

(2014) 04 DEL CK 0128
In the Delhi High Court
Case No : W.P. (C) 10319/2004

Ex. Const. Ram Kumar

APPELLANT

Vs

UOI and Another

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Border Security Force Act, 1968 — Section 117(2)
Constitution of India, 1950 — Article 226

Citation : (2015) 213 DLT 113

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : Suresh Singh, Advocate for the Appellant; Anjana Gosain, Advocate with Mr. Pradeep Desodhya, Advocate and Mr. Bhupinder Sharma, Deputy Commandant, BSF, Advocate for the Respondent

Judgement

Pradeep Nandrajog, J.—The factual backdrop leading to filing of the above captioned is that on April 25, 1988 the petitioner was enrolled as a Constable in Border Security Force. Pertaining to an incident dated August 18, 2002 as per which the petitioner was found absent from unit parade ground at the time of fall-in parade and was subsequently found outside the precincts of the camp in a state of intoxication, the Commandant of the 78th Bn. BSF to which the petitioner was attached took cognizance of the offence report and reduced the allegation(s) to writing in the form set out in Appendix VI of the BSF Rules, 1969 i.e. drew out a charge sheet against the petitioner.

2. On August 23, 2002 the Commandant 78th Bn. directed S.M. Kispotta, Deputy Commandant 78th Bn. to prepare the Record of Evidence. Pursuant thereto, Record of Evidence was prepared by S.M. Kispotta and eight witnesses were examined by the prosecution in the presence of petitioner who was given an opportunity to cross-examine the witnesses, which opportunity he declined to avail and thus no witness was cross-examined.

3. SI Chaman Lal PW-1, stated that he was attached with the 67th Bn. BSF and

was deployed in Panjipara location. On August 18, 2002 he was in the SO's mess when Ram Kumar, Assistant Commandant/Adjutant rang him and stated that the police had informed that a BSF personnel is lying in a red light area in a drunk condition. Accompanied by HC Hemraj, Ct. S. Barua, Ct. Ravinder Kumar and Ct./Driver Mohinder Pal, he proceeded towards Panjipara location in a vehicle. On reaching Panjipara he and other persons got down from the vehicle and started walking towards the red light area. After sometime they reached near a house where he saw the petitioner lying on the floor in an unconscious condition. Thereafter they brought the petitioner to the location of 67th Battalion. He gave a report of the aforesaid incident to the Adjutant, 67th Battalion. Being relevant, we note the following portion of the statement of the witness relating to the condition of the petitioner when he was found lying on the ground:-

When we walked about 200-250 yds and after querying 1/2 local people, when we reached near house, I along with others saw one man in unconscious state lying on the floor. He was wearing one camouflage color pant and white vest and was wearing gov PT shoes in his legs. I tried to speak to him and tried to wake him up 5/6 times but he did not respond. He was completely unconscious. He could not respond. He could not speak. I recognize No. 886888897 Ct RAM KUMAR of 78 BN BSF who is sitting beside me while I am deposing these statement and he is the same person, who was laying in unconscious and intoxicated state. His mouth was smelling with alcohol and he had no sense of himself and his body.

(Emphasis Supplied)

4. Ct. S.P. Barua PW-2, stated that on August 18, 2002 between 01:30 P.M.-02:00 P.M. he was informed by SI/Adjutant Chaman Lal that a party has to be sent to Panjipara and that he has been detailed as a member of said party. After sometime he along with SI Chaman Lal, HC Hemraj and Ct. Ravinder proceeded towards Panjipara area in a vehicle. When the vehicle reached near Panjipara market SI Chaman Lal informed him that he and other persons have to go to the red light area where some BSF personnel are lying whereupon he and other persons started walking towards the red light area. After sometime he saw that the petitioner was lying in front of verandah of a house in an unconscious condition. Thereafter they brought the petitioner to the location of 67th Bn. Being relevant, we note the following portion of the statement of the witness relating to the condition of the petitioner when he was found lying on the ground:-

Hardly had we walked 200-250 yds as the lane was narrow enough and 407 vehicle could not go on it, I saw a man in camouflage pant and a white vest and PT shoes, laying in front of verandah of a house. He was in unconscious state. We made an effort to talk to him, but he did respond. His mouth was smelling badly with alcohol....I recognize No. 886888897 Ct Ram Kumar of 78 Bn BSF who is sitting beside me, when I am deposing these statements, is the same person, when on 18.8.2002 we had brought in complete unconscious and intoxicated

state from Panjipara Red Light area to 67 BN.

(Emphasis Supplied)

5. The witnesses of the prosecution viz. HC Suresh Yadav PW-3, Ct. Ram Singh PW-5, Ct. Mohan Singh PW-6 and HC Shashi Shekhar PW-7, stated facts regarding absence of the petitioner from the unit parade ground at the time of fall-in parade and that he i.e. the petitioner had gone out of BSF Panjipara Campus at about 11.15 A.M. on August 18, 2002. Witnesses; Ct. Kuldeep Raj PW-4 and Assistant Commandant Ram Kumar PW-8, stated that on August 18, 2002 at about 02:10 P.M. SI (Adjutant) Chaman Lal, HC Hemraj, Ct. S.P. Borua, Ct. Ravinder Kumar and Ct./Driver Mohinder Lal had gone to Panjipara to look for the petitioner.

6. Complying with Rule 48(3) of the BSF Rules, the petitioner was asked whether he wish to make any statement, to which he refused.

7. On perusal of Record of Evidence the Commandant framed charges against the petitioner which read as under:

8. With respect to the afore-noted charges framed against him the petitioner was tried at a Summary Security Force Court presided over by the Commandant and when the Court convened on September 04, 2002, the petitioner pleaded "Guilty".

9. In view of evidence led during Record of Evidence and the plea of guilt entered by the petitioner the Summary Security Force Court returned a verdict of guilt against the petitioner and vide order dated September 04, 2002 sentenced the petitioner to be dismissed from service.

10. Petitioner challenged the verdict of guilt and the penalty imposed upon him by filing a statutory petition in terms of Section 117(2) BSF Act, 1968 but without any success as the same was dismissed vide order dated July 18, 2003.

11. Aggrieved by the aforesaid, the petitioner has filed the above captioned petition under Article 226 of Constitution of India.

12. In support of the present petition, learned counsel appearing for the petitioner advanced following four submissions:-

A The proceedings of Summary Security Force Court were vitiated on account of bias for the reason the Presiding Officer of the Court i.e. the Commandant had formed an opinion regarding the guilt of the petitioner before the commencement of the trial. To demonstrate that the Commandant had formed an opinion regarding the guilt of the petitioner before the commencement of trial the counsel highlighted that:-

(i) On August 23, 2002 after taking cognizance of the offence report the Commandant had drawn a charge sheet against the petitioner;

(ii) On the same date i.e. August 23, 2002 the Commandant had ordered that

the petitioner be placed under close arrest; and

(iii) After perusing Record of Evidence the Commandant had ordered that the petitioner be tried by a Summary Security Force Court. Counsel argued that the test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that the bias was likely. It is settled law that a judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non judice". Thus tested the conclusion becomes inescapable in the instant case that, having regard to the fact that the Commandant was likely to decide the matter only in a particular way i.e. petitioner was guilty of the charges framed against him, the presiding over of the Summary Security Force Court by the Commandant rendered the proceedings of the Court coram non judice.

B The trial of the petitioner is vitiated because following procedural irregularities were committed by the department before the commencement of trial:-

(i) Commandant did not examine any witness of the department/prosecution while hearing the petitioner on charge as required by Rule 45 of the BSF Rules.

(ii) Petitioner was neither given particulars of charges framed against him in writing nor explained the same before the commencement of trial as required by Rule 40 of the BSF Rules.

(iii) Petitioner was asked to give statement before the Recording Officer without supplying him with the copies of statements of witnesses examined during Record of Evidence as required by Rule 49(3) of the BSF Rules.

(iv) Petitioner was not asked to nominate an officer who was to act as his "friend" at the trial before the convening of the Summary Security Force Court as required by Rule 157 of the BSF Rules.

(v) Petitioner was not provided with the Hindi translation of the statements of witnesses examined during Record of Evidence as required by Rule 49(3) of the BSF Rules.

C Finding returned by the Summary Security Force Court that on August 18, 2002 the petitioner was found in a state of intoxication is perverse, in that, no prudent person would have ever reached said conclusion. It was argued that the charge relating to intoxication of the petitioner ought not to have been sustained by the Summary Security Force Court when no medical examination of the petitioner was got conducted by the department. Taking this argument further, it was contended that Rule 142 (2) of BSF Rules casts an obligation upon the Court to advise an accused to withdraw the plea of guilty entered by him if it appears from the Record or Abstract of Evidence or otherwise that the accused ought not to plead guilty. In the instant case, no evidence emerged in the Record of Evidence that the petitioner was found in a state of intoxication on August 18, 2002 inasmuch as no medical evidence was adduced by the prosecution/department to said effect. Such being the position, it was obligatory upon the

Summary Security Force Court to have advised the petitioner to withdraw the plea of guilty entered by him but no such advise was given by the Court thereby violating Rule 142(2) of the BSF Rules.

D The penalty of dismissal from service imposed upon the petitioner is shockingly disproportionate to the misconduct(s) alleged against him.

13. In order to deal with the argument predicated upon the "bias" of the Commandant we would be required to note certain provisions of the BSF Rules.

14. Rule 43 prescribes that where it is alleged that a person subject to the Act (other than an officer or subordinate officer) has committed an offence punishable under BSF Act an offence report shall be prepared reducing the allegation in writing. Rule 45 prescribes that the charge contained in the offence report shall be heard by the Commandant of the accused, after hearing the charge may:-(i) award any of the punishments to the accused which he is empowered to award; or (ii) dismiss the charge; or (iii) remand the accused for preparation of Record of Abstract of Evidence against him; or (iv) remand accused for trial by a Summary Security Force Court. Rule 51 requires the officer detailed to prepare Record/Abstract of Evidence to forward the same to the Commandant. The Commandant, may after going through Record/Abstract of Evidence:-(i) dismiss the charge; (ii) rehear the charge and award one of the summary punishments; or (iii) try the accused by a Summary Security Force Court where he is empowered to do so; or (iv) apply to a competent officer or authority to convene a Court for the trial of the accused.

15. As evident from the afore-noted provisions, the BSF Rules empowers the Commandant of an accused person to take decisions in many matters antecedent to the trial of such accused. Rule 70 prescribes that the Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court. When the BSF Rules itself envisages taking of decisions by the Commandant of an accused person in various matters antecedent to the trial of such accused the proceedings of Summary Security Force Court which is presided over by the Commandant cannot be held to be vitiated on the ground that the Commandant had taken decisions in various matters antecedent to the trial of an accused person.

16. In dealing with the submission the charge of being intoxicated, in the absence of any medical examination of the petitioner having got conducted, we note the testimonies of witnesses viz. SI Chaman Lal PW-1 and Ct. S.P. Barua PW-2, examined at the Record of Evidence. The statements of SI Chaman Lal PW-1 and Ct. S.P. Barua PW-2, establish that on August 18, 2002 when they i.e. the witnesses found him the petitioner was lying on the floor in an unconscious state; they tried to speak to the petitioner but he did not respond; the mouth of petitioner was smelling of alcohol and he i.e. the petitioner had no sense of himself and his body at that time. It is not the case of the petitioner that he was unconscious or non-responsive at the time when SI Chaman Lal PW-1 and Ct.

S.P. Barua PW-2 found him on August 18, 2002 due to a particular reason. In a highly drunken condition a person becomes unconscious and has no sense of himself and his body. Within the parameters of quality of evidence required to sustain an inference of fact at a trial by the Summary Security Force Court, the evidence adduced by the prosecution at the Record of Evidence justifies the inference drawn by the Summary Security Force Court that the petitioner was found in a state of intoxication on August 18, 2002.

17. As already noted hereinabove, the petitioner joined service on April 25, 1988.

18. In our opinion, it would be a penalty disproportionate to the gravity of the offence for remaining absent from the unit parade ground at the time of fall-in parade and being drunk; penalty being of dismissal from service.

19. In W.P. (C) No. 2145/1998 titled as "Ashok Kumar vs. DG, BSF & Ors" decided on July 11, 2011 a Division Bench of this Court, of which one of us was a member namely, Pradeep Nandrajog J., dwelled on the aspect of drunkenness in the Central Para-Military Forces in the following terms:-

In our opinion, it would be a penalty disproportionate to the gravity of the offence for not completing the job assigned and being drunk; penalty being of dismissal from service. It cannot be lost sight of that Jawans of BSF and other Central Para Military Forces perform duties which are stressful. Sitting on the current jurisdiction for the 6th month, we find a man power shortage in each and every Central Para Military Force and as against the uniform norms followed, the force requiring 20% personnel in reserve, we find that in India there are hardly any reserved personnel either in the Indian Army or a Central Para Military Force. This results in the Commandants or the Regimental Heads not being able to sanction leave as and when required by the Jawans and this becomes a source of mental tension for these poor Jawans, who usually come from rural backgrounds and are not able to handle stress, except by drowning the same in liquor. In the instant case, the Petitioner was having a domestic problem and obviously was under a mental stress. He consumed a peg or two in excess to drown his sorrow and grief, as any other person sharing his socio-economic background would. We are not justifying what the Petitioner did, but note as aforesaid as a mitigating circumstance.

20. For the reasons stated above, we set aside the penalty of dismissal from service inflicted upon the petitioner. We direct petitioner to be reinstated in service with 50% back wages to be paid. Loss of 50% wages would be sufficient penalty for the reason petitioner was dismissed from service on September 04, 2002 and we are reinstating him after nearly 12 years. No costs.