

(2015) 03 DEL CK 0069
In the Delhi High Court
Case No : Writ Petition (C) 6798/2006

Ex-Constable Rajwant

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 23-03-2015

Acts Referred:

Border Security Force Act, 1968 — Section 20(c), 26

Citation : (2015) 03 DEL CK 0069

Hon'ble Judges : Pratibha Rani, J.;Pradeep Nandrajog, J.

Bench : Division Bench

Advocate : G.S. Rana, for the Appellant; Barkha Babbar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—At the hearing of the writ petition three contentions were urged on behalf of the petitioner, and thus before we note the relevant facts we set the tune for our decision by noting the three contentions which were urged.

2. The first was that the order levying the penalty of dismissal from service being the result of a de-novo trial conducted against the petitioner, and there being no provision for a de-novo trial either under the BSF Act, 1968 or the Rules framed there under, the same was a nullity and hence was the penalty also a nullity.

3. The second contention urged was that the plea of guilt recorded at the arraignment when the Court assembled on May 24, 2003 was the result of force and coercion.

4. Lastly, it was urged that it is a case of no evidence.

5. Regarding the last contention, there is an apparent mismatch between the same and the preceding contention for the reason, at the trial the petitioner has pleaded guilty and thus no evidence was led. If no evidence was led because the petitioner pleaded guilty, where would be the scope to argue that it was a case of

no evidence. From the arguments advanced, where a reference was made to the statements of the witnesses made during Record of Evidence, it is apparent that what learned counsel wanted to urge was that there is no material which has surfaced during Record of Evidence proceedings.

6. With the aforementioned clarification regarding the second and the last submissions advanced, we note the relevant facts.

7. Enrolled as a constable with BSF and subject to the BSF Act, 1968 and the BSF Rules, 1969, the petitioner was employed with the 68th Bn. BSF stationed at Ambassa in September 2002.

8. On September 04, 2002, so was it alleged against the petitioner, when SI Birender Lal went to petitioner's residence because information was received that the petitioner was standing outside his residence under influence of alcohol and was threatening to commit suicide, the petitioner abused the Officiating Commandant : Deputy Commandant J.S. Shimar. An offence report dated September 07, 2002 was put up before the officiating commandant as required by Rule 43 of the BSF Rules, 1969. As per the offence report it was alleged that the petitioner had committed an offence punishable under Section 20(c) of the BSF Act, in that, at about 13:10 hours on September 04, 2002 when SI Birender Lal went to his residence he abused the Officiating Commandant as also that the petitioner committed an offence punishable under Section 26 of the BSF Act because he was drunk. The petitioner was produced before Deputy Commandant J.S. Shimar (the Officiating Commandant) who examined SI Birender Lal, HC/BHM B.R. Yadav, HC Govardhan Singh and HC Hakim Singh and directed that a Record of Evidence be prepared. A charge-sheet was drawn up listing two charges against the petitioner as per the offence report.

9. Asstt.Commandant Ramesh Kumar was directed to conduct the Record of Evidence. He conducted Record of Evidence proceedings by recording the statements of six witnesses in the presence of the petitioner and gave an opportunity to the petitioner to cross-examine the witnesses, an opportunity which the petitioner declined to avail of.

10. The Record of Evidence was placed before the Commandant as required by Rule 51(a) of the BSF Rules, who after considering the same ordered the petitioner to be tried at a Security Force Court and for which the Commandant drew up a charge-sheet on September 20, 2002 and served the same upon the petitioner requiring him to be produced before the Court on September 30, 2002. Permitted by the Rules to preside over the Court, the Commandant conducted the proceedings on September 30, 2002, and at the arraignment the petitioner pleaded guilty. After explaining to the petitioner as required under Rule 142, the charges against him and the effect of petitioner pleading guilty, the plea of guilt not being withdrawn, as required by Rule 142, the Record of Evidence was read and annexed with the court proceedings. Penalty of dismissal from service was inflicted.

11. The petitioner was sent home.

12. Required to be placed before the DIG, BSF, on January 08, 2003, the penalty was set aside for the reason Rule 46 of the BSF Rules, 1969 prohibits a Commandant to initiate any action against an enrolled member of the force where the offence of which the accused is charged is against the Commandant or where the Commandant is a witness or where the Commandant is otherwise personally interested in the case. As noted above, one of the offence of which the petitioner was charged was of having abused the Officiating Commandant : Dy.Commandant J.S. Shimar, who took cognizance of the offence report and directed Record of Evidence proceedings to be conducted. As per Rule 46 of the BSF Rules, 1969, the correct thing which was required to be done was to have attached the petitioner to another unit.

13. But by then, i.e. when the DIG BSF passed the order on January 08, 2003, neither was Dy.Commandant J.S. Shimar with the 68th Bn. and nor was he the Officiating Commandant. Sh.A.K. Sharma had taken charge as the Commandant of the 68th Bn. and thus the cause which had tainted, and hence had imparted the colour of illegality to, the very initiation of the proceedings against the petitioner by Dy.Commandant J.S. Shimar had ceased to exist, and thus de-novo proceedings commenced, as were permitted to be done by the DIG, BSF, before the Commandant Sh.A.K. Sharma.

14. An offence report dated April 05, 2003 was put up before Commandant A.K. Sharma alleging the same charges which were there in the earlier offence report. The petitioner was produced before him. SI Birender Lal, HC/BHM B.R. Yadav, HC Govardhan Singh and HC Hakim Singh were examined by him in presence of the petitioner. He directed Record of Evidence to be prepared and once again appointed Asstt.Commandant Ramesh Kumar to conduct the proceedings, who examined six witnesses, whom he had examined earlier. The statements of the witnesses were recorded in presence of the petitioner who was given an opportunity once again to cross-examine the six. The petitioner declined.

15. The six witnesses are SI Birender Lal PW-1, HC B.R. Yadav PW-2, HC Govardhan PW-3, HC Hakim Singh PW-4, HC K.D. Mani PW-5 and Insp.Moti Singh PW-6.

16. SI Birender Lal PW-1 deposed that on September 04, 2002 at about 13:10 hours he received information that Ct.Rajwant Singh had called ADIG (OPS) at TCandM FTR HQ threatening to commit suicide if the IG did not come and meet him. Therefore along with HC BR Yadav, HC Gordhan Singh, HC KD Mani and RP Hav.Hakim Singh he went to petitioner's house and found him under the influence of liquor. They all brought him near the PCO. The Deputy Commandant and the Assistant Commandant reached there and the unit Inspector Moti Singh was also present. The petitioner was abusing and using insubordinate language against the Deputy Commandant Sh.Jai Singh Shimar. At 13:30 hours ASI/ Pharmacist medically examined the petitioner and thereafter the petitioner was

taken for a medical check-up to the Medical Officer of Assam Rifle.

17. The other witnesses corroborated SI Birender Lal.

18. As per the medical examination report of the petitioner dated nil September, 2002 his behaviour was found to be talkative, his gait was alcoholic and fumes of alcohol coming from breath.

19. The Record of Evidence drawn up afresh by Assistant Commandant Ramesh Kumar pursuant to the order dated April 05, 2003 passed by the Commandant A.K. Sharma was placed before the Commandant who decided that the petitioner should be tried at a Summary Security Force Court. He drew up a charge-sheet on May 20, 2003 which was served upon the petitioner the same day with information that the trial shall commence on May 24, 2003.

20. At the arraignment which took place on May 24, 2003 2-IC M.B. Khan acted as the friend of the accused. The charge was read-out. The petitioner pleaded guilty. In compliance with Rule 142 of the BSF Rules the Commandant recorded that he had explained to the accused the meaning of the charge and was satisfied that the accused understood the nature of the charge. He recorded thereafter that he had told the accused the general effect of the plea of guilt and the procedure which would be followed if we maintain the plea of guilt and what would be followed if he withdrew the plea of guilt.

21. Since the plea of guilt was not withdrawn, the Record of Evidence drawn up by Assistant Commandant Ramesh Kumar was read and annexed to the record of the Court. The petitioner was asked whether he wanted to say something in his defence, to which he replied that domestic problems had made him lose control over himself and he was under the effect of alcohol. He pleaded that for the sake of his family he should be spared.

22. With respect to the service record of the petitioner the Commandant noted that in 13 years" service the petitioner had been punished 5 times earlier and the last time on August 02, 2002.

23. Returning a verdict of guilt penalty imposed was of dismissal from service.

24. The petitioner has not named any officer who forced or coerced him into pleading guilty. Thus, to simply plead that the petitioner was coerced into pleading guilty is neither here nor there. Further, even at the stage of Record of Evidence the petitioner opted not to cross examine any witness or deny the medical certificate concerning he being medically examined on September 04, 2002.

25. We find that the petitioner had filed an appeal against the penalty levied upon him, the same is at pages 70 to 87 of the writ record and we find that the petitioner never took the stand that at the arraignment which took place on May 24, 2003 he was forced to plead guilty. He has simply said that he was confined to the quarter guards and some papers concerning an inquiry held on May 24,

2003 were handed over to him.

26. It is apparent that the petitioner is making different noises at different points of time.

27. Concerning the issue of a de-novo trial, except for stating that in the decision reported as Union of India and Others Vs. P. Thayagarajan, , it was held that unless the statute permits a de-novo inquiry cannot be ordered, the counsel for the petitioner took the argument no further.

28. The decision in question guides that the Disciplinary Authority may ask the Inquiry Officer to record further evidence but that provision would not enable the Disciplinary Authority to set aside the previous inquiries on the ground that the report of the Inquiry Officer does not appeal to the Disciplinary Authority.

29. But, where the earlier proceedings are found to be procedurally tainted, and on the taint being detected the entire proceedings are set aside and de-novo trial commenced, it would be a situation different than the one contemplated in P.Thayagarajan's case. It would not be a case where the superior officer has found something wrong done by the Inquiry Officer. If, as in the instant case, the Officiating Commandant could not have commenced the proceedings by taking cognizance of the offence report, the corrective action warranted was to set aside everything which had flown from said decision.

30. The matter can be looked at differently. The taint took place at the stage of taking cognizance of the offence report. The derailment took place at said stage. It is trite that if at a subsequent stage it is found that a derailment has taken place at some stage, the further journey has to be declared nullified, requiring the train to recommence the journey from the stage where the derailment took place. Thus, the same offence report of which cognizance was taken by the Officiating Commandant J.S. Shimar could have been placed before the Commandant. A verbatim copy of the same offence report which was placed before the Commandant A.K. Sharma at the resumed proceedings.

31. As regards it being a case of no evidence, suffice it to highlight that at the trial the petitioner pleaded guilty and in spite of being informed of his rights chose to stick on. What more evidence incriminating a person can exist other than a plea of guilt? Further, the evidence at the trial became the Record of Evidence, which we have briefly noted hereinabove. We wonder as to how somebody can argue that it is a case of no evidence.

32. No other argument concerning proportionality etc. of the penalty was urged.

33. The writ petition is dismissed but without any order as to costs.