

(1998) 09 DEL CK 0008
In the Delhi High Court
Case No : C.W. No. 2446 of 1995

Mohinder Singh (Ex. Constable)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-09-1998

Acts Referred:

Citation : (1998) 09 DEL CK 0008

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. Bishram Singh, for the Appellant; Mr. A.K. Vali, for the Respondent

Judgement

K. Ramamoorthy, J.—The petitioner has challenged his removal from service on the basis of the decision taken by the Summary Security Force Court under the Border Security Force Act, 1968.

2. The case of the petitioner briefly stated is in the following terms. The petitioner was enrolled in Border Security Force (in short BSF) in April 1988. In march 1989, he was posted in "B" Coy of 92 Battalion BSF. In October 1993, the said "B" Coy under the charge of Company Commander Shri Shiv Kumar Garg, Assistant Commandant. The Company was required to do election duty. Other Companies were detailed for similar duties and all those Companies together formed part of BS-1 Battalion under the charge of Shri U.K. Chakraborty, who was the senior most officer in the Company. The said Shri U.K. Chakraborty who was not competent to impose any punishment as the disciplinary powers could be exercised by only the Commandant of the Company, unjustifiably imposed punishment of 14 days rigorous imprisonment. The said officer was told that the petitioner could make a complaint against the superior officer and that was the genesis of the petitioner being roped in in a case of assault of one L.G. Singh. It was alleged that along with Constable Dinesh Saklani caused hurt on the person of that L.G Singh. The occurrence is stated to have taken place at 1830 hours on 25.11.1993. The petitioner came to know about it on 14.12.1993. No staff court

of inquiry was held. No copy of the staff court of inquiry was given to the petitioner. No hearing was given to the petitioner, as required under Rule 45 of the BSF Rules. On 06.02.1994, charges were framed u/s 20(a) of the BSF Act, 1968 against the petitioner and four others after recording the evidence.

3. The case of the petitioner is that what is alleged to have been committed by him is a civil offence within the meaning of Section 2(1)(d) of the B.S.F Act, 1968 and the provision of Section 74 of the Act had not been followed. Rule 158 in this behalf had not been complied with. The petitioner has also alleged that the provisions of Section 70 of the BSF Act, 1968 have not been followed. It is the further case of the petitioner that in providing friend of the accused the mandate of Rule 154 of the Act had been ignored.

4. On the merits the petitioner has stated that on a perusal of the evidence on record it could be seen that no offence had been made out against the petitioner. The petitioner has also stated that the provisions of Evidence Act, 1872 had not been followed.

5. In the counter affidavit respondents had accepted that they have acted in accordance with the provision of the Army Act and the Rules and the petitioner cannot have any grievance. The first point relating to complying with Rule 45 of the BSF Rules can be considered. If on this point the finding goes against the respondents no other point would arise for consideration. As pointed out by the Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, , if the Rule relating to the hearing is not followed, the whole proceedings become void. As a matter of fact, the Army orders also would categorically lay down that if the rules are not followed the proceedings would be vitiated. Rule 45 of the B.S.F. Rules reads as under:

Rule 45

Hearing of the charge against an enrolled persons:

1) The charge shall be heard by the Commandant of the accused.

a) The charge and statements of witnesses is recorded shall be read over to the accused. If written statements of witnesses are not available, he shall hear as many witnesses as he may consider essential to enable him to determine the issue;

b) The accused shall be given an opportunity to cross-examine the witnesses and make a statement in his defense.

2) After hearing the charge under sub-rule (1), the commandant may:-

i) award any of the punishment which he is empowered to award; or

ii) dismiss the charge, or

iii) remand the accused, for preparing a record of evidence or for preparation of an abstract of evidence against him; or

iv) remand him for trial by a summary security force court;

Provided that, in cases where the commandant award more than 7 days imprisonment or detention he shall record the substance of evidence and the defense of the accused;

Provided further that, he shall dismiss the charge, if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him it is not advisable to proceed further with it;

Provided also that, in case of all offence punishable with death a record of evidence shall be taken.

6. In para 8 of the petition, the petitioner has asserted that Rule 45 had not been complied with. In reply to this, the respondents had stated in the counter.

"The contents of para 8 are denied being false and baseless. However, it is submitted that all the accused persons including the petitioners were given hearing under Rule 45 by the Commandant on the offence report on 14.12.1993. All the accused, per sons had pleaded 'no guilty' to the charge. Then Comdt heard relevant witnesses and on being prima facie satisfied, ordered for Record of Evidence with a view to investigate the matter in detail as per Rule 48. Then after ROE, Comdt perused the same and finding sufficient evidence against the accused person, tries them by SSFC as he is empowered to do so under Rule 51 of BSF Rules 1969. The copy of the hearing under Rule 45 is annexed as Annexure R-1."

7. No annexure R-I is filed Along with the counter affidavit. Nothing was produced at the time of hearing. The respondents must have complied with Rule 45 before the charges were framed. When Rule 45 has not been followed by the respondents all other proceedings taken by the respondents would be null and void. There is absolutely nothing on record to show that the respondents had complied with Rule 45 of the BSF Rules.

8. On 06.02.1994, after the record of evidence, a charge was framed u/s 29(a) of the Border Security Force Act, 1968 against the petitioner and the four others. According to the learned counsel for the petitioner, the case of the petitioner would come within the meaning of Civil offence u/s 2(d) of the Border Security Force Act, 1968 which states civil offence means an offence which is triable by a criminal court. If the offence comes within the ambit of civil offence, according to the learned counsel for the petitioner, the procedure u/s 46 of the Border Security Force Act, 1968 provides for the procedure which is as under:

Section 46:

Subject to the provisions of Section 47, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall

be liable to be tried by a Security Force Court and, on conviction, be punishable as follows:

9. This is again subject to provisions of Section 74 of the Border Security Force Act, 1968 and the procedure u/s 74 is provided in Rule 158 of the Border Security Force Rules, 1969. According to the learned counsel for the petitioner the procedure provided had not been followed. Rule 158 reads as under:

Rule 158:

Memorandum to be attached to proceedings: where a Summary Security Force Court tries an offence which shall not ordinarily be tried without reference to an authority mentioned in sub section 92) of Section 74, an explanatory memorandum shall be attached to the proceedings.

10. According to the learned counsel for the petitioner, no reference as contemplated of Section 74 of the Act, 1968 has been made to the DIG, Calcutta before conducting the trial by a Summary Security Force Court and no explanatory memorandum was attached to the trial proceedings justifying the urgency in conducting the trial without following the procedures u/s 74 of the Border Security Force Act, 1968.

11. The learned counsel for the petitioner referred to Section 70 of the Border Security Force Act, 1968. Section 70 of the BSF Act reads as under:

Section 70

70(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 proceeding shall be attended throughout by two other persons who shall be officers or subordinate officers or one of either and who shall not as such, be sworn or affirmed.

12. As per the provisions, the proceedings can be attended by two other persons who shall be officers or subordinate officers or one of either who shall not be sworn or affirmed. In the instant case the proceedings were attended by two subordinate officers, namely, Subedar Balbir Singh and Sub Inspector B.P. Balodi who was examined as PW-4 in the case.

13. According to the learned counsel for the petitioner Mr. Bishram Singh this is a serious violation of the procedure prescribed. The learned counsel next relied upon Rule 157 of the Border Security Force Rules, 1969 which provides for assistance to the Accused. Rule 157 reads as under:

Rule 157:

During a trial at a Summary Security Force Court an accused may take the assistance of any person, including a legal practitioner as he may consider necessary.

Provided that such person shall not examine or cross-examine witnesses or address the court.

14. The petitioner wanted to have the the assistance of one Shri Man Singh, Deputy Commandant as friend of the accused that was not provided by the respondents. The petitioner exercised his choice of friend and asked for assistance of one Shri Ran Singh Inspector. His services were also not provided to the petitioner. The respondents had complied with the rules of 57 thrust upon the petitioner the services of one SI Bhomick who had absolutely no knowledge of the Border Security Force law or the civil law and he was only watching the proceedings and he was not rendered any assistance to the petitioner. The learned counsel for the petitioner submitted that the respondents had made a mockery of Rule 157.

15. Referring to the arraignment he referred to Rule 138 of the Border Security Force Rules, 1969, which reads as under:

1) After the court and interrupter (if any) are sworn or affirmed as above mentioned, the accused shall arraigned on the charges against him.

2) The charges on which the accused is arraigned shall be read and, if necessary, translated to him, and explained and he shall be required to plead separately to each charge.

16. According to the learned counsel for the petitioner Mr. Bishram Singh the accused all of them were not jointly asked whether they were pleading guilty or not. According to the learned counsel this is contrary to Rule 130. Regarding the evidence given by the witnesses, it is stated in para 22 of the petition which is as under:

That in the present case, ten PWs and four DWs were examined in addition to be recording of the statements of all the five accused persons including the petitioner. Out of the said ten prosecution witnesses, only PW1, HC.L.G Singh (Complainant) made criminating statement to the effect that no sooner the roll call was over, constable Mohinder Singh (Petitioner) gave a severe punch on his chest and constable S.K. Tyagi, constable Dinesh Saklani, constable N.s. Dalal started beating him with belts and sticks (wicket of Cricket Game). P.W.1 then shouted for help but accused constable Vijay Bahadur said "Maro Maro Sale Ko Maar Dalo". This PW1 specified the time of assembly of roll calls 1830 hours, and its disposal at 1840 hours and the time of alleged incident at 1845 hours. However, no prosecution witnesses i.e. PW5 to 9 who were juniors, guard commander etc. whose reference PW1 made in his deposition supported the said incident of beating. According to them no such incident occurred. The PW1 to 4 and all the five accused persons have also denied the occurrence of the incident.

17. According to the learned counsel for the petitioner prosecution witnesses 2, 3, 4 and 10 were supervisory staff and they were formal witnesses and they did not speak anything about the occurrence. Mr. Bishram Singh submitted that the

medical reports have been admitted the evidence without examining the Doctor.

18. The trial court had cross-examined the prosecution witnesses PW5 to PW9 adopting the curious procedure of re-examining them without declaring them hostile. In the re-examination new facts have been introduced and questions were not related to clarification of points arising out of cross-examination, and some of the witnesses who were not cross-examined had been re-examined.

19. Bishram Singh, the learned counsel for the petitioner submitted that wearing apparels of PW1 were admitted in the evidence on the premise that it was stained with human blood without examination of Serologist.

20. Though Mr. Bishram Singh, the learned counsel for the petitioner earlier submitted that prosecution witnesses 2, 3, 4 and 10 were supervisory staff and formal witnesses. The learned counsel submitted a reading of the evidence would show that no case has been made out by the petitioner and this is a case of no evidence. The learned counsel referred to Section 48 of the Border Security Force Act, 1968 about the proportionality of punishment. Section 48 of the BSF Act, 1968 reads as under:

Section 48:

1) Punishment may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following that is to say:

a) death:

b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in the Force Custody

c) dismissal from the service;

d) imprisonment for a term not exceeding three months in force custody;

e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer;

f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;

g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purposes;

h) fine, in respect of civil offences;

i) severe reprimand or reprimand except in the case of persons below the rank of an under-officer;

j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;

k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;

l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good.

Each of the punishments specified in sub-section (1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale.

21. The learned counsel also submitted that there is no record of special finding as recorded under Rule 149(3)(4) of the Border Security Force Act, 1968. Rules 149(3)(4) are as under:

RULE 149(3)(4)

1)

2)

3) When the court is of opinion as regards any charge that the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge and that the difference is not so material as to have prejudiced the accused in his defense, it may, instead of a finding of "Not Guilty" record a special finding.

4) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.

22. The learned counsel for the petitioner referred to Rule 166 of the Border Security Force Rules, 1969. Rule 166 reads as under:

BSF RULE 166 Sentence of Dismissal -

1) Sentence of dismissal shall take effect from the date of promulgation of such sentence or from any subsequent date as may be specified at the time of promulgation.

2) A sentence of dismissal combined with imprisonment to be undergone in a civil prison shall not take effect until such person has been committed to a civil prison,

According to the learned counsel this was not complied with.

23. In the counter affidavit, it is stated that the petitioner was given sufficient opportunity. His statutory complaint was also considered and rejected. Without referring to the evidence and the material placed before the court, it is stated in paras 5 and 6 of the counter:

In reply to para 5, it is stated that on 14.12.1993, the petitioner Along with other o4 co-accused was heard by his Commandant" on offence report under Rule 45

of BSF Rules 1969. The Commandant after all hearing the accused persons relevant witnesses ordered for preparation of ROE. Thereafter, the petitioner Along with other co-accused was jointly tried by SSFC from 11.3.94 to 26.3.94 on the charge punishable U/S 20(a) of BSF Act. The petitioner was awarded sentence of dismissal as the gravity of offence against him was more serious as he played leading.

The contents of the para are denied. In reply to para 6, it is submitted that after the occurrence of the incident on 25 Nov. 1993, the matter was immediately reported first to Subedar Rattan Chand (PW-3 to the SSFC) at about 1845 hrs on the same day who in turn reported to the Comdt. Shri Chakraborty Then Commandant immediately deputed Shri S.K. Gard, Asstt. Comdt. (PW-2 to the SSFC) to evacuate the victim (HC L G Singh) to the hospital. On the way to hospital the officer investigated the matter as to who had beaten him. Thereupon, it was informed to him that the victim had been beaten by the petitioner Along with other co-accused persons. As such, the evidence came forth during the SSFC trial, implicitly proves the quality of the petitioner. As the petitioner had played a leading role in causing serious injuries to HC L G Singh, Therefore, he was awarded severe punishment in comparison of other co-accused. Had he not played the leading role, perhaps the incident could not had occurred.

24. According to the respondents in the counter Rule 45 had been complied with. In para 8, it is asserted with reference to the the compliance of Rule 45.

The contents of para 8 are denied false and baseless. However, it is submitted that all the accused persons including the petitioners were given hearing under Rule 45 by the Commandant on the offence report on 14.12.1993. All the accused persons had pleaded "not guilty" to the charge. Then Comdt. heard relevant witnesses and on being prima facie satisfied, ordered for Record of Evidence with a view to investigate the matter in detail as per Rule 48. Then after ROE, Comdt perused the same and finding sufficient evidence against the accused person, tried them by SSFC as he is empowered to do so under Rule 51 of BSF Rules 1969. The copy of hearing under Rule 45 is annexed as Annexure R.1.

25. The document R-1 had not been filed is stated to have been annexed. The respondents have not taken any care to place all the facts before this court and the counter affidavit is very vague.

26. To the points taken by the petitioner relating to the compliance with the procedure prescribed under the statutory provision, the respondents have not been able to give any answer though stating merely that the court had imposed punishment after enquiring the petitioner cannot be held to contend that there had been pre trial violation of the procedure prescribed. There is no material from the respondents to prove that Rule 45 had been complied with. There is no evidence to prove that Section 74 had been followed. The counter sign by DIG on

11.11.1996 as contended for on behalf of the respondents is not compliance with Section 74. The respondents have not explained as to how the the medical report could be admitted without examination of the Doctor. The respondents have also not explained as to how the wearing apparels of PW1 could be admitted in evidence without the opinion of an expert. The learned counsel for the petitioner Mr. Bishram Singh relied upon the judgment of the Supreme Court reported in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, wherein the Supreme Court had dealt with the scope of Rule 22 of the Army Rules. The learned counsel for the petitioner submitted that in Major Harpar Singh Vs. Union of India & Others 1996 (37) DRJ Delhi 390. This Court had considered the entire case law on the all points.

27. The learned counsel for the petitioner submitted that the respondents should show that the rules had been complied with by placing the necessary materials before this Court and that has not been done in this case. According to the learned counsel the respondents had ignored the dictum laid down by the Supreme Court in Prithi Pal Singh case. There is considerable force in the submissions made by Mr. Bishram Singh. I have also gone through the evidence when the respondents have not followed the rules. Whatever happened subsequent to the preliminary enquiry and the trial proceedings would be wholly void. I have no hesitation in coming to the conclusion that the entire proceedings taken by the respondents was vitiated and the sentence imposed by the Summary Court Force is absolutely void and it cannot be sustained.

28. Accordingly, the writ petition is allowed. The proceedings of summary Security Force Court stands quashed and the petitioner shall be entitled to be reinstated with all consequential benefits. The respondents shall pass appropriate orders reinstating the petitioner with consequential benefits on or before 30.11.1998. There shall be no order as to costs.