

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 13.02.2025

Pronounced on: 01.03.2025

SWP No. 1441/2007

IA No. 1/2017

1. Rattan LalAppellant(s)/Petitioner(s)
S/O Sh. Prem Dass R/O Manlik
Nagar (IInd Phase) Near BSF
Campus Paloura, Jammu Aged
40 years

Through: Ms. S. Kour, Sr. Advocate with
Ms. Manpreet Kour, Advocate.

vs

1. Union of India Respondent(s)
Th. Home Secretary, Ministry of Home
Affairs, New Delhi.

2. Director General of BSF
CGO Complex Lodhi Road, New
Delhi.

3. Inspector General of BSF
Frontier headquarter C/O 56 APO

4. Deputy Inspector General of BSF,
HQ Ambassa Dhalai, Tripura.

5. Commandant,
46 Bn. BSF C/O 56 APO

Through: Mr. Vishal Sharma, DSGI.
Mr. Eishan Dadichi, CGSC.

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioner, who was working as Constable with the respondents, was retired from service with effect from 31.07.2006 (AN) under Rule 26 of the BSF Rules 1969 by the respondent No. 5 vide order No. Estt/Ret-Uns/46 Bn/2006/13296-102 dated 31.07.2006 (for short, 'the order impugned').

2. The petitioner has impugned the order impugned on the following grounds:-

- a) That the respondents have not given any cogent reason in the order impugned while retiring the petitioner and have not granted any personal hearing to the petitioner before imposing major punishment of compulsory retirement;
- b) That it is settled proposition of law that even a person who has more than 4/5 red entries cannot be retired from service solely on the basis of those entries and the nature of the offences, length of service, hard stations and difficulties in living etc. are required to be considered by the concerned authority before taking any such action. The respondents have not taken into consideration the previous record of the petitioner and have passed the order in a mechanical manner. The petitioner has not done any act, for which he has been imposed the punishment.
- c) That the respondents have imposed the punishment of compulsory retirement on the petitioner which amounts to double jeopardy because for the same allegations, the respondents have punished the petitioner twice.

3. The respondents have objected to the writ petition by submitting that the petitioner has not availed the statutory remedy by filing petition under Rule 28-A of the BSF Rules 1969, which provides that an individual has a right to file petition against the order passed under Rule 26 of the BSF Rules to the superior officer, if he feels aggrieved of the said order and, as such, the petitioner, without availing the said remedy, has filed the present

petition, which is not maintainable. The respondents have further stated that the petitioner during his service tenure of 15 years 10 months and 4 days of service was awarded 15 cash rewards for his performance as a Welder in Unit repair organization and 6 punishments were imposed upon the petitioner for committing offences while on duty. The petitioner on 12.02.2000 created nuisance after consuming liquor while on duty and a written warning was issued to him to abstain himself from indulging in such activities and to be careful in future vide communication dated 15.02.2000, but he continued to consume liquor, therefore, three punishments were awarded to him under Section 26 of BSF Act, 1968. It is further stated that the Board assembled in the year 2003 for screening the performance of unit personnel and found the performance of the petitioner not upto the required standard and accordingly, as per recommendation of the Board, a written warning was issued to him vide communication dated 24.01.2004 to improve his conduct, failing which, necessary action would be taken against him for retirement on the ground of unsuitability under Rule 26 of BSF Rules. The petitioner instead of improving his performance continued with the acts of indiscipline. He was sanctioned 30 days' of Earned Leave with 09 days journey period with effect from 24.10.2005 to 01.12.2005 but he failed to join his duty in time and reported on 05.01.2006 (FN) after overstaying 34 days without leave. His leave was regularized by the competent authority, and he was given one more opportunity to improve his conduct/behaviour, however, despite the abovementioned warnings issued to the petitioner, he did not improve himself at all and could not prove himself to be a disciplined member of

service and continued with his misconducts. The petitioner, on 12.08.2005 again used in-subordinate language to his superior officer, for which, he was tried by SSFC on 20.01.2006 for committing an offence under Section 20(c) of the BSF Act and awarded 30 days rigorous imprisonment in force custody. The Board of Officers was detailed for screening the performance of those unit personnel who were eligible to be boarded out on the ground of unsuitability and the name of the petitioner was recommended by the Board to be retired on the ground of unsuitability. Board proceedings were approved by the Commandant and after confirmation by the DIG BSF, a Show-Cause Notice dated 15.07.2006 was issued to the petitioner. He submitted his reply to the show-cause notice on 27.07.2006 and after careful consideration of his reply by the competent authority, he was retired from service with effect from 31.07.2006 (AN) on the ground of unsuitability under Rule 26 of BSF Rules with full compensation pension and gratuity on the basis of qualifying service under Rule 40 of CCS Pension Rule, 1972. It is further stated that the total length of the service, hard station as well as family factors were kept in mind by the competent authority while passing the order impugned. It is further stated that retirement on account of unsuitability as per Rule 26 of the BSF Rules is not violation of any fundamental right of the petitioner and it not a case of double jeopardy. As the conduct of the petitioner was not found up to mark, he was sent for retirement. Once he was tried for serious offences by holding SSFC, the court had taken lenient view against the petitioner keeping in mind his family and awarded 30 days rigorous imprisonment instead of dismissing him from service without any pensionary benefit.

The pensionary benefits as admissible have already been released by Pay and Accounts Division BSF vide their PPO dated 21.02.2007 and as the petitioner was sent on retirement under Rule 26 of the BSF Rules, therefore, question for award of full compensation pension and gratuity is not applicable in case of the petitioner.

4. Ms. S. Kour, learned Senior Counsel appearing for the petitioner has argued that the respondents could not have retired the petitioner as for meritorious services of the petitioner, he was awarded with cash rewards and further merely because of two punishments/adverse entries in the past five years, the order of retiring the petitioner could not have been passed by the respondents. Ms. S. Kour has relied upon the judgment passed by the Hon'ble Supreme Court of India in cases titled as **Veerendra Kumar Dubey vs. Chief of Army Staff and others** reported in **2016 (2) SCC 627** and **Amarendra Kumar Pandey vs. Union of India** reported in **2022(3) SLJ 476**.
5. Per contra, Mr. Vishal Sharma, learned DSGI appearing for the respondents has argued that the conduct of the petitioner during his service was unbecoming of a disciplined member of force. He was warned numerous times and even notice dated 24.01.2004 was served upon the petitioner to be careful but despite that he did not mend his behaviour and even was awarded 30 days' rigorous imprisonment on 20.01.2006. He further submits that the cash rewards awarded to the petitioner were in respect of work done by him on different occasions, however, the overall behaviour and conduct of the petitioner, who was a habitual drunkard and disrespectful to his seniors, prompted the respondents to pass the order

impugned in this petition. Mr. Vishal Sharma, learned DSGI has relied upon the judgment of Coordinate Bench of this Court in case titled as **Sardari Lal vs. Union of India** reported in **1999 (1) SCT 747**.

6. Heard learned counsel for the parties and perused the record.
7. The petitioner has been removed from service by invoking Rule 26 of the BSF Rules, 1969. The Rule is extracted as under:

“26. Retirement of enrolled persons on grounds of unsuitability—Where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the force, the Commandant, may after giving such enrolled person an opportunity of showing cause (except when he considers it to be impracticable or inexpedient in the interest of security of the State, to give such opportunity), retire such enrolled person from the force.”

8. A perusal of the abovementioned rule reveals that if a Commandant is satisfied that an enrolled person is unsuitable to be retained in the force, the Commandant, may after giving such enrolled person an opportunity of showing cause (except when he considers it to be impracticable or inexpedient in the interest of security of the State, to give such opportunity), retire such enrolled person from the force.
9. Further Rule 28-A of the BSF Rules, 1969 provides that an enrolled person feeling aggrieved by any order of termination of his service passed under this chapter may present a petition to the Inspector General, who may pass such orders on the petition as deemed fit. Though the respondents have raised a plea that the petition is premature, but rejecting the petition on the ground of availability of alternative remedy after 18 years would not be proper, as such, this Court deems it appropriate to consider the issues raised by the petitioner on merits.

10. A perusal of the record depicts that the petitioner has rendered service with the respondents for 15 years 10 months and 4 days and during his service, the following punishments were inflicted upon the petitioner:

- a) U/S-19(a) of BSF Act 07 days RI (Rigorous Imprisonment) on 11.08.1997
- b) U/S-26 of BSF Act 07 days of RI on 29.02.2000
- c) U/S-26 of BSF Act 07 days confinement to lines on 27.04.2000
- d) U/S-26 of BSF Act 14 days RI on 23.10.2000
- e) U/S-19(b) of BSF Act 28 days RI on 24.02.2003
- f) U/S-20(c) of BSF Act 30 days RI on 20.01.2006 by holding SSFC.

11. Equally true is that the petitioner was rewarded with 15 cash awards and those 15 cash awards were awarded to the petitioner for his performance as Welder in the unit repair organisation. 15 cash rewards awarded to the petitioner on different occasions were for his good work on those occasions but the respondents have passed the order impugned taking into consideration the overall conduct and behaviour of the petitioner. Merely doing good work for few occasions does not necessarily mean that the employee is very good and useful for the organization and cannot be retired prematurely when in the estimation of employer, the employee is not fit person to be retained in service. The respondents have stated that the conduct of the petitioner was not suitable for retaining him in the service and that is why the Board of Officers recommended the petitioner to be retired on the ground of unsuitability and thereafter, a Show-Cause Notice dated 15.07.2006 was served upon the petitioner. A perusal of the notice dated 15.07.2006 reveals that the respondent No. 5 while issuing notice to the petitioner has taken into consideration the service record of the petitioner for the last five years only and have taken into account two

adverse entries/punishments inflicted upon him during the said period, which are as under:

- a) U/S 19(b)- 28 days RI on 24.02.2003.
- b) U/S 20(c)- 30 days RI on 20.01.2006.

12. The petitioner responded to the show cause notice on 27.07.2006 by stating that he wanted to continue with the service. Thereafter, taking into consideration the reply, the respondent No. 5 vide order impugned directed the retirement of the petitioner from the service with effect from 31.07.2006 (AN) under Rule 26 of the BSF Rules. Record further demonstrates that the petitioner was even issued notice dated 24.01.2004 thereby warning him to mend his behaviour, but he did not do so. He was tried by SSFC and awarded 30 days rigorous imprisonment under force custody vide order dated 20.01.2006.
13. Though the respondents have taken into consideration only two punishments imposed upon the petitioner on 24.02.2003 under Section 19(b) of the BSF Act and 20.01.2006 under Section 20(c) of the BSF Act but the past conduct of the petitioner has also not been satisfactory, as he has been punished on four different occasions.
14. It is contended by the petitioner that he has been punished twice for the same offence. Retiring an enrolled person on the ground of unsuitability by taking into consideration the earlier occasions when he was punished for the offences does not amount to punishing an individual twice for the same act and in fact the respondents have retired the petitioner by taking into consideration his overall conduct and performance.

15. In this context, it would be appropriate to take note of the judgment passed by the Hon'ble Supreme Court of India in case titled as **Amarendra Kumar Pandey vs. Union of India** reported in **2022(3) SLJ 476**, wherein at Paras 28 and 29 following has been held:

“28. Where an Act or the statutory rules framed thereunder left an action dependent upon the opinion of the authority concerned, by some such expression as is satisfied or is of the opinion or ‘if it has reason to believe’ or ‘if it considered necessary’, the opinion of the authority is conclusive,

- (a) If the procedure prescribed by the Act or rules for formation of the opinion was duly followed,
- (b) If the authority acted bona fide,
- (c) If the authority itself formed the opinion and did not borrow the opinion of somebody else and
- (d) If the authority did not proceed on a fundamental misconception of the law and the matter in regard to which the opinion had to be formed.

29. The action based on the subjective opinion or satisfaction, in our opinion, can judicially be reviewed first to find out the existence of the facts or circumstances on the basis of which the authority is allegedly to have formed the opinion. It is true that ordinarily the court should not inquire into the correctness or otherwise of the facts found except in a case where it is alleged that the facts which have been found existing were not supported by any evidence at all or that the finding in regard to circumstances or material is so perverse that no reasonable man would say that the facts and circumstances exist. The courts will readily defer to the conclusiveness of the authority's opinion as to the existence of matter of law or fact upon which the validity of the exercise of the power is predicated.”

16. So far as the present case is concerned, the respondents have followed the mandate of Rule 26 of the BSF Rules by issuing a show-cause notice to the petitioner, which was duly replied by him and after taking into consideration the reply filed by the petitioner, the order impugned was passed. This Court does not find any infraction of rule which may compel this Court to take a view contrary to the opinion formed by the respondent No. 5.

17. In **Veerendra Kumar Dubey's Judgment (Supra)**, the Hon'ble Supreme Court of India has observed that **"award of four red ink entries simply pushes the individual concerned into a grey area where he can be considered for discharge. But just because he qualifies for such discharge does not mean that he must necessarily suffer that fate. It is one thing to qualify for consideration and an entirely different to be found fit for discharge"**. This observation was made by the Hon'ble Supreme Court of India by taking into consideration that Rule 13 applicable in that case does not make it mandatory for the competent authority to discharge an individual just because he has been awarded four red ink entries particularly, when the threshold of four red ink entries, as a ground for discharge had no statutory sanction.
18. So far as the present case is concerned, the only requirement in terms of Rule 26 is to determine the un-suitability of enrolled person to be retained in force. Once the competent authority has recorded its satisfaction on the basis of some material with regard to un-suitability of the member of the force to be retained, the Courts cannot act as an appellate or revisional authority for the purpose of determining as to the sufficiency of the material leading to formation of the opinion, rather the courts are only concerned as to whether the procedure prescribed by law has been followed by the authorities in passing the order impugned or not and further whether the same suffers from fundamental misconception of law. Of course, while exercising power of judicial review, the courts can show indulgence when the order is perverse in nature.

19. In this context, it would be appropriate to take note of the judgment passed by the Coordinate Bench of this Court in case titled as **Sardari Lal vs. Union of India** reported in **1999(1) SCT 747**, wherein at paras 5 and 6 following has been held:

“5. The Commandant, thereafter, has to assume satisfaction regarding the unsuitability of the person on the basis of relevant material having nexus with such unsuitability. Though, his satisfaction is subject to judicial review but it is enough if he proceeds on some basis, The court can't go into its sufficiency or otherwise, Therefore, all that requires to be seen is whether or not the requisite satisfaction was drawn on the basis of some material. If it is found based on no material, it can't sustain and the action would be rendered arbitrary. But where the satisfaction is drawn on some relevant material having proximate relation to the unsuitability of the person, it is the end of the matter.

6. It is a matter of common knowledge by now that provisions of Article 311(2) of the Constitution are not attracted to the defence services. Nor are these available in case of compulsory retirement even in Civil Services because it neither entails penal consequences nor amounts to dismissal or removal from service. Even so, an order of compulsory or premature retirement is questionable on some specific grounds like arbitrariness or perversity of action or that it was taken for mala fide or extraneous considerations. Nonetheless, it falls within the domain of the competent authority to take action by taking in regard the whole service profile of the individual. The Authority can't be pinned down to consider the material only upto a point, nor can it be faulted for taking any pre- promotion material into consideration. It is for the Authority to derive satisfaction about the unsuitability of the person in service upon all the available-material.”

20. For all what has been discussed, considered and analysed hereinabove, this Court is of the considered view that the order impugned has been passed by the respondent No. 5 well within the parameters of law after affording due opportunity of hearing to the petitioner and there is no

perversity in the order impugned. Accordingly, the instant petition is found to be misconceived and the same is **dismissed**.

(RAJNESH OSWAL)
JUDGE

Jammu
01.03.2025
Sahil Padha

Whether the order is speaking:	Yes/No.
Whether the order is reportable:	Yes/No.

