
(2016) 03 DEL CK 0193
In the Delhi High Court
Case No : W.P. (C) 6305/2006

Anirudha Panda

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-03-2016

Acts Referred:

Border Security Force Act, 1968 — Section 45, Section 46, Section 85
Penal Code, 1860 (IPC) — Section 354

Citation : (2016) 4 ADDelhi 109 : (2016) 229 DLT 17

Hon'ble Judges : Hima Kohli and Sunil Gaur, JJ.

Bench : Division Bench

Advocate : Anil Gautam, Advocate, for the Appellant; Ashwani Bhardwaj, CGSC, for the Respondent

Final Decision : Dismissed

Judgement

Hima Kohli, J.—1. The petitioner is aggrieved by the order dated 4.11.2004, passed by the Deputy Inspector General, BSF rejecting his statutory petition against conviction by the Petty Security Force Court (PSFC) for the offence under Section 46 of the BSF Act, 1968 (in short "the Act"), i.e., using criminal force on a woman with the intent to outrage her modesty that is punishable under Section 354 IPC.

2. By the impugned order dated 24.2.2004, the PSFC had concluded that the petitioner had used criminal force on the victim (hereinafter referred to as "A", to protect her identity), a girl eight years of age, with the intention of outraging her modesty and has thus committed an offence punishable under Section 354 IPC read with Section 45 of the Act. Resultantly, the petitioner was dismissed from the service and was inflicted a punishment of imprisonment for a period of nine months.

3. The incident in question relates back to the year 2002, when the petitioner was working on the post of a Constable and while posted at Shillong, Meghalaya, he had allegedly outraged the modesty of A, the daughter of his colleague, Head

Constable Nurul Islam.

4. As per the case of the prosecution and the parents of the victim, on 18.12.2002, between 17.00 to 17.30 hrs., the petitioner had gone to the house of the victim and asked her mother to send her to his quarters for handing over a water drum for storage of water. The petitioner had asked for the whereabouts of A's father from her mother, who was present in the house. He insisted and brought "A" to his house under the guise of handing over the water drum. Inside his quarter, the petitioner had forcibly dragged the girl on bed, lay her down and opened her panty. Thereafter, the petitioner inserted his finger in the private part of "A". Before this, the petitioner had tied the hands of "A" to her back and forcibly pressed his hand on her mouth to prevent her from shouting out for help. As per the prosecution, criminal force was used on the victim which was established from the fact that there was tenderness and redness in her lower abdomen, red marks on her cheeks and redness on her private parts. The victim was complaining of pain during micturition and was unable to sit. She was not normal for a period of 3 to 4 hours after the incident and was nervous and frightened.

5. On the other hand, the petitioner had denied the aforesaid incident and produced seven witnesses in his defence, however he did not produce any defence witness at the time of Record of Evidence (in short "the ROE"). The petitioner made a statement on oath before the court wherein he had denied the allegations levelled against him and stated that on 18.12.2002, at about 17.15 hrs., he had visited the house of his colleague, Head Constable Nurul Islam and had taken his daughter, the victim along with him to his house and after handing over some items to her, she had returned back to her house. He had stated that while the victim was going back from his quarter, she was fine and he did not know as to whether she had met anyone thereafter or where she had gone.

6. After the incident, on 20.12.2002, the Commandant gave a hearing to the petitioner under Rule 45 of the BSF Rules and examined six prosecution witnesses, including Dr. Mili Nag Biswas, SMO, who had examined "A" on the night of the incident. Though an opportunity was afforded to the petitioner to cross-examine the said witnesses, he had declined to do so. During his statement, the petitioner had denied having done anything wrong. After conclusion of the proceedings under Section 45 of the Act, the Commandant had opined that a ROE was required to be recorded under Rule 48 of the Act.

7. The trial proceeded on the following charges :

8. The ROE proceedings had commenced on 20.12.2002 and concluded on 23.12.2002. During the ROE proceedings, the evidence of 11 witnesses was recorded, which included the parents of the victim, PW-1 and PW-2, the victim, PW-3 and Dr. Mili Nag Biswas, PW-8 and the statement of the petitioner was separately recorded. The petitioner's counsel had duly cross-examined the witnesses who had deposed against the petitioner. In his defence, the petitioner

had stepped into the witness box himself and had got seven witnesses examined. After the conclusion of the ROE proceedings, a charge sheet was issued to the petitioner on 27.1.2004, which was as follows :

9. The respondents proceeded to convene a PSFC on 3.2.2004. During the course of trial, the prosecution had cited eleven witnesses and the petitioner had cited seven witnesses in his defence. The petitioner was duly assisted by a counsel. At the conclusion of the trial, the impugned order dated 24.2.2004 was passed holding inter alia that the prosecution version was to be believed in view of the statement of the victim, a minor girl, and the expert opinion of the Medical Officer (PW-11). It was concluded that the symptoms found on the body of the victim proved that her modesty had been outraged by use of criminal force by the petitioner, an offence punishable under Section 354 IPC read with Section 45 of the Act, and it was held that the prosecution had established the case beyond any reasonable doubt. The petitioner was thus found guilty of the charge and sentenced to undergo nine months of imprisonment and was dismissed from service.

10. Challenging the aforesaid decision, the petitioner had filed a statutory petition before the Director General, BSF on 30.6.2004, which was rejected, vide order dated 4.11.2004. Aggrieved by the aforesaid rejection order, the present petition came to be filed in the year 2006.

11. Mr. Anil Gautam, learned counsel for the petitioner starts by submitting that the respondents had failed to file the records of proceedings conducted under Section 45 of the Act, which oversight would go to the very root of the matter and would vitiate the entire proceedings held by the PSFC.

12. Dr. Ashwani Bhardwaj, learned counsel for the respondents rebuts the said submission and produces the records which demonstrate that the proceedings under Section 45 of the Act had been conducted and though a hearing was granted to the petitioner after recording the evidence of the witnesses, he had declined to examine anyone and elected not to produce any witness in his defence. In view of the said records that we have perused, it cannot be contended that the provisions of Rule 45 of the Act were not complied with by the respondents before directing the ROE.

13. The next submission made by the counsel for the petitioner is that the respondents had not only failed to consider the evidence adduced by the petitioner in his defence, they had considered the evidence on a selective basis only to support the prosecution case instead of examining the same in entirety. In support of the said submission, learned counsel adverts to the testimony of PW-11, Dr. Mili Nag Biswas and submits that on the date of the incident, i.e., 18.12.2002, when the victim and her mother had presented themselves in the OPD of the BSF Hospital, the doctor had recorded that she had examined the victim's private parts, but there did not appear any clear evidence of crime. However, there was tenderness in her lower abdomen area. It was also recorded

that as per the duty nursing assistant, the petitioner had consumed alcohol.

14. Learned counsel for the petitioner submits that as against the aforesaid sketchy report submitted by the doctor, when she appeared as PW-11 before the PFSC after a period of one year and three months, she had extensively deposed about the incident in minute details and referred to the condition of the victim, which is quite implausible as over a period of time, the memory would ordinarily fade when it comes to recalling such fine details.

15. To rebut the said submission, learned counsel for the respondents draws our attention to the statement of Dr. Mili Nag Biswas dated 22.12.2002, recorded in the course of the ROE proceedings, where she had been arrayed as PW-8.

16. A perusal of the testimony of Dr. Mili Nag Biswas, the expert witness, that came to be recorded within a period of three days from the date of the incident, shows that she has gone into minute details and her version was that there was no sign of tearing or bleeding on the private parts of the victim, but there was tenderness on her lower abdomen on palpation; there were some red marks on both her cheeks that indicated closing of mouth by hands or with, some other thing. The doctor had testified that while undergoing examination, "A" was nervous and frightened and she could not pass urine at that time. She had also suffered pain during micturition and had complained that the petitioner had put his finger in her vagina. The doctor had deposed that after the examination, she had found that there was redness in the vagina of the victim. Further, the doctor had narrated the version of the incident that had taken place and was conveyed to her by the victim, which corroborates with the testimonies of the victim (PW-3) and her mother (PW-2).

17. It is pertinent to note that the doctor was extensively cross-examined by the petitioner but she did not change her version at any stage. Instead, she had replied to one of the questions posed to her by stating that the victim was nervous and panicky and could not talk freely and that she had pain in her lower abdomen. She had also reiterated her statement made in the examination-in-chief to the effect that there was redness on both sides of the victim's cheeks and tenderness in her lower abdomen. After the ROE, when the doctor had appeared as PW-11 before the PSFC, she had stood by her deposition as was recorded earlier.

18. The doctor had concluded her evidence by stating that after hearing the version of the incident from the parents (PW-1 & PW-2) and the victim (PW-3), she had confronted the petitioner, who was present in the hospital, and asked him as to how could he commit such a misdeed with the little child. She stated that in the course of her interaction with the petitioner, he had suddenly come towards her and had threatened that if she would not save him, he would consume poison and commit suicide and had requested her that he be excused from the crime.

19. During the trial, the doctor (DW-11) had stuck to her version as recorded in

the ROE, and had also reiterated that the petitioner had threatened her that if she would not come to his aid, he would consume poison and commit suicide, which would result in her landing in a problem. In other words, the petitioner had tried to threaten the doctor.

20. As for the victim herself, who had appeared as PW-3, she had clearly narrated the sequence of events that had taken place on 18.12.2002 and had stated that when she had accompanied the petitioner to his house to collect the water drum for storage of water; there was no light inside the room and when she had asked the petitioner to switch on the lights, he had declined to do so and instead, after laying her on the bed, he had molested her. Later he went inside the bathroom and had started to masturbate. In her cross-examination, the victim, had clearly stated that she recognized the petitioner and went on to narrate the manner in which he had molested her. In the course of the trial, the victim, who was by then, nine years of age, was quite lucid and had deposed about the incident that had taken place on the fateful day and gone on to add that she had forgotten to inform the doctor that the petitioner had kissed her several times.

21. The records produced by the respondents have been carefully examined by us and they reveal that the victim had undergone extensive cross- examination at the hands of the defence counsel, but her testimony had remained unshaken. During her cross-examination, the defence did not pose any question to the victim on her statement that the petitioner had kissed her several times and that she had suffered from pain on her waist, mouth, abdomen, thighs and private parts. In other words, the evidence of the victim remained consistent throughout her cross-examination.

22. Another plea taken by counsel for the petitioner is that Rule 85(3) of the Act is mandatory in nature and was not complied with by the respondents and in view of the said omission, the deposition of the victim in the course of the trial would stand vitiated. The aforesaid provision contemplates that where the witness is a child under 12 years of age and the Security Force Court is of the opinion that though the witness understands the duty of speaking the truth, but he does not understand the nature of an oath or affirmation, then the oath need not be administered.

23. Upon perusing the record of the trial, conducted by the PSFC, it transpires that before PW-3's statement was recorded, the Law Officer had read over and explained the provision of Section 85 of the Act. It shall therefore have to be assumed that having noted the said provision, the PSFC had elected to dispense with the requirement of administering an oath to PW-3, keeping in mind her tender age. In any event, the said provision is procedural in nature and its non-compliance, if any, cannot be a ground to ignore the entire evidence, nor can it vitiate the trial.

24. Coming next to the contention of the counsel for the petitioner that the

evidence of the defence was considered selectively to the detriment of the petitioner, we may note that the petitioner had produced seven witnesses, i.e., DW-1, HC S.P. Thapa, who was performing Guard Commander duty, DW-2 Constable Sadashiv, DW-3 Constable Mool Chand and DW-4 Constable P.T. Mohanty, who were performing Guard Duty at gate 4 on the fateful evening. The other material witness on whose deposition, the petitioner relies, is Constable S.N. Rajesh DW-5, who was a neighbour of the petitioner and had deposed that on 18.12.2002, he was off duty from 13.00 hrs. to 19.00 hrs. and around 17.00 hrs., when he was in the house while his wife had gone to the neighbourhood and he was waiting outside at 17.30 hrs., he had seen the petitioner along with the victim. The petitioner had borrowed a torch from him and had gone into his quarter with the victim. After some time, she had come out the house followed by the petitioner, who had handed over some items to her.

25. Counsel for the petitioner submits that on perusing the deposition of DW-5, it clearly emerges that the victim had stayed inside the petitioner's house for only 5 to 6 minutes and was looking normal when she had come out, nor did he hear any sound similar to a cry. He states that the said evidence has been overlooked by the PSFC while passing the impugned order dated 24.2.2004. However, a perusal of the said order reveals that the defence version, through statements of the accused on oath as also the witnesses produced by him, was considered along with that of the prosecution, but at the end of the day, the court had elected to give weightage to the statement of the victim and had believed the expert opinion of the Medical Officer, based on her medical examination, while discarding the rest of the evidence.

26. The circumstantial evidence read with the testimony of the victim and the deposition of the doctor, who had stated that symptoms were found on the body of the victim which proved that she had been molested by the petitioner through use of criminal force, were sufficient for arriving at the conclusion that the petitioner was guilty of the offence under Section 354 of the IPC read with Section 45 of the Act. The petitioner's defence lacks plausibility and has been rightly discarded by the PSFC.

27. It is settled law that while exercising the powers of judicial review, the court is not required to reappraise the evidence by examining it with a toothcomb or sit in appeal over the findings of fact recorded in the course of the trial. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice and as such, the court would not be justified in re- appreciating the evidence adduced before quasi-judicial tribunal or alter the findings arrived at the trial. The purpose is to ensure that such Tribunals do not exceed their statutory jurisdiction, or commit jurisdictional errors or errors of law that would be apparent on the face of the record. Reference may be made to the following judgments on the parameters for exercise of judicial review by a writ court:-

(i) B.C. Chaturvedi v. Union of India, , AIR 1996 SC 484

(ii) R.S. Saini v. State of Punjab and Others, , AIR 1999 SC 3579

(iii) Apparel Export Promotion Council v. A.K. Chopra, , AIR 1999 SC 625

(iv) Major Anil Behl No. 3141 is (Ex). v. Union of India and Ors., , 1999 I AD (Delhi) 447

(v) Balwan Singh v. Union of India, , AIR 2000 SC 3425

(vi) Prosenjit Kundu v. The Presiding Officer, General Security Force Court and Ors., , 2006 (88) DRJ 856

28. In the instant case, we have examined the evidence carefully and gone through the testimony of the prosecution witnesses as also the defence witnesses so as to satisfy ourselves if there has been any oversight or infirmity therein, which would cast a shadow on the assumption drawn in the impugned order. Having examined the entire records, we can safely conclude that there is no illegality, arbitrariness or perversity in the impugned order requiring any interference in judicial review. Consequently, the present petition is dismissed as being devoid of merits.

29. No orders as to costs.