
(1996) 05 DEL CK 0097

In the Delhi High Court

Case No : Civil Writ Appeal No. 4481 of 1993

Ram Vir Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-05-1996

Acts Referred:

Border Security Force Rules, 1969 — Rule 26

Citation : (1996) 3 AD 63 : (1997) 40 DRJ 721

Hon'ble Judges : Kripa Shankar Gupta, J;Devinder Gupta, J

Bench : Division Bench

Advocate : R.P. Sharma, E.X. Joseph and S.T. Siddiqui, for the Appellant;

Judgement

Devinder Gupta, J.

(1) Petitioner has, in this writ petition, prayed for quashing of the order, annexure P-7 dated 30.3.1993, of his removal from service.

(2) The facts in brief are that the petitioner joined Border Security Force (for short B.S.F.) as a Constable in 1989 and was promoted as Naik, Radio Operator, in the Communication set up of B.S.F. In the month of March, 1993, the petitioner was deployed in 7th Bn. B.S.F. Ajnata, Amritsar, on 3.3.1993 Officiating Commandant A.S. Gill of the Battalion detailed Bhupinder Singh, Assistant Commandant of the Unit, to prepare Record of Evidence in the case of the petitioner, who was stated to have been charged for an offence u/s 20(a) of the Border Security Force Act, 1968 (for short the "Act"), which was required to be done, in accordance with Rule 48 of the Border Security Force Rules, 1969 (for short the "Rules"). Assistant Commandant was also enjoined upon to comply with the requirements of sub rule (8) of Rule 48, after recording the statements. Record of Evidence, duly completed, was required to be submitted on 6.3.1993.

(3) It is the petitioner's case that he was not supplied with any charge sheet. He was also not heard by the Commandant, before the order dated 3.3.1993 was passed, detailing the Assistant Commandant for preparation of the Record of

Evidence and, thus, the act of ordering the preparation of the record is in violation of the statutory procedure. It is alleged that petitioner had refused to carry out some private job of the Commandant, which infuriated him and with a view to teach the petitioner a lesson, a false charge of "using criminal force to a superior" u/s 20(a) of the Act, which entails 14 years rigorous imprisonment was framed.

(4) It is also alleged that on 12.3.1993 the Commandant issued another order Constituting the Board of Officers to screen the performance and service record of the petitioner and also to assess his suitability for retention in service. The Board was directed to submit its recommendation by the following day, namely, 13.3.1993. The Board of Officers comprised of Chairman Shri A.S. Gill, Second-in-Command, Shri K.K. Singh, Deputy Comdt. and Shri Bhupinder Singh Assistant Commandant (both members). It is further alleged that the next morning, namely, 13.3.1995, the Commandant called the petitioner in his office and was informed that he has been awarded the punishment of "severe reprimand", for the offence, allegedly committed by him. The same evening, the petitioner was summoned to the unit office and dispatch clerk handed over to him a show cause notice issued by the Commandant for petitioner's pre-mature retirement under Rule 26, on the ground of unsuitability. It is also alleged that the Commandant inflicted punishment on the petitioner, in violation of Rule 47, on 13.3.1993. It was done with a view to add one or more punishment in the service record of the petitioner, so that a case could be made out against him for his pre-mature termination. On 25.3.1993 Commandant issued yet another order Constituting second set of officers to screen the service record and performance of the petitioner. The Board was required to submit its recommendation. Composition of this Board this time was changed and the Board comprised of Deputy Commandant Shri R.K. Singh, Chairman, and Deputy Commandant Shri S.C. Puri and Assistant Commandant Shri Kanwaljit Singh (both members). It is petitioner's case that he submitted his reply to the notice but the same was rejected and on 30.3.1993 the impugned order was passed, retiring him from service.

(5) Against the impugned order a representation was made which was also rejected. The petitioner has challenged both these orders on the ground that the impugned orders are neither bonafide, nor passed in accordance with the provisions of law. On 3.3.1993 he was charged u/s 20(a) of the Act, for using Criminal force to a superior and a Record of Evidence was ordered to be prepared. On 12.3.1993 the Commandant constituted a Board to screen the service record of the petitioner, with a view to assess his suitability for his further retention. On 13.3.1993 Commandant summoned him in the office and informed that he had been awarded punishment of severe reprimand. This could be done by the Commandant in exercise of his jurisdiction to summarily try an incumbent. Rule 47 prohibits the trial of offence u/s 20(a) summarily. In order to avoid proper trial, with malafide designs the provision under which the offence was alleged to have been committed was changed to a different charge, so as to

make it summarily triable, which ultimately was done with a view to add one more adverse order on the petitioner's record, which ultimately would have facilitated the respondents in weeding out the petitioner from service and, thus, the action of the Commandant in removing the petitioner from service summarily was a cloak and, thus, preventing the petitioner from having a fair trial for an offence u/s 20(a) of the Act.

(6) Respondents in their reply, filed on the affidavit of R.S. Mehta, Deputy Inspector General, Shq, Shillong stated that the petitioner had served for 3 years 11 months and 23 days in Bsf, during which he had earned four separate punishments for various offences, namely, (a) Awarded "Severe Reprimand" on 14.10.1992 for committing an offence for deserting from Bsf Campus while on active duty; (b) Awarded "Severe Reprimand" on 2.1.1993 for absenting himself without leave; (c) Awarded "Severe Reprimand" on 27.2.1993 for absenting himself without leave; and (d) Awarded "Severe Reprimand" on 13.3.1993 for using insubordinate language to his superior officer. Looking at the overall performance and conduct of the petitioner, a show cause notice was issued on 13.3.1993 by Commandant, Bsf, tentatively proposing to retire him from service on the ground of unsuitability under Rule 26 and before issuing show cause notice a Board of Officers was also constituted to examine his service record. The Board scrutinised the service record and made due recommendations and it was after a proper and detailed scrutiny that the petitioner was retired from service w.e.f. 31.3.1993. It is also stated that the order for conducting "Record of Evidence" was also issued on 3.3.1993 for an offence u/s 20(a) of the Act by A.S. Gill, Second in Command, who was then officiating Commandant in the Unit. The order was, however, cancelled on 10.3.1993. Since the petitioner had committed an offence u/s 20(c) of the Act in having used insubordinate language to his superior officer he was rightly tried by the Commandant u/s 53 of the Act, which was very much within the competence of the Commandant. In this background it is stated that there is no merit in the petition, which deserves dismissal. Petitioner was a chronic case of indiscipline and the impugned order of removal from service was passed in exercise of the powers under Rule 26 looking at over all performance and conduct of the petitioner.

(7) Counsel for the parties were heard. Counsel or the respondents also made available the relevant service record of the petitioner for our perusal. Contention of the learned counsel for the respondents has been, that it is a simple case of removal from service, in bonafide exercise of the powers of Commandant under Rule 26 of the Rules, which is not liable to be challenged, on the grounds alleged; virus of the Rules is not under challenge. The Court in exercise of writ jurisdiction will not interfere with the decision, arrived at by the Commandant, on the basis of the recommendation made by the Board of Officers, who had gone through the service record and seen the performance of the petitioner. Learned counsel for the petitioner contended that this court is not precluded to look into the real circumstances as well as the basis and foundation of the order impugned against. In the light and circumstances as have been brought on record and as

are born on record there is no manner of doubt that after denying fair opportunity of a regular trial, in mala fide exercise of power, the offence was converted and changed into an offence which is triable summarily and after doing so, punishment of serve reprimand was inflicted, which was included in the punishments earlier awarded. The same was taken into consideration by the Board of Officers, while making their recommendations for petitioner's premature retirement, which could not have been done and, thus, the decision is vitiated.

(8) Section 20 of the Act with which we are concerned reads as under :

"20, Striking or threatening superior officers : 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 officer; or (b) uses threatening language to such officer; (c) uses insubordinate language to such officer; shall, on conviction by a Security Force Court :- (A) if such officer is at the time in the execution of his office or, if the offence is committed on active duty, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as in this Act mentioned: and (B) in other cases, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as in this Act mentioned: Provided that in the case of an offence specified in clause (c), the imprisonment shall not exceed five years."

"USE of criminal force or assault on superior officer is an offence under Clause (a) of Section 20 and if such an offence is committed on active duty, person accused of the offence is liable to be punished for a term which may extend to 14 years. Use of insubordinate language to an officer is a separate offence under clause (c) of Section 20, which is punishable with imprisonment not exceeding five years. Chapter Vi, of the Rules deals with the investigation and summary disposal of some offences. Chapter Viii pertains to the framing of charge sheet and matters antecedent to trial. Chapter Ix of the Rules prescribes the procedure in the Security Force Courts. At the stage of investigation, it is provided in Rule 43, that where it is alleged that person subject to the Act has committed an offence, punishable thereunder, allegations shall be reduced to writing, which is to be done in the form set out in Appendix IV. Hearing by the Company Commandant is the next step. Rule 44 deals with the manner in which hearing is to be afforded by the Company Commandant. Sub-rule (1) of Rule 44 says that a person, who is subject to the Act, other than an officer, will be heard by the Company Commandant and the witnesses shall give evidence in the presence of the accused, who shall have a right to Cross-examine and the accused will have a right to call witnesses in defense. After hearing the charge, Company Commandant may award any punishment, which he is empowered to award or dismiss the charge, when it is not proved; or may refer the case to a Commandant. Commandant's power to hear are specified under Rule 45, Commandant, after hearing, is entitled to dismiss the charges, if in his opinion the charge is not proved or 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. It is under clause (iii) of Rule 45 that when Commandant has heard the officer, he is entitled to remand the accused for preparing "a Record of Evidence" or for preparation of an abstract of evidence against him. It was under clause (iii) of Rule 45 that on 3.3.1993 A.S. Gill, Officiating Commandant detailed Bhupinder Singh, Assistant Commandant, to prepare a Record of Evidence, who was also required to comply with Rule 48, which gives details and the manner in which Record of Evidence is to be prepared. As it was case in which the petitioner was charged for an offence under clause (a) of Section 20 of the Act the same could not have been dealt with summarily, as is provided under Rule 47."

(9) We have examined the service record of the petitioner. It is also the case of the respondents that Bhupinder Singh, Assistant Commandant, did not proceed to prepare the Record of Evidence, which he was required to prepare through order dated 3.3.1993, Annexure P-1. This order came to be cancelled by the Commandant. What prompted the Commandant in cancelling the order, Annexure P- 1 by which A.S. Gill, Officiating Commandant had directed Bhupinder Sigh to prepare Record of Evidence, is neither stated in the counter, nor can be ascertained from the service record, which has been produced for our perusal. The order passed on 10.3.1993 simply says:

"AS approved by the Commandant the order regarding record of Evidence in the case of No. 89076013 NK/RO Ramvir Singh of Sig Pl this unit, issued vide this office O/No. Estt/710/93/2089-94 dated 3 March, 1993 are hereby cancelled."

(10) In view of the specific allegations made by the petitioner that the order, annexure P-1, was cancelled and the charge was converted into a charge u/s 20(c) of the Act to enable the Commandant to summarily punish the petitioner with malafide intention, it was but necessary for the respondents to have shown the reason for making abrupt change in the offence. Form in Appendix Iv which was filled up for the charge for which preparation of the Record of Evidence was ordered stated :

"BSFACT 1968 U/Sec-20(a) Assaulting His Superior Officer In that he, at Bn Hq on 26.2.93, when ordered by In spr (T) Joginder Sigh (I/C Comn) to change date of his correct arrival in his Ta Bill, assaulted up while the So sitting in office at 260945 hrs. in presence of NK/HO Kc Roy (Signal Clerk)."

(11) Form in Appendix Iv aforementioned also bears an endorsement dated 3.3.1993 which says :

"ROE to be recorded by Shri Bhupinder Singh Ac and to submit proceedings by 6th March 1992."

(12) There is no entry or endorsement on this document, as to why there was abrupt change in the offence alleged or the reason why this order for recording of evidence was cancelled. Instead, another form prescribed in vail Iv was filled

up, which states that on 26.2.1993 at Ajnala the following offence was committed by the Petitioner :

"BSFACT 1968 U/Sec-20(c) Using Insubordinate Language To His Superior Officer In that he, at Bn Hq on 26.2.93, when ordered by In spr (T) Joginder Singh to change date of his correct arrival in his Ta Bill said who are you to order to do so."

(13) The endorsement on this Form is of 13.3.1993 by the Commandant which says :

"SEVERELY Reprimanded"

(14) Neither in the reply filed, nor from the record it is shown that how and under what circumstances the offence u/s 20(2) of the Act was changed to an offence u/s 20(dc) of the Act, which is not only separate but different offence than the one, which had earlier been alleged against the petitioner. There is also no material on record even to draw an inference justifying the change. Form in Appendix Iv, filled in this case on 13.3.1993 records that the petitioner had pleaded guilty. It is petitioner's case that he was called to the office on 13.3.1993 and was apprised that Record of Evidence had been prepared and he had been awarded punishment of "severe reprimand". There is no Record of Evidence constituted . There is also no other material on record which would show that instead of assault, it was the use of abusive language by the petitioner. Admittedly the Commandant did not act of his own, when order dated 3.3.1993 was passed. It was passed by A.S.Gill, the Officiating Commandant, when allegation was of an assault to superior, namely, Joginder Singh (Inspector). The offence u/s 20(a) of the Act could not have been tried summarily. The only inference, thus, which can be drawn is that only with a view to try it summarily, the offence was changed to become an offence under Clause (c) of Section 20 which was done on 13.3.1993, namely, use of abusive language. Statement of Joginder Singh is not on record. It was done on 13.3.1993, before which date Commandant had already ordered the constitution of Board of Officers for screening the performance and conduct of the petitioner. Show cause notice was also issued on 13.3.1993, which also included the punishment inflicted on the same day. The Board apparently formed its opinion on that basis. A fresh Board of Officers was constituted on 25.3.1993 which also formed its opinion taking into consideration the punishment inflicted on 13.3.1993 and it was on the basis of this opinion that ultimately the impugned order was passed on 30.3.1993.

(15) In view of the aforementioned circumstances and the state of record, when there are allegations made by the petitioner assailing the order of implicate retirement on the ground of unsuitability under Rule 26 and when an allegation is made that the same is based upon misconduct though couched in innocuous terms, it is incumbent on the Court to lift the veil and to see the circumstances as well as the basis and foundation of the order complained of, in the light of the ratio of the decisions in Sheo Dutt Sharma Ors. Vs. State of U.P. and Others, ,

Nepal Singh Vs. State of U.P. and Others, , Jarnail Singh and Others Vs. State of Punjab and Others, , and Om Prakash Goel Vs. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla and another, , the court is not precluded to lift the veil and see termination of service is not so innocuous as claimed to be or the circumstances further disclose that it was only a camouflage with a view to avoid a full inquiry.

(16) Nothing prevented the respondents, in case they wanted to take any action against the petitioner, only on the basis of the past three punishments inflicted on him on 14.10.1992, 2.1.1993 and 27.2.1993, which are not under challenge in this petition. Commandant could have taken the action, in the exercise of powers under Rule 26, in case he so wanted, which was not done. Instead of doing so, it appears that the Commandant under the impression that it was necessary to have at least one more punishment, to take any action under Rule 26. It also appears that the Commandant under the impression that trial for an offence u/s 20(a) was likely to take considerable and sufficient time, in his anxiety to take action against the petitioner under Rule 26 ordered the cancellation of order dated 3.3.1993. Alleged incident of 26.2.1993 was changed to be an offence falling within the ambit of clause (c) of Section 20 instead of under clause (a) of Section 20. The said offence on conversion was tried summarily and then the same was included on the same day, in the show cause notice, which was served upon the petitioner. The alleged incident of 26.2.1993 is specifically denied by the petitioner and the circumstances also disclose that such an incident might not have happened at all. It was on 27.2.1993 that A.S.Gill had passed an order for the offence u/s 19(a) of the Act in the petitioner having absented himself, without leave, on the allegation that having been relieved of his duties at Ftr Hq Bsf Jal on 20.2.1993 (AN) and directed to report the Commandant 7 Bn Bsf, after completion of Pl Route Cadre Srl No. 01 he absented himself enroute without leave till 23.2.1993 and the total period of absence was stated to be 02 days.

(17) In the absence of any material on record justifying the reason for conversion of offence from clause (a) to clause (d) of Section 20 and in the absence of any material or record in support of the said offence or any other material, the impugned action of the respondents cannot be sustained in law, which is liable to be quashed and set aside.

(18) Consequently the writ petition is allowed, impugned order, annexure P-2, and the punishment inflicted on 13.3.1993 are quashed and set aside. As a result of this it is directed that the petitioner will be taken back in the job forthwith with all consequential benefits including back wages and continuity in service. Liberty, however, is reserved to the respondents to take actions, if any, in accordance with law against the petitioner.