

**(2015) 09 J&K CK 0005**  
**In the Jammu And Kashmir High Court**  
**Case No : SWP No. 1133 of 2003**

Yar Mohd. Khan

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision :** 02-09-2015

**Acts Referred:**

Border Security Force Act, 1968 — Section 11(2), Section 19  
Border Security Force Rules, 1969 — Rule 173(8), Rule 177, Rule 22(2)

**Citation :** (2016) 2 JKJ 424

**Hon'ble Judges :** Mr. Mohammad Yaqoob Mir, J.

**Bench :** Single Bench

**Advocate :** Mr. Satinder Singh with Ms. Bumika and Mr. J.K. Verma, Law Officers, for the Respondents; Petitioner Present In Person, for the Appellant/Petitioner

**Final Decision :** Allowed

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## Judgement

Mr. Mohammad Yaqoob Mir, J. - Petitioner seeks quashment of the order dated 20th July, 2001 passed by respondent No. 3, in terms

whereof, petitioner has been dismissed from service with effect from 20.07.2001 under Section 11(2) of Border Security Force Act, 1968 read

with Rule 177 of Border Security Force Rules, 1969. The period of unauthorized absence from 29th March, 2001 to 20.07.2001 has been

treated as dies-non. Furthermore, an amount of Rs. 320/- on account of cost of deficient Government kit/clothing has been directed to be

recovered from his dues.

2. Basically petitioner was appointed as Constable in B.S.F in the year 1997. On 8th March, 2001, he had proceeded on leave which was

sanctioned for a period of 15 days but thereafter he has not returned, as such, has remained absent. On 3rd April, 2001, a letter has been sent to

him by the respondents informing him that he was granted 15 days casual leave with effect from 09.03.2001 to 28.03.2001, therefore, was

required to rejoin in the forenoon of 29.03.2001 which he failed, as such, overstayed. He has been directed to rejoin duties forthwith otherwise

necessary disciplinary action will be initiated as per B.S.F. Act and rules.

3. Petitioner seem to have responded by sending a request letter to the respondent No. 3 on 27th April, 2001 stating therein that his parents are in

old age, his mother is blind suffering from heart problem, he being the only person at home to look after his old aged parents, on such basis has

requested that he wants to leave the job. This letter of request has been responded by the respondent-authorities vide its letter dated 14th May,

2001 addressed to the petitioner asking him to rejoin duty forthwith as before accepting the resignation he has to deposit the training charges and

other clearances from the unit as per rules. Then again vide letter dated 4th June, 2001, petitioner has been directed to rejoin duty forthwith as

before accepting his resignation he has to deposit training charges and other clearance from the unit as per rules.

4. On 17th May, 2001, petitioner is shown to have conveyed to the respondent No. 3 that his parents being in old age so he shall not be in a

position to resume the duties as he is only one to look after the old parents. Again has stated that he wants to resign and hoped that the respondent

No. 3 will consider his application sympathetically.

5. Faced with the aforesaid position of the petitioner, vide order dated 1st June, 2001, Shri Atul Vyas (AC) has been detailed to conduct One

Man Court of Enquiry to investigate into the circumstances under which petitioner from 15 days casual leave ""has not rejoined.

(emphasis added)

6. The Court of Enquiry after concluding the proceedings is shown to have submitted the report to the respondent No. 3(Commandant) on 15th

June, 2001. In the proceedings so recorded on 6th June, 2001, it is recorded as under:

Composition of the Court: Atul Vyas, Astt. Comdt., 72 Battalion, BSF.

The Court having been assembled to above order proceeds to examine and record the statements of relevant witnesses.

The list of witnesses comprises of four witnesses whose statements have been

recorded. Then after recording findings, opinion has been framed under the caption ""Opinion of the Court"", wherein amongst other things it is recorded as under:

Disciplinary action under BSF Act and rules be taken against the individual.

7. The Commandant(respondent No. 3) on receiving opinion of the Court of Enquiry has issued show cause notice dated 17th June, 2001 where-

under petitioner has been informed that he has been absenting with effect from 29.03.2001 without any reasonable cause. After considering the

reports relating to his absence, satisfaction has been recorded that the trial by a Security Force Court is impracticable and at the same time it has

been mentioned that the Commandant is of the opinion that further retention of the petitioner in service is undesirable and has concluded that he

tentatively proposes to dismiss the petitioner from service. If he has anything to urge in defence against the imposition of the proposed penalty,

same shall be done within a period of 30 days. In case no reply is received within the stipulated period, it would be presumed that the petitioner

has no defence to put forward and ex parte decision will be taken in the matter.

8. Finally, vide order dated 20th July, 2001, petitioner has been dismissed from service under Section 11(2) of the BSF Act 1968 read with Rule

177 of the BSF Rules, 1969.

9. It is projected by the learned counsel for the petitioner that the respondent-authorities have not followed the procedure and the law as was

required to be followed, therefore, entire proceedings, both of the Court of Enquiry as well of the disciplinary authority (Commandant) are bereft

of legal sanctity.

10. While hearing learned counsel for the parties in detail on 2nd September, 2001 i.e. yesterday, learned counsel for the respondents was

pointedly asked to show as to whether procedure prescribed under Rule 173 of the BSF Rules has been followed and then as to whether

disciplinary authority while proposing punishment did abide by the procedure prescribed under Rule 22 of the BSF Rules. Case, as such, was kept

on board. Today learned counsel is assisted by two law officers who produced the Court of Enquiry record and rendered useful assistance.

According to learned counsel for the respondents, there was no scope for adhering to Rule 173(8) of the BSF Rules by the Court of Enquiry or of

Rule 22 by the disciplinary authority. When petitioner did not respond to various letters, the disciplinary authority was constrained to appoint Court

of Enquiry. There was no scope or chance for Court of Enquiry to adhere to the referred rules in view of conduct and absence of the petitioner.

Learned counsel further added that case of the petitioner is governed by Section 62 of the BSF Act, 1968 and the Court of Enquiry had a limited

role to ascertain the cause for absence as well as for deficiency, if any.

11. In opposition, learned counsel for the petitioner again highlighted that the act of the petitioner would fall within the ambit of Section 19(b) of the

BSF Act as, admittedly, he had overstayed the leave granted to him.

12. Section 11(2) of the BSF Act and Rule 177 of the BSF Rules cloth the authorities with the power to impose punishment but the basic question

is that before invoking such power, whether there could be any substitute for not adhering to the rules and the provisions governing conduct of

Court of Enquiry as well as proposed punishment. The answer has to be in negative.

13. Keeping in view case of the petitioner in the factual background, as admitted, the first course available to the respondent-authorities was to

proceed against the petitioner in accordance with Section 19 of the BSF Act i.e. for such act of overstaying the period of leave Security Force

Court could be held and conviction could be recorded which course has not been adopted. Perhaps in the understanding of the respondent-

authorities, such course was impracticable in view of absence of the petitioner but such theory cannot be accepted. The respondent-authorities had

taken various steps which have not fructified but some more steps could be taken for securing presence which have not been. Be it as it is, when

the Security Court proceedings are not held nor same position is under challenge, such issue is not required to be looked into.

14. Now coming to the important position i.e. holding of Court of Enquiry. The records as produced by the learned counsel are suggestive of the

fact that the Court of Enquiry has been held in absentia and no notice at all is shown to have been issued to the petitioner from the date said

proceedings have commenced. Then another glaring defect is that when the Court of Enquiry has recorded opinion under the captioned ""Opinion

of the Court"" what was to be done is that Rule 173(8) was required to be

observed. Rule 173(8) of BSF Rules, for facility of reference is reproduced here-under:

(8) Before giving an opinion against any person subject to the Act, the court will afford that person the opportunity to know all that has been

stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

The lucid language of the referred sub-rule would suggest that the Court of Enquiry before giving an opinion was required to afford petitioner an

opportunity to know all that has been stated against him, has a right to cross examine any witness who have given evidence against him, to make a

statement and call witnesses in his defence. From the records of the proceedings of the Court of Enquiry it appears that sub-rule (8) of Rule 173 of

the BSF Rules has remained to be complied with, so a legal flaw i.e. violation of principles of natural justice. Formation of opinion by the Court of

Enquiry is to the prejudice of the petitioner. In case petitioner would have been put on notice, he would have opted to cross examine the witnesses

and would have opted to produce witnesses in his defence.

15. Contention of the learned counsel for the respondents is that when petitioner was not inclined to resume his duties and had requested for

accepting his resignation, there was no requirement of putting the petitioner on notice. The contention is without merit as the request for acceptance

of resignation was prior in point of time i.e. prior to the commencement of Court of Enquiry proceedings. The Court of Enquiry was bound by the

rules and was to observe spirit of Rule 173 of the BSF Rules. Absence or non-response of the petitioner prior to the commencement of enquiry

proceedings can't be an excuse for not adhering to Rule 173.

16. Again the disciplinary authority while issuing the show cause notice proposing punishment has also erred in not following the mandate of Rule

22 of the BSF rules, 1969. Sub-rule (2) of Rule 22, for facility of reference is relevant to be quoted:

When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is

inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all

reports adverse to him and he shall be called upon to submit, in writing, his

explanation and defence:

Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion, its disclosure is not in the public interest.

(Emphasis supplied)

When respondent No. 3, in the show cause notice, had formed opinion that the retention of petitioner in service is not desirable, then he was

mandatorily required to inform the petitioner together with reports adverse to him and to ask him to submit, in writing, his explanation and defence.

In the show cause notice dated 17th June, 2001, nowhere it has been mentioned that the reports adverse to the petitioner i.e. report of Court of

Enquiry, statements of witnesses recorded which were adverse to him, have been sent to him so as to enable him to respond to the show cause

notice proposing punishment.

17. Another interesting position as emerged is that on 17th June, 2001 show cause notice proposing punishment is shown to have been signed and

the petitioner has been asked to say whatever he has in defence within 30 days. On 20th July, 2001, the order of punishment has been passed. It is

nowhere mentioned as to by which mode show cause notice had been sent to the petitioner, a resident of far off village of District Kupwara, and as

to whether it had reached to him or not, only then period of 30 days could be counted. Without waiting for any response, in haste final order of

punishment has been passed.

18. When Court of Enquiry has fallen in error by not adhering to Rule 173 of the BSF Rules, could opinion of the Court of Enquiry be read against

the petitioner. Answering has to be no.

19. Disciplinary authority has also erred on two counts, first, requirement of sub-rule (2) of Rule 22 of the BSF Rules has not been adhered to, and

second respondent-authorities have not derived any satisfaction as to whether show cause notice of proposed punishment had actually reached to

the petitioner.

20. In the totality of the circumstance's, the order of dismissal impugned dated 20th July, 2001 is set aside. Respondents are at liberty to proceed

from the point of commencement of proceedings of the Court of Enquiry, if they

so choose. In the process all the provisions of BSF Act and the

Rules framed there-under shall be strictly adhered to. Otherwise to pass appropriate orders for taking the petitioner back into service. If so done,

salary for the period he has been out of service shall not be allowable but the period shall be counted for pension.

21. Petition, accordingly, succeeds so shall stand disposed of.

22. Record as produced by the learned counsel for the respondents is returned to him.