

(2011) 11 DEL CK 0224

In the Delhi High Court

Case No : Writ Petition (C) No. 2716 of 1997

Balbir Singh Vats

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

Border Security Force Act, 1968 — Section 113
Border Security Force Rules, 1969 — Rule 63
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 354

Citation : (2011) 11 DEL CK 0224

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : Ajay Veer Singh, Ms. Anisha Jain, Mr. Atul Aggarwal and Ms. Divya Garg, for the Appellant; Anuj Aggarwal and Mr. Gaurav Khanna, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner has filed the above noted petition under Article 226 of the Constitution of India seeking a writ of certiorari

for quashing the order of dismissal from service dated 15th December, 1990 passed against him and has also sought an appropriate writ, order or

direction, directing the respondents to reinstate the petitioner to the post of Assistant Commandant w.e.f. 15th December, 1990

2. The brief facts to comprehend the disputes between the parties are that the petitioner was posted as Assistant Commandant of No. 51 Battalion

BSF vide IRLA-3980 at Amritsar (Pb) under the command of the Commandant No. 51 Battalion BSF, Bhikhiwind, Amritsar (Punjab). The

petitioner was initially appointed as Sub-inspector with the Border Security Force in the year 1980 and was thereafter, promoted from time to time

till he was ultimately appointed as Assistant Commandant. According to the petitioner, he has an unstinted service record of 23 years and 7 months

of service and that while he was posted at Raja Tal at the Amritsar border in 1990 he was served with a charge sheet for an incident which had

allegedly taken place on 18th May, 1990. The charges against the petitioner were that he used criminal force to a person, who was subject to the

BSF Act and was subordinate to him in rank and that he also committed an offence of using criminal force on a woman with the intent to outrage

her modesty, which is punishable u/s 354 of the Indian Penal Code

3. It was alleged that the petitioner at BOP, Rajatal on the intervening night of 18/19th May, 1990, had slapped Subedar (G), Sharam Singh of

JAD (G) Team, Amritsar, who was bearing No. 66010109 and that on the said date he had also used criminal force on Smt. Subia, wife of Edul

Mian, a Bangladesh National, with the intention to outrage her modesty

4. According to the petitioner, it was only after the expiry of three days since the alleged incident, that the Commandant of 51 Bn. BSF handed

over the charge sheet to the petitioner and intimated him that a record of evidence shall be prepared by Sh. V.S. Ahlawat, Dy. Commandant, his

second-in-command of the Battalion. Later on the said order was cancelled and the commandant himself took over the task of preparing the

record of evidence which commenced on 23rd May, 1990

5. The petitioner filed his written submissions dated 16th June, 1990 against the charges made against him contending, inter alia, that on the night

intervening 18th/19th May, 1990 some Bangladeshi Nationals were apprehended by the BSF personnel and that they were brought to BOP

Rajatal, where they were made to sit in the company compound and water was served to them. The petitioner pleaded that he had interrogated

some of the detainees but that he did not interrogate the women and children. He contended that he left them after some time and went to sleep

and left the Santry to keep a watch over them. According to the petitioner, his 18 years old son was sleeping nearby. After some time, the

petitioner had noticed a light of a vehicle at his post and he also noticed some men roaming about, who were not of his company and, therefore, he

called SI Shyam Lal and made enquiries from him. Shyam Lal intimated him that the persons, who were roaming about, belonged to JAD(G) Team

Amritsar. The petitioner allegedly rebuked Shyam Lal as to why he had not reported the matter about their arrival. After some time, Sub (G)

Sharam Singh rushed towards him and got infuriated and declared that they belonged to JAD (G) T Amritsar, which is a superior force and that

they are not liable to report to anyone

6. The petitioner, however, insisted that every person coming to the company compound was liable to report to the Company Commander. There

had been exchange of heated words and, therefore, the petitioner was threatened with dire consequences. In order to avoid any mishap, Sub (G)

Sharam Singh was taken away by SI Shyam Lal from the post. According to the petitioner, the allegation of slapping Sub (G) Sharam Singh by

him was concocted in order to harm and humiliate the petitioner. Even the allegation of the petitioner outraging the modesty of a Bangladeshi

woman was a fabricated story which was woven at the instance of Sub (G) Sharam Singh

7. The petitioner further contended that his entire service record is unblemished and that the said allegations have been made in order to harass him

and to tarnish his image in the public in general. The petitioner, in the circumstances, had sought acquittal from the charges framed against him

8. On the basis of the evidence recorded, the petitioner was brought to trial by the General Security Force Court (hereinafter referred to GSFC).

The petitioner contended that the GSFC conducted an illegal trial and had held that both the charges against the petitioner were made out.

Consequently the petitioner was awarded the sentence of loss of one year's seniority, forfeiture of 31/2 years of past service for the purpose of

pension and he was also given severe reprimand by order dated 21st June, 1990

9. Aggrieved by the order of sentence dated 21st June, 1990, the petitioner filed a mercy petition for mitigation of his sentence and sought

voluntary retirement from the service. The petitioner filed the application for voluntary retirement on 18th December, 1990

10. The Commandant, however, by his order dated 29th April, 1991 intimated the petitioner that by order dated 29th April, 1991, the petitioner

had been imposed the sentence of dismissal from service. The petition dated 18th December, 1990 by the petitioner requesting for mitigation of

sentence had also been considered and rejected by DIG, BSF

11. The petitioner also filed a review petition on the mercy petition for the mitigation of sentence, reiterating his prayer for accepting his voluntary retirement on 27th October, 1991, however, it too was dismissed by order dated 13th February, 1992. It was held that the petition dated 22nd

October, 1991 had been duly considered by the Director General, Border Security Force and that the same was rejected, because of being devoid of any merit

12. The petitioner has challenged his dismissal in the present writ petition, inter alia, on the grounds that the order of dismissal was passed in

violation of the procedure established by law under the Borders Security Force Act, 1968 read with the Border Security Force Rules, 1969 and in

violation of the principles of natural justice. The petitioner contended that his dismissal is also in violation of the law laid down by the Supreme

Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, against the Armed Services and Article 21 of the service

personnel. According to the petitioner, the recording of evidence was done in barely four days after the alleged incident on the night of 18th/19th

May, 1990 which according to the petitioner was not in compliance with the established procedure laid down in Rule 63 of the BSF Rules, 1969.

The plea of the petitioner is that the respondents have not proved the charges leveled against him beyond reasonable doubt and thus suffers from

serious infirmities

13. The averment of the petitioner is also that the revision u/s 113 of the BSF Act, 1968 by the Convening Authority was in fact a direction given

to the GSFC which gives an impression of "command influence" on the members of the court. The petitioner challenged his dismissal by filing a civil

suit which was dismissed and the appeal filed against the dismissal of the suit also did not result in quashing of punishment awarded to the

petitioner. The petitioner, therefore, contended that he had availed his remedies under a wrong legal advice to a wrong forum and consequently,

latches, if any, in not invoking the jurisdiction of this Court within reasonable time was neither willful nor deliberate nor could any ulterior motive be

attributed to the petitioner and, therefore, the delay, if any, ought to be condoned

14. The learned counsel for the petitioner has very emphatically contended that the case of the petitioner is based on no evidence as the evidence

recorded is not sufficient to inculcate him. He has contended that Mrs. Subia, who is alleged to have been molested by the petitioner, has not even identified him. The counsel also contended that the witness Shyam Lal of his company is the friend of Sub (G) Sharam Singh and that false charges have been leveled against him as he had challenged the entry of JAD(G) T in his company compound. Therefore, as per the learned counsel for the petitioner the testimony of SI Shyam Lal of his company could not be relied in the facts and circumstances. The counsel contended that the petitioner could not have molested the Bangladeshi woman in his room as his son aged about 18 years was also present which fact had also been admitted by the witnesses, who had deposed before the GSFC

15. The respondents contested the writ petition and filed a counter affidavit of Sh. S.P.S. Tanwar, DIG/PSO, Border Security Force, Raj & Guj

Frontier who contended that the writ petition is hopelessly barred by time. It was averred that the petition is nothing but an abuse of the process of

law as the petitioner is trying to cover up and undo his wrongful, illegal and shameful acts of first striking/hitting a subordinate on duty and secondly

of attempting to outrage the modesty of a Bangladeshi woman which should not be permitted and cannot be permitted in a disciplined force like the

BSF

16. The respondents disclosed that the petitioner had filed a suit for declaration and mandatory injunction being suit No. 365/1993 before the Civil

Judge, Delhi, which was dismissed by the judgment dated 29th August, 1995 by Sh. Brijesh Sethi CJ. An appeal filed against the judgment and

decree dated 29th August, 1995 being RCA No. 322/1996 was also dismissed as withdrawn at a later stage. The petitioner, thereafter, filed the

present writ petition and in the circumstances, the petitioner cannot be allowed to invoke the extraordinary jurisdiction of this Court. It was also

averred that before the Civil Court the petitioner had himself deposed on oath that the orders were passed by the respondents in consonance and

in compliance with the provisions of BSF Act, 1968 and the BSF Rules, 1969 and, therefore, his plea to the contrary now in the writ petition is not

sustainable

17. On behalf of the respondents, it was further averred that the petitioner was the Assistant Commandant being the Company Commander of the

particular BSF company and on his orders all the apprehended persons were brought to BOP Rajatal. While conducting an inquiry of the

apprehended persons, in front of his room he hit them with a cane and ordered them to be detained at the Camp. Later on during the night

Constable Bhagwan Singh, one of the BSF personnel present at the post, on hearing the weeping and crying from the Bangladeshi nationals, saw

the petitioner forcibly taking the apprehended Bangladeshi woman towards the visitor room. On being informed of this Sub (G) Sharam Singh

asked Constable Bhagwan Singh to verify this again. Thereafter, Sharam Singh (Sub-G) along with constable Bhagwan and L/NK Mohd. Nasir

came near the visitors? room where they heard weeping from inside the room which was lit by the light of a torch kept on the bed side. It was seen

by them that a woman was lying naked on the bed from waist below and her saree had been pulled up above the waist and the petitioner was lying

over her attempting sexual intercourse. At that time the generator installed at the camp had been switched off temporarily to allow it to cool and the

petitioner had been doing the nefarious act in the light of torch which had been kept on the bed side table pointing towards the bed

18. Shri Shyam Lal SI of ""A"" Company 51 Bn. BSF was woken up and he along with Constable Sadanand of JAD(G) Team also saw the

petitioner trying to outrage the modesty of the apprehended woman through the gaps in the door and window of the visitors? room. Sub (G)

Sharam Singh then pushed the door to knock on it but since it was not bolted from inside it opened easily. When the door opened, the petitioner

was found naked from below the waist wearing a half sleeves round neck baniyan along with the Bangladeshi woman who was also lying on the

bed and was naked below the waist as well. At this point the petitioner got up and shouted at Sharam Singh and challenged him as to how he

entered the room of the petitioner who was the Company Commander. On being told that he was doing an inappropriate act, Sharan Singh was

manhandled by the petitioner and in the process his baniyan was torn. The Bangladeshi woman, thereafter, came out of the room after pulling down

her saree and kept on weeping. The information was sent by the personnel present in the camp to the higher authorities and the Commander, 51

Bn. BSF was informed about the incident. On the orders of Commandant, Sh. S.S. Bal and Dy. Commander Sh. H.R. Sishnoi along with the

Commandant reached the site of the incident. The eye witnesses were examined and since a prima facie case was made out, therefore, recording

of evidence (ROE) was ordered against the petitioner which was to be conducted by Sh. V.S. Ahlawat, Second-in-Command of 51 Bn. BSF.

The ROE, however, was recorded by the Commandant himself. The ROE was commenced on 23rd May, 1990 and was concluded on 27th

May, 1990. On appraisal of the evidence recorded during the ROE, the case was forwarded to the headquarter to convene the GSFC against the

petitioner pursuant to which the petitioner was tried by the GSFC from 7th June, 1990 to 21st June, 1990 which thereafter, passed the sentence of

reduction of rank ordering that appointment of the petitioner as Assistant Commandant be held to be from 1st April, 1990 instead of his actual

date of appointment as well as the forfeiture of his 31/2 years of past service for the purpose of pension and he was also severely reprimanded

19. The respondents disclosed that the BSF trial proceedings were sent for confirmation on 21st June, 1990 to the Competent Authority. The

Competent Authority, however, keeping in view the gross misconduct of the petitioner, instead of confirming the sentence, reviewed and re-

considered the punishment imposed and accordingly in accordance with the rules and regulations, the lenient punishment awarded was revoked

and the sentence of dismissal from service was passed

20. The learned counsel for the respondents has very emphatically contended that before the Court, Constable Sunil Dutt (Hindu); Constable B.S.

Hartar (Hindu); Head Constable Mobin Khan (Muslim); SI Shyam Lal (Hindu), Subedar (G) Sharam Singh (Sikh); L/NK Mohd. Nasim

(Muslim); Constable Bhagwan Singh (Hindu); Constable Sadanand (Hindu) and Mrs. Subia (Muslim) were examined under the BSF Rules, 1953.

The petitioner was asked to give his evidence on oath as a witness or make a statement without being affirmed and he opted to give a statement

without oath. The petitioner handed over a written address which was signed by the law officer. Certain questions were also put to the petitioner

by the GSFC, however, in his answers, the petitioner did not disclose the plea taken in the present writ petition that as he had challenged the entry

of Sharam Singh and other persons of JAD(G) in his company compound, therefore, he was falsely implicated and that Shyam Lal of his company

was friendly with Sharam Singh and, therefore, they colluded with each other

21. Learned counsel for the respondents also contended that the evidence recorded by the Court was sufficient to draw the inference of the guilt of

the petitioner and in such proceedings, the charges against the petitioner were not to be proved beyond reasonable doubt as in the criminal trials

but the inferences had to be drawn on the basis of preponderance of probabilities. The learned counsel contended that the plea on behalf of the

counsel for the petitioner that the case against the petitioner is of no evidence is not sustainable as perusal of the evidence given by the said

witnesses un-equivocally reflects that there has been sufficient evidence to inculcate the petitioner. The learned counsel for the petitioner also

produced the file of the GSFC proceedings in respect of Assistant Commander Balbir Singh/petitioner containing all the testimonies of the

witnesses recorded before the Court and other proceedings

22. The plea of the learned counsel for the petitioner that the petitioner is an old person now and that he wants to vindicate his honor and that he

has also suffered substantially and, therefore, he be absolved of the charges made against him is also not sustainable. The plea has neither been

taken in the writ petition, nor is it legally sustainable in the facts and circumstances

23. This Court has heard the learned counsel in detail and has also perused the testimonies of the various witnesses recorded by the GSFC. On

perusal of the different testimonies, the plea of the learned counsel for the petitioner that the case against the petitioner is based on no evidence

cannot be accepted. This Court does not have to re-appreciate the evidence, however, even on perusal of the statements of the witnesses, which

was recorded before the GSFC, this cannot not be held that there is no evidence against the petitioner. The inferences drawn by the GSFC, if

found to be probable in the facts and circumstances and is not such which no reasonable person would draw, then the findings of the GSFC cannot

be held to be perverse and. The deposition of the victim Ms. Subia that she could not recognize the person who dragged her inside and tried to

molest her would also not absolve the petitioner in view of the other testimonies on the record. The victim Subia categorically deposed that the

man, who beat her and thereafter, dragged her into his room with a view to

molest her was wearing white clothes, which has been substantiated from the testimonies of the other witnesses as well. Even if, Sharam Singh JAD (G), who was allegedly assaulted by the petitioner, was friendly with SI Shyam Lal of the company of the petitioner and both were friends, on perusal of the entire evidence of different witnesses, it cannot be inferred that Shyam Lal's testimony is liable to be ignored on this sole ground. There was no reason for Ms. Subia to have falsely implicated the petitioner by deposing against a person wearing white clothes dragging her to his room to molest her. In her re-examination Ms. Subia verified that the torch was inside the room and was placed on a table adjacent to the charpai. In reply to the court's question, Ms. Subia deposed that there was nobody inside the room except the person who dragged her in

24. Though the petitioner has contended that his son was present there, which fact has also been deposed by other witnesses however, from the testimonies, it has not been established that his son was present in the same room where he tried to molest Mrs. Subia. In any case, this Court does not have to re-appreciate the testimonies of all the witnesses and substitute its own inferences with the inferences drawn by the GSFC. H.C.

Mobin Khan had also corroborated the fact that the petitioner was wearing a white kurta pajama, who had also deposed that he had heard the petitioner and Sub (G) Sharam Singh talking loudly in English

25. SI Shyam Lal from the company of the petitioner also categorically deposed that Sub (G) Sharan Singh along with the escort had reached the

BOP Rajatal in a Gypsy and he had made arrangements for them to sleep at BOP. He deposed that he had asked for food for them, however, this

was declined by them. The said witness categorically stated that he had seen the petitioner beating the Bangladeshi Nationals with a "danda" and he

had told the petitioner "mat maro bahut ho gaya". He also deposed that the petitioner was wearing a whitish kurta pajama. The further deposition

of the said witness was that Sharam Singh had come to him to show him as to what the petitioner was doing and through the door and window he

had seen the petitioner lying on a half naked Mrs. Subia and the torch of the petitioner was lying on the table. According to him, although he tried

to stop Sharam Singh from opening the door as it could have brought bad name to his company, however, Sharam Singh pushed the door which

opened easily. Thereafter, there was an altercation between the petitioner and Sharam Singh. The said witness, Mobin Khan, categorically stated

that when the altercation was going on the son of the accused came and asked ""papa kya bat hai"" at which he was told to go back and sleep

26. The witness SI Shyam Lal categorically denied that he had not reported about the arrival of Sub (G) Sharam Singh along with the escort to the

petitioner. Rather he deposed that he had received a telephonic message from BOP Naushera Dala that Sub(G) Sharam Singh along with the

escort were coming to BOP Rajatal and will be staying at the BOP in the night. The testimony of the Sharam Singh also substantiates the charges

made against the petitioner. He had also confirmed that the petitioner was wearing a white kurta pajama. About the presence of son of the

petitioner he had deposed that his son had rather told the petitioner after he came there that the petitioner should be ashamed of doing such a thing

with another woman and that he does not want to see his face and that he should be sent from there immediately. The testimony of L/NK Mohd.

Nasir also corroborates the testimonies of the other witnesses and there are no major contradictions in the testimonies of these witnesses

27. Though this court was not to re-appreciate the evidence, however, on perusal of the testimonies of the witnesses recorded before the GSFC, it

is apparent that the plea of the petitioner that the case against the petitioner is based on no evidence is not sustainable in the facts and

circumstances. The findings of the GSFC holding that the charges against the petitioner had been made out cannot be termed to be perverse, nor

can it be held that the inferences drawn are such which would not be drawn by any rational person. In the facts and circumstances, the plea that the

charges against the petitioner had not been made out cannot be accepted in the facts and circumstances

28. The learned counsel for the petitioner has not pointed out any specific violation of any of the rules or provisions of the BSF Act and BSF

Rules. The counsel for the respondents had pointed out that in his deposition in the Civil Suit filed by the petitioner, he had himself admitted that

there were no violations of any of the provisions of the BSF Act and BSF Rules

29. The grounds on which administrative action is subject to control by judicial review are ""illegality"", ""irrationality"" and ""procedural impropriety"".

The court will not interfere in such matters unless the decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety.

Whether the action falls within any of the categories is to be established and mere assertion in that regard may not be sufficient. To be "irrational" it

has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on

the basis of facts which do not exist, or which are patently erroneous, then such exercise of power shall be vitiated. Exercise of power will be set

aside only if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on

reasonableness" the court has to find out if the respondents have left out any relevant factors or taken into account any irrelevant factors. It was

held in M.V. Bijlani Vs. Union of India (UOI) and Others, that the Judicial review is of the decision making process and not the re-appreciation of

evidence. The Supreme Court in para 25 at page 96 had held as under:

25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there

should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial

i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the

documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record.

While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of

proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations

with which the delinquent officer had not been charged with

30. In such facts and circumstances it is not appropriate to go into the correctness of the truth of the charges framed against the petitioner. This

court also should not take over the functions of the disciplinary authority. It cannot sit in appeal on the findings of the disciplinary authority and

assume the role of the appellate authority. This court is also not to interfere with the findings of fact arrived at in the disciplinary proceedings except

in case of mala-fides or perversity, i.e, where there is no evidence to support a

finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity had not been given to the delinquent to defend himself or if it is a case where there has been non application of mind on the part of the disciplinary authorities or if the charges are vague or if the punishment imposed is shocking to the conscious of the Court. None of these grounds have been made in the present case

31. In the entirety of the facts and circumstances, no such illegality or perversity has been made out by the learned counsel for the petitioner, which will entail any interference by this Court in exercise of its jurisdiction against the order of the respondents dismissing the petitioner from service

32. The writ petition, in the facts and circumstances, is without any merit and it is, therefore, dismissed. No orders as to cost.