

(2008) 09 DEL CK 0289

In the Delhi High Court

Case No : Writ Petition (C) No. 6036 of 2005

Ex. Naik Subhash Chander

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Army Rules, 1954 — Rule 115, 115(2), 125, 129, 2
Border Security Force Act, 1968 — Section 20
Border Security Force Rules, 1969 — Rule 142
Constitution of India, 1950 — Article 14

Citation : (2008) 09 DEL CK 0289

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Jyoti Singh and Ankur Chhibber, for the Appellant; M.K. Bhardwaj, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The petitioner was enrolled with the BSF as a Constable (Radio Operator) on 12.8.1991. On account of alleged misconduct of the petitioner, disciplinary proceedings were initiated against the petitioner whereby the charge was made out u/s 20 of the Border Security Force Act, 1968 (hereinafter referred to as the said Act). Section 20 of the said Act deals with striking or threatening superior officers. The offence charged was stated as under: "in that he, at Tac HQ Budhal on 24.9.97 at 1845 Hrs entered in Signal Centre and stepped up towards chair of Inspector (T Ram Avtar Yadav) with slapping hand and asked him forcibly to forward his application."

2. The petitioner was charged by the Summary Security Force (SSF) on 23.10.1997 for committing an offence u/s 20(a) of the said Act.

3. The substance of the charge is that the petitioner went to his Inspector requesting him for his signatures on a request letter the subject of which was not known. He was asked to wait but started speaking loudly for the application to be

forwarded and moved towards his superior while raising a hand to hit him and the superior on such conduct got up and saved himself and with the assistance of the persons present removed the petitioner from his office. The petitioner is stated to have run away towards the lines thereafter.

4. In the SSF proceedings the statement of the petitioner was recorded. It is the case of the petitioner that after reading the contents of the application, the petitioner was informed that the application could not be forwarded. The petitioner claims to have stated that the application has to be forwarded only through the Inspector at which stage he was abused and the petitioner protested and that he never raised his hand. The petitioner was found guilty on the plea of guilt being acknowledged by him and was awarded with the sentence of dismissal from service on 23.10.1997.

5. The petitioner aggrieved by the said decision preferred an appeal before the DG (BSF) which was dismissed on 2.11.1999. The petitioner thereafter filed a suit in the Court of Civil Judge, Senior Division, Rewari on 27.11.2000 but withdrew the same on 10.2.2005 to avail of the appropriate remedy and has thereafter filed the present petition.

6. The conviction and sentence of the petitioner as submitted by learned Counsels for the parties undisputedly rests on the plea of guilt on the part of the petitioner. The original record is therefore perused, which is a printed format and the blanks have been filled in. The plea of guilt has been recorded but is not countersigned by the petitioner. Similarly in respect of the question relating to mitigating circumstances for sentence, the blank has been filled in stating that the petitioner did not want to make any statement. The questions and answers are recorded in the following terms:

The accused No. 91588004 Rank NK/RO Name Subhash Chander of 58 BN BSF is found "Guilty" of the charge (all the charges).

The AOE is read(Translated)explained marked Exb "K" signed by the court and attached to the proceedings.

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

Ans. The accused says No (No)

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

Ans. No?

7. It may be noticed that the questions are in typed format and the answers "No" are written in red ink which are not countersigned. It is thereafter that the verdict has been delivered.

8. The petitioner has raised the plea of procedural irregularities, disproportionality of sentence and the factum of the petitioner never having

pleaded guilty. It is submitted that the plea of guilt could not have been recorded without getting an endorsement on the part of the petitioner by his signatures. Learned Counsel for the petitioner in respect of the aforesaid has relied upon a decision of the Division Bench of this Court in LPA No. 254/2001 titled The Chief of Army Staff and Ors. v. Ex. 14257873 K Sigm Trilochan Behera decided on 17.1.2008. The provision in both the Army and the BSF are almost identical. Rule 142 of the Border Security Force Rules, 1969 (hereinafter referred to as the said Rules) stipulates how General plea of "Guilty" or "Not Guilty" should be recorded, which reads as under:

142. General plea of "Guilty" or "Not Guilty". " (1) The accused person's plea of "Guilty" or "Not Guilty" (or if he refuses to plead or does not plead intelligibly either one or the other), a plea of "Not Guilty" shall be recorded on each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after Sub-rule (2) has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which the accused has pleaded guilty without requiring the accused to plea thereto, and a record to that effect shall be made in the proceedings of the Court.

9. The judgement in The Chief of Army Staff and Ors. v. Ex. 14257873 K Sigm Trilochan Behera case (supra) also dealt with the question of guilt in a similar situation. It was observed as under:

5. Secondly, the signatures of the respondent were not obtained on any of these proceeding. The plea of the respondent was recorded on a printed format. The column of arraignment reads as under:

By the Court-How say you No. 14257873K ULNK Trilochan Behera are you guilty or not guilty of the charge preferred against you?

The answer is recorded as "Guilty". It does not mention what was the charge though a separate chargesheet has been placed on record which is dated 22nd March, 1994, which is not signed by the respondent. The complete plea of guilt of the respondent was not recorded.

6. In Sashidhara Kurup Vs. Union of India (UOI) and Others, his Lordship Dr. H.K. Sema, the then judge of the High Court, was pleased to hold:

7. ...Recording of the plea of the accused as nearly as possible in the words which is used by the accused has an important significance because unless the plea of the accused is recorded as nearly as possible in the words which is used by the accused the appellate court is deprived of the privilege to examine as to whether the plea made by the accused amounts to admission of guilt or not.

However, in the next page, the following question was put to the respondent:

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

This question was put to the respondent after he had pleaded guilty, to which the respondent replied,

I repent for the mistake I have done. I want to continue serving as my family is dependent on my income only.

It is also noteworthy that no date is mentioned on this paper. Not even under the signatures of the Judge, Col. K.C. Mehta.

7. Counsel for the respondent has drawn our attention towards guide to Summary Court Martial issued in the year 1984, Heading (b) Arraignment at pages 7 and 8, it is mentioned:

(iii) If the accused pleads guilty to the charge, the implications of the plea should be explained to the accused(s) by the officer holding the trial vide AR 115(2). He should also make the following record on page "B" of the proceedings in the presence of the accused and obtain his signature thereon:

Before recording the plea of guilty offered by the accused, the Court explains to the accused the meaning of the charge(s) to which he had pleaded guilty and ascertains that the accused understands the nature of the charge(s) " to which he has pleaded guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty accepts and records the same. The provisions of Army Rule 115(2) are complied with.

(Signature) (Signature) Accused The Court

(iv) Failure to comply with the procedure explained in sub-para 16(b) (iii) above will amount to violation of the procedural safe guard provided in AR 115(2) and violation of Article 14 of the Constitution of India and the punishment awarded will have to be set aside.

(Auth : HQ Western Command letter No 0337/1/A3 dated 30 Oct 84 attached as Appx F and Judgment of J and K High Court, see Pritpal Singh v. Union of India (J and K) 1984 (3) SLR 680.

8. In Prithpal Singh v. Union of India and Ors. (supra) that is, 1984(3) SLR 675 (J and K), it was held:

9. Coming to the present case, I have stated the requirement of Rules 115 and 129 of the army Rules. The procedure laid down in the said Rules cannot be observed in breach by Summary Court Martial. It is revealed from the record that at no stage the petitioner had accepted Mr. Arun Dhar as a friend under Rule 129 yet he was imposed on him against his wish. This would amount denial of right to the person in having a friend to assist him as required by Rule 129 of the Army Rules. So the proceedings conducted cannot be termed to be fair because an important right of the petitioner was arbitrarily taken away in violation of Article 14 of the Constitution. He was to be given equal protection of laws that protection has been denied to him. Therefore, the decision taken by the Summary Court Martial in awarding punishment to the petitioner is tainted with arbitrariness and unfairness.

10. The most important aspect of the case is as to whether the petitioner had pleaded guilty to the charges as is suggested by Mr. Hussain or not Plea of guilt recorded by Lt. Col. Mehta is dehors Rule 115 of the Army Rules. In the first place the alleged plea of guilt is unsigned by the authorities. Surprisingly the petitioner also has not signed the alleged plea of guilt. At what stage word "guilty" was recorded against each charge is not known. If it was recorded in presence of the accused/petitioner obviously his signatures would have been obtained on it. Then the minutes of the enquiry should have contained an advice to the petitioner not to plead guilty as enjoined by Rule 115 of the Army Rules. This important mandate of the Rule has been flagrantly violated. Therefore the proceedings conducted by the Summary Court Martial which have affected the petitioner's fundamental rights as he is deprived of his job are vitiated. The protection afforded by the procedure should not have been denied to the petitioner if it was intended to proceed against him under the Army Rules. As to whether charges were correct or not as already observed this Court cannot go into that aspect of the matter. But certainly this Court will set aside the punishment which is awarded to the petitioner on the ground that the decision to punish the petitioner was taken by contravening the mandate of Rules. Such a decision would be arbitrary and shall be violative of the guarantees contained in Article 14 of the Constitution. The argument of the learned Counsel for the respondent that the petitioner was not prejudiced in any manner during the Summary Court Martial proceedings is devoid of force. The petitioner has suffered punishment of dismissal from service and the punishment is awarded by conducting proceedings in such a manner which were neither fair nor judicial. Could the Summary Court Martial observe the Rules governing the conduct of Summary Court Martial in breach. Answer to this question will be emphatic no in view of the glory of the Constitution and rights guaranteed by it.

10. A similar provision being Rule 115 (2) of the Army Rules was discussed in paras 10 to 14 of the judgement, the same read as under:

10. It clearly goes to show that this certificate was prepared after the respondent had pleaded guilty. This is apparent that the provisions of Rule 115(2) were not

complied with. The said rule runs as under:

115. General plea of "Guilty" or "Not Guilty".

(1) XXXX

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but before it is recorded, the court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.

(3) XXXX

11. This formality should have been done before the plea of guilt of the respondent was recorded. There is no indication in the charge dated 22nd March, 1994 that the Commanding Officer had already undergone this formality. That is why in the absence of ordersheets and other proceedings, the position does not begin to jell. The preparation of ordersheets would have gone a long way to illustrate the position more vividly on this hazy record. It is also not understandable as to why did the Commanding Officer fail to correct the date of 28th March, 1994. Again, the certificate given by him under Rule 115(2) of the Army Rules is on a separate paper. The possibility of its being manipulated cannot be ruled out. Such like certificates can be prepared at any time. This justifies the need for obtaining the signatures of the accused viz. to lend authenticity to such a record.

12. In a recent authority reported in *Sukanta Mitra v. Union of India and Ors.* 2007 (2) J & K 197, it was held:

9. This apart the fact remains that the appellant has been convicted and sentenced on the basis of his plea of guilt. The plea of guilt recorded by the Court does not bear the signatures of the appellant. The question arising for consideration, therefore, is whether obtaining of signatures was necessary. In a case *Union of India and Ors. v. Ex- Havildar Clerk Prithpal Singh and Ors.* KLJ 1991 513, a Division Bench of this Court has observed:

The other point which has been made basis for quashing the sentence awarded to respondent-accused relates to Clause (2) of Rule 115. Under this mandatory provision the court is required to ascertain, before it records plea of guilt of the accused, as to whether the accused undertakes the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea and in particular of the meaning of charge to which he has pleaded guilty. The Court is further required under this provision of law to advise the accused to withdraw that plea if it a appears from summary of evidence or otherwise that the accused ought to plead not guilty. How to follow this procedure is the main crux of the

question involved in this case. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate of the same. We may take it that the signature of the accused are not required even after recording plea of guilt but as a matter of caution same should have been taken.

13. In *Lachhman (Ex. Rect.) v. Union of India and Ors.* 2003 II AD (Delhi) 103, it was held:

13. The record of the proceedings shows that the plea of guilty has not been entered into by the accused nor has it been recorded as per Rule 115 inasmuch neither it has been recorded as finding of court nor was the accused informed about the general effect of plea of guilt nor about the difference in procedure which is involved in plea of guilt nor did he advise the petitioner to withdraw the plea if it appeared from the summary of evidence that the accused ought to plead not guilty nor is the factum of compliance of Sub-rule (2) has been recorded by the Commanding Officer in the manner prescribed in Sub rule 2(A). Thus the stand of the respondents that the petitioner had entered into the plea of guilt stands on highly feeble foundation.

14. The learned Counsel for the respondent also cited a case reported in *Uma Shanker Pathak v. Union of India and Ors.* 1989 (3) SLR 405 by Allahabad High Court, wherein it was held:

10. The provision embodies a wholesome provision which is clearly designed to ensure that an accused person should be fully forewarned about the implications of the charge and the effect of pleading guilty. The procedure prescribed for the trial of cases where the accused pleads guilty is radically different from that prescribed for trial of cases where the accused pleads "not guilty". The procedure in cases where the plea is of "not guilty" is far more elaborate than in cases where the accused pleads "guilty". This is apparent from a comparison of the procedure laid down for these two classes of cases. It is in order to save a simple, unsuspecting and ignorant accused person from the effect of pleading guilty to the charge without being fully conscious of the nature thereof and the implications and general effect of that plea, that the framers of the rule have insisted that the court must ascertain that the accused fully understands the nature of the charge and the implications of pleadings guilty to the same.

13. It is thus apparent that the questions and answers have to be reproduced by the Court in their entirety, which, in the context of Army Rule 115 (2), means all the questions and answers must be reproduced verbatim. In the present case however, the Court has not done this. Instead the Court merely content itself with the certificate that "the provisions of Army Rule 115 (2) are here complied with.

11. The present case is also similar inasmuch as the blanks have been filled in with the plea of guilt and a similar procedure has been followed without getting the signatures of the petitioner appended.

12. The petitioner was disputing the offence as is obvious from his statement and was seeking to defend himself in the proceedings and despite this fact the plea of guilt has been recorded which is unsustainable.

13. We are, thus, of the considered view that the impugned order of dismissal of the petitioner from service dated 23.10.1997 and order of dismissal of appeal dated 2.11.1999 cannot be sustained and the same are hereby set aside. The petitioner stands restored to service with liberty to the respondents to treat the plea of the petitioner as "not guilty" and thereafter proceed with the SSF. In case the same officer who held the SSF is not available another officer may be nominated. The petitioner should be granted full opportunity to defend himself and thereafter the finding recorded. The petitioner not having worked for all this period of time shall not be entitled to pay and allowances for the period from the date of dismissal till the date of reinstatement but would be entitled to all other benefits.

14. The petition is allowed in the aforesaid terms leaving the parties to bear their own costs.