

(2008) 08 DEL CK 0036
In the Delhi High Court
Case No : Writ Petition (C) 623 of 2005

Rakesh Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-08-2008

Acts Referred:

Army Rules, 1954 — Rule 149

Border Security Force Act, 1968 — Section 21(2), 24, 35, 46

Border Security Force Rules, 1969 — Rule 44, 45B, 45B(1), 45B(2), 48

Citation : (2008) 152 DLT 663

Hon'ble Judges : T.S. Thakur, J;S.N. Aggarwal, J

Bench : Division Bench

Advocate : Anil Gautam, for the Appellant; A.K. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—The petitioner is serving as Commandant in the Border Security Force. He is facing trial by the General, Security Force hereinafter referred to as GSFC for disobedience of lawful command given to him, malingering and for making false allegations against his superiors punishable under Sections 21(2), 24(b) and 35(a) of the BSF Act, 1968. The charges framed against the petitioner read as under:

CHARGE SHEET

The accused Shri Rakesh Sharma, Second-in-Command, IRLA No. 18430868 of 131 Bn BSF attached with 26 Bn BSF is charged with:

(FIRST CHARGE) DISOBEYING A LAWFUL COMMAND GIVEN BSF ACT SECTION 21(2) BY HIS SUPERIOR OFFICER in that he,

at Sector Headquarter BSF Baramulla on 25 Aug 2002 when asked by DIG BSF Baramulla to take over the charge of Commandant SB-II Adhoc Battalion deployed on election duty under Frontier/Sector HQ Baramulla, did not take over the charge of said Battalion as reported by SHQ Baramulla Frontier vide Signal

No. O/4989 dated 29.08.02 & FTR HQ BLA L/No. Ops/517/B Ftr/02/2558-59 dated 25 Sep'02.

(SECOND CHARGE) MALINGERING BSF ACT SECTION 24(b) in that he,

at Sector Headquarter BSF Baramulla on 28 Aug" 2002 with intention of evading his duties to take over charge of SB-II Adhoc Battalion pretended to be sick whereas he was not so suffering as intimated by SHQ Baramulla vide signal No. O/4992 dated 28.08.02.

BSF ACT SECTION 35(a) IN A DOCUMENT SIGNED BY HIM 3RD CHARGE KNOWINGLY MAKING A FALSE STATEMENT In that he,

At 131 Bn BSF Seemanagar (WB) on 29.07.03 when performing the duty of Second in Command of 131 Bn BSF in a letter No. Nil dated 29.07.03 signed by him and addressed to DG BSF, New Delhi, made a statement that Shri R P Singh, DIG/PSO is a interested party as serious allegation are against him in the case, he is manipulating things at various Hqrs and till the time he is there at SB, the question of justice does not arise, knowing well such statement to be false.

2. Aggrieved by the proposed trial by Court Martial on the above counts, the petitioner has filed the present writ petition for a writ of certiorari quashing the order by which he has been put on trial as also the record of evidence and the attachment of the petitioner under the command of the South Bengal Frontier. The petitioner has also prayed for a writ of prohibition restraining Sh Rajender Singh, IG BSF from dealing with the disciplinary proceedings against him and for a mandamus directing the respondents 1 and 2 to initiate appropriate criminal/ departmental proceedings against respondents No. 7 to 10.

3. Briefly stated the petitioner's case is that he was denied 7 days casual leave on extreme compassionate grounds in the year 2002 only because Sh. M.S. Sharma, Second-in-command had to be allowed to proceed on leave even when the latter had already availed leave for the year where as the petitioner had not done so. Aggrieved by the alleged unfair denial of casual leave the matter was reported by the petitioner to DG, BSF who asked for the comments of the officers concerned in response to which Sh. R.P. Singh the then DIG/Principal Staff Officer who was officiating as IG had according to the petitioner sent a concocted reply dated 24th October, 2002 in an attempt to save his skin and to implicate the petitioner. The said communication had also enumerated the alleged acts of misconduct of the petitioner and recommended disciplinary action against him. On receipt of a copy of the above communication, the DIG, BSF, Krishnanagar had asked the Commandant of the petitioner to initiate disciplinary action against him. At the same time, the petitioner was, in terms of a signal dated 12th June, 2003 attached to 26 Bn BSF, New Delhi for disciplinary purposes. The petitioner alleges that he sought an interview with the Director General of the Force and prayed for cancellation of the attachment order who, according to the petitioner, ordered a Staff Court of Inquiry (hereinafter referred to as SCOI). No such inquiry was, however, initiated against the petitioner, who represented to the

Director General, BSF for permission to go back to his unit.

4. The petitioner's further case is that the Commandant of 26 Bn, BSF was pressurised by Sh. Rajender Singh, the then IG to initiate disciplinary proceedings against the petitioner and that instead of ordering a Staff Court of Inquiry, the Commandant had, under pressure from Sh. Rajender Singh, directed the petitioner to appear before him on 12th February, 2004 for hearing of the charges levelled against him. No hearing of the charges, according to the petitioner, took place on 12th February, 2004 or on any other date. The Commandant, all the same, ordered recording of evidence and served upon the petitioner an envelope containing the order for Recording of Evidence and Charge Sheet both dated 12th February, 2004. Aggrieved whereof the petitioner has filed the present writ petition.

5. Appearing for the petitioner, Mr. Anil Gautam strenuously argued that the impugned proceedings initiated against the petitioner were vitiated by reason of a legal infirmity inasmuch as the competent authority had been directed to do what it ought to have done on its own after due and proper application of mind. The disciplinary proceedings it was contended, were initiated at the instance of Shri Rajinder Singh the then Inspector General of BSF and not because the "Commandant" - the authority competent considered it necessary to do so. This argued the learned Counsel amounted to the competent authority abdicating in favour of a superior officer, even when the latter had no role to play under the relevant rules.

6. Per contra it was contended by Mr. A.K. Bhardwaj that there was no question of abdication of any essential power or function by the competent authority in the instant case. He submitted that complaints regarding the petitioners alleged misconduct committed by the petitioner were received by the Frontier HQ BSF, South Bengal from various quarters viz; Ftr HQ BSF BLA, SHQ BSF BLA and SHQ BSF Krishan Nagar. Based on these complaints a detailed report was prepared by Ftr HQ South Bengal as required by FHQ (Per Dte) New Delhi. The direction issued by Ftr HQ BSF South Bengal for taking action against the petitioner after following the due process as prescribed by the relevant rules was justified and could not be said to be incompetent or uncalled for.

7. There is, in our opinion, considerable merit in the submission made by Mr. Bhardwaj that the complaints received against the petitioner could be directed to be looked into in accordance with the procedure prescribed by the rules. The position may have been different if the complaints did not even on a prima facie basis make out a case for any enquiry against the petitioner. A direction to the Commandant to initiate disciplinary enquiry may in that case have amounted to an interference with the exercise of powers vested in him. That, however, is not the case at hand. It is not the case of the petitioner that the complaints based on which the Ftr HQ BSF South Bengal issued directions for initiating disciplinary action against him did not even ex facie disclose the commission of any offence. Such being the case the Ftr HQ BSF South Bengal which exercised administrative

control over the petitioners formation could legitimately direct action to be taken by the competent authority, especially when the competent authority had no discretion in the matter, for once the commission of any offence under the Act was alleged against any officer or subordinate officer, Rule 44 of the BSF Rules, 1969 required the allegation to be reduced to writing in the prescribed form. The said rule is as under:

44. Charge Sheet. Where it is alleged that an officer or a Subordinate Officer has committed an offence punishable under the Act, the allegation shall be reduced to writing in the form set out in Appendix VI.

8. It is evident from the above that the obligation to reduce the allegation against an officer or subordinate officer in the prescribed form arises the moment it is alleged that an offence punishable under the Act has been committed. A perusal of Appendix VI would further show that the same is in the form of a Charge Sheet. It is noteworthy that the very same format is adopted by Rule 53(2) of the BSF Rules in drawing up of the charge sheet. The charge so framed has to be heard by the Commandant in terms of Rule 45B of the Rules who has in terms of Sub rule (2) of the Rule 45B the discretion to either dismiss the charge or to remand the accused for preparation of the record of evidence or for preparation of an abstract of evidence against him. Rule 45B (2) is as under:

45B Hearing of charge against an officer and a subordinate officer.

(1) xxxxxx

(2) After hearing the charge under Sub-rule (1), the officer who heard the charge may---

(i) dismiss the charge; or

(ii) remand the accused, for preparation of a record of evidence or preparation of abstract of evidence against the accused:

Provided that he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him, it is not advisable to proceed further with it:

Provided further that in case of all offences punishable with death, a record of evidence shall be prepared]:

[Provided also that in case of offence under Sections 14, 15, 17, 18 and offence of "murder" punishable u/s 46 of the Act, if the accused has absconded or deserted, the Commandant shall hear the charge in his absence and remand the case for preparation of record of evidence.]

9. There has been and indeed can be no interference with the exercise of the discretion vested in the Commandant under the above provision. It is not the case of the petitioner that any superior authority had directed the Commandant

to exercise the discretion vested in the latter in a particular manner or to a particular end. That being so the argument that the exercise of discretion vested in the Commandant was interfered with by the BSF HQ South Bengal needs to be noticed only to be rejected.

10. It was next contended by Mr. Gautam, counsel for the petitioner that no hearing was given to the petitioner in terms of Rule 45(B) of the BSF Rules. The requirement of a hearing of the officer facing the charge being mandatory, failure of the Commandant to provide such a hearing vitiated the proceedings before him and rendered illegal any subsequent action by way of a court martial.

11. On behalf of the respondent, it was argued by Mr. Bhardwaj that the allegation regarding denial of hearing to the petitioner was not only vague and cryptic but had been specifically denied by the respondents in the counter affidavits filed by them. They further pointed out that the petitioner was heard by the commandant on 12th February, 2004 on 13:10 hours and that in the course of the hearing relevant documents referred to in the record of proceedings were also perused and read over to the petitioner. This was, according to the learned Counsel, evident from the record of proceedings under Rule 45(B) prepared by the Commandant in the prescribed format forming a part of the official record that was produced by Mr. Bhardwaj for the perusal of the Court.

12. Rule 45(B) of the BSF Rules does require that the charge-sheet and the statements of witnesses, if any, recorded and the relevant documents, if any, produced shall be read over to the accused and that the accused shall be given an opportunity to make a statement in his defence. The officer who heard the charge is then competent to either dismiss the charge or remand the case for preparation of the record of evidence or preparation of abstract of evidence against the accused. The allegation of the petitioner, however, is that he was not heard in terms of the said requirement. That allegation has been specifically denied by the respondents on affidavit, according to whom, the Commandant had heard the charge, read over the documents produced before him by the witnesses referred to in the proceedings and given to the accused-petitioner herein the liberty to make a statement in his defence. After conclusion of the hearing of the charge, the Commandant had directed the record of evidence to be prepared by Sh.A. Srinivas, Second-in-Command, 26 Batallion, BSF pursuant to which order the authorized officer had recorded the statements of Sh. Abhay Kumar Ghosh, DIG, STS Bangalore as PW-1, Sh. Mohan Lal Verma, DIG (Coord) FHQ as PW-2, Sh. R.P. Singh, Inspector General, IG (Adm) Force Head Quarters, Border Security Force, New Delhi as PW-3, Sh. M.S. Sharma, Commandant 195, Batallion, BSF as PW-4, Dr. H.S. Shekhawat, CMO(SG), 128 Batallion, BSF as PW-5 apart from the statement of the petitioner himself. In the course of record of evidence the petitioner had also examined SI/Clerk Randhir Singh, 131 Batallion, BSF as DW-1, SI/Clerk D.S. Pathania, 26 Batallion, BSF as DW-2 and Head Clerk C.P. Chacko, 26, Batallion, BSF as additional prosecution witness No. 6. The recording officer had then issued a certificate on 4th August, 2004 to the

effect that the record of evidence ordered by the Commandant was made in the presence and hearing of the accused and that the provisions of BSF Rule 48 had been complied with.

13. From the record of the proceedings produced before us, it is evident that not only was the petitioner given a hearing in terms of Rule 45 B which fact has been specifically recorded in the proceedings prepared by the Commandant but also that after the hearing of the charge the petitioner was all through present and participating in the proceedings before the recording officer and had cross-examined each one of the prosecution witnesses apart from adducing his own evidence in defence. The allegation that the petitioner was not heard in terms of Rule 45 B is, therefore, not only refuted on affidavit by the respondents but is contrary to the official record of the said proceedings which clearly supports the version of the respondents that such a hearing was indeed provided.

14. That apart, the participation of the petitioner in the subsequent proceedings, viz; the record of evidence, his cross-examining the witnesses for the prosecution and making his own statement clearly establish that the procedure followed by the Recording Officer in the course of the record of evidence was also fair and had given every possible opportunity to the petitioner to prove his case. The contention urged by Mr. Gautam that a hearing was denied to the petitioner which had resulted in miscarriage of justice, therefore, remains unsubstantiated. The Commandant had the power to direct recording of evidence based on what transpired during the course of the hearing of the charge and the material that was available before him to finally determine whether the petitioner had to be tried by a court martial. The record of the evidence also being an investigative process, all that was required was that the said process must be undertaken fairly and without any bias or pre-conceived notions about the guilt of the petitioner. There is, in our opinion, nothing in the writ petition or in the official record produced before us to even remotely suggest that those basic requirements of fairness in action were given a go-bye at any stage either during the hearing of the charge or recording of evidence to warrant our interference with the action proposed against the petitioner. We have, therefore, no hesitation in repelling the second limb of petitioner's argument also.

15. It was next argued by Mr. Gautam that in the course of the record of evidence, the petitioner was not given reasonable opportunity to cross-examine the witnesses produced by the prosecution or to adduce his evidence in defence. We find no merit whatsoever in that contention also. The official record produced before us by the respondents bears testimony to the petitioner being given an opportunity to cross-examine but his having availed that opportunity by actually cross-examining the witnesses at length. We have also noticed from the record that the petitioner had been non-cooperative with the entire process throughout and even when he had exercised his right to cross-examine all the prosecution witnesses, he had declined to sign the said statements when asked to do so. No prejudice or fault can, therefore, be found with the procedure adopted by the

Recording Officer nor has any prejudice been demonstrated before us by the learned Counsel.

16. Mr. Gautam next contended that the entire exercise of hearing of charge and record of evidence was actually a camouflage to somehow take punitive action against the petitioner. He submitted that a signal had been sent by the Commandant on 20th July, 2004 to the effect that the ROE shall be submitted to Sh. Rajinder Singh, IG, BSF. Since the initiation of the proceedings was at the instance of Sh. Rajender Singh, the submission of the proceedings to him was intended to teach a lesson the petitioner and punish him for an alleged misconduct which he had not committed. It was also contended that since the petitioner's unit had been transferred to another frontier, the petitioner could not be brought back on attachment to the old frontier under Sh. Rajender Singh, IG and that any court martial in any formation under Sh. Rajender Singh's command or jurisdiction was bound to cause prejudice and result in grave miscarriage of justice to him.

17. We regret our inability to accept submissions of Mr. Gautam even in regard to the alleged malafides of respondents in attaching the petitioner to the old frontier. The contention that Sh. Rajender Singh was biased against the petitioner and that the entire exercise was meant to somehow find an excuse to punish him is unsupported and unsubstantiated by any material on record. We need not dilate on this part of the controversy any further having regard to the fact that Sh. Rajender Singh against whom the petitioner has expressed his apprehensions has since retired and is no longer in a position to influence the course of future events. We may at this stage refer to the decision of the Supreme Court in *Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827)*, where the Court has authoritatively declared that while court martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the same is not subject to the superintendence of the High Court under Article 227. Their lordships have further held that if a court martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must be slow to interfere. The Court has further observed that requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. Following passage from the said decision is in this record apposite:

23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands.

Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the CrPC where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment.

18. In the light of above, we see no merit in this writ petition which fails and is hereby dismissed but in the circumstances without any order as to costs.

19. We make it clear that if petitioner is eventually tried by a court-martial, he shall be free to question the outcome of the same on all such grounds as may otherwise be open to him in law and that nothing stated in the foregoing paras of this judgment would be taken as the expression of any opinion about the validity of the court martial or the out come thereof.