GAHC010025952015

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/7146/2015

NO.134502953 CONSTABLE/COOK KOMAL
S/O LT. GIRIJA PRASAD, R/O KUTUBPUR UJIYAR, P.O. KORANTADIH, P.S. NARHI, DIST- BALLIA, U.P., PIN-277501

VERSUS

THE UNION OF INDIA and 4 ORS
REP. BY ITS SECY., MINISTRY OF HOME AFFAIRS, NEW DELHI

2:THE DIRECTOR GENERAL OF B.S.F.
10TH BLOCK
CGO COMPLEX
LODHI ROAD
NEW DELHI-3

3:THE INSPECTOR GENERAL
FRONTIER HEAD QUARTER
B.S.F. GUWAHATI-1
ASSAM

4:THE COMMANDANT
57BN
BSF
PRAHARI NAGARI
ARAI MILE
WEST GARO HILLS
TURA
MEGHALAYA

5:THE COMMANDANT
BSF TRANSIT CAMP

KAMAKHYA
GUWAHATI
ASSAM
PIN-78101

Advocate for the Petitioner : MR.H BEZBARUAH

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri R. Mazumdar
Advocates for the respondents : Shri RKD Choudhury, ASGI

Date of hearing : **13.09.2022**
Date of Judgment : **20.09.2022**

JUDGMENT & ORDER

The writ jurisdiction of this Court has been sought to be invoked by the petitioner in respect of an order of dismissal from service dated 18.04.2015. It is the case of the petitioner, who was a Constable (Cook) in the BSF that such dismissal does not have the legal sanctity and has been passed without affording the minimum opportunity to the petitioner. On the other hand, the authorities have contended that there is no violation of the law holding the field and therefore, the impugned action does not sustain from any legal infirmity.

2. Before coming to the issue which has arisen for determination in this case, it would be convenient to state the facts of the case in brief.

3. The petitioner was appointed as a Constable (Cook) in the Border Security Force (BSF) on 24.01.2013 and was posted at 25 Bn. in New Delhi. In the month August-September, 2014, he was posted under the Commandant 57 Bn., BSF,

Praharinagar, West Garo Hills, Meghalaya. At that time, the petitioner had availed Casual Leave from 04.10.2014 to 25.10.2014. However, just prior to expiry of the said leave period, the mother of the petitioner had expired and the petitioner claims to have informed about the same to the authorities, subsequent to which, the Casual Leave was cancelled and transformed to Earned Leave from 04.10.2014 to 08.11.2014. The petitioner had projected that on 09.11.2014, he was diagnosed with Typhoid and Jaundice as a result of which, the petitioner was advised bed rest till 29.05.2015 on which date the petitioner was declared to fit.

4. On 30.05.2015, the petitioner had reported back to his place of posting. However, the petitioner has alleged that he was not allowed to join and rather on 28.06.2015 the petitioner had received an order of dismissal dated 14.04.2014. The said order was served upon the petitioner by the concerned Police Station.

5. Against the aforesaid order of dismissal, the petitioner had preferred an appeal on 20.07.2015 and thereafter the preset writ petition has been filed whereafter, on 24.11.2015, the appeal has been dismissed.

6. I have heard Shri R. Mazumdar, learned counsel for the petitioner. I have also heard Shri RKD Choudhury, the learned Assistant Solicitor General of India appearing for all the respondents, who has also produced the relevant records.

7. Shri Mazumdar, learned counsel for the petitioner has opened his arguments by submitting that he could learn from the pleadings, more specifically the affidavit-in-opposition dated 03.03.2016 of the respondent that a Court of Inquiry was constituted on 28.12.2014. To formulate the grounds of challenge, the learned counsel has referred to the following provisions of the Border Security Force Rules, 1969 (hereinafter called the Rules) which are extracted hereinbelow-

> "***171. Assembly***.- *A Court of inquiry may be assembled by order of a Commandant or any officer or authority superior to the Commandant.*

173. Procedure of Courts of inquiry.-

(i) …..

…..

(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.

…

[Provided that this provision shall not apply when such inquiry is ordered to enquire into a case of absence from duty without due authority.]

….."

8. It is contended that the aforesaid Rules come under Chapter XIV which deals with "Court of Inquiry". By referring to the Convening Order dated 28.12.2014 which is annexed as Annexure R5 in the affidavit-in-opposition, learned counsel for the petitioner has submitted that the said order of convening a Court of Inquiry has been issued by the Deputy Commandant (ADJT). The contention made is that a Court of Inquiry can be assembled only by an order of the Commandant or any Officer / Authority superior to the Commandant. However, in the instant case, apparently the Convening Order has been issued by the Deputy Commandant and therefore, the same suffers from jurisdictional error and accordingly not sustainable in law.

9. The learned counsel for the petitioner further submits that the aforesaid Convening Order was issued on 28.12.2014 which was a Sunday which itself raises a serious doubt on the *bona fide* of the respondent authorities as no case of any urgency was there.

10. Shri Mazumdar, learned counsel further submits that under Rule 173(8), there is

an obligation to afford the affected person an opportunity to know all that has been stated against him, cross-examine any witness, who has deposed against him, and make a statement and call witness in his defence. The proviso however lays down an exception of dispensing of with such requirement in case of absence from the duty without due authority. Shri Mazumdar, the learned counsel however contends that the said proviso is not applicable which would be apparent from the conduct of the respondents as well as from the sequence of events.

11. By referring to Annexure R7 of the affidavit-in-opposition, Shri Mazumdar, the learned counsel has submitted that the show cause notice was issued on 14.02.2015 which was never received and thereafter the order of dismissal was passed on 18.04.2015, which was received on 28.06.2015 as would be evident from the signature and date of the petitioner as an acknowledgement of receipt. The learned counsel has emphasised that apart from the order of dismissal dated 18.04.2015, none of the official documents have been received by the petitioner and the so called procedure had proceeded *ex-parte qua* the petitioner. The appeal was dismissed vide the order dated 24.11.2015 by the appellate authority.

12. Shri Mazumdar, learned counsel for the petitioner argues that the present is a case of overstay of leave and not a case of unauthorized absence. In this connection, attention of this Court has been drawn to Section 19 of the Border Security Force Act, 1968 (hereinafter called the Act) wherein the offence of absence without leave has been explained. Section 19(a) contemplates a situation of being absent without leave and under Section 19(b) it is a case where without sufficient cause, overstay leave granted to him. The learned counsel has submitted that when the statute itself has made a distinction between the two concepts of overstay of leave and unauthorized absence, the petitioner has to be treated under the proper category of overstay in leave.

13. It is accordingly submitted that the impugned order of dismissal from service

dated 18.04.2015 and the consequential order dated 24.11.2015 by which the departmental appeal has been rejected are liable to be interfered with and with a direction to reinstate the petitioner in accordance with law.

14. In support of his submission, Shri Mazumdar, the learned counsel has placed reliance upon before this Court the following case laws-

i. 1982 (1) GLR 664 [S.K. Mazumdar Vs. Union of India and ors.

ii. 2007 (4) GLR 830 [Md. Irfan Ali Vs. Union of India]

iii. (2012) 3 SCC 178 [Krushnakant B. Parmar Vs. Union of India and ors.

15. In the case of ***SK Mazumdar*** (supra), a Division Bench of this Court while interfering with the order of removal from service, the following observations have been made in the judgment which are quoted hereinbelow-

> "*Even if there had been no rules, I should have though that the demand of natural justice was that the points raised in the memorandum of appeal should have been properly considered and due weight given by the appellate authority has disposed of the appeal amounts to no consideration of the appeal at all.*
>
> *We are in respectful agreement with the above observation of the Division Bench of this Court and we find that in the case in hand also the appellate authority did not consider the appeal in its proper perspective giving due weight on the grounds raised in the appeal by the petitioner."*

16. In the case of ***Md. Irfan Ali*** (supra), this Court was dealing with a similar case of overstay which had culminated in an order of dismissal from service. While interfering with the same, the following has been held-

> "*16. Keeping in view the mitigating circumstances as narrated by the petitioner which have also been admitted by the respondents to the effect that*

he had to over stay due to his serious illness and also due to premature death of his minor son, this Court is of the considered view that punishment of dismissal for such unauthorized overstay is shocking the conscience of the Court and accordingly the competent authorities is directed to reconsider their decision as regards the quantum of punishment to be inflicted upon the petitioner save and except the dismissal from service."

17. In the case of ***Krushnakant*** (supra), the Hon'ble Supreme Court had set aside the order of dismissal on the ground that if there is an allegation of unauthorized absence, the disciplinary authority is required to prove that the absence is wilful and without from such finding such absence would not amount to misconduct. For ready reference paragraphs 16, 17 and 18 are extracted hereinbelow-

"***16.*** *In the case of the appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.*

17. *If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.*

18. *In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct."*

18. *Per contra,* Shri Choudhury, learned ASGI has submitted that the entire issue of dismissal of the petitioner from his services as Constable (Cook) has to be examined from the perspective that the BSF is a disciplined force where strict rules of discipline are to be maintained. He contends that the present was not a case of overstay of leave but of unauthorized absence and therefore the procedure was adopted by following the due process of law. By countering the first argument which involves a point of jurisdiction connected to the Convening Order of the Court of Inquiry, the learned ASGI has submitted that though the order has been issued by the Deputy Commandant, the same has the approval of the Commandant as would be evident from the first sentence of the order itself. As regards the other grounds, the learned ASGI has submitted that it is the proviso to Rule 173(8) which will apply. As indicated above, the proviso contemplate a situation where such an enquiry is ordered for absence from duty without due authority. The learned ASGI submits that procedural safeguards have been granted to the petitioner and therefore there is no scope for any interference by this Court for exercise of writ jurisdiction.

19. Shri Choudhury, learned ASGI relies upon a case of the Hon'ble Division Bench of this Court reported in ***1999 2 GLJ 525 [Jitendra Chandra Nath @ Jiten Nath Vs. Union of India and Ors.]***. In that case, the Hon'ble Division Bench had upheld of an order of dismissal of the petitioner, who was a Constable in the BSF.

20. The rival contention of the learned counsel for the parties have been duly considered and the materials placed before this Court have been duly examined.

21. The first issue is to resolve the controversy as to whether the misconduct of the petitioner was one of "overstay of leave" or one of "unauthorized absence". However,

before going to the said aspect, the question of jurisdiction with regard to the Convening Order which is by the Deputy Commandant and not by the Commandant is to be answered. The contention of the petitioner is that under Rule 171(1), a Court of Inquiry has to be assembled by an order of Commandant or any Officer superior to the Commandant. However, this Court has observed that the Convening Order, though issued by the Deputy Commandant has clarified that the same has the approval of the Commandant. Therefore, this Court would give the benefit of doubt to the Department on this issue.

22. Coming back to the substantial question which has arisen for consideration regarding the nature of misconduct, Section 19 of the Act lays down a clear distinction between the two concepts "overstay of leave" and "unauthorized absence". For better appreciation Section 19 (a & b) are extracted hereinbelow-

> "***19. Absence without leave.***- *Any person subject to this Act who commits any of the following offences, that is to say,-*
>
> *(a) absents himself without leave; or*
>
> *(b) without sufficient cause overstays leave granted to him; or*
>
> …"

23. To come within the definition of "unauthorized absence", an incumbent has to absent himself without leave. Overstay means overstay leave granted to an incumbent without sufficient cause. In the instant case admittedly, the petitioner was granted Casual Leave from 04.10.2014 to 25.10.2014 which was however cancelled and changed to Earned Leave from 04.10.2014 to 08.11.2014 on account of the death of the mother of the petitioner. Thereafter, the petitioner has claimed to have been suffering from Typhoid and Jaundice for which he was advised bed rest till 29.05.2015 and on 30.05.2015 when he had gone to report back to his duty he was not allowed to join. The case of the respondent is that no reasons were assigned for extension of

leave. Even assuming that the period subsequent to 08.11.2014 was without any explanation, the same would come within the definition of "overstay" and not "unauthorized absence". The aforesaid finding of this Court is fortified by the records of the case itself. The Convening Order itself makes it clear that a Court of Inquiry was constituted to find out the circumstances under which the petitioner had "overstayed from leave". The said order makes a further clarification that Rule 173(8) of the Rules would be complied with and has been indicated above, Rule 173(8) requires a proper opportunity to the incumbent to defend himself including cross-examine the witnesses and adduce his own evidence. The records further do not reveal that any of the documents namely Apprehension Role and Show Cause Notice were received by the petitioner and even the order of dismissal dated 18.04.2015 was received only on 28.06.2015.

24. Once the Court comes to a finding that the rigours of Rule 173(8) are required to be followed, the case becomes almost equivalent to a normal departmental proceeding wherein the procedural safeguards are required to be given to an incumbent failing which such order of dismissal would suffer from the vice of jurisdictional error as the conditions precedent have not been followed.

25. Apart from the case laws relied upon by the petitioner, the Hon'ble Supreme Court in the case of ***M.D. ECIL*** *Vs. B. Karunakar* reported in ***(1993) 4 SCC 727***, has laid down as follows:

> "*26. The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity it the first stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary*

authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary, authority while arriving at its conclusion. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary, authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is then required to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it.

.....

29. Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

26. In view of the aforesaid facts and circumstances and the clear finding arrived at by the Court regarding the allegation being of overstay in leave, the impugned order of dismissal is held to be unsustainable in law inasmuch as, the procedural safeguards have been denied to the petitioner and he was deprived of a reasonable opportunity to defend himself. The fact that the employer is a disciplined force, the same will not have much of an impact in the present case as there is *ex-facie* violation of the law. Accordingly, the impugned order of dismissal from service dated 18.04.2015 and the order dated 24.11.2015 by which the appeal has been dismissed are interfered with and are set aside. The petitioner is accordingly directed to be reinstated in service forthwith. The petitioner shall also be given notional benefits from the date of submission of his appeal dated 20.07.2015.

27. No order as to cost.

28. The records in original are returned back to the learned ASGI.

JUDGE

Comparing Assistant