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Vijay Kumar Vs. Uoi and ors

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Court : Delhi

Decided On : Jul-29-2013

Judge : Gita Mittal

Appellant : Vijay Kumar

Respondent : Uoi and ors

Advocate for Def. : Dr. Ashwani Bhardwaj

Advocate for Pet/Ap. : Mr. Ram Naresh Yadav

Judgement :

$~ 20 * IN THE HIGH COURT OF DELHI AT NEW DELHI + W.P.(C) No.17/2012 Date of decision:

29. h July, 2013 % VIJAY KUMAR Through : ..... Petitioner Mr. Ram Naresh Yadav, Adv. versus UOI AND ORS Through : ..... Respondents Dr. Ashwani Bhardwaj, Adv. CORAM: HONBLE MS. JUSTICE GITA MITTAL HON'BLE MS. JUSTICE DEEPA SHARMA GITA MITTAL, J.

(Oral) 1. The petitioner has by way of the present writ petition assailed the finding and sentence dated 24th June, 2008 of the Summary Security Force Court (SSFC) and the order dated 26 th March, 2009 passed by the Director General, Border Security Force (BSF) rejecting his statutory appeal against the same.

2. The petitioner was enrolled as a Follower (Water Carrier) with the respondents on 13th May, 1989. With regard to an incident dated 28th May, 2008, he was subjected to SSFC on the following charges:- WP(C) No.17/2012 page 1 of 11 i) FIRST CHARGE COMMITTING A CIVIL BSF ACT 196.U/s-46 OFFENCE THAT IS TO SAY USING CRIMINAL FORCE TO A WOMAN INTENDING TO OUTRAGE HER MODESTY PUNISHABLE U/S 35.IPC In that he, At BOP Baramadhusudan on 28/05/08 at about 0100 hrs used criminal force to Smt. Nilima Begum W/o Sh. Ajijul Miah of Vill Baramadhusudan, PS Sital Kuchi, Distt Cooch Behar (WB) intending to outrage her modesty by such criminal force, for which he was caught by above civilian. ii) SECOND CHARGE AN ACT PREJUDICIAL TO BSF ACT 196.U/S -40 GOOD ORDER AND DISCIPLINE OF THE FORCE In that he, At BOP Baramadhusudan, on 28/05/08 at about 0100 hrs No.891320139 W/C Vijay Kumar improperly and without authority entered the house of a one civilian namely Ajijul Miah S/O Lt Barkat Miah, R/O Baramadhusudan, P S Sital Kuchi, Cooch Behar (WB) located in nearby vicinity while he was sleeping with his wife and children in his house. WP(C) No.17/2012 page 2 of 11 iii) THIRD CHARGE ABSENTING HIMSELF BSF ACT 196.U/S WITHOUT LEAVE 19 a) In that he, At BOP Baramudhusudan, on 28/05/2008 at about 0100 Hrs absented himself without leave from BOP Baramadhusudan till 0630 Hrs on 28/05/08.

3. The challenge by the petitioner to the proceedings conducted by the SSFC rests primarily on two grounds. The first, ground of challenge is that the petitioner was denied an opportunity to effectively defend himself for the reason that the proceedings were conducted in Bengali a language which claims he was not conversant with. The second ground of challenge by the petitioner is on the plea that the conviction and sentence of the SSFC are based on no evidence at all for the reason that the complainant has failed to identify him and also her testimony renders the occurrence of the incident impossible in the given circumstances.

4. We have heard learned counsel for the parties. The proceedings against the petitioner commenced on a telephonic message being received by Subedar Puran Singh who was Officiating Company Commander of C Company of 13 Battalion BSF in the night intervening 27th /28th May, 2008. The SHO PS Sitalkuchi, District

Cooch Behar (West Bengal) informed Subedar Puran Singh on his mobile that the petitioner had left the Border Out Post, Bara Madhusudan without permission; gone to Village WP(C) No.17/2012 page 3 of 11 Bara Madhusudan and entered into a civilians house. He was caught red handed by the civilian and handed over to PS Sitalkuchi. After reporting to the officers, Subedar Puran Singh, the Officiating Company Commander along with another SubInspector Dharambir Singh, the Post Commander of the Border Out Post went to PS Sitalkuchi wherein the petitioner was in police lockup in half dressed condition and was brought back to the Border Out Post.

5. Disciplinary action under the provisions of BSF Act and Rules was initiated against the petitioner thereafter. On 28th May, 2008, he was heard by the then Officiating Commandant as per the provisions of the BSF Rule 45 for committing offences under Sections 46, 40 and 19(a) of the BSF Act, 1968. The record of the evidence was ordered and prepared against the petitioner in which he was given opportunity to cross-examine all prosecution witnesses and to produce witnesses in defence but the petitioner denied the opportunity. After completion of the record of the evidence, the Commandant of the Battalion applied his mind thereto in accordance with the Rule 51 of the BSF and thereafter referred the matter to the Deputy Inspector General who in accordance with the provision of Section 74(2) of the BSF Act, 1968 permitted the Commandant to try petitioner summarily by the SSFC. It was in this background that the petitioner was tried by the SSFC on the 24th of June, 2008 for the above offences. WP(C) No.17/2012 page 4 o

6. Given the narrow area of challenge, we may examine the first contention of the petitioner that he was denied an effective opportunity to defend himself in the SSFC proceedings for the reason that the proceedings were conducted in Bengali which was a language which he did not understand. In this regard, Dr. Ashwani Bhardwaj, learned counsel appearing for the respondents has drawn our attention to the proceedings of the SSFC which have been placed before us.

7. We find that the respondents appointed two interpreters in this proceeding. Shri K.S. Rathore, Commandant, of the 13 Battalion of the BSF who was conversant with the Hindi and English language was appointed as the first interpreter.

Additionally, the respondents had assigned ASI/Radio Operator Mridul Ghosh of the BSF as interpreter who was a personnel of the BSF and conversant with Bengali and other languages.

8. We find that eight prosecution witnesses were examined during the trial. The petitioner selectively cross-examined the witnesses. He has made no objection at all to the proceedings of the SSFC. He at no time stated that he was unable to understand the proceedings or that he was denied an opportunity to defend himself or that he was prejudiced in any manner by the procedure followed by the SSFC. Given the fact that two interpreters had been appointed and were available during the course of the proceedings, we find no merit in the petitioners plea that he was prejudiced in any manner WP(C) No.17/2012 page 5 of 11 for the reason that some of the witnesses were local civilians or that he was not able to understand their deposition. In fact the petitioner has cross-examined the lady complainant who he claims to have given testimony in Bengali which has been transcribed in the English language.

9. We may also note that the petitioner was given an option of engaging friend of the accused and that he had selected Shri D.S. Tomar, Assistant Commandant who was present with him throughout the SSFC proceedings. In any case, nothing precluded the petitioner from seeking an appropriate clarification from the interpreters who were available, in case he was finding difficulty in understanding anything. This plea is clearly an afterthought. We find that the plea of the petitioner being without substance and reject the same.

10. We may also examine the second plea raised by the petitioner to the effect that the finding and sentence against him is based on no evidence at all. We find that complainant - Smt. Nilima Begum has been examined as sixth witness in support of the prosecution. This witness has categorically stated that she was awakened at about 0100 hrs on the night intervening 27 th/28th May, 2008, while she was sleeping with her husband and two children in their room because some person touched her on her legs. She had raised an alarm, and as a result, her husband woke up and caught the intruder. PW-6 further explained that she had come out of the room and shouted for help from her two brother-in-laws who were

WP(C) No.17/2012 page 6 of 11 living near her house. She further states that her children had also woken up due to her shouting and started weeping. As she got involved in consoling them, and due to the darkness of the night, she did not see the face of the intruder who had been intercepted by her husband.

11. Learned counsel for the petitioner has submitted that in the cross-examination, the complainant who was examined as PW-6 deposed that door of the house was locked and bolted and there was only one window which had rods of 6 inches between them and, therefore, it is not possible to believe that any incident as alleged could have occurred. This submission however is to be noted only for the sake of rejection.

12. The prosecution has also examined the complainants husband Ajijul Miah as PW-3. He has supported the complainant in all material respects. This witness has categorically stated that he was woken up by the shout of his wife at 0100 hrs on 28th May, 2008. When he had woken up, he had seen somebody moving from his wifes bed side. He tried to catch hold the intruder and had scuffled with him. The intruder managed to overpower him and ran into the kitchen. However his brothers, Agul Miah, the elder brother and Ajijul Miah, his younger brother had also arrived. Along with his younger brother, PW-3 had overpowered the intruder and taken him into the room from the kitchen. They had lit the kerosene lamp to identify the intruder and saw that it WP(C) No.17/2012 page 7 of 11 was a BSF Jawan. A neighbour was called who telephonically informed PS Sitalkuchi. The police arrived at about 0200 hrs and took the intruder along with civilian witneses to PS Sitalkuchi. PW-3 has categorically identified the petitioner who was present in the SSFC proceedings as the intruder who had entered his house on the stated night.

13. Corroborating the testimony of the husband of the complainant, the prosecution has examined PW-4 Azizual Miah, the younger brother of her husband. He has deposed with regard to the incident from the stage of having been woken up in the night intervening 27/28th May, 2008 on account of the shouts of Smt. Nilima Begum and her husband. He has supported the testimony of PW-3 in all material particulars and has also unequivocally identified the petitioner

as the intruder who is stated to have entered the house of the complainant with the intention to rape her.

14. The prosecution has additionally examined PW-5 Mr. Bidyut Kumar Roy, the neighbour of the complainant who was also woken up by cries on the night intervening 27/28th May, 2008 and identified the petitioner as the person who had intruded into the house of the complainant with mala fide intention.

15. We may note that the petitioner was given due opportunity to cross-examine PW3, PW-4 and PW-5 but has refused to do so. As such their testimonies remain unchallenged.

16. In view of the above, there is ample evidence which establishes that the petitioner entered the house of PW-6 Smt. WP(C) No.17/2012 page 8 of 11 Nilima Begum without authority and with the intention to outrage her modesty for which he was accosted by the civilians 17. No contradiction in the material particulars are pointed out in the submissions before us. There is no reason to disbelieve the testimony of the witnesses. In this background, the contention of the petitioner that the finding of guilt on the charge nos.1 and 2 against the petitioner is misconceived and contrary to record.

18. We may note that other witnesses have also supported the surrounding circumstances including the factum of the petitioners absence from the Border Out Post. PW-7 HC Dilbagh Singh and PW-8 Constable Om Prakash have deposed about the petitioners absence from the barrack without any information at the time of incident. An entry was recorded in the general diary register as well with regard to his unauthorized absence from the barrack.

19. PW-1 Subedar Puran Singh and PW-2 Sub Inspector Dharambir Singh have deposed about the receipt of the information of the PS Sitalkuchi about the petitioners having been intercepted by the civilians in the above circumstances in the night intervening 27/28th May, 2008 and the circumstances with regard thereto. These two witnesses had taken custody of the petitioner from the civilian police station and brought him back to the Border Out Post, Palkarhat.

20. It is therefore established on record that on the night intervening 27/28th May, 2008, at about 0100 hours, the petitioner had absented himself without leave from the Border Out Post, WP(C) No.17/2012 page 9 of 11 Baramadhusuan till 0630 hours on the 28th May, 2008 with which he was charged.

21. In view of the above, the second contention of learned counsel for the petitioner that findings of guilt returned on the 24th June, 2008 of the SSFC were based on no evidence is also devoid of any merit and is hereby rejected. After consideration of the material before the court, the petitioner was sentenced to dismissal from service.

22. The petitioners statutory appeal under Section 117 was rejected in these circumstances by an order dated 26 th March, 2009 by the Director General of the BSF.

23. Learned counsel for the petitioner has alternatively urged before us that the sentence of dismissal imposed upon the petitioner was disproportionate to the seriousness of the charges levied against him. It is urged that the petitioner had completed 19 years, 1 month and 10 days of unblemished service at the time of his sentencing and that the same ought to have been considered inasmuch as this entire family has been rendered destitute because of his dismissal. In this background, the challenge by way of the instant writ petition has to be rejected.

24. At this stage, learned counsel for the petitioner submits that in terms of Rule 41 of the CCS (Pension) Rules, the petitioner has option of seeking compassionate allowance from the respondents given the length of his service. This aspect of the matter has to be WP(C) No.17/2012 page 10 of 11 considered by the respondents in accordance with the applicable principles of law and considered view has to be taken by them.

25. We accordingly dismiss the present writ petition with the observation that it shall be open for the petitioner to make an appropriate representation to respondent No.4/competent authority seeking grant of compassionate allowance under Rule 41 of the CCS (Pension) Rules which may be considered and decided by the respondents within six weeks of the receipt of the representation from the

petitioner. (GITA MITTAL) JUDGE (DEEPA SHARMA) JUDGE JULY 29 2013 mk WP(C) No.17/2012 page 11 of 11

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