R.N.R.

Before Ranjit Singh, J.

DIDAR SINGH,—*Appellant/Plaintiff*

versus

UNION OF INDIA,—*Respondent/Defendant*

RSA No. 532 of 1986

10th March, 2010

Code of Civil Procedure, 1908—Probation of Offenders Act, 1955—S. 12—Border Security Force Rules, 1969—Ss. 7, 10, 11, 20, 21 & 23—Conviction of appellant u/s 494 IPC for contracting second marriage—1st Appellate Court while giving benefit of 1955 Act releasing him on probation—Removal from service by invoking Rl. 7 of 1969 Rules providing ineligibility for enrollment or employment to force—Not applicable to persons validly enrolled, recruited or appointed to force—Authorities failing to follow proper procedure as prescribed under Rl. 20 of 1969 Rules before passing order of removal—Order of removal suffers from infirmity and not sustainable either in law or in equity—Authorities could have validly order retirement of appellant on ground of unsuitability to continue in service—Appeal allowed, order of removal set aside and appellant held entitled to receive all retiral benefits.

Held, that the Commandant had not invoked the enabling provisions of Section 11 to order the removal. Though a show cause notice was issued to the appellant but provisions of Rule 7 of the Rules were invoked to pass the order of dismissal. Rule 7 of the Rules is not a source of power with the Commandant to remove or dismiss a person from service. This Rule only provides for ineligibility and/or disqualification for enrollment The dismissal on the ground of contracting second marriage or for conviction of a criminal offence, apparently was not separately provided under the provisions of the Act till a provision in this regard was made in the form of Rule 23-A with effect from 1st March, 1983. This provision would not be applicable as not being in existence on the date the order was passed. This order, thus, could only be justifiably sustained under Section 11 of the Act.

(Para 35)

Further held, that the Commandant while passing the order has not exercised his power under the relevant enabling provision and was misconceived in directing removal of the appellant by invoking the provisions of Rule 7 of the Rules. The appellant could either be said to have become unsuitable after contracting second marriage or he could be accused of misconduct on the ground of his conviction. In the event of he being found unsuitable, the appellant could be ordered to be retired by invoking the provisions of Rule 26 of the Rules. Even if that was to be considered, the position that would emerge is that the requisite procedure was to be followed while passing the order. Rule 26 clearly provides giving an opportunity of showing cause before passing any order under this rule is concerned. Only the order of retirement could be passed under this rule and not of removal or dismissal.

(Para 36)

Further held, that an act of contracting second marriage may have rendered the appellant unsuitable, ineligible or disqualified for further continuing in service but he could have been removed from service only after following proper procedure, which was not done. Other options under Rule 20 were also open and the appellant could have been either dismissed, removed, retired or called upon to resign. These options were concededly not even considered. The power to dismiss the appellant may be available with the Commandant being the Prescribed Officer to exercise power under

Section 11(2) but this could have been so exercised by invoking the procedure as prescribed under Rule 20 of the Rules. The impugned order having been passed by invoking a wrong provision, which did not leave any power with the Commandant to pass an order of dismissal or removal as such, cannot be sustained either in law or in equity. The order of dismissal passed against the appellant cannot, thus, be sustained.

(Paras 45 & 46)

M.J.S. Sethi, Senior Advocate with Amit Singh, Advocate, *for the appellant.*

Hemen Aggarwal, Advocate, Addl. Central Government Standing Counsel, *for Union of India.*

RANJIT SINGH, J :

(1) The issue involved in this case would relate to powers of the authorities under the B.S.F. Act (for short "the Act") to remove an employee from service on the basis of his conviction for an offence by criminal court. Another incidental issue would arise in regard to the effect of release of an employee on probation subsequent to the passing of the order of conviction and the effect thereof on the order of removal in this regard. Yet another issue, which may also arise, is whether respondent-authorities were justified in removing the appellant by invoking the provisions which apparently may not apply or was not an enabling provision to pass an order of dismissal.

(2) The facts which would give rise to the issues, as noted above, are that the appellant-plaintiff had joined the B.S.F. service in 1971. He had nearly eleven years service to his credit, when he was dismissed on 6th September, 1982 on the ground that he had contracted second marriage while his first wife was living. The appellant would say that there was no cause of complaint against him and he had performed his duties with utmost honesty. As averred in the suit, the appellant comes from Mazbi Sikh family and was married at very young age. He would say that his wife never came to live with him. As per the appellant, his parents decided to arrange another marriage for him. His first wife filed a complaint with the police leading to his conviction for an offence under Section 494 IPC on 20th April, 1982. The appellant appealed against this order before the Court of Sessions and ultimately before this court, when this Court while maintaining the conviction, had given benefit of Probation of Offenders Act and released him on probation on 11th January, 1983.

(3) The grievance of the appellant, thus, is that his Commandant totally ignored the provisions of Section 12 of the Probation of Offeners Act and removed him from service without holding any formal enquiry or without issuing any show cause notice. The appellant would term this order to be arbitrary, illegal and void. Submission is that the effect of the order of his release on probation was required to be considered even though the order of his removal was passed prior to his release on probation. The appellant accordingly filed a suit after having served a notice under Section 80 CPC impugning the order of his removal from service, which, according to him, was served to him at his house at Amritsar.

(4) In response to a notice, the defendant-Union of India put in appearance and raised an objection regarding the jurisdiction of the civil court to entertain the suit. Plea was that the court at Amritsar would not have any territorial jurisdiction to try the suit. The suit was also termed as bad under Order 2 Rule 2 CPC. While submitting reply on merits, it was stated that one Gurmit Kaur was legally married wife of appellant Ex-HC. Intimation was received that appellant was convicted by Judicial Magistrate under Section 494 IPC. It was averred that appellant was ineligible for service in the B.S.F. as he had more than one living wife. He was accordingly served with show cause notice on 18th August, 1982. Finding his reply to the show cause notice un-satisfactory, the appellant was removed from service. It is further averred that there is no cause of action with the appellant as he was removed from service under Rule 7 of the B.S.F. Rules. It is stated that the order of removal was served to him at Mamdot and so the civil court at Amritsar would have no jurisdiction to try this suit.

(5) On the basis of pleadings, the suit was tried on the following issues :—

"1. Whether order dated 6th September, 1982 passed by Commandant 44th Battalion B.S.F. is illegal and void ? OPP

2. Whether civil court at Amritsar have territorial jurisdiction to try this suit ? OPP

3. Whether plaintiff is entitled to declaration prayed for ? OPP

4. Relief.

(6) The trial Court, however, held that the order passed by the Commandant was legal and valid and accordingly decided issue No. 1 against the appellant. Issue No. 2 regarding the jurisdiction of the Court at Amritsar was decided in favour of the appellant and ultimately the suit was dismissed on 25th September, 1984. The appellant remained unsuccessful in his appeal filed before the first Appellate Court and accordingly had filed this Regular Second Appeal.

(7) The factual position does not appear to be much in dispute. As is noticed by the first Appellate Court, it was not disputed before the said Court that the appellant was married twice. The first Appellate Court accordingly viewed that there was no need to hold a regular enquiry, when the conviction of the appellant was recorded under Section 494 IPC. It is also observed by the first Appellate Court that no rule could be referred before the court, which provided that the regular enquiry was required to be held or any other formality was required to be completed in this regard. Reference was made to Rule 7 of the Border Security Force Rules, 1969 (hereinafter called as, "the Rules") to say that the appellant was liable to be removed from service for contracting second marriage.

(8) Rule 7 of the Rules appears in Chapter II of the Rules, which relates to recruitment. This rule, as initially enacted, provided for ineligibility for appointment, enrollment or employment to the force. As per this rule, no person who had more than one wife living or who having a spouse living married in any such case in which such marriage was void by reasons of its taking place during the life time of such spouse, was eligible for appointment, enrollment or employment in the Force. As per this Rule, as then existing, no woman was eligible for appointment, enrollment etc. There was then a proviso in the rule that the Central Government may, if satisfied, that there are sufficient reasons for so to order, exempt any person from the operation of this Rule. It is, thus clear that this Rule only provided for conditions of ineligibility for enrollment, recruitment or appointment etc.

(9) Rule 7 of the rules was substituted on 13th March, 1993 and it now read as under :—

"Disqualification—No person,—

(a) who has entered into or contracted a marriage with a person having a spouse living, or

(b) who, having a spouse living, has entered into or contracted a marriage with any person shall be eligible for appointment in the Force.

Provided that the Central Government may, if satisfied, that such marriage is permissible under the personal law applicable to such person and the other party to the marriage and that there are other grounds for so doing, exempt any person from the operation of this rule.".

Initially Rule 7 read as under :—

"**Ineligibilty.**—(1) No person, who has more than one wife living or who is having a spouse living marries in any case in which such marriage is void by reason of its taking place during the life time of such spouse, shall be eligible for appointment, enrollment, or employment in the Force, and

(2) no woman shall be eligible for appointment, enrollment or employment in the Force.

Provided that the Central Government may if satisfied, that there are sufficient grounds for so ordering exempt any person from the operation of this rule."

(10) Amended as well as unamended rule only made a provision for providing the conditions of ineligibility or disqualification for appointment to the force. This rule cannot be read to mean as an enabling provision to dismiss an employee, who had validly been enrolled or recruited or appointed to the Force. Concededly, this provision has been used to dismiss the appellant from service, which may not sound legally tenable.

(11) The first question of law that thus would arise is whether the powers have been invoked under a provision, which is enabling one ?

(12) If the provisions of the Border Security Force Act are analysed, as these were enacted initially, then it can be seen that power to dismiss or remove an employee can be exercised in two ways. It can either be by a sentence passed by a Security Force Court after holding trial for an offence alleged and proved or by exercise of power administratively. Section 10 of the Act has made a provision for dismissing or removing any person

subject to the Act administratively without the intervention of Security Force Court. The Section is as under :—

> **"Termination of service by Central Government :**—Subject to the provisions of this Act and the rules, the Central Government may dismiss or remove from the service any person subject to this Act.

(13) Section 11 of the Act then makes a provision for dismissal, removal or reduction in rank by Director General or other officer. This Section reads :—

> **"Dismissal, removal or reduction by the Director-General and by other Officers.**—(1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.
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> (2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.
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> (3) Any such officer as is mentioned in sub-section (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.
>
> (4) The exercise of any power under this section shall be subject to the provisions of this Act and the rules."

(14) There has not been any change made in these sections.

(15) It would be seen that powers available under Sections 10 and 11 are subject to the provisions of the Act and the Rules made thereunder. The procedure to pass order of dismissal or removal is regulated by the provisions made in the Rules. Rules have been framed to regulate the power to order dismissal, removal and retirement. These rules are contained in Chapter IV of the Rules with a heading reading 'Termination of service'. Rule 17 of the Rules talks of retirement on the ground of unsuitability. Rule 18 then makes a provision for retirement on the ground of physical unfitness. Rule 19 regulates the case of resignation.

Termination of services on the ground of misconduct is governed by the procedure given in Rule 20 of the Rules. This rule (as enacted initially) was as under :—

> **"20. Termination of service for misconduct**—(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.
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> (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.
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> (3) The Director-General shall furnish the particulars of allegations and the report of investigation (including the statement of witnessess, 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) Notwithstanding the provisions of sub-rule (3) where it would not be in public interest to disclose the evidence or the documents, it shall be lawful for the Director-General to withhold copies of such evidence or documents from the person concerned.
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> (5) Where any evidence or document is withheld under sub-rule (4), the Director General shall record the nature of the evidence or the document withheld and forward the same to the Central Government together with the reasons for withholding such evidence or document.

(6) The person concerned shall within seven days from the receipt of information furnished to him under sub rule (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 has not taken any part previously in the investigation into the matter.

(8) Where any complaint has been received by the Central Government against a person subject to the Act that he has conducted himself in such manner as would render his retention in service undesirable, the Central Government may require the Director General to take necessary action in this behalf in accordance with the provisions of the foregoing sub-rules."

(16) Pointed reference here may also be made to Rule 20(8) of the Rules. When a complaint is received by the Central Government to the effect that a person under the Act had conducted himself in such a manner as would render his retention in service undesirable, the Central Government may require the Director General to take necessary action. This of course, has to be done in accordance with the procedure given in the rule, i.e. Rule 20 of the Rules.

(17) A procedure to hold enquiry and to detail an Enquiry Officer is given in Rule 21. This is followed by Rule 22 for imposing penalty, which may also include dismissal or removal. Exception is then carved out in the form of Rule 23 for dismissal or removal by the Central Government without

following the procedure as laid down in the rules, noted above, when it is of the opinion that it is not reasonably practicable to follow the same or it is not expedient in the interest of security of the State to follow the procedure. The Government may then order dismissal or removal from the Force without following the procedure as given in Rules 20 and 21 of the Rules. Rule 24 makes provision for retirement of subordinate Officers and enrolled persons on fulfillment of condition of enrollment.

(18) It would be essential to make reference to Rule 25, which talks of retirement of subordinate officer and enrolled person on the ground of physical unfitness and Rule 26 of the Rules, which regulates the retirement on the ground of unsuitability.

(19) All these rules have distinguishably been amended by providing a different enabling power and a different procedure.

(20) Rule 20 has now been amended to make a provision for termination of service of Officers by the Central Government on account of misconduct. This has also been worded differently by providing a different procedure as was initially given in the said Rule. The amended Rule 20 reads as under :—

> "**20. Termination of service of officers by the Central Government on account of misconduct.**—(1) When it is proposed to terminate the service of an officer under section 10 on account of misconduct, he shall be given an opportunity to show cause in the manner specified in sub-rule (2) against such action :
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> Provided that this sub-rule shall not apply—
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> (a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court ; or
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> (b) where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(2) When after considering the reports on an Officer's misconduct, the Central Government or the Director General, as the case may be, is satisfied that the trial of the Officer by a Security Force Court is in expedient or impracticable, but is of the opinion that the further retention of the said officer in the service is undesirable, the Director General shall so inform the officer together with particulars of allegation and report of investigation (including the statements of witnesses, if any, recorded and copies of documents if any, intended to be used against him) in cases where allegations have been investigated and he shall be called upon to submit, in writing, his explanation and defence :

Provided that the Director General may withhold disclosure of such report or portion thereof if, in his opinion, its disclosure is not in the interest of the security of the State.

(3) In the event of the explanation of the Officer being considered unsatisfactory by the Director General, or when so directed by the Central Government, the case shall be submitted to the recommendation of the Director General as to the termination of the Officer's service in the manner specified in sub-rule (4).

(4) When submitting a case to Central Government under the provisions of sub-rule (2) or sub-rule (3), the Director General shall make his recommendation whether the Officers's service should be terminated, and if so, whether the officer should be—

(a) dismissed from the service ; or

(b) removed from the service ; or

(c) retired from the service ; or

(d) called upon to resign ;

(5) The Central Government, after considering the reports and the officer's defence, recommendation of the Director General, may remove or dismiss the officer with or without pension or retire or get his resignation from service, and on his refusing to do so, the officer may be compulsorily retired or removed from the service with pension or gratuity, if any, admissible to him."

(21) It may be noticable that power to terminate the services of the an Officer by the Central Government under Section 10 could be after following the procedure prescribed under Rule 20 of the Rules. Thus, there is a clear link established between Section 10 and the procedure required to be followed under Rule 20 which would be a mandatory requirement. Prior to amendments, there was a link between Section 11 of the Act and Rule 20 of the Rules. Earlier Rule 21 made a provision for procedure before Enquiry Officer, whereas amended Rule 21 introduced with effect from 29th May, 1990 has altogether been differently worded to make a provision for termination of services of the officers by the Central Government on the grounds other than misconduct. Rule 21 of the Rules is as under :—

> "**21. Termination of service of officers by the Central Government on grounds other than misconduct.**—(1) When the Director General is satisfied that an officer is unsuitable to be retained in service, the officer—
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> (a) shall be so informed ;
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> (b) shall be furnished with particulars of all matters adverse to him ; and
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> (c) shall be called upon to urge any reasons he may wish to put forward in favour of his retention in the service :
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> Provided that clauses (a), (b) and (c) shall not apply, if the Central Government is satisfied that, for reasons to be recorded by it in writing, it is not expedient or reasonably practicable to comply with the provisions thereof :
>
> Provided further that the Director General may not furnish to the officer any matter adverse to him, if in his opinion, it is not in the interest of the State to do so.
>
> (2) In the event of the explanation being considered by the Director General unsatisfactory, the matter shall be submitted to the Central Government for orders, together with the officer's explanation and the recommendation of the Director General.

(3) The Central Government after considering the reports, the explanation, if any, of the officer and the recommendation of the Director General may call upon the officer to retire or resign and on his refusing to do so the officer may be compulsorily retired from the service with pension and gratuity if any, admissible to him."

(22) Earlier Rule 22, as already noticed, related to imposition of penalties whereas the present Rule 22 now makes a provision for dismissal or removal of person other than officer on account of misconduct. Rule 23 continues to remain as was originally worded and reads as under :—

"**23. Dismissal or removal by Central Government.**—Where the Central Government is satisfied, for reasons to be recorded in writing that—

(i) it is not reasonably practicable to follow the procedure laid down in the said rules, or

(ii) it is not expedient, in the interests of the security of the State, to follow such procedure, it may order the dismissal, or removal from the Force of a person subject to the Act without following the procedure laid down in rules 20 and 21."

(23) This Rule makes a provision when there is a move to dismiss or remove a person without following the procedure as was or is prescribed under Rules 20 and 21. There was no provision earlier made for termination of service of an employee upon his conviction by a criminal Court. A new provision in the form of Rule 23-A has been introduced with effect from 1st March, 1983 to provide for termination of service on conviction on a criminal charge. This Rule reads as under :—

"**23A. Termination of service on conviction on a criminal charge.**—When a person subject to the Act is convicted of a civil offence the competent authority may dismiss or remove him from service without holding any inquiry or issuing a show cause notice."

(24) Rule 24 regarding retirement of subordinate officer and enrolled persons and Rule 25 regarding retirement of subordinate officers and enrolled persons on the ground of physical unfitness have almost been retained in the same form as were enacted initially in the year 1969.

(25) Rule 26 relating to retirement of enrolled person on the ground of unsuitability has basically been retained as was originally enacted except for few changes in the exceptions which were there in the Rule, which appears to have been enlarged in its scope. The original as well as amended Rule 26 respectively are 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 where he consider it to be impracticable or in-expedient in the interest of security of the State to give such opportunity), retire such person from the Force.
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> 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 or showing cause (except where he considers it to be impracticable to give such opportunity), retire from the Force the said enrolled person."

(26) Rule 27 talks about retirement of subordinate officers on the ground of unsuitability. Since these are not attracted in the present case, no further reference may be needed. Another new provision has been introduced in the form of Rule 28-A, which was inserted on 29th May, 1990 and substituted again with effect from 27th June, 2003 to make a provision for allowing the person to file a petition when he feels aggrieved by any order of termination passed under this Chapter.

(27) The position that would emerge from the above noted provisions is that there was no provision made for terminating the services of an employee on the ground of his conviction on a criminal charge till such time

a provision was introduced in the form of Rule 23-A, with effect from 1st March, 1983. Amended Rule 20 provides for procedure for termination of service on the ground of misconduct and also those cases where conviction by a criminal court and Security Force Court is recorded. This provision has to be read with enabling provision of Rule 23-A now made for removing a person subject to Act on account of his conviction by a criminal Court. In such cases, necessity of issuing show cause notice is dispensed with.

(28) The power to dismiss or remove a person subject to the Act, however, could be exercised only under those provisions of the Act and the rule, which were applicable at the time when the impugned orders were passed. The amended provision in the Act and the Rules, thus, would have no applicability as these were not in existence, when the impugned orders were passed. The validity of the impugned order is required to be tested on the basis of the then prevalent provisions under the BSF Act and the Rules and not on the basis of amended rules, which have subsequently been introduced or substituted.

(29) There may be a need to make passing reference to the procedure for holding trial by Secruity Force Court under the Act. Sections 14 to 47 of the Act create various offences for which a person subject to the Act can be put to trial by various forms of Security Force Court. The provisions are also made under the Act to try person accused of offences by convening a Security Force Court. As per the amended Rules 23-A and Rule 20, a conviction by a criminal court or by Security Force Court can be a ground to terminate the services. Since, these provisions are not to apply in this case, the issue in this case will have to be tested on the basis of the rules in existence when the order was passed.

(30) The dismissal or removal on the basis of conviction or for contracting second marriage, if otherwise permissible, could be ordered under the provisions of Section 10 or 11 of the Act. If that is held permissible, then procedure as given in unamended Rules referred to above was required to be followed.

(31) If one is to consider the conviction as a ground to order removal, then one may have to construe that removal was on account of misconduct on the part of the appellant. This may be so as the order of

conviction is now dealt with under Rule 20, prescribing procedure for removal on the account of misconduct. If one is to take an act of second marriage, then it could be said that by contracting second marriage, the appellant had rendered himself ineligible or disqualified for enrollment and, thus, unsuitable for further retention in service. In that situation, the provisions of Rule 26 may get attracted, which provides that where a Commandant is satisfied that enrolled person is unsuitable to be retained in the Force, then he may, after giving such enrolled person an opportunity of showing cause (except where he considered it to be impracticable to give such opportunity) retire the said enrolled person from the Force. The respondents have not set up a case that the appellant was not required to be served any show cause notice or that it was considered impracticable to give him an opportunity as are laid down in Rule 26, referred to above.

(32) It is also to be seen whether the punitive order of removing the appellant from service could made if he was found unsuitable being ineligible for enrollment or recruitment or he was required to be retired.

(33) As already noticed, when the Act was initially enacted, no provision was made for dismssing or removing a person from service on the ground of his conviction by a Court for criminal offence. This provision subsequently has been introduced. Since this provision was not in existence, when the impugned order was passed, obviously this cannot be taken into consideration as it would then have a retrospective operation, which cannot be permitted. The validity of the impugned order is, thus, required to be tested on the basis of the provisions that were prevailing at the time when the impugned order was passed.

(34) Reference in detail has been made to the provisions of the Act and the Rules. Under Section 10 of the Act, the Central Government could order the dismissal or removal of the appellant from the service but this was subject to the provisions of the Act. This provision obviously has not been invoked as order of dismissal has been passed by Commandant. The order of dismissal, thus, could have the source of its power or authority only under Section 11 of the Act. Except for Director General, Inspector General or Deputy Inspector General of the Force, no other officer could exercise the

power and authority to pass an order under Section 11 of the Act. Though Section 11(2) of the Act appears to be an embargo on the power of any other officer to pass an order of dismissal or removal by not providing the enabling power to any officer not below the rank of Deputy Inspector General of Police but the Commandant indeed can exercise such powers being the prescribed officer. The section leaves these powers with the officer, who is so prescribed. As per Rule 177 of the Rules, Commandant is prescribed as an Officer who can dismiss or remove from service any person under his command other than officer or subordinate officer. Even if the Commandant was to exercise power under Section 11 of the Act, such exercise of powers was subject to the provisions of the Act and the Rules as given in Section 11 (4) of the Act.

(35) Admittedly, the Commandant had not invoked the enabling provisions of Section 11 to order the removal. Though a show cause notice was issued to the appellant but provisions of Rule 7 of the Rules were invoked to pass the order of dismissal. Rule 7 of the Rules is not a source of power with the Commandant to remove or dismiss a person from service. As already noticed, this Rule only provides for ineligibility and/or disqualification for enrollment. The dismissal on the ground of contracting second marriage or for conviction of a criminal offence, apparently was not separately provided under the provisions of the Act till a provision in this regard was made in the form of Rule 23-A with effect from 1st March, 1983. As already noted, this provision would not be applicable as not being in existence on the date the order was passed. This order, thus, could only be justifiably sustained under Section 11 of the Act.

(36) This cannot be taken to be a case where only wrong mention is made to the provisions applicable for invoking this power. The Commandant while passing the order has not exercised his power under the relevant enabling provision and was misconceived in directing removal of the appellant by invoking the provisions of Rule 7 of the Rules. The appellant could either be said to have become unsuitable after contracting second marriage or he could be accused of misconduct on the ground of his conviction. In the event of he being found unsuitable, the appellant could be ordered to be retired by invoking the provisions of Rule 26 of the Rules. Even if that was to be considered, the position that would emerge is that the requisite procedure

was to be followed while passing the order. Rule 26 clearly provides giving an opportunity of showing cause before passing any order under this rule is concerned. Only the order of retirement could be passed under this rule and not of removal or dismissal.

(37) The conviction appears to have not been made the basis of passing impugned order. While distinguishing the ratio of law laid down in **Gangayya Veerayya Kashinath** *versus* **Commissioner, Huvli and another, (1)** cited on behalf of the appellant, it is observed by the lower Appellate Court that "this authority is applicable only in those cases where dismissal order is based solely upon the conviction of a person in a criminal case who has been released by giving benefit of Probation of Offenders Act. However, in the present case show cause notice is issued to the plaintiff which has been proved on the file as Ex.D2. In this show cause notice, it was specifically made known to the plaintiff that since he had another wife living, which is against the conduct rules of B.S.F. Act, so it was proposed to dismiss him from service. The show cause notice issued to the appellant is as under :—

> "Whereas you have been convicted by a court of law for having two living wives and awarded punishment of one year's civil imprisonment with a fine of Rs. 1000. Smt. Gurmet Kaur is your second illegal wife. Since having another illegal wife is against the Conduct Rules as well as BSF Act and Rules. I, therefore, propose to dismiss you from service. If you have anything to urge in your defence or against the proposed action, you may do so before 5th September, 1982. In case no reply is received from you in this regard by that date it will be presumed that you have nothing to say."

(38) The reply filed to this cause notice is Ex.D3 and it was replied that he had no other wife and he is law abiding soldier. After considering this reply the order of dismissal Ex.D4 was passed. As such, it cannot be said that the order of removal of the plaintiff was passed merely bacause he was convicted by criminal court, rather he was given opportunity to explain his conduct in contracting second marriage and when the reply and explanation given by him was not found to be satisfactory only then he was

(1) 1974 (2) S.L.R. 157

dismissed from service. It is possible to say that the appellant was not dismissed on the basis of his conviction. Reason why this course was not adopted could be because of lack of enabling provision to exercise such powers.

(39) That being the factual position, it is now to be seen if the punitive order of removing the appellant from service could be passed or not. The suit filed by the appellant was dismissed only on the ground that the show cause notice issued to him was not on the basis of his conviction but on the ground that he had contracted a second marriage and thus had become ineligible as per Rule 7. That being the basis for removing the appellant from service, he was removed by way of punishment. If the Commandant was intending to dismiss or remove the appellant, the action was required to be taken under Section 11 of the Act. This mode was not adopted. The source of power to dismiss or remove was wrongly invoked and to an extent, the appellant was taken by surprise. Having become ineligible or unsuitable for enrollment or appointment and, thus, unsuitable for further retention, the appellant could be retired under Section 26 of the Act. The order of removal as passed could legally have been made only under Section 11 of the Act, which was never invoked. The impugned order, thus, would suffer from infirmity and may not be sustainable.

(40) The issue is further compounded as the appellant was subsequently released on probation. Mr. Sethi, learned Senior counsel would be justified in making reference to the law laid down in **Shankar Dass** *versus* **Union of India and another, (2)** and **The Divisional Personnel Officer Southern Railway and another** *versus* **T. R. Challapan (3).** In Shankar Dass's case *(supra),* it is held that upon his conviction of criminal charge, Government servant even if released on probation under Section 12 of the Probation of Offenders Act was still liable to be dismissed from service. However, it is held that power has to be exercised fairly, justly and reasonably. In the case before Supreme Court, it was found that the Constitution did not contemplate that a Government servant, who was convicted for parking his scooter in a 'No Parking' area should be dismissed from Government service. It was rightly observed that right to impose penalty carries with it the duty to act justly. In T.R. Chalapan's

(2) AIR 1985 S.C. 772
(3) AIR 1975 S.C. 2216

case *(supra)*, the Hon'ble Supreme Court again observed that when a penalty of removal from service was imposed on an employee on his conviction of a criminal charge of which he was released on probation, then such penalty when imposed by disciplinary authority without application of mind to the facts and circumstances, cannot be upheld. The Hon'ble Supreme Court further went on to observe that the matter can be objectively determined if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final order that may be passed by the said authority. Interpreting the word 'consider' used in Rule 14 of the Railway Servant Discipline and Appeal Rules, 1968, the Court held as under :—

> "We feel that we are not in a position to go to the extreme limit to which the Rajasthan High Court has gone. The word 'consider' has been used in contradistinction to the word 'determine'. The rule-making authority deliberately used the word 'consider' and not 'determine' because the word 'determine' has a much wider scope. The word 'consider' merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge."

(41) Thereafter, the Hon'ble Supreme Court went on to observe as under :—

> "In other words the position is that the conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction. This is a very salutary provision which has been enshrined in these rules and one of the purpose for conferring this power is that in cases where the disciplinary authority is satisfied that the delinquent employee is a youthful offender who is not convicted of any serious offence and shows poignant penitence or real repentance he may be dealt with as

lightly as possible. This appears to us to be the scope and ambit of this provision. We must, however, hasten to add that we should not be understood as laying down that the last part of Rule 14 of the Rules of 1968 contains a licence to employees convicted of serious offences to insist on reinstatement. The statutory provision referred to above merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fair-play. The disciplinary authority has the undoubted power after hearing the delinquent employee and considering the circumstances of the case to inflict any major penalty on the delinquent employee without any further departmental inquiry if the authority is of the opinion that the employee has been guilty of a serious offence involving moral turpitude and, therefore, it is not desirable or conducive in the interest of administration to retain such a person in service."

(42) On the other hand, the counsel appearing for the respondents has referred to **Harichand** *versus* **Director of School Education (4)**, where it has been observed that Section 12 of the Probation of Offenders Act would only apply in respect of disqualification that goes with the conviction under the law, which provides for the offence and its punishment. Where the law that provides for an offence and its punishment also stipulates a disqualification, a person convicted of the offence, but released on probation, does not, by reasons of Section 12, suffer the disqualification. It is then observed that it cannot be held that by reasons of Section 12 a conviction for an offence should not be taken into account for the purpose of dismissal of a person convicted from the Government service.

(43) The ratio that would emerge from these judgments, thus would be to the effect that the conviction for a criminal offence can be formed the basis of dismissal or removal from service but this power has to be exercised fairly, justly and reasonably.

(44) It may be relevant to note here some telling observations made by the Hon'ble Supreme Court in the case of **Pawan Kumar** *versus* **State of Haryana and another (5).** This was a case where termination

(4) AIR 1998 S.C. 788

(5) 1996 (4) S.L.R. 40

of a service had followed on the ground that the employee had been convicted for an offence under Section 294 IPC and was ordered to pay a fine of Rs. 20. The Hon'ble Supreme Court, thus, drew the attention of the Parliament to step in and see large many cases, which, per law and public policy, are tried summarily involving thousand and thousand of people throughout the country appearing before the Summary Court and paying small amounts of fine, more often than not, as a measure of plea bargaining. The Hon'ble Supreme Court has referred this to be a cruel result of conviction of that kind which lead to end of a career, future or present of the young and inexperienced person putting a blast to his life and his dreams. It is further observed that life is too precious to be staked over a petty incident like this and accordingly it was recommended that some immediate remedial measures necessary in raising the toleration limit with regard to petty offences when tried summarily.

(45) No doubt, in this case the entire life of the appellant has also been put to blast because of this infringement by him in his life. The appellant has tried to explain this by relating it to custom in his community and the fact that his first marriage was when he was too young. The life of the appellant, and with him that of his wife, has also been ruined with nobody to get any benefit. There may not be a justification to retain a person in service if he has violated any condition, which is an essential pre-requisite for his enrollment. The question, thus, here would be to see whether any punitive action would be called for or was otherwise permissible under law. Even if there was power available to discontinue the service of the appellant by way of dismissal or termination on the ground of his contracting a second marriage, then provision of enabling section was to be invoked and the relevant procedure followed. Show cause notice issued was not on the ground of conviction for offence for which appellant was released on probation. An act of contracting second marriage may have rendered the appellant unsuitable, ineligible or disqualified for further continuing in service but he could have been removed from service only after following proper procedure, which was not done. Other options under Rule 20 were also open and the appellant could have been either dismissed, removed, retired or called upon to resign. These options were concededly not even considered. The power to dismiss the appellant may be available with the Commandant being the Prescribed Officer to exercise power under Section 11(2) but this could have been so exercised by invoking the procedure as prescribed

under Rule 20 of the Rules. The impugned order having been passed by invoking a wrong provision, which did not leave any power with the Commandant to pass an order of dismissal or removal as such, cannot be sustained either in law or in equity.

(46) The order of dismissal passed against the appellant can, thus not be sustained. The legal issues and the substantial question of law arising in this case gave apparently escaped notice of the Courts below. The substantial question of law in regard to violation of the procedure and the effect thereof or the power to dismiss an employee under the Act on the ground of his conviction would arise in this case, which has not been considered and decided.

(47) The question now to be seen is as to what relief is to be granted to the appellant. The impugned order of dismissal, of course is required to be set-aside and it is so ordered. It cannot be denied that the appellant either on account of his conviction for an offence, (though released on probation) or account of contracting second marriage, had rendered himself disqualified or ineligible for employment in the Disciplined Force like Border Security Force. The appellant had, thus, rendered himself unsuitable for his being retained in the service. Appropriately, the Commandant, thus, could have validly order his retirement on the ground of unsuitability for which he had the necessary power under Rule 26 of the Rules. The show cause notice issued to the appellant would clearly show that the reason to find the appellant unsuitable for retention was his second marriage and not his conviction, which was for an offence under Section 494 IPC. Rule 7 of the Rules was invoked which provides for ineligibility of a person for appointment on the ground of second marriage. The Commandant, thus, intended to exercise his power to retire the appellant which he could have validly directed on the ground of unsuitability of the appellant to continue in service. Thus, while setting aside the order of removal, it is ordered that the appellant would be deemed to have retired from the date he was ordered to be removed from service and as a consequence of his retirement, he would be entitled to receive all the retiral benefits that would accrue to him on the basis of the service rendered by him.

(48) Regular Second Appeal is allowed. Let the amended decree be prepared by Registry of this Court.

R.N.R.