

(2019) 09 DEL CK 0362

In the Delhi High Court

Case No : Civil Writ Petition No. 11126 Of 2005

Ex-Constable Subhash Singh

APPELLANT

Vs

Government Of India & Anr

RESPONDENT

Date of Decision : 25-09-2019

Acts Referred:

Border Security Force Rules, 1969 — Rule 45, 48, 142(2)

Border Security Force Act, 1968 — Section 19(a), 22(e), 26, 30(a)

Citation : (2019) 9 AD(Delhi) 627

Hon'ble Judges : Dr. S. Muralidhar, J; Talwant Singh, J

Bench : Division Bench

Advocate : Avnish Ahlawat, N. K. Singh, Palak Rohmetra, Laveena Arora, Barkha Babbar

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J

1. The Petitioner who was a constable with the Border Security Force (BSF) has filed this writ petition seeking the quashing of an order dated 7th April, 2004 passed by the Officiating Commandant (OC) of the 95th Battalion, BSF holding the Petitioner guilty of the charges for which he was tried by the Summary Security Force Court (SSFC) of the offences under Sections 19 (a) and 22 (e) of the Border Security Force Act, 1968 (BSF Act) and sentencing him to be dismissed from service. He has also challenged the order dated 13th December, 2004 passed by the Deputy Inspector General (DIG), BSF rejecting his appeal against the above order and sentence.

2. The facts in brief are that the Petitioner was enlisted as a Constable in the BSF on 1st April, 1988 in the 95th Battalion. He states that he moved with the unit and served in the border areas like Rajasthan, Mizoram, Assam, Kashmir, Tripura etc. The Petitioner's last posting was at Amarkot, District Amritsar, Punjab on the Indo Pak Border.

3. On 1st April, 2004 the Petitioner was performing his duty as Constable at the border Naka from 0600 hrs till 1800 hrs. After his reliever came, the Petitioner started from the Naka for the post. This distance approximately takes half an hour to cover. According to the Petitioner when he reached midway he realized that he had left behind his tiffin box at the Naka. He went back to get the tiffin box and thereafter reached the post 15 minutes late i.e. at 1845 hrs.

4. According to the Petitioner suddenly thereafter on 28th March, 2004 he was called and told that Inspector Budh Shashan Dhar would be preparing the Record of Evidence (ROE) as ordered by the OC of the 95th Battalion, by his order dated 22nd March, 2004, for a charge under Sections 19 (a) and 22 (e) of the BSF Act. According to the Petitioner he was not told what the charge was and for which offence the evidence was proposed to be recorded.

5. According to the Petitioner on 6th April, 2004 he received an order indicating that he would be tried by the SSFC on 7th April, 2004 at 16:30 hrs for the offences under Sections 19(a) and 22(e) of the BSF Act. He states that copies of the entire ROE and charge sheet were forwarded to him and he was directed to submit a list of witnesses he intended to produce by 1800 hrs on 6th April, 2004 itself. Simultaneous with the service of the above orders, the Petitioner was served with an order to the effect that consequent upon the SSFC trial being held on the following day i.e. 7th April 2004, the Petitioner was being placed under "close arrest with immediate effect."

6. The Petitioner claims that the entire proceedings of the SSFC were an eye wash. The SSFC proceedings ended with the Petitioner being held guilty of the charges levelled against him. He was then sentenced to be dismissed from service. The appeal filed by the Petitioner was rejected by the impugned order dated 10th/13th December, 2004 of the DIG.

7. Pursuant to the notice issued in the present petition, a counter affidavit has been filed by the Respondents. It is pointed out that the Petitioner was deployed with the E Company on the international border during the relevant period when the offence was committed. The case of the Respondents is that on 1st March, 2004 the Petitioner was detailed for outpost (OP) duty at OP No. 3 (Naka No. 48). He was relieved from OP duty at 1800 hrs. He is then supposed to have visited a nearby village Kalash without the permission of his superior officer. A reference is made to Para 20 (vii) of the Standard Operating Procedure (SOP) issued by the Frontier Headquarters of the BSF at Jalandhar, Punjab. The Petitioner was also charged with having absented himself without leave enroute to the BOP.

8. After the report was received from the officiating Coy Commander Subedar Rakesh Kumar, the Petitioner was produced before the OC on 22nd March, 2004. After hearing the Petitioner under Rule 45 of the BSF Rules, 1969 (Rules) the OC detailed Mr. Budh Shasan Dhar for preparation of the Record of Evidence (ROE) under the Act and Rules. It is pointed out by the Respondents that during the

ROE the Petitioner was afforded a full opportunity of cross-examining the prosecution witnesses (PWs) but declined to do so.

9. There were two charges framed against the Petitioner which read thus:

"Charge -I BSF Act 1968 Section 19 (a) Absenting himself without leave

In that/he having been relieved of his duties at OP No. 48 on 01.03.04 at 1730 hrs and was required to report BOP Kalash, absented himself enroute without permission until 1930 hrs (Total absence period 02 hours).

Charge -II BSF Act 1968 Section 22(e) Neglecting to obey a general order

In that he, at 1730 hrs on 01.03.04 when relieved from O P duty at OP No. 48 visited nearby Village Kalash without proper permission in contravention to SOP on subject."

10. The Court has perused the original records produced by the Respondents. It is seen that 5 PWs were examined in the ROE proceedings. The first was Constable Dinesh Singh who confirmed that it takes about approximately 15 minutes from the OP No. 3 located at Naka No. 48 to reach the Border Out Post (BOP), Kalash by the shorter route and 25 minutes by the longer route. The second PW was Head Constable Alakh Deo Singh. PW-3 was Constable Ram Badan who relieved the Petitioner at 1800 hrs. PW-4 Constable Pramod Kumar Tigga was a crucial witness for the Respondents. His statement during the ROE reads as under:

"On 01/03/04, I along with Constable Pyare Lal was detailed for advance Naka daily at Naka No. 49. We occupied the naka point at about 1745 Hrs.

At that naka point Constable Virender Singh of "E-company" had already reached. At about 1800 Hrs Constable Subhash and Constable Virender Singh came from Naka No. 48 side and went to Village Kalash and returned back to Naka No. 49 after about 10 mins.

At Naka No. 49 both remained together for 10-15 minutes and drunk together in one glass, which may be liquor or water. When they were drinking, I was on the top of the tower (observation). That time Constable Pyare Lal was observing the area towards Naka No. 50. After 10-15 mins Constable Subhash then left towards the BOP. I escorted Constable Virender Singh later taken to Battalion Headquarters and was found drunk. The statement of the Doctors is being read over to him in the language he understands he sign it as correct."

11. It is seen that below the statement there is the signature of Mr. Pramod Kumar Tigga and a counter signature of the Petitioner. There is also the signature of Mr. B.S. Dhar, DC who was preparing the ROE. It clearly states that after the above statement of PW-4 was recorded the Petitioner was given an opportunity to cross-examine Constable Pramod Kumar Tigga "but he declined to do so". Below this statement also there is the signature with date of both the Petitioner and Mr. Tigga. The Petitioner cannot possibly therefore contend that he was not

aware of the ROE proceedings and was not given an opportunity to know what the case against him was.

12. PW-5 was Mr. Baldev Singh Sandhu, Assistant Commandant (AC), who confirmed that the SOP had been issued in 1998 itself and that he had declared all the villages falling in the AOR of E-company of the 95th Battalion, BSF as "out of bound" including Village Kalash which is adjacent to BOP, Kalash. He confirmed that this was conveyed to the troops time and again by way of Sainik Sammelan and briefing in the roll call. PW-5 confirmed that in case of urgency, prior permission of the Company Commander is to be sought for visiting the market in the village. He also confirmed that consumption of liquor on border was prohibited and this too was conveyed to the troops by similar means. They were also told that violation of the said orders would invariably call for the attention of BSF Act and Rules for disciplinary action. The SOPs were themselves exhibited in the ROE. Here again the said statement was signed by both Mr. Sandhu and countersigned by the Petitioner. It also records that the Petitioner declined to cross-examine the said witness.

13. There is a recording at the end of the ROE to the following effect.

"Caution to the accused in terms of Rule 48.

You may make a statement if you wish to do so. You are not found to make one and whatever you state shall be taken down in writing and may be used in evidence.

At this stage No. 881233649 Constable Subhash Singh declined to do so."

14. The above endorsement is also signed by the Petitioner.

15. It is thus seen that at every stage of the ROE during which the statements of the witnesses were recorded, the Petitioner was afforded an opportunity of cross-examination which he declined. He also declined to make any statement.

16. The original record contains the original signed receipt of the Petitioner acknowledging that he received a copy of the ROE proceedings and charge sheet relating to offences under Section 19(a) and 22(e) of the BSF Act from the Commandant 95th Battalion BSF on 6th April, 2004 at 1145 hrs.

17. When the SSFC convened on 7th April, 2004 at 1700 hrs the Petitioner pleaded guilty to both charges. The arrangement clearly states that the SSFC explained to the Petitioner the meaning of the charges to which he had pleaded guilty. Further it informed the Petitioner of the general effect of that plea and the defence and the procedure which would be followed consequent upon the plea. The SSFC recorded its satisfaction that the Petitioner had understood the charges and the effect of his guilty plea.

18. The proceedings further show the following recording under the title "Proceedings on plea of Guilty":

"Question to the accused:

Q.3 Do you wish to make any statement in reference to the charge or in mitigation of punishment?

Ans: The accused states, this is my last mistake and I may be pardoned.

Q.4 Do you wish to call any witness as to character?

Ans: No."

19. The proceedings before sentence records that a separate statement giving full particulars of previous convictions was produced with reference to entries in a service book. Keeping all of that in view, the impugned order was passed by the SSFC finding the Petitioner guilty of the offences with which he was charged and awarding him a sentence of dismissal from service.

20. This Court has heard the submissions of Ms. Avnish Ahlawat, learned counsel for the Petitioner and Ms. Barkha Babbar, learned counsel for the Respondents.

21. Ms. Ahlawat submitted that there was absolutely no evidence in support of the offence under Section 22(e) of the BSF Act and therefore the SSFC was in error in finding the Petitioner guilty of that offence and sentencing him accordingly.

22. Section 22(e) of the BSF Act reads as under:

"22 Insubordination and obstruction- Any person subject to this Act who commits any of the following offences, that is to say-

....

(e) neglects to obey any general, local or other order;

shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend, in the case of the offences specified in clauses (d) and (e), to two years, and in the case of the offences specified in the other clauses, to ten years, or in either case such less punishment as is in this Act mentioned."

23. The Court has been shown the SOP issued by the BSF way back in 1998. Para 20 (vii) of the SOP reads thus:

"No make person shall pass through or visit any village or speak/convey any message to any civilian after having been detailed for specific nakas on any pretext what so ever. Secrecy will be maintained to dominate area effectively."

24. The evidence of PW-4 in the ROE, which is not challenged by the Petitioner very clearly states that Petitioner and Constable Virender Singh both went to the nearby Village Kalash after 1800 hrs when the Petitioner's duty at the Naka ended. He further clearly states that they came back with alcohol and both shared a drink at the Naka before the Petitioner left for the BOP. With the

Petitioner not having chosen to challenge this part of the evidence and having pleaded guilty to the charge, it cannot be said that the case against the Petitioner was not proved.

25. Ms. Ahlawat submitted that the entire ROE was already prepared; the Petitioner was not even provided a copy thereof; he was, therefore, not even aware about the charges that were levelled against him till 6th April, 2004. This however does not appear to be correct when the original record is perused. It is noted that on every page of the ROE below the statement of every witness there is the signature of the Petitioner. The positioning of the signatures makes it impossible to believe that the Petitioner was not present and did not actually sign those pages contemporaneously.

26. Ms. Ahlawat then submitted that Petitioner had not signed below the "guilty" plea. The requirement of such a signature was introduced in Rule 142 (2) of the BSF Rules by proviso only with effect from 25th November, 2011. Prior thereto this was not a mandatory requirement. The legal position in this regard has been explained in a judgment dated 16th August, 2012 of this Court in WP(C) No. 4997/1998 (Ex. Constable Kalu Ram v. Union of India) in the following terms:

"21. In the decisions reported as *Lance Naik Vimal Kumar Singh v Union of India* MANU/DE/1512/2010 and *Subhash Chander v Union of India* MANU/DE/1266/2008 the plea of guilt taken by the petitioners therein was held to be vitiated as the document containing the plea of guilt of the petitioners did not bear the signatures of the petitioners. On the other hand in the decisions reported as *Chokha Ram v Union of India* 110 (2004) DLT 268 and *Diwan Bhai v Union of India* MANU/DE/1823/2001 it was held that plea of guilt taken by the petitioner therein cannot be held to be vitiated on the ground that the document containing the plea of guilt of the petitioners does not bear the signatures of the petitioners when there is no specific legal requirement to obtain signatures of a charged officer on the plea of guilt taken by him.

22. In view of the above legal position, it cannot be universally laid down that the plea of guilt taken by a charged officer would stand vitiated in every case where the document containing the plea of guilt of the charged officer does not bear the signatures of the charged officer. What would be the effect of non-bearing of signatures of the charged officer in document containing the plea of guilt by him on the veracity of the plea of guilt taken by him depends on facts and circumstances of each case."

27. This was reiterated in a subsequent judgment dated 7th December, 2012 in WP(C) No. 5529/2012 titled *Ex. GNR Satyaveer Singh vs. Union of India*.

28. Consequently, this Court is not satisfied that there is any procedural irregularity in the recording of plea of the guilt by the SSFC.

29. The Court further finds that the SOP was absolutely clear on the complete bar of BSF personnel serving in the Border Out Posts from visiting the nearby

villages. Indeed, no prior permission was taken from the Company Commander and the deposition of PW-4 is very clear that the Petitioner and Constable Virender Singh did go to Village Kalash and came back with alcohol which they consumed at the Naka. Consequently, the offence under Section 22 (e) of the BSF Act stood clearly proved against the Petitioner. As regards the offence under Section 19(a), the delay of 15 minutes in the Petitioner reporting back at the BOP was obviously because of his consuming drinks at the Naka after visiting Village Kalash. This explains how the Petitioner pleaded guilty even to this charge.

30. Finally Ms. Ahalwat argued that the sentence awarded to the Petitioner was too harsh. The Court finds that the Petitioner had a previous track record. There had been four such instances in the past and the last was a trial of the Petitioner by the SSFC for the offences under Section 30 (a) and 26 of the BSF Act in April, 2002. The two charges on the last occasion for which he was convicted read thus:

"01. 1st Charge

U/s 30(a) of BSF Act 1968 Committing theft of property belonging to a person subject to BSF Act.

In that he, at Frontier HQ, Jalandhar at Midnight on 16/17 Dec" 2001 committed theft of the following items:

- a) One side Mirror of Car belonging to Shri Harbhajan Singh, Commandant 140 Bn BSF.
- b) One side Mirror of car belonging to Shri Kuldeep Singh, DC (Sports).
- c) One side Mirror of Car belonging to Shri Gurmit Singh, AC (Sports).
- d) Battery of Motor Cycle belonging to Subedar Vipin Kumar.

2. II nd Charge

U/s 26 of the BSF ACT 1968 Intoxication In that he, at 0100 hrs on 17 Dec" 2001, was found in a state of intoxication at Ftr HQ BSF, Jalandar.

2. The accused found guilty of both the charges and awarded sentences as under:

- a) To suffer rigorous imprisonment for 89 days in force custody,
- b) To forfeit 5 years of service for the purpose of promotion, and
- c) Stoppage of pay and allowances until he has made good a sum of Rs. 1000/-."

31. In that view of the matter, the punishment of dismissal from service cannot be said to be disproportionate. There is no merit in this petition and it is dismissed as such.