

(2009) 03 CAL CK 0096
In the Calcutta High Court
Case No : M.A.T. 2706 of 2004

In Re: An Appln. for Stay (CAN 6546/05)

Date of Decision : 03-03-2009

Acts Referred:

Army Act, 1950 — Section 162, 164, 164(2)
Border Security Force Act, 1968 — Section 117, 117(1), 117(2), 26, 40
Border Security Force Rules, 1969 — Rule 156, 167, 168, 169, 48.3
Constitution of India, 1950 — Article 226

Citation : (2009) 03 CAL CK 0096

Hon'ble Judges : Surinder Singh Nijjar, C.J; Biswanath Somadder, J

Bench : Division Bench

Advocate : Kalyan Bandyopadhyay and Joydeep Sen, for the Appellant; M.P. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

1. The appellant enrolled in Border Security Force as a Constable on 1st April, 1988. On 27th of October, 2000 whilst he was deployed at B.O.P. Lachugacha, Jalpaiguri, West Bengal, an outpost of "A" Coy of the B.S.F., he exchanged some hot words with Nakka Commander with regard to the Naka duty. The dispute was ultimately patched up and the battalion was subsequently deployed at Kashmir. However, a charge sheet was issued on 9th November, 2001 on the following allegations:

BSF ACT BSF ACT 1968 Section-40. SECTION 40 AN ACT PREJUDICIAL TO GOOD ORDER

AND DISCIPLINE OF THE FORCE

IN THAT HE, At about 22.30 hrs. on 27.10.2000 Brought a local woman to Naka Machan, while performing ambush Duty in the area of BOP Lachugachh On International Border with Bangladesh.

BSF ACT BSF ACT 1968 SECTION-26 SECTION -26 INTOXICATION CHARGE-II In that he, At about 22.30 hrs. on 27.10.2000, While an ambush duty in area of

BOP Lachugachh found in a state of intoxication

2. It is not disputed that before issuance of the charge sheet the officiating Commandant of the 40th Battalion of BSF had ordered for record of evidence by an order dated 9th June, 2001. In view of the charge sheet, the appellant was informed by a notice that the Commandant proposes to try the appellant by Summary Security Force Court (hereinafter referred to as SSFC) at 10-30 a.m. on 12th November, 2001 under Sections 40 and 26 of the Border Security Force Act, 1968. The appellant was given liberty to be present along with any person of the Battalion as friend, as permitted under Rule 156 of the B.S.F. Rules, 1969. The statement of one Constable Anup Singh was recorded during the course of the proceedings held by SSFC between 12th and 13th November, 2001. The appellant pointed out that there was a contradiction in the statement of Anup Singh and other witnesses. Accordingly, it was submitted that there was no worthwhile evidence on the record to show that the appellant had been in the company of a woman at the Naka Machan. It was also pointed out that the statement of the alleged woman was never recorded, nor was she produced before the S.S.F.C. In spite of the contradictory nature of the evidence, the same was relied upon against the appellant. It is also the case of the appellant that even with regard to the second charge of alleged intoxication, the same had not been proved by conducting a medical test. The S.S.F.C. had merely relied on the statements of P.W.s. According to the appellant, both the charges were not proved in accordance with the provisions of the Indian Evidence Act, 1872. It is also the case of the appellant that the proceedings have been conducted in breach of rules of natural justice. The record of evidence was illegally prepared on the basis of the order issued on 9th June, 2001. Section 87 of the B.S.F. Act clearly provides that the provisions of the Indian Evidence Act, 1872 shall be applicable to proceedings before the S.S.F.C. Since the evidence had not been recorded in accordance with the Evidence Act, the entire proceedings are vitiated.

3. It appears that on consideration of the entire matter, the appellant was found guilty of both the charges. Thereafter, in accordance with the provisions under the BSF Act he was ordered to be dismissed from service on 13th November, 2001.

4. The appellant challenged the aforesaid order of dismissal by filing a writ petition being W.P. 5505 (W) of 2002. This writ petition was disposed of by this Court on 13th May, 2002 with the direction to the respondents to supply copy of the S.S.F.C. proceedings. The appellant was also granted liberty to file a petition u/s 117 of the B.S.F. Act, 1968. The appellant submitted the necessary petition. This petition has also been dismissed by the Appropriate Authority by order dated 8th May, 2003 by passing the following order:

The issues raised in your petition have been considered very carefully in the light of relevant records, legal provisions and evidence in SSFC trial proceedings. After a detailed consideration and careful scrutiny of all facts and circumstances of the case, the DG BSF has rejected the petition being devoid of merit.

5. Upon dismissal of the petition, the appellant filed the present writ petition which has been dismissed by the learned Single Judge by order dated 28th April, 2004. It is this order of the learned Single Judge which has been challenged in the present appeal.

6. Along with the appeal, the appellant has filed a petition for stay of the impugned judgment. In the stay petition the submissions earlier made before the Trial Court have been reiterated.

7. The respondents have filed a detailed affidavit-in-opposition to the stay petition in which the facts have been elaborately set out. It is stated that in October, 2000 the appellant was deployed at BOP Coy Cops Lachugacha on the international border in Bangladesh for border duty along with "A" Coy personnel. On 27th October, 2000, he was detailed for Naka duty (Border Ambush) at the international border along with one L/Nayek Shikshawali and Constable Anup Singh. He along with other two reached at the Naka point at 6-30 p.m. On the way to the Naka point, Shikshawali realized that the appellant was drunk from the way he was talking and walking. When he reached the Naka Point the appellant wanted to go for urination. This was only an excuse to enable the appellant to meet a local woman with whom he allegedly had sexual intercourse. A little later Constable Anup Singh reached the Naka Point with night meal and since it was dark he was using a torch. Focus of the torchlight fell upon the appellant, who was in a compromising position with the local woman. This is the genesis of how the whole incident came to be discovered. Thereafter, necessary proceedings were conducted and the appellant has been found guilty of both the charges.

8. We have heard the learned Counsel for the parties.

9. Mr. Bandyopadhyay submitted that the order passed by S.S.F.C. as well as the Appropriate Authority are liable to be set aside on the short ground that the same are not accompanied by reasons. Learned Counsel also submitted that even in proceedings under the B.S.F. Act, the S.S.F.C. is required to comply with the rules of natural justice. In support of his submissions the learned Counsel had relied upon the judgment of the Supreme Court in the case of S.N. Mukherjee Vs. Union of India, and the judgment of a learned Single Judge of this Court in the case of Randhir Singh v. Union of India reported in 1999 (2) C.L.T. 107. The learned Counsel also submitted that even if a Rule does not provide for recording of reasons, it would have to be read into the provision. In support of the submission, the learned Counsel relied on the judgment of the Supreme Court in the case of State Bank of India and Others Vs. Ranjit Kumar Chakraborty and Another,

10. On the other hand, learned Counsel for the respondents submitted that the Trial Court has clearly held that S.S.F.C. was entitled to rely on hearsay evidence as the strict rules of evidence are not applicable in proceedings under the B.S.F. Act. It is submitted that the learned Single Judge had supported his conclusion

by the ratio of law laid down in the case of *State of Haryana v. Rattan Singh* reported in (1997) 2 S.C.C. 491. The submissions made before this Court were not made before the learned Single Judge. Therefore, the points now raised should not be entertained.

11. We have considered the submissions made by the learned Counsel for the parties. We have also perused the entire record which has been attached with the stay petition. A perusal of the aforesaid shows that lengthy statements had been recorded of all the witnesses, including the two eye witnesses, L/Nayek Sikshawali and Constable Anup Singh at the time when record of evidence was prepared. Not only the statements of all the witnesses were recorded but the appellant had duly cross-examined all the witnesses. After recording the evidence of the witnesses, the statement of the appellant was recorded under Rule 48.3 of the Border Security Force Rules, 1969. The appellant clearly stated that he had cross-examined the witnesses. He had also stated that there are contradictions in the statement of Constable Anup Singh. It was pointed out that Anup Singh had said that he had seen the naked legs of woman with the appellant in Naka Machan, whereas in the statement of Head Constable S. S. Nair, Post Commander, B.O.P. Lachugacha it had been mentioned that the Constable Anup Singh heard the voice of a woman, who later ran away. On appreciation of the entire evidence, the appellant has been found guilty by the S.S.F.C. It is therefore, not possible to accept that the appellant has been condemned unheard. In our opinion, there has been sufficient compliance with the rules of natural justice.

12. It is well known that judgments in S.S.F.C. are not required to be accompanied by detailed reasons. It is sufficient if the rules of natural justice are complied with at the time when the S.S.F.C. proceedings are conducted. We may also notice here that the only challenge made by the appellant to the findings recorded by the S.S.F.C. was that the findings had been given on the basis of hearsay evidence only. We are unable to accept this submission. We fail to see how the evidence of the eye witnesses can be dubbed as Hearsay Evidence. Admittedly in the present case, the evidence of the witnesses was recorded in the presence of the appellant. The appellant was permitted to cross-examine the witnesses. It is emphatically stated by the appellant that at the time when the evidence was recorded, he has cross-examined the witnesses. Therefore, it would not be possible to hold that any evidence or material relied upon against the appellant, of which the appellant did not have any notice. In our opinion, the appellant has been given ample opportunities of hearing before the S.S.F.C.

13. The issue with regard to the illegality of the order of the Authority deciding the petition of the appellant u/s 117 of the Border Security Force Act, 1968, has not been considered by the Trial Court. There was some confusions amongst the learned Counsel as to whether the point about the order dated 8.5.2003 being non-speaking had been pleaded in the writ petition.

14. Not being satisfied, we asked the representative of the department present

in Court for a copy of the writ petition as the same was not available either with the counsel for the appellant or with the counsel for the respondents. Mercifully the same was made available by the departmental representative. We have had the opportunity to peruse through the same. A perusal of the writ petition shows that the appellant has specifically taken the following grounds:

XI. For that the Appellate Authority has not considered the merit of the Appeal petition at all and did not go into the facts of the case how the disciplinary authority made both the charges proved;

XII. For that then in the Statutory Appeal there were specific allegations for violation of principle of natural justice as well as non compliance of the statutory provisions of the BSF Act and Rules, the Appellate Authority should have passed a reasoned order declaring that the entire SSF Court proceeding was vitiated for non compliance of the procedural rule;

XIII. For that the Appellate Authority without going through the merit of the Appeal petition rejected the same in an ipse dixit manner just to cover the misdeeds of the disciplinary authority;

XVII. For that the Appellate Order not being reasoned order the same should be set aside and/or be quashed;

15. In our opinion, these grounds were sufficiently clear to indicate that the appellant had challenged the order of the authority, described as "Appellate Authority", on the ground that these are non-speaking order. Although pleaded, this point was not canvassed before the Learned Single Judge at the time of arguments. Nevertheless, we have considered the same as it has been specifically raised before us.

16. It is true that even if the relevant rule does not provide specifically for recording of reasons, it may be possible to read the same into the provision. In the judgment of the Supreme Court in the case of State Bank of India v. Ranjit Kumar Chakraborty (supra) it is observed as follows:

Simply by recommending the matter and sending the papers to the Appointing Authority, does not mean that the incumbent who is going to be heard in the matter. It is now settled principle that where ever the Rule is silent the principles of natural justice shall be read in it. A hearing should be given to a person who is being punished with a major penalty. Therefore, the principle of natural justice has to be read in this Rule.

17. In our opinion, the proceedings in the present case have clearly complied with the aforesaid rule. Mr. Bandopadhyay had also relied on a judgment of the Supreme Court in the case of Rajiv Arora Vs. Union of India (UOI) and Others, wherein it has been held that:

If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have

exercised its jurisdiction of judicial-review.

18. These observations are also of no assistance to the petitioner as, in our opinion, the entire proceedings have been conducted by complying with the rules of natural justice. Not only was the appellant made aware of the charges leveled against him, the entire recording of evidence was conducted in his presence. Each and every witness was subjected to cross-examination by the appellant. In such circumstances, it would not be possible to hold that the appellant had been condemned unheard.

19. We may point out that in the present case we are dealing with the situation where the appellant had filed the writ petition under Article 226 of the Constitution of India challenging the order passed by the competent authority u/s 117(2) of the BSF Act. We are of the considered opinion that the appellant has confused the provisions contained u/s 117(2) of the BSF Act with the provisions of a normal appeal before an "Appellate Authority" either under a particular Act or under the disciplinary rules.

20. Section 117(1) of the BSF Act provides for remedy against the order, finding or sentence of Security Force Court. This Sub-section provides that any person who considers himself aggrieved by any order passed by any Security Force Court may present the petition to the officer or authority empowered to confirm any finding or sentence of such Security Force Court, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the corrections, legality or propriety of the order passed.

21. Section 117(2) provides for a petition to the Central Government, the Director General or any prescribed officer who may be superior in command to the one who confirmed the finding. Any one of the aforesaid authorities may pass such order on the petition as it or he thinks fit.

22. We may reproduce here the provisions:

117. Remedy against order, finding or sentence of Security Force Court. -

(1) Any person subject to this Act who considers himself aggrieved by any order passed by any Security Force Court may present a petition to the Officer or authority empowered to confirm any finding or sentence of such Security Force Court, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any Security Force Court which has been confirmed, may present a petition to the Central Government, the Director General, or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Director-General, or the prescribed office, as the case may be, may pass such order thereon as it or he thinks fit.

23. We may also notice here that a pari material provision is contained under the Army Act, 1950. Section 164 therein also provides for confirmation of the finding or sentence of the Court- Martial authority by a post-confirmation petition u/s 164(2). The provisions under the Army Act, 1950 came up for consideration before the Constitution Bench of the Supreme Court in the case of S.N. Mukherjee Vs. Union of India, Upon consideration of the entire matter the Supreme Court came to the conclusion that an administrative authority exercising judicial or quasi-judicial function must record the reasons for its decision except in cases where the requirement has been dispensed with expressly or by necessary implication. Reasons need not be as elaborate as the decision in the Court of Law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. In paragraph 36 of the said judgment, the Supreme Court categorically concludes:

The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

24. Thereafter, in paragraph 39 of the said judgment, the Supreme Court after emphasizing that the requirement to record reasons can be regarded as one of the principles of natural justice states as follows:

The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework where under jurisdiction has been conferred on the administrative authority. With regard to the exercised of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement.

25. In this context, the Supreme Court examined the provisions contained in Section 162 and Section 164 of the Army Act. With regard to Section 162 it observes as follows:

46. The provisions mentioned above show that confirmation of the findings and sentence of the court martial is necessary before the said finding or sentence become operative. In other words the confirmation of the findings and sentence is an integral part of the proceedings of a court martial and before the findings and sentence of a court martial are confirmed the same are examined by the deputy or assistant judge-advocate general of the command which is intended as a check on the legality and propriety of the proceedings as well as the findings and sentence of the court martial. Moreover we find that in Section 162 an

express provision has been made for recording of reasons based on merits of the case in relation to the proceedings of the summary court martial in cases where the said proceedings are set aside or the sentence is reduced and no other requirement for recording of reasons is laid down either in the Act or in the Rules in respect of proceedings for confirmation. The only inference that can be drawn from Section 162 is that reasons have to be recorded only in cases where the proceedings of a summary court martial are set aside or the sentence is reduced and not when the findings and sentence are confirmed. Section 162 thus negatives a requirement to give reasons on the part of the confirming authority while confirming the findings and sentence of a court martial and it must be held that the confirming authority is not required to record reasons while confirming the findings and sentence of the court martial.

26. With regard to Section 164(2) we may notice here the observations contained in paragraphs 47 and 48 of the said judgment which are as follows:

47. With regard to post-confirmation proceedings we find that Sub-section (2) of Section 164 of the Act provides that any person subject to the Act who considers himself aggrieved by a finding or sentence of any court martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army staff or other officer, as the case may be, may pass such orders t or he thinks fit. Insofar as the findings and sentence of a court martial and the proceedings for confirmation of such findings and sentence are concerned it has been found that the scheme of the Act and the Rules if such that reasons are not required to be recorded for the same. Has the legislature made a departure from the said scheme in respect of post - confirmation proceedings? There is nothing in the language of Sub-section (2) of Section 164 which may lend support to such an intention. Nor is there anything in the nature of post-confirmation proceedings which may require recording of reasons for an order passed on the post confirmation petition even though reasons are not required to be recorded at the stage of recording of findings and sentence by a court martial and at the stage of confirmation of the findings and sentence of the court martial by the confirming authority. With regard to recording of reasons the considerations which apply at the stage of recording of findings and sentence by the court martial and at the stage of confirmation of findings and sentence of the court martial by the confirming authority are equally applicable at the stage of consideration of the post-confirmation petition. Since reasons are not required to be recorded at the first two stages referred to above, the said requirement cannot, in our opinion, be insisted upon at the stage of consideration of post confirmation petition u/s 164(2) of the Act.

48. For the reasons aforesaid it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial as well as for the order passed by the

Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in *Som Datt Datta* case the submission of Shri Ganguly that the said decision needs reconsideration cannot be accepted and is, therefore, rejected.

27. These observations, in our opinion, make it abundantly clear that in a confirmation petition as well as post-confirmation petition it is not necessary either for confirming authority or the post-confirming authority to record reasons in support of its decision where the aforesaid authorities agree with the findings of the Court. It is only in cases of disagreement with the findings of the Court, that the reasons are to be recorded. As noticed above, Section 117(2) is *pari materia* to Section 164(2). The provisions of Section 117(2) were again considered by the Supreme Court in the case of *Union of India and another Vs. Ex Constable Amrik Singh*, In considering the aforesaid provisions it is categorically concluded as under:

7. From the above discussion it emerges that in cases of special enactments like Army Act, all the principles of natural justice cannot be imported. The same ratio applies to a petition u/s 117(2) of the Act also. We may also point out here that Chapter XIII consisting of Rules 167 to 169 of the BSF Rules deals with petitions filed u/s 117 of the Act. Even in them there is nothing to indicate that a hearing has to be given before disposal of a petition.

8. As noticed above, u/s 117(2) the respondent is only entitled to file a petition but the disposal of such a petition does not attract principles of natural justice. The respondent has been tried by observing the due process of law and the verdict of the Security Force Court was confirmed and it is only a post-confirmation petition that was filed u/s 117(2) of the Act and the authority which disposed of the same is not a Court and every order passed administratively cannot be subjected to the rigours of principles of natural justice.

28. We may also notice here that aforesaid observations have been made by the Supreme Court after noticing the judgment rendered in *S.N. Mukherjee's* case (*supra*)

29. Mr. Bandopadhyay, vehemently submitted that the procedure under the BSF Act cannot be equated with the procedure under the Army Act for the conduct of general Court Martial. Under the aforesaid Act, the general Court Martial is assisted by an independent authority namely, "Judge Advocate General" who assists the Court in recording the evidence and also recording of the findings in accordance with the provisions of the Act. In those circumstances, the Supreme Court came to the conclusion that once the proceedings are concluded in accordance with the rules of natural justice, further reasons need not be recorded either by the confirming authority or by the post-confirming authority. In the proceedings under the BSF Act, the evidence is recorded by an officer of the Border Security Force and, therefore, cannot be equated with the summary of evidence as recorded in the Court Martial. We are unable to accept the

submissions made by the learned Counsel. As noticed by us earlier, the appellant was not only present at the time when the record of evidence was prepared but he was given due opportunity for cross-examination of the witness.

30. In such circumstances, we are of the considered opinion that the writ petitioner has failed to establish that any injustice has been caused to him during the proceedings resulting in dismissal of service. We see no reason to interfere with the order passed by the learned Single Judge.

31. With the above observations, the appeal is dismissed by treating the same as on day's list. The application for stay is also dismissed.

32. Xerox certified copy of this order, if applied for, be given to the learned Counsel for the parties.