

(2023) 08 J&K CK 0039

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 193 Of 2023

Kanhiya Lal

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 21-08-2023

Acts Referred:

Border Security Force Rules, 1969 — Rule 22, 45, 48, 48(3), 49, 53, 113, 142(2), 167, 168, 170, 171, 172, 173, 174, 175, 176
Border Security Force Act, 1968 — Section 19(a), 26, 40, 45, 71

Citation : (2023) 08 J&K CK 0039

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : S. Kour, Michael Singh, Sandeep Gupta

Final Decision : Dismissed

Judgement

Sanjeev Kumar, J

1. The petitioner was enlisted in Border Security Force [“BSF”] as Constable on 28-06-1980 and after undergoing necessary basic training was posted in 84 Bn of the BSF. The petitioner states that he was then transferred to 77 Bn and thereafter to 93 Bn of the BSF. While the petitioner was posted in 93 Bn, he was charged for the offence under Section 19(a) of the BSF Act on the allegation that at 1600 hrs on 18-10-1998 the petitioner had absented himself without leave from TP/OP NO.01 of BOP Somrar (?D? Coy, 93 BN) till 2330 hrs (total period of absence 7 ½ hrs). Another offence alleged against the petitioner ,under Section 26 of the Act, was that, at 2330 hrs on 19-10-1998 the petitioner was found in a state of intoxication while performing the duty at Tent post/OP NO.01 of BOP Somrar and after holding enquiry, he was placed under arrest. The Summary Security Force Court was held thereafter and the petitioner was dismissed from service.

2. The case of the petitioner is that a false and frivolous charge under Section 19(a) of the Border Security Force Act, 1968 [“the Act of 1968 hereafter”] has

been levelled against the petitioner on the false allegation that, on 18-10-1998 at 1600 hrs, the petitioner absented without leave from TP/OP NO.1 of BOP Somrar till 2330 hrs for a total period of 7½ hrs. It is submitted that the allegation of absence is false as on 18-10-1998, it was Diwali festival and the petitioner went to get the meals for the personnel posted in the TP/OP No.1 on foot, as he did not know how to ride an elephant. He was thus late by half an hour, however, the respondents wrongly mentioned absence for 7½ hours. The petitioner claims that he has not committed any such offence. He also denied that second charge framed against him under Section 26 of the Act of 1968 on the allegation that the petitioner, on 19-10-1998, at 2330 hours, was found in a state of intoxication while performing his duty at Tent post OP No.1 of the BOP Somrar.

3. The petitioner has assailed the order of his dismissal and the proceedings of the Summary Security Force Court on numerous grounds. The grounds which were pressed into service by the learned senior counsel, while arguing the matter on behalf of the petitioner, may be summarized thus:-

(i) That the order of dismissal has been passed against the petitioner in violation of the relevant provisions of the Act of 1968 and the Rules framed there under.

(ii) That the order of dismissal has been passed without holding/conducting any enquiry, in that, the respondents were obliged to prepare an offence report in terms of Rule 43 of the Rules of 1969 and after reducing it in writing, the Commandant was required to hear the charge and award the punishment or dismiss the charge, but in the present case the respondents have not followed the relevant provisions of law.

(iii) That the petitioner was required to be heard before imposing major punishment upon him but the petitioner was not afforded any opportunity to prove his innocence. Additionally, under Rule 48 of the Rules of 1969, the respondents were required to record the evidence in presence of the petitioner and give opportunity to the petitioner to cross examine the witnesses and it was only then the charge sheet could have been framed in terms of Rule 53 for conducting the Summary Security Force Court. But in the case of the petitioner, neither the respondents have recorded the evidence under Rule 48 and 49 of the Rules of 1969 nor have provided the copies of the same to the petitioner.

(iv) That the respondents have not conducted any enquiry under Rules 170 to 176 of the Rules of 1969. Further, the petitioner was ill and was undergoing treatment from the medical officers of the respondents and, as per Rule 113 of the Rules, in case the accused is ill, the trial should not be continued and is required to be adjourned. Even under Section 71 of the Act, in case the accused is ill, the Summary Security Force Court is required to be dissolved. Despite the petitioner being ill, the respondents conducted the proceedings in his absence and, without affording him opportunity of being heard, awarded a major punishment of dismissal from service on the petitioner.

(v) That, Rule 22 of the Rules has not been followed in the present case which envisages that if penalty is required to be imposed on the delinquent, he is required to be informed and all reports adverse to him are required to be supplied to him. Furthermore, he is to be given opportunity to submit his explanation in defence.

4. On being put on notice, the respondents have filed their objections. It is submitted that, while posted in 93 BN, the petitioner, on 18-10-1998 was deputed at Tent Post/ Observation Post No.1 of Border Out Post Somrar and at 1600 hours he was sent to Company Headquarter to bring meals for other personnel of the post, but he absented himself without any leave up to 2330 hours. On 19-10-1998 at about 2330 hours, the petitioner was found in a state of intoxication and was sent to the Battalion Headquarters for disciplinary action. The charge sheet under Section 19(a) and Section 26 of the Act was framed and preliminary hearing under Rule 45 of the Border Security Force Rules, 1969 [The Rules of 1969 hereafter], was conducted by the Commandant and the petitioner was remanded for record of evidence. On the basis of evidence recorded the petitioner was tried for two charges i.e. Charge Under Section 19 (a) and under Section 26 of the Act of 1968. The Record of Evidence was ordered by the Commandant. The Dy. Commandant of the Unit conducted the Record of Evidence. The Dy. Commandant recorded statements of four witnesses and gave due opportunity to cross-examine the witnesses to the petitioner. The petitioner, however, declined to cross-examine any of the witness. Finally statement of the accused-petitioner after administering caution upon him under Rule 48(3) of the BSF Rules was recorded on 31-12-1998. The Summary Security Force Court found the petitioner guilty and sentenced him to ?be dismissed from service?. It is submitted by the respondents that the petitioner has pleaded guilty and had even declined to cross examine the witnesses while preparing the record of evidence. Even after compliance of Rule 142(2) of the Rules, the petitioner did not withdraw his plea of guilty. It is submitted that no appeal was ever filed by the petitioner under Rules 167 and 168 of the Rules of 1969.

It is averred that the petitioner has a track record of being punished for offences under Sections 19(a) and 26 of the Act and has been previously awarded following punishments:-

- (i) Reprimand under Section 40 of the BSF Act-1968 on 13-08-1990 for violation of good order and discipline of the force.
- (ii) Reversion to the rank of Const. U/S 19(a) and U/S 26 on 18-12-1990 for absent without leave and intoxication.
- (iii) Awarded 14 days extra duties on 10-04-1991 U/S 26 of BSF Act, 1968 for intoxication.
- (iv) 14 days rigorous imprisonment in Force Custody on 26-11-1997 U/S 26 of the BST Act, 1968 for intoxication.

(v) 28 days rigorous imprisonment in Force Custody on 10-06-1998 U/S 26 of the BSF Act, 1968 for intoxication.

5. Having heard the learned counsel for the parties and perused the original record, which has been produced by the respondents, I am of the considered opinion that, having regard to the past conduct of the petitioner, punishment of "dismissal from service" awarded to the petitioner is befitting and cannot be said to be strikingly disproportionate to the established misconduct.

6. I have gone through the original record produced by the learned counsel for the respondents and find that a good care has been taken by the respondents to adhere to the procedural and substantive provisions of the BSF Act and the Rules framed thereunder. The petitioner was charged under Sections 19(b) and 26 of the BSF Act i.e. absence without leave and intoxication while performing the duty. He was heard by the Commandant under Section 45 of the Act and the proceedings conducted by the Commandant reveal that the petitioner pleaded guilty and refused to call any witness. Having found the explanation tendered by the petitioner totally unsatisfactory, the Record of Evidence was ordered by the Commandant. The Dy. Commandant of the Unit conducted the Record of Evidence. The Dy. Commandant recorded statements of four witnesses and gave due opportunity to cross-examine the witnesses to the petitioner. The petitioner, however, declined to cross-examine any of the witness. Finally statement of the accused- petitioner after administering caution upon him under Rule 48(3) of the BSF Rules was recorded on 31-12-1998.

7. The Dy. Commandant submitted the ROE to the Commandant, who, on perusal thereof, rightly came to the conclusion that the petitioner was liable to be tried by SSFC. Accordingly, SSFC was convened by the Commandant, 93 Bn, BSF vide his order dated 14-01-1999. The SSFC held its proceedings on 14-01-1999 and Shri MAG Unni, Dy Commandant was nominated as friend of the accused-petitioner to assist him during his trial before the SSFC. The petitioner was medically examined and was found mentally and physically fit to undergo SSFC trial. Accordingly, the trial commenced, the petitioner pleaded guilty to the charges in the presence of his friend Sh. MAG Unni, Dy Commandant. The Commandant has appended requisite note making it clear that provisions of BSF Rule 142(2) are complied with in letter and spirit. The note indicates that not only the charge was read over and explained to the petitioner but he was also made to understand the nature of charge to which he pleaded guilty. The petitioner was also informed about the general affect of the plea of guilty and the difference in procedure which would be followed consequent upon such plea. It is only after recording its satisfaction, the plea of guilty made by the petitioner was recorded. It is true that the petitioner has not signed the plea of guilty nor do I find signatures of the next friend of the petitioner, who was present during trial. However, having regard to the stand of the petitioner taken before the Commandant hearing charge under Section 45 of the BSF Act and the one taken during ROE before the Dy. Commandant, it is abundantly clear that the petitioner

has pleaded guilty and refused to cross examine any witness or to produce his defence at any stage.

8. As is rightly pointed out by the learned counsel for the respondents that this is not for the first time that the petitioner has committed the offences with which he was charged, but he has earlier been reprimanded, reverted and punished five times also for the same offences.

9. The submission of the learned senior counsel for the petitioner, that the no inquiry was conducted and, if any conducted, that too was conducted in the absence of the petitioner, is again untenable because the record produced by the respondents clearly indicates that the record of evidence was conducted in the presence of the petitioner, who has even signed on the margin of statements of the witnesses. He refused to cross examine them. Same is the position in the Summary Security Force Court proceedings.

10. On the conspectus of facts and circumstances and having gone through the original record produced by the respondents, I do not find any substantive or procedural irregularity having been committed by the respondents in awarding the punishment of "dismissal from service" to the petitioner.

11. In view of the above, the petition lacks merit, and is, accordingly, dismissed.