

(2005) 06 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 1469 of 2002

Constable Basavaraj

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-06-2005

Acts Referred:

Border Security Force Act, 1968 — Section 117 (2), 20 (a)
Constitution of India, 1950 — Article 225, 311

Citation : (2005) 107 FLR 468 : (2005) ILR (Kar) 3513 : (2006) 4 KCCR 2695

Hon'ble Judges : K. Bhakthavatsala, J

Bench : Single Bench

Advocate : Jayakumar S. Patil and Sri Chandrashekhar P. Patil, for the Appellant; R. Rajalakshmi, for Vishwanath Shendge, Addl. CGSC, For R-1 to 3, for the Respondent

Final Decision : Allowed

Judgement

K. Bhakthavatsala J.

1. The Petitioner, who is dismissed Border Security Force (BSF) Constable, has challenged the order of dismissal dated 7.10.2001 issued by the Respondent No. 2/ the Commandant of BSF (Annexure-A) dismissing the Petitioner from service on the ground that he was found guilty of charge u/s 20(a) of the Border Security Force Act, 1968 (in short, "the Act").

2. The Petitioner has prayed for the following reliefs:-

(a) to quash the order of dismissal dated 7.10.2001 bearing No. Estt/SSFC-BR/63 Bn/2001/7726-34 made against the Petitioner;

(b) to quash the letter bearing No. LO/1342/CC.Misc./2003/724 issued by the Law Officer, Grade-I (Annexure-D) requesting the Petitioner to approach FHQ BSF, New Delhi, for copies of S S F C proceedings as the records were not available in the unit;

(c) to direct the Respondent Nos. 1 and 3 to reinstate the Petitioner into service with all consequential monetary benefits;

(d) to direct the Respondent No. 1 to initiate appropriate action against the Respondent No. 2 for initiating illegal proceedings against the Petitioner;

(e) to issue appropriate directions as this Court may deem fit in the circumstances of the case; and

(f) to quash the letter bearing No. 20/1342/CC-Misc/2002/724/27 dated 27th February 2002 (Annexure-K).

3. The Petitioner is represented by Sri. Jayakumar S. Patil, learned Senior Counsel along with Sri Chandrashekhar P. Patil. The Respondents are represented by Mrs. R. Rajalakshmi for Sri. Vishwanath Shendge, learned Addl. Central Government Standing Counsel.

4. The brief facts of the case leading to the filing of the Writ Petition may be stated as under: -

During the month of July 2001, the Petitioner/B S F Constable was posted in 63 Battalion at Baishnabnagar-Bengal. On 30-7-2001, a special train for carrying the troops from Samba to Farrakka was marshaled at Samba Railway Station. During the process of loading, there was a quarrel between Head Constable Puran Singh and the Head Constable B. Balakrishnan of the unit of the Respondent No. 2. The Petitioner was standing nearby the window of the same compartment in which the quarrel took place. On hearing, and witnessing the exchange of hot words, the Petitioner approached the persons quarreling, in the meantime, the Head Constable Puran Singh fell down from the box on which he was standing. The Petitioner, so as to save Puran Singh from getting hurt, he held him. Before that, he did not indulge in the quarrel, but the Petitioner was falsely implicated in the criminal case for the offence of using criminal force or assaulting his superior Officer u/s 20(a) of the Act. Accordingly, the Petitioner was charge sheeted and tried by the Summary Security Force Court (SSFC) under the BSF Act. The S S F C found the Petitioner guilty of charge u/s 20(a) of the Act, and therefore sentenced that the Petitioner be dismissed from service with effect from 7.10.2001 (afternoon) as per the order of the Commandant, 63 BN B S F dated 7.10.2001 (Annexure-A). After filing the Writ Petition the Appeal made by the petitioner u/s 117(2) of the Act was rejected and communicated the same by letter dated 27th of February 2002 (Annexure-K).

5. The Petitioner has urged the following grounds:-

(i) that the statements of eye witnesses were not recorded;

(ii) that P. W-2 has deposed in different versions when he was re-examined twice by the S S F C;

(iii) that the Petitioner was given only a day's notice to name the Officer so as to act as "Friend of Accused" and thus no opportunity was given to the Petitioner to

defend him in the case;

(iv) that the two witnesses examined were the persons fighting with each other and reliance shall not be placed on such statements of witnesses;

(v) that non-examination of five persons, who were the persons present at the spot vitiates the trial;

(vi) that the Petitioner's representation made u/s 117(2) of the Act to the Respondents (Annexure-F) has not been considered by the Respondent No. 2 till the date of filing writ petition;

(vii) that the order dated 27.2.2002 (Annexure-K) made by the Appellate Authority rejecting the Appeal filed by the petitioner u/s 117(2) of the Act, after tilting the Writ Petition, is illegal, non-speaking and arbitrary.

6. Sri Jayakumar S. Patil has urged the same grounds as pleaded in the Writ Petition and also cited the following decisions:-

(i) Pritam Singh v. Union of India and Ors. 2004(7) SC 94 on the point that compulsory retiring of the Appellant-Head Clerk from the Northern Railways service was held as arbitrary and on reasonable person could have come to the conclusion that the Appellant had outlived his utility as a member of railway service and had become a deadwood which had to be chopped off.

(ii) B.C. Chaturvedi Vs. Union of India and others, on the point that the Disciplinary Authority and appellate authority are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the Appellate authority shocks the conscience of the High Court/Tribunal while exercising the power of judicial review it would appropriately mould the relief either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

7. On the other hand, the learned Counsel for the Respondents submitted that as per the information given by the Respondents, action was initiated against the Head Constable Puran Singh and V. Balakrishnan, who quarrelled with each other on 30.7.2001 at Samba Railway Station (Jammu and Kashmir). It was further contended that Article 311 of the Constitution is not applicable to the members of the B S F, and as per B S F Laws-Practice and Procedure, there is no provision for judicial review, and therefore the Writ Petition is liable to be dismissed as devoid of any merits,

8. As per Annexure-B viz., the proceedings of the Summary Security Force Court pertaining to the trial of the Accused for the offence u/s 20(a) of the Act, the Commandant, 63 BN BSF had framed a charge on 4.9.2001 against the

petitioner alleging that on 30.7.2001, the Petitioner assaulted Head Constable Puran Singh at Samba Railway Station. On 7.10.2001 when the charge was read over and explained to the Petitioner/Accused he has pleaded not guilty. On the same day viz., 7.10.2001, Head Constable Puran Singh was examined as P. W.-1. It is in his statement that on 30.7.2001, while the Unit was concentrated at Railway Station, Samba (Jammu and Kashmir) for further move to Baishnab Nagar by special train, as ordered by his Coy. Comdr. Shri Shiv Taj, A.C, but sufficient bogies were not available. Hence one platoon of each Coy had to go by passenger/mail train to Baishnab Nagar (W B). Head Constable V Balakrishnan told him that he had no money to move to new location ie., Baishnab Nagar and asked him to provide some money. He took V. Balakrishnan to the Coy. Comdr. to discuss his problem. Thereafter, Head Constable V. Balakrishnan came back to the compartment of the train. P.W-1 again passed the order given by the Coy. Comdr. to Head Constable V. Balakrishnan to be ready for move along with his troops. But, V. Balakrishnan flatly refused and told him that he would not go by that train. When Puran Singh insisted V. Balakrishnan to keep his platoon ready, V. Balakrishnan told Puran Singh (P.W.1) saying that "Tum sale Coy Comdr Ke Aadmi ho tumhe dekh longa...." Thus, there were some heated arguments between them, but V. Balakrishnan did not listen to Puran Singh and V. Balakrishnan pushed Puran Singh aside by holding Puran Singh's arm. Puran Singh fell down. Before Puran Singh could do anything. It is alleged that the Petitioner/Basavaraj, who was standing near the compartment came towards Puran Singh and held him from by back and started boxing on his chest and face with fist. Therefore, Puran Singh again fell down and Basavaraj was abusing Puran Singh saying "Yeh chutia Head Constable hai ise tou sabak sikha ke rahunga...." In the meanwhile, other men of Coy collected at the site and separated Basavaraj from Puran Singh. Since P.W. 1 was feeling giddiness, he took rest and then started his job, to move the Coy to Baishnab Nagar. This witness/ P.W.-1 has not been cross-examined by the Petitioner. On the same day viz., 7.10.2001 V. Balakrishnan has been examined as P.W-2. P.W.-2 has stated that when P.W-1 was moving his hands in the air, he (P. W-2) held one of his hands, as a result, P.W-1 fell down due to the movement of the box on which he was standing. The Petitioner/ Accused, who was standing near the compartment gate, came towards P.W-1Puran Singh and pulled him down when he was trying to get up and again the Accused pushed him down using criminal force, but he has not seen the Accused hitting P. W. 1 by way of boxing and he had nothing more to say on the subject. In the meanwhile, other men of the Coy, collected at the site and separated them. P.W-2 was re-examined by the prosecution on the same day. P.W-2, in his re-examination has deposed that he did not see the Petitioner/Accused hitting P.W-1 by way of boxing. On 8.9.2001, the Accused declined to cross-examine P.W-2. Hence, prosecution closed its side. When the Accused was asked to lead evidence, he declined to do so. Again, P.W-2 was recalled and re-examined, but it does not indicate the date on which P.W-2 was recalled for re-examination. At that time, the Court has recorded the statement of P.W-2 in the form of question and answer. The same is excerpted hereunder

for immediate reference:

"Quest. No. 1 : You have already stated in your statement, that, when Head Const. Puran Singh was trying to standup, Const. Basavaraj pushed him back by striking his hand on the front part of Head Const. Puran Singh on his chest as a boxing. Was it not a continuous hitting by boxing. Was it not a continuous hitting by boxing to Head Const. Puran Singh by Coast. Basavaraj by using a criminal force?

Ans : Yes, it was continuous hitting on the front part of Head Const. Puran Singh, boxing by Const. Basavaraj by using the criminal forced and Head Const. Puran Singh was hit at chest, face and his head being the part of his body facing towards boxing."

P.W-2 was not cross-examined by the Accused. The Accused, in his defence, has stated that after P.W-1 fell down from the box on which he was standing, he went there and helped him.

9. Keeping in view the facts of the case and contention of the Learned Counsel for the Respondents as to jurisdiction of this Court to entertain the Writ Petition, it must be mentioned that "the Courts are not mere ornamental in the judicial system". This Court while exercising jurisdiction under Article 225 of the Constitution of India has authority to do justice to the aggrieved person when there is violation of principles of natural justice; when the finding of the Authorities is perverse, and contrary to the evidence on record.

10. At the very outset, it must be mentioned that the Respondents have not made available the entire original records of the S S F C except placing few picked up papers from the proceedings. There is no material on record as to who gave the information about the petitioner assaulting P.W-1/Head Constable-Puran Singh. Further, the Respondents have not placed any material on record to show whether it was a case initiated suo moto or at the instance of P.W-1Puran Singh or any other person.

11. The content ion of the Learned Counsel for the Petitioner is that as per B S F Rules, when a decision was taken to place to Accused on trial, not less than 4 days shall be given before the trial. As per the B S F Rules, the stipulation of 4 days time before the trial is not applicable to a trial before S S F C. In other words, when the trial is before S S F C, the time prescribed is 24 hours instead of 4 days. Therefore, the contention of the Counsel for the Petitioner in that regard is not maintainable. Further, the contention of the Counsel for the Petitioner is that the Petitioner/Accused could not take assistance of a legally qualified person or Counsel to defend him. Though the copy of proceedings filed by the Respondents show that one Gurbax Singh, Deputy Commandant, 63 BN BSF was given as friend of the Accused to defend the case of the Petitioner, there is no mention or indication to show that the said friend of the Accused really participated in the proceedings and defended the Petitioner/Accused before the S S F C as the proceedings does not bear the signature of the said friend of the

Accused. Had he really defended the Petitioner/Accused and present during the course of proceedings, why he did not sign the proceedings?

12. From the proceedings of the S S F Court, it is crystal clear that it does show the need for recalling P.W-2 twice to re-examine by the prosecution, after concluding the trial. On 7-9-2001 when P.W-2 was re-examined, he has emphatically deposed that he did not see the Constable Basavaraj hitting by way of boxing, and the head of P. W-1 Puran Singh might have struck with some hard surface etc. Again P.W-2 was recalled and re-examined and his statement has been recorded in the form of question and answer. The question formulated by the Court goes to show that the Court was biased and prejudiced as against the Petitioner/Accused. When P.W-2 was recalled for the second time, it does not bear the date on which he was recalled. Under such circumstances, there is no impediment to hold that the proceedings initiated against the Petitioner was with some sinister motive and to settle the scores. Admittedly, a strict discipline shall be maintained in the Force. But, the Respondents have not placed any material on record to show as to whether any action was initiated against P. W. 1 and P.W. 2 for their quarreling. The prosecution has not examined the independent eye witnesses to the alleged incident. Further the prosecution has not placed any medical certificate to establish that P.W-1 had sustained any injuries in the alleged incident. Admittedly, the Accused has not adduced any defence evidence, but it does not mean that the prosecution has established its case. The Petitioner/Accused has stated in his statement that he went to the spot only to rescue P.W-1 and he had no intention to assault P.W.1. The prosecution has not established on record that there was any such rancor between P.W-1 and the Petitioner/Accused. Non-examination of independent witnesses is fatal to the prosecution. Solely on the evidence of P.W.1 and P.W.2 conviction cannot be based. The order of conviction is not a speaking order and apart from that there was no application of mind.

13. Even if the case of prosecution is accepted as true and the same was proved that the Petitioner/Accused assaulted his superior viz., Head Constable Puran Singh (P.W. 1) does not call for such a major penalty viz., dismissal of the Petitioner from service. The decisions reported in Pritam Singh v. Union of India and Ors. (supra) And B C Chaturvedi v. Union of India and Ors. (supra), on the point of punishment, are applicable to the case on hand.

14. Though the Petitioner/Accused made an Appeal u/s 117 of the Act, the concerned Authority did not care to dispose of the appeal. But after the Petitioner approached this Court on 11.1.2002, the competent Authority by letter dated 27.2.2002 rejected the appeal as devoid of merits (Annexure-K). Therefore, the Petitioner got the Writ Petition amended and has challenged the letter dated 27.2.2002. The letter does not contain any reason for dismissal of the Appeal. Absolutely, there is no application of mind by the Authority concerned in so far as the grounds urged in the statutory Appeal by the Petitioner. On this score alone, the impugned letter at Annexure-K is liable to be quashed. The Petitioner was

dismissed from service with effect from 7.10.2001. In view of the improper procedure adopted by the S S F.C, and non application of mind by S S F C as well as the Appellate Authority, the Petitioner is entitled to succeed in the petition. Since the Petitioner was dismissed from service with effect from 7.10.2001 and in view of the facts on record, and to shorten the litigation, it is not a fit case to remand the matter. Therefore I hold that the impugned order of dismissal is not sustainable in the eye of law.

15. For the reasons said supra, I pass the following order: -

The Petition is allowed and the impugned order dated 7.10.2001 (Annexure-A) on the file of Respondent No. 2 as well as the order dated 27.2.2002 (Annexure-K) are quashed, and the Respondents are directed to reinstate the petitioner in service forthwith, within a month from today. The Petitioner is entitled for continuity of service, but he is not entitled for monetary benefits. No costs.