
(2016) 04 MEG CK 0003
In the Meghalaya High Court
Case No : Writ Petition (C) No. 177 of 2015

Ex-Constable Padh S.D.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-04-2016

Acts Referred:

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

Citation : (2016) 4 NEJ 353

Hon'ble Judges : Mr. Dinesh Maheshwari, CJ.

Bench : Single Bench

Advocate : Mr. K. Paul, Advocate, for the Respondent; Mr. S. Banik, Advocate, for the Petitioner

Final Decision : Disposed Off

Judgement

Mr. Dinesh Maheshwari, C.J. - By way of this Writ Petition, the petitioner, who was serving as constable "E" Coy under 19 Bn of Border Security Force (BSF), seeks to question the order dated 13.09.2014 as issued by the Commandant 19 Bn BSF, informing him of the decision of the Summary Security Force Court, awarding him the sentence of dismissal from service.

2. Shorn of unnecessary details, the relevant background aspects of the matter are that the petitioner was charged of offences pertaining to Sections 34(a), 40 and 19(a) of the Border Security Force Act, 1968 ("the BSF Act, 1968") on the allegations respectively of: (i) making false allegations against a person subject to the Border Security Force Act, 1968 knowing such accusations to be false; (ii) acting prejudicial to good order and discipline of the force; and (iii) absenting himself without leave on two occasions while he was under "Record of Evidence" in connection with disciplinary case pending against him. The order dated 13.09.2014 as issued by the Commandant, 19 Bn BSF indicating the charges against the petitioner and the decision of the Summary Security Force Court could be taken note of as under:

"Office of The Commandant 19 Bn Bsf, Mawpat, Shillong, (Meghalaya)

No. Estt-I/SSFC-Trial/Phad SD/19 Bn/2014/10425-30, dated, the 13th Sept? 2014

ORDER

Whereas, a Summary Security Force Court held at HQr 19 Bn BSF, Mawpat, Shillong (Meghalaya) with effect from 11th Sept? 2014 to 13th Sept? 2014 for trial of the accused No. 001140314 Constable Phad S D of "E" Coy of 19 Bn BSF for committing offences as mentioned below :-

BSF Act 1968 Section 34(A)

Making A False Accusation Against A Person Subject To BSF Act Knowing Such Accusation To Be False.

In that he,

At Bn HQ on 9th May? 2014 stated that "No. 012541281 SI Manish Kumar and Other pers of BOP Hangaria were Involved in smuggling" well knowing the said statement to be false.

BSF Act 1968 Section-40

An Act Prejudicial To Good Order And Discipline of The Force

In that he,

At Bn HQ Mawpat Shillong on intervening night of 30/31 May?2014 made complaint/allegations regarding Sexual Harassment (sodomy) with him by unknown colleagues, while he was under "Record of Evidence? in connection with disciplinary case pending against him with reference to this office order No. 6124-28 dated 27th May? 2014. Whereas, on Court of Inquiry, same allegations found incorrect.

BSF Act 1968 Section-19(A)

Absenting Himself Without Leave

In that he,

At Bn HQ Mawpat on 28.05.2014 absented himself without leave from 1030 hrs to 1230 hrs, while he was under "Record of Evidence? in connection with disciplinary case pending against him with reference to this office Order No. 6124-28 dated 27th May?2014.

BSF Act 1968 Section-19(a)

Absenting Himself Without Leave

In that he,

At Bn HQ Mawpat on 31.05.2014 absented himself without leave from 1200 hrs to 1600 hrs, while he was under "Record of Evidence? in connection with

disciplinary case pending against him with reference to this office Order No. 6124-28 dated 27th May?2014.

2. No. 001140314 Constable Phad S D of "E" Coy of 19 Bn BSF was convicted for offences Under Sections 34 (a), Under Section-40 and Under Section-19 (a).

3. And whereas the said Summary Security Force Court on 13th Sept."2014 (Afternoon) has passed the sentence as under:

To Be Dismissed From Service.

4. The sentence has been promulgated to the accused on the same day i.e. 13th Sept., 2014 (Afternoon).

Sd/-

(P.S. Bhatti)

Commandant

19 Bn BSF"

3. The petitioner has contended in this petition that the conclusion reached by the Summary Security Force Court remains perverse where the evidence on record has not been examined and the order dated 13.09.2014, awarding punishment of dismissal from service does not reflect the reasons and the basis whereby such conclusion has been reached. The petitioner further contends that the punishment provided for in the BSF Act, 1968 in respect of charging sections did not warrant punishment of dismissal from service; and such a punishment of dismissal is grossly disproportionate to the charges against him.

4. It has been strenuously argued by the learned counsel for the petitioner that the impugned order remains entirely unjustified, particularly when the Summary Security Force Court has failed to consider the submissions and explanation of the petitioner. The learned counsel has referred to the Medical Report dated 31.05.2014, as drawn at 1.45 PM by North Eastern Indira Gandhi Regional Institute of Health and Medical Sciences to contend that the petitioner's allegations of sexual harassment and assault were not altogether false and there had been assault on the person of the petitioner as clearly made out from the medical report. It has also been submitted that the petitioner was not intentionally absent at the given hours but was prevented by sufficient reasons from appearing, as explained in detail by him; and that the petitioner never knowingly made any false accusations about smuggling activities. According to the learned counsel, in the circumstances of the case, the punishment awarded being grossly disproportionate to the charges levelled, the impugned order calls for interference. The learned counsel has referred to the decision in *Vikram D Momin v. State of Meghalaya*, 2014 (3) GLT (ML) 285.

5. Apart from the above mentioned submissions on the merits of the case, the petitioner has also asserted in the petition that the appeal filed by him before the

Appellate Authority was pending. However, in this regard, the respondents in their counter affidavit have indicated that proper course for the petitioner in this matter was of submitting the petition/appeal under Section 117(2) of the BSF Act, 1968 read with Rule 167(2) of BSF Rules, 1969. The respondents have also indicated that the DIG, BSF, to whom the petitioner addressed the appeal, was not the authority competent to decide the appeal in the case of the SSFC trial. The averments in this regard, as appearing in the counter affidavit, could be taken note of as under:

"That the in reply to para 10 of the writ petition the Answering Deponent submits that as per record available the petitioner has filed an appeal dated 27-06-2014 addressed to the DIG, BSF Shillong followed by a reminder Appeal dated nil to the DIG, BSF Shillong. In response to that, the petitioner was communicated vide L/No. 1568-70 dated 15-03-2015 by the DIG, BSF obtain the copy of the SSFC trial proceedings and submit the petition/appeal to the appropriate authority as prescribed under Sec 117 (2) of the BSF Act and Rule 167(2) of BSF Rules, 1969.

It is submitted that in terms of Rule 129 of the BSF Rules, 1969, petitioner is entitled to obtain on demand Copy of the SSFC trial proceedings from the Chief Law Officer. Petitioner may demand the copy of the SSFC trial proceedings and avail the statutory remedy available under Sec 117 of the BSF Act read with BSF Rules, 167, by preferring an appeal to the Central Govt or the DG BSF if he so desires, it is relevant to mention that the DIG BSF is not competent to decide the appeal in case of the SSFC trial. The petitioner has so far did not avail the alternative statutory remedy in terms of Sec 117 (2) of the BSF Act read with BSF Rule 167 and hence filing of this writ petition is pre-mature on the part of the petitioner without exhausting the statutory appeal to the appropriate authority. Therefore, this instant writ petition is liable to be dismissed at the threshold."

6. A copy of the communication from the DIG, BSF dated 15.03.2015 has also been placed on record by the respondents as Annexure-5. Even while filing rejoinder affidavit, the petitioner has not been able to specifically controvert the aforesaid submissions made by the respondents.

7. In the circumstances of the present case, this Court is clearly of the view that for availability of statutory alternative remedy, the other issues sought to be raised need not be adjudicated at this stage in this petition. Indisputably, under Section 117(2) of the BSF Act 1968, any person subject to the Act, when aggrieved of the findings or sentence of the Security Force Court, may present a petition to the Central Government, DG BSF, or any other superior officer. The respondents have also referred to the availability of such remedy in their counter affidavit and have also asserted that DIG, BSF was not the authority competent to decide on the appeal of the petitioner. In this regard, it gets per force observed that if the DIG, BSF was not the authority competent to deal with the grievances of the petitioner against the order dated 13.09.2014, the matter

ought not to have remained pending with the said authority until the month of March, 2015. Moreover, there was no occasion for the learned DIG to make any comments on merits of the issues sought to be raised by the petitioner. Thus, the observations made by the DIG in the order dated 15.03.2015, as regard merits of the issues, deserves to be held unwarranted and such observations shall be treated as annulled for all practical purposes.

8. This Court is of the view that no further observations need to be made in this order as the petitioner is proposed to be relegated to the statutory alternative remedy under Sections 117(2) of BSF Act, 1968 read with Rule 167(2) of BSF Rules, 1969.

9. Therefore, while declining to interfere with the order impugned in the writ jurisdiction at this stage, the petitioner is left free to take recourse to the appropriate statutory remedy in accordance with law. In this regard, it is observed in the interest of justice that if the petitioner takes steps in accordance with law and files petition/appeal to the appropriate authority after obtaining the requisite copies, the authority concerned shall examine the grievance of the petitioner on its merits while ignoring the time spent by the petitioner in filing appeal before the DIG, BSF and in prosecuting this writ petition.

10. Needless to observe further that in case of any grievance arising even after the order of the competent authority, the petitioner shall be free to take recourse to the appropriate remedy in accordance with law.

11. The petition stands disposed of accordingly.