

(2005) 10 GAU CK 0009
In the Gauhati High Court
Case No : Civil Rule No. 301 of 1996

Rajendra Sarkar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-10-2005

Acts Referred:

Border Security Force Act, 1968 — Section 30, 30(A), 48, 48(1), 50
Border Security Force Rules, 1969 — Rule 48, 48(3)

Citation : (2006) GLT 507 Supp

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Advocate : P. Roy Barman, for the Appellant; P.K. Biswas, for the Respondent

Judgement

A.B. Pal, J.—The Petitioner who was Constable/Tailor under the Border Security Force (for short "BSF") has called in question the legality and correctness of the impugned order dated 30.9.1995 passed by JAD (Admn.) whereby the Petitioner has been dismissed from service.

2. The short facts giving rise to the present proceeding may be noted as follows:

The Petitioner initially entered into the service under the BSF in the year 1982 and was promoted to the rank of Constable/Tailor in the year 1983. His grievance is that on 11.10.1995, after a period of 13 years of unblemished service, he was suddenly directed to face a trial before the Summary Security Force Court (for short "SSFC") on a charge of committing theft, which is an offence punishable u/s 30(A) of the BSF Act, 1968 (for short "the Act"). The charge framed against him reads as follows:

The accused No. 82844001 Constable/Tailor Rajendra Sarkar of 97 Bn. BSF attached with 103 Bn. BSF is charged with:

COMMITTING THEFT OF PROPERTY BELONGING TO THE GOVERNMENT

In that be,

At Gokulnagar SHQ TRA (S) on 08th July '95 at about 2200 hrs, committed theft jointly along with No. 90192196 Constable Maquebul Hussain of 97 Bn BSF in respect of four ceiling fan, four regulator, four chokes of Tube light, the property belonging to primary school of SHQ TRA (S), the property of the Government by taking away from said school.

Place: Salbagan Dated, the 11 Oct" 1995

Sd/- (D.V. SARASWAT) COMMANDANT 103 BN BSF

Before the above charge was framed, an order was passed by DIG, BSF on 23rd September, 1995 directing JAD (Comm.) to record evidence in respect of the allegation against the Petitioner with further instruction to comply with the provisions of Rule 48 of the BSF Rules, 1969 (for short "the Rules").

3. Following the above order dated 23rd September, 1995 the JAD (Comm.) recorded the statements of Subedar Ranjit Singh (P.W.1), C.T. Ashok Kumar (P.W.2), N.K. Sribas Saha (P.W.3) and C.T. Maquebul Hossain (P.W.4). The statements recorded brought into focus the modus operandi of the alleged offence and its Mens rea. C.T. Maquebul Hossain (P.W. 4) is, in fact, a co-accused, who stated that on 8th July, 1995, he along with the Petitioner planned to commit theft of the ceiling fans from the Primary School as both of them were in need of such fans for their home. While Maquebul Hussain brought the electric plier, the Petitioner brought one screwdriver for opening the window and iron grill for entry into the school building. As planned, they entered the school building and removed four electric fans, four regulators and four chokes of tube lights. Thereafter, the blades of the fans were disassembled and they divided the booty equally among themselves. P.W.3, Sribas Saha stated that on 19th September, 1995 he was on guard duty when C.T. Ashok Kumar (P.W.2) came to him with a purse in hand asking permission from the sentry to go inside the guard room for handing over the money and the purse to C.T. Rajendra Sarkar, the Petitioner herein. He was asked to obtain permission from Sobedar Ranjit Singh (P.W. 1). When approached, Ranjit Singh searched the purse wherein one bus ticket, one rail ticket, Rs. 690/- and a letter written in Bengali language were found. As Ashok Kumar being a non-Bengalee could not read the letter, Sobedar Ranjit Singh (P.W. 1) asked N.K. Sribas Saha (RW.3) to read out the letter and translate the same into Hindi which he did accordingly. The letter was written by the Petitioner to his wife Aruna advising her to hide the fans as there might be a search by the BSF personnel. This factum, particularly the contents of the letter had also been narrated by C.T. Ashok Kumar (RW.2) and Subedar Ranjit Singh (P.W.1). All the statements were recorded on 26.9.1995 and 27.9.1995. On 28.9.1995, the accused-Petitioner in terms of Rule 48(3) of the Rules was asked by JAD (Comn.) whether he would like to make any statement cautioning him that he was not found to make one and whatever he would state might be taken down in writing and might be used as evidence. The accused-Petitioner, however, declined to make any statement then, though on 19.9.1995 he had already given a confessional statement to Joint Asstt. Director (Admn.) in presence of

Constable Mahadeb Mistry and Nayek S. Saha, marked Exbt. B.

4. Apart from the statements of witnesses recorded, the documents relied on include Exbt. A, which is English rendering of the letter written by the accused-Petitioner to his wife found in his purse. The letter reads:

Aruna, the two fans which I have brought be kept at Ranjit's house immediately on receipt of this letter because there has been some problem arisen at this location. House may also be searched for the same. Therefore, it may be shifted immediately and you should not write anything in this regard to me. Do not worry about me.

Exbt. B is the English translation of the confessional statement of the accused-Petitioner, which is noted below:

I Const/Tailor No. 82844001 Rajendra Sarkar of 97 Bn BSF am serving in Welfare Centre of 97 Bn. BSF. I proceeded on 30 days E/L w.e. 9.8.95. While proceeding on leave I took away two ceiling fans. These fans were given to me by Const. Maquebul Hossain around 1 1/2 months back and were removed by him from Primary School of 97 Bn BSF. Four fans were taken away by him to his Quarter on the same day. He had removed six fans from the School. I was entertaining TV at his home upto 2339 hrs. On the intervening night he committed the theft. After entertainment he came with me upto Welfare Centre. When he was carrying away the fans from the School I saw him from the Welfare Centre as I am staying in Welfare Centre. The two fans we given to me for non reporting of this matter to any body. Therefore, these fans were taken away to my home while proceeding on leave. These fans are kept in my house beneath our cot and this matter is well known to my wife Smt. Aruna Sarkar. Along with these fans two chokes and two regulators were also taken away by me.

5. The charge dated 11th October, 1995 was framed following the statements of witnesses recorded and the documentary evidence exhibited. On 12.10.1995, the proceeding before the SSFC commenced when contents of the charge were read over and explained to the accused-Petitioner, who pleaded guilty to the charge. The said court after having satisfied that the accused-Petitioner understood the nature of the charge to which he had pleaded guilty, sentenced him with dismissal from service on the same date. The said dismissal order has been brought under challenge in the present writ petition.

6. I have heard Mr. P. Roy Barman, learned Counsel for the Petitioner and Mr. P. K. Biswas, learned Asstt. S.G. for the Respondents.

7. Mr. Roy Barman assailed the sentence of dismissal mainly on three grounds, namely (i) the SSFC has no jurisdiction to order dismissal from service; (ii) confession of the accused-Petitioner cannot be said to be voluntary as it was obtained under tremendous pressure and this particular allegation made in the writ petition has not been controverted by the Respondents, who have filed no counter-affidavit and (iii) the punishment of dismissal from service is utterly

disproportionate to the alleged offence of theft.

8. Taking the first point on the jurisdiction of the SSFC, it would appear from Section 64 of the Act that there are three kinds of Security Force Court, namely (a) General Security Force Courts; (b) Petty Security Force Courts; and (c) Summary Security Force Courts. The powers of a SSFC has been provided in Section 74, Sub-section (4) which provides as follows:

74(4). A Summary Security Force Court may pass any sentence which may be passed under this Act, except the sentence of death or of imprisonment for a term exceeding the limit specified in Sub-section (5).

This provision would go to show that SSFC cannot pass a sentence of death and as regards imprisonment of any description certain limits have been imposed by Sub-section (5), which reads as follows:

(5) The limit referred to in Sub-section (4) shall be--

(a) One year, if the officer holding the Security Force Court has held either the post of Superintendent of Police or a post declared by the Central Government by notification to be equivalent thereto, for a period of not less than three years or holds a post of higher rank than either of the said posts; and

(b) Three months; in any other case.

9. Mr. Barman strenuously argued that SSFC cannot pass any sentence other than what has been provided in Clause (b), particularly because the provision in Clause (a) does not apply having regard to the rank of the officer who held the SSFC and the word "sentence" should be strictly construed to make a reference to imprisonment only, not any other punishment. But in the instant case the Petitioner has been dismissed from service, which punishment has not been contemplated by Sub-section (4) of Section 74 of the Act. The punishments which a Security Force Court can inflict have been provided in Section 48 of the Act, which includes death, imprisonment, dismissal from service, reduction to lower rank, forfeiture of seniority, forfeiture of service, fine, severe reprimand, forfeiture of pay and allowances, forfeiture of all arrears of pay and the stoppage of pay and allowances. According to Mr. Barman, only a General Security Force Court has got the power to inflict any punishment u/s 48 of the Act, but SSFC has a limited jurisdiction u/s 74(4) of the Act, which does not permit it to inflict any punishment other than imprisonment for not more than three months.

10. Mr. Biswas, learned Asstt. S.G. controverted this line of argument of Mr. Barman by placing an argument that Sub-section (4) of Section 74 of the Act empowers a SSFC to pass any sentence and the restrictions imposed by Sub-section (5) are only in respect of death or imprisonment. Such restrictions have not done away with the jurisdiction of SSFC to impose other punishments including dismissal from service. According to him, the word "sentence" if construed in the context of the scheme of the Act must inevitably refer to all the punishments specified in Section 48 of the Act. His further submission is that

Section 50 of the said Act empowers Security Force Court to award in addition to, or without any one other punishment, the punishment specified in Clause (c) of Sub-section (1) of Section 48 and any one or more of the punishments specified in Clauses (e) to (1) of that sub-section. Clause (c) to Sub-section (1) of Section 48 provides the punishment of dismissal from service and, therefore, it is submitted, that such a punishment can be inflicted in addition to other punishment like imprisonment. This provision in Section 50 is a discretionary power of a Security Force Court to inflict an additional punishment, which has not been exercised in the case on hand. The Respondent concerned has chosen to award only the punishment of dismissal from service, not any other punishment.

11. The rival contentions, thus canvassed by the learned Counsels for the contending parties, if examined in the light of Sub-section (4) of Section 74 of the Act, would give the impression that SSFC being one of the Security Force Courts may pass any sentence as specified in Section 48 though when it comes to death or imprisonment, certain limitations have been clearly imposed providing that such court cannot inflict death sentence and under certain circumstances cannot inflict imprisonment for more than three months. I entirely agree with the submission advanced by Mr. Biswas that such restriction has not in any way diminished or excluded the jurisdiction of SSFC to inflict other punishments. In other words, subject to above restrictions SSFC may inflict any other punishment including dismissal from service. The argument of Mr. Barman that the restrictions contained in Sub-section (5) of Section 74 ipso facto has ousted jurisdiction of SSFC to inflict any other punishment except imprisonment not exceeding three months is, in my view, totally misconceived and mis placed.

12. Coming to the next question whether the confessional statement of the Petitioner was given voluntarily it is the emphatic submission of Mr. Barman that under tremendous pressure from the higher authority, the accused-Petitioner had to give a confessional statement and for that reason such statement should not have been the basis for inflicting the punishment of dismissal from service. It may be noticed from the discussions made above that the statement has been recorded in presence of witnesses, who are Constable and Naik of the same Battalion and after the statement in Exbt. B, he pleaded guilty when the charge so framed was explained to him with caution that he was not liable to make any such statement and if any statement is made it might be used as evidence against him. Throughout the proceeding there had been no whisper that at any point of time any pressure was mounted upon the accused-Petitioner for making a confessional statement. Even the friend, who was engaged to assist the accused-Petitioner during the proceeding in terms of the relevant provisions of the Act and the Rules, did not raise any objection at the time when the accused-Petitioner pleaded guilty or when his confessional statement was recorded. It would not be possible and appropriate for a writ court to enter into the question whether the confession of the accused-Petitioner recorded by the concerned authority was voluntary or not as that exercise would entail a separate phase calling for examination of witnesses and other relevant documents. The

materials, which are available on record, have nothing to indicate even vaguely that during the course of the proceeding before the SSFC any pressure was mounted upon the accused-Petitioner compelling him to make the confessional statement as alleged. This point questioning nature of the confession raised by Mr. Barman, therefore, leads to no consequence and, therefore, the same stands rejected.

13. The other point, which Mr. Barman strenuously argued is that the punishment is disproportionate to the alleged offence, which is a simple theft of few ceiling fans. On this issue, Mr. Biswas has referred to the provision of Section 30(a) of the Act, which provides:

30. Offences in respect of property: Any person subject to this Act who commits any of the following offences, that is to say--

(a) Commits theft of any property belonging to the Government or to any Force mess, band or institution, or to any person subject to this Act; or..shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned.

It may be noticed here that this power of inflicting punishment has been given to a Security Force Court, which certainly includes a SSFC also. Mr. Biswas submits that though on conviction for committing an offence of theft the Petitioner could be sentenced to suffer imprisonment for a term, which may extended to ten years, he has been given a lesser punishment of dismissal from service as provided in that Section. This view of Mr. Biswas has been strongly refuted by Mr. Barman submitting that Section 30 of the Act clearly supports his contention that a SSFC can inflict only an imprisonment of a term which shall not exceed three months, not any other punishment. But the words "less punishment" appearing at the end of Section 30 forbid, in my view, any restricted construction of the said provision as otherwise the words "less punishment" cannot be linked to the other punishments provided in Section 48 of the Act. It would thus appear that the legislatures have carefully devised the scheme of punishment keeping in mind the paramount necessity of keeping discipline in the Force and for that purpose, the punishment for every offence has been carefully provided. In that view of the matter, it cannot be said that dismissal from service is disproportionate to the offence committed as such a view, if taken, shall go against the scheme of punishments provided in Chapter IV of the Act. That apart, when the law specifically provides a particular punishment for a particular offence, it is beyond the jurisdiction of the court to hold that such punishment is disproportionate to the offence committed. In support of the above contention that dismissal from service is not disproportionate to the offence of theft, Mr. Biswas has sought to derive support from a decision of this Court in *Dipak Kumar Chakraborty v. Union of India* reported in (2005) 2 GLR 667. Relevant paragraph of that decision reads as follows:

21. From the aforesaid provisions it will also be seen that the penalties imposed on the Petitioner are prescribed and incorporated in the provisions of the Act and thus it cannot be said to be disproportionate to the gravity of the offence committed by the Petitioner. In the case of Union of India (UOI) and Others Vs. Mithilesh Singh, the Division Bench of this Court noticing that on charge of unauthorized absence of Railway Protection Force personnel from duty could be removed from service as per the punishment prescribed in the rules, held that the penalty of removal from service interfered by the learned Single Judge was misplaced. The said judgment of the Division Bench of this Court was carried on appeal before the Apex Court and the Apex Court by its judgment reported in Mithilesh Singh Vs. Union of India (UOI) and Others, affirmed the aforesaid judgment of the Division Bench.

14. For the above discussions, I am of the considered view that this writ petition has no merit and consequently, the same stands dismissed.

No costs.