
(2011) 09 DEL CK 0528
In the Delhi High Court
Case No : Writ Petition (C) 136 of 1999

Prem Pal Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Border Security Force Act, 1968 — Section 20, 46, 74
Border Security Force Rules, 1969 — Rule 45, 48(3), 93
Penal Code, 1860 (IPC) — Section 352

Citation : (2011) 09 DEL CK 0528

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Bishram Singh and A.K. Singh, for the Appellant; Bhupinder Sharma, (Law Office), BSF, for the Respondent

Final Decision : Disposed Off

Judgement

Pradeep Nandrajog, J.—The Petitioner, a constable with Border Security Force, attached with "A" Coy of 83rd Bn. BSF, was a member of the North Bengal Frontier Shooting team. On 03.02.1996, the team arrived at New Jalpaiguri Railway Station, West Bengal to board a train to Indore, where an Inter Frontier Shooting Competition was to be held and at the station, a brawl ensued between the Commander of the group, HC Jai Bhagwan Singh and the Petitioner; both of whom suffered injuries.

2. A report of the incident was sent to the Commandant of the unit who took cognizance of the offence report and summoned the Petitioner for hearing of the charge and pertaining to the said proceedings issued a charge sheet to the Petitioner alleging as under:

BSF ACT Section 40

AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

in that he, at about 1000 hrs on 3/2/96 quarrelled with No. 77001462 HC Jai

Bhagwan at NJP Railway Station.

3. On 3.09.1996, the Commandant conducted a hearing of the charge as per provision of Rule 45 of BSF Rules 1969 and after examining 5 witnesses, passed an order detailing Asst.Comdt.Dinanath to prepare Record of Evidence.

4. At the Record of Evidence proceedings, only 4 witnesses were examined; namely, HC Jai Bhagwan Singh PW-1, Ct. Bhanu Pratap Singh PW-2, Ct. (Driver) Kamal Chand PW-3 and SI Rajnish Kumar PW-4.

5. HC Jai Bhagwan Singh PW-1 deposed that on 3.2.1996 along with other officers of the North Bengal Frontier Shooting Team he arrived at New Jalpaiguri Railway station to board a train to Indore and since he was detailed as the Commander of the team, in that capacity, he ordered all members to load the luggage into the train bogie. All, except the Petitioner obeyed his command and when he asked the Petitioner as to why he was disobeying the orders, the Petitioner said: "AAP MERE KO KAUN HOTE HO ORDER DENEWALE"? He reported against the Petitioner to SI Rajnish Kumar but in the meantime the Petitioner went out of sight. After a while he saw the Petitioner again and he i.e. HC Jai Bhagwan Singh said to the Petitioner: "TUM BAHANCHOD NA KAL RIFLE PACKING ME THE AUR NA AAJ LANE ME HAU". At that, the Petitioner became violent and started beating him. Ct.Bhanu Pratap assisted the Petitioner by holding him i.e. HC Jai Bhagwan Singh when the Petitioner was assaulting him with his belt and bit his i.e. HC Jai Bhagwan Singh's fingers. The scuffle stopped only after other members of the team intervened and separated the two. As a result of the scuffle, he sustained injury on his head and a fracture on his right hand.

6. Ct. Bhanu Pratap Singh PW-2 and Ct. (Driver) Kamal Chand PW-3 deposed that they saw the Petitioner and HC Jai Bhagwan Singh quarreling with each other and that both were beating each other with their belts at the New Jalpaiguri Railway station on 3.2.1996. Relevant would it be to highlight that although the word "quarreling" has been used mindlessly by the witnesses, what emerges from their testimony is that the Petitioner and HC Jai Bhagwan Singh were physically fighting with each other; for the meaning of a word "quarrel" as in a dictionary would mean a verbal fight.

7. SI Rajnish Kumar PW-4 deposed that on 3.2.1996 at Jalpaiguri Railway station, HC Jai Bhagwan Singh, the Commander of the team came to him and reported that the Petitioner was not following orders and upon enquiring about the reason, was told by HC Jai Bhagwan Singh, that the Petitioner challenged his authority saying: "Who are you to give me order"?. He promised HC Jai Bhagwan Singh that he would talk to the Petitioner and convince him, but HC Jai Bhagwan Singh got "over excited" and called the Petitioner and threatened him and as a result a brawl ensued involving the two. The Petitioner took out his belt and began beating HC Jai Bhagwan Singh who also took out his belt and both entered into a physical scuffle.

8. After being cautioned, as per Rule 48(3) of the BSF Rules 1969, the Petitioner made a statement wherein he stated that on 03.02.1996 at New Jalpaiguri Railway Station, in addition to his personal luggage, he carried luggage of other officers to platform No. 3 wherefrom they were to board the train to Indore HC Jai Bhagwan Singh called him and started abusing him and made a false complaint to SI Rajnish Kumar, in whose presence HC Jai Bhagwan Singh used unparliamentary language. That he requested HC Jai Bhagwan Singh to not use such derogatory language in public but he said "Bahanchod" and hit him i.e. the Petitioner on his face. Angered by this action, he too hit HC Jai Bhagwan Singh and upon HC Jai Bhagwan Singh hitting him with his belt, he too unfastened his belt and beat HC Jai Bhagwan Singh with it.

9. Considering the evidence which emerged at the Record of Evidence; and to our surprise, ignoring the fact that the evidence led as per HC Jai Bhagwan Singh's version the incident could be put into two parts. Part-I got over when Petitioner statedly did not obey the order of HC Jai Bhagwan Singh to put luggage into the train bogie and questioned the authority of HC Jai Bhagwan Singh to order him to do so. The matter rested. As per HC Jai Bhagwan Singh he reported the matter to SI Rajnish Kumar, and in the own words of HC Jai Bhagwan Singh, when he reported the matter to SI Rajnish Kumar he had seen the Petitioner walk away. That was the end. Part-II commenced, as stated by HC Jai Bhagwan Singh, when upon Petitioner returning he i.e. HC Jai Bhagwan Singh, used abusive language and said to the Petitioner "TUM BAHANCHOD NA KAL RIFLE PACKING ME THE AUR NA AAJ LANE ME HAU". It was only on this provocation that the Petitioner statedly got violent. The Commandant ignored the statement of SI Rajnish Kumar as per whom after HC Jai Bhagwan Singh complained to him regarding Petitioner's conduct and he told HC Jai Bhagwan Singh that he would talk to the Petitioner and convince him, HC Jai Bhagwan Singh got "over excited" and called the Petitioner and threatened him, which led to a brawl. Both took out their belts and belting each other and entered into a physical scuffle. The Commandant even ignored the testimony of Ct.Bhanu Pratap Singh PW-2 and Ct.(Driver) Kamal Chand PW-3 that when they first saw the Petitioner and HC Jai Bhagwan Singh at New Jalpaiguri Railway Station, the two were belting each other with their respective belts. The Commandant ignored that HC Jai Bhagwan Singh was a senior officer and he had triggered the quarrel by abusing the Petitioner. The Commandant ignored that if the Petitioner had disobeyed the lawful command of HC Jai Bhagwan Singh, the latter did not get the authority to abuse his subordinate officer.

10. Taking a decision that the Petitioner should be tried at a Summary Security Force Court and altering the charge, vide charge sheet dated 10.3.1997, the Petitioner was required to face a trial on the charge as under:

BSF ACT Section 20(a)

USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER

in that he, at about 1000 hrs on 3/2/96 quarrelled with No. 77001462 HC Jai Bhagwan at NJP Railway Station.

11. A Summary Security Force Court was convened and upon the Petitioner pleading not guilty, was tried for having assaulted his superior officer, HC Jai Bhagwan Singh with a belt.

12. At the trial, 4 witnesses were examined by the department; namely, HC Jai Bhagwan Singh, Ct.Kamal Chand, Ct. Bhanu Pratap and Asst.Comdt.R.K. Singh.

13. Relevant would it be to highlight that all witnesses examined at the Record of Evidence were examined at the trial, except SI Rajnish Kumar and a new witness Asst.Comdt.R.K. Singh was examined.

14. At the trial HC Jai Bhagwan Singh deposed *pari materia* with his statement made at the Record of Evidence and during cross-examination categorically admitted that when the Petitioner refused to obey his command, he i.e. HC Jai Bhagwan Singh abused the Petitioner for disobeying a lawful command and thereupon the Petitioner launched an assault on him and even he retaliated. Ct.Kamal Chand and Ct.Bhanu Pratap deposed as per their statement made during Record of Enquiry i.e. they saw the Petitioner and HC Bhagwan Singh belting each other with their belts. But, it needs to be highlighted that on being crossexamined, Ct.Bhanu Pratap Singh admitted that it was correct that when Petitioner did not carry the luggage HC Jai Bhagwan Singh tauntedly asked him: "Are you ghaint". What does the expression mean? Neither counsel could throw light thereon, but it is apparent that the word "ghaint" is not a very complimentary word.

15. Asstt.Comdt.R.K. Singh stated that after the incident was reported he conducted a spot verification and at that time the Petitioner told him that HC Jai Bhagwan Singh had abused him and he retaliated by hitting HC Jai Bhagwan Singh. He said that both HC Jai Bhagwan Singh and the Petitioner were having simple injuries on their person at that time when he saw them.

16. In his defence, the Petitioner examined Ct. Pamod Singh and made a statement wherein he i.e. the Petitioner stated that on 3.2.1996 HC Bhagwan Singh abused him and made a false complaint to SI Rajnish Kumar who told HC Bhagwan Singh that he would tell him i.e the Petitioner to obey orders and asked HC Bhagwan Singh to get back to his duty. That after a while HC Bhagwan Singh came to him i.e. the Petitioner and started abusing him in public and when he objected, HC Jai Bhagwan Singh slapped him as a result of which he also hit HC Jai Bhagwan Singh in self defence and a brawl started. HC Bhagwan Singh unfastened his belt and began hitting him with it, in retaliation of which, he too hit HC Jai Bhagwan Singh with his belt. The brawl broke when other members of the team separated the two.

17. Ct.Pramod Singh deposed in sync with the statement made by the Petitioner.

18. Vide order dated 15.06.1997, the Summary Security Force Court returned a

verdict of guilt qua the charge and sentenced the Petitioner with a penalty of dismissal from service, countersigned by the Dy.Inspector General on 4.09.1997. Challenging the order of sentence, the Petitioner preferred a statutory petition which was rejected vide letter dated 19.06.1998.

19. The instant writ petition lays a challenge to the sentence imposed and the rejection of statutory petition.

20. During arguments, learned Counsel for the Petitioner made the following submissions:

(i) That in spite of assault being a "civil offence" punishable u/s 46 of the BSF Act, the Petitioner was wrongly charged u/s 20(a) of the Act by the Commandant to avoid the mandatory reference u/s 74 to an officer empowered to convene a Petty Security Force Court.

(ii) That Asst. Comdt. Dinanath was one of the attending officers of the SSFC which gravely prejudiced the Petitioner since he was also the Recording Officer who prepared the Record of Evidence and thus had a bias against the Petitioner.

(iii) That the Petitioner was not given an opportunity to choose the defending officer/friend of the accused and that Dy. Comdt. A.B. Tripathi was thrust upon him against his will.

(iv) That the trial suffered from several irregularities in that the testimonies of the witnesses examined were not got signed by them and that the incriminating evidence was not put to the Petitioner in violation of Rule 93 of the BSF Rules.

(v) That the penalty imposed upon the Petitioner was disproportionate in the face of the unimpeachable service record of the Petitioner and discriminatory since HC Jai Bhagwan Singh was penalized with a reprimand for the same incident.

21. The first contention is noted and rejected, for the reason the Petitioner was charged and tried for having assaulted his superior officer, HC Jai Bhagwan Singh, which offence is specifically punishable u/s 20(a) of the BSF Act and is different than the offence of assault punishable under the Indian Penal Code, which is intended qua any person. For the sake of clarity, Section 20(a) of BSF Act is reproduced below. It reads as under:

20. Any person subject to this Act who commits any of the following offences, that is to say,-

(a) uses criminal force to or assaults his superior.

22. Section 352 of Indian Penal Code reads as under:

Section 352 - Punishment for assault or criminal force otherwise than on grave provocation

Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with

imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

23. It may be highlighted that the BSF Act contemplates assaulting a superior officer as an offence as distinct from the offence of a simple assault on any person.

24. The second and third contention of the Petitioner are noted and rejected inasmuch as the Petitioner has not brought to our attention any objection made by him before a superior officer against participation of Asst.Comdt.Dinanath as attending officer at the trial nor has he highlighted as to how exactly was he prejudiced by the officer's presence at the trial. Similarly in regard to the friend of the accused being thrust upon the Petitioner, we note that the Petitioner does not assert that he had requested the Commandant to change the friend of the accused and appoint another person nominated by him i.e. the Petitioner.

25. That the witnesses did not sign the statements made by them is an omission and at best an irregularity and not an illegality. Suffice would it be to state that qua irregularities, unless it can be shown that they are of a material nature and have caused a prejudice, they would be irrelevant. Even qua incriminating evidence not put to an accused, it cannot be said that the trial is vitiated. All that is required is that while evaluating the evidence, said incriminating evidence or circumstance not put to the accused would have been excluded while considering the incriminating evidence.

26. That takes us to the last submission urged on the proportionality of the penalty levied upon the Petitioner vis-à-vis HC Jai Bhagwan Singh being let off with a simple minor penalty of reprimand.

27. We have commented herein above that even while taking the decision to convene a Summary Security Force Court to try the Petitioner, the Commandant overlooked HC Jai Bhagwan Singh's statement where he admitted that it was upon him having abused the Petitioner, there was retaliation as also the statements of Ct.Bhanu Pratap Singh and Ct.Kamal Chand that when they first saw the fight, they saw HC Jai Bhagwan Singh and the Petitioner belting each other with their belts. The Commandant ignored the testimony of SI Rajnish Kumar as per whom when HC Jai Bhagwan Singh complained to him about the Petitioner not obeying his command, he having told HC Jai Bhagwan Singh that he would talk to the Petitioner resulted in HC Jai Bhagwan Singh getting over excited and in the state of excitement having called the Petitioner and threatened him which resulted in a brawl.

28. We find that even during trial this evidence reemerged and suffice would it be for us to highlight that the admission of HC Jai Bhagwan Singh that he abused the Petitioner when Petitioner did not obey his command is good evidence, on the assumption that the Petitioner was the first to remove his belt and belted HC Jai Bhagwan Singh, who retaliated by paying back the compliments with the same act.

29. It is thus a case where unimpeachable evidence leaves No. scope for any view to be taken other than that HC Jai Bhagwan Singh triggered the physical fight by abusing the Petitioner. He abused the Petitioner on being angry that SI Rajnish Kumar did not take stringent action against the Petitioner when HC Jai Bhagwan Singh complained to SI Rajnish Kumar of Petitioner disobeying him and SI Rajnish Kumar told HC Jai Bhagwan Singh that he would talk to the Petitioner. This explains the testimony of SI Rajnish Kumar that the Petitioner got over excited.

30. No. superior officer can abuse a subordinate even if a lawful command is disobeyed. Remedial action by taking disciplinary action has to result and not to take the law in one's own hands.

31. HC Jai Bhagwan Singh has exaggerated the assault by saying that he suffered injury on his head and a fracture of his right hand. He understated his role by not admitting that even he belted the Petitioner. There is No. proof thereof. On the contrary the testimony of Asstt.Comdt.R.K. Singh establishes that both, Petitioner and HC Jai Bhagwan Singh were having simple injuries.

32. A superior officer abusing a junior officer and also beating the junior officer, upon the supposition that when abused, the junior officer started beating the superior officer, would still render the role of the superior officer more grave. For, it was the superior officer who triggered the incident and the first spark came from him. If the superior officer is simply reprimanded, on the proportionality it has to be held that penalty of dismissal from service upon the subordinate officer is disproportionate.

33. Keeping in view that HC Jai Bhagwan Singh has been let off with a simple reprimand and that on being dismissed from service the Petitioner has been litigating for nearly 12 years and has received No. salary during this period and hence not only he but even his family has suffered, we are of the opinion that justice demands that we do not remand the matter permitting the Disciplinary Authority to levy a fresh penalty upon the Petitioner in light of the observations made by us and as per the findings reached by us and as a consequence thereof we dispose of the writ petition quashing the order dated 15.6.1997 levying penalty of dismissal upon the Petitioner as also the order dated 19.6.1998 rejecting the statutory petition filed by the Petitioner and we impose the penalty of reprimand upon the Petitioner. We direct Petitioner to be reinstated in service within 6 weeks from the date certified copy of this order is received in the concerned department and further direct that Petitioner would be paid 50% back-wages and the period interregnum Petitioner being dismissed from service till reinstatement would be counted as period spent on duty for all other purposes i.e. the Petitioner would be entitled to all other consequential benefits.

34. No costs.