

(2019) 09 CAL CK 0042

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 27380 (W) Of 2007

Anil Kumar Tiwari

APPELLANT

Vs

Union Of India & Others

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Border Security Force Act, 1968 — Section 2(I), 40, 48(1), 70, 87, 117, 117(2)
Evidence Act, 1872 — Section 155(3)
Border Security Force Rules, 1964 — Rule 14A, 16(2), 16(2)(a), 16(2)(b), 16(2)(c),
16(5), 45, 45(2)(iii), 48, 49(3), 148, 149, 149(1)
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 09 CAL CK 0042

Hon'ble Judges : Biswajit Basu, J

Bench : Single Bench

Advocate : Srijan Nayak, Rituparna Maitra, Arindam Mitra, Indrajit Dasgupta

Final Decision : Disposed Off

Judgement

Biswajit Basu, J

1. The petitioner in the year 2002 was enrolled as the member of the Border Security Force, "The Force" in short, as defined under Section 2(I) of the Border Security Force Act, 1968 (hereinafter referred as the 'said Act' in short).

2. The petitioner while was serving as the constable of the 140th battalion of the force at Indo-Bangladesh Border was served with the following charge-sheet by the officiating commandant of the said battalion:-

CHARGE SHEET

Charge against No. 02145842 Rank- Constable Name- Anil Kumar Tiwari of 'D' Coy 140 BN BSF

BSF ACT- 1986

AN ACT PREJUDICIAL TO GOOD

SECTION- 40

ORDER AND DISCIPLINE OF THE FORCE

in that he, at BOP Subhash Ex- 140 Bn BSF on 28.04.2007 in between 280001 hrs to 280600 hrs while performing Naka duty between picket No. 90 to 99 near BP No. 194/8-s deliberately allowed 20 No of cattle heads to cross from India to Bangladesh.

(T P S SIDHU) 21/C

OFFICIATING COMMANDANT

140 BN BSF

3. The said officiating commandant conducted the hearing of the said charge in terms of Rule 45 of the Border Security Force Rules, 1964 (hereinafter referred as the 'said Rule' in short) and after considering evidences emerged during the record of evidence remanded the petitioner for trial by Summery Security Force Court (hereinafter referred to as the 'SSFC' in short). The SSFC was constituted by the officiating commandant of the unit of which the petitioner was a member and the trial was held accordingly, as many as nine witnesses were examined from the side of the prosecution and were cross-examined in the said trial.

4. The said officiating commandant found the petitioner guilty of allowing twenty number of cattle heads to cross from India to Bangladesh on April 28, 2007 in between 280001 hours to 280600 hours at border outpost Subhash while performing Naka duty between picket no. 90 to 99 near border outpost no. 194/8-5 and such act of the petitioner was considered to be an act, prejudicial to good order and discipline of the force under Section 40 of the said Act and he accordingly vide his order dated May 26, 2007 awarded sentence of dismissal of the petitioner from service and the petitioner was struck off from the strength of the force with effect from the afternoon of the said date.

5. The petitioner being aggrieved by and dissatisfied with the said award of sentence presented a petition under Section 117 of the said Act before the Director General of the force, the respondent no. 2 herein. The said respondent by the order dated September 27, 2017 has disposed of the said petition thereby affirmed the said sentence of the SSFC.

The petitioner, in the present writ petition has challenged the legality and propriety of the said order of the respondent no. 2 as well as the charge-sheet and the award of punishment passed by the SSFC.

6. Mr. Srijan Nayak, learned counsel appearing for the petitioner submits that proper procedures laid down in the said Act and the Rules framed thereunder have not been followed in conducting the case by the SSFC. He submits that the copy of the abstract of evidence has not been supplied to the petitioner even on demand in terms of the Rule 49(3) of the said Rule which is mandatory for making statements by the petitioner before holding the SSFC and non-

compliance of the said provision vitiates the entire proceeding.

7. Mr. Indrajit Dasgupta, learned counsel for the respondents in reply to the said submission of Mr. Nayak submits that the said submission of Mr. Nayak, has no basis inasmuch as the petitioner was heard under Rule 45 of the said Rule and under sub-rule (2) (iii) thereof order was passed for preparation of record of evidence which was prepared in terms of Rule 48 of the said Rule and the petitioner had signed on each of the pages of such recorded evidence. He further submits that in the writ petition the petitioner never raised such an issue on the contrary he has admitted submission of his statement. The officiating commandant after preliminary investigation and after recording of evidence decided to remand the petitioner for trial by the SSFC. Therefore, according to him there is no procedural lapses in holding the SSFC, as suggested by Mr. Nayak.

8. It appears on perusal of records that the petitioner neither before the appellate authority nor in the writ petition has assailed the award of sentence on the ground that he was not supplied with the copy of the abstract of evidence. On the contrary the petitioner in paragraph. 5 has made the following statement:-

"The evidence of the witnesses in the preliminary enquiry and the evidences recorded on the trial by the Summery Security Force Court and the statement of your petitioner are annexed hereto and collectively marked with the Letter "P/2"

Therefore, the allegation of the petitioner that there are procedural lapses in conducting the case by the SSFC is of no substance.

9. The next ground on which Mr. Nayak throws challenge to the sentence of punishment is that the said order is not supported by any reason and such lack of reasoning vitiates the said order since reasoning is the soul of any judicial and/or quasi-judicial order.

In support of his such contention he placed reliance on the three decisions of the Supreme Court in the case of RE: KRANI ASSOCIATES PRIVATE LTD & ANR. Vs. MASOOD AHMED KHAN AND ORS. reported in (2010) 9 SUPREME COURT CAESS 496, RE. NATIONAL INSURANCE COMPANY LIMITED Vs. GULAB NABI & ANR. reported in (2008) 11 SUPREME COURT CASES 349 and RE. THE SECRETARY & CURATOR, VICTORIA MEMORIAL HALL Vs. HOWRAH GANTANTRIK NAGRIK SAMITY AND ORS. reported in AIR 2010 SC 1285 and one decision learned Single Judge of this Court in the case of RE.

RABINDRANATH DE Vs. MANIC CHANDRA SASMAL & ORS. reported in (2012) WBLR (CAL) 224.

10. Mr. Dasgupta, responding to the said argument of Mr. Nayak, submits that in terms of Rules 148 and 149(1) of the said Rules there is no necessity of giving detail reason in support of the award of punishment, in terms of the said Rules recording of guilty or of not guilty in the award is sufficient. In support of his such contention Mr. Dasgupta relies on the decision of the Supreme Court in the case of UNION OF INDIA Vs. DINESH KUMAR. reported in (2010) 3 SUPREME

COURT CASES 161.

11. The Rules 148 and 149(1) of the said Rule is reproduced below to appreciate the rival contentions of the learned counsel for the parties:-

"148. Verdict.- The Court shall after the evidence for prosecution and defence has been heard, give its opinion as to whether the accused is guilty or not guilty of the charge or charges.

149. Finding.- (1) The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of "Guilty" or of "Not Guilty".

It appears that aforesaid Rule 148 mandates that the Court after hearing the evidence for prosecution and defence shall give its opinion as to whether the accused is guilty or not guilty of the charge or charges and Rule 149(1) thereof mandates only recording of the finding as guilty or not guilty.

12. The following two questions were considered by the Supreme Court in the decision reported in (2010) 3 SUPREME COURT CASES 161 (supra) :-

"(i) Whether the Summary Security Force Court (SSFC) is required to give reasons in support of its verdict?

(ii) Whether the appellate authority under Section 117 (2) is required to give reason while considering the correctness, legality or propriety of the order passed?"

The Supreme Court in paragraphs 17 and 23 of the aforesaid report answered both the questions in negative. The said paragraphs of the report are quoted below for ready reference:-

"17. It is needless to mention that Rule 99 will not apply to SSFC. The procedure for the SSFC is provided in Chapter XI (Rules 133 to Rule 161), which alone is relevant here. It must be noted here that though Rule 99 was amended requiring authority of General Security Force Court or Petty Security Force Court to give reasons in support of their findings, no such amendment was made to Rule 149 which is applicable in the case of the SSFC. Shri Malhotra, learned Additional Solicitor General, therefore, rightly argued that since Rule 149 was left intact in contradistinction to Rule 99, the authorities of the SSFC were not required to give reasons in support of their findings in all these cases and the High Court has gravely erred in setting aside the orders of authorities on that count alone.

23. In this backdrop, it is clear that the provisions for the SSFC and the appellate authority are pari material, more particularly in case of Rule 149 and Section 117(2) of the Act, which the provisions which were considered in both the above authorities. Therefore, there cannot be any escape from the conclusion that as held by the Constitution Bench, the reasons would not be required to be given by the SSFC under Rule 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the

legislature has chosen not to amend Rule 149, though it has specifically amended Rule 99 w.e.f. 9-7-2003. It was pointed out that in spite of this, some other view was taken by the Delhi High Court in *Nirmal Lakra v. Union of India*. However, it need not detain us. since Rule 149 did not fall for consideration in that case. Even otherwise, we would be bound by law declared by the Constitution Bench in *S.N. Mukherjee v. Union of India*."

13. There cannot be a second opinion that the order passed by any judicial or quasi-judicial authority must be supported by reason as held in the decisions reported in (2010) 9 SUPREME COURT CAESS 496 (supra), (2008) 11 SUPREME COURT CASES 349 (supra) , AIR 2010 SC 1285 (supra) and (2012) WBLR (CAL) 224 (supra) relied on by Mr. Nayak, but the legislative intent as reflected in Rules 148 and 149 of the said Rule and in view of the above mentioned decision of the Supreme Court interpreting the said Rules the requirement of supply of reason in the award of punishment passed by the SSFC or in the order under Section 117 of the said Act passed by the appellate authority is not mandatory, consequently the argument of Mr. Nayak on this point fails.

14. The next point of argument of Mr. Nayak is that the SSFC can only be held by a commandant of any unit and he alone shall constitute the Court but in the present case such Court has been held by an officiating commandant, according to him such delegation of power to hold the SSFC to an officer inferior in rank to the rank of commandant of a unit is not permissible either under the provisions of the said Act or under the said Rules as such the award of punishment is a nullity being passed by a Court not validly constituted.

15. Mr. Dasgupta refuting the said contention of Mr. Nayak submits that in terms of Rule 16 (2) (a) of the said Rule in the absence of commandant of a battalion command shall devolved upon second-in-command and the second-in-command so given power to command the battalion has also the authority to exercise the disciplinary powers in terms of Rule 16(5) thereof.

16. Let me now consider whether an officiating commandant is competent to hold the SSFC under Section 70 of the said Act. The said provision of the said Act is reproduced below for ready reference:-

"70. Summary Security Force Court.- (1) A Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court.

(2) The proceedings shall be attended throughout by two other persons who shall be officers or subordinate officers or one of either and who shall not as such, be sworn or affirmed."

17. The procedure of command of a unit of the force has been prescribed under paragraphs (a), (b) and (c) of sub-rule 2 of Rule 16. The said sub-rule and the said paragraphs thereof being relevant to the present issue under discussion are reproduced below:-

"16. Command.- (1) An officer appointed to command shall have the power of command, over all officers and men, irrespective of seniority placed under his command.

(2) (a) In the contingency of an officer being unable to exercise the command, to which he has been appointed, due to any reason, the command shall devolve on the second-in-command, if one has been so appointed.

(b) If no second-in-command has been appointed, it shall devolved on the officer who may be appointed to officiate by the immediate superior of the officer unable to exercise command.

(c) If no such officer has been so appointed, command shall devolved on the senior most officer present."

18. The ranks of the officer and other members of the force have been classified under Rule 14-A of the said Rule, it appears that in terms of the said Rule 14-A the immediate next rank to the rank of commandant is second-in-command, who in terms of said Rule 16 (2) (a) is competent to command the unit in the contingency when an officer being unable to exercise the command. By virtue of Rule 16 (2) (b) of the said Rule if no second-in-command is appointed the command shall devolve upon the officer who may be appointed to officiate the command by the immediate superior of the officer unable to exercise the command and by virtue of the said Rule 16 (2) (c) if no such officer is so appointed command shall devolve upon the senior most officer present. A complete mechanism, therefore, has been provided for command of a unit of the force under the said paragraphs of sub-rule (2) of Rule 16.

19. An officer of the force who has been delegated with the power to command a unit of the force has been authorised to exercise disciplinary power by the Sub-rule (5) of Rule 16 of the said Rule. The said sub-rule of Rule 16 being relevant to the present context is reproduced below for ready reference:-

"16. Command.-(5) Disciplinary powers over a person subject to the Act shall be exercised by the Commandant of the battalion or unit to which such a person belongs or the officer on whom command has devolved in accordance with sub-rule (2) .

Provided that when person belonging to different battalions or units are working together, disciplinary powers in respect of such persons may also be exercised by an officer appointed to command such persons in accordance with clause (i) of sub-rule (3) or in his absence by the senior most officer present."

20. The aforesaid detailed provision for delegation of power to command a unit of the force including the exercise of disciplinary powers unmistakably suggest that the officiating commandant of a unit of the force is competent to hold SSFC in a contingency contemplated under the said Rules. In view of such detail procedure being provided in the said Rule the validity of the Constitution of the SSFC cannot be impeached on the ground that the same was held by the

officiating commandant of the unit.

Besides that the petitioner never raised the objection as to the jurisdiction of the officiating commandant of the battalion to hold the SSFC at any stage of the disciplinary proceeding. Therefore, the argument of Mr. Nayak, that the award of punishment has been passed by a Summery Security Force Court not validly constituted has no merit.

21. Mr. Nayak lastly argued that the award of punishment is disproportionate with the offence charged, he taking support on the decision of the Supreme Court in the case of EX-CONSTABLE RAMVIR SINGH Vs. UNION OF INDIA reported in (2009) 3 SUPREME COURT 97 submits that this Court in exercise of the jurisdiction under Article 226 of the Constitution of India can scrutinize the validity and legality of the sentence of punishment by applying the doctrine of proportionality. He further submits that the petitioner had challenged the legality and propriety of the award of punishment before the appellate authority under Section 117 of the said Act, inter alia, on the ground that the punishment awarded is disproportionate to the offence charged but the appellate authority without considering the said ground of challenge affirmed the award of punishment.

22. Mr. Dasgupta, responding to the said argument of Mr. Nayak submits that no doubt the doctrine of proportionality in a given case may be invoked by this Court in exercise of the jurisdiction under Article 226 of the Constitution of India to scrutinize the validity and legality of the award of punishment but unless the sentence is found to be vindictive and undoubtedly harsh such jurisdiction is not exercisable. He submits that in view of the nature of the offence committed by the petitioner much higher punishment, even death sentence could be awarded to the petitioner by virtue of Section 48(1) of the said Act but the authority instead of awarding such punishment dismissed the petitioner from service, therefore, the said punishment is not disproportionate with the charge of violation good order or discipline of the force. In support of his said contention he places reliance on the decision of the Supreme Court in the case of UNION OF INDIA AND ORS. Vs. P. GUNASEKARAN reported in (2015) 2 SUPREME COURT CASES 610.

23. The power of the High Court to take the doctrine of proportionality of the punishment with the offence charged within the sweep of it's power of judicial review under Article 226 of the Constitution of India is well recognized. The Supreme Court in the decisions reported in (2009) 3 SUPREME COURT 97 (supra) and (2015) 2 SUPREME COURT CASES 610 (supra) has also recognised such power of High Court but indicated the limitations for exercise of the said power.

In the present case the petitioner in his petition under Section 117 of the said Act at paragraph 22 which is quoted below had challenged the legality and propriety of the award of punishment on the ground that the same is disproportionate to the offence charged:-

"22. That the punishment order passed against the applicant is really severe and hard compared to the alleged incident and the same is also a disproportionate order of punishment. Whereas the alleged incident did not take place during the duty period of the appellant."

The respondent no. 2 while dealing with the said petition under Section 117 of the said Act acting as an appellate authority should have dealt with the said ground. The disposal of the said statutory petition without considering the said ground of challenge of the petitioner to the award of punishment is a failure on the part of the respondent no. 2 to exercise the jurisdiction vested in him under Section 117 of the said Act.

24. This Court is conscious about its limitation to venture into re-appreciating the evidence to interfere into the disciplinary proceedings, but it is equally settled that such interference is permissible where the findings of the disciplinary authority are based on no evidence. The permissible limit of interference in the disciplinary proceeding as laid down by the Hon'ble Supreme Court at paragraph 12 in the case reported in (2015) 2 SUPREME COURT CASES 610 (supra) is required to be quoted, to appreciate the scope of such interference by the High Court:-

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappraisal of the evidence. The High Court can only see whether:

- (a) the enquiry is held by a competent authority;
- (b) the enquiry is held according to the procedure prescribed in that behalf;
- (c) there is violation of the principles of natural justice in conducting the proceedings;
- (d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
- (e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
- (f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
- (g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;
- (h) the disciplinary authority had erroneously admitted inadmissible evidence

which influenced the findings;

(i) the finding of fact is based on no evidence."

25. It is worth mentioning in this context that by virtue of Section 87 of the said Act which is reproduced below, the Indian Evidence Act, 1872 shall subject to the provisions of the said Act, shall apply to all proceedings before the SSFC.

"87. General rule as to evidence.- The Indian Evidence Act, 1872 (1 of 1872), shall, subject to the provisions of this Act, apply to all proceedings before a Security Force Court."

26. In a departmental enquiry standard of proof may not be as high as in a criminal trial but the offence charged against a delinquent officer at least is required to be proved by preponderance of probability. The alleged offence since was detected within the area of responsibility of the petitioner after he was relieved from his duty without any complaint, proof of the fact that such offence occurred during his period of duty is the condition precedent to complete the circle of alleged charge against the petitioner. Evidence is heavily lacking on this score, in fact the prosecution never attempted to prove the time of occurrence of the said offence. On the contrary entire disciplinary proceeding proceeded on the assumption that the alleged offence happened during the period of the duty of the petitioner.

Moreover the precision of the charge that the petitioner allowed twenty number of cattle heads to cross Indo-Bangladesh Border imputes absurdity to the charge, which can be repelled only by evidence of high quality but in the present case such evidence is shockingly absent.

The respondent no. 2 at the time of disposal of the petition under Section 117 of the said Act has totally overlooked this aspect of the matter.

27. The petitioner was relieved from his duty by the head constable Gama Yadav. The said Gama Yadav in his evidence during the trial has stated that he met the petitioner between picket nos. 92 and 93 i.e. the place of occurrence of the said alleged offence and he took over the charge from the petitioner near the said pickets. The said witness further claimed that relying on the "Ok" signal of the petitioner he allowed him to go without thoroughly checking the area of responsibility of the petitioner but subsequently in course of detail checking he found that the fencing wire between picket nos. 92 and 93 was breached and there were larger number of hoof marks.

28. The prosecution has heavily relied on the evidence of the said Gama Yadav to prove the charge against the petitioner. The said witness at the time of initial enquiry stated that he did not found any hoof mark near the place of occurrence of the alleged offence but the said witness before the SSFC while deposing as P.W. 2 has stated that he gave a wrong statement in the record of evidence that he had not seen any hoof marks which he regret. The credit of the said witness for his such contradictory statements at different stages of proceeding is

impeachable by virtue of Section 155(3) of the Indian Evidence Act, 1872 hence not sufficient to substantiate the charge against the petitioner that he allowed twenty number of cattle heads to cross Indo-Bangladesh border during his period of duty. The prosecution although has relied on some other witnesses but those witnesses could not throw any light on the period of occurrence of the said alleged offence since all of them came to the place of occurrence after the detection of the said offence.

29. The petitioner by his application under Section 117 of the said Act since had challenged the award of punishment, inter alia, on the grounds that said award is based on no evidence the correctness, legality and propriety of the said award should have been tested by the respondent nno. 2 on the said ground while disposing the said application. The respondent no. 2 by not doing so has failed to discharge the statutory duty vested on him.

In view of the discussion made above, the order dated September 27, 2017 passed by the respondent no. 2 disposing the application of the petitioner under Section 117 of the said Act thereby affirming the award of punishment is set aside, with a direction upon the said respondent to decide the said application afresh in the light of the observations made hereinabove in accordance with law, expeditiously.

W.P. No. 27380(W) of 2017 is thus disposed of. However, there will be no order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.