
(2015) 08 TP CK 0046
In the Tripura High Court
Case No : Writ Petition (C) No. 76 of 2013

Nirmal Das

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 20-08-2015

Acts Referred:

Border Security Force Act, 1968 — Section 46
Penal Code, 1860 (IPC) — Section 494
Special Marriage Act, 1954 — Section 5

Citation : (2015) 08 TP CK 0046

Hon'ble Judges : Deepak Gupta, C.J.;Utpalendu Bikas Saha, J

Bench : Division Bench

Advocate : P.K. Ghosh, for the Appellant; B. Majumder, CGC, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, C.J.

1. By means of this writ petition the petitioner has challenged the order dated 26th May 2012 passed against the petitioner whereby he has been retired from service. The heading of the order reads as follows:

"Retirement on ground of unsuitability under BSF Rule-26"

2. The undisputed facts are that the petitioner was working as a Sweeper in the BSF. It is also not disputed that the petitioner in his service record had shown that he was married one Smt. Palika Rani Das and she was his legally wedded wife. A complaint was received by the employer that the petitioner had entered into a second marriage with the complainant Smt. Baby Biswas (Das), D/o. Birendra Nath Biswas, Vill-Kundipur, P.O. - Ganrapota, P.S. - Bongaon, District-North 24 Paraganas, West Bengal. On submission of this complaint proceedings were initiated against the petitioner under Section 46 of the Border Security Force Act, 1968 (for short, the BSF Act) which deals with civil offences. In these

proceedings the statement of Smt. Baby Biswas (Das) was recorded. The statements of other witnesses were also recorded. The statement of the petitioner was also recorded. On the basis of these statements the Court of Inquiry came to the conclusion that the petitioner had entered into a second marriage with Smt. Baby Biswas.

3. Thereafter the employer decided to proceed against the petitioner under Rule-26 of the Border Security Force Rules, 1969 (for short, the BSF Rules) which reads as follows:

"26. Retirement of enrolled persons on grounds of unsuitability.--Where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force, the Commandant may, after giving such enrolled person an opportunity of showing cause (except where he consider it to be un-practicable or inexpedient in the interest of security of the State to give such opportunity), retire such enrolled person from the Force."

Rule 26 does not contemplate any inquiry being conducted and it only mentions that if any enrolled person is found unsuitable to be retained in the Force then that person can be retired from the Force only on giving him a show cause notice and considering his reply. Undoubtedly, two show cause notices were given. No reply was filed by the petitioner and finally an order was passed retiring him from service. He filed an appeal against the said order which has been dismissed. Hence, the present writ petition.

4. Sri P.K. Ghosh, learned counsel for the petitioner has raised a number of issues before us. We shall first deal with the submissions which go to the jurisdictional aspects. According to Mr. Ghosh the action has been taken under Section 46 of the BSF Act. No doubt the proceedings were initiated against the petitioner under Section 46 of the BSF Act. There is also no manner of doubt that records of Court of Inquiry proceedings were conducted thereafter but no punishment as contemplated under Section 46 has been imposed upon the petitioner. Section 46 deals with imposition of punishments where the civil offences are tried by the Security Force Courts and these Security Force Courts then imposes punishment on the employee which can be penal punishment like imprisonment etc. Though this inquiry was held no punishment in terms of Section 46 was imposed upon the petitioner. The action which has been taken against the petitioner is not under Section 46 but under Rule 26 of the BSF Rules. This action may have been taken on the basis of the findings arrived at in the proceedings under Section 46 of the BSF Act but the final action of retiring the petitioner has been taken under Rule 26 of the BSF Rules and not under Section 46 of the BSF Act.

5. As pointed out above, under Rule 26 no inquiry is required to be conducted, only show cause notice is required. The ground for issuing the show cause notice was that in the inquiry proceedings the petitioner himself admitted his second marriage to Smt. Baby Biswas (Das).

6. Learned counsel for the petitioner has also made reference to Rule 174 and Rule 179 of the BSF Rules. It is contended by Mr. Ghosh that second marriages was not a disciplinary matter and no Court of Inquiry could have held in this regard. This submission has been made only for the purpose of being rejected. Under the Conduct Rules as applicable to the BSF no employee is entitled to get married a second time while his first marriage is subsisting. This is misconduct and any misconduct gives rise to disciplinary proceedings. Therefore, a Court of Inquiry could have been held under Rule 174 of the BSF Rules. With regard to Rule 179 we are unable to comprehend the submission made on behalf of the petitioner. The punishment which the petitioner has been visited has not been imposed under Rule 179 but he has been found to be unsuitable to be retained in service and therefore, retired from service under Rule 26 of the BSF Rules. No punishment under Rule 179 of the BSF Rules has been imposed upon him. After a Court of Inquiry is held the appropriate authority may decide to punish the member of the BSF. Punishment can be of various types. It could be detention; it could be imprisonment; it could be rigorous imprisonment etc. In addition to punishment of this nature, the employee can also be dealt with, with administratively and it is for the employer to decide whether he is to be retained in service or not. That is the second aspect of the matter. To give an example supposing a member of the force of the BSF rapes a lady. Though this is an offence punishable under the IPC the BSF can try the person for rape in its Special Force Courts also. If the person is found guilty punishment in accordance with the provision of the IPC has to be imposed upon him by the BSF Security Force Court. Merely because punishment is imposed does not mean that the BSF cannot take any disciplinary action against the said person. In addition to imposing punishment of criminal nature the employer has the right to ensure that such person who is guilty of a heinous offence is also removed or dismissed from service. Both orders can emanate out of the same inquiry proceedings also.

7. As far as the present case is concerned in the inquiry it was found that the petitioner is guilty of having contracted a second marriage while his first wife was alive. This is misconduct. Rule 21 of the Central Civil Services (Conduct) Rules, 1964 as applicable to the civil employees of the BSF.

8. Coming to the challenge to the inquiry, learned counsel for the petitioner has raised various points. His main issue is that since the petitioner was not given a Defence Assistant the petitioner had been prejudiced in the inquiry and, therefore, the inquiry proceedings cannot be used against him. It is also submitted that before recording the statement of the petitioner he was not warned that the statement could be used against him and therefore, injustice has been caused to him. Each case has to be decided on its particular facts. Every violation of the rules of natural justice does not mean that the order is vitiated. It will have to be shown whether violation of rule of natural justice has caused prejudice to the petitioner or not. As far as the present case is concerned the case against the petitioner is that he married Smt. Baby Biswas (Das) when his first wife was living. One of the documents relied upon by the Court of Inquiry is

the affidavit of Smt. Baby Biswas (Das). In this affidavit she has stated that she is the legally married wife of Sri Nirmal Das and their marriage was solemnized on 17.02.2011 at Duttafullia Dhantala, District-Nodia in the house of her uncle Amaresh Halder. No doubt, this affidavit is of Smt. Baby Biswas (Das) but this affidavit has been counter signed by Nirmal Das. The only explanation given by the petitioner, Nirmal Das is that his signature was obtained fraudulently. What was the fraud committed on him is not stated even in the writ petition. The only explanation given is that the signature was obtained fraudulently. Fraud is based on certain factual material. Unless that material is brought to the notice of the Court no inference can be drawn that a fraud exists. Merely saying that signature had been obtained by fraud is not sufficient. Baby Biswas (Das) appeared in the witness box and stated that she had married Nirmal Das on 17.02.2011 at Duttafullia Dhantala, District-Nodia in the house of her uncle Amaresh Halder.

9. It is contended by the learned counsel for the petitioner that the marriage has not been proved to be a valid marriage and, therefore, relying upon the judgment of the learned Single Judge of this Court in Gopal Debnath Vs. State of Tripura: (2014) 2 TLR 1048 it is contended that no action could be taken against him. The case relied upon by the petitioner arises out of proceeding under Section 494 IPC. We are dealing with disciplinary proceedings where a person has been found to be unsuitable to be retained in service because he has got married a second time. The degree of proof required in a criminal proceeding is much higher than the proof required in disciplinary proceedings. The petitioner cannot be absolved of his own conduct. What is his explanation? He has given no explanation worth the name as to why he has signed the affidavit. The affidavit was not only signed by him but also bears a joint photograph of himself and Smt. Baby Biswas (Das). The explanation of the petitioner given in his writ petition is that in the modern age these things happen. That in our view is no answer. Assuming for the sake of argument without deciding this issue that the petitioner has not been married again, it is not expected of a government servant to live with some other woman while he is married to his first wife. That would also be misconduct.

10. Another objection has been raised that the petitioner was not given an opportunity to defend himself. The answer to this objection lies in the signed document at page-37 of the file wherein the Presiding Officer of the inquiry has recorded that the petitioner Nirmal Das was given an opportunity to cross examine any of the witnesses to make a statement and to produce documents in defence and to call his witness in defence but declined to avail any of the three opportunities. This document has been signed by the petitioner and he cannot now turn around and say he was not given an opportunity, to defend himself.

11. No doubt in the writ petition, the petitioner has now raised a plea that he was not given proper hearing in the matter. No such plea was raised when show cause notice was issued to him under Rule 26. The petitioner has become much wisher at the time of approaching the Court but his conduct at the time when the

inquiry was held shows that he had no grievance with regard to the nature of manner of conducting inquiry. In this case the statement of the petitioner was also recorded and he in his statement has unequivocally admitted that he had got married to Smt. Baby Biswas (Das). The said statement reads as follows:

"Witness No. 2

I No. 04466053 CT (SK) Nirmal Das having been duly affirmed states that I joined BSF on 08 Aug 04 and was further posted to and joined 134 BN BSF during Nov. 10 and presently I am presently performing duty at D. Coy 134 Bn BSF.

I would like to state that I have been married twice. On the first instance I got married Smt. Pallika Rani Das, D/o. Shri Sunil Das, Village-Limbuchara, PO-Limbuchara, PS-Lipunga, Distt-West Tripura, and State-Tripura. The marriage took place on 04 Feb 07.

Then on 19 Feb 11 I again got married to Smt. Baby Biswas, D/o. Birender Biswas resident of Kolkata (whose address I do not know) and the marriage took place at her aunt's (her mother's younger sister) house at Nadia district, West Bengal. I took 6(six) days CL for the marriage.

After the marriage I reported back to the Unit and after about 7 or 8 days I again went for 2 months E/L.

This is all I have to say.

Questions asked by the Court.

Q1. It has been brought to the notice of the Commandant 134 Bn BSF that you have brought Smt. Baby Biswas to the Bn after the marriage and stayed outside the campus. Is it true?

Ans. Yes. It is right.

Q2. How long did you stay outside the campus with her?

Ans. We stayed there for around one month. The house was just outside the campus near the Kali Mandir.

Recorded by the sd/- (Limatemjen) DC PO

Sd/- No. 04466053 Rank. CT(SK) Name. Nirmal Das"

With regard to the statement, it is stated that this statement was already written and typed out and the petitioner was not made aware what was typed and had just signed the statement. We cannot believe this version. We cannot believe that all the officers in the BSF were so inimical to the petitioner that they would set up a false case against the petitioner. We must note that the case against the petitioner has not been initiated by the officers of the BSF but on a complaint made by his second wife. The officers of the BSF had no enmity against the

petitioner. Why would they falsify or create false evidence against him. Furthermore, the petitioner did not reply to the show cause notice and did not make any allegation at that stage that he had been forced to sign the documents which were false. This statement clearly shows that the petitioner has now come up with a totally false case before this Court.

12. The falsity of the case of the petitioner is apparent from the fact that now with the additional affidavit filed by the respondents they have placed on record a photo state copy of a notice of intended marriage signed by the petitioner and Baby Biswas (Das) which he had submitted before the Registrar of marriages, Ranaghat Sub-Division District, Nadia under Section 5 of the Special Marriage Act, 1954. We are not using this certificate to hold whether the petitioner was married or not married but this document definitely shows that the petitioner has withheld material fact from this Court and has not come to Court with clean hands and, therefore, he is disentitled to claim any discretionary relief from this Court.

13. Strong reliance has been placed by the learned counsel for the petitioner on the judgments delivered by this Court in Karambir Singh Vs. The Union of India and Others(2015) LabIC 1267 . We are clearly of the view that this case stands on a totally different footing. This is a case where the copy of the affidavit and the statement of Baby Biswas (Das) were by itself sufficient to give a finding against the petitioner that he had entered into a second marriage. Coupled with that is the statement of the petitioner himself. When a person himself admits the offence then even if no Defence Assistant has been given to him that will be of no consequence because this is a finding which has been arrived at on the basis of plea of guilt. Relying upon the judgment of this Court in Union of India and Anr. Vs. No. 14454614 AEX GNR (OPR) Prem Singh of 176 Field Regiment : (2015) 1 TLR 745 it is urged that before recording the statement of the petitioner he should have been warned that the statement could be used against him. We are afraid that this judgment also has no applicability to the present case. That judgment was given in the context of Army Rule 115(2A) which specifically mandates that before the plea of guilt of an accused is recorded he should be given a warning. The Army rules are not applicable to the BSF.

14. Furthermore, in this case the petitioner was examined, made a statement and in reply to the questions admitted that he had not only got married to Baby Biswas(Das) but had been living with her. Therefore, we have no doubt in our mind that the case now being set up by him is a totally false case.

15. In view of the above discussion, we find no merit in the petition and the same is accordingly dismissed.

No order as to costs.