
(2012) 09 MP CK 0278

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1024 of 2000

Ramashray Prasad Dwivedi

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Border Security Force Act, 1968 — Section 20(a), 20(b)
Constitution of India, 1950 — Article 226

Citation : (2012) 09 MP CK 0278

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Advocate : Udyan Tiwari, for the Appellant; Kanak Gaharwar, Learned Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Hon''ble Shri Justice Rajendra Menon

1. Challenging the order dated 5th July, 1999 passed by the Commandant, B.S.F. dismissing the petitioner from service on the basis of finding recorded in a Summary Security Force Court held in accordance to the Border Security Force Rules, 1969, this writ petition has been filed. Petitioner joined the force on 1.4.1987 as a Constable. It seems that in July, 1999 while the petitioner was posted as a Constable in E.Coy 195 Battalion B.S.F. under the control of respondent No. 3, a charge sheet was issued to him vide Annexure P/1 wherein it was alleged that on 29th June, 1999 at about 19.45 hours when Shri S.K. Ghosh, AC was talking to various persons, the petitioner Constable Ramasray slapped Shri Ghosh AC and Company Commandant on the left side of the face, threatened to shoot him and kill him. On the ground that the aforesaid act was committed without any provocation, allegations were leveled in the charge sheet issued to the petitioner, thereafter a Summary Security Court was convened, the proceedings of the Court were held on 5.7.99 and in the said proceeding the petitioner''s guilt having been established, the impugned action is taken.

2. Challenging the impugned action without taking recourse to any statutory remedy available departmentally for filing a appeal, petitioner has approached this Court.

3. Initially the writ petition was dismissed on 17.2.2006 by this Court on the ground that the cause of action for the writ petition accrues in the State of West Bengal and therefore, this Court has no jurisdiction. However, a Division Bench of this Court on 16.8.2007 in W.A. No. 1/2006 interfered and held that a part of the cause of action arose within the jurisdiction of this Court. As a result the order passed on 17.2.2006 dismissing the petition was set aside and the matter is now being heard on merit.

4. Shri Udyan Tiwari, Learned Counsel appearing for the petitioner argued that the petitioner is charged for having committed an offence punishable u/s 20(a) of the Border Security Force Act, 1968. He refers to the provision of Section 20(a) and argues that the said provision only pertains to commission of an offence by use of criminal force or assault. The said provision does not pertain to threatening to kill without provocation which comes u/s 20(a) and as the charges are only framed u/s 20(a) there is certain defect in framing of the charges and therefore, the entire action stands vitiated. Thereafter it was argued by him that the entire enquiry was completed in a single day, proper opportunity of engaging a defence counsel or a friend of the accused was not granted to the petitioner. One Assistant Commandant S.K. Rudra was nominated as friend of the accused/ defense counsel without the consent and approval of the petitioner and therefore, the entire action is without giving proper opportunity to the petitioner. It is stated that petitioner was through out in custody after the incident took place and as the mandatory provisions of Rule 63(2) and Rule 157 have not been complied with, Learned Counsel argues that the entire action taken stands vitiated. Shri Udyan Tiwari further submitted by taking me through the statements of various witnesses recorded in the trial to emphasize that there are discrepancies in the statement of witnesses, the allegations leveled are not proved and therefore the entire action is unsustainable. Shri Udyan Tiwari refers to an appeal allegedly filed by the petitioner as contained in Annexure P/4 and tried to emphasize that petitioner has been falsely implicated because the petitioner had demanded for a vehicle to carry him and the Commandant annoyed with the same has falsely implicated the petitioner and as entire action is taken in an illegal manner without giving due opportunity to the petitioner, the same stands vitiated. He submitted that the allegations leveled against the petitioner is not properly proved and as the enquiry is conducted in an illegal manner in total disregard to and in total violation of the principles of natural justice the action stands vitiated. He submitted that interference be made into the matter and petitioner's right be protected.

5. Respondents represented by Smt. Gaharwar has opposed the aforesaid and Smt. Gaharwar submits that after the impugned action was taken on 5.7.99, the petitioner immediately filed this writ petition within a few days on 30.1.2000

without even caring to file a statutory appeal to the competent authority. It was further emphasized by her that originally when the petition was filed in the year 2000 no such grounds as are being canvassed for the present were raised and even the so called appeal Annexure P/4 was not filed initially with the writ petition. It is pointed out that the petition is signed and dated 24.8.99 even though it is shown to be presented on 31.1.2000. It is stated that it is only after amending the petition in August 2003 that all these grounds were raised and Annexure P/4 introduced. Referring to Annexure P/4 she submits that it does not bear the signature of any person, it is typed copy of complaint allegedly submitted by petitioner's wife and even in this appeal Annexure P/4 dated 20.7.99 no grounds as are canvassed in this writ petition are raised. Accordingly, her first objection is that petition filed without taking recourse to the statutory remedy available is not permissible and as disputed question of facts with regard to grant of opportunity is involved. Thereafter, she invites my attention to the proceedings in the Summary Security Force Court from page 34 onwards of the return and argues that the entire trial was held in accordance to the requirement of the statutory provisions namely the procedure contemplated in the Border Security Force Rules, 1969 and as the petitioner participated in the proceedings without any objection and did not avail of the opportunity granted to him, therefore, he cannot now make any complaint in the matter. It is emphasized by her that petitioner has made all these grounds as an after thought when the entire enquiry was conducted in accordance to the requirement of the statute. Referring to the provisions of Rule 63(3) of the Border Security Force Rules, 1969 and the period of 24 hours stipulated in the statute to be granted to the accused to prepare his defence, Smt. Gaharwar submits that in the Summary Security Force Court as the action is taken after granting 5 days time to the petitioner, the charge sheet was issued to him on 1.7.99, thereafter proceedings were held on 5.7.99 she emphasized that the contention of the petitioner that he was not granted opportunity is not correct. Referring to the procedure followed it was emphasized by her that petitioner has come out with a false claim. She refers to the statements of witnesses, opportunity granted to the petitioner to cross examine the witnesses, the refusal in accepting this opportunity by the petitioner, further opportunity granted to the petitioner to give his own statement and produce defense witnesses, denial of the same by the petitioner and further invites my attention to Rule 157 and 122 of the Rules of 1969 and argues that friend of the accused is only permitted under the statutory rules to be present as an Assistant to the petitioner or the accused person and he is not entitled to cross examine the witnesses or address the Court. Referring to the provisions of Rule 157 and requirement of Rule 122 Learned Counsel argues that in the present case, the petitioner did not take the assistance of the friend of the accused nor did he make any objection to the competent authority at the relevant time and by contending that the allegations now leveled by the counsel at the time of hearing after amending the petition in the year 2003 is nothing but an after thought only to make out a defence for assailing the impugned action, Smt. Gaharwar submits that petitioner a Member of Discipline Force has

assaulted the superior officer in the presence of more than 4 persons and as action is taken in the matter in accordance to law after complying with the requirements of statute, the same does not call for any interference. Smt. Gaharwar submits that evidence available on record shows that petitioner was guilty of the allegations leveled against him and therefore, interference into the matter by again appreciating the evidence and by taking note of certain minor discrepancies pointed out by Shri Udyan Tiwari is not called for. It is submitted by her that this is beyond the scope of judicial review in a petition under Article 226 of the Constitution.

6. I have heard Learned Counsel for the parties and perused the record. A very important omission on the part of the petitioner which has a lot of bearing in the case is to be taken note of. It is seen that the petition is shown to have been prepared on 24.8.99, it is signed by the petitioner and his counsel on 24.8.99 and challenge is made therein to a order impugned dated 5.7.99. An affidavit to the petition is also sworn at Jabalpur on 24.8.99 and the oath Commissioner has affixed his signature and attestation on 24.8.99. However, the petition is actually presented in the Court on 31.1.2000. Be it as it may be, the petition as was originally filed, did not raise any ground as is now canvassed by Shri Udayan Tiwari at the time of hearing. Even there is no mention with regard to any appeal filed by the petitioner as Annexure P/4 on 20.7.1999. The petition as was originally filed only stipulates that the petitioner has not committed any offence, he has already tendered his apology through his wife, he was mentally disturbed and, therefore, he has sought for reinstatement in service and prayed for natural justice, but nothing has been done and, therefore, he filed the writ petition after a period of one and a half months of the incident. At that point of time, he did not raise any ground as is canvassed at the time of hearing. It is for the first time that is after three years of the filing of the writ petition, that an amendment was made in the writ petition and all the ground with regard to breach of statutory rules pointed out and Annexure P/4 introduced as an appeal. However, Annexure P/4 is only a memorandum submitted by petitioner's wife to the Director General of Border Security Force, New Delhi, wherein she makes certain allegations of harassment of the petitioner, in this also he does not challenge the summary trial or the action initiated in the matter. It is, therefore, a case where the grounds now canvassed has to be viewed in the backdrop of the aforesaid factual aspects, particularly when it is the case of the respondents that the grounds canvassed now is an after-thought, after the petitioner had participated in the trial on 5.7.1999 without any objection.

7. At this stage, it would be appropriate to take note of the proceedings that were held in the matter.

8. The incident is said to have taken place on 29.6.1999. On 30.6.1999, the allegations and charge-sheet in accordance to Appendix 6 to Rule 53(2) of the BSF Rules, 1969 is prepared; names of five witnesses are indicated as witnesses to the incident; and, after preparing the charge-sheet on 30.6.1999, the same is

served on the petitioner on 1.7.1999 itself. The charge-sheet is served on the petitioner alongwith statement of five witnesses, as are recorded and the petitioner is granted 24 hours time as contemplated under Rule 63(6) to give his defence in the matter. Thereafter, a Summary Security Force Court is constituted and the petitioner is directed to appear before the Court on 5.7.1999. On 5.7.1999 the summary proceedings of the Court are conducted by the Presiding Officer - Commandant G.S. Sandhu; Shri Mohan Singh, Deputy Commandant; and, Sub B.S. Rawat were present as Representative for the Department and Interpreter; and, Shri S.K. Rudra, Assistant Commandant, was the next friend and defence counsel of the petitioner. After oath was administered in accordance to the requirement of the Statute, the charge-sheet translated in Hindi was explained to the petitioner and he was asked as to whether he pleads guilty or not. The proceedings recorded on 5.7.1999 indicate that the accused, namely the petitioner, refused to speak and did not say anything. He was asked to submit his say, but he again refused to say anything. Accordingly, it was recorded that he is pleading not guilty and after holding that the requirement of Rule 142(1) of the BSF Rules, 1969 has been complied with, the petitioner was held to have pleaded not guilty and the matter proceeded with. Five witnesses, who were present, were examined as PW-1 HC Baljit Singh; PW-2 HC Abhimanyu Yadav; PW-3 CT Kamlesh Kumar; PW-4 Shri S.K. Ghosh, Assistant Commandant; and, PW-5 Constable Karna Ram. PW-1 HC Baljit Singh gave his statement and narrated the incident that took place on 29.6.1999 and testified as an eye-witness. Certain questions were put to him by the Court and thereafter he was presented to the petitioner, for cross-examination. Petitioner refused to cross-examine or speak anything, therefore, by recording that the petitioner is refusing to speak and cross-examine the witness and by holding that the requirement of Rules 89 and 90 have been complied with. The second prosecution witness PW-2 HC Abhimanyu Yadav was examined. In his case also the petitioner behaved in the same way and likewise all the witnesses were examined and cross-examined. Neither the petitioner said anything and he refused to cross-examine them. After the five witnesses of the prosecution were examined, the prosecution closed its case and thereafter the Presiding Officer asked the petitioner whether he wants to examine any witness in defence or whether he wants to say anything in his defence. The proceedings indicate that the petitioner refused to give any reply, he persisted with total silence and, therefore, the statement was recorded that the accused does not want to give any defence and refused to make his defence statement. Thereafter, the Enquiry Officer proceeded with convicting the petitioner in accordance to the statutory rules and recorded his sentence, which was promulgated in accordance to the Rules and the impugned action taken.

9. From the aforesaid narration of facts, it would be clear that the inquiry was conducted in accordance to the requirement of the Rules and even though the petitioner was present throughout in the inquiry, but he refused to say anything and after the impugned order was passed on 5.1.1999, he did not even bother to submit an appeal or representation to any Higher Appellate Authority or make

any complaint with regard to the matter. He simply filed this writ petition and as indicated hereinabove, did not even raise any ground as was raised in this writ petition. Under such circumstances, the assumption that the grounds raised by the petitioner are an after-thought, brought out for the first time after having participated in the inquiry in accordance to the facts as are narrated hereinabove, without any objection has to be given due weightage and the conduct of the petitioner in raising the grounds now viewed with suspicion. Accordingly, there is much force in the contention of Smt. Kanak Gaharwar that the grounds raised by the petitioner now are nothing, but an after thought, when liberty was granted to him, he refused to avail of the same.

10. Be it as it may be, even if the grounds raised by the petitioner in this writ petition are taken note of, the first ground is with regard to framing of charge u/s 20(a) and not under 20(b). Section 20(a) of the BSF Rules, 1968 only contemplates that a person commits an offence if he uses criminal force or assaults his Superior Officer. Admittedly, petitioner is alleged to have assaulted Shri S.K. Ghosh, Assistant Commandant and, therefore, an offence u/s 20(a) is made out. Section 20(b) pertains to use of threatening language to an office and when the petitioner has threatened to kill Shri Ghosh, this offence is also made out. Merely because in the communication made to the petitioner, it is not mentioned that the offence u/s 20(b) is also made out, that would not vitiate the entire proceedings as canvassed by Shri Udayan Tiwari. It is not a ground on which a writ court should interfere merely because a section which is attracted in the matter is not mentioned in the charge-sheet. The petitioner is guilty of assaulting and also of insubordination and for that he has been punished. That being so, merely on the ground that section 20(b) has not been mentioned in the charge-sheet or that the petitioner is not proceeded under that section, the entire action cannot be interfered with.

11. As far as grant of opportunity to the petitioner is concerned, it is clear that the inquiry was conducted in accordance to the Rules and the petitioner during the inquiry chose to remain silent and did not avail of the opportunity granted to him. It was tried to be explained by Shri Udayan Tiwari during the time of hearing that the petitioner was kept in custody, he was not given any opportunity and he was compelled to participate in the proceedings under pressure. If that was so, position would have objected at least after 5.7.1999 when the trial concluded and the impugned action was taken. If the petitioner was right in so contending that he has been compelled to participate in the inquiry by use or force or coercion and was not given any opportunity, then atleast immediately after 5.7.1999 or atleast till filing of the writ petition he should have made a complaint to the Higher Authorities or atleast pointed out to this Court when he filed the writ petition about these actions. When the writ petition was drafted by the petitioner's counsel on 24.8.1999 and even when it was presented before this Court on 30.1.2000, no such allegation is made. If the unamended petition is taken note of, it would be seen that there is no allegation of the nature as canvassed now at the time of hearing. It was only stated by the petitioner that

he has been falsely implicated in the case, it is Shri S.K. Ghosh, who has assaulted the petitioner and abused him on flimsy grounds and he is being harassed. That being so, it is a case where the ground of non-availing of opportunity is raised for the first time in the year 2003 and even the documents in support thereof or material in support are not forthcoming from the petitioner. It is a case where the petitioner had participated in a statutory trial held without any complaint and he is now raising grounds, which seem to be incorrect.

12. That apart, records indicate that one Shri S.K. Rudra was nominated as a defence counsel for the petitioner. There is nothing to show that the petitioner objected to his nomination. It is only stated that Shri Rudra kept quiet and did not defend the petitioner properly. Shri Rudra is only a friend of the petitioner and when the statutory provision i.e..... Rule 122 and 63(6) prevents a defence counsel or a friend of the Court from cross-examining or addressing the Court, there is no error if the defence counsel had kept quiet in the matter.

13. Infact, it is a case where the grounds raised by the petitioner in the writ petition are not substantiated by the material available on record. The ground of non-grant of opportunity is not properly proved by the petitioner and, therefore, I see no reason to interfere into the matter on such grounds.

14. As far as discrepancies in the statement of witnesses pointed out by Shri Udayan Tiwari is concerned, the same is with regard to statement of PW-2 HC Abhimanyu Yadav and the statement of complainant PW-4 Shri S.K. Ghosh, wherein Shri Ghosh has spoken about the petitioner slapping him twice and Shri Abhimanyu Yadav speaks about the petitioner only slapping once. The said discrepancy is minor in nature and cannot be a good ground for interfering into the matter.

15. That apart, a writ court exercising limited jurisdiction in a petition under Article 226 of the Constitution, does not sit over the findings recorded in a departmental inquiry as if it is exercising further right of appeal. The petitioner should have challenged the action first by filing a statutory appeal and thereafter should have filed this writ petition, he has not done so for the reasons best known to him. Having evaluated the totality of the circumstances and for the reasons as are indicated hereinabove, this Court is of the considered view that the grounds raised by the petitioner are not such on the basis of which interference can be made by this Court.

16. Shri Udayan Tiwari, Learned Counsel for the petitioner, after conclusion of hearing has given a list of citations in support of his contentions, which are as under:

(a) Non-supply of documents - AIR 1961 SC 1623;

and, AIR 2010 SCW 1077.

(b) Consideration of past record - 1993 LAB IC 1767.

- (c) Legal Assistance - J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others,
- (d) No attempt made by Enquiry Officer to produce the complainant - Kuldeep Singh Vs. The Commissioner of Police and Others,
- (e) Bias - no independent witness - S. Parthasarathi Vs. State of Andhra Pradesh,
- (f) Complainant himself was a witness - (1993) 2 LIC 1808.
- (g) Request to change Enquiry Officer - (1994) 2 Supp SCC 256.
- (h) Not asked whether he wanted to be represented by Government Servant - vitiated - Bhagat Ram Vs. State of Himachal Pradesh and Others,
- (i) Alternate remedy not a bar to file a writ petition under 226, if there is violation of statutory rules and natural justice - Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and, Vikram Sharma Vs. State Bank of Indore and Others,

17. As far as non-supply of documents are concerned, it is not known as to which document is being referred to, what were the document that were not supplied or demanded by the petitioner and how non-supply of these documents did cause prejudice. There is nothing available on record to show as to which document was demanded by the petitioner and what was refused to him. Alongwith the charge-sheet reference was made to statement of five witnesses and it is stated that all the five statements were supplied to the petitioner and they are available on record.

18. As far as consideration of the past record is concerned, once a Member of the Disciplined Armed Force is found to have committed serious offence of assaulting a Superior Officer, however good his past record may be, a Writ Court cannot substitute the punishment, when the allegations of assault are established.

19. As far as the ground of legal assistance is concerned, it is seen that the legal assistance was provided to the petitioner in the form of Shri S.K. Rudra, but the petitioner himself failed to avail of the opportunity as the requirement of the statutory rule in this regard is complied with there is no merit in this contention.

20. As far as the ground with regard to no attempt made by the Enquiry Officer to produce the complainant is concerned, the same is wholly irrelevant and does not apply in the present case.

21. As far as the ground of bias or no independent witness being produced is concerned, the same is not correct. All the four witnesses apart from Shri S.K. Ghosh are independent witnesses, who have seen the incident and there is nothing to indicate that these witnesses are biased or were deliberately speaking against the petitioner.

22. The other ruling cited are with regard to the complainant himself being a witness, request to change Enquiry Officer and non-providing of a Government

Servant to represent the petitioner are concerned, the same are not applicable in the facts and circumstances of the present case.

23. In the circumstances, the judgments relied upon do not assist the petitioner in the matter and infact have no relevancy in the peculiar facts and circumstances of the present case. Accordingly, finding the petitioner - a Member of the Disciplined Armed Force, to have been punished for the act of assaulting a Superior Officer, which has been proved in a properly conducted departmental inquiry, I see no reason to interfere into the matter.

Accordingly, the petition stands dismissed.