

(2006) 05 GAU CK 0018
In the Gauhati High Court
Case No : Civil Rule No. 50 of 1996

Madan Kumar Nama

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-05-2006

Acts Referred:

Border Security Force Act, 1968 — Section 117, 20, 53, 70
Border Security Force Rules, 1969 — Rule 151, 157, 16(2), 16(5), 167
Constitution of India, 1950 — Article 226

Citation : (2006) 3 GLT 733

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Advocate : B. Das and D. Chakraborty, for the Appellant; P.K. Biswas, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Pal, J.—The Petitioner Madam Kumar Nama entered into the service of the Border Security Force (for short, "BSF") in the year 1982 as Constable and was promoted to the rank of Lance Naik in the year 1990. On 21.8.95, he was asked by Head Constable R.D. Singh to maintain inside area of BOP when he picked up a brick and hit the Head Constable by it causing simple injury, an act amounting to misconduct. On the same day, a charge was framed against him for this gross misconduct u/s 20(a) of the Border Security Force Act (for short, "the Act"). The said charge for using criminal force against a superior officer reads as follows:

In that, he at BOP K.K. Barrier on 21.8.95 when ordered by No. 66911261 H.C. R.D. Singh on his Coy to maintain inside area of BOP K.K. Barrier, he picked up a brick and hit on the face in a simple injury.

Sd/-21.8.95 (M. Damodaran) 2IC Commandant 63 Brn. BSF Place: Khemkaran (Pb) 21.8.95

After framing the charge the Summary Security Force court proceeded to

assemble on 24.8.95 for trial of the Petitioner on the said charge. One Gurbox Singh Asst. Commandant, 63 Bn. BSF was engaged as friend of the accused to assist him. One Shekhar Gupta Asst. Commandant was engaged to prepare the record of evidence during trial. Thereafter, the said court proceeded to examine H.C. Ramdayal Singh, H.C. Om Prakash Pandey, SI. Himmat Singh, Constable Asim Kumar Saha, Dr. D.S. Hanspal. During their examination, the Petitioner was given opportunity to cross-examine those witnesses, but he declined. After conclusion of the trial, the Commandant found the Petitioner guilty and by order dated 24.8.95, the Petitioner was dismissed from service. Aggrieved, the present writ proceeding has been instituted calling into question the legality and correctness of the impugned order of punishment.

2. I have heard Mr. B. Das, learned Sr. counsel assisted by Mr. D. Chakraborty, learned Counsel for the Petitioner and Mr. P.K. Biswas, learned Assistant SG.

3. The first contention of the Petitioner is that the proceeding of the Security Force Court was initiated on 21.8.95 and concluded on 24.8.95 in a great haste which reduced the proceeding into a mockery. That apart, it has been alleged that though the Petitioner expressed his intention to examine the witnesses he was not given opportunity to produce any witness in support of his defence. Secondly, the witness Asim Kumar Saha had deposed in support of the Petitioner but he was then threatened by the Commandant that he would suffer adverse consequences. Thirdly, Mr. Damodaran was second in command who asked him whether he pleaded guilty in presence of Gurbox Singh who was engaged to assist him and others. He pleaded guilty under pressure from the BSF personnel who assured him that he would be given lighter punishment if he had pleaded guilty. Fourthly, the law does not permit a second in command to hold Summary Security Force Court. Fifthly, Rule 66 of the BSF rules, 1969 provides that at the commencement of the trial, the order convening the court and the names of the officers appointed to try the case should be read out within the hearing of the accused which was not done in the case on hand. Sixthly, though the allegation is that he picked up a brick and hit the Head Constable which only caused simple injury, such an allegation cannot be accepted at face value as the said Head Constable if really was hit by a brick would have sustained grievous injury. On all the above points, it was argued that the entire proceeding was highly arbitrary, illegal and not in conformity with the procedures laid down in the BSF Acts and rules and, therefore, the same should be quashed.

4. The Respondents in their counter affidavit contended, inter alia, that every opportunity was given to the Petitioner to defend himself, but he pleaded guilty and even declined to cross-examine the witnesses of the prosecution. After pleading guilty and declining to cross-examine the prosecution witnesses, the Petitioner made no prayer to examine his own witnesses. That apart Rule 167 and 168 of the BSF rules were not availed of by the Petitioner to file a petition against the finding of the Summary Security Force Act. Section 117 of the BSF Act, 1968 provides that any person aggrieved by an 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. The relevant provision in Section 117 provides as follows:

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 property 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 officer, as the case may be, may pass such order thereon as it or he thinks fit.

5. It is further contended that in the writ petition, the Petitioner has not given any reason why the alternative remedy available u/s 117 of the Act read with 167 and 168 of the rules were not availed of. Failure on his part to explain the same may be the only ground for rejection of the writ petition. The other grounds taken in the counter affidavit is that as the order of dismissal was passed by a Summary Force court at Khemkaran, Punjab, this High Court has no territorial jurisdiction to entertain a writ petition before this Court. According to the Respondents, the Summary Security Force Court was constituted u/s 117 of the BSF Act, 1968 when the Petitioner was asked to intimate the names of an officer of his choice to act as his friend under the provision of Rule 157 of the said rules. Regarding the question of power of the second in command to preside over the Summary Security Force Court, their contention is that under Sub-rules (2) and (5) of Rule 16 of the BSF rules, the second in command is empowered to hold such Security Force Court in the absence of regular Commandant posted to the Unit. At the relevant time, there was no regular Commandant and Mr. Damodaran was the second in command and so under Rule 16, he was competent to hold Summary Security Force court. On the above grounds, the said Respondents claim that the writ petition is not maintainable and the same should be rejected at the very threshold.

6. I have heard Mr. B. Das, learned sr. counsel assisted by Mr. D. Chakraborty, learned Counsel for the Petitioner and Mr. P.K. Biswas, learned Assistant SG for the Respondents.

7. After going through the records of the proceedings, it appears that after preparation of the charge, the accused was asked whether he intended to plead guilty or not. He pleaded guilty and his pleading was recorded. He was, however, cautioned that he was not bound to plead guilty and if pleaded guilty, it might

have adverse consequences. During trial before the Summary Security Force court the Petitioner was given the opportunity to cross-examine the witnesses but he declined to do. There is no prayer that he wanted to examine any witness in support of his defence. The claim that he made such prayer is not believable for the reason that he pleaded guilty and declined to cross-examine the witnesses of the prosecution. As regards the question raised about competence of the second in command to preside over a Security Force Court, Mr. Das made a reference to the provision u/s 70 of the Act which provides as follows:

70. Summary Security Force Court--(1) A Summary Security Force Court may be held by the Commandant of any Unit of the Force and he alone shall constitute the court.

The record of the proceeding would show that Mr. M. Damodaran acted as Commandant of 63 Bn. BSF. Nowhere he signed as second in command. When the official records indicated clearly that Mr. M. Damodaran was the Commandant, there cannot be any reason to take a view that he was second in command. If any person takes such plea the burden is on him to prove the same. Even if it is accepted that Mr. Damodaran was second in command, Rule 16(2)(a) of the said rules provides that in the contingency of an officer unable to exercise the command, the second in command shall exercise all the powers of the Commandant. Thus, this argument of Mr. Das is not acceptable. He admitted that the alternative remedy available to the Petitioner was not availed of by the Petitioner, but he alleged that non-supply of the copy of the order or record within time was the reason of such failure on his part. In the written argument submitted on behalf of the Petitioner it is stated that as the copy of the order was not supplied to him he had to apply for the same which was made available to him on 13.1.96. But by the time, the period of appeal had expired. It has not been made clear when the application for the copy of the order was made and why after allowing the period taken for supply of the copy, the period of limitation did expire. The way this argument has been placed does not stand to satisfaction and, therefore, is rejected. It is the settled law that writ jurisdiction cannot be invoked without availing the statutory remedy. In *Seth Chand Ratan v. Pandit Durga Prasad* reported in 2003 AIR SCW 3078, the Apex court observed in Para 13 the relevant part of which is quoted below:

It has been settled by a long catena of decisions that when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution.

As noticed above the alternative remedy has been made available u/s 117 of the Act which the Petitioner did not avail and the reasons shown therefore does not appear to be acceptable. It is true that Rule 151 of the rules provides that where the finding on any charge is "guilty" the courts may record of its own knowledge, or take evidence on any record, the general character, age, rank and any

recognized acts of gallantry or distinguished conduct of the accused and previous convictions of the accused either by a Security Force Court, or a Criminal Court, any previous punishment awarded to him by an officer exercising authority u/s 53, the length of time he has been in arrest or in confinement on any previous sentence and any decoration or reward or to which he may be in possession or to which he may be entitled. The record shows that the Commandant has made such remarks. Mr. Das submits that though such remarks have been recorded, there is nothing to show that these were given any consideration. Such a submission is not acceptable for the reason that recording of such remarks itself shows that those were taken into consideration though the word "consideration" might not have been written separately.

8. Mr. Das, learned Counsel for the Petitioner advanced an argument that even though the Petitioner was found guilty of causing simple hurt to the Head Constable, the same cannot be a ground for imposing the punishment of dismissal from service. This submission has been controverted by Mr. P.K. Biswas, learned Assistant SG. According to him, even verbal abuse was held by the Supreme Court to be sufficient for imposing the punishment of dismissal from service. In support of this contention, he placed reliance on a decision of the Supreme Court in *L.K. Verma v. H.M.T. Ltd* reported in 2006 AIR SCW 460. the observation made in Para 22 of that judgment reads as follows:

So far as the contention as regard quantum of punishment is concerned, suffice it to say that verbal abuse has been held to be sufficient for inflicting a punishment of dismissal.

9. Mr. Das has sought to derive support from the following decisions for his submissions noted above:

(i) *Central Coalfields Ltd. Vs. State of Jharkhand and Others*, This decision relates to availability of alternative remedy which point was not raised earlier. It has not dealt with the military trials as noted in the written submissions,

(ii) *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, . This decision underlines the need for the court to interfere with the internal affairs of Army in certain special circumstances. The observations of Justice Black and the relevant laws prevailing in USA have been discussed in those two paragraphs. In the case on hand, there is no dispute about the jurisdiction of this Court to interfere with the decision of the Summary Security Force Court if such decision is found to be arbitrary, perverse and in derogation of the procedure, laid down in the relevant Act and the rules framed thereunder. Therefore, this decision has no relevance, for it extends no support to the Petitioner.

(iii) *Suk Das Vs. Union Territory of Arunachal Pradesh*, In this case, the availability of free legal aid was the subject matter of discussion which again has no relevance in the case on hand.

10. The upshot of the discussions aforementioned is that this Court is not to enter into the factual aspects of the case which has been decided by the Summary Security Force Court after recording depositions of several-witnesses. The findings that the Petitioner being a Constable had physically assaulted his superior officer by means of a brick cannot be called in question. As regards the procedural aspect, it has been noticed that Mr. Damodaran acting as Commandant presided over the said court. The charge was framed which was read over to the Petitioner who pleaded guilty though he was cautioned about consequence of the same. During trial, the Petitioner was given opportunity of cross-examining the witnesses which he declined. He did not make any prayer giving the list of witnesses to examine in his defence. He did not avail of the alternative remedy of appeal before the higher authority as provided u/s 117 of the Act. As it was a Summary procedure the trial was completed within a few days, but such speedy trial does not suffer from any material irregularity or procedural illegality calling for interference from this Court. As regards the quantum of punishment the Apex Court held that even for an abusive language used by the delinquent against his superior officer, an order of dismissal is justified.

11. Thus, this writ petition has no merit and, therefore, the same is dismissed. No cost.