

(2005) 07 DEL CK 0019

In the Delhi High Court

Case No : Writ Petition (C) No. 6404 of 2003

Ex.-Const. Driver Bhagirath Singh

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-07-2005

Acts Referred:

Border Security Force Act, 1968 — Section 19, 40
Border Security Force Rules, 1969 — Rule 45, 63

Citation : (2005) 122 DLT 134 : (2005) 83 DRJ 37

Hon'ble Judges : B.A. Khan, J;Anil Kumar, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; Rajat Gaur, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—Whether petitioner's dismissal from service for not taking food and water while undergoing rigorous imprisonment was disproportionate is the point for consideration in this petition.

2. The petitioner joined Border Security Force as Constable on 1st March, 1990 at BSF, STC Jodhpur. He was posted at SHQ BSF, Siliguri with effect from 1st April, 1992. While posted at Siliguri, petitioner received information from his home on 2nd May, 1997 about serious illness of his wife. With permission to contact his wife, he contacted her and came to know that she was hospitalized in a serious condition. On the request of the petitioner for leave, the Company Commander on compassionate grounds sent the petitioner to battalion head quarter to enable him to proceed on leave and also handed over some dak from the company to be handed over at battalion head quarter. On reaching Battalion Head quarter, petitioner reported to MTO and handed over dak to him. However, MTO at battalion head quarter refused to grant leave and asked him to go back to his post. Instead of doing so he went to his home and voluntarily reported for duty after 31 days. He was consequently tried summarily u/s 19(a) of BSF Act, 1968 and awarded punishment of 14 days RI in the forced custody on 5th

September, 1997. He was sent to the quarter guard on 5th September, 1997 when he allegedly refused to eat. He was charged u/s 40 of the BSF Act and was tried by a Summary Security Court and was sentenced to dismissal from service from 11.11.1997.

3. The petitioner filed a statutory petition against his dismissal contending that from the statement of witnesses recorded before the Summary Security Force Court, it was apparent that the petitioner was not well and, Therefore, instead of providing him medical assistance, false charge of refusing to take food as a protest was leveled against him to dismiss him from service. He also alleged that the he was denied hearing under BSF Rule 45. He also alleged bias against Sh. T.N.S. Reddi, AC (T) a member of the SSFC who had investigated the matter against him. He also complained that the copy of SSFC trial proceedings was not provided to him. Nor was he supplied the copy of ROE and charge sheet before trial in violation of BSF Rule 63 which prejudiced his defense.

4. Petitioner's statutory petition was rejected by order dated 17th/25th April, 2001. He, thereafter, filed another representation to Central Government and has now filed this writ petition seeking quashing of his dismissal from service and for his reinstatement with all consequential relief and full back wages. His main case is that the punishment awarded to him was excessively harsh and grossly disproportionate to the alleged offence.

5. The respondents have justified petitioner's dismissal from the service and have denied his allegations. It was contended by them that the copy of charge sheet and record of evidence (ROE) including exhibits were given to the petitioner on 2nd November, 1997. u/s 40 of the Act he could be awarded sentence up to seven years" imprisonment, but looking at the case, the Commandant decided to dispose of by SSFC and in SSFC the imprisonment of one year and dismissal from service could be awarded but he has been awarded the sentence of dismissal from service only. Regarding Sh. T.N.S. Reddy, it was contended that he was an officer in attendance in the Court and he was not a member of the Court. In SSFC trial, the Commandant alone constitutes the Court and the proceedings are attended by two other officers/SOs or one of either who do not have any say in the decision of the Court. It was also contended on behalf of the respondents that as per service record the petitioner was awarded punishment on two earlier occasions u/s 19(b) and Section 19(a) of BSF Act, 1968 during the year 1993 and 1997 and was awarded 28 days" rigorous imprisonment in forced custody and 14 days" rigorous imprisonment in forced custody respectively by the Commandant of 03 Bn and 34 Bn BSF.

6. Regarding unauthorized absent of 31 days for which the petitioner was convicted with 14 days" rigorous imprisonment in forced custody, it was contended that petitioner did not apply for any kind of leave to the Bn office and in case the leave was refused by MTO then the petitioner ought to have approached Adjutant 2IC or the Commandant about his grievances instead of absenting himself without leave. It is also stated that due to exigencies of

circumstances despite a bona fide cause for leave, it may be declined and in such case a person does not have a right to be absent without authorized leave.

7. According to respondents, refusal to take food and water in protest against the summary punishment was an act prejudicial to good order and discipline of the force and actionable u/s 40 of the BSF Act, 1968. It was a serious offence and had a bearing on the discipline of the other personnel of the unit at large and such type of hunger strike/protest is not conducive for the force.

8. The counsel for the parties were heard at length. The Learned counsel for the petitioner mainly contended that even if the offence of not taking food and water while undergoing rigorous imprisonment in forced custody is made out, the sentence ought to have been proportionate to the offence and it should not have been vindictive and unduly harsh. It was argued that dismissal of the petitioner on this ground in itself is a conclusive evidence of bias against the petitioner as a mere refusal to eat food and take water is an innocent neutral act, as the petitioner could be considered to be expressing his anguish at what he considered an unjust punishment awarded to him of fourteen days rigorous imprisonment under forced custody without hearing his grievances by his superior officers.

9. Counsel for the petitioner, relying on *Ranjit Thakur Vs. Union of India (UOI) and Others*, , contended that in totality of circumstances, the dismissal of the petitioner was utterly disproportionate to the alleged offence and was liable to be set aside and he was entitled to be reinstated with all consequential benefits.

10. Petition, in our view, must succeed on the plea of disproportionateness of the punishment only. His case is wholly covered by the Supreme Court judgment in *Ranjit Thakur's* case (supra) in which dismissal from service in identical circumstances was held to be disproportionate and quashed. The Supreme Court held:-

"Judicial review, generally speaking is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

11. Going by the parameters laid down by the Supreme Court in the judgment (supra) we find no difficulty in taking the view that the punishment of dismissal from service was unsuited and disproportionate to the offence of which petitioner was charged.

12. This writ petition is accordingly allowed on the strength of the Supreme Court judgment in Ranjit Thakur's case and impugned order of petitioner's dismissal from service and other subsequent orders passed by respondents are quashed. Petitioner shall be reinstated in service with consequential benefits.