

(2000) 03 DEL CK 0046

In the Delhi High Court

Case No : Civil Writ Petition No. 3369 of 1995

Ashok Kumar (Ex. Constable)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-03-2000

Acts Referred:

Citation : (2000) 3 AD 388 : (2000) 53 DRJ 352

Hon'ble Judges : R.S. Sodhi, J;Chander Mohan Nayar, J

Bench : Division Bench

Advocate : Mr. Bishram Singh, for the Appellant; Mr. Rakesh Tikku and Mr. Sanjeev Sachdeva, for the Respondent

Judgement

R.S. Sodhi, J.—The petitioner, Ashok Kumar, an Ex.Constable, Border Security Force, by this petition under Article 226 of the Constitution of India, seeks to challenge the findings and sentence awarded by the General Security Force Court vide order dated 18th April, 1994, which were confirmed by the statutory authority as also the Central Government rejected the statutory petition of the petitioner against the findings and sentence of the said General Security Force Court vide order dated 29th July, 1995.

2. It is the case of the petitioner that he was enrolled in the Border Security Force as a Constable on 12th April, 1989 and after completion of training was posted in 142 Battalion BSF. During June, 1992 the petitioner was posted in FCompany, Headquarter, located a Border Out Post, Nayatal, Barmer Sector, Rajasthan, within the jurisdiction of Commandant 412 Battalion, BSF. That on 6th June, 1992 the petitioner was nominated by Head Constable Santokh Singh to work as Personal Orderly to Subedar Nathu Ram, Officiating Company Commander of the said "F" Company at the said Border Out Post, Nayatal which job, according to the petitioner, was of a menial nature, such as polishing shoes, bringing food from cook house, washing utensils etc. and, Therefore, the petitioner declined to perform the said duties as it was a job beyond the call of duty. This, it is stated, was a cause of annoyance which brought about his being

victimised. On 13th June, 1992 the petitioner was directed to do pack drill for allegedly not being attentive while on duty at observation post, Naka, where a water tanker approached the said Border Out Post, Nayatal, and went undetected. The said punishment was supervised by Naik Mukhtiyar Singh. It is the case of the petitioner in the writ petition that while doing pack drill, the petitioner saw Head Constable Santokh Singh carrying one rifle and one bandolier and going towards the office-cum-residence of the said Company Commander, Nathu Ram. After the pack drill, the petitioner found his rifle and ammunition missing.

3. In order to retrieve his rifle and ammunition, the petitioner went to the office-cum-residence of the Company Commander and made missing report of his rifle and ammunition from the barrack. The Company Commander, Nathu Ram, pointed towards a rifle which was kept near the window which, the petitioner confirms, was the one issued to him and the petitioner in the attempt to take back his rifle grappled with the Company Commander who was holding the rifle from its butt while the muzzle was pointing towards the petitioner. During the struggle one round got fired which hit the petitioner in his stomach and he fell down on the ground and remained in senses. The Company Commander, according to the petitioner, sensing the gravity of the situation committed suicide by firing a shot from the same rifle at his forehead. The petitioner was evacuated to Civil Hospital, Barmer at about 1945 hours on the same day i.e. 13th June, 1992 and the next day was moved to M.G. Hospital, Jodhpur. He was tried in April, 1994 by a General Security Force Court on allegedly false and fabricated charges, convicted and sentenced to suffer imprisonment for life and dismissed from service vide order dated 18th April, 1994. He assails the proceedings on various counts, primarily, on the ground of appreciation of evidence and non-compliance of Rule 45 of the Border Security Force Rules (for short "the Rules").

4. The case put up against the petitioner by the prosecuting agency is that the "F" Company of the Unit was deployed at the Border Out Post, Nayatal since 14th May, 1992 and was having two out posts of platoon level each at Badha, Ekal and a platoon plus Company Headquarter at Nayatal. Inspector Ram Kumar, the then officiating Company Commander was relieved by Inspector Nathu Ram as he proceeded on sixty days earned leave on 8th June, 1992.

5. That on 13th June, 1992, Constable Ashok Kumar, petitioner herein, was detailed for observation post duty from 0700 hours to 0900 hours. At about 0830 hours a water tanker from Janpalia came into the post for water supply. Constable Ashok Kumar who was on out post duty alarmed the post at the time when the water tanker was just entering into the border out post, Nayatal. The drill for alerting the post is that the out post on duty whenever spots any vehicle coming towards the post from a distance must sound the alert whereby alerting the border out post which would give enough time even when the intruder is about a kilometer away. But in this case, the petitioner was not vigilant enough while performing his duty.

6. That at 0910 hours the Guard Commander, Naik Mukhtiyar Singh, brought the petitioner before the Officiating Company Commander, Inspector Nathu Ram, who then sought an Explanation as to why the tanker was allowed to get away without the requisite alert being sounded. The Explanation not being satisfactory, Constable Ashok Kumar was given pack drill from 1000 hours to 1030 hours under the supervision of the Guard Commandar.

7. That at about 1140 hours on the same day i.e. 13th June, 1992 a sound of rifle fire followed by another was heard from the office-cum-residence of the Company Commander. All the personnel available at the border out post rushed towards the post and found that the petitioner was standing outside with hands raised, shouting "INSPECTOR KO MAR DALA. MENE JO KARNA that KAR DIYA. MAIN BHI MARUNGA. APNE KO BHI GOLI MARI HAI (have killed the Inspector. I have done what I wanted to do. I will also die. I have also shot myself). Upon this he threw away the rifle on the platform in front of the building. Some personnel including Head Constable Birender Singh rushed in the room and saw Inspector Nathu Ram's dead body lying on the ground in a pool of blood. The petitioner too was found bleeding on the left side of the stomach. He was taken to the barrack and given first aid and thereafter evacuated to Civil Hospital Chhotan / Barmer and further to Jodhpur. The incident was initially reported to Police Station Bakasar on the same day and FIR No.16 dated 13th June, 1992 under Sections 302/309 IPC was recorded. The case, however, was got transferred to Border Security Force and thereafter Constable Ashok Kumar was tried by General Security Force Court who after trial, found him guilty and sentenced him on 18th April, 1994 to suffer imprisonment for life and dismissed from service.

8. We have heard learned counsel for the petitioner at length. He has taken us through the record of the case and has pleaded that we reappraise the evidence which, according to him, would show that the petitioner was innocent, he emphasises that parameters of judicial review under Article 226 of the Constitution do not inhabit the court from doing complete justice which would then mean that the entire evidence can be gone into as if the Court were one of First Appeal. In any event, according to the learned counsel, Rule 45 of the Border Security Force Rules having not been complied with, the trial would be vitiated and the petitioner entitled to an acquittal. On the other hand, it is argued by learned counsel for the respondents, that the High Court under Article 226 of the Constitution is not a Court of Appeal but can certainly go into the matter of procedural irregularities and/or matters relating to violation of natural justice as also the Rules but contends that in the present case there has been no violation which calls for interference by this Court.

9. We have given our careful consideration to the contentions of learned counsel for the parties; satisfied ourselves and gone through the record of the case. We may at the outset state that the judicial review envisaged under Article 226 of the Constitution in respect of the proceedings, in which the defense personnel

serving in the Army, Navy, Air Force or even paramilitary force when commit any offence, are dealt with by a special provision contained in statutory enactments governing them and not by normal criminal procedure code is not in the nature of an appellate court. These personnel are to be dealt with under such enactments which are completed codes in themselves and prescribe the procedure to be followed in cases governed by it. Personnels that are tried by such procedure are provided with sufficient safeguards by way of further appeal to the Heads of the organisations and then ultimately to the Union Government. Therefore, ordinarily there should be a finality to the proceedings as envisaged by these enactments, in this case the Border Security Force Act and the Border Security Force Rules. The High Court's powers under Article 226 of the Constitution to judicially review such findings is for a limited purpose, namely, for finding out whether there has been infraction of any mandatory provisions of the Act prescribed and procedure which has caused gross miscarriage or for finding out whether there has been violation of principles of natural justice which vitiated the entire proceedings or that the authority exercising the jurisdiction has not been vested with the jurisdiction under the Act. The power of judicial review cannot be that of an appellate authority permitting to reappreciate the evidence and come to a conclusion that the evidence is sufficient for the conclusion arrived at by the competent authority under the Act. The Supreme Court has held in a number of judgment that at the highest the jurisdiction of the High Court of judicial review of the findings of these authorities cannot be higher than those exercised by the High Court under Article 227 of the Constitution against an order of an inferior tribunal and, Therefore, the High Court would not be justified in entering into the forbidden zone of reappreciating the evidence as a Court of Appeal. A Division Bench of this Court in Ex. Major R.S. Budhwar Vs. Union of India (UOI) and Others, had an occasion to go into the question of the nature of judicial review and has dwelt into all aspects thereof. It has held :-

"The jurisdiction of this Court under Article 226 is, Therefore, defined and is limited to the extent of finding it whether there is an error of jurisdiction and it is a case of total lack of evidence. This Court, as has been consistently held, does not sit as a Court of Appeal. In case legal evidence was available on which a finding could be given, the sufficiency or otherwise was for the Authority to decide and this Court cannot substitute its opinion for that of Court Martial "

Further :

"The Court on its own appraisal of the evidence may come to a contrary conclusion but it is not open to quash an order until and unless the impugned order was based on no evidence at all. The sufficiency and insufficiency of evidence is not a matter for this Court to consider in a petition under Article 226 of the Constitution of India. The same is for the Authority to decide. The error or defect of procedure of which some instance have been given by learned Counsel appearing for the petitioner, cannot be entertained in the present proceedings as these may be mere procedural irregularities and they cannot be regarded as

errors of law apparent on the face of the record and no challenge was made at an appropriate stage and the principles of natural justice have not been violated."

10. The judgment has found favor with the Supreme Court in Major R.S. Budhwar Vs. Union of India and others, .

11. In the backdrop of the settled legal position we may appreciate the contentions raised by learned counsel for the petitioner. It is the contention of the petitioner that there has been an infringement of Rule 45 of the Border Security Force Rules inasmuch as the Commanding Officer purportedly held a hearing on 6th August, 1992 and the minutes were signed by the Commanding Officer on 10th September, 1992 to be treated as a certificate of compliance of the said Rule 45. In other words, the certificate appended to the proceedings under Rule 45 having been done at 10th September, 1992 shows that no proceedings had taken place on 6th August, 1992 and that it was a fabrication of record. He has urged that without complying with Rule 45, a procedure under Rule 48 could not have been resorted to and in absence thereof there was no basis to hold a General Security Force Court, Therefore, the trial is vitiated. He submits that Rule 45 is mandatory in character and any infringement thereof would vitiate the trial.

12. A bare perusal of Rule 45 would indicate that by its very nature, the hearing of evidence by the Commanding Officer at the initial stage when the person charged with an offence is brought before him is for the purpose of ascertaining whether the charge should be dismissed or be proceeded with. If the Commanding Officer is of the opinion that the charge ought not to be proceeded with, the person charged with the offence has to be released forthwith. On the other hand, if the Commanding Officer is of the opinion that the charge ought to be proceeded with, he may then follow the procedure prescribed for further proceedings. The object of the Rule, it appears, is to hold a sort of preliminary investigation by the Commanding Officer with a view to ascertain whether a prima facie case exists to justify further proceedings and the nature of those proceedings, namely, he can either award any punishment which he is empowered to or dismiss the charge or remand the accused for preparing a record of evidence or for preparation of an abstract of evidence against him or remand him for trial by Summary Security Force Court, but in cases where the offence is punishable with death, a record of evidence shall be taken. In this case, the Commandant directed recording preparation of record of evidence by order dated 6th August, 1992. Once Therefore, having come to the conclusion that the charge ought to be proceeded with, the Commandant directed the formal recording of statement of witnesses, as provided to enable remand of the accused for trial by General Security Force Court. It is thus implicit in the procedure prescribed that any error or irregularity at the stage before the case is charged for the purpose of having the evidence reduced to writing, will not vitiate the subsequent trial as the guilt of the accused has to be established not on the basis of what the Commanding Officer might have done or might not have

done at the initial stage. Any irregularity in procedure at that initial stage might have a bearing on the veracity of witnesses examined at the trial or on the bona fide of the Commanding Officer or on the defense that may be set up by the accused at the trial, but the irregularity, by no means, be recorded as effecting the jurisdiction of the court to proceed with the trial. Therefore, even if it is assumed that there was noncompliance with the requirement of Rule 45, the non-observance of the Rule is not such as to vitiate the trial and ultimate conviction of the petitioner. In the present case, there appears to be no infringement inasmuch as the proceedings were, in fact, held by the Commandant on 6th August, 1992 on the two charges punishable under Sections 302/309 IPC under the provisions of the Border Security Force Rule 45 and the Commander, after giving hearing to the petitioner on the offence report, ordered for preparation of record of evidence on 6th August, 1992 which subsequently led to his trial by General Security Force Court. It is on record that the Commandant orally examined as many as eight witness and the accused was given an opportunity to cross-examine them. Three witnesses were cross-examined while the accused declined to cross-examine others. Therefore, no fault could be found in the procedure adopted under Rule 45. The attack on the date of certification of the compliance of Rule 45 being 10th September, 1992 cannot possible vitiate what was actually done on 6th August, 1992 and, Therefore, the grievance of the petitioner of non-compliance of Rule 45 is mis-placed.

13. Learned counsel for the petitioner contended that this was a case of "no evidence" and, Therefore, to satisfy ourselves, we proceeded to examine the record from that angle and found that the contention is baseless. Witnesses have been examined and from their testimony it cannot be said that this is a case of "no evidence". We choose, however, not to discuss the sufficiency or the evidentiary value which is not within our purview.

14. Yet another grievance of the learned counsel is that the proceedings of investigation by the civil authorities were not given to him and this infringement has vitiated the trial of the case. It need hardly be said that the case put up by the prosecution and the material relied upon had been supplied in accordance with the requirements of the Rules under the Border Security Force Act. If any further material was required for the purpose of defense, it could always have been summoned during trial. The petitioner chose not to exercise this option in the conduct of the trial and, Therefore, cannot at this stage claim that breach has been caused because of non-supply of material which was not used in the trial against him by the prosecution.

15. In this view of the matter, we are of the considered opinion that the grievance of the petitioner is baseless and, Therefore, the writ petition deserves to be dismissed. Accordingly, the writ petition is dismissed and the Rule discharged. There shall be no order as to costs.