
(1991) 03 RAJ CK 0013

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 4421 of..

Kali Das

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-03-1991

Acts Referred:

Army Act, 1950 — Section 164
Border Security Force Act, 1968 — Section 117, 30
Constitution of India, 1950 — Article 14

Citation : (1991) 1 WLN 577

Hon'ble Judges : N.K. Jain, J;Kanta Bhatnagar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.K. Jain, J.—By this habeas corpus petition the petitioner has sought quashing of the illegal proceedings of General Security Force Court resulting in his detention and quashing of the sentence and findings of the order dated 30.1.90, order of confirmation dated 6.3.90 and the promulgation of sentence Ex. 20 dated 9.3.90 and order dated 23.8.90 Ex. 26 by which his petition, dated 7.6.90 against detention was rejected. The petitioner has also prayed for a direction to the respondents to reinstate him in service with all consequential benefits.

2. The brief fact given rise to this petition are that the petitioner had joined BSF as peon on 4.1.67 at Calcutta B.S.F. Barrackpore (West Bengal). He was posted to No. 72 BN, at water carrier. The said Battalion was moved to Malda, Tripura/ Shlliong and then to Jaisalmer. He was designated as sweeper. He was tried by General Security Force Court from 10th Jan., 90 to 30th Jan., 90. It is stated that while he was working in the accounts branch of 72 BN as sweeper but discharging clerical duties, some irregularities were detected and he was placed under open arrest by an oral order from 15.6.1985 and the written order was passed on 31.8.85. The petitioner during arrest period moved an application on 16.12.85 for consultation with a civil lawyer but the same was rejected on

17.12.85. However, he was ordered to be released from open arrest w.e.f. 10.4.86 by the order dt. 9.4.86 with a direction not to leave unit without prior permission or pass of competent authority. Thereafter the Court of enquiry was ordered and witnesses were examined by the court of enquiry and a charge-sheet u/s 30(b) for misappropriating fund of Rs. 42,602.84 was issued on 17.10.86 vide Ex. 6 but the petitioner was charge-sheeted for misappropriating fund of Rs. 62,992.60 by the Court Martial and was found guilty of dishonestly misappropriating the property belonging to the Government worth Rs. 38,059.70 and was sentenced to two years rigorous imprisonment and was dismissed from service.

3. The petitioner had given legal notice on 9.4.90 (Ex. 21) u/s 117 of the B.S.F. Act, 1968(hereinafter referred to as the Act) and also moved a petition u/s 30 for suspension of sentence vide Ex. 23 but with no response. Then a notice Ex. 24 was sent on 12.7.90, which was followed by a telegram (Ex. 25) dated 20.8.90. The petition dated 7.6.90 was rejected on 23.8.90 (Ex. 26). He has, therefore, preferred this habeas corpus petition on 11.10.90, alleging that he is in illegal detention and entitled to be get at liberty as principles of natural justice were not followed and opportunity of being heard was not given. A return to this petition was filed. It has been stated in the reply that petitioner's application dated 16.12.85 was rejected for consultation which the civil justice and not for civil lawyer, and witnesses were heard in the presence of the accused and procedure was followed, and no prejudice was caused to the petitioner as he was given full opportunity to defend his case. The petitioner was represented by his counsel but no objection was raised by him before the court martial trial. It has also been stated that sentence passed on 30.1.90 and confirmed on 9.2.90 was according to law after following the procedure, and the petitioner is serving sentence since 9.3.90. As such the jurisdiction of competent authority could not be challenged in this habeas corpus petition. The State has also filed reply stating that the petitioner is serving sentence awarded by G.S.F.C. and he is in Central Jail, Jodhpur since 12.3.90 and prior to that he remained in sub jail, Jaisalmer from 9.3.90 to 12.3.90. The petitioner has filed rejoinder and the respondents have also filed reply to the rejoinder.

4. We have heard Mr. S.K. Nanda, learned Counsel for the petitioner and Mr. P.P. Choudhary learned Counsel for the respondent Nos. 1 to 4 and Mr. K.L. Jasmatia, Government Advocate and perused the record.

5. Mr. S.K. Nanda, learned Counsel for the petitioner has submitted that the principles of natural justice have been disregarded at each and every stage in as much as the procedure at the stages of pre-court martial and post-court martial has not been followed. Mr. Nanda, has firstly contended that the petitioner was not provided with an officer of his choice to defend his case and he was not allowed to meet and consult his defending counsel.

6. Mr. P.P. Choudhary, learned Counsel for the respondents has submitted that the petitioner was asked to give names of officer to defend his case during

G.S.F.C. trial vide Ex. 9 dated 30.11.89. The petitioner intimated vide letter dated 1.12.1989 (Ex. 10) names of two officer viz. Mr. Ambika Tewari and S.P. Lakher to defend his case by any one of them. The officer Commandant vide letter Ex. 11 dated 8.12.89 asked the petitioner to intimate at least 4/5 names of officers of his choice to defend his case at the court martial trial and it was also mentioned in the letter that he is at liberty to engage a civil counsel to defend his case. Thus, the petitioner gave names of five officers vide letter dated 9.12.89 Ex. 12. The Commandant vide letter Ex. 13 dated 27.12.89 informed the petitioner that they are neither willing nor available to defend his case. The petitioner vide Ex. 14 dated 29.12.89 requested that any Officer may defend his case and the case may be finalised in the month of January, 1990 positively. An officer of the rank of Dy. Commandant Mr. A.S. Salariya was appointed. In pursuance of the letter dated 27.12.89 of the Commandant, the petitioner requested vide his letter Ex. 15 dated 8/9.1.90 that he may be permitted to engage Mr. Laxmi Narain Mehta a civil lawyer.

7. It is true that as per scheme of the special provision a delinquent is given an officer of his choice to defend his case. However, when the desired officers were not willing and available due to exigencies of service, an officer was appointed as stated earlier and the petitioner was also permitted to have private counsel of his choice to defend him as prayed by him and Mr. L.N. Mehta was allowed to represent him at the court martial trial, the proceedings of which started on 10.1.90. Therefore, under these circumstances, it could not be said that no proper opportunity was given to the petitioner and principles of natural justice were not followed. It is pertinent to note that Mr. A.S. Salariya, was appointed by the authorities to defend the case of the petitioner at the court martial proceedings but since the accused has engaged a defence counsel Mr. L.N. Mehta, to represent his case in the court Mr. A.S. Salariya withdrew. In the rejoinder petitioner has stated that he did not wish to have the defending officer and also that the appointment of officer was formal who was neither keen nor could guide the accused- petitioner nor could defend him effectively, when he withdraw himself, the petitioner never submitted that he was ready and willing to be defended by Mr. A.S. Salariya, under these circumstances the grievance of the petitioner does not survive. He never requested the court that he was willing to be represented in the case through Mr. Salariya and he was forced to have a civil lawyer and that the mandatory provisions were not followed. As a matter of fact he was permitted to defend his case through a civil lawyer at his request and as such he cannot now say that he was not properly defended.

8. The next grievance of the petitioner is that he was not allowed to meet his defence counsel on 21.1.90 at 5.30 and the petitioner had to move an application Ex. 17 on 22.1.90 before the Presiding Officer.

9. In the instant, case, the trial was in day to day process since 10.1.90. On 21.1.90 also he was not refused meeting with his counsel but he was told that nobody could see the accused without prior permission of the concerned

authority. He met his counsel on the next day. An application was moved before the Presiding Officer through his counsel on 22.1.90. He did not give any reasons as to why he wanted to meet his counsel on the previous day nor he asked for some more time to consult his defending counsel on that count. Merely by filing application, the petitioner cannot establish that his case has been prejudiced. In view of these facts, not allowing the petitioner to his counsel on 21.1.90 after 5.30 had not adversely affected his case and in no way violated the principles of natural justice.

10. So far as the contention of Mr. Nanda that the evidence of Mr. I.M. Poonappa, recorded on 6.2.89 by D.S. Dhillon, was not considered and rather it is missing from the record, is concerned, Mr. Choudhary, has submitted that the statement of I.M. Poonappa was never recorded earlier as alleged by the petitioner rather his statement was recorded by Shri G.S. Goswami along with 39 witnesses in August, 1989 in second lot. In the reply to this contention the respondents have stated that it is admitted to the extent, thus are borne on record available in the unit. Though the respondents have not specifically denied the averments made by the petitioner, but it is pertinent to note that while cross examining Mr. Poonappa, the petitioner particularly asked question No. 10 that "did you depose in the R.O.E. conducted by Shri D.S. Dhillon, Dy. Commandant?" the answer of Mr. Ponnappa was that "my statement was not recorded in the R.O.E." But at that time the petitioner never raised the objection that his statement was recorded on 6.2.89 as alleged by him now, Anx. 7 that is the copy of such statement-Original is not on the file nor was the witness confronted with its contents during his cross-examination with the previous statement. Hence, the court cannot take note of it especially, when Mr. Poonappa had categorically stated that his statement was not recorded by D.S. Dhillon, Dy. Commandant earlier on 6.2.89. In view of this it cannot be said that any prejudice has been caused to the petitioner.

11. So far as the argument regarding not affording opportunity of being heard to the petitioner while deciding his petition u/s 117 is concerned, learned Counsel for the petitioner has placed reliance on the case of Madan Singh v. Union of India 1984 (3) SLR 424 wherein it has been held that the appellate authority is under obligation to give opportunity of hearing before disposal of the appeal. The doctrine of principles of natural justice and audi alteram partem are part of Article 14 and there are any number of decisions of the Hon'ble Supreme Court regarding the scope of this doctrine. To resolve this controversy it would be proper to reproduce Section 117 of the Act, which reads as follows:

117. Remedy against order, finding or sentence of Security Force Court: (1) Any person subject to this Act who considered 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 proceedings to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentences 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 officer, as the case may be, may pass such order thereon as it or he thinks fit.

12. A perusal of this section reveals that 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 proceedings to which the order relates. It no-where says that before disposal of the petition, the aggrieved party should be heard in person. That apart, the petitioner never requested to give him personal hearing of the petition dated 7.6.90, which was rejected on 23.8.90. As such this contention has no substance and the observations made in Madan Singh's case (supra) are of no help to the petitioner.

13. The next contention of Mr. Nanda is that while deciding the petition u/s 117 of the Act no reasons have been given. The B.S.F. is an armed force of the Union of India constituted under Item 2 of List I of Schedule 7 of the Constitution and is primarily connected with the defence of the country for ensuring the security of the Border of India as in the cases arising out of the special enactment like Army Act, all the principles of natural justice cannot be imported. Therefore, this argument is not tenable. In *S.N. Mukherjee V Union of India* 1990 SCC (4) 594 their lordships while considering the implications of Section 164 of the Army Act, 1950, which is analogous to Section 117 of the B.S.F. Act, 1968, noted the principle that requirement to record reasons can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities, however, proceeded to hold that "There is nothing in the language of sub-section (2) of Section 164 which indicates that recording of reasons for an order passed on the post confirmation petition was necessary". On the basis of the ratio laid down in *Som Datt Datta v. Union of India* 1969 (2) SCR 117 And their lordships of the Supreme Court has further reiterated the same in the recent decision of the Supreme Court in *Union of India V Ex. Constable Amrik Singh* (Civil Appeal No. 3201 of 89) decided on January 29, 1991 and held that u/s 117, the petitioner is only entitled to file a petition but the disposal of such petition does not attract principles of natural justice.

14. The next contention of Mr. Nanda is that procedure of pre-court martial laid down in the B.S.F. Rules has not been followed. It may be stated that these stages are provided under Chapter XIV, Courts of Enquiry under Rules 170 to 176 which provides of opportunity to knowall that has been stated against him and to cross-examine any witness who have given evidence against him and make a statement and all witnesses in his defence, second stage is provided in Chapter VIII-"Investigation and Summary disposal". Under Rules 44 and 45 which

provides that the witness shall give evidence in the presence of the accused who shall have the right to cross examine; and the third stage is of recording evidence under Rule 48 which provides that after all the witnesses against the accused have been examined, he shall be cautioned in the following terms," You may make a statement you wish to do so, you are not bound to make one and whatever you state shall be taken down in writing and may be used in evidence." After having been cautioned in the aforesaid manner, whatever the accused states shall be taken down in writing. The B.S.F. Act, is a self contained Code and General Security Force Court has a special jurisdiction and with a view to prevent miscarriage of justice and fair play in the trial this special procedure has been provided. In the instant case when all the evidence was available to the petitioner and it was within his knowledge but he never raised any objection regarding any irregularities alleged to have been committed prior to the court martial. It is pertinent to note that before commencing trial by the court martial petitioner was to answer certain questions including question no. 6, which reads as under:

Q.6 Do you wish to apply for an adjournment on the ground that any of the rules relating to procedure before trial have not been complied with and that you have been prejudiced thereby or on the ground that you have not had sufficient opportunity for preparing your defence?

15. In reply to it he never raised any grievance on any ground on which his learned Counsel has based his arguments in this petition before us, such as opportunity was given at the time of court of enquiry, giving of charge-sheet and the witnesses were not examined in his presence, or procedure has not been followed. Therefore, in the absence of any request from the petitioner more particularly while answering question no. 6 before commencing of the court martial trial or the petitioner raising any objection there the petitioner is not entitled to agitate these points here.

16. In view of the above discussion, we are of the opinion that the petitioner was given full opportunity to defend his case both at pre-court martial stage as well as at the court martial trial and subsequent thereto and no prejudice has been caused to him as principles of natural justice have been fully followed. The petitioner is serving sentence awarded to him which was duly confirmed by the competent authority and he is not in illegal detention, therefore, the order passed by the General Security Force Court calls for no interference and no relief can be granted in this petition. The habeas corpus petition deserves to be dismissed.

17. No other point has been pressed before us.

18. In the result, the habeas corpus petition is dismissed with no order as to costs.