
(2014) 04 CAL CK 0107
In the Calcutta High Court
Case No : W.P. No. 18661 (W) of 2008

Md. Elyash

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-04-2014

Acts Referred:

Border Security Force Act, 1968 — Section 117, 22

Citation : (2014) 3 CHN 652

Hon'ble Judges : Tapabrata Chakraborty, J

Bench : Single Bench

Advocate : Mintu Kumar Goswami, Advocate for the Appellant; Amal Kumar Mukhopadhyay, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Tapabrata Chakraborty, J.—This writ application had been preferred challenging the charge sheet dated 31st October, 2006 issued by the respondent no. 3, the order dated 9th November, 2006 passed by the Summary Security Force Court (hereinafter referred to as the SSFC) and the order dated 22nd May, 2007 passed by the respondent no. 2. The facts, in a nutshell, are that the petitioner was appointed to the post of Constable in the Border Security Force on 15th June, 1988 and he was posted under the respondent no. 3 on 14th June, 1990. Surprisingly thereafter, the petitioner was issued a charge sheet vide memorandum dated 31st October, 2006 and by an order passed on the self-same date, the said respondent no. 3 directed the Assistant Commandant of the unit to prepare a Record Of Evidence (hereinafter referred to as the ROE) in the disciplinary case in respect of one Sri Mahat Baruah and the petitioner. The said Mahat Baruah was the Head Constable and the petitioner was inferior in rank to the said Mahat Baruah. Upon completion of ROE, the respondent no. 3 by an order dated 8th November, 2006 directed trial before the SSFC and the petitioner was issued a memorandum dated 8th November, 2006 asking him to appear before the SSFC on 9th November, 2006 and an order was passed by the SSFC

on 9th November, 2006 itself dismissing the petitioner from service and that too by the self-same respondent no. 3 who had issued the charge sheet and had made a spot enquiry pertaining to the alleged charge. Challenging the said order dated 9th November, 2006, the petitioner on 20th November, 2006, filed an appeal against the order of SSFC u/s 117 of the Border Security Force Act, 1968 (hereinafter referred to as the said Act of 1968), contending inter alia that the order passed by the SSFC was an unreasoned one and that it was definitely under an obligation to record its findings and reasons in support of the decision. Reliance was placed upon a judgment delivered by the Hon''ble Court in the case of Roni Thomas Vs. Union of India and Ors. reported in 2005 (1) CLJ (Cal) 116, wherein the Hon''ble Court had inter alia observed that recording of reasons in support of a decision is one of the fundamental requirements of the rule of law and moreso when the SSFC was acting as a quasi-judicial authority. In the midst of pendency of the said petition, the petitioner was communicated a memorandum dated 31st January, 2007 issued on behalf of the respondent no. 3 intimating inter alia that the respondent no. 2 had been pleased to commute the sentence of "TO BE DISMISSED FROM SERVICE" to that of "to forfeit 10 years of past service for the purpose of pension and to undergo 89 days RI in Force Custody". Subsequent thereto, the respondent no. 2 passed an order dated 22nd May, 2007, the operative part of which runs as follows:-

However, considering the circumstances of the case and unblemished past record of petitioner with 4 CCs/rewards, the Director General is pleased to commute the sentence of "forfeiture of 10 years of past service for the purpose of pension" and "to undergo 89 days RI in Force Custody" to that of -

- a) Forfeiture of 6 years of past service for the purpose of pension, and
- b) To undergo 89 days RI in Force Custody.

2. Mr. Goswami, learned advocate appearing for the petitioner submits that the charge against the petitioner was that he failed to stop cattle smuggling between BP No. 279/25-S to BP No. 279/26-S as would be explicit from the charge sheet itself, which runs as follows:-

In that they together at ambush No. 6 BOP Mathurapur on the night intervening 30/31st October, 2006 while on ambush duty on 301800 hrs to 3024000 hrs. failed to stop cattle smuggling from India to Bangladesh through the AOR of ambush No. 6 between BP No. 279/25-S to BP No. 279/26-S.

3. Mr. Goswami further drew the attention of this Court to the ROE wherein the petitioner had inter alia deposed as follows:-

Ambush party Commander HC Mahat Baruah told me to dominate the area between BP No. 279/8-S to 279/19-S, i.e., from the place where unfenced area starts and up to ambush No. 6 point. He took the responsibility to dominate the AOR between BP No. 279/19-S to 279/26-S.

4. Mr. Goswami further places reliance upon the deposition of the said Sri Mahat

Baruah wherein the said officer had inter alia stated that "I asked Constable Md. Elyash to dominate the area between ambush "hut" and BP No. 279/8-S and I myself decided to dominate the area between ambush hut and BP No. 279/25-S."

5. According to Mr. Goswami the petitioner, obeying the command of his superior, was dominating the area between BP No. 279/8-S to 279/19-S and such statement of the petitioner also stands confirmed from the deposition of the Head Constable and that as such, the petitioner was not in any manner responsible for the alleged failure to stop cattle smuggling from India to Bangladesh through the AOR of ambush no. 6 between BP No. 279/25-S to BP No. 279/26-S.

6. Mr. Goswami further submits that the petitioner could not have neglected the order of his superior inasmuch as such neglect, in terms of the provisions of Section 22 of the said Act of 1968, constitutes an offence.

7. Mr. Goswami further submits that there is no evidence linking the petitioner with the alleged charge and that though such ground was incorporated in the statutory appeal, the respondent no. 2 had not considered the same and had not set aside the order of punishment. However, the punishment of dismissal was commuted to sentence of forfeiture of 10 years of past service for the purpose of pension and 89 days RI in Force Custody vide memorandum dated 31st January, 2007 and thereafter the said punishment was further commuted in appeal to the extent of forfeiture of 6 years past service for the purpose of pension.

8. Mr. Goswami further submits that the consecutive orders towards commutation of sentence reveal that the respondents were tentative as regards imposition of punishment in the backdrop of the fact that there was no evidence to establish any nexus between the alleged misconduct and the petitioner.

9. Mr. Mukhopadhyay, learned advocate appearing for the respondents places reliance upon the affidavit-in-opposition filed by the said respondents and submits that the petitioner's punishment was reduced not on the ground that there was no evidence against the petitioner but the concerned authority had reduced the punishment in consideration of the past service of the petitioner. It had also been contended by the respondents that the petitioner had pleaded guilty to the charge and that accordingly the SSFC observing the provisions of Rule 142 (2) of the Border Security Force Rules, 1969 (hereinafter referred to as the said Rules of 1969) awarded the punishment of dismissal from service and that for the failure on the part of the petitioner to stop smuggling of cattle, the discipline of the force was marginalized and that as such the authority had rightly imposed the punishment.

10. According to Mr. Mukhopadhyay, the totality of the circumstances needs to be taken into consideration and that the punishment ultimately given to the petitioner cannot be construed to be disproportionate.

11. Mr. Mukhopadhyay further submits that the petitioner had been granted the

fullest of opportunity and that the proceeding had been conducted in a fair manner and that there is no perversity in the findings arrived at by the concerned authorities and in the backdrop of such circumstances question of reappraisal of evidence does not occasion.

12. Mr. Goswami, in reply to the submissions made by Mr. Mukhopadhyay, places reliance upon the averments made in affidavit-in-reply wherein the petitioner had categorically denied that during trial he unequivocally pleaded guilty to the charge. The entire proceeding had been conducted in hot haste and that there had been blatant violation of the provisions of Rule 142 (2) of the said Rules of 1969.

13. Mr. Goswami further submits that the SSFC upon serving a notice on 8th November, 2006, passed the order on 9th November, 2006 and the representation made against such action placing reliance upon a judgment delivered by this Court was not at all considered by the authorities.

14. Mr. Goswami further submits that a perusal of the charge sheet and the deposition of the petitioner and of Sri Mahat Baruah reveal that there is no evidence which establishes any nexus between the alleged misconduct and the petitioner inasmuch as it is explicit from the records that the charge against the petitioner was that he had failed to stop cattle smuggling from India to Bangladesh through the AOR of ambush No. 6 between BP No. 279/25-S to BP No. 279/26-S but it had been admitted by the said Sri Mahat Baruah that he had asked the petitioner to dominate the area between BP No. 279/8-S to 279/19-S and that as such the proceeding stands maligned through perversity.

15. In the case of Sher Bahadur Vs. Union of India (UOI) and Others, , the Hon"ble Supreme Court had observed as follows:

it may be observed that the expression sufficiency of evidence postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence, however, voluminous it may be, which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law. The mere fact that the enquiry officer has noted in his report, in view of oral, documentary and circumstantial evidence as adduced in the enquiry, would not in principle satisfy the rule of sufficiency of evidence.

16. I have heard the learned advocates appearing for the parties at length and I have given my anxious consideration to the facts and circumstances of the case.

17. It is well-settled that an infirm charge sheet is violative of the principles of natural justice and it vitiates the entire decision making process. The question as to whether the facts alleged and or proved constitute any act of misconduct or not is subject to judicial review and the Court can certainly interfere when there is a patent legal infirmity.

18. Rule 54 of the said Rules of 1969 inter alia provides that charge sheet must

consist of two parts, namely, statement of offence and particulars of the offence so that it constitutes a sufficient notice to the accused as regards the matter with which he is charged.

19. The charge sheet dated 31st October, 2006 does not specify the particulars of the provisions which had been allegedly violated by the petitioner and it also does not impute any material to reveal that the accusation is attributable to the petitioner and that as such the said charge sheet is unsustainable in law and accordingly the same is set aside and quashed.

20. As per the records, Brajesh Kumar, Commandant 115 Bn, BSF issued the charge sheet against the petitioner. The self-same officer also conducted spot verification and enquiry at the place of the alleged incident and that the said report was the very basis of the proceeding against the petitioner. The self-same officer had also passed the order of dismissal against the petitioner. Such sequence of facts reveal that the entire proceeding was biased and violative of the principles of natural justice. The SSFC proceeding was concluded and an order was passed within a single day and such hot haste had maligned the order dated 9th November, 1996. Furthermore, the petitioner was not granted opportunity for preparing his defence in consonance of provisions of Rule 63 of the said rules and the said facts could neither be denied nor could be dislodged by the respondents.

21. A perusal of the order of punishment issued by the respondent no. 3 reveals that Mahat Baruah and the petitioner were tried jointly by SSFC on the basis of the ROE and that both of them were issued the punishment of dismissal from service.

22. It is well-settled that the power of judicial review available to the High Court under the Constitution takes in its stride the domestic enquiry as well and it can interfere with the conclusion reached therein if there is no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse or made at the dictate of the superior authority.

23. A perusal of the averments made in paragraph 3 (II) and in paragraph 4 of the affidavit-in-opposition would reveal that the respondents had clearly stated that the petitioner was given the responsibility to dominate area from BP No. 279/8-S to BP No. 279/19-S and that as such the petitioner could not have been charged of failure to stop cattle smuggling in the area from BP No. 279/25-S to BP No. 279/26-S.

24. The contention of the respondents to the effect that the petitioner pleaded guilty to the charge had not been established through appropriate materials and the respondents even did not respond to the petitioner's application under Rule 129 of the said Rules. Furthermore the respondents had even not complied with the provisions of Rule 142 of the said Rules of 1969 and there had been no explanation and information of the general effect of the plea to the petitioner and

the petitioner was also not afforded any opportunity for preparing his defence as required under Rule 63 and decision was adopted in hot haste and in blatant violation of the principles of natural justice.

25. The respondents through their affidavit-in-opposition had admitted that pertaining to the alleged charge, a spot verification of the place of incident was done by Sri Brajesh Kumar in the capacity of Commandant 115 Battalion in BSF and that on the basis of the said spot verification report, the charge of the petitioner was sought to be established and that the self-same officer, constituting SSFC, had issued the order of punishment against the petitioner as would be explicit from the memorandum dated 9th November, 2006 at page 64 of the writ application. Such sequence of admitted facts establishes that there had been an unfair trial and blatant violation of principles of natural justice.

26. There is no answer on the part of the respondents as to why they had not considered the petitioner's claim in the light of the judgment delivered in the case of Roni Thomas (Supra). The SSFC by giving notice on 8th November, 2006 had fixed the hearing on 9th November, 2006 and had passed the order of punishment on 9th November, 2006 itself dismissing the petitioner from service without recording any reason whatsoever in support of the said decision. Such infirmity in the decision making process renders the impugned order dated 9th November, 2006 to be unsustainable in law and accordingly the same is set aside.

27. The memorandum dated 31st January, 2007, also does not disclose any reason towards commutation of the sentence and in the backdrop of such records it is explicit that the respondents were tentative and could not find any ground to substantiate the initial order of dismissal from service.

28. A perusal of the order of the respondent no. 2 dated 22nd May, 2007 also does not reveal consideration of the petitioner's statutory petition dated 20th November, 2007 and the said respondent no. 2 could not dislodge the specific and categoric contention of the petitioner that there was no nexus between the alleged misconduct and the petitioner and that as such the said impugned order suffers from total non-application of mind and is a cryptic one and accordingly the said impugned order is set aside and quashed.

29. The entire proceedings against the petitioner smacks of bias and closed mind and all the authorities had been swayed by a preconceived notion that the petitioner had failed to stop cattle smuggling being oblivious of the fact that the petitioner was commanded by his superior to dominate an area which was admittedly not the area in which the alleged smuggling had occasioned.

30. For the reasons discussed above the charge sheet dated 31st October, 2006 issued by the respondent no. 3, the order dated 9th November, 2006 passed by the Summary Security Force Court, order dated 22nd May, 2007 passed by the respondent no. 2 are all quashed and set aside.

31. The respondents are accordingly directed to grant the admissible service

benefits which had been denied to the petitioner pursuant to the order of punishment, within a period of eight weeks from the date of communication of the order, as if no order of punishment was issued to the petitioner in relation to the disciplinary proceedings initiated pursuant to the Charge Sheet dated 31st October, 2006.

32. The writ application is accordingly disposed of.

33. In the facts of the present case, there will be no order as to costs. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.