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

+ **W.P.(C) 3747/2013**

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Decided on: 19.08.2015

DAYA SHANKER RAI

..... Petitioner

Through: Mrs Rekha Palli, Sr. Adv. with
Ms Ankita Patnaik and Mrs Garima Sachdeva,
Advs.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Ruchir Mishra and Mr Mukesh
Kumar Tiwari, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MS. JUSTICE DEEPA SHARMA (OPEN COURT)

1. The petitioner has challenged the order of dismissal from service vide the present writ petition and has prayed for the reinstatement in the service.
2. The petitioner was enrolled as Constable (GD) on 16.02.1991. In the year 1999, he was transferred from 18 Bn to 44 Bn and was deployed at 'Border Outpost'(BOP) Pipli in a company. This company was headed by Post Commander HC S.N. Singh and was comprising of 09 Constables. On 19.02.2000, he was detailed for O.P. duty at O.P. No. 3

from 0600 hrs to 1800 hrs and then from 2200 hrs to 2300 hrs on sentry duty.

3. A complaint was made by HC S.N. Singh to the Commandant reporting that the petitioner was missing from his duty and when the enquiries were made from him, he hit him with his rifle on his left shoulder and also on his eye, ear and hand and that it was Constable Mohinder Singh, who, on reaching there, caught hold of the petitioner and that Constable Partibhan also reached there and took him (HC S.N. Singh) to living barrack and made him to lie down on bed. He was medically examined. It was found that HC S.N. Singh had suffered following injuries:-

- (i) Ecchymosis around Lt Eye.
- (ii) Abrasions on pinna of Lt ear and contusion over preauricular region.
- (iii) Collulitis over Lt scapular region with undisplaced fracture of the middle part of the spine of left scapula.

4. The petitioner was heard on this complaint by the Commandant under Rule 45 of the BSF Rules and thereafter the Commandant ordered for Record of Evidence (RoE). The Record of Evidence proceedings were drawn regarding the whole episode. The petitioner had duly participated in RoE and cross examined the witnesses. However, he did not produce any defence witness in support of his statement despite the opportunity being given to him. The statements of 7 prosecution witnesses were recorded. Since the prima facie case was made out against the petitioner, the competent authority Commandant decided to try the petitioner by Summary Security Force Court (SSFC). The

petitioner was accordingly issued the charge sheet of the following charge:-

“BSF ACT SECTION -20(a) USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER

In that he, having been deployed at BOP Pipli on 19.2.2000 at about 2215 hrs while performing sentry duty of BOP used criminal force to No. 75002627 HC Shiv Narayn Singh BOP Comdr by assaulting him with his personal rifle butt No. 483 body No. G-2609 resulting which HC Shiv Narayan Singh suffered injuries in his eye head and left shoulder”.

5. The proceedings of SSFC were held on 05.04.2000 by the Commandant 44 Bn. During the proceedings, the petitioner had pleaded guilty in writing and pleaded for mercy. Thereafter, the order of dismissal from service by way of penalty was passed on 05.04.2000. The petitioner submitted his appeal which was decided by DG BSF on 12.01.2001 and the decision was conveyed to the petitioner vide letter dated 13.02.2001. The petitioner had filed a writ petition no. 21591 of 2001 in Allahabad High Court which was dismissed vide order dated 08.03.2013 for want of territorial jurisdiction.

6. The contention of the petitioner is that Post-Commander HC S.N. Singh was harassing him as due to his presence he was unable to indulge in illegal activities, including smuggling. In order to harass him he always used to assign him extra duties as compared to other constables and whenever he had protested, he was threatened. On the date of incident also, he was made to perform duties for 15 hrs which was contrary to the

established practices. He had also used to give undue benefits to some other constables. At about 21 hrs on 19.02.2000, HC S.N. Singh had gone out for BOP at Pipli on bicycle when the petitioner objected to his going, he was rebuked by him in filthy language and was also threatened. At 22 hrs, the petitioner saw a torch light coming from the side of the view point and he ran towards it and at that point HC S.N. Singh blew his whistle and he went running towards him and when he reached near him, he abused him and also hit him with his torch, compelling the petitioner to retaliate with the torch, he was holding in his hand. On hearing the commotion, 4 constables, i.e. Constable Mohinder Singh, Constable S. Pratibhan, Constable Hardhan Ghosh and Constable Diwakar Mandal reached there and HC S.N. Singh falsely stated to them that the petitioner had hit him. He had also suffered the injuries but he was not allowed to be medically examined. It is further submitted that despite the fact that there was no grave urgency, the petitioner was tried by Summary Security Force Court wherein the Commandant alone constituted the board and no reason was given to deny trial by the General Security Force or Petty Security Force Court wherein the Court would comprise of 5 members and 3 members respectively. The Summary Security Force Court was a mere sham proceeding and he was even not allowed to engage a defence assistant of his choice and an Assistant Commandant was detailed as Friend of Accused, he did not advise him properly and he pleaded guilty under these circumstances. It is further submitted that given the circumstance of the case wherein the testimony of the witnesses clearly show that he had acted in self-defence, penalty of dismissal from service is highly excessive and disproportionate.

7. The contentions of the respondents are that the trial of the petitioner by Summary Security Force Court is in accordance with the Border Security Force Act (BSF Act) and Rules and no fault can be found. Reliance is placed on the findings of this Court in case of **Constable Bhisham Singh vs. Border Security Force reported in 2002 (8) SLR 599**. It is further submitted that the petitioner had assaulted his senior who suffered grievous injuries, and for this reason dismissal from service is the appropriate punishment. Reliance is again placed on Constable **Bhisham Singh's** case (supra).

8. We have given thoughtful consideration to the rival contentions of the parties and have perused the record. The contention of the petitioner that SSFC was not competent to try him for offence under Section 21(a) of the BSF stands answered by this Court in **Bhisham Singh's** case (supra) wherein the same issue was before the Court. The Court held as under:-

“4. According to the learned counsel for the petitioner, the Summary Security Force Court was not competent to try the petitioner for an offence under Section 20(a) of the BSF Act. The learned counsel, in this regard, relied upon Rule 47 of the BSF Rules. Rule 47 of the BSF Rules lays down as follows:

“47. Charges not to be dealt with summarily: A charge for an offence under Section 14 or Section 15 or clauses (a) & (b) of section 16, or section 17 or clause (a) of section 18 or clause (a) of section 20 or clause (a) of section 24 or section 46 (other than that for simple hurt or theft) or a charge for abetment of or an attempt to commit any of these offences shall not be dealt with summarily.”

5. According to the aforesaid Rule, a person charged with an offence under Section 20(a) of the Act cannot be dealt with summarily. The aforesaid rule does not put an embargo on the trial by a Summary Security Force Court

of a person charged with an offence under Section 20(a) of the BSF Act. The petitioner admittedly has not been dealt with summarily under Rule 47 of the BSF Act. The petitioner admittedly has not been dealt with summarily under Rule 47 of the BSF Rules, but has been tried by a summary Security Force Court. As per Section 48 of the BSF Act, a Security Force Court is entitled to inflict punishment of dismissal from service in respect of offences committed by persons subject to the BSF Act. Under the Act, there are three kinds of Security Force Courts, namely, (1) General Security Force, (2) petty Security Force Court, and (3) Summary Security Force Court, but it could also order his dismissal from service on his conviction. Section 74 of the Act provides that subject to the provisions of sub-section (2) thereof, a Summary Security Force Court can try any offence punishable under the Act. A person charged with an offence under Section 20(a) of the Act, therefore, can be tried by a Summary Security Force Court. It is not a case which falls under sub-section (2) of Section 74 of the Act, nor it is so claimed by the petitioner. We, therefore, do not find any infirmity in the holding of a Summary Security Force Court to try the petitioner for an offence under Section 20(a) of the Act”.

9. The process thus suffers with no infirmity or illegality. From the proceedings, it is clear that the petitioner had admitted his guilt and before us also, he admits that he hit the Post Commander but qualifies it with the contention that he did it in retaliation and self defense. He thus admits that he assaulted his senior officer and therefore is guilty of the charge under Section 20(a) of BSF Act.

10. The next argument of the petitioner is that the punishment of dismissal from service is not commensurate to the gravity of the offence. It is argued that a false complaint was made by HC S.N. Singh due to the

grudge he was nurturing and also wanted to teach him lesson for the incident dated 19.02.2000 when at about 21 hours, petitioner questioned HC S.N. Singh for going out of the BoP Pipli on his bicycle. However, from the record it is evident that the petitioner has not put any of these facts to HC S.N. Singh or to any other witness in the cross-examination. This argument finds no support from the record.

11. It is also urged by petitioner that it was HC S.N. Singh who first abused him and hit him 3-4 times with his torch and then he retaliated and that he was absent from post as he had gone out to answer the nature's call. He had politely informed the reason of his absence to HC S.N. Singh, still he went ahead and hit him and that all the witnesses have also supported him on this count. It is urged that in view of these facts, the penalty is highly excessive and disproportionate.

12. It is argued by learned counsel for respondent that punishment of dismissal is not disproportionate and parity can be drawn from **Bhisham Singh's** case (supra), where this Court had upheld the punishment of dismissal from service taking note of the fact that the insult of the senior and beating him is a very serious charge. It is submitted that in that case Constable Bhisham Singh had also caused injuries on the right eye, superficial cut at lower eye lid and clot at nostrils accompanied by swelling around the nose and the Court had upheld the penalty of dismissal from service while in the present case, the petitioner had caused even more serious injuries i.e. undisplaced fracture of the middle part of the spine of left scapula and ecchymosis around left eye and abrasions on pinna of left ear and contusion over preauricular region. Also, on earlier two occasions, the petitioner had been found guilty of misconducts under Section 19 (b)

(over staying from leave without sufficient cause) and Section 40 (act prejudicial to good order and discipline of the force).

13. We have given thoughtful consideration to the submissions. The fact of the case in *Bhisham Singh's* case (supra) differ from the facts before us. In that case, Constable Bhisham Singh had during the roll call parade pulled his senior HC Pratap Singh and used abusive and filthy language, in front of several other members of the Force attending the parade. The personnel present intervened and the matter was reported to the Post Commander who advised HC Pratap Singh to file a written complaint. HC Pratap Singh returned to his barrack to write the complaint. Constable Bhisham Singh followed him to his barrack and inflicted blows on him. In *Bhisham Singh's* case (supra), the misconduct done in the presence of all the other personnel attending the roll call parade. The delinquent did not stop at pulling the senior out of roll call and abusing him, but followed him to his barrack and assaulted him. He did an intentional, unprovocative and motivated act to teach lesson to his senior for daring to write a complaint against him. Such an act on the part of an official of a discipline force certainly cannot be tolerated. However, here the facts and circumstances are different. No doubt, the petitioner had assaulted his senior but the same was done under entirely different set of circumstances. In the present case, there is no evidence (except the statement of HC S.N. Singh) that petitioner had first started the fight. The petitioner's stand is that he acted in self defence when beaten with torch by H.C S.N. Singh. There are thus contradictory versions of petitioner and of H.C. S.N. Singh, accusing each other, and the witnesses have not supported any of these on the contention that the other starting the fight

first. The witness PW-4 has clearly stated that within 2-3 minutes, after HC S.N. Singh enquired from the petitioner for the reasons of his absence from post, *“both had started beating each other”*. PW-5 had stated that *“I heard quarrel started between them”*. PW-3 states *“I heard the sound that someone is beating somebody with torch and rifle”*.

14. Where the authorities have ample discretion in the matter of imposing penalty then while exercising such discretion, for quantifying the punishment on charges of misconduct, it is necessary that they must take into account the magnitude of the misconduct, circumstance and the manner in which it was committed including all the other relevant factors.

15. As regards the antecedents of the petitioner is concerned, he had a clean record except one of over-staying leave by 7 days and other for an act which was considered prejudicial to good order and discipline and the petitioner had already underwent punishment for both. Merely because a delinquent underwent punishments on earlier occasions for comparative minor offences, does not ipso facto call for stringent punishment, if there are other factors on record minimizing the culpability of the charge.

16. In view of the attending facts of the case, we are of the view that the writ petition has to partly succeed. The punishment, in given circumstances, was severe and disproportionate. Consequently, the order of imposition of the penalty from dismissal of service is modified to one of withholding the three increments with cumulative effect from 05.04.2000. The petitioner is directed to be reinstated into the service forthwith with all consequential benefits, including notional fitment in the pay-scale-after giving effect to the penalty, increments, grant of notional increments, etc. The arrears of salary and allowances, however, are restricted to the past

three years. The respondents shall ensure that consequential orders are made and amounts released to the petitioner within three months from today.

17. The writ petition is partly allowed in the above terms. Parties are left to bear their own costs.

DEEPA SHARMA, J

S. RAVINDRA BHAT, J

AUGUST 19, 2015

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