

(2001) 09 GAU CK 0047

In the Gauhati High Court

Case No : Writ Petition (C) No. 214 (SH) of 2000

Son Sing Marak

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Border Security Force Act, 1968 — Section 117, 40, 53

Border Security Force Rules, 1969 — Rule 51

Constitution of India, 1950 — Article 14, 226

Citation : (2001) 3 GLT 455

Hon'ble Judges : N.S. Singh, J

Bench : Single Bench

Advocate : G. Bhattacharjee, for the Appellant; S.C. Shyam, for the Respondent

Judgement

N.S. Singh, J.—The impugned order of dismissal dated 26.4.1999 issued by the Commandant 18 BN Border Security Force, Kalyani (WB) thus striking off the name of the Petitioner Shri Son Sing Marak from the strength of 18 BN Border Security Force (BSF) with effect from 24.6.1999 (AN) and the impugned order dated 28.2.2000 issued by the competent authority of the BSF rejecting the statutory petition of the Petitioner against conviction by Summary Security Force Court, as seen in the documents marked Annexure IV and VI to the writ petition, are the subject matters under challenge in this writ petition.

2. The Petitioner- Shri Son Sing Marak, ex-Constable No. 89163041 of "C" Coy, 18 BN BSF was charged for violation of Good Order and Discipline of the Force as required u/s 40 of the BSF Act, 1968 (hereinafter referred to as Act of 1968). The said charge is quoted below:

In that he, (Son Sing Marak) at BOP Gunrajpur on 18th March '99 at about 1620 hrs while performing the OP duty alongwith No. 95145238 CT Ankia Mog at border fencing gate No. 15 of BOP Gunrajpur illegally permitted, is without Passport and Visa, a BD National namely Smt. Achhiya Begum W/O Sirajul Karim R/O Satkhira, Bangladesh, to cross into India border fencing gate No. 15 without

having any authority or permission to do so.

3. The trial of the Petitioner was conducted by Summary Security Force Court, as required under Rule 51 of the BSF Rule, 1969. The prosecution examined nine witnesses (PWs) in order to prove the charges levelled against the present Petitioner. Lastly, the Petitioner was found guilty of the charges levelled against him and awarded the sentence for dismissal from service. Such findings and sentence of the Summary Security Force Court were promulgated to the accused and thereafter his name was struck off from the strength of the force from 24.6.99 under the impugned order dated 26.4.99. Being aggrieved by the order of dismissal and conviction, the Petitioner presented a petition u/s 117 of the Act of 1968 to the competent authority and the competent authority rejected the petition being devoid of merit under the impugned order dated 8.2.2000, as in Annexure VI.

4. Mr. G. Bhattacharjee, learned Counsel appearing for the Petitioner, contended that there is no material/evidence on record for proving the charge levelled against the Petitioner and the Summary Security Force Court had misappreciated the evidence on record. Apart from that, penalty imposed upon the Petitioner is grave and disproportionate. The learned Counsel also contended, that during the inquiry/trial the main witness namely, a Bangladeshi National Smti Achhiya Begum was never examined by the authority in the course of the trial and her statement was never recorded though the said Bangladesh National was easily available for recording her statement during the trial.

5. According to Mr. G. Bhattacharjee, the entire proceedings in Summary Security Force Court is vitiated by malafide and vindictiveness of the authority and the conviction and sentence made on the basis of the interested witnesses is liable to be set aside and there is no convincing and reliable evidence on record against the Petitioner for warrant his conviction.

6. The case of the Petitioner is resisted by the Respondents by filing affidavit-in-opposition Mr. S.C. Sham, learned Addl. CGSC submitted, that there is no infirmity or illegality in the impugned order of dismissal and the punishment is proportionate with the offence committed by the Petitioner and, the Petitioner has been given adequate opportunity of being heard at the time of the trial/inquiry. The learned Addl. CGSC also contended, that Summary Security Force Court, on perusal of the related documents and evidence on record found beyond reasonable doubt that one Smti Achhiya Begum, a Bangladeshi national illegally entered into the Indian territory through IB Gate No. 15 while ex-constable Ankia Mog and ex-constable Son Singl Mark, the Petitioner herein were performing their duty and they did not prevent the said Bangladeshi national while entering into Indian territory without any valid Passport.

7. Now, this Court is to see and examine as to whether there is infirmity or illegality or incorrectness in the impugned orders as in Annexure IV and VI to the writ petition, and whether, this Court can interfere with these two impugned

orders by invoking Article 226 of the Constitution of India or not.

8. The main allegation and charge as against the Petitioner is, that while he was performing his duty alongwith one constable Ankia Mog at the border fencing Gate No. 15 of BSF, Gunrajpur, illegally permitted one Bangladeshi national Smti Achhiya Begum to cross into Indian border without having any authority or permission to do so. A bare perusal of the evidence statement of nine PWs witnesses shows that most of the witnesses stated, that before crossing the said Gate No. 15 to India the said Achhiya Begum paid 50 takkas to a civilian near the gate in the field and crossed to India. This is the evidence available on record and this evidence was given mainly by the BSF personnel and not by independent witnesses except one Mohd. Sahidul Gazi, member of village Gunrajpur under Govindpur Gram Panchayat who adduced his evidence to the effect that after the said Bangladeshi national Smti Achhiya Begum was apprehended by BSF personnel," he (Mohd. Sahidul Gazi) was asked by the DC to record the statement of the said Achhiya Begum and the said DC also asked the said Achhiya Begum to tell the truth in Bengali without fear and, accordingly, the said Mohd. Sahidul Gazi noted down what all the lady said in presence of the DC and other BSF personnel. The relevant statement of the said Mohd. Sahidul Gazi, PW No. 6 is reproduced as here under:

She told that she first asked a civilian working in the field that she wants to come to India. On this the civilian asked her to pay 100 takkas but Achhiya Begum told that she can pay only BD Taka 50. She then paid BD Taka 50 to the Civilian who helped her to cross the IBB fence gate around 1600 hrs. At that time BSF present on duty were sitting in the thatched hut and were doing some work. Whether they have seen her or not, she don't know as told. Then Shri P.K. Anand, DC asked me to submit an application to keep the lady in our safe custody for the night and accordingly I have done it.

From this evidence, it is seen that the said Bangladeshi national Achhiya Begum did not speak about the gate No. 15 where the Petitioner was performing his OP duty alongwith his colleague and from this evidence also, it is clearly seen that she paid only BD 50 taka to a civilian to help her to cross the IBB fence gate. Apart from that, she was kept in safe custody for the night at the house of Mohd. Sahidul Gazi as directed by the DC Shri R.K. Anand. This is the only evidence that is reliable and available on record which does not make any involvement of the present Petitioner. Apart from that the authority concerned i.e. prosecution could not make even an attempt to produce the said Achhiya Begum during the course of the trial. Instead, the trial Court relied upon the statement of the interested witnesses who are not eyewitnesses of the occurrence. The best evidence would be the evidence and statement of Smti Achhiya Begum which was withheld by the authority and such withholding of best evidence will certainly be adverse to the prosecution case. The same thing happened in the same case.

9. The order of the higher authority under the impugned order dated 28.2.2000 as in Annexure VI is also not a speaking order inasmuch as, no reason has been

assigned by the higher authority in rejecting the petition u/s 117 of the Act of 1968 filed by the Petitioner except the statement, that after carefully considering all the points raised by the Petitioner, the trial proceedings, all the facts and circumstances of the case, the Director General has rejected the petition.

10. A bare perusal of Annexure-V which is a copy of the petition u/s 117 shows, that the Petitioner assailed, rather requisitioned the authority of the order of conviction and sentence and order of dismissal from service by raising as many as 21 grounds/points and not a single reason has been assigned in respect of any of the grounds by the higher authority of the BSF while rejecting the petition of the Petitioner. In view of the above position. I hereby opined that the Respondents/authority concerned, particularly the higher authority who passed the impugned order at Annexure VI had failed to record the reasons for its decision as discussed above, thus causing miscarriage of justice. At this stage, I hereby recall a decision of the Apex Court rendered in, S.N. Mukherjee Vs. Union of India, wherein the Apex Court held thus:

As contrasted with the ordinary courts of law and tribunals and authorities exercising judicial functions where the Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency, an Executive Officer generally looks at things from the standpoint of policy and expediency. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions irrespective of the fact whether the decision is subject to appeal, revision or judicial review." The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". The requirement about recording of reasons for its decision by an administrative authority exercising quasi judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principle of natural justice, therefore, it must be held that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.

11. It is also needless to mention that the authority concerned, while awarding penalty upon an employee, the authority concerned must always bear in mind that the punishment to be imposed would be rational and has to commensurate with the offence proved and, such punishment imposed must conform to the test of equality clause enshrined under Article 14 of the Constitution and the authority should not go away from logic and the accepted legal and moral standards and, order of punishment should not be extravagant, oppressive and out of tune to the occasion. It is also well settled, that the Court can judge the legitimacy and the reasonableness of exercise of discretionary power by the authority. At this stage, I hereby recall the related decisions of the Apex Court and this Court rendered in, Ranjit Thakur Vs. Union of India (UOI) and Others,

and Ex-C Sukhvindar Singh v. Union of India and Ors. reported in (1999) 3 GLR 490. In Ex-C Sukhvinder Singh v. Union of India and Ors. (supra), this Court held thus:

In the exercise of powers of judicial review the Court should not assume the power of the authority who is conferred with the authority to exercise the discretion, but it is the Court also to appraise the legality of the action. It is an essential part of judicial review entrusted by the Constitution to the superior Court to judge the legitimacy and reasonableness of the exercise of discretionary power by the authority. Whether the decision maker strayed outside the purpose defined by the statute is to be assayed by the Court. The decision maker, in exercise of its discretion cannot take leave of its duty in maintaining a right balance between any detrimental effects on the rights, liberties and privilege of the person concerned and the purpose of exercise of the discretionary power. In their choice within the area of discretion, the decision maker is required to maintain fair balance between the one result and the objective sought to be achieved by sanctioning of the power. In the matter of awarding punishment, the authority should not go away from logic and the accepted legal and moral standards. The order of punishment should not be extravagancies, oppressive and out of tune to the occasion. The authority is duty bound to take into account the relevant factors over looking " extraneous considerations and bestow appropriate weight on the pertinent and admissible considerations.

In the instant case also, the impugned penalty of dismissal from service awarded upon the Petitioner is disproportionate and not commensurate with the offence even assuming it is proved and established. Again, even assuming the charge and offence is proved as against the Petitioner, at the most minor punishment as required u/s 53 of the Act of 1968 or penalty for forfeiture of pay and allowance for a period not exceeding 3 months could be awarded upon the Petitioner.

12. For the reasons, observations and discussion made above, I am of the view that the Petitioner could make out a case for interference with the impugned order dated 26.4.99 as in Annexure IV including the finding and sentence of the Summary Security (sic) Court promulgated to the Petitioner on 24.6.99 and, that of the impugned order dated 28.2.2000 including the decision of the Director General.

13. In the result, petition is allowed thus setting aside the impugned orders as highlighted above, but no order as to costs.

14. Despite the disposal of this case finally on its own merit, I am constrained to make the following order and observations considering the nature of the case.

15. This judgment and order shall not stand on the way of the authority concerned i.e. Respondents to impose minor penalty/punishment like severe reprimand with forfeiture of pay and allowances for a period of 2 (two) months. It is also made clear, that the Petitioner shall be reinstated in service by the authority concerned by issuing necessary order as early as possible.