
(2014) 08 GAU CK 0001
In the Gauhati High Court
Case No : WP(C) No. 1213 of 2007

Rajib Choudhury

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-08-2014

Acts Referred:

Border Security Force Act, 1968 — Section 11, 114, 115, 117, 46
Constitution of India, 1950 — Article 226
Prevention of Corruption Act, 1988 — Section 7

Citation : (2015) 1 GLT 185

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : K.D. Chetri, Advocates for the Appellant; N. Barua, CGC, Advocates for the Respondent

Judgement

Ujjal Bhuyan, J.—Heard Mr. K.D. Chetri, learned counsel for the petitioner and Mr. N. Baruah, learned Central Govt. Counsel for the respondents. By way of this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 06.12.2006 and for re-instatement in service.

2. Petitioner was a Constable in the Border Security Force (B.S.F). At the relevant point of time he was serving in the "G" Coy under 94 Battalion B.S.F., Roshan Bagh, Murshidabad (West Bengal).

3. On 03.12.2006, a charge-sheet was issued by the Commandant, 94 Battalion B.S.F. under section 46 of the Border Security Force Act, 1968 (BSF Act) charging the petitioner of committing a civil offence of agreeing to accept or attempting to accept a gratification, other than legal remuneration as a motive or reward for doing or forbearing to do an official act punishable under Section 7 of the Prevention of Corruption Act, 1988. The charge against the petitioner was that on 23.08.2006 while he was discharging his duty at Border Outpost, Meghna from 1200 hrs to 1800 hrs, he had improperly allowed safe passage to 4 cattle heads from India to Bangladesh through gate No. 121 for the purpose of

smuggling which was an attempt to accept gratification other than legal remuneration, as a motive or reward for doing or forbearing to do an official act.

4. It appears that the petitioner was tried by a Summary Security Force Court on 06.12.2006 and for conducting the trial, petitioner was placed under close arrest on 06.12.2006.

5. In the Summary Security Force Court 6 (six) persons deposed as witnesses including the petitioner. On conclusion of the Summary Security Force Court proceeding, the Commandant recorded a finding on 06.12.2006 itself opining that petitioner was guilty of the charge and consequently imposed the sentence "to be dismissed from service" on the petitioner. Accordingly, petitioner was dismissed from the service of B.S.F. with effect from 06.12.2006 and his name was struck off from the rolls of B.S.F.

6. Consequent upon imposition of the penalty as above, petitioner was released from close arrest at 12.30 hrs on 06.12.2006.

7. Petitioner's wife then submitted representations dated 14.12.2006 before the Commandant and other higher authorities requesting the said authorities to recall the punishment or atleast to modify the penalty imposed. Since no decision was taken on the said representations, the present writ petition has been filed.

8. This Court by order dated 14.03.2007 had admitted the writ petition for hearing by issuing rule.

9. Respondents have filed a common counter affidavit. It is stated that on 23.08.2006 distinct hoof marks of cattle were found on the wet soil leading from the duty place of the petitioner towards the boundary; no hoof marks of cattle returning were found by any of the witnesses. The petitioner could not explain the situation in the Summary Security Force Court. Investigation revealed involvement of the petitioner in providing a safe passage for cattle smuggling. On 30.08.2006, petitioner was put on offence report and was heard by the Commandant. After hearing the petitioner, the Commandant ordered for preparation of record of evidence which was prepared by the Assistant Commandant in presence of the petitioner. As per the record of evidence, petitioner was given opportunity to cross examine the witnesses or to produce defence witness on his behalf. Upon scrutiny of the record of evidence submitted, the Commandant decided to try the petitioner by a Summary Security Force Court after approval of the DIG. Petitioner was tried by the Summary Security Force Court on 06.12.2006 which was conducted as per the prescribed procedure. Copies of record of evidence and charge sheet were made available to the petitioner. A friend of the accused was detailed as per the choice of the petitioner and the petitioner was given sufficient opportunity to defend himself. After conclusion of the trial, petitioner was found guilty of the charge leveled against him and was given the punishment of dismissal from service. Though petitioner had stated during the record of evidence that a farmer in his bullock cart had come to the area where he was detailed for duty and that the hoof

marks were that of the bullock cart, he could not produce evidence in his support. Hoof marks were found only in one direction i.e., towards the Indo-Bangladesh border. Petitioner was tried in accordance with the established procedure and the punishment that was awarded was commensurate with the gravity of the offence. Petitioner did not file statutory appeal and straight away invoked the writ jurisdiction without exhausting the alternative remedy.

10. Mr. Chetri, learned counsel for the petitioner has referred to the evidence tendered by the witnesses and contends that from a careful reading of the evidence adduced it would be evident that it was only a presumption that some cattle were allowed by the petitioner to cross the international border. There is no specific evidence to prove culpability of the petitioner in the offence alleged. In such circumstances, imposition of the severe penalty of dismissal from service is not justified, he contends. Referring to the provisions of the B.S.F. Act and the Rules framed thereunder, learned counsel for the petitioner submits that the Commandant was not justified in imposing the penalty of dismissal from service which should be interfered with by this Court. He further submits that there is no specific finding recorded by the Summary Security Force Court convicting the petitioner for the charge framed against him. In the absence of any conviction, penalty imposed would be wholly untenable in law, he submits.

11. Mr. Baruah, learned Central Govt. Counsel on the other hand, submits that the writ petition is not maintainable on two counts. Firstly, cause of action has not arisen within the territorial jurisdiction of this court and secondly, petitioner did not avail the statutory alternative remedy as provided under the statute and, therefore, without exhausting the statutory remedy, writ petition would not be maintainable. On merit, learned Central Govt. counsel submits that all that this Court is required to examine is whether the procedure prescribed under the statute has been followed or not while imposing the penalty on the petitioner. Court is only required to examine the decision making process and not the decision, he submits. He submits that materials on record justify the conclusion reached by the Summary Security Force Court and, therefore, the punishment imposed is justified. No case for interference is made out, he submits.

12. Mr. Baruah, learned Central Govt. Counsel has also produced the original record of Summary Security Force Court proceeding.

13. Submissions made by the learned counsel for the parties have been considered. I have also perused the record produced by Mr. Baruah, learned Central Govt. counsel.

14. Before proceeding further, it would be apposite to first deal with the preliminary objection raised by Mr. Baruah, learned Central Govt. Counsel. As already noticed above, the objection is that no cause of action has arisen within the territorial jurisdiction of this Court and that the petitioner has not availed the statutory alternative remedy before invoking the writ jurisdiction of the Court. On a query by the Court as to whether such objection has been taken in the counter

affidavit filed, Mr. Baruah fairly submits that the first objection relating to cause of action has not been taken in the counter affidavit filed by the respondents. In the absence of any such objection or point being taken in the counter relating to cause of action or territorial jurisdiction, this Court is not inclined to entertain the same at the stage of final hearing, that too, without putting the other side on notice. Moreover, this case was admitted for hearing way back on 14.03.2007 i.e., more than 7 years ago. Case having been admitted for hearing, I am of the view that it would neither be just nor fair to non-suit the petitioner on the said preliminary ground. In *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, the Hon'ble Supreme Court has held that an objection not taken in the petition cannot be permitted to be raised at the stage of final hearing. In so far the second objection is concerned, availability of alternative remedy is not an absolute bar for the writ Court to invoke its writ jurisdiction under Article 226 of the Constitution. Law is well settled on this point and requires no restatement. Moreso, as already held above, writ petition having already been admitted for hearing, it would neither be just nor fair to relegate the petitioner to the statutory remedy at this distant point of time. It may also be mentioned that a Division Bench of this Court in *Manager, Borsapori Tea Estate v. Addl. Deputy Commissioner*, reported in 1995 (1) GLT 120: (1995) 1 GLR 203 has held that after a writ petition has been admitted for hearing, the same has to be adjudicated on merits and cannot be dismissed on the ground of availability of alternative remedy particularly when no question of fact is involved in deciding the writ petition. Therefore, preliminary objection raised by the learned counsel for the respondents cannot be accepted.

15. Having answered the preliminary objection in the manner as indicated above, I now proceed to deal with the case on merit

16. B.S.F. Act is a central legislation which has been enacted to provide for constitution and regulation of an armed force of the Union for ensuring the security of the borders of India and for matters connected there- with.

17. Section 11 of the B.S.F. Act deals with dismissal, removal or reduction by the Director General and by other officers. As per sub-section (2), an officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed. As per Rule 177 of the Border Security Force Rules, 1969, the Commandant may, under sub-section (2) of section 11, dismiss or remove from service any person under his command other than an officer or a subordinate officer.

18. Section 46 of the B.S.F. Act deals with civil offences. It provides that subject to the provisions of section 47, if any person who is subject to the B.S.F. Act commits any civil offence, he shall be deemed to be guilty of an offence under the B.S.F. Act and, if charged under the said section, he shall be liable to be tried by a Security Force Court and on conviction, he shall be liable to be punished as provided in the B.S.F. Act. Under section 47, if a person who is subject to the

B.S.F. Act commits an offence of murder or of culpable homicide not amounting to murder or rape in relation to a person not subject to the B.S.F. Act, he shall not be tried by a Security Force Court unless he commits the offence while on active duty or at any place outside India or at any place specified by the Central Government by notification in this behalf.

19. Punishments awardable by Security Force Court are enumerated in Section 48. As per sub-section (1), punishments may be inflicted in respect of offences committed by persons subject to the B.S.F. Act and convicted by Security Force Courts according to the scale mentioned in the said sub-section starting from death to stoppage of pay and allowances. Such punishments include dismissal from service which is at serial number 3 in the scale of punishment in order of severity. As per sub-section (2), 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.

20. Section 64 of the B.S.F. Act provides that there shall be three (3) kinds of Security Force Courts, namely,

- "a. General Security Force Courts;
- b. Petty Security Force Courts; and
- c. Summary Security Force Courts."

21. As per Section 70, a Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court Under Section 74, a Summary Security Force Court is empowered to try any offence punishable under the B.S.F. Act

22. Under Section 114, the finding and sentence of a Summary Security Force Court shall not require confirmation but may be carried out forthwith. However, as per sub-section (2), if the officer holding the trial is of the rank of Superintendent of Police or of equivalent rank or of lower rank and has held such rank for less than five years, he shall not, except on active duty, carry into effect any sentence until it has received the approval of an officer not below the rank of Deputy Inspector-General. Section 115 provides that the proceedings of every Summary Security Force Court shall, without delay, be forwarded to the officer not below the rank of Deputy Inspector- General within whose command the trial was held, or to the prescribed officer, who may set-aside the proceedings or reduce the sentence to any other sentence which the Court might have passed but that must be for reasons based on the merits of the case and not on merely technical grounds.

23. Section 117 provides the statutory remedy to persons who may be aggrieved by any order passed by any Security Force Court.

24. The Border Security Force Rules, 1969 (BSF Rules) have been framed under the provisions of the B.S.F. Act Rule 48 deals with record of evidence. It lays

down the detail procedure of how evidence is to be recorded. Rule 54 provides for framing of charge against a person who is subject to the B.S.F. Act Chapter XI of the BSF Rules comprising of Rules 133 to 161 provides the detail procedure for conduct of Summary Security Force Court. While Rule 138 deals with arraignment of accused, Rule 139 deals with objection by accused to charge. Under Rule 142, the accused is required to plead guilty or not guilty. If he pleads not guilty, the procedure to be followed thereafter is prescribed in Rule 145. Court is to record all findings of guilty or not guilty under Rule 149 and if finding of guilty is recorded, the procedure to be followed thereafter is provided in Rule 151.

25. Rule 151 of the B.S.F. Rules is relevant for the purpose of adjudication of the present case and the same is quoted hereunder:--

"Procedure on finding of Guilty--

(1) Where the finding on any charge is "Guilty" the Court may record of its own knowledge, or take evidence of any record, the general character, age, service, rank, and any recognized acts of gallantry, or distinguished conduct of the accused, and previous convictions of the accused either by a Security Force Court, or a Criminal Court, any previous punishment awarded to him by an officer exercising authority under section 53, the length of time he has been in arrest or in confinement of any previous sentence, and any decoration, or reward, or to which he may be in possession or to which he may be entitled.

(2) Where the Court does not record the matters mentioned in this rule of its own knowledge, evidence of this matters may be taken in the manner directed in rule 101 for similar evidence."

26. Thus, from a conjoint reading of the relevant provisions of the B.S.F. Act and the B.S.F. Rules as noticed above, it is evident that the Summary Security Force Court which tries a person under the B.S.F. Act has first to ask the accused as to whether he pleads guilty or not guilty. Separate procedures are laid down which would follow the plea of the accused. If the accused pleads not guilty, evidence of prosecution witnesses are taken whereafter the accused is called upon to make his submission in defence. He may also call upon his own witnesses. After evidence has been tendered, the Summary Security Force Court shall give its finding as to whether the accused is guilty or not guilty of the charge. Once a finding of guilty is recorded, Rule 151 comes into play and the Summary Security Force Court is required to record the general character of the accused, recognized acts of gallantry, conduct and previous convictions, if any, of the accused. If the Summary Security Force Court has no knowledge of the aforesaid factors, evidence on these matters may be taken. Thereafter, the sentence is required to be pronounced.

27. There is a purpose behind Rule 151. Before imposing any punishment upon conviction of the accused, the Security Force Court (in this case the Summary Security Force Court) has to apply its mind to the previous service record of the

accused. Previous conduct of the accused is therefore a relevant factor to be taken into consideration before imposing any penalty.

28. Reading sections 46, 47 and 48 of the BSF Act together would show that the accused may be punished following his trial and conviction by a Security Force Court. Punishment must be preceded by conviction by a Security Force Court. In other words, without conviction, there can be no punishment.

29. This now leads to the important question as to what is conviction as the word conviction has assumed critical importance since without conviction there can be no punishment. What then is conviction? "Conviction" has been defined in the Black's Law Dictionary, Sixth Edition as the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged. It is the final judgment on a verdict or finding of guilt but does not include a final judgment which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory. It is that stage of a criminal proceeding where the issue of guilt is finally determined. The word "verdict" is derived from the Latin word "veredictum" which means a true declaration. It is the formal decision or finding. Conviction therefore would mean the outcome of a criminal prosecution which concludes in a judgment that the accused is guilty of the offence for which he was charged. It is that stage of a criminal proceeding where the question of guilt of the accused is finally ascertained. Thus, conviction is the final determination of guilt of the accused by the competent Court. In other words, conviction is the formal and final declaration/finding of guilt of the accused. All deliberations preceding such formal and final determination/declaration of guilt would be the opinion or view of the Court. Such opinion or view must crystallize into a formal and final determination/declaration of guilt which would then be legally construed as conviction.

30. Section 48 provides for as many as 12 punishments starting from death to stoppage of pay and allowances. Punishment of dismissal from service is placed at serial No. 3 in descending order of severity. What is implicit in Section 48 is that after conviction of the accused by a Security Force Court, it must satisfy itself on the basis of the materials before it or the evidence recorded under Rule 151 as to which of the punishments as prescribed in section 48 would be commensurate with the gravity of the offence for which the accused has been convicted.

31. Coming back to the facts of the present case, as noticed above, petitioner was tried by a Summary Security Force Court which was held by the Commandant of the Unit.

32. From a perusal of the record of the Summary Security Force Court it is evident that it was conducted by the Commandant. After charge was read over and explained to the petitioner and after he was asked as to whether he would plead guilty or not guilty to the charge, petitioner answered the question by pleading not guilty. Thereafter, evidence of the prosecution witnesses were

recorded who were not cross-examined by the petitioner. Petitioner also declined to Call any witness in his defence. When he was called upon to make his statement in defence after conclusion of the evidence of the prosecution witnesses, he declined to say anything in his defence. The Summary Security Force Court thereafter opined that on the evidence which were before it, the accused was guilty of the charge. Under the heading "proceedings before sentence" it has been recorded that it was to the knowledge of the Commandant that petitioner was not previously convicted by any Security Force Court or by any Criminal Court. It was also recorded that he was not undergoing any sentence and that irrespective of the trial, his general character was certified to be satisfactory. Thereafter, the Commandant acting as the Summary Security Force Court imposed the sentence of dismissal from service. Proceedings have been counter signed by the DIG, B.S.F. Krishnanagar on 15.03.2007.

33. Two things are quite apparent from the case record. Firstly, there is no order of conviction of the petitioner by the Summary Security Force Court. Though finding has been recorded that the Court was of the opinion that the accused (petitioner) was guilty of the charge, such an opinion did not crystallize into an order of conviction. There was no order of conviction. After all, an opinion is an opinion. An opinion is not the final, formal and conclusive determination of guilt. Therefore, an opinion cannot be equated with a conviction. This though appears to be a technical point, it has a significant bearing because as already discussed above, it is based on the conviction that punishments as prescribed in sub-section (1) of section 48 of the B.S.F. Act are imposed. In the absence of conviction, any punishment imposed under section 48 of the B.S.F. Act would be illegal and untenable.

34. Consequently, a meaningful reading of section 48 with Rule 151 would clearly show that the Summary Security Force Court or for that matter any Security Force Court has to apply its mind on the basis of the materials/evidence before it as to which of the penalty as prescribed under sub-section (1) of section 48 should be imposed which would be commensurate to the gravity of the offence for which the accused has been convicted. In the present case, there is nothing on record to show that the Commandant acting as the Summary Security Force Court had applied his mind to the evidence before him and thereafter decided to impose the penalty of dismissal from service. The Summary Security Force Court is vested with the discretion to impose any one or more of the punishments prescribed in section 48. Discretion to impose any one of the 12 punishments prescribed would have to be exercised judiciously and in a reasonable and rational manner. Punishment cannot be imposed mechanically. In what manner such discretion has been exercised must be discernible from the record, which unfortunately is not the situation in the present case.

35. There is one more aspect None of the witnesses said in their evidence that they had seen the petitioner either talking to smugglers or allowing cattle to pass through the security gate to Bangladesh. All that they said was that they saw

cattle hoof marks on wet soil near the border gate where the petitioner was detailed for duty on 23.08.2006 and that the hoof marks were only in one direction i.e. towards the Bangladesh border. It is not understood as to how therefore so specific a charge could be framed against the petitioner that he allowed safe passage to 4 cattle heads to Bangladesh? There is no evidence at all to the effect that petitioner allowed 4 cattle heads to cross over to Bangladesh. What is even more baffling is that after the petitioner had pleaded not guilty, he did not cross-examine any of the prosecution witnesses. He also neither said anything in his defence nor brought any witness to adduce evidence in his defence. This is surprising indeed as such conduct runs counter to normal human behaviour.

36. For all the aforesaid reasons and taking an overall view of the matter following the deliberations made above, I am of the considered opinion that the impugned punishment imposed on the petitioner cannot be sustained. Accordingly, the impugned order dated 06.12.2006 dismissing the petitioner from service of the B.S.F. is set-aside and quashed. Petitioner shall be taken back on the rolls of the B.S.F. within a period of one month from the date of receipt of a certified copy of this order. However, as he has not rendered any service during the period since his dismissal, no order for payment of arrear salary would be called for. Writ petition is accordingly allowed in the above terms. There shall, however, be no order as to costs. Record produced by Mr. Baruah is returned back.