
(2012) 01 DEL CK 0140

In the Delhi High Court

Case No : Writ Petition (C) No. 3491 of 1999

Ex. Ct. Mangal Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0140

Hon'ble Judges : J.R. Midha, J;Anil Kumar, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; D.S. Mahendru, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner has challenged his dismissal pursuant to being tried by the Summary Security Force Court (hereinafter referred to as "SSFC") at the Battalion Headquarter, 122 Bn. Border Security Force and he has also sought his reinstatement with full back wages and other consequential reliefs from the date of his dismissal.

2. The petitioner contended that he joined the BSF in the year 1988 and served the Force with utmost sincerity, devotion and dedication.

3. In June, 1995 the petitioner had sought leave on account of his brother's marriage, since he was the only responsible member of his family. He further contended he could not have kept away from the social function as he had lost his father earlier and it was obligatory on him to perform the marriage of his brother pursuant to many requests made by his mother. However, the leave was denied by the authorities, and inspite of this his brother on the instructions of his mother, had come to take him from the Unit. Despite the petitioner making sincere requests to the Subedar Major, the Company Commander and the Unit Adjutant, the leave was not sanctioned. He had also sought the interview with the Commandant so as to avail five days casual leave but the same was denied despite the fact that he had not availed any leave of any kind during the year

1995.

4. According to the petitioner, had he not reached for the marriage of his brother, it would have caused a stigma on him within the social circle of the village that he hails from, since it would have sent the message that he had deliberately shirked his responsibilities, particularly in view of the fact that his father had passed away earlier. Since despite the earnest requests made to all the concerned authorities, he was not granted leave, he requested for an interview with the DIG who was on a visit to the Unit. However, even the DIG denied the interview and consequently in utter frustration, being left with no option, the petitioner had to leave his Unit on 2nd June, 1995 after leaving an application with the Unit authorities.

5. The petitioner contended that he had every intention to report back to the Unit after his brother's marriage, but unfortunately on 6th June, 1995 his son, Deepak Kumar, aged about 8 years, met with a serious road accident and was hospitalized. He had suffered severe head injuries and multiple fractures on the skull and he remained under coma for many days while hanging between life and death for almost two months. His son was admitted in the Govt. Primary Health Centre, Kadama (Bhiwani) w.e.f. 6th June, 1995 up to 8th August, 1995.

6. The plea of the petitioner is that though his son had not recovered fully by 8th August, 1995, however, as soon as he was discharged from the hospital and was out of danger, the petitioner left for his Unit and reported on 13th August, 1995 and he also submitted the relevant medical documents with the Unit authorities. According to him, it would have been inhuman for him to have left his son to die, so that he could join the duty earlier.

7. On 14th August, 1995, a ROE was ordered without issuing any charge sheet. He contended that no hearing was conducted in terms of BSF Rule 45, which is mandatory in nature. Thereafter, on 4th September, 1995, the Commandant tried the petitioner by a SSFC and dismissed him from the service. The petitioner further pleaded that on realizing that the hearing in terms of Rule 45 had not been done, the Commandant on 3rd September, 1995 prepared a fake certificate for the hearing of the charge on the said date itself, in order to meet the requirements of the circular of the Law Directorate pertaining to the hearing of the charge. The petitioner asserted that since an ROE had already been ordered and was completed on 11th August, 1995, therefore, the said ROE having been conducted without a preliminary hearing under Rule 45 is void ab-initio and consequently the subsequent SSFC trial based on the said ROE is also vitiated.

8. The petitioner also challenged his dismissal on the ground that the Commandant committed the legal error in not making a reference to the concerned Govt. Medical Officer as required by the BSF Act, u/s 97 and hence in the absence of such a reference, the SSFC trial is illegal. The punishment of dismissal from the service was also challenged on the ground that it is disproportionate to the lapse on his part. The petitioner also submitted a

statutory petition to the Director General, BSF, on 6th July, 1997 however, the petition was turned down by a non-speaking order dated 3/4th October, 1997. The petitioner made another representation to the Central Govt. on 11th March, 1998 seeking an annulment of the SSFC trial proceedings, however, despite repeated reminders, the representation has not been decided till now. Aggrieved by the orders of the respondents, the petitioner has filed the above noted writ petition.

9. The petition is contested by the respondents by filing a counter affidavit dated 2nd May, 2000 contending, inter-alia that the petitioner was enrolled w.e.f. 29th September, 1988 and was dismissed from service w.e.f. 4th September, 1995 by the SSFC for an offence u/s 19(a) of the Border Security Force Act. The respondents disclosed that during the short service of the petitioner with the Border Security Force, he was awarded four punishments before his dismissal from the service.

10. The respondents disclosed that the petitioner had over stayed the leave granted to him from 3rd May, 1989 to 22nd May, 1989 without sufficient cause. At the time, for over staying for two days, as he had rejoined only on 24th May, 1989, he had been awarded 14 days of rigorous imprisonment in force custody on 6th June, 1989.

11. During the year 1989, again the petitioner had been granted 45 days earned leave w.e.f. 10th July, 1989 to 23rd August, 1989 due to the death of his father. The petitioner had managed to extend his leave by 15 days on the plea that his mother had died while he was serving in the 82 Bn. BSF. However, when the matter was verified through the Police and SP Bhiwani, the concerned police authorities had intimated by letter No.11245 dated 20th September, 1989 that both the parents of the petitioner were alive. Consequently, the CTC issued a letter dated 7th November, 1989 to the petitioner, warning him not to make such false claims in the future.

12. The petitioner again absented himself without leave from 1200 hours on 18th March, 1992 till 1935 hours on 27th March, 1992. For this unauthorized leave, u/s 19(a) of the BSF Act the petitioner was awarded 7 days rigorous imprisonment in force custody on 28th April, 1992. Thereafter the petitioner had been granted one day's casual leave on 10th June, 1992, however, the petitioner failed to rejoin after the one day's casual leave and voluntarily joined only on 21st August, 1992, after an unauthorized absence of 71 days, for which the petitioner was awarded 28 days of rigorous imprisonment in force custody on 26th November, 1992.

13. The petitioner again committed the breach of Section 19(a) of the BSF Act by absenting himself without leave from 29th January, 1995 to 18th March, 1995 i.e. 49 days for which he had been awarded 14 days of rigorous imprisonment in force custody on 10th May, 1995.

14. Thereafter, the petitioner yet again committed the violation of Section 19(a)

of the BSF Act, by absenting himself without leave on 2nd June, 1995 from Bn. Headquarter, Magra, Barmer (Rajasthan) till 13th August, 1995 for a total of 71 days. For this, the petitioner was tried by the SSFC and dismissed from service w.e.f. 4th September, 1995. Relying on the above noted pleas and contentions, the respondents have contended that the petitioner had not served in the force with sincerity and devotion as has been falsely alleged by him.

15. The respondents also refuted the plea of the petitioner that his request for casual leave was not considered. It is contended that Commandant had assured that the request of the petitioner for five days casual leave would be considered, however, before the leave could be granted, the petitioner left the Unit which he could not do and which cannot be allowed as a member of the discipline force of the country. Thus it is contended that this act on the part of the petitioner, tantamounts to insubordination and extreme indiscipline.

16. The allegations of the petitioner that the petitioner had requested for an interview with the DIG and that he had applied for discharged were also denied by the respondents. The respondents contended that though the petitioner had sent an application from his home stating that his son had met with an accident, however, no supporting documents were sent, nor was the date on which the son of the petitioner allegedly met with an accident mentioned. Since the petitioner had already absented himself without leave, a number of times prior to this incident, his case for grant of leave was not considered. Even after reporting to the Unit on 13th August, 1995, the petitioner had not mentioned about the illness of his son, nor had he produced any medical documents relating to his illness.

17. The plea of the respondents is that the petitioner was produced before the Commandant on 14th August, 1995 and that he had not pleaded guilty of the charge and accordingly, an ROE was ordered. In this manner Rule 45 of the BSF Rules was complied with and the ROE was ordered after proper hearing of the charge against the petitioner. The allegation that a fake certificate dated 3rd September, 1995 was prepared was also denied. The respondents further asserted that a hearing was done on 14th August, 1995 and that the date on the certificate as 3rd September, 1995 is an inadvertent mistake as in the certificate itself the date of hearing has been mentioned as 14th August, 1995. The respondents also denied that the issuance of certificate is a requirement under Rule 45 of the BSF Rules. The respondents produced the copy of the offence report which was signed on 14th August, 1995, showing that the petitioner was heard on the said date and that the date as 3rd September, 1995 was an inadvertent mistake and is not on account of any forgery or manipulation.

18. Regarding the seven witnesses examined during the ROE and 2 witnesses recorded during the SSFC, it is contended that only the relevant/initial witnesses had been examined in the SSFC trial. The petitioner had declined to call any witness in his defense and by referring to Section 97 of the BSF Act, it was asserted that there was no question of making a reference to the Govt. Medical

Officer. It was also contended that the petitioner never made any reference about the Govt. Medical Officer during his trial by the SSFC, nor had the petitioner produced any documents regarding the illness of his son on 13th August, 1995, nor had the petitioner sent any documents along with his application. Considering that the petitioner is a habitual offender, it is contended that the punishment of dismissal from service cannot be termed as disproportionate.

19. The respondents also disclosed that the undated application was received from the petitioner requesting for a copy of the SSFC trial proceedings on 31st March, 1997 and consequent thereto a copy of the SSFC trial proceedings had been handed over to the petitioner by the Law Branch by the letter dated 1/2 April, 1999. The petition of the petitioner was also considered by the Director General and was rejected as being devoid of any merit. Regarding the representation made to the concerned Ministry, it has been contended that no such representation was received by the Ministry of Home Affairs.

20. The petitioner filed a rejoinder dated 17th April, 2001 denying the pleas and contentions raised by the respondents in their counter affidavit. However, he did not produce any documents to substantiate his pleas and contentions. The petitioner also did not produce any documents to show that any medical documents were sent by the petitioner along with his application, nor was anything produced to show that the said documents were handed over on 13th August, 1995.

21. The learned counsel for the petitioner in support of his pleas and contentions has also relied on a decision of this Court in *Shri Bhagwan Lal Arya Vs. Commissioner of Police Delhi and Others*, and *Ex.-Const. Driver Bhagirath Singh Vs. Union of India (UOI)*, .

22. This Court has heard the learned counsel for the parties in detail. In the writ petition filed by the petitioner, no particulars have been given by the petitioner that he has been wrongly punished for breaching the Section 19(a) & (b) of the BSF Act, on earlier occasions. Rather what is contended is that the petitioner had served the force with utmost devotion and merit. Learned counsel for the petitioner has not been able to refute the fact that the petitioner had been punished on various occasions on account of over staying on leave and absenting without authorization. No cogent reason is given for not disclosing the previous punishments on account of his absence without leave and over staying the leave granted to him, without sufficient cause, which particulars were relevant to the facts in the writ petition. Though the writ petition is supported by an affidavit verifying that nothing material has been concealed, however, in the facts and circumstances not disclosing the earlier punishments granted to the petitioner on account of absenting himself without leave and not disclosing the details about over staying the leave granted to him, without sufficient cause, can be construed as not disclosing relevant facts. These facts would be relevant as the petitioner has contended that his dismissal from the Border Security Force on account of 71

days of absence without leave is disproportionate. The respondents have contended that the petitioner is a habitual defaulter and had repeatedly committed the offences u/s 19(a) & (b) of the BSF Act, 1968. In view of the totality of the facts and circumstances, the plea of the petitioner that the punishment of the dismissal is disproportionate cannot be accepted.

23. The precedents relied on by the petitioner are also distinguishable and the ratio laid down therein do not support the case of the petitioner. In *Bhagwan Lal Arya*, (supra) a police constable in the Delhi Police, while undergoing the prescribed training, had fallen on the parade ground. Thereafter, he was sent to the police dispensary as ordered by the Chief Drill Inspector of the parade. As his condition had not improved, his relatives had taken him to his home town in Gwalior, where he remained under treatment of the Govt. Doctor and he had also sent applications for leave on medical grounds supported with the medical certificates from the competent medical authorities in accordance with the leave rules. The competent police authorities had also passed an order sanctioning leave without pay for the period of his illness from 7th October, 1994 to 14th December, 1994 as no other leave was due to him. The police constable was, however, issued a charge sheet alleging unauthorized absence for the same period and later on the notice of termination from service was issued. In the circumstances, the punishment of dismissal was found to be disproportionate to the previous misconduct as the constable had absented himself for two months and 7 days on medical grounds. It was held that the absence of the petitioner on medical ground with application for leave as well as sanction of leave could not be termed as grave misconduct or continued misconduct rendering him unfit for the police service. In contradistinction, in the present matter the petitioner is in the habit of absenting himself without leave and over staying the leave granted to him without sufficient cause for which he has been punished repeatedly on many occasions. Those proceedings have become final. There are no mitigating circumstances in the case of the petitioner, and therefore, he cannot rely on the ratio of the *Bhagwan Lal Arya* (supra).

24. The petitioner has failed to produce any documents on the basis of which it can be inferred that the petitioner had sent the outdoor ticket of the dispensary pursuant to his son Deepak Kumar, being admitted in the hospital, along with his application or that he had submitted the copy of the same when the petitioner had joined the duty after the unauthorized absence of 71 days on 13th August, 1995. The medical certificate of Deepak Kumar produced by the petitioner along with the writ petition also does not inspire confidence and is contrary to the averments made by the petitioner. The petitioner has contended that his son had suffered severe head injuries and that he was hanging between life and death between the period 6th June, 1995 to 8th August, 1995. However, the certificate produced by the petitioner merely states that his son was admitted to the hospital for the stipulated period but does not specify that it was a matter of life and death or that he was in coma at the time. The certificate, however, produced by the petitioner is of a dispensary and the son of the petitioner is merely an out

patient. Learned counsel for the respondents has contended that the medicines disclosed in the certificate are also not such which are administered to a person who had suffered severe head injuries and multiple fractures. Though the disease has been mentioned as "head injuries and multiple fractures", however, there is no history of any head injuries nor is there a mention of the treatment that was given for the head injuries or multiple fractures suffered by the petitioner's son, in the outdoor ticket produced by the petitioner. In the circumstances, the fact that the petitioner had remained absent without leave on account of the illness of his son, has not been substantiated before the respondents. The stand of the respondents cannot be considered to be unreasonable nor can their decision be faulted in the facts and circumstances.

25. The plea of the petitioner that he was not heard by the Commandant in terms of Rule 45 of the BSF Act, 1969 also cannot be accepted on the basis of the allegations made by the petitioner. It also cannot be inferred that a false certificate was issued on 3rd September, 1995. The respondents have produced the offence report dated 14th August, 1995 disclosing that the petitioner was heard in the first instance by the Commandant. Sh. B.S. Rana, who then issued the certificate dated 14th August, 1995 after hearing the petitioner and directed that the matter be tried by a Summary Security Force Court. In the circumstances, it cannot be held that no hearing was given to the petitioner on 14th August, 1995. The date of 3rd September, 1995 appears to be an inadvertent mistake as has also been contended by the respondents in their counter affidavit dated 3rd July, 2000.

26. Learned counsel for the petitioner has also relied on, Ex.Ct. Driver Sh. Bhagirath (supra) in support of the pleas and contentions of the petitioner. Perusal of the said precedent, however, reveals that the ratio is distinguishable and cannot be applied in the case of the petitioner. In the instant case relied on by the petitioner, the constable was tried u/s 19(a) of the BSF Act, and awarded 14 days of rigorous imprisonment in force custody. Thereafter he was sent to the quarter guard, but he refused to eat and consequently, he was charged u/s 40 of the BSF Act by the Summary Security Force Court and thereby sentenced to dismissal from service. In the instant case, the order of the dismissal from service was set aside and it was held that the dismissal from service was disproportionate to the offence for which the petitioner was charged relying on the decision of the Supreme Court in the case Ranjit Thakur Vs. Union of India (UOI) and Others, . The case of the petitioner is apparently distinguishable as he has been punished four times before his dismissal from the service on account of his absence without leave and over staying without sufficient cause.

27. In the circumstances, it cannot be held that the punishment of dismissal from service imposed on the petitioner by the SSFC is disproportionate, nor has the learned counsel for the petitioner been able to make out any such illegality, irregularity or perversity in the actions of the respondents which shall entail any interference by this Court in exercise of its jurisdiction under Article 226 of the

Constitution of India. The writ petition is therefore, without any merit and it is dismissed. Parties are however, left to bear their own costs.