

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : January 19, 2015*
Judgment Delivered on : January 28, 2015

+ **W.P.(C) 4586/2005**

SATYAWAN SINGH

..... Petitioner

Represented by: Ms.Amita Gupta, Advocate

versus

UOI

..... Respondent

Represented by: Ms.Anjana Gosain, Advocate with
Mr.Pradeep Desodya, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The petitioner has sought quashing of the order dated February 21, 2004 passed by the Commandant BSF whereby he was ordered to be dismissed from service and subsequent orders dated May 14, 2004 passed by IG, BSF and dated 3rd/4th January, 2005 passed by the Director General, BSF respectively rejecting the appeal and the revision petition filed by the petitioner and thereby upholding the order of dismissal.

2. The facts are not in dispute. The petitioner joined BSF as Water Carrier in August 1990. He was appointed as a Constable (GD) in the year 1995. The petitioner proceeded on reward leave of 10 days from December 17, 2003 to December 26, 2003 and earned leave for 15 days from December 27, 2003 to

January 10, 2004. He was required to report for duty on January 11, 2004, but he overstayed leave by 30 days and reported for duty on February 02, 2004. Along with an offence report dated February 10, 2004 he was produced before the Commandant for having committed an offence under Section 19(b) of BSF Act, 1968 for overstaying leave. The petitioner claims to have pleaded 'Not Guilty' to the charge, claiming that due to his wife being unwell and problems faced by his handicapped son he was forced to extend the leave. Declared guilty in a summary manner the petitioner was awarded 14 days' imprisonment in force custody and was immediately sent to the Quarter Guard in custody.

3. While undergoing the sentence in the Unit Quarter Guard, on February 15, 2004 the petitioner did not take lunch as also dinner. The next day on February 16, 2004 he did not take breakfast. The matter was brought to the notice of the superior officers. An offence report contemplated by Rule 43 of the BSF Rules, 1969 was laid before the Commandant against the petitioner for having committed an offence punishable under Section 21(2) of the BSF Act for having disobeyed lawful command given by the superior officer i.e. not taking food repeatedly when being directed to do so. Petitioner pleaded not guilty and the Commandant decided that Record of Evidence be prepared. Sh.P.L.Maurya, Dy. Commandant, 70 Bn BSF was directed to prepare ROE. The gist of the statement of seven witnesses recorded during ROE is to the following effect:-

4. Witness No.1, Assistant Commandant K. Murali 70 BN. BSF having been duly affirmed stated that:-

“On February 16, 2004 when the District Quarter Guard during weapon cleaning parade, Head Constable S.K. Pandey, Guard Comdr. informed him

that the petitioner did not take dinner on February 15, 2004 and breakfast on February 16, 2004. He called the petitioner in his office at 10.30 hrs. and asked for the reason in not taking the food. The petitioner replied that he did not feel like eating and he would take food whenever he would feel like eating. He again called the petitioner in his office asking him the reason for not taking food and petitioner replied that he did not feel like eating and assured him that he would take food whenever he would feel like eating. On being informed that the petitioner had not taken dinner on February 16, 2004 he ordered Inspector Mangat Ram to give further order to constable Satyawar to take food. Inspector Mangat Ram telephonically informed that the petitioner had not taken the dinner. He personally visited Quarter Guard and the petitioner did not take food and then he informed Commandant.

On February 17, 2004 at 10.00 hrs, Quarter Guard Commander reported to him that the petitioner was not feeling well and wanted to visit Unit Hospital. He sent the petitioner along with Guard Commander to the Unit Hospital. He was also informed that the petitioner also did not have his lunch on February 17, 2004.” (Bold highlighted)

5. Witness No.2, HC Zafar Mohd, Witness No.3, HC Kishan Chand, Witness No.4 ASI (RM) Brijkishor Singh, Witness No.5, Mangat Ram and Witness No.6, Shri K Murali have made statement to the effect that the petitioner did not eat food despite being asked to do so saying that he was not hungry and despite being asked time and again to take food he did not eat stating that he did not feel like eating. Thereafter matter was reported to the superior officers.

6. Dr.Umesh Tiwari, CMO PW 7 made statement to the effect that constable Satyawar was brought to the Unit Hospital by the Guard Commander as he was not taking food for last one day. When he questioned the petitioner about his problem the petitioner replied that he did not feel like eating. He tried to convince him to take some food but the petitioner refused to take any food complaining of stomachache and pain in left leg. He clinically examined the petitioner but found no

positive finding for pain. The petitioner wanted some medicine which was given to him and thereafter he was sent back.

7. The petitioner was given an option to make a statement in defence if he so desired. The statement made by the petitioner reads as under:-

“I reported to BN HQ on 10th February, 2004 at 08:00 hrs. I kept my language in ORS line and visited barber shop for hair cutting. Unit Adjutant sent 01 M.C.O and 02 Constable and called me in the office at that time I was in washerman shop. At 11:00 hrs on 10th February, 2004, I submitted my Movement order in G.D. office and reported to main office along with Guard. I was standing outside the Admin Block. Commandant asked why is standing outside then Adjutant replied that the Constable Satyawar roaming in the Campus since yesterday and did not attend P.T. Parade. Commandant sent me back in OR's line and again called me in the office in proper uniform. After some time, I reported back to Admin Block after wearing proper uniform. I got the interview of Commandant. Commandant asked me why u reported back to unit after OSL. I was suffering from domestic problems at my hometown and regarding problems. I discussed with Commandant on telephone from my hometown. Commandant advised me to meet with concerned S.P./DIG. I convey my domestic problem to Commandant during interview. Commandant gave 14 days RI. I accept the punishment and came outside the office. Due to the punishment given by Commandant and my domestic problem my tension increased and I lost my appetite. On 14th February, 2004, duty S.O. visited Quarter Guard at that time I asked him to make a phone call at my hometown but duty S.O. refused me to do so during RI period. Due to the tension I lost my appetite.”

8. Considering the Record of Evidence, vide order no.Estt/70BN/SSFC(SW)/04/1723-29 dated February 19, 2004, the petitioner was ordered to be tried by Summary Security Force Court on February 20, 2004 at 11:00 hours under Section 21(2) of the BSF Act, 1968. Sh.V.J.S.Salaria, Asstt. Commandant, 70 Bn BSF was appointed as friend of the accused. All the seven witnesses examined during ROE were re-examined. The petitioner preferred not to

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cross-examine any witness. He did not make any statement in defence or produce any evidence in his defence.

9. The petitioner was held guilty by the SSFC and awarded sentence of dismissal from service which was upheld by IG and DG, BSF vide impugned orders.

10. On behalf of the petitioner it is submitted that the petitioner was suffering from loss of appetite and in the given circumstances the penalty imposed on the petitioner being disproportionate to the offence stated to have been committed by him warrants interference by this Court in exercise of the writ jurisdiction.

11. On behalf of respondent not only the order upholding petitioner guilty for disobeying lawful command given by the superior officers has been claimed to be justified but also the punishment awarded submitting that in Armed/Para-military Forces there is no place for throwing tantrum or resorting to methods like hunger strike to show their resentment. Learned counsel for the respondent had drawn the attention of this Court to the statement the prosecution witnesses to highlight that they have stated that though persuaded/commanded, the petitioner did not agree to take food claiming that he was not hungry.

12. With a view to examine the circumstances in which the petitioner was not taking/able to take food, it is necessary to consider the statement of the witnesses recorded immediately after the occurrence at the stage of ROE as well before SSFC. There is no dispute that on being awarded 14 days punishment in force custody on February 10, 2004, the petitioner was taking his diet normally till February 15, 2004 before lunch.

13. PW 1 HC S.K.Pandey, Witness No.2, HC Zafar Mohd, Witness No.3, HC Kishan Chand, Witness No.4 ASI (RM) Brijkishor Singh, Witness No.5, Mangat Ram and Witness No.6, Sh. K. Murali have stated about the petitioner not taking lunch and dinner on February 15, 2004 as well breakfast and meals on February 16, 2004. They have also stated that despite being persuaded/ordered to take food the petitioner refused to take food stating that he was not hungry and despite being ordered petitioner refused to it. PW 6, Sh. K. Murali, AC deposed that on being informed that the petitioner has not taken his meals on February 15, 2004 as well breakfast on February 16, 2004 he questioned the petitioner the reason for not taking the meal and the problem if any he had. The petitioner replied that he did not have any problem. However, the Guard Commander informed him that the petitioner wanted to make a call which he permitted from Unit PCO availing the conference facility but he did not make the call. PW 6, Sh.K.Murali, AC stated that he also offered the petitioner that he could make a call if he so desired but he did not make a call and when questioned about the reason for not taking the meal he stated that he was not hungry. He directed HC Zafar Mohd to make the petitioner eat but he did not eat stating that he was not hungry. He again called the petitioner asking the reason for not taking the meal and the petitioner again replied that he was not hungry. The petitioner promised to eat whenever he would feel like eating and thereafter the petitioner was sent to the Quarter Guard and Guard Commander was asked to inform as and when the petitioner take the food.

14. On being informed by Subedar Mangat Ram that petitioner had not taken the food he again personally went to Quarter Guard and ordered the petitioner to eat

food but the petitioner disobeyed his order and did not eat the food and he returned the matter to the Commandant.

15. PW 7, Dr.Umesh Tiwari, CMO has made statement on similar lines as made during ROE except adding that he arranged some light snacks and tea for Constable Satyawar but he refused to have in spite of continuous persuasion but opted to have water. The petitioner was offered water which he took. The petitioner was given some medicines as he complained of stomachache which could be due to formation of gases or acid in his stomach due to not taking meal for which he was given medicines.

16. The proceedings of SSFC qua the sentence records the following facts at serial number 3, 4 and 9 as under:-

“3. That he is present undergoing sentence “14 days RI in force custody”.

4. That, irrespective of this trial, his general character has been ‘Satisfactory’.

9. That he is in possession of the following decorations and rewards:-

(i) Decorations: nil Nos. (ii) Cash rewards: 06 Nos.”

17. PW-1 to PW-7 in their deposition at the stage of ROE as well during their examination by SSFC have stated that the petitioner did not take his meals on February 15, 2004 which continued on February 16, 2004 as well on February 17, 2004 (when the disciplinary proceedings were initiated against him) despite being convinced, persuaded and ordered to take his food. This fact is not denied by the petitioner at any stage of proceedings even the prosecution witnesses have not been

cross-examined. Thus it is not disputed by the petitioner himself that during the above period despite being ordered, he did not take his meal.

18. Before considering the plea of proportionality, the record of disciplinary proceeding has been perused by us to ascertain whether refusal to take meal was due to some physical ailment, or an act of belligerency. The petitioner was member of Border Security Force and as a soldier he was amenable to the Rules and Regulations governing his service condition and he was subject to rigorous discipline. The petitioner does not dispute that his act of not taking food despite being repeatedly ordered by his superiors amounts to defiance but he had offered justification for his conduct i.e. loss of appetite for which he himself requested to be shown to a doctor.

19. The question on proportionality of sentence on refusal to take food has come up for consideration before the Supreme Court in the decision reported as 1987 AIR 2386 Ranjit Thakur Vs. Union of India & Ors.

20. In the above noted case, Ranjit Thakur, the appellant was sentenced to serve 28 days rigorous imprisonment imposed on him for violating the norms for presenting representation to the higher officers wherein he complained of ill treatment at the hands of his senior officer, respondent no. 4. While confined in Quarter-guard cell in handcuffs to serve the sentence, on that very day despite being asked by the orderly officer of the same regiment to eat his food, he refused to take the food. On the very next day he was tried by the Summary Court Martial. The witnesses were examined and the appellant Ranjit Thakur also pleaded guilty. He was sentenced to undergo RI for one year and also dismissed from service. The questions arising in the appeal were formulated as under:-

(a) (i) The proceedings of the Court-Martial are vitiated by non-compliance with the mandate of Section 130(1) of the Act in that the Summary Court Martial did not afford to the appellant an opportunity to challenge its constitution as required by that section;

(ii) The proceedings of the Court-Martial were vitiated by bias on the part of Respondent 4 who participated in and dominated the proceedings; H 518

(b) In as much as the appellant was then serving a sentence of rigorous imprisonment, he was not in "active service" and that no question of disobeying any lawful command could at all arise;

(c) Appellant's refusal, while serving a sentence to accept food did not amount to disobedience, under Section 41, of any lawful command of a superior officer in such manner as to show a wilful defiance of authority;

(d) At all events, the punishment handed down is so disproportionate to the offence as to amount, in itself to conclusive evidence of bias and vindictiveness.

21. While answering question (c) and (d), formulated in Ranjit Thakur (supra) case, the Supreme Court observed as under:-

"8. Re: contention (c): The submission that a disregard of an order to eat food does not by itself amount to a disobedience to a lawful command for purposes of section 41 has to be examined in the context of the imperatives of the high and rigorous discipline to be maintained in the Armed Forces. Every aspect of life of a soldier is regulated by discipline. Rejection of food might, under circumstances, amount to an indirect expression of remonstrance and resentment against the higher authority. To say that, a mere refusal to eat food is an innocent, neutral act might be an over-simplification of the matter. Mere in-action need not always necessarily be neutral. Serious acts of calumny could be done in silence. A disregard of a direction to accept food might assume the complexion of disrespect

to, and even defiance of authority. But an unduly harsh and cruel reaction to the expression of the injured feelings may be counter-productive and even by itself be subversive of discipline. Appellant was perhaps expressing his anguish at, what he considered, an unjust and disproportionate punishment for airing his grievances before his superior officers. However, it is not necessary in this case to decide contention (c) in view of our finding on the other contentions.

9. Re: contention (d): Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the 523 sentence has to suit the offence and the offender. It should not be A vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of B logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 Weekly Law Reports 1174 (HL) Lord Diplock said:

"... Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come<http://JUDIS.NIC.IN> *SUPREME COURT OF INDIA Page 9 of 9 about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality'. the second irrationality' and the third 'procedural impropriety'. That is*

not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community E In BhagatRam v. State of Himachal Pradesh, A.I.R. 1983 SC 454 this Court held:

"It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. The point to note, and emphasise is that all powers have legal limits.

22. Every refusal to take food cannot be considered to be an act of defiance or delinquency. This question needs to be answered in the facts and circumstances of each case and for that reason the same was left open by the Supreme Court in Ranjit Thakur's case.

23. This aspect has also come up for consideration before this Court in W.P.(C) 6856/2000 Dinesh Kumar Vs. Union of India and Anr., decided on May 15, 2014 wherein the petitioner Dinesh Kumar was charged for using criminal force against HC Bhanwar Lal and HC Hawa Singh, in a state of intoxication for which he was ordered to be placed under close arrest. During his confinement the petitioner refused to eat food despite several orders by his superior officers and also creating nuisance and publicly refusing to accept the orders passed by the superior officers. The background of assailant on HC Bhanwar Lal was that on May 03, 2000, rum was to be distributed freely to BSF personnel. HC Bhanwar Lal after finishing the

distribution of pegs was taking his dinner when Constable Rajinder Singh asked HC Hawa Singh who was taking dinner at the adjoining cot, to give a bottle of rum. He was asked to wait till they finish their food. The petitioner insisted for the rum to be given immediately as they were having party. When the petitioner was again asked to wait, he took the Tiffin box from HC Bhanwar Lal and started quarreling with him, caught his collar with one hand and hit on the left side of his cheek. HC Bhanwar Lal tried to save himself but the Petitioner again hit him with leg and was saved by HC Hawa Singh and Constable Jetha Ram.

24. The matter was reported. After preparation of ROE, the Commandant ordered the petitioner to be tried by SSFC. On being held guilty, he was ordered to be dismissed from service. The petitioner impugns his dismissal by filing W.P.(C)6856/2000 taking shelter under the decision of Hon'ble Supreme Court in Ranjit Thakur's case claiming the punishment of dismissal being disproportionate to the nature of offence. While negating the contention of the petitioner, one of us (Pradeep Nandrajog, J.) held:-

“39. The petitioner demanded liquor from HC Bhanwar Lal when he was dinner. HC Bhanwar Lal asked the petitioner to wait till he finished his dinner. Instead of waiting for HC Bhanwar Lal to finish his dinner the petitioner turned aggressive and hit HC Bhanwar Lal. Thereafter petitioner slapped HC Hawa Singh for he sided with HC Bhanwar Lal and admonished him i.e. petitioner for having lost his cool. On account of aforesaid misconduct(s) committed by him, the petitioner was ordered to be placed under close arrest. Instead of being remorseful the petitioner threw tantrums and refused to eat food on several occasions while in custody.

40. Much reliance was placed by the counsel for petitioner on the decision of Supreme Court in Ranjit Kumar's case (supra) to contend that the rejection of food by a force personnel is not a serious misconduct. We have closely read the decision of the Supreme Court in Ranjit Kumar's case (supra). The

aforesaid decision would not come to the rescue of the petitioner for the reason the question whether the disregard of an order to eat food by a force personnel amounts to disobedience of a lawful command or not was left open by the Supreme Court in said case. In fact, it was observed by the Supreme Court that 'Every aspect of life of soldier is regulated by discipline. Rejection of food might, under circumstances, amount to an indirect expression of remonstrance and resentment against the higher authority. To say that, mere refusal to eat food is an innocent, neutral act might be an over-simplification of the matter. Mere inaction need not necessarily always be neutral. Serious acts of calumny could be done in silence. A disregard of a direction to accept food might assume the complexion of disrespect to, and even defiance of authority.'

41. BSF is a para-military force. Its members carry arms. There is no place for belligerence in a disciplined force like Border Security Force. Noting incidents of gross discipline are on the rise in the armed forces, we do not find penalty imposed upon the petitioner being disproportionately shocking."

25. Thus, it was in that backdrop as well the subsequent conduct of the petitioner Dinesh Kumar under close arrest that disentitled him to challenge proportionality of sentence relying on Ranjit Thakur's case (supra).

26. Reverting to the facts of the case in hand, none of the prosecution witnesses at any stage has even whispered about any aggression being shown by the Petitioner qua any of them. The testimony of all the witnesses is consistent to the fact that the petitioner on being asked to take food, stated that he did not feel hungry and he will take food as and when he would feel hungry. His conduct throughout was satisfactory. While undergoing sentence for 14 days in Force Custody he had already spent more than 5 days without throwing any tantrum or creating any nuisance and was taking food normally. He explained his problem that he had lost his appetite because of his domestic problem and on being denied permission to make phone call to his home town. His statement recorded at the stage of ROE

records that he accepted the punishment and came outside the office. Thus he had no grievance on being punished to 14 days RI in Force Custody. The problem seems to have aggravated because immediately on reporting for duty on February 10, 2014 he was awarded the punishment for overstaying by 30 days, he was not allowed to make phone call to his family. Here the statement of PW-7 Dr. Umesh Tiwari, CMO makes the picture more clear, as to him also he complained of loss of appetite and stomach ache. The medical opinion is also to the effect that there must be gas formation and acidity as he did not take his food for which medicine was given as asked by the Petitioner and he also asked PW 7 for water. We may again emphasize here that it is not the case of the respondent that petitioner was taken to Unit Hospital for force feeding rather the petitioner expressed his desire to visit the doctor. The analysis of evidence before SSFC leads to only one conclusion that though the petitioner did not take food despite being ordered repeatedly, but it was neither to throw any tantrum, nor to show his resentment against the authorities who detained him. Unfortunately for the petitioner, his inability to take food was taken as defiance of Command given by the superior officers. The petitioner as member of force should have preferred to eat and vomit rather to face dismissal for his inability to take food due to loss of appetite.

27. We are of the considered view that in view of overall conduct of the petitioner being satisfactory during his tenure as constable in BSF, SSFC should have taken into the circumstances in which the petitioner could not take food rather than to consider it as an act of defiance which falls in the category of zero tolerance for a member of disciplined force.

28. On examining the facts of this case on the parameters laid down by the Hon'ble Supreme Court in Ranjit Thakur's case (supra), we are of the considered opinion that the punishment of dismissal from service was disproportionate to the offence for which the petitioner was held guilty. The writ petition is allowed and the impugned order to the extent of penalty of dismissal from service is quashed.

29. The petitioner was dismissed from service in the year 2005, while directing the respondent to reinstate the petitioner in service, we direct that he be not paid any back wages. However the said period would be treated as spent on duty for purposes of pensionary service. The petitioner would be entitled to his seniority as well as continuation in service for all purposes which would require he to be paid wages on a notional basis for the period in question and this would include annual increments. Meaning thereby that salary of the petitioner, when he would rejoin service, would be fixed after giving notional benefits to him.

30. No costs.

(PRATIBHA RANI)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

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