
(2015) 08 DEL CK 0299
In the Delhi High Court
Case No : W.P.(C) 3585/2003

Dharambir Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-08-2015

Acts Referred:

Border Security Force Act, 1968 — Section 20(b), 21
Constitution of India, 1950 — Article 14

Citation : (2015) 08 DEL CK 0299

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : Rekha Palli, Sr. Advocate, Punam Singh, Ankita Patnaik, Shruti Munjal, Garima Sachdeva, Advocates, Nikhil, Amicus and Party-in-Person, for the Appellant; Vivekanand Mishra, Advocate, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The petitioner is aggrieved by the order dated 19.08.1999 by the Border Security Force (BSF) dismissing him from its services.

2. The undisputed facts are that the Petitioner joined the BSF as a Constable on 06.08.1990. He was posted to Jammu and Kashmir region in 1997 and while on a "combing" operation, sustained injuries after falling off a truck. He, therefore, reported ill on 19.12.1997 and was placed under medical treatment but his condition did not improve. He was referred for treatment to the Unit Hospital at "Ganderwal" on account of having severe stomach pains. He reported on 21.04.1998 and was referred to Pantha Chawk Hospital where he was admitted on 22.04.1998. He remained admitted in the said hospital and continuously sought treatment. However, due to non-availability of a specialist there, the petitioner was treated by the doctor on duty. The petitioner avers - without contradiction by the respondents - that the facilities in the place were not standard; so much so that he was not even X-Rayed. His condition worsened to such a degree that he was hospitalized during the period 30.04.1998 and

08.05.1998. There was no marked improvement in his condition. He refers to an incident of 27.05.1998, when he fainted while on duty and had to be assisted to the medical center, where the specialist who examined him recommended him to undergo Ultrasound test. However, that facility was lacking. He continued under medical treatment and has furnished copies of the BSF doctor's prescription, etc. Apparently, this situation continued and on 18.06.1998, he sought leave for 15 days. His immediate superior recommended it; however, the Deputy Commandant rejected the application for leave. It is contended that since the Petitioner's condition worsened, he was unable to report for work. In support of this plea, the petitioner relies on his BSF medical prescriptions for the period 06.07.1998 to 08.09.1998. In one of these, the doctor recommended rest.

3. When the petitioner did report for duty on 17.09.1998, he was proceeded against departmentally for 62 days' unauthorized absence and sentenced to undergo 89 days' rigorous imprisonment. The petitioner is not aggrieved by the procedure adopted in the imposition of this penalty. What has impelled him to approach this Court is his dismissal from service on the allegation of misconduct whilst undergoing the said 89 days' imprisonment. When he had been sent to the Unit quarter guard to serve his 89 days' sentence, the petitioner went on hunger strike and did not eat his food. He also misbehaved with senior officers. The BSF alleged that though he was instructed not to misbehave, he continued to do so. Accordingly, he was heard on an offence report; and "Record of Evidence" ("RoE") proceedings were undertaken. On completion of RoE, he was tried by Summary Security Force Court for offences under Sections 20 (b) and (c) and Section 21 of the Border Security Force Act, 1968. He was consequently dismissed from service.

4. It is argued that the Petitioner felt dismayed and let down when he was sentenced to 89 days' imprisonment after he returned from 62 days' absence. Having suffered grievously, for which he was not given proper medical treatment and not even allowed full leave to recover and recuperate, he states that his 89 days' imprisonment for unauthorized absence was excessive and severe. It is stated that during the time he was sent for undergoing punishment, he respectfully submitted to the orderly officer/duty officer to allow him to redress his grievances to the Company Commander in accordance with the rules and procedure laid down in this behalf but was not allowed to do so. Counsel points out that the proceedings preceding the detention were not even made known to him at that time. He argues that for justifiable reasons, having served the force with dedication and also having incurred severe injuries in combing operations, (which had led to his illness), it was natural for him to feel disappointed and let down. Consequently, when he returned and was promptly punished, he expressed his disappointment and also registered his anguish by refusing food. Learned counsel relied on the medical papers and prescriptions to say that for the entire duration till September, 1998, the Petitioner was unwell and had not been given proper medical attention. He was justifiably embittered by the unconcern of the Force and higher officers. It was submitted that the Petitioner's

behaviour was not so outrageous or reprehensible as to warrant the severest penalty of dismissal. Counsel attacked both the SFC proceedings as unfair and the penalty of dismissal as excessive and shockingly disproportionate under the circumstances.

5. The BSF submits that the petitioner was a habitual offender and had on previous occasions also indulged in indiscipline. In June 1996 also, he had overstayed for a period of 10 days. However, taking a sympathetic view, his overstay was regularized. On 20.08.1996, he had violated his Commandant's orders conveyed to him by his Company Commander. It is argued that the petitioner's misconduct and indiscipline in the past were let off with minor penalties to enable him to mend his ways but as that did not happen and he continued to behave in an undisciplined manner, the BSF was constrained to remove him from service. It is submitted that decision to remove the Petitioner from service was not a hasty decision but was in fact taken after due compliance of all the procedure laid down by the law. The SSFC recorded the evidence of the prosecution in his presence and accorded him an opportunity to lead defence evidence, which he chose not to. Thus, there were no procedural irregularities in his dismissal.

6. The respondents contend that the petitioner was indulging in indiscipline and misconduct at his own will and was fully aware of the consequences that would follow his behaviour. Reliance is placed by the BSF on the decision reported as Government of India and Anr Vs. George Philip, to say that the Court should seldom, if ever, interfere with findings recorded in the course of disciplinary proceedings.

7. It is argued next that ample material was produced in the SSFC to show that the petitioner indulged in willful disobedience and misconduct. The petitioner went on hunger strike and abused his senior officers while in quarter guard- both of them amount to grave indiscipline and irresponsible conduct in a disciplined force. To say that this Court should not interfere by invoking the doctrine of proportionality BSF relies on Ex. Constable Manohar Singh v. UOI and Ors. (cited in Ram Kumar Vs. Commr. of Police and Others,).

8. The facts are not in controversy. The BSF does not deny that the petitioner suffered grave injuries in December 1997, whilst on active operations, i.e. combing duty, in Jammu and Kashmir. This was the result of his fall from a vehicle. Illness dogged him. The record would show that he was not only hospitalized, but even fainted whilst on duty, in May, 1998. He had to be assisted to the medical center. It is also a matter of record that his leave application for 15 days had been recommended- he pleaded inability to join and perform his normal duties. However, he was denied leave. The petitioner did not admittedly report for duty and was absent for 62 days. He says that he underwent medical treatment in the unit, by the BSF doctor. To support the contention, he has produced copies of the medical documents such as diagnosis by the doctor etc. These show that he was always advised rest. It is an admitted fact that when he

reported for duty in September, 1998, he was summarily tried and imprisoned in the quarter guard. The petitioner does not question this fact. The controversy in this case is his conduct during the imprisonment. When incarcerated, he abused his superior officer saying that he would "see them" ("dekh loonga") after his release. The other misbehaviour he is charged with is that he said that all superior officers were interested in themselves. He further refused food. The explanation given is that the petitioner felt bitter and betrayed firstly because his superior officers did not even listen to his explanation and straightaway imposed the penalty for absence and secondly that his reason for absence was justified because he had incurred a persistent medical condition whilst on active duty. The submission made is that BSF did not extend due consideration to him, a combatant, in the form of proper and prompt medical treatment and did not sanction him leave when he was barely able to function.

9. The petitioner's injury in December 1997, his consequent sickness, hospitalization, even falling down and fainting in May, 1998 whilst on duty, are not denied. It is also a matter of record that the petitioner was recommended 15 days' leave, to undergo rest which was denied by the superior officers. In the circumstances, he was perhaps justifiably an embittered man, when compelled by his medical condition, he was unable to report for duties and when he did so, was promptly disciplined and imprisoned for 89 days. Customarily members of the armed and paramilitary forces are expected to maintain discipline and calm. However, the circumstances here were neither ordinary nor commonplace. An armed force personnel who commits himself to steadfast duty and compliance to his superiors' commands, also expects - nay has a right to expect familial concern by such officers. This case depicts a grim picture of utter unconcern by the superior officers. The petitioner was straightaway penalized when he reported for duty after absence, without waiting to see whether he had a reasonable or justifiable explanation. The petitioner does not seriously dispute that he did utter the words that are attributed to him and also that he refused food. His explanation is that he did so, feeling bitter and alienated by the disregard to his condition shown by the superior officers. The question is whether the penalty of removal in these circumstances was too severe to be called disproportionate warranting judicial review.

10. In *Ranjit Thakur Vs. Union of India (UOI) and Others*, , the petitioner had represented about his maltreatment, directly to the higher officers and was sentenced to rigorous imprisonment for one year for that offence. While serving the sentence he declined to eat food. The summary Court martial assembled the next day sentenced him to undergo imprisonment for one more year and dismissal from service. The Supreme Court held that the punishment imposed upon the delinquent was totally disproportionate to the gravity of the offence committed by him. In *Ex-Naik Sardar Singh Vs. Union of India (UOI) and Others*, instead of a bottle of brandy authorized to him, the delinquent was found carrying four bottles while going home on leave. He was sentenced to three months rigorous imprisonment and dismissal from service. The Supreme

Court found the penalty to be disproportionate to the gravity of the offence proved against him. In *Management of Coimbatore District Central Co-operative Bank Vs. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Another*, the Supreme Court declared that the doctrine of proportionality arrived in our legal system and has come to stay. The Court held that any action taken by an authority contrary to law, improper, irrational or otherwise unreasonable, can be interfered with in exercise of judicial review. At the same time the Supreme Court has cautioned time and again that judicial review should not be exercised unless the penalty is so severely disproportionate as to shock the conscience. In *Union of India and Others Vs. R.K. Sharma*, it was observed that:

"It is only in extreme cases, which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a court should not interfere".

11. Recent decisions too, have reiterated the principle of proportionality. It was observed in *Charanjit Lamba Vs. Commanding Officer, Southern Command and Others*, that:

"the punishment imposed upon a delinquent should commensurate to the nature and generally of the misconduct is not only a requirement of fairness, objectivity, and non-discriminatory treatment which even those form quality of a misdemeanour are entitled to claim but the same is recognized as being a part of Article 14 of the Constitution. It is also evident from the long time of decisions referred to above that the courts in India have recognized the doctrine of proportionality as one of the ground for judicial review. Having said that we need to remember that the quantum of punishment in disciplinary matters is something that rests primarily with the disciplinary authority. The jurisdiction of a Writ Court or the Administrative Tribunal for that matter is limited to finding out whether the punishment is so outrageously disproportionate as to be suggestive of lack of good faith."

In *Ex-Constable Ramvir Singh Vs. Union of India (UOI) and Others*, the Supreme Court declined to apply the doctrine of proportionality. In that case, the petitioner had overstayed; he had committed a similar offence earlier. He was asked to report to duty as he had been carrying a bank draft, which was necessary for payment of the unit electricity bill as it had to be deposited by the due date. He disobeyed the said order and reported three days after the date he was asked to report for duties.

12. Whether a penalty is merely harsh, or shockingly disproportionate would be a fact dependent on the circumstances of each case. In this case, the petitioner's injuries, his entreaties (duly recommended by his superiors, but declined by the officer) for leave and his injury related condition, are matters of record. The unsympathetic - even callous - attitude displayed by the concerned superior officers who declined leave, and when he was fit, straightaway proceeded to

punish him with 89 days" imprisonment led him to express himself strongly. As recollected earlier, discipline expected of an armed force personnel, places responsibility upon those exercising command, to be sensitive to their needs, to the extent service exigencies permit. Here, such sympathy or courtesy, were absent. Not unreasonably, the petitioner lost his calm and spoke as he did. We have no doubt in our minds that BSF's reaction- removing him from service, (displayed with a promptitude which was regrettably lacking when he requested for leave to tend to his illness), was shockingly disproportionate and arbitrary.

13. In view of the above discussion, the writ petition has to succeed. The impugned order of removal is hereby set aside. However, we are of the opinion that this case does not warrant award of full arrears of salary. Instead, the respondents are directed to reinstate the petitioner and grant him 50% arrears of salary and allowances, with all consequential benefits (including notional increments, fitment in the new scales after sixth pay commission recommendation and seniority). The respondents shall issue consequential orders and also ensure that payments are released to the petitioner within twelve weeks from today. The Writ Petition, W.P.(C) 3585/2003 is allowed in the above terms.