

(2005) 03 GAU CK 0031
In the Gauhati High Court
Case No : WP (C) No. 5967 of 2004

Dipak Kumar Chakraborty		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 10-03-2005

Acts Referred:

Border Security Force Act, 1968 — Section 117, 35, 40, 41, 48
Border Security Force Rules, 1969 — Rule 45, 51

Citation : (2005) 2 GLR 667 : (2005) 3 GLT 564

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A.S. Choudhury and R. Mazumdar, for the Appellant; H. Rahman and J. Kadir, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner who is a retired Commandant of Border Security Force (B.S.F.) has assailed the legality and validity of the order of penalty passed against him and subsequent denial of promotion to the rank of Addl. Deputy Inspector General, B.S.F., at par with his juniors.

2. The facts as narrated in the writ petition are that the petitioner while was serving under the respondents, i.e., the B.S.F., as Commandant was taken up for proceeding under General Security Force Court (G.S.F.C.) on the following charges:

"1st Charge, BSF Act, 1968 Section 40:

An act prejudicial to good order and discipline of the force:

In that he, at SHQ N & M while performing the duties of presiding officer for the Recruitment test of HC(RO/Fitter) held with effect from 24th to 29th July, 2000 knowingly had altered Roll No. of the Answer sheet of chest No. 9 to read as No. 29 with a mala fide intension to make pass the candidate bearing chest No. 29 namely Md. Muzibur Rahman, who was actually failed in the written test but the

candidate bearing chest No. 9 who actually passed in the written test declared fail.

2nd Charge, BSF Act, 1968 Section 41(e)

Accepting a gratification for himself for procuring enrolment of a person in service:

In that he, at SHQ BSF N & M, while performing the duties of presiding officer for Recruitment Test of HC (RO/Fitter) held at SHQ BSF N&M with effect from 24th to 29th July, 2000 accepted an amount of Rs. 15,000/- from a candidate namely Md. Muzibur Rahman through No. 807330386 HC Nizamuddin Khan of SHQ BSF N & M, which was returned to the said candidate through HC Nizamuddin Khan after confirmation about non-appointment of the said candidate.

3rd Charge, BSF Act, 1968. Section 35(c)

Knowingly and with an intention tear off the documents in his charge:

In that he, at SHQ BSF N & M while he was the custodian of a file regarding Recruitment of HC (RO/Fitter) held at SHQ BSF N & M with effect from 24th to 29th July, 2000, torn off some portion of answer sheet where the chest No. 9 was altered to read as chest No. 29."

3. After the aforesaid charges framed against the petitioner by order dated 4.01.2001, one Shri Anil Kamboj, Commandant of 80 B.N. was detailed to prepare the record of evidence (R.O.E.) on the charges framed against the petitioner. It appears that after the R.O.E. conducted by the appointed officer, the said proceeding was treated as set aside due to some technical/legal reasons. To that effect an order was issued by the Deputy Inspect General, BSF on 31.5.2001. In the order it was indicated that the R.O.E. proceeding prepared earlier be treated as set aside due to technical/legal reasons. However, it was provided that the charges framed against the petitioner would stand.

4. After the aforesaid developments, the petitioner was issued with another charges sheet dated 11.2.2002 which reads as follows:

First charge, BSF Act, Section 35(c)

Knowingly and with an intend to defraud, defaces a document which was his duty to preserve :

In that he, at SHQ, BSF N & M, between 23rd Oct, 2000 and 4th November, 2000, while performing the duties commandant sector HQN & M and in custody of a file containing documents regarding irregularity in recruitment of Hd. Const. (RO/Fitter) held at Sector HQ N & M with effect from 24th July, 2000, with intend to defraud, removed top portion of first page of two answer papers available in said file, where chest Nos. 09 and 29 were altered to read as 29 and 09 respectively, which was his duty to preserve.

2nd Charge, BSF Act, Section 41(e)

Directly accepting for himself gratification as a motive for procuring the enrolment of a person in service:

In that he, at SHQ BSF N & M, between 24th July, 2000 and 30th July, 2000, being presiding officer for recruitment test of Hd. Const (RO/Fitter) directly accepted a sum of Rs. 15,000/- (Rupees fifteen thousand only) from No. 807330386 HC Nizamuddin Khan of Sector HQ BSF N & M as gratification for procuring the enrolment of Shri Mohd. Muzirbur Rahman, S/o. Md. Samsur Jaman, R/O. Sangaiyumpham, P.O. Wangjing, Dist. Thoubal, Manipur in BSF.

3rd Charge (alternate to second charge), BSF Act, Section 40

An omission prejudicial to good order and discipline of the force :

In that he, at SHQ, BSF, N & M, between 24th July, 2000 to 2nd August, 2000, being presiding officer of the recruitment board of Hd. Const (RO/Fitter), improperly omitted to exercise proper supervision over functioning of the said recruitment board, as a result the candidate having chest No. 29, who actually failed in the written test was declared pass and the candidate have chest No. 09 who actually passed in the written test was declared fail.

5. On perusal of the first and second charge sheets, it will be seen that there is some variation in respect of the first and third charges. The proceeding was conducted as per the rules and the statement of the petitioner was also recorded. The prosecution also examined which witnesses and adduced documentary evidence. On conclusion of the enquiry proceeding, the Court gave its findings to the effect that the first and the second charges had been established. However, as regards the third charge, it was stated to be alternative to the second charge and was held to be not established. After the petitioner was held guilty as aforesaid, the petitioner was imposed with the penalty of sentence by order dated 6.5.2002 which reads as follow:-

(1) Forfeit six years of past service for the purpose of promotion.

(2) Forfeit fifteen years of past service for the purpose of pension and

(3) Severe reprimand.

6. The sentence passed against the petitioner which was subject to confirmation was declared in the open Court. The confirmation of the sentence was duly communicated by the Inspector General of BSF.

7. Being aggrieved by the aforesaid imposition of penalty, the petitioner preferred a petition/appeal as provided u/s 117(2) of the B.S.F. Act before the Director General seeking interference in the matter. However, the appeal preferred by the petitioner was rejected by the Director General and the same was communicated to him by Annexure 13 communication dated 16.4.2004.

8. In view of the aforesaid penalties imposed on the petitioner, he could not earn his promotion to the rank of Addl. D.I.G., BSF which according to the petitioner,

he was entitled to with effect from 29.6.2004 when his juniors were so promoted. After filing of the writ petition challenging the legality and validity of the aforesaid penalties and denial of promotion on that basis by filing the instant writ petition, the petitioner retired from service on attaining the age of superannuation with effect from 31.1.2005. In the event of promotion to the rank of Addl. D.I.G., the petitioner would have continued in service upto the age of 60 years. Thus, it is the grievance of the petitioner that apart from the aforesaid penalties, his service which otherwise would have continued upto the age of 60 years have been taken away by not granting promotion to him to the rank of Addl. D.I.G. at par with his juniors with effect from 29.6.2004.

9. Various grounds have been urged to assail the legality and validity of the impugned orders of penalty and the rejection of appeal filed by the petitioner. A counter affidavit has been filed on behalf of the respondents controverting the claim of the petitioner. The stand in the affidavit is that, in the proceeding due opportunity was given to the petitioner to defend himself. The respondents have further stated that the proceeding was concluded giving all reasonable opportunity to the petitioner to have his say in the matter and it is on that basis the order of penalty as envisaged in the provisions of the Act, was passed and thus, there was no illegality in passing the impugned order. As regards the dismissal of the appeal, the plea in the affidavit is that the appellate authority duly considered the appeal preferred by the petitioner and having found no merit in the same, dismissed the same by the order which was duly intimated to him by communication dated 16.4.2004.

10. Heard Mr. A. S. Choudhury, learned senior counsel assisted by Mr. R. Mazumdar, learned counsel for the petitioner. Also heard Mr. H. Rahman, learned senior C.G.S.C. assisted by Mr. J. Kadir, learned counsel for the respondents. Mr. Choudhury, submits that after conclusion of the proceeding of R.O.E. there could not have any occasion to proceed de novo against the petitioner. In this connection, he placed reliance on Section 51(a) of the BSF Rules, 1969. He submits that in the proceeding pertaining to the first R.O.E., nothing could be established against the petitioner which forced the authorities which conducted the proceeding against the petitioner, to abandon that proceeding. They proceeded further in the matter on non-available ground, which according to him could not have done in view of the bar under Rule 51(a) of the aforesaid Rules, 1969. He submits that the Deputy Inspector General, while issuing the order dated 31.5.2001 treating the earlier proceeding as set aside due to some technical/legal reasons, did not assign any reason and passed the order mechanically paving the way for the authorities to somehow establish the charges against the petitioner.

11. Mr. Choudhury, learned senior counsel for the petitioner also submits that the petitioner has been made a victim of the circumstances inasmuch as he being a man of general cadre, could not have been made the Chairman of the selection board. He submits that in the normal circumstances the Chairman of the

selection board is selected from the technical cadre. In this connection, he has referred to the provisions of the G.S.R. 147. Mr. Choudhury further submits that the presiding officer of the R.O.E. proceeding being junior to the petitioner, he could not have conducted the R.O.E. Mr. Choudhury submits that as per requirement, the Presiding Officer of such proceeding must be senior to the charged Officer.

12. Mr. Choudhury, elaborating his argument, further submits that the charges could not have been altered in view of the order passed on 31.5.2001 by which, although the earlier R.O.E. proceeding was treated to be set aside, but the charges framed against the petitioner were to hold the filed. He also attacks the appellate order being cryptic. He finally submits that even if the charges are held to be established against the petitioner, the penalties imposed on him are disproportionate to the gravity of the offence.

13. Countering the above arguments advanced on behalf of the petitioner, Mr. H. Rahman, learned senior C.G.S.C., submits that there being no procedural irregularity in conducting the proceeding against the petitioner, no interference is called for in the impugned orders. He submits that the writ Court in exercise of its power of judicial review will not sit on appeal to appreciate the evidence recorded during the proceeding so as to arrive at a different finding. As regard the plea of the petitioner that the R.O.E. proceeding was recorded in presence of the officer junior to the petitioner, Mr. Rahman referring to Rule 45(b) of the BSF Rules, 1969, submits that the said provisions having been complied with, the petitioner cannot make any grievance in respect of the proceeding in the R.O.E.

14. As regard the plea of the petitioner that the first ROE proceeding having come to an end, the respondents could not have initiated the fresh ROE proceeding, Mr. Rahman submits that as per the provisions of Rule 51(a) of the aforesaid Rules, 1969, the matter can be referred to the competent superior officer for disposal after preparation of the ROE. He submits that in the instant case, the competent superior officer decided to go for fresh ROE and there was nothing wrong in doing so. Referring to the statements made in paragraphs 8 and 9 of the counter affidavit, Mr. Rahman submits that the process to go for fresh ROE was not in violation of the Rules.

15. As regards the allegations of the petitioner that the Presiding Officer in the ROE proceeding was not competent, he submits in reference to paragraph 9 of the counter affidavit that there was no illegality in the matter. He further submits that the plea of the petitioner that he ought not have been made the Chairman of the selection committee is not tenable. According to him, the petitioner is estopped from urging the ground, he having participated in the selection process and conducted the same as the Chairman of the board. Placing reliance on the records of the proceeding, Mr. Rahman submits that the evidences are overwhelming to establish the charges against the petitioner and on that basis the impugned order of penalty having been passed, no interference is called for in the same. As regards the plea that the penalty is disproportionate to the

gravity of the offence, Mr. Rahman placed reliance on the provisions of Sections 40, 41(e), 48 and 50 of BSF Act, 1968.

16. I have considered the submissions made by the learned counsel for the parties and the materials on record. I have gone through the proceeding file pertaining to the General Secretary Force Court. The petitioner was issued with the first charge sheet containing the three charges. Thereafter the ROE proceeding was conducted. However, same was treated as nonest due to some technical/legal reasons. At the same time, the charges against the petitioner were not dropped and a decision was taken to proceed in the matter on the basis of those very charges. In due course, a fresh charge sheet was issued to the petitioner on 11.2.2002. The charges have already been quoted above. It appears that there is some minor variations in respect of the charges framed earlier and the charges framed on 11.2.2002. It was on that basis the learned counsel for the petitioner argued that even though the ROE proceeding could not have been further carried on after dropping the first ROE proceeding, but even if the same is held to be legally sustainable, the respondents could not have altered the charges so as to issue new charges to the petitioner after having recorded in the order dated 31.5.2001 that the charges framed against the petitioner would stand.

17. As per the said order dated 31.5.2001 while dropping the earlier ROE, the charges framed against the petitioner were not cancelled. It appears that after the aforesaid order dated 31.5.2001 further proceeding started as will be evident from Annexure-C order, dated 24.7.2001 by which the proceeding of that day was recorded. The petitioner duly participated in the same. During the course of the proceeding the petitioner was informed that he would be at liberty to make statements in defence. The petitioner made his statement on 18.9.2001 which has been annexed as Annexure-8 to the writ petition. In the statement the petitioner inter alia made the following statements-

"I do agree that I have miserably failed in my supervision during recruitment test as well as after the irregularity came in notice".

18. After the aforesaid proceeding the petitioner was charged with three charges by communication dated 11.2.2002. The charges have been quoted above. The charges framed against the petitioner by order dated 3.1.2001 was before recording the ROE proceeding. However, after the ROE proceeding and submission of the defence by the petitioner, the Annexure-7 charge sheet dated 11.7.2002 was issued containing the above quoted charges. On a close scrutiny of the charges, it appears that while the basic theme of the charges against the petitioner remains the same, but there is some minor variations between the first and the second charges. In any case, the petitioner participated in the proceeding without raising any objection even in respect of the plea now being raised that upon closure of the first ROE proceeding, the second ROE proceeding and for that matter further proceeding could not have been initiated. Such a plea is not sustainable inasmuch as the petitioner duly participated in the proceeding

without raising any objection in respect of such alleged irregularities.

19. On conclusion of the proceeding, the petitioner has been imposed with the sentence as quoted above. Thereafter, the petitioner made an appeal before the appellate authority as per the provision of Section 117 of the BSF Act, 1968. The appeal was disposed of and the same was communicated to the petitioner by Annexure 13 communication dated 16.4.2004. As per the said communication, the appellate authority after a detailed consideration and careful scrutiny of the facts and circumstances of the case rejected the prayer of the petitioner being devoid of merit.

20. Section 40 of the BSF Act, 1968 makes a person who is subject to this Act and who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned. Section 41(e) makes an officer liable directly or indirectly who accepts or obtains, or agrees to accept, or attempts to obtain, for himself or for any other person, any gratification as a motive or reward for procuring the enrolment of any person, or leave of absence, promotion or any other advantage or indulgence for any person in the service. In this connection, Clauses (f), (g), (h) and (i) of Section 48 may be referred to which prescribe forfeiture of seniority and severe reprimand. Section 50 speaks of combination of punishments. Thus from the above provisions of the BSF Act, it cannot be said that the petitioner has been imposed with impermissible punishments leading to double jeopardy.

21. From the aforesaid provisions it will also be seen that the penalties imposed on the petitioner are prescribed and incorporated in the provisions of the Act and thus it cannot be said to be disproportionate to the gravity of the offence committed by the petitioner. In the case of *Mithilesh Singh v. Union of India* reported in 2000 (3) GLT 62, the Division Bench of this Court noticing that on charge of unauthorised absence of Railway Protection Force personnel from duty could be removed from service as per the punishment prescribed in the rules, held that the penalty of removal from service interfered by the learned Single Judge was misplaced. The said judgment of the Division Bench of this Court was carried on appeal before the Apex Court and the Apex Court by its judgment reported in *Mithilesh Singh Vs. Union of India (UOI) and Others*, affirmed the aforesaid judgment of the Division Bench.

22. Above was a case in which the writ petitioner remained unauthorisedly absent from duty. Although the penalty of removal from service is prescribed in the Railway Protection Force rules for such offence, the learned Single Judge held that unauthorized absence from duty would not entail severe penalty like dismissal or removal from service. However, the Division Bench of this Court noticed that since there was express provision for removal from service on the ground of unauthorized absence, there was no scope for interference in imposition of the penalty. The aforesaid finding of the Division Bench has been

upheld by the Apex Court in the aforesaid case.

23. Mr. Rahman, learned senior C.G.S.C. has produced the relevant records pertaining to the proceeding. It appears that as many as 11 witnesses were examined in the proceeding. Two of the witnesses, namely Shri L. M. Khan and Shri M. Rahman, clearly stated about the illegal gratification obtained by the petitioner as reflected in the charge No. 2. In the cross examination, Mr. Khan's testimony could not be dislodged. In so far as the testimony of the Mr. M. Rahman, for whom the money was offered to the petitioner, same went unrefuted in absence of any cross examination. He categorically stated about the money offered to the petitioner and the petitioner declined to cross examine him. So far as other witnesses are concerned, they also stated about the charge No. 1 and in the cross examination their such testimony could not be dislodged by the petitioner. Thus, on such evidence, both the charges, i.e., charge Nos. 1 and 2, were held to be established in the proceeding. It is on that basis the petitioner has been awarded the aforesaid penalties which are permissible as per the aforesaid provisions of the Act of 1968. It cannot be said that having regard to the nature of offence committed by the petitioner, the penalty imposed on him by the impugned order is disproportionate to the gravity of the offence committed by the petitioner.

24. As regards the appellate order being cryptic, I find that by the communication dated 16.4.2004, the petitioner was intimated about the rejection of his appeal on the ground of being devoid of merit. It was intimated that the appellate authority upon detailed consideration and careful scrutiny of the facts and circumstances of the case, did not find any merit in the appeal preferred by the petitioner and accordingly the appeal was rejected. The appellate authority agreed with the finding recorded in the enquiry proceeding and the order of penalty imposed on the petitioner. In such a situation, it is not necessary to give detailed reasons on each and every aspects. In the communication dated 16.4.2004, it was duly indicated that the appellate authority upon detailed consideration and scrutiny of the facts and circumstances of the case, found the appeal to be devoid of merit. In case of agreeing with the findings of the enquiry proceeding, no detailed reason is required to be given. In this connection, I may gainfully refer to the decisions of the Apex Court reported in Ram Kumar Vs. State of Haryana, and Indian Institute of Technology, Bombay v. Union of India. In both the decisions the Apex Court held that the appellate authority in the event of agreeing with the findings of the enquiry officer and the disciplinary authority, need not give detailed reasons. It is enough if there is indication of consideration of the appeal on the basis of the materials available on record.

25. In view of the above, I do not find any merit in the writ petition and accordingly, same stands dismissed leaving the parties to bear their own costs.