

(2005) 10 P&H CK 0089
In the Punjab And Haryana At Chandigarh

Baljinder Singh

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-10-2005

Acts Referred:

Border Security Force Act, 1968 — Section 117, 130, 80, 81, 89
Constitution of India, 1950 — Article 226, 227

Citation : (2006) 3 SLJ 392

Hon'ble Judges : Surya Kant, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Surya Kant, J.—The petitioner has come up with a prayer to quash the Summary Security Force Court proceedings (Annexure P-7) whereby apart from sentencing the petitioner to undergo rigorous imprisonment for six months in civil jail, he was also dismissed from the service of Border Security Force. As a consequential relief, the petitioner seeks his reinstatement in service along with all the monetary benefits.

2. The petitioner was enrolled as a Constable (General Operator) in BSF on January 10, 1995. While he was attached with 42nd Battalion, stationed at Border Outpost Sowarwali near Fazilka, it is alleged that he unauthorizedly loaded 69.5 meters of underground cable valuing approximately Rs. 15,290/- on an Eichor tractor-trolley bearing No. PB-03-0444 with the help of one Karnail Singh--a civilian. The underground cable was despatched to Fazilka market in order to earn some money by disposing it of there; The underground cable was Government property meant for supplying electricity to border flood-light poles. The petitioner, at the relevant time, was responsible for counting and maintaining of the underground cable wires. The aforesaid incident of theft was also reported vide complaint dated 23.8.2001 (Annexure P-I) by the Company Commander to the SHO, Police Station Sadar Fazilka on the basis of which a formal FIR was registered. In the aforementioned complaint, it was alleged that the petitioner in

connivance with a civilian, namely, Karnail Singh and one more unknown person, had committed the theft. On the next day, i.e. 24.8.2001, respondent No. 3--the Commandant, 47th Battalion convened a Court of Inquiry headed by K.N. Mishra, Assistant Commandant of 47th Battalion "to enquire into the circumstance under which the petitioner unauthorizedly loaded and despatched 185 mm UG-cable of 69.5 meters length on civilian tractor (Eichcr) trolley No. PB-03-0444.., and to find out the possible involvement of other personnel, if any, and the destination of despatch of the said UG-cable and to apply Rule 173(8) of the BSF Rule, if need be.

3. The Court of Inquiry after examining 17 witnesses including the petitioner, gave an opinion that the petitioner was responsible for the theft in question. The Court of inquiry proceedings, photostat copies of which have been placed on record as Annexure P-2, further reveal that an opportunity to say or make any statement in support of his deference and to produce any documents in support of his defence or to carry any witness in his defence at that stage was given to the petitioner "to which he declined to do so". The Presiding Officer also "certified that Rule 173(8) was complied with". Based upon the opinion of the Court of Inquiry, the Commandant 42nd Battalion, the third respondent prepared an offence report (Annexure P-3) against the petitioner followed by an order dated 5.9.2001 (Annexure P-4) whereby the Deputy Commandant of the Unit was detained to conduct "Record of Evidence" (ROE) as per the details mentioned in the accompanying charge-sheet.

4. The proceedings of the Record of Evidence (the photostat copies Annexure P-6), further reveal that six prosecution witnesses including Karnail Singh--a civilian--were produced and on each occasion, opportunity to cross-examine these witnesses was afforded to the petitioner but he declined to avail the same. The petitioner duly acknowledged the fact that opportunity to cross-examine the witnesses was given but declined by him. The petitioner was thereafter given an opportunity to make his own statement in terms of Rule 48(3) of the BSF Rules, 1969 (in short the Rules) but the proceedings reveal that he did not want to make any such statement. Upon a question by the Presiding Officer as to whether he wanted to produce any witness in his defence, the petitioner answered that "no, I do not want to produce any witness". These proceedings were thereafter concluded by the Deputy Commandant-cum-Recording Officer by certifying that Rule 48 of the rules was duly complied with.

5. Thereafter, the Summary Security Force Court was assembled on September 11, 2001 for the petitioner's trial. These proceedings are also placed on record as Annexure P-7. In reply to question No. 1, namely, as to whether or not he was guilty of the charges, the petitioner is stated to have confessed that he was "guilty". The Summary Security Force Court then concluded as follows:

Accused having pleaded guilty to the charge, the Court, read and explains to the accused the meaning of that charge to which he has pleaded guilty and ascertains that the accused understands the nature of the charge 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 satisfies itself that the accused understands the charge and the effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court satisfies itself that the accused understands the charge and the effect of his plea of guilty to the charge particularly the difference in procedure.

The provisions of BSF Rule 142(2) are complied with.

6. The proceedings further reveal that after the petitioner had been found guilty of the charge, he was given an opportunity to make statement in reference to the charge or in mitigation of the punishment to which also he replied that he did not want to make any statement nor he wanted to produce any witness. The proceedings finally culminated into imposition of sentence/punishment a reference to which has already been made.

7. Aggrieved at the aforesaid decision of the Summary Security Force Court, the petitioner preferred a statutory petition u/s 117 of the Border Security Force Act, 1968 along with an application u/s 130 of the Act for suspension of the sentence imposed upon him. His appeal, however, was turned down by the Director General, Boarder Security Force--respondent No; 2 vide order dated 30.4.2002 (Annexure P-9); The petitioner thereafter served the respondents with a Justice Demand Notice (Annexure P-10) but having received no response thereto, has approached this Court.

Notice of motion was issued and in response thereto, written statement on behalf of the respondents has been filed.

8. I have heard Mr. G.S. Ghuman, learned Counsel for the petitioner and Mr. Anil Rathi, learned Additional Central Govt. Standing Counsel for the Union of India and have perused the record with their assistance.

9. In order to make out a case of gross violation of principles of natural justice, learned Counsel for the petitioner vehemently contended that the action taken against the petitioner stands vitiated for the reason that in total disregard to the mandate of Rule 176 of the Rules, copies of the proceedings of the Court of Inquiry (Annexure P-2) were not supplied to the petitioner though the said Court of Inquiry gave its opinion against him. Reference has been made to para 10(a) of the written statement in which it is admitted that the copy of the Court of Inquiry proceedings was not supplied to the petitioner as he "did not apply" for the same. Mr. Ghuman further contended that the Court of Inquiry was conducted in total violation of Rule 173(8) of the Rules as no opportunity to cross-examine the witnesses was given to the petitioner. It has also been contended that there is no application of mind while issuing the charge-sheet, Annexure P-7, which is a replica of the original charge-sheet (Annexure P-5) and bears the same date. Reference to Section 80 of the Act has also been made to contend that since a civilian was the petitioner's co-accused, the trial for the

alleged offence ought to have been held before the Criminal Court under the Code of Criminal Procedure and not before the Summary Security Force Court. According to Mr. Ghuman, learned Counsel for the petitioner, the order dated 30.4.2002 (Annexure P-9) rejecting the petitioner's statutory petition is also unsustainable being a non-speaking and cryptic order. Mr. Ghuman also referred to Section 81 of the Act in order to contend that once FIR had been registered by the police, Summary Security Force Court could not have tried the petitioner without prior permission of the Illaqa Magistrate. According to Mr. Ghuman, the proceedings of the Court of Inquiry as well as the Summary Security Force Court are further vitiated for the reason that officers subordinate to the Commandant, namely, i.e. in the rank of Assistant Commandant or Deputy Commandant were authorized to proceed against the petitioner though under the Act/Rules, the Commandant alone was competent. In support of his aforementioned contentions, Mr. Ghuman placed reliance upon the judgments of the Apex Court in (i) Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, ; (ii) State of Madhya Pradesh Vs. Surbhan, ; (iii) State of Uttar Pradesh and Others Vs. Ramesh Chandra Mangalik, ; and (iv) Union of India and Ors. v. B.N. Jha 2003(3) SLR 365.

10. On the other hand, Mr. Rathi, learned Counsel for the respondents referred to the proceedings of the Record of Evidence and contended that the petitioner having admitted his guilt, which is as good as a confessional statement, has no locus standi to contend that principles of natural justice have not been complied with. According to Mr. Rathi, the petitioner was given full opportunity to cross-examine the witnesses which he refused to avail and he also did not take advantage of the opportunity to produce defence evidence. It is, thus, contended that the petitioner now cannot be permitted to raise such disputed questions of fact which cannot be gone into by this Court in exercise of its writ jurisdiction. Reliance has been placed by him upon judgment of the Apex Court in the case of Union of India v. Himmat Singh Chahar 1993(3) RSJ 256 a Division Bench judgment of this Court in Kulwinder Singh v. Union of India and Ors. 2004(2) SLR 31 and a Single Bench judgments of this Court in the cases of Ex. Sepoy Ranjit Singh v. Union of India and Ors. 2004(1) RSJ 647 and Union of India v. State of Punjab 1999(3) RCR 365.

11. From the facts and contentions noticed above, it emerges that two sets of inquiries were held against the petitioner. Firstly, there was a Court of Inquiry ordered by the Commandant 42nd Battalion on the next day of the occurrence, i.e. 24.8.2001. As provided in Rule 174 of the Rules, a Court of Inquiry is held to investigate into any "disciplinary matter" or "any matter of importance". In addition, a Court of Inquiry can also be held in all cases falling under Sub-rule (2) of Rule 174 which includes cases of "financial irregularities, losses, theft and misappropriation of public or force property". The Court of Inquiry is required to be held as per the procedure laid down in Rule 173 which reads as follows:

173. Procedure of Courts of Inquiry-

- (1) The proceedings of a Court of enquiry shall not be open to the public. Only such persons may attend the proceedings as are permitted by the Court to do so.
- (2) The evidence of all witnesses shall be taken on oath or affirmation.
- (3) Evidence given by witnesses shall be recorded in narrative form unless the Court considers that any questions and answers may be recorded as such.
- (4) The Court may take into consideration any documents even though they are not normally proved.
- (5) The Court may ask witnesses any question, in any form, that they consider necessary to elicit the truth and may take into consideration any evidence, whether the same is admissible under the Indian Evidence Act, 1872 (1 of 1872) or not.
- (6) No Counsel, or legal practitioner shall be permitted to appear before a Court of inquiry.
- (7) Provisions of Section 89 shall apply for procuring the attendance of witnesses before the Court of inquiry.
- (8) Before giving an opinion against any person subject to the Act, the Court will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him,, and make a statement and call witnesses in his defence.
- (9) The answers given by a witness to any question asked before the Court not shall be admissible against such a witness on any charge at any subsequent occasion except a charge of giving false evidence before such Court.

(Emphasis applied)

12. There can be no exception that in terms of Sub-rule (8) reproduced above, a Court of inquiry, before it gives any opinion against a person, is required to afford an opportunity to such person concerned: (i) to know all that has been stated against him; (ii) cross-examine the witnesses who have given evidence against him; (iii) make a statement; and (iv) call witnesses in his defence. Rule 175 provides that the authority who ordered the Court of Inquiry, upon receipt of the proceedings, may either pass final orders himself, if so empowered, or refer them to a superior authority. Further, Rule 176 provides as follows:

176. Copies of Court of inquiry proceedings--A person subject to the Act against whom the Court of inquiry has given an opinion or who is being tried by a Security Force Court on a charge relating to matters investigated by the Court of inquiry, shall be entitled to copies of the proceedings of the Court of inquiry unless the Director General orders otherwise.

13. On the other hand, Summary Security Force Court proceedings are to be held in accordance with the procedure laid down in Chapter XI of the Rules. It will be apposite to refer Rules 139, 142 and 145, which read as follows:

139. Objection by accused to charge--The accused, when required to plead to any charge, may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules.

142. General plea of "Guilty " or "Not Guilty "--(1) The accused person's plea of "Guilty" of "Not Guilty" (or if he refuses to plead to does not plead intelligibly either one or the other), a plea of "Not Guilty" shall be recorded on each charge.

(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 had 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.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after Sub-rule (2) has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which the accused has pleaded guilty without requiring the accused to plead thereto, and a record to that effect shall be made in the proceedings of the Court.

145. Procedure after plea of "Not Guilty"--(1) After the plea of "Not Guilty" to any charge is recorded the evidence for the prosecution will be taken.

(2) At the close of the evidence for the prosecution the accused shall be asked if he has anything to say in his defence, or may defer such address until he has called his witnesses.

(3) The accused may then call his witnesses including also witnesses to character.

14. In the light of these rules, it needs to be examined as to whether or not in the present case the procedure as laid down for the Court of Inquiry and/or for the Summary Security Force Court has been substantially followed.

15. The Court of Inquiry proceedings (Annexure P-2) reveal that 17 witnesses including the petitioner were examined. Their statements were read over to them in the language they understood and were duly signed by them in the presence of independent witnesses. The concluding part of these proceedings which has a material bearing on the fate of this case reads as follows:

APPLICATION OF RULE 173(8)

No.95076852 Const./Gen Opr Baljinder Singh of BOP Khanpur, "D" Coy, 42 BN BSF was summoned by the Court and explained him that as per his own statement and as per statement made against him the Court blame him responsible for theft of UG cable from BOP Khanpur of its AOR on 22 Aug., 01 at about 1400-1415 hrs as such you having committed theft of Govt. property

knowingly and tried to dispose it of in market.

Court hereby giving you an opportunity whether you want to say or make any statement in your defence or to produce any documents in support of your defence or to call any witness your defence at this stage to which he declined to do so.

Recorded by me Independent Accused witness. Sd/- Sd/- Sd/- (K.N. Mishra) (HC Ramesh (CT/Genopr AC/PO. Chand) Baljinder Singh) No.8607629, No. 95076852 42 BN BSF Certified that Rule 173(8) complied with. Sd/-(K.N. Mishra) AC/PO

It is true that the expression "cross-examine the witnesses" is not mentioned in the above reproduced note, however, the fact that the petitioner himself has signed and acknowledged the opportunity given to him to lead defence evidence etc., thus, he could put up a note of protest against denial of opportunity coupled with the fact that the Presiding Officer has certified the compliance of Rule 173(8) of the Rules, leaves no doubt in one's mind that the plea as if the petitioner was not afforded an opportunity to cross-examine Karnail Singh-- the civilian--during me course of Court of Inquiry proceedings, is merely an afterthought.

16. Another vital contention which goes to the root of the matter pertains to non-compliance of Rule 176 of the Rules, namely, non-supply of the copies of the proceedings of the Court of Inquiry. Whereas learned Counsel for the petitioner contended that respondent No. 3 was obligated in law "to supply" copies of these proceedings, the respondents contend that the petitioner never "demanded" the same. In my view, the expressions "shall be entitled to copies of the proceedings of the Court of Inquiry unless the Director General orders otherwise" as contained in Rule 176 are of significant importance. It appears that the right to seek copies of the proceedings of the Court of Inquiry has been given to a delinquent in order to ensure that he can effectively participate in the trial proceedings before the Summary Security Force Court and no prejudice is caused to him. However, the fact that the Director General, BSF is entitled to refuse the supply of copies of the Court of inquiry proceedings, clearly indicates that there is no obligation is cast upon the authorities to supply copies of these proceedings to the delinquent and it is for him to apply and seek copies thereof. Further, prior permission of the Director General before supplying such copies is also visible, who, in turn is competent to decline such request. It is not the case of the petitioner that he had applied for the copies of the Court of Inquiry proceedings yet the same were denied to him, no advantage of Rule 176 can be taken by him at this stage.

17. There is yet another aspect of the matter. As observed earlier, the object of getting copies of the Court of Inquiry proceedings is to have effective participation in the trial proceedings before the Summary Security Force Court. A perusal of the Summary Security Force Court proceedings (Annexure P-6)

reveals that after recording the statement of each witness, a note has been given that "the accused is provided an opportunity to cross-examine the witness but he declines to do so". This note has been duly signed and acknowledged by the petitioner. The petitioner thereafter declined "to make any statement" and also refused to "produce any witness". Before conclusion of the proceedings, he confessed his guilt of the charge, a detailed reference to which has already been made. The petitioner, thus, having, refused to avail the opportunity to cross-examine the witnesses or to produce his own evidence and rather having admitted his guilt, cannot be permitted to turn around and say that he has been held guilty in derogation to the principles of natural justice and fair play. Further, the note recorded by the Summary Court in terms of Rule 142 of the rules, suggests that the petitioner did not object to the charge framed against him though such a right is conferred under Rule 139. Similarly, the procedure laid down under Rule 145 also appears to have been complied with.

18. The scope of interference in such like matters has been well explained by the Apex Court in *Himmat Singh Chahar's case* (supra), wherein their Lordships observed as follows:

5. It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial proceeding the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an Appellate Authority permitting the High Court to reappreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior Tribunal....

19. No other point was urged by learned Counsel for the parties.

For the reasons aforementioned, I do not find any merit in this petition which is accordingly dismissed.