

(2011) 07 UK CK 0016

In the Uttarakhand High Court

Case No : Writ Petition No. (SS) of 194 of 2010

Pooran Singh Bisht

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-07-2011

Acts Referred:

Constitution of India, 1950 — Article 309, 310, 311, 311(2)
Penal Code, 1860 (IPC) — Section 307

Citation : (2012) 2 UC 1203

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Yogesh Pacholia, for the Appellant; V.B.S. Negi, Assistant Solicitor General of India, for the Respondent

Judgement

Sudhanshu Dhulia, J.—Heard Mr. Yogesh Pacholia, Advocate for the petitioner and Mr. V.B.S. Negi, Assistant Solicitor General of India for the respondents. The petitioner was a constable in Central Industrial Security Force (From hereinafter referred to as CISF). At the relevant time, he was posted for quarter guard duty at CISF Unit Oil and Natural Gas Corporation Campus, Dehradun. On the night of 17.9.2009 while the petitioner was on duty, the petitioner had some scuffle with another constable of CISF namely, D.K. Chand. It is alleged, that the petitioner fired from his rifle and consequently D.K. Chand sustained injuries on his chest. Consequently an FIR was also lodged u/s 307 in which a chargesheet has been filed and the petitioner is presently facing trial in Dehradun. Meanwhile the petitioner has been dismissed from service vide order dated 23.9.2009 by the Senior Commandant CISF Unit BHEL, Haridwar (Annexure No. 1 to the writ petition). Evidently, the order has been passed by invoking powers under Rule 39 of the Central Industrial Security Force Rules, 2001 which reads as follows:-

39. Special procedure in certain cases.- Notwithstanding anything contained in rules 36 to 38-

(i) where any penalty is imposed on an enrolled member of the Force on the

ground of conduct which has led to his conviction on a criminal charge: or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the enrolled member of the Force may be given an opportunity of making representation against the penalty proposed to be imposed before any order is made in case under clause (i).

2. The powers given to the authority under the said rule is para materia to the provisions of Article 311 of the Constitution of India. Article 311 of the Constitution of India reads as follows:-

311. Dismissal, Removal or reduction in rank of persons employed in civil capacities under the Union or a State. - (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply-

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

3. Though the petitioner is not a member of civil service yet the rules which are applicable to him carry the same principle on which there is a catena of decision by the Hon"ble Apex Court and by the Hon"ble High Courts. Rule 36, 37 and 38 of 2001 Rules provide for a procedure before a penalty is imposed on an enrolled member of the force (i.e. CISF). However, exception is given in Rule 39 of 2001 Rules where is three reasons the procedure as contemplated in Rules 36, 37 and 38 can be dispensed with. These contingencies are - (a) where any penalty is imposed on an enrolled member of the Force on the ground of conduct which has led to his conviction on a criminal charge, (b) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules and (c) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit. In the present case, while dismissing the petitioner from services what has been invoked is Rule 39(ii). In other words, the services of the petitioner have been dismissed without having holding any departmental proceedings on the ground that according to the disciplinary authority, he is satisfied that holding a departmental enquiry by serving a charge sheet and following the due procedures in the manner as prescribed in rules 36, 37 and 38 of CISF Rules, 2001 is practicably impossible. All the same, a perusal of the impugned order dated 23.9.2009 shows that no such reasons have been assigned by the concerned authority before invoking power under Rule 39(ii) of 2001 Rules. The order only states as follows:-

AND WHEREAS, I am satisfied that under the circumstances any attempt to hold departmental enquiry by serving a charge sheet and following due procedures in the manner as prescribed in the rule 36, 37 and 38 of CISF Rules, 2001 is practicably impossible.

4. These are bald reasons and cannot be taken as "reasons to be recorded in writing", where a proper enquiry or a disciplinary proceeding has been dispensed with under Rule 39(ii) of 2001 Rules and there has been no compliance of Rule 39(ii) where a disciplinary authority has to satisfy "for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules". All the authority concerned, in the present case has stated that "it is practicably impossible to hold such inquiry". In other words, no reasons as envisaged under the law have been given. This is not permissible under the law. The seminal case on this aspect is the case of Union of India and Another Vs. Tulsiram Patel and Others, which is a decision of Constitution Bench of the Hon"ble Supreme Court which presently holds the law on the subject. In Tulsiram Patel case, the Constitution Bench of the Hon"ble Supreme Court had an occasion to examine and interpret Articles 309, 310 as well as 311 but more particularly Article 311(2) and the second proviso particularly in the light of the 42nd Amendment. Although, by and large, the orders impugned in the case where the authorities had dispensed away with the inquiry and the disciplinary

proceedings were upheld. The majority Judges had observed that clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and more particularly the principle of "audi Alteram Partem" by providing that a civil servant shall not be dismissed or removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given reasonable opportunity of hearing in respect of those charges. This safeguard provided for a civil servant under clause (2) of Article 311 is taken away when the second proviso to that clause becomes applicable. However, the majority of Judges had also pointed out that the most important aspect to be borne in mind is that the second proviso will apply only where the conduct of the government servant is such that he deserves dismissal, removal or reduction in rank and before denying a government servant his constitutional right to an inquiry. The first consideration would be whether the conduct of a government servant is such as justifies the penalty of dismissal, removal or reduction in rank and only after such a conclusion is reached, the conditions specified in the second proviso become applicable, as it has already been referred above. The Hon"ble Apex Court in Tulsiram Patel case (supra) stated as under:

134. It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore, find a place in the final order. It would be usual to (sic) the reason separately and then consider the question of the penalty to be imposed and pass the order imposing the penalty. It would, however, be better to record the reason in the final order in order to avoid allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances.

5. The procedure adopted by the authorities in the present case, does not meet the requirement of Article 311 of the Constitution of India or Rule 39 of 2001 Rules. It is in violation of the paradigm set in the Tulsiram Patel's case (supra) as well.

6. This Court in a similar case, namely, Constable 268 A.P. Dharmendra Rathi Vs. State of Uttaranchal and Others, , though related to a constable of the police department, has held such an order as bad.

7. The facts of this case have already been stated above. The appointing authority of the petitioner vide order dated 23.9.2009 while dispensing with the disciplinary proceedings against the petitioner and taking recourse to Rule 39(ii)

of 2001 Rules has passed, inter alia, the following orders:

8. AND WHEREAS, CISF No. 894502309 Constable P.S. Bisht by his extreme act of indiscipline and by creating an atmosphere of fear in the CISF Unit has not only indulged in an act of extreme indiscipline but has also rendered himself unworthy of any further continuance in the Force.

9. AND WHEREAS, I am satisfied that under the circumstances any attempt to hold departmental enquiry by serving a charge sheet and following due procedures in the manner as prescribed in the rule 36, 37 and 38 of CISF Rules, 2001 is practicably possible.

10. AND WHEREAS, on consideration of the facts and circumstances of the case and also the fact that he has been awarded punishments on 11 different occasions in the past for various acts of omission and commission. I am of the view that the penalty of Dismissal from Service should be imposed upon CISF No. 894502309 Constable P.S. Bisht.

11. NOW, THEREFORE, in exercise of the powers conferred by sub-rule (ii) of Rule - 39 of CISF Rules 2001, I hereby order that CISF No. 894502309 Constable P.S. Bisht be Dismissed from service with immediate effect.

8. A bare perusal of the said order shows that there has not been the compliance of the provision of Rule 39(ii) of 2001 Rules as well as Article 311 of the Constitution of India. What were the compelling reasons for the appointing authority to dismiss the petitioner from service without giving him an opportunity of hearing or show cause has not been explained at all.

9. In view of the law already discussed above, writ petition is allowed. Order dated 23.9.2009 (Annexure No. 1 to the writ petition) passed by the Senior Commandant CISF Unit, BHEL, Haridwar and order dated 5.3.2010 (Annexure No. 2 to the writ petition) passed by the appellate authority are hereby set aside. No order as to costs.