HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

LPA No. 03/2024

Reserved On: 25th of September, 2025
Pronounced On: 9th of October, 2025

1. **Union of India,**
   Through Director General,
   Border Security Force, New Delhi.

2. Commandant, 193 BN,
   Border Security Force.

… Appellant(s)

Through: -
Mr Hakim Aman Ali, CGC.

V/s

Mohammad Shafi Khan
S/O Gh. Nabi Khan
R/O Chakilpora, District Anantnag,
Kashmir.

… Respondent(s)

Through: -
Mr S. A. Qadri, Advocate.

CORAM:

Hon'ble Ms Justice Sindhu Sharma, Judge
Hon'ble Mr Justice Shahzad Azeem, Judge

(JUDGMENT)

Shahzad Azeem-J:

01. This *intra* Court appeal is directed against the Judgment dated April 26, 2023 passed by the learned Single Judge ["the Writ Court"] in SWP No. 1112/2007 titled **'Mohammad Shafi Khan v. Union of India & Ors.'**, whereby and whereunder the Writ Court, while allowing the Writ Petition, quashed the impugned Order of dismissal of the Respondent (Petitioner before the Writ Court) and also granted liberty to the Appellants (Respondents before the Writ Court) to initiate fresh proceedings against the

Respondent strictly in accordance with the BSF Act and the Rules framed thereunder, if they so desire.

02. To be brief, the nub of the matter is that the Respondent, while performing his duties as Constable in the Border Security Force (BSF), proceeded on one day casual leave on February 03, 2004, but over stayed from leave w.e.f. February 04, 2004. Despite issuance of letter to rejoin the duties, the Respondent failed. Thereafter, the Appellants had convened the Court of Inquiry, followed by issuance of "Apprehension Roll" and letters to the Sector Headquarters, BSF, Anantnag and SSP, Anantnag, respectively. Show cause notices were also issued and finally Order of dismissal of the Respondent from service, dated July 28, 2004, came to be issued, when the Respondent had neither responded to the communications/ notices nor resumed the duties.

03. This Order of dismissal of the Respondent from service, passed by the Appellant No.2, came to be challenged by way of Writ Petition and, vide impugned Judgment, the Writ Court has allowed the same.

04. Since, seemingly there is some variance over the facts as were pleaded by the parties before the Writ Court, therefore, it is deemed proper to take note of the rival versions, as were put forth before the Writ Court, because same may be advantageous for proper understanding the matter in controversy.

THE WRIT PETITION:

05. According to the Respondent (Petitioner before the Writ Court), he was appointed as a Constable in the year 1997 and as such joined the service in 193 BN BSF, however, he said to have applied for one month's leave, as his father was not feeling well. The leave applied by him was duly sanctioned and he proceeded on leave, but due to ailment of his father, he applied for extension of leave, since his father was got admitted in Sher-e-Kashmir Institute of Medical Sciences (SKIMS), Soura. The Respondent had

further put forth his case that he hails from a far-flung area, therefore, he did not receive any communication nor could he get the information about any such communication being issued by the Commandant-Appellant No.2, however, when after a lapse of one year, he reported in the office of Appellant No.2, he was not allowed to join the duties, therefore, on his direction, he filed a representation before the Appellant No.1 (Director General, BSF), but the same was not considered.

06. The contention of the Respondent before the Writ Court was that when, after availing leave, he reached home, the militants said to have extended threats to him and also to kill his family, nonetheless, he reported back, but he was not allowed to join the duties. The Respondent's bone of contention was that the Order of dismissal came to be passed in utter violation of rules of natural justice, as no charge-sheet was served nor any inquiry was conducted, so much so, he was never informed about the passing of the Order of dismissal.

THE OBJECTIONS:

07. The Appellants have taken a specific stand before the Writ Court that the Respondent had applied for one day's casual leave to see his ailing sister. As noticed above, there is variation over the facts, in that, the very foundation of the case of the Respondent that he availed leave on account of ailment of his father for one month came to be falsified by the Appellants.

08. The Appellants have stated that, during his service career, the Respondent has never been dedicated or worked devotionally, as he was habitual of indiscipline and, thus, was awarded rigorous imprisonment two times for 07 days and 28 days Force Custody, respectively. It was the stand of the Appellants that the Respondent, many a times beforehand, was also found unauthorizedly absent from the duty.

09. The Apellants had further contended that when the Respondent proceeded on one day's casual leave, he failed to rejoin, accordingly, through

registered letter/ notice dated February 09, 2004, he was asked to join, but no response was received nor he joined, as a consequence thereof, the Court of Inquiry was convened, followed by warrant of arrest came to be issued. Meanwhile, a communication dated May 12, 2004 was received from the Respondent that he is facing threat from militants, therefore, the Department has made a request to Station Headquarter, BSF/ SSP, Anantnag to verify the threat perception and take appropriate steps for protection of the Respondent and his family. However, no response was received from the Respondent, whereafter, a show cause notice was issued, but the Respondent, this time also, did not reply, therefore, after the lapse of 30 days, i.e., on July 28, 2004, the impugned Order of dismissal came to be passed under Section 11 (2) of the Border Security Force Act, 1964 (for short "the BSF Act") and Rule 177 of the Border Security Force Rules of 1969 ("the BSF Rules").

10. According to the Appellants, at every stage, notices/ letters/ communications have been issued to the Respondent in compliance to the provisions of the BSF Act and the Rules, but he did not respond, therefore, the impugned Order of dismissal came to be passed strictly in accordance with the provisions of the BFS Act and the Rules, respectively.

FINDINGS OF THE WRIT COURT:

11. While passing the Judgment under challenge, the reasoning prevailed with the Writ Court was that in the absence of the record of the Court of Inquiry, it is not clear as to whether proceedings of the Court of Inquiry have been conducted in the manner prescribed under Rule 173 (8) of the BSF Rules, giving the Respondent the opportunity to cross-examine the witnesses and to lead evidence in defence. Therefore, the Writ Court, in absence of record, had come to the conclusion that the Respondent was not associated during the proceedings of the Court of Inquiry and, at the same time, that the BSF authorities did not pursue the matter with the SSP, Anantnag for execution of warrant of arrest nor there is anything on record

to show that the Sector Headquarter, BSF has taken any action in pursuance of the communication issued by the BSF authorities to inquire about the threat perception to the Respondent, besides, there is no proof of sending of the purported communications to the Respondent in the shape of postal receipts, therefore, the Writ Court opined that in absence of these vital documents, it appears that the Appellants have approached the matter in a casual manner. Hence, on finding that the impugned Order of dismissal came to be passed in violation of Rule 22 (2) of the BSF Rules and the mandate of Article 311 of the Constitution as well as the principles of natural justice, the Writ Court has quashed the impugned Order of dismissal of the Respondent.

CHALLENGE:

12. After giving the factual narration of the matter about the overstayal of leave by the Respondent and issuance of letters/ notices, the Appellants have thrown challenge to the impugned Judgment, on the ground that the Court of Inquiry was held under Section 62 of the BSF Act against the Respondent on account of his absence from duty, thus, the question of applicability of Rule 173 (8) of the BSF Rules does not arise. Therefore, the finding of the Writ Court that the Respondent was not associated with the Court of Inquiry is unsustainable.

13. According to the Appellants, the Writ Court has misconstrued and misinterpreted Rule 173 (8) of the BSF Rules and, if the interpretation of the Writ Court is accepted, then same would result in non-completion of any Court of Inquiry under Section 62 of the BSF Act. The Appellants have also taken the stand that at every stage, proper communications/ letters were sent to the Respondent to report to the Unit and, after convening of the Court of Inquiry, the police authorities were approached to secure his presence, however, despite the Unit had made all the efforts to secure the presence of the Respondent, including the issuance of “Apprehension Roll”, no response

was received from the Respondent nor he rejoined the duty, therefore, the authorities were left with no option than to pass the Order of dismissal.

14. Most importantly, the Appellants have taken a specific stand that the Respondent, in his representation addressed to the Director General, BSF, which was received on September 03, 2004, at paragraph Nos. 6 and 7, specifically stated that he had received the communication from the BSF, therefore, the question of violation of rules of natural justice does not arise, hence, the Writ Court erred in quashing the impugned Order of dismissal of the Respondent.

15. *Per Contra*, the learned Counsel appearing for the Respondent has vehemently argued that the Respondent could not join the duties on expiry of leave because he was facing threat from the militants, inasmuch as neither he was informed about the convening of Court of Inquiry nor ever communicated regarding holding of disciplinary proceedings against him, therefore, the Writ Court, after satisfying itself regarding violation of rules of natural justice, passed a reasoned Judgment based on sound legal principles of law. Therefore, no fault can be found with the impugned Judgment passed by the Writ Court.

16. Heard learned Counsel for the parties and perused the record.

ANALYSIS:

17. In order to keep the record straight, be it noted that, as per record, the Respondent proceeded for one day casual leave on February 03, 2004 and was to report back on duty on February 04, 2004 (FN). The record reveals that the Respondent had applied the leave on the ground that his sister is admitted in the Hospital, however, the Respondent failed to report on duty after expiry of the leave period, therefore, vide communication dated February 09, 2004, he was directed to report on duty immediately, failing which disciplinary action will be initiated under the BSF Act and the Rules.

The communication dated February 09, 2004 depicts that same came to be issued by registered post under endorsement No. Estt/2021/193/04/Tac HQ 193 Bn BSF C/o 56 APO. Thereafter, vide Order dated March, 03, 2004, a Court of Inquiry was convened to inquire into the circumstances under which the Respondent has been over staying from leave w.e.f. February 04, 2004 (FN).

18. Accordingly, it was found by the Court of Inquiry that the Respondent has been overstaying from leave w.e.f. February 04, 2004 (FN) and has also earned two bad entries, inasmuch as there is no good entry recorded during his service period. It has been further found that total overstaying of leave period is 42 days as on March, 04, 2004, for which he himself is found blameworthy and it has been further categorically held by the Court of Inquiry that the Respondent seems to be a habitual offender, therefore, the Court of Inquiry recommended initiation of strict action against the Respondent.

19. Thereafter, the Commandant, while agreeing with the findings of the Court of Inquiry, vide Order dated March 24, 2004, directed for issuance of "Apprehension Roll" and show cause notice to the Respondent for taking disciplinary action.

20. The record further reveals that in compliance to Order dated March 24, 2004, warrant of arrest against the Respondent came to be issued on April 12, 2004 and June 03, 2004, respectively and same were sent for execution to SSP, Anantnag.

21. Although, the Respondent did not give the reference of the issuance of "Apprehension Roll", or any communication issued by the BSF authorities, but, he addressed a communication dated May 12, 2004 to the Commandant, delineating therein that he and his family members are facing threat from militants. In pursuance thereof, the SSP, Anantnag and Sector Headquarter, BSF, Anantnag, vide communications dated June 03, 2004 and

June 04, 2004, respectively, were requested to verify the threat perception to the Respondent and his family members and to provide the protection also.

22. It is noteworthy that as borne from the record, the Appellants have also issued show cause notices twice on May 04, 2004 and June 28, 2004, respectively, under registered post with A/D in exercise of power vested under sub-Section (2) of Section 11 of the BSF Act read with Rule 177 of the BSF Rules and in conformity with sub-rule (2) of Rule 22 of the BSF Rules, thereby the Respondent was called upon to show cause why he should not be dismissed from service for the act of omission and commission. By virtue of these show cause notices, the Respondent was also provided an opportunity to urge in his defence against the proposed punishment. However, when all the communications/ letters/ notices, inasmuch as Apprehension Roll issued by the authorities from time to time did not yield any result, the authorities left with no option than to pass the Order of dismissal dated July 28, 2004 against the Respondent.

23. Indisputably, the Respondent came to be dismissed from service by the Appellants in exercise of power conferred on the Commandant as prescribed authority under Section 11 (2) of the BSF Act read with Rule 177 of the BSF Rules to dismiss any person under his command from the service, which is an independent power, however, still, the element of natural justice is very much engrained in the provisions of BSF Act and Rules before resorting to such major punishment. Therefore, it has to be only seen as to whether or not, while passing the Order of dismissal dated July 28, 2004, the Appellants had provided the opportunity to the Respondent.

24. The Appellants, on finding the Respondent overstaying the leave, vide letter dated February 09, 2004, directed the Respondent to report on duty, failing which disciplinary action will be initiated and this letter was sent to the home address of the Respondent through registered post.

25. Thereupon, the Court of Inquiry was convened, wherein the statements of the witnesses came to be recorded and it has been found by the Court that the Respondent is overstaying the leave, who was further found to be a habitual offender under the BSF Act and Rules. Thereafter, "Apprehension Roll" came to be issued followed by show cause notice in terms of Rule 22 (2) of the BSF Rules.

26. The Respondent never responded to any of the notices/ communications/ letters issued by the Appellants, therefore, finally came to be dismissed from service vide Order dated July 28, 2004.

27. It is noteworthy that Rule 173 of the BSF Rules prescribes the procedure to hold the Court of Inquiry and Rule 173 (8), as was existing on the Statute at the relevant time, mandates that the Court will afford the person an opportunity to know all that has been stated against him and to provide opportunity to cross-examine the witnesses and also lead evidence in his defence. At the same time, Rule 22 (2) of BSF Rules postulates that before taking any action, including termination of service of a person, he shall be informed of the proposed action along with adverse report and such person shall be called upon to submit, in writing, his explanation and defence.

28. Therefore, Rule 22 (2) of BSF Rules casts duty on the prescribed authority to inform the delinquent about the proposed action by providing an opportunity, *inter alia*, to submit, in writing, his explanation and defence.

29. Now, turning to the case on hand, the Commandant had issued the show cause notices dated May 04, 2004 and June 28, 2004, in compliance to Rule 22 (2) of BSF Rules, thereby calling upon the Respondent to urge in his defence against the proposed dismissal from service within 30 days of receipt of the notice and also, along with the show cause notice, copy of the Court of Inquiry and the report was dispatched to the Respondent through registered post with A/D.

30. The contention of the Respondent before the Writ Court was that he was never informed about the convening of Court of Inquiry or proposed action of dismissal from service, therefore, the authorities have observed in breach the provisions of the BSF Act and Rules, inasmuch as rules of natural justice also vitiated and same had found favour with the Writ Court, in absence of postal receipts as also the record of proceedings of the Court of Inquiry.

31. The Appellants have produced the record and on thrashing the same, we also did not find any postal receipt produced by the authorities. However, we had come across a vital document during examination of the record that is the Petition made by the Respondent in terms of Rule 28-A of BSF Rules against the Order of his dismissal from service, which was addressed to the Director General, BSF, received by the authorities on September 03, 2004, wherein, at paragraphs 6 and 7 of the Petition, the Respondent specifically admitted that the Company Commander has issued one communication, whereby he was directed to ------ (words are missing) period of one month and he sent a detailed reply with a request for few weeks leave for rehabilitation of his family. The Respondent had further admitted in the Petition that he has received another communication, whereby he was directed to collect his belongings from the Company as he has been dismissed from service.

32. When the specific admission made by the Respondent in his Petition addressed to the Director General, BSF in terms of Rule 28-A of BSF Rules is read in juxtaposition with the show cause notices dated May 04, 2004 and June 28, 2004, respectively, one would find that it was this show cause notice, whereby the Respondent was provided an opportunity of 30 days to show cause against the proposed punishment in terms of Rule 22 (2) of BSF Rules.

33. The conduct of the Respondent can further be gauged from the fact that the Respondent in his Writ Petition averred that he belongs to a far flung area, where no source of communication is available nor he had any knowledge that any notice issued by the Commandant is received by any person, whereas, to the contrary, in the same breath in his Petition under Section 28-A of BSF Rules, the Respondent went onto submit that he could not inform the higher authorities about his miseries as he resides in a village which is surrounded by forest and there is neither any facility of telephone nor there is any police post.

34. Admittedly, the Respondent was a member of a disciplinary force, therefore, it was expected of him to approach the Court with clean hands and to state true facts, but the Respondent appears to have misstated the facts before the Writ Court, rather same are twisted in a manner that, while testing the veracity of the same in the light of the record made available by the Appellants, it becomes clear that the Court of Inquiry was held not on the ground of overstayal of sanctioned one month leave on account of his father's ailment, but it was on account of overstaying of sanctioned one day's leave in view of his sister's ailment, who, as per record, shown to be admitted in the Hospital.

35. In terms of the admission made by the Respondent in his Petition under Rule 28-A of BSF Rules, it becomes very much conspicuous that the plea of the Respondent that he did not receive any communication nor the rules of natural justice have been complied by the authorities flies in the face of the record which speaks for itself and, thus, it appears that the Respondent had approached the Writ Court with unclean hands.

36. Nonetheless, despite receipt of show cause notice, whereby the Respondent was asked to submit in his defence against the proposed punishment, the Respondent had deliberately chosen not to respond to the show cause notice. Therefore, it appears that these vital facts and documents

have escaped the attention of the Writ Court, otherwise, the Writ Court would not have shown the indulgence.

37. Insofar as the observation of the Writ Court that the authorities failed to pursue the execution of warrant of arrest is concerned, in our opinion, same cannot be stretched to imply that the warrant is not deliberately executed, because, admittedly the Respondent had received the communications served by the authorities, therefore, it appears that he had deliberately evaded the process of law and only when he had come to know about the order of dismissal, he approached with a Petition under Rule 28-A of the BSF Rules.

38. We are strengthened in our view by the admission made by the Respondent in his Petition under Rule 28-A of the BSF Rules, wherein he has admitted that he has received the communications issued by the authorities, as such, non-execution of warrant appears to be on account of deliberately evading the responsibility or due to his absconding, therefore, the Respondent forfeits any right to gain advantage by exploiting the circumstances to his benefit, more particularly, when record shows that the order was passed not by way of penalty, but in exercise of an independent and separate power conferred by Section 11 (2) of the BSF Act read with Rule 22 (2) of the BSF Rules, after holding that further retention of the Respondent in the service was undesirable.

39. In a case before the Hon'ble the Supreme Court titled **"Sri Gouranga Chakraborty v. State of Tripura and Anr., AIR 1989 Supreme Court 1321"**, the challenge was thrown to the power of the Commandant to pass the order of dismissal for an offence made under Section 19 of the BSF Act without holding trial by the Security Force Court. While dealing with the powers of the Commandant to impose the punishment of dismissal and the procedure thereof, it has been held that 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. The relevant portion of the observations of the Hon'ble Supreme Court read, thus:

> "24. ----------
>
> The Prescribed Authority i.e. the Commandant is competent to exercise the power under S. 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."

40. In the case on hand, as has been noticed, the Respondent has been informed from time to time by virtue of letters/ notices/ communications sent through registered post and same has been admitted by the Respondent in his Petition filed under Rule 28-A of the BSF Rules, therefore, once the Respondent did not avail this opportunity, he cannot be heard to complain of the violation of provisions of BSF Act and Rules, inasmuch as principles of natural justice.

41. Before parting, we wish to add that in terms of Section 27 of the General Clauses Act, 1897, when notice is sent on a proper address, but neither unserved notice nor the acknowledgement cards received, in that event, notice must be taken to have been served and then addressee has to prove that the notice was not delivered to him, however, to the contrary, in the case on hand, the Writ Court has taken the burden on itself, when the

Respondent is on admission to say that he has received the communications, therefore, we do not find any violation of principles of natural justice or that the provisions of the BSF Act and Rules have been observed in breach, while passing the impugned Order of dismissal of the Respondent from the service.

42. In the above backdrop, the impugned Judgment dated April 26, 2023 does not sustain. Accordingly, the instant appeal is **allowed** and the impugned judgment of the Writ Court is set aside. Consequently, the Writ Petition filed by the Petitioner (Respondent herein), being SWP No.1112/2007, is **dismissed**.

43. LPA No. 03/2024 shall stand **disposed** of on the above terms, along with connected CM(s).

44. Record be returned with due dispatch.

(Shahzad Azeem) **(Sindhu Sharma)**
Judge **Judge**

SRINAGAR
October 9th, 2025
"TAHIR"

i. Whether the Judgment is approved for reporting? **YES**.