on medical grounds since he was entitled for the same after putting in 18 years of service of unblemished record.”

5. Precisely, the grouse of the petitioner as has been highlighted in the petition and further canvassed by Mr. Vipinder Roach, learned counsel for the petitioner, is that though petitioner as

well as his family members repeatedly apprised the authorities with regard to the illness suffered by the petitioner during his leave as well as his admission in the hospital, but yet his leave was not extended. While making this Court peruse show cause notice dated 20.05.2006, learned counsel representing the petitioner argued that show cause notice was a mere formalities, because a bare perusal of the same suggests that before issuance of show cause notice, petitioner had already been declared deserter. He submitted that though by way of aforesaid show cause notice, petitioner was directed to rejoin the services, but since he stood declared deserter from the service w.e.f.15.02.2006, there was otherwise no occasion for him to rejoin the duties. While referring to Annexure R-2 annexed with the reply filed by the respondents, learned counsel for the petitioner submitted that prior to expiry of his leave period i.e. 10.02.2006, petitioner had sent a communication to the concerned quarters for extension of leave, as is evident from the endorsement given on the letter head by the diary dispatch section of the ITBP, but yet respondents, without verifying the factum of illness of the petitioner, kept on issuing office memorandums, thereby calling upon the petitioner to rejoin the service immediately. Learned counsel for the petitioner further invited attention of this Court to communication placed on record by the respondent-ITBP (available at page No.89 of the paper book) to

suggest that elder brother of the petitioner had apprised the authorities that petitioner herein was admitted in the hospital and as and when he is discharged from the hospital, he would join the services, but yet respondents, without following principal of natural justice, proceeded to dismiss him from the service, that too without holding any inquiry. Lastly, learned counsel for the petitioner submitted that once it was brought to the notice of the respondents by the petitioner that he was unable to join duties on account of illness, it was incumbent upon the respondents to constitute an inquiry to verify aforesaid fact, but certainly, without constituting such inquiry, petitioner could not have been declared deserter, as a result thereof, petitioner, after having rendered service of more than 18 years, is not in receipt of any kind of pension.

6. To the contrary, Mr. V.B. Verma, learned Central Government Counsel, vehemently argued that no illegality can be said to have been committed by the respondents in ordering dismissal of the petitioner, especially when it stands duly established on record that petitioner remained on unauthorized leave for more than 30 days. He submitted that the petitioner was sanctioned leave w.e.f. 14.01.2006 to 14.02.2006, but fact remains that till passing of impugned dismissal order, petitioner, despite receipt of number of office memorandums calling upon him to rejoin duty, failed to resume

service. He submitted that once despite there being number of office memorandums and show cause notice petitioner failed to come before the authority to explain his conduct, there was no occasion for the respondents to afford opportunity of being heard to the petitioner, rather in that situation, respondents rightly in terms of provisions contained under ITBP Rules, proceeded to declare him deserter and ultimately he was dismissed from the service. Learned counsel for the respondents further argued that communication, if any, thereby intimating factum with regard to illness of the petitioner were received in the office of the respondents after his being declared deserter and as such, there was no occasion, if any, for the respondents to take note of the same. He further submitted that though respondents after declaring petitioner deserter, repeatedly advised him to join the services, but yet he failed to resume the service and as such, respondents had no option, but to dismiss him from the service.

7. Having heard learned counsel representing the parties and perused material available on record, this Court finds that before his being dismissed from the service vide order dated 10.07.2006, petitioner had rendered more than 18 years of service with the respondents and during afore period, no complaint of any kind was ever received against him. It is also admitted that petitioner at first instance was sanctioned leave w.e.f. 14.01.2006 to 14.02.2006,

meaning thereby he had to resume duty on 15.02.2006, which admittedly, he failed to do.

8. As per the reply filed by the respondents, petitioner herein, despite having received various office memorandums, failed to rejoin his duties within a period of 30 days from the date of expiry of his sanctioned leave, but careful perusal of Annexure R-2 placed on record by the respondents itself suggests that petitioner herein, while on leave, had requested extension of leave on the ground that he was unwell. Besides above, brother of the petitioner also apprised the respondents that his brother was admitted in the hospital and he would join duty as and when he is discharged from the hospital.

9. True, it is that aforesaid communication sent by the brother was after the issuance of show cause notice, but since respondents, while issuing show cause notice, had called upon the petitioner to resume his duties, respondents were very much expected to take note of the communication sent by the brother of the petitioner, wherein he specifically apprised the authority with regard to illness of the petitioner.

10. Careful perusal of the documents adduced on record by the respondents themselves (Annexure P-5) suggests that request for extension of leave made by the petitioner was duly received by the respondents, but yet they failed to extend the leave or constitute an

inquiry to verify the correctness of the claim put forth by the petitioner with regard to his illness. Respondents straightway without there being any inquiry, issued show cause notice dated 20.05.2006(Annexure P-7). Interestingly, bare reading of show cause notice clearly suggest that though show cause notice was issued to the petitioner to explain his conduct, but prior to doing so, petitioner was apprised factum with regard to his being declared “deserter” from ITBP. Once respondents had declared petitioner as deserter, where was the occasion for them to call upon petitioner to join duty within a period of 15 days from the date of publication of notice in daily newspaper. Interestingly, after issuance of aforesaid show cause notice, respondents again, vide communication dated 12.06.2006, called upon the petitioner to resume duty within a period of 15 days, but it is not understood that what was the purpose or object of sending such office memorandums, especially when prior to issuance of such office memorandums, petitioner stood declared “deserter”, as is evident from bare reading show cause notice dated 20.05.2006. As per aforesaid show cause notice, respondents, based on the opinion of Court of inquiry, had declared petitioner a “deserter” from service w.e.f. 15.02.2006.

11. There is another aspect of the matter, once respondents were in receipt of the application dated 25.03.2006 (Annexure R-2)

sent by the petitioner, thereby requesting for extension of leave, as is evident from the endorsement given on the afore communication by diary dispatch of the ITBP, respondents were expected to associate petitioner with the Court of Inquiry alleged to have been conducted by the respondents prior to issuance of show cause notice dated 20.05.2006 (Annexure P-5).

12. Petitioner herein had sent a communication, praying for extension of leave by registered letter dated 8.3.2006, which is claimed to have been received by the respondents on 25.03.2006. Once prior to issuance of show cause notice dated 20.05.2006 respondents had received the application for extension of leave and factum of illness of the petitioner had come to their notice, they were expected to constitute inquiry, if not satisfied with the explanation rendered by the petitioner with regard to his unauthorized leave. If the reply filed by the respondents is perused in its entirety, there is no dispute qua factum of illness of the petitioner. It is not disputed that during the period of overstay, petitioner remained admitted in the hospital. Otherwise also, such fact, if any, could only be rebutted by the respondents by constituting an inquiry, wherein admittedly petitioner was never associated.

13. In similar facts and circumstances, Hon'ble Apex Court in case titled **Yasodhar Kamat vs. Director General Border Security**

Force and others,(2021) 13 Supreme Court Cases 333, having taken note of the fact that appellant i.e. petitioner in that case had never been penalized in the past for unauthorized absence without leave, coupled with the fact that petitioner in that case had served the department concerned for more than 17 years prior to his dismissal, directed that, instead of and in substitution of an order of dismissal, petitioner in that case shall be treated as having discharged from the service with effect from the date on which he completes pensionable service of 20 years. However, employee concerned would not be entitled to any back wages between the date on which he was originally dismissed and date on which he completes the requirement of pensionable service.

14. In the case before Hon'ble Apex Court, appellant was enrolled as a Constable in the BSF on 02.01.1990. He applied for leave from 10.02.2007 to 01.03.2007, which was sanctioned. The cause of misconduct arose because he rejoined his duties on 4.4.2007. On 16.4.2007, he was charged with misconduct under Section 19(b) of the BSF Act, 1968. Following the convening of a Summary Security Force Court, the petitioner in that case was dismissed from the service. A statutory petition filed by the petitioner in that case was dismissed by the Director General, BSF on 13.06.2007. Though, learned Single Judge of High Court remitted the

case back for reconsideration of the quantum of punishment, but Division Bench of concerned High Court set aside the judgment of learned Single Judge and upheld the dismissal of the petitioner. Hon'ble Apex Court having taken note of the fact that appellant in that case had submitted an application for extension of leave belatedly specially apprising therein reason for his not joining well within the time, coupled with the fact that he had served more than 17 years of service prior to his order of dismissal, ordered for his reinstatement.

15. At this stage, it would be profitable to reproduce relevant paras of aforesaid judgment herein below:-

“2. The appellant was enrolled as a constable in the BSF on 2-1-1990. He had 17 years of service by the date of the incident. The appellant applied for leave from 10-2-2007 to 1-3-2007, which was sanctioned. The cause of misconduct arose because he rejoined his duties on 4-4-2007. On 16-4-2007, he was charged with a misconduct under Section 19(b) of the BSF Act, 1968. Following the convening of a Summary Security Force Court, the appellant was dismissed from service. A statutory petition filed by the appellant was dismissed by the Director General, BSF on 13-6-2007.

3. The High Court was moved under Article 226 of the Constitution. On 29-7-2013 [*Yasodhar Kamat v. Union of India*, 2013 SCC OnLine Pat 1586] , a learned Single Judge came to the conclusion that the dismissal of the appellant from service was contrary to law and accordingly the proceedings were remitted back for reconsideration of the quantum of punishment. This order [*Yasodhar Kamat v. Union of India*, 2013 SCC OnLine Pat 1586] of the learned Single Judge has been reversed [*Union*

of *India v. Yasodhar Kamat*, 2016 SCC OnLine Pat 9773] by the Division Bench in appeal.

4. From the order of the Director General, BSF on the statutory petition, it is evident that the appellant had contacted the Unit Adjutant for extension of leave on the ground that his niece had been abducted and that other pressing family circumstances necessitated an extension. This aspect has been recorded in the order dated 13-6-2007 in the following terms:

“It is on record that the petitioner while on leave had contacted the Unit Adjutant for extension of leave for searching his niece who was reportedly kidnapped. Shri V.S. Shekhawat, DC/Adjutant deposed in his statement in the ROE that the petitioner did talk to him on mobile for extension of leave and he in turn asked the petitioner to apply for extension of leave through telegram for a week or so.”

5. Moreover, the learned Single Judge, in the course of his judgment [*Yasodhar Kamat v. Union of India*, 2013 SCC OnLine Pat 1586], extracted the oral statement of the appellant which had been noticed by the appellate authority. The oral statement was to the following effect : (*Yasodhar Kamat case* [*Yasodhar Kamat v. Union of India*, 2013 SCC OnLine Pat 1586], SCC OnLine Pat para 9)

“9.... ‘4. ... I was granted 15 days’ CL w.e.f. 10-2-2007 to 1-3-2007 due to my niece kidnapping. However, I had requested to my Offg Coy Comdr to grant 30 days’ EL. But I was granted 15 days’ CL only. When I reached at my native place, I tried my best to find out my niece; later on I came to know that she is staying in Delhi. I left for Delhi on 15-2-2007. I had given information about the kidnapping of my niece to Unit Adjutant Shri V.S. Shekhawat Dy Comdt on mobile on 25-4-2007, 26-4-2007 and requested him for extension of leave. He told me that your CL will be converted into EL if you have not availed EL of this year. On 21-3-2007, I sent a letter to Bn HQ regarding extension of leave. I could recover my niece on 27-2-2007. It stayed 6 to 7 days at Delhi at the residence of my relatives with my niece. I reached at my

home on 08 Mar with my niece. After settled down this problem I sent her to her husband's house on 17-3-2007. On 25-3-2007, the stomach operation of wife of my nephew was conducted. Medical documents alongwith discharge certificate I have already deposited to this HQ alongwith my application. There was no responsible person present at my home to settle down this problem. However, I overstayed only after getting assurance of extension from leave to Unit Adjutant.' ”

6. The position which emerges then is that the appellant had contacted his Unit Adjutant for extension of leave. The Division Bench observed [*Union of India v. Yasodhar Kamat*, 2016 SCC OnLine Pat 9773] that the appellant had submitted an application for extension of leave belatedly and that as a member of the disciplined force, his conduct could not be condoned. The appellant had furnished an explanation for seeking a further extension. That explanation has not been rejected as being either false or incorrect. The appellant had seventeen years of service. Undoubtedly, the record indicates that in the past he was penalised for being on unauthorised absence without leave. His past conduct, in our view, would militate against the grant of an order of reinstatement in service which we decline to do. In fairness, we also note that this is not the submission of the appellant before the Court. However, having regard to the fact that the appellant had nearly seventeen years of service, we are of the view that, in the peculiar facts and circumstances of the case, an appropriate view needs to be taken so as to facilitate the appellant being granted pension after completion of twenty years of pensionable service. This is in view of the fact that the imposition of the penalty of dismissal would be disproportionate having regard to the material which has emerged from the record. We order and direct that instead of and in substitution of an order of dismissal from service, the appellant shall be treated as having been discharged from service with effect from the date on which he completes pensionable service of twenty years. However, the appellant will not be entitled to any back wages between the date on which he was originally dismissed and the date on which he completes the requirement of pensionable service. The arrears of pension to which the appellant is entitled shall be paid to him within a period of three months from the date of receipt of a certified copy of the present order.

16. Admittedly, in the case at hand, as has been discussed hereinabove, petitioner as well as his brother had sent communications apprising therein authorities of the petitioner's illness

as well as his admission in the hospital, but yet respondents, without bothering to verify aforesaid aspect, straightway proceeded to declare him a “deserter”. Interestingly, respondents after declaring petitioner as deserter issued him show cause notice, thereby calling upon him to resume the duty. Once petitioner was declared deserter, there was otherwise no occasion for him to join the duties.

17. Since in the case at hand, petitioner had rendered more than 18 years of service and during this period, he never remained on unauthorized leave and there was no complaint, if any, of any kind against him, coupled with the fact that during period of overstay, he had repeatedly apprised the authorities concerned with regard to his illness and had also prayed for extension of leave, this Court finds the action of the respondents in dismissing the petitioner from service to be harsh and totally uncalled for.

18. Though, prior to filing the petition at hand, this Court, having taken note of aforesaid aspect of the matter, had afforded an opportunity to the Appellate Authority to re-examine the matter, but it appears that Appellate Authority, without bothering to look into the grounds taken in the appeal as well as observations made in judgment dated 28.04.2016 passed by this Court in CWP No. 177 of 2009, proceeded to pass a mechanical order, thereby upholding the order of disciplinary authority dismissing the petitioner from service.

19. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds merit in the preset petition and accordingly same is allowed. The order dated 07.11.2016 (Annexure P-16) is quashed and set-aside. Having taken note of the fact that petitioner has already completed more than 17 years of service prior to his dismissal, and in the peculiar facts and circumstances of the case, the penalty of dismissal, being wholly disproportionate to the offence alleged to have been committed by the petitioner, is set aside, and petitioner shall be treated to have been discharged from service with effect from the date on which he completes pensionable service, but he will not be entitled to any back wages between the date on which he was originally dismissed and the date on which he completes the requirement of pensionable service. The needful in terms of instant judgment shall be done within a period of two months. Pending applications, if any, also stands disposed of.

**(Sandeep Sharma),
Judge**

October 06, 2025
(shankar)