
(2008) 06 GAU CK 0072
In the Gauhati High Court

Purna Kanta Sharma

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 13-06-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 3 GLR 581

Hon'ble Judges : Jasti Chelameswar, C.J; Anima Hazarika, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Anima Hazarika, J.—Whereabouts of Navadev Sharma being unknown, his brother, the petitioner herein, has knocked the door of the court invoking power under Article 226 of the Constitution seeking a writ in the nature of Habeas Corpus for a direction to the official respondents to find out his missing brother who happened to be on duty till 29.9.2004, including the production of all materials information of his whereabouts.

2. The brief facts leading to the case in a nutshell is summarised as follows:

The brother of the petitioner Sri Navadev Sharma was under pay roll as Constable in the Assam Police Task Force Battalion (APTF Bn.") and posted at Dakurbhita, Goalpara, Assam since 1989. His marriage was scheduled to be held in the month of November, 2004 and he was on duty till 29.9.2004. Thereafter his whereabouts is not known to the members of his family. The factum of disappearance/missing of Navadev Sharma from APTF Bn. came to their knowledge only when a notice dated 12.10.2004 was received addressed to the brother of the petitioner in his residential address whereby and whereupon it was alleged that the said employee had deserted from duty on 29.9.2004 without taking prior permission from the concerned authority. On receipt of the said communication dated 12.10.2004 an FIR was lodged at their local police station, i.e., before the Officer-in-Charge, Dhing Police Station for immediate action.

Thereafter the petitioner alongwith brother-in-law went to the place of duty of his brother and submitted a detailed representation on behalf of their mother contending, inter alia, that her son did not return home and asked for a satisfactory explanation about the lapses of their superior officers since he was last seen attending the duty on 29.9.2004 and the lapses on the part of the authority writ large since they failed to notice till 12.10.2004 that one Constable was missing though roll call was held twice everyday. Therefore the petitioner apprehends that his brother may be killed in operation or encounter with extremist or may be killed by his fellow policemen. The respondent No. 3, whom the petitioner met in place of work did, not give any satisfactory explanation of the whereabouts of his brother and thus the petitioner ultimately lodged another FIR on 27.5.2005 before the Officer-in-Charge, Goalpara Police Station, the place wherefrom his brother was missing. The official respondent did not make any endeavour to trace him out and hence the instant writ petition.

3. Separate affidavits-in-opposition have been filed on behalf of respondent Nos. 2 and 3. A detail affidavit-in-opposition has been filed on behalf of respondent No. 3 contending, inter alia, that Navadeb Sharma, i.e., the missing constable was found absent from morning roll call on 29.9.2004. He remains absent unauthorizedly without any leave or permission from the competent authority and till date, he remained untraced. BHM, Sirish Basumatary submitted the written report on 29.9.2004 in this regard and on the same day an enquiry was directed to be conducted. Accordingly, an enquiry was conducted by the then Second-in-Charge of the Battalion, who submitted the enquiry report on 7.10.2004 with a finding that there was no clue of the whereabouts of the missing constable. In the said enquiry, it was revealed that his overall behaviour was not satisfactory and there are several instances of indiscipline conduct on the part of the missing constable like unauthorized absence and quarrelsome behaviour. Such records are also available in his service record in earlier postings at 4th APBN as well as Commando Battalion. It is further revealed in the enquiry that the missing constable refrained from talking or mixing up with other inmates of the barrack and also he used to drink a lot. During his last 15 years of service his service sheet is marked in red with several punishments in all the three battalions that he had served and serving. Some of the punishments awarded to him due to his previous unauthorized absence, misconduct and negligence of duty are quoted at paragraph 4 of the affidavit-in-opposition filed by respondent No. 3, which are reproduced hereinbelow:

(i) 7 days punishment Drill 2 hrs. daily for his unauthorized absent vide BO No. 240 dated 9.2.1993.

(ii) Awarded 7 days Quarter Guard and 7 days punishment drill 2 hrs daily for his indisciplined conduct vide BP No. 398 dated 4.3.1993.

(iii) Awarded 4 days punishment drill 2 hrs. daily for his negligence of duty vide BO No. 1445 dated 15.7.1994.

(iv) Awarded 28 days Quarter Guard for picking up quarrel during sentry duty and willful misconduct resulting in firing one round from his service rifle vide BO No. 697 dated 8.3.1999.

(v) Awarded 7 days Quarter Guard with punishment drill 2 hrs daily for his indisciplined conduct vide BO No. 253 dated 24.1.2002.

(vi) Awarded 15 days Quarter Guard with 2 hrs punishment drill from his unauthorized absence and quarreled with public personnel vide BO No. 1246 dated 17.2.2002.

(vii) Awarded 27 days extraordinary leave for his unauthorized absence w.e.f. 12.4.2002 to 8.5.2002 vide BO No. 1246 dated 17.5.2002.

(viii) Absent for one day on 12.11.2002, however, EL was granted for the unauthorized absence vide BO No. 2803 dated 24.12.2002.

(ix) Awarded 2 days extraordinary leave for his unauthorized absence w.e.f. 16.1.2003 to 18.1.2003 vide BO No. 149 dated 22.1.2003.

(x) Awarded 2 days leave without pay for his unauthorized absence w.e.f. 13.3.2003 to 15.3.2003 vide BO No. 566 dated 17.3.2003.

(xi) Awarded 3 days punishment drill 2 hrs daily for his indisciplined conduct vide BO No. 1319 dated 24.6.2003.

In the said affidavit, it is further contended that immediately after the constable was found absent, one missing entry for enquiry was submitted to the Officer-in-Charge of Goalpara Police Station vide M/No. BN1/APTF/R/PF-191/04/6044 dated 10.11.2004 giving the bio-data and his home address alongwith the same. An enquiry as aforesaid was also made at the battalion Head Quarter. The enquiry further revealed that during his days of posting at Bijni when he was attached to Commando Battalion, he developed soft corner to a married lady. He used to visit Bijni to meet the lady after joining the battalion. The lady with whom the missing constable had a relationship was interrogated. She told that her name was Sumitra Barman and she was married to one Krishna Bahadur Chetri. She has two sons, aged about 13 years and 11 years respectively. Since last 8-9 years her husband has been missing and she was staying in a house near Bijni College. She used to work as maidservant in the house of late Uday Das (Ex. Principal of Bijni College) and subsequently, after her husband went missing she started staying in Late Uday Das' house. She met Navadev Sharma, missing constable while he was deployed at Bijni Commando Battalion. The commando personnel used to stay near the residence of Late Uday Das and by that way she came to know Navadeb. Their knowing of each other gradually developed into a cordial relationship. While at Bijni Navadeb once made a proposal to marry Sumitra but she turned down the proposal as she was having two sons. She further stated that after leaving Bijni for Bongaigaon, Navadeb maintained the relationship. However, after leaving Bongaigaon she had not met him for almost three years. She also volunteered to share further information either to Battalion Head

Quarter at Dakurbhita or to Bijni PS if Navadeb visits her. However, no further information came from her.

It has further been stated that WT Message addressed to all the Officer-in-Charges of all police stations of Assam were sent vide Office letter No. S/No.Bn.1/APTF/R/PF-191/04/890 dated 6.3.2005 to enquire and find out the whereabouts of the constable Navadeb in their respective areas. However, till date, no report has come from any of the police station. The Superintendent of Police of Chirang District has also made an enquiry regarding the missing constable. As per his report, the missing constable, could not be traced out. In the meanwhile, a letter has also been sent to the Chief Public Relation Officer, Assam Police Head Quarter for publication of a notice in vernacular newspaper giving the bio-data of the missing constable. Pursuant thereto a publication was made but that also did not yield any result. A departmental proceeding too was also drawn up against the missing constable vide DP No. 11/07. The first show-cause notice was sent on 30.8.2007, followed by a second show-cause notice dated 31.10.2007 and third final show-cause notice dated 3.2.2008 alongwith the statement of allegations, list of witnesses/documents were sent in his home address intimating that in the event of not receiving any response, the proceeding shall proceed ex. parte. The said notice was received by the elder brother of the missing constable on 13.2.2008. Sri P.K. Brahma, APS Assistant Commandant of the unit has been appointed as Enquiry Officer with a direction to submit his findings within a period of 30 days.

4. Heard Mr. N.H. Mazarbhuyan, learned Counsel appearing for the petitioner. Also heard Ms. B. Goyal, learned Addl. Sr. Govt. Advocate, Assam appearing for the respondents.

5. Perused the materials on record. From the facts pleaded and established and the specific statements made on oath in the affidavit-in-opposition filed on behalf of respondents, it would reveal that the petitioner was a habitual absentee and in earlier occasion also without any leave or prior permission of the authority concerned he absented himself for a long time. The statements made in the affidavit reveals that the authority concerned has done whatever they could on their part to trace out the missing constable. We find no slackness on the part of the authority in tracing out the missing constable.

6. The petitioner has approached this Court, seeking a writ in the nature of Habeas Corpus. The hon"ble Supreme Court in Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, has pointed out that the writ of Habeas Corpus is essentially a procedural writ. The writ of Habeas Corpus is primarily designed to give a person restrained liberty a speedy and effective remedy for having the legality of his sanction enquired into and determined and if the detention is found be unlawful having himself discharged and freed from such restraint, deals with the machinery of justice, not the substantive law. The act of the writ is to secure release of a person who is illegally restrained his liberty. In (1890) 15 AC 506, Lord Halsbury, L.C. has pointed out at the essential and

leading theory of the whole procedure is the mediate determination of the right to the applicants freedom and his case, if the detention is found to be unlawful.

7. In the instant case the respondent authority has left no stone turned to find out the brother of the petitioner who deserted APTF without taking recourse to the Rules available under service imprudence and his whereabouts is not known to the authority though very possible endeavour has been made to find him out. Therefore there is no question of release of petitioner's brother who has not been legally restrained by the official respondents. The foundation of pleadings and the relief sought for, therefore, would not be available under the writ of Habeas Corpus to the petitioner, more so, when the records do not divulge illegal restrain of the brother of the petitioner.

8. For all the foregoing reasons, we are of the opinion that the petitioner has failed to make out a case for issuance of a writ of Habeas Corpus. once a case of desertion by the missing constable has been made out the respondents in the instant case, there is no scope left for the part to issue a writ of Habeas Corpus.

9. The petition is found, to be devoid of any merit and is dismissed. No costs.