
(2023) 05 GAU CK 0006

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1739 Of 2012

Hirok Jyoti Das

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 02-05-2023

Acts Referred:

Border Security Force Rules, 1969 — Rule 172, 173(8), 174, 174(2)
Border Security Force Act, 1968 — Section 62

Citation : (2023) 05 GAU CK 0006

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : H Bezbaruah

Final Decision : Disposed Of

Judgement

1. Heard Mr. R. Mazumdar, learned counsel appearing for the writ petitioner. Also heard Ms. B. Sarma, learned Central Govt. Counsel appearing for the respondents.

2. The writ petitioner herein, who is an ex-Border Security Force (BSF) Constable, has approached this Court by filing the present writ petition assailing the order dated 12.11.2009 passed by the Commandant of the 27th Battalion, BSF, dismissing the petitioner from service inter-alia contending that the provisions of Rule 173(8) of the Border Security Force Rules, 1969 has not been followed in this case and therefore, the impugned order as well as the enquiry proceeding which had commenced on 05.09.2009 stands vitiated in the eye of law.

3. The facts of the case, in a nutshell, are that the petitioner had joined as a Constable in the BSF in the year 2004. While in service, the petitioner had to avail 15 days casual leave with effect from 01.06.2009 to 20.06.2009 with two days in between viz. 7th and 14th June being Sundays and 18th to 20th of June being the joining period. The petitioner claims that he was not keeping well on

being diagnosed of being suffering from hepatitis, associated with malaria and was advised bed rest for the period till 12.12.2009. However, the Commandant i.e. the respondent No.4 was of the view that the petitioner had overstayed his leave and accordingly, ordered a One-Man Court of Enquiry so as to enquire into the reason for such over stay. The Court of Enquiry assembled on 05.09.2009 and after examining five witnesses and 11 documents, had come to an opinion that the petitioner may be declared as a deserter and disciplinary action be initiated against him including issuance of apprehension rule for recovery of the I-Card. Consequently, follow up action was initiated which had culminated in the order of dismissal from service dated 12.11.2009. The appeal preferred by the petitioner against the order of dismissal from service was rejected by the appellate authority by order dated 07.12.2010 pursuant where to, the petitioner had submitted a representation before the Director General of BSF viz. respondent No.2 on 10.01.2011. However, the said representation was not entertained by the respondent No.2 on the ground that the matter was already closed. Situated thus, the petitioner has approached this Court by filing the instant writ petition.

4. Mr. Mazumdar, learned counsel for the petitioner has argued that the proceedings in the Court of Enquiry was conducted without serving any notice or giving the petitioner an opportunity of being heard in the matter and hence, the same was in clear violation of the provisions of Rule 173(8) of the BSF Rules, 1969. Contending that the case of the petitioner is covered under the decision of this Court rendered in the case of Satish Kumar (Force No.970027836 Ex ASI/ Ministerial) vs. Union of India and others reported in 2018 Legal Eagle (GAU) 780 wherein, a similar procedure adopted against another BSF Constable in violation of Rule 173(8) of the Rules 1969 was set aside by the learned Single Judge and a direction was issued to reinstate the constable back in service with liberty to initiate de novo Court of Enquiry against the delinquent. Mr. Mazumdar submits that since the proviso to Rule 173(8) was inserted with effect from 25.11.2011, the same would not have any retrospective application in this case in view of the fact that the Court of Enquiry was commenced on 05.09.2009 i.e. before the insertion of the proviso.

5. Ms. B. Sarma, learned Central Govt. Counsel appearing for the respondents has invited the attention of this Court to the statements made in the counter-affidavit in paragraph 6 and submits that in the present case a notice was issued to the petitioner but despite receipt of the same he did not reply to the notice sent by the authorities. As such, the ratio of the law laid down in the case of Satish Kumar (supra) would not be applicable in this case. The learned Central Govt. Counsel has also obtained instruction in response to a query made by this Court as recorded in the order dated 25.04.2023 and submits that the decision of the Court rendered in the case of Satish Kumar (supra) has been implemented by the authorities and the concerned BSF constable had been reinstated in service in terms of the order of this Court.

6. After hearing the submissions of the learned counsel for both the sides, the core issue that arises for consideration in this case is as to whether, there was any duty upon the Court of Enquiry to give an opportunity of being heard to the petitioner under Rule 173(8) of the BSF Rules, 1969. The aforesaid issue has been decided by the learned Single Judge in case of Satish Kumar (supra). The relevant observations made in the said decision are reproduced herein below for ready reference :-

"10. A perusal of Rule 173 of the BSF Rules, 1969 shows that the proviso to Rule 173 (8) has been inserted by S.O. 2628 (E) dated 25.11.2011. In the present case, the Court of inquiry had been held on 27.10.2008 and concluded on 01.11.2008, prior to insertion of the proviso to Rule 173 (8). Accordingly, the proviso to Rule 173 (8) is not applicable to the present case.

11. Rule 174 (2) clearly states that "in addition to a Court of inquiry required to be held under Section 62." The above clearly shows that Rule 173 & 174 (chapter XIV) of the BSF Rules, 1969 would be applicable to a Court of inquiry held under Section 62 of the BSF Act, 1968.

12. In view of the above facts, it is clear that it was mandatory on the part of the respondents to have issued a Show Cause Notice to the petitioner informing him that a Court of Inquiry was to be held against him and he was to have been made aware of all the charges that were framed against him so as to enable him to participate in the COI. The same not having been done, the entire proceedings in the Court of Inquiry and the consequential findings and decisions made stood vitiated. The consequence of the same is that the dismissal Order dated 19.10.2009 also stands vitiated. Accordingly, in view of the reasons stated above, the Order dated 19.10.2009, issued by the respondent No. 4 dismissing the petitioner from service is hereby set aside along with any consequential orders. The petitioner should accordingly be reinstated into service by the respondents.

13. This Court is not passing any directions with regard to any consequential benefits, entitlements or continuity of service of the petitioner in view of the fact that the Apex Court in the case of Metropolitan Transport Corporation Vs V. Venkatesan, reported in 2009 9 SCC 601, has held that there is a misconception that whenever reinstatement is directed, continuity of service and consequential benefits should follow, as a matter of course. The above being said, the respondents are given the liberty to initiate a de novo Court of inquiry against the petitioner after giving him notice of the proposed Court of Inquiry. The entitlements or consequential benefits of the petitioner, if any, will be made subject to the outcome of the Court of Inquiry, if the same is held against the petitioner. It is needless to add that a COI can be held in the absence of the petitioner, if the petitioner does not appear in the proposed COI after notice is issued to him."

7. In the present case also, the enquiry was evidently held under Section 62 of

the Border Security Force Act, 1968 and the procedure that was required to be followed in the matter was laid down in Rule 173 of the Rules of 1969. Rule 173(8) of the Rules of 1969 enjoins a duty upon the authorities to give an opportunity to the constable of being heard in the matter. However, no such opportunity was admittedly given to the petitioner in this case. It may be correct that some notice was served upon the petitioner but that was after the Court of Enquiry was concluded and the opinion was given by the Court of Enquiry against the petitioner. Service of notice at that stage, in the opinion of this Court, would not be in compliance of the mandate of Rule 173(8) of the Rules of 1969. What is required under the Rules is an opportunity of being heard at the stage of the enquiry and not after conclusion of the same. In view of the above, this Court is of the opinion that the case of the petitioner is squarely covered by the decision rendered in the case of Satish Kumar (supra).

8. The impugned order dated 12.11.2009 is therefore, set aside. The respondents are directed to reinstate the petitioner back in service whereafter, they would be at liberty to proceed de novo against the petitioner after complying with Rule 173(8) of the Rules of 1969. Since this is a very old matter and the petitioner has remained out of service for more than 10 years, hence, it is ordered that the necessary steps under this order be taken, as expeditiously as possible, but not later than four weeks from the date of receipt of a certified copy of this order. Needless to say, since this Court has granted liberty to the respondents to initiate de novo enquiry, the provisions of the Rules, in force as on date, would only be applicable in this case.

With the above observation, the writ petition stands disposed of.