

(2012) 08 DEL CK 0339
In the Delhi High Court
Case No : Writ Petition (C) 2681 of 2000

Anil Kumar

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 06-08-2012

Acts Referred:

Citation : (2012) 08 DEL CK 0339

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; Barkha Babbar, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Having joined BSF as a Constable in the year 1988, the petitioner was attached to the 69th Bn. of BSF as on January 27, 1999, and was a part of "C" Company of the battalion, which was posted at Border Out Post (BOP) Noorpur. It is the case of the petitioner, and for which assertion made by the petitioner, he admittedly gave proof to the superior authorities that he had swelling in his testicles due to which he was in pain. It is the case of the petitioner that his medical problem was known to the Coy Commander Subedar S. Chatterjee, who had assured him that he would give light duties to the petitioner. It is the further case of the petitioner that he learnt that the Coy Commander Subedar S. Chatterjee, HC Gurkmukh Singh and L/Nk. Mithilish Kumar were engaged in or were facilitating smuggling activities and even they learnt about the petitioner having said knowledge and thus extended threats to the petitioner to falsely implicate him; and despite the assurance of being assigned light duties by the Coy Commander, the petitioner was assigned strenuous duties.

2. It is not in dispute that on January 27, 1999, the petitioner was assigned duty as a sentry at the armoury (Kote) from 20:45 hours to 23:30 hours and admittedly he abandoned the place at around 20:50 hours, and taking along with

him the Self Loading Rifle and ammunition, exited the Border Out Post, and this departure was noted by Ct. S. Mohan, on sentry duty at the main gate, who immediately informed the next superior officer i.e. L/Nk. Mithillesh Kumar that petitioner had walked out of the Border Out Post with his arms and ammunition. At the same moment, the Coy Commander Subedar S. Chatterjee chanced to come out of his room and noted none being on duty at the Kote. L/Nk. Mithillesh Kumar informed him of petitioner having walked out of the Border Out Post. A search party comprising HC Gurmukh Singh and L/Nk. Mithillesh Kumar was sent to track the petitioner and bring him back, and indeed the situation so warranted, inasmuch as the petitioner was carrying arms and ammunition.

3. Admittedly, L/Nk. Mithillesh Kumar and HC Gurmukh Singh were able to find the petitioner near a video hall. They brought him back.

4. At this stage of the events which transpired late night on January 27, 1999, the petitioner and the respondents parted company; each giving a different version.

5. Whereas L/Nk. Mithillesh Kumar and HC Gurmukh Singh claim that they found the petitioner drunk, and when they asked him : Why had he abandoned the duty and what was he doing in the market? And claim that the petitioner replied : What duty? Who is the Coy Commander to detail my duty? And further on the way back i.e. when the two were bringing him back to the Border Out Post he hurled verbal abuses at them; and further when brought to the Border Out Post, and finding the petitioner drunk and abusive, he had to be immediately disarmed and as HC Gurmukh Singh went to disarm the petitioner, the petitioner attempted to hit HC Gurmukh Singh with the butt of his rifle. HC Gurmukh Singh blocked the blow. L/Nk. Mithillesh Kumar and the Coy Commander had to intervene to disarm the petitioner, who was then taken to the barracks and on the way, being intoxicated and hence unstable, fell on the bricks lying nearby. The petitioner denies being drunk or having verbally abused either/or L/Nk. Mithillesh Kumar and HC Gurmukh Singh. As per the petitioner, he was consulting a local doctor for his medical ailment i.e. swelling in the testicle, and since, when he was on sentry duty at the Kote, the pain became unbearable he left the duty place to visit the doctor concerned so as to be administered medicine which would give him immediate relief. According to the petitioner, as he reached the house of the doctor, he learnt that the doctor was not available and thus he returned to the Border Out Post, and when he was passing by the video hall, L/Nk. Mithillesh Kumar and HC Gurmukh Singh met him. According to the petitioner, these two gentlemen abused him and when they returned to the Coy Headquarter, HC Gurmukh Singh punched him in the presence of the Coy Commander Subedar S. Chatterjee. Petitioner claims that HC Gurmukh Singh pushed him on to a pile of bricks, and he became unconscious.

6. Now, the prosecution claims that the petitioner was drunk, which fact petitioner denies. Both are not at variance that petitioner received injuries as a consequence of falling on bricks; but at a variance as to the cause of the

petitioner falling on the bricks. The petitioner alleges being pushed; the prosecution claims the petitioner being unstable due to being drunk and hence falling on the bricks.

7. We would have expected some evidence of the medical treatment accorded to the petitioner the same night, i.e. the night of January 27, 1999. We would have expected to have some evidence of petitioner being medically examined pertaining to his alleged state of intoxication. But there is no evidence before us; neither annexed with the counter-affidavit, nor a part of the Record of Evidence which was prepared and much less part of the Summary Security Force Court Trial against the petitioner.

8. With a gap of what happened over the next three days, parties are again not at variance that on January 30, 1999, the petitioner was first admitted at the MI Room and his condition warranted In Patient treatment at a proper hospital. Accordingly parties are not at variance that the petitioner was shifted to SD Hospital, Lal Bagh, Murshidabad where he remained admitted as an In Patient till February 05, 1999. A discharge certificate to said effect i.e. petitioner remaining admitted at the SD Hospital, Lal Bagh, Murshidabad from January 30, 1999 to February 05, 1999 exists in the official records, but we find that the same does not constitute a record of a Summary Security Force Court Trial conducted against the petitioner.

9. As per the record, the offence report (contemplated by Rule 43 of the BSF Rules 1969) pertaining to the incident of January 27, 1999, was placed before S.S. Multani, the Commandant of the 69th Bn. who took cognizance thereof on February 02, 1999. The record reveals that the petitioner was produced before the Commandant who read out the offence report which brings out three charges against the petitioner; firstly, the petitioner was drunk while on duty, secondly the petitioner was found absent from duty, and lastly the petitioner assaulted HC Gurmukh Singh. It records that the petitioner pleaded guilty. The record reveals that on the same day i.e. February 02, 1999, the Commandant directed Record of Evidence to be prepared by Asstt. Comdt. K. Umesh. The record produced by the respondents would evidence that Asstt. Comdt. K. Umesh commenced and completed the Record of Evidence proceedings on one day i.e. February 12, 1999. He recorded the statements of Subedar S. Chatterjee, HC Gurmukh Singh, L/Nk. Mithilesh Kumar and Ct. S. Mohan, and suffice would it be for us to note that the four witnesses deposed against the petitioner and as per the version of the prosecution.

10. The Record of Evidence proceedings would show that the petitioner was present. His signatures have been obtained on each page of the testimony of the witnesses. The petitioner has cross-examined the four witnesses and has also made a statement in defence. The record consisting of 12 pages has been signed by the petitioner on each page. The place where the testimony of a witness ends is the place where the witness has penned his signatures and just adjacent thereto i.e. on the left side of the page, the petitioner has signed. For example,

the testimony of PW-1 consists of one full sheet and five lines on sheet No. 2. The paper sheets have a dimension of length 13 inches and breadth 8 inches. Thus, on sheet No. 2, the signatures of the petitioner are 3 inches from the top. Thereafter the cross-examination of the witness is recorded, which continues till the third sheet and ends in the middle thereof. The witness has signed and opposite thereto the petitioner. Somewhat similar is the position qua other witnesses as well.

11. The record reveals that the Record of Evidence proceedings were placed before the Commandant who decided that a trial was warranted and accordingly on February 16, 1999 drew up a charge-sheet alleging as under:-

The Accused No. 88254247 Constable Anil Kumar of 69 Battalion BSF is charged with:-

FIRST CHARGE BSF ACT SEC 20(a)

ASSAULTING HIS SUPERIOR OFFICER

in that he, at BOP Chandni Chak, on 27.01.1999, hit No. 67500298 HC Gurmukh Singh of his coy with butt of his Self Loading Rifle.

SECOND CHARGE BSF ACT SEC 16(d)

LEAVING HIS GUARD WITHOUT ORDERS FROM HIS SUPERIOR OFFICER

in that he, at BOP Chandni Chak, on 27.01.1999, while on sentry duty from 2045 hours to 2330 hours, left the BOP at about 2050 hours without orders from his superior officer.

THIRD CHARGE BSF ACT SEC 40

AN OMISSION PREFUDICIAL TO THE GOOD ORDER AND DISCIPLINE OF THE FORCE

at BOP Chandni Chak, on 27.01.1999, while on sentry duty from 2045 hours to 2330 hours, consumed country liquor.

12. The record reveals that after serving the chargesheet afore-noted upon the petitioner on February 16, 1999, the trial commenced on February 18, 1999. The charges were read. The petitioner pleaded "Guilty" to the three charges and thereafter the Commandant; ostensibly complying with Rule 142(2) of the BSF Rules 1969, recorded a satisfaction that the petitioner understands the nature of the charge and the consequence of his pleading guilty. Thereafter the Record of Evidence was read. The petitioner thereafter sought pardon, saying this was the first mistake. Proceedings closed at 11:05 hours, followed by a verdict of guilt being returned and penalty of dismissal from service inflicted.

13. With respect to the record, petitioner pleads that everything is a hogwash. He pleads contrivance and false preparation of the record. The petitioner brings home the point that admittedly on February 02, 1999 he was admitted, as an In

Patient, at S.D. Hospital Lal Bagh, Murshidabad; where he was admitted on January 30, 1999 and was discharged on February 05, 1999. The petitioner therefore questions the veracity of the alleged proceedings shown to have been conducted by the Commandant when he ostensibly took cognizance of the offence report on February 02, 1999. The petitioner asserts that after he was discharged from the hospital, on February 12, 1999 he was compelled to sign a few papers; and these are the ones which pertain to the Record of Evidence. Pertaining to what transpired at the SSFC Trial on February 18, 1999, petitioner states that he was called by the Commandant and the charges were read out to him, but claims to have pleaded "Not Guilty" i.e. claims that the plea of "Guilty" recorded is false. The petitioner highlights that the record of the trial at the arraignment does not bear his signatures beneath the plea of "Guilty" recorded.

14. From the facts noted by us herein above and the rival versions of the parties, it needs to be highlighted that the petitioner was admittedly admitted at S.D. Hospital Lal Bagh, Murshidabad as an In Patient on February 02, 1999 and it is therefore difficult to believe that the petitioner appeared before the Commandant, when as per the record, the Commandant took cognizance of the offence report and heard the petitioner. We highlight that the petitioner was admitted at S.D. Hospital, Lal Bagh, Murshidabad on January 30, 1999 and was discharged on February 05, 1999. The discharge certificate does not reveal that the petitioner was permitted to leave the hospital for a few hours on February 02, 1999. There is merit in the contention of the petitioner that the record pertaining to hearing of the charge proceedings held on February 02, 1999 is falsified.

15. But, there is hardly any merit in the plea of the petitioner that the record pertaining to Record of Evidence is false. Since this record bears the signatures of the petitioner on each page, and as explained by us in paragraph 11 above, the place where petitioner's signatures are to be found, is not only different on each sheet, but is situated on the different sheets at a point, where-from it would be difficult to believe that signatures of the petitioner were obtained on some sheets and the same were used to create a Record of Evidence. Further, the record shows that the petitioner has cross-examined each witness, and the nature of cross-examination is such that a person having personal knowledge of the events would be posing the questions. To Subedar S. Chatterjee 10 questions have been put. The question and the answers read as under:-

Q.1 What was my condition before 27 Jan 1999?

Ans. You were having swollen veins near the joint between leg and abdominal portion.

Q.2 On 27/01/1999 at 1915 hrs was I in drunken state?

Ans. At 1915 hrs I did not noticed, if you were in drunken state.

Q.3 On 22/01/1999 when I return to Coy with two days rest from MI room, why

you did not give me rest.?

Ans. You did not show me any paper, regarding rest. Still I give you only sentry duty. However, you have shown the MI Room slip on 28/01/1999.

Q.4 When you took my rifle what was my rifle position?

Ans. Your rifle was in your both hands, and you had lifted it up, butt down, barrel above your head at 400, and hit "HC" Gurmukh Singh.

Q.5 Did you took me to my bed?

Ans. Yes I took you to your bed.

Q.6 At which place we had a scuffle?

Ans. It was near main gate of the BOP.

Q.7 When they brought me back where were you?

Ans. I was in front of the gate.

Q.8 When they bring me back, whom did you see near by you?

Ans. I saw CHM "HC" Gurmukh Singh and Catani Kumar trying to break free, and you were also abusing loudly.

Q.9 If I was intoxicated, why didn't you get my medical done?

Ans. There was no medical officer near the camp.

Q.10 When I fall down, who pushed me?

Ans. No one pushed you, however, you fell down being unstable due to, taking of Country liquor.

16. To HC Gurmukh Singh four questions have been put. The questions and the answers read as under:-

Q.1 Do you drink liquor?

Ans. No, I don't liquor?

Q.2 How did you come to know that day I was having liquor and in intoxicated state?

Ans. When I went near you that day, you were stinking of Country liquor and your body was shaking.

Q.3 When you came to me at video hall, did you ask any question to me?

Ans. I asked you as to what were you doing there, as you are supposed to be on duty at the Kote.

Q.4 When you found me near Video hall, did I abuse any one?

Ans. No you were not abusing any one.

17. To L/Nk. Mithilesh Kumar four questions have been put. The questions and the answers read as under:-

Q.1 When Coy Comdr was shouting as to where was Kote sentry who reached Coy Comdr first?

Ans. I reached/met Coy Comdr first.

Q.2 Did you see me hitting with rifle butt to "HC" Gurmukh Singh?

Ans. Yes, I did see you hitting with rifle butt to "HC" Gurmukh Singh.

Q.3 When he took my weapon, what was the position of weapon?

Ans. When you hit him with your weapon, it was in your both hands.

Q.4 When you asked for weapon did I refuse you to give?

Ans. I did not ask for your weapon. It was snatched by the Coy Comdr (officiating) Subedar S. Chatterjee himself from you and hand it over to me.

18. To Ct. S. Mohan six questions have been put. The questions and the answers read as under:-

Q.1 When I came to you, did you find me in the state of intoxication?

Ans. I don't know.

Q.2 Who took my weapon?

Ans. It was snatched from you by the officiating Coy Comdr Subedar S. Chatterjee and given to the guard Commander L/Nk. Mithilesh Kumar.

Q.3 Where did he (Mithilesh Kumar) guard Commander deposit my weapon?

Ans. I do not know.

Q.4 Who all escorted me to my barrack?

Ans. Coy Commander officiating, guard Commander and CHM Gurmukh Singh.

Q.5 At which place I fell?

Ans. Approx. 10 to 15 yards inside the camp from main gate sentry post, as it was dark I don't know exact place.

Q.6 Where were you in position at that time?

Ans. It was at sentry post of main gate.

19. The questions posed by the petitioner while cross-examining the four witnesses would render it difficult to digest that the said record has been fabricated.

20. As per the Court of Inquiry proceedings, the petitioner made a statement in defence, which needless to state is as per his version of what happened on the night of January 27, 1999.

21. It is in this backdrop i.e. of the Commandant fabricating the record pertaining to the cognizance of the offence report as on February 02, 1999 and even the petitioner taking an apparently wrong stand pertaining to his participation at the Record of Evidence, we have to consider the effect of the Commandant not obtaining the signatures of the petitioner under the plea of "Guilty" made by the petitioner, as per the record.

22. It is true that as per the BSF Rules 1969 which were in force when the trial took place there is no requirement of obtaining the signatures of the accused upon the accused pleading guilty. But, prudence demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we hasten to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment.

23. What would the surrounding circumstances be? The Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross-examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading guilty and simultaneously pleading for mercy at the trial. We note that various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial. In the decision reported as (152) 2008 DLT 611 Subhas Chander v. UOI the view taken was that a plea of guilt which is not signed by the accused would vitiate the punishment. The decision reported as Chokha Ram Vs. Union of India (UOI) and Another, holds to the converse.

24. Neither decision has taken note of the jural principle that a default in procedure, unless hits at the very root of the matter, would not vitiate a decision making process.

25. It is in the aforesaid backdrop of the legal principle and the facts noted by us herein above pertaining to the instant case that the matter needs to be considered.

26. We reiterate, we have good proof of the Commandant, in all probability, falsifying the record pertaining to the offence report dated February 02, 1999. Disagreeing with the petitioner that the Record of Evidence is a false record, but we find that the petitioner having taken a stand by cross-examining the witnesses and thereafter making a statement in defence at the Record of Evidence. His defence was of being in extreme pain due to swelling in the testicle, and overcome by the pain, he abandoning the duty post as a guard outside the armoury, to obtain immediate relief by visiting a doctor who would obviously have prescribed a pain relieving medicine. To put it simply, the petitioner was projecting a defence of necessity. Upon success, the defence would have seriously dented the mens rea element of the offence; and suffice would it be to state that it is not the actus reus alone but when backed by the mens rea that criminality is attached to an act.

27. Why would the petitioner plead guilty? In the facts of the instant case nothing emerges which leads us to believe that the petitioner would plead guilty.

28. Sub-Rule 2 of Rule 142 of the BSF Rules reads as under:-

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.

29. An incisive reading of sub-rule 2 of Rule 142 would reveal that there are two distinct limbs thereof. As per the first limb, if the accused pleads guilty, it is the duty of the Court to ascertain whether the accused understands the nature of the charge and the general effect of the plea of guilt. The second limb is for the Court to read the Record of Evidence or the Abstract of Evidence, as the case may be, and if it appears from the record that the accused ought to plead not guilty, to record a plea of not guilty (despite the accused having pleaded guilty) and proceed with the trial.

30. The record reveals that after recording the plea of Guilty, the Commandant has only recorded satisfaction of the first limb of sub-rule 2 of Rule 142 and not the second. It stands recorded as under:-

The accused having pleaded guilty to the charge, the Court explains to the accused the meaning of charge(s) to which he has pleaded guilty and ascertains that the accused understands the nature of the charge(s) to which he has pleaded guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty, accepts and records the same. The provisions

of Rule 142(2) are complied with.

31. We are accordingly constrained to hold in favour of the petitioner and against the respondents. Two facts lean in favour of the view taken by us. The first is the Commandant falsifying the record pertaining to February 02, 1999, offence report proceedings and the second being that the petitioner had been projecting a defence, which was backed by his medical condition i.e. the petitioner's compulsion, being in seething pain due to testicle swelling, to abandon the duty post and rush to a doctor which would have removed the culpable mens rea with reference to the act of the petitioner, thereby leading towards a suggestion that the petitioner did not plead guilty at the trial; the Commandant who could falsify the offence report proceedings on February 02, 1999 could well have thereby falsified the trial proceedings as well. In any case, there is a complete dereliction of duty by the Commandant to ignore the second limb of sub-rule 2 of Rule 142 of the BSF Rules 1969.

32. The trial being vitiated, and unfortunately the writ petition being decided by us after nearly 12 years of it being filed compels us not to grant permission for the petitioner being re-tried.

33. But, we intend not to grant any back-wages to the petitioner, and for which our reason is that howsoever excruciating was the pain under which the petitioner was labouring when on duty at the Kote on the night of January 27, 1999, he knew that he was carrying arms. It may be his compulsion, arising out of necessity, to visit the doctor and thus it became his compulsion to abandon the duty post and walk out of the precincts of the Border Out Post. But why did he not handover the Self Loading Rifle and the ammunition to Ct. S. Mohan who was on sentry duty at the gate of the Border Out Post, and as per whom (refer his statement made at the Record of Evidence), that when he saw the petitioner walk out of the Border Out Post carrying his arms and ammunition, he tried to stop the petitioner, who uncaringly went away. Howsoever excruciating was the pain, the petitioner was walking and this means that the pain was not of such extreme unbearable character that the petitioner was just not in his senses. We may overlook the fact that the petitioner abandoned the armoury because he was in excruciating pain, but cannot overlook the fact that in spite of Ct. S. Mohan cautioning him, the petitioner took along with him his arms and ammunition and walked to a residential colony nearby. He is also in default.

34. A relevant fact also needs to be noted pertaining to petitioner's character. It stands recorded in the trial proceedings that the petitioner had not committed any offence while in service of 11 years and 3 days. He was never punished even once. His general character was satisfactory and he has earned 7 cash rewards.

35. We dispose of the writ petition declaring that the trial against the petitioner is vitiated and as a consequence we quash the penalty of dismissal from service inflicted upon the petitioner. The petitioner shall be reinstated in service but shall not be entitled to any back-wages. However, the period in question would be

reckoned as service rendered for pension purposes. The petitioner would be restored his seniority and on reinstatement his pay would be fixed by giving him notional increments for the period interregnum the date when petitioner was dismissed from service till he is reinstated.

36. Needful would be done by the Department within 8 weeks from today. No costs.