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

Decided on : 29.10.2015

+ **W.P.(C) 12354/2009**

ROKADE NITIN

.....Petitioner

Versus

UOI AND ORS.

.....Respondents

+ **W.P.(C) 12357/2009**

SUBHASH KUMAR

.....Petitioner

Versus

UOI AND ORS.

.....Respondents

Through: Dr. Ashwani Bhardwaj, Advocate, for
petitioners in Item Nos. 1 and 18.
Sh. Vivek Goyal, CGSC with Sh. Arvind Sharma, DC,
BSF.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioners in both cases are aggrieved by their dismissal from service by orders issued by the Border Security Force (BSF). Both were asked to face trial before the Summary Security Force Court (SSFC) proceeding in respect of an incident that occurred on 28.06.2008. They were suspended from service the next day. Subsequently, an Office Memorandum was issued on 09.08.2008, alleging commission of offences. The charge

sheet outlined essentially two main charges, i.e. scuffle with another Constable and threatening a superior officer. The writ petitioner in W.P.(C) 12357/2009 was charged with causing injury during scuffle with another BSF personnel and also absence from the roll call without sufficient cause at the relevant time.

2. After the charge sheet was issued, a separate Record of Evidence (ROE) was prepared against the petitioners on 31.08.2008. The Summary Court proceedings were held between 20.10.2008 and 22.10.2008. Based upon the charge sheet issued under Section 46 of the BSF Act, 1968, both the petitioners were charged with committing offences punishable under Section 323, IPC, i.e. causing simple hurt.

3. It was alleged by BSF that the petitioners scuffled and caused serious injuries to Subhash Wadile [hereafter “Wadile”] on the evening of 28.06.2008. In support of the allegations, the BSF relied upon the testimonies of 11 witnesses. The victim Wadile deposed as PW-11. Based upon the testimonies of other witnesses produced, the officiating Commandant/Commandant (in respective cases) concluded that the petitioners were guilty and directed that the penalty of dismissal be imposed against them. They felt aggrieved and approached the higher/appellate authority. Their appeals were rejected.

4. They have approached this Court complaining against the findings recorded by the SSFC and also aggrieved by the punishment of dismissal imposed upon them. It is urged firstly that the proceedings of the SSFC were defective in as much as the petitioners were not given the facility of a proper defence and that the defence representative did not effectively participate in

the proceedings. It was contended next that from an overall reading of the evidence led, what has transpired was that the alleged victim Wadile could not be absolved from blame. Learned counsel pointed out that the said Wadile who had deposed in both the SSFC proceedings, i.e. against Subhash Kumar and Rokade Nitin clearly brought out the circumstances that an altercation took place which led to his physically assaulting Rokade Nitin first and then the conflict escalating. Learned counsel relied upon the testimony of Wadile in the SSFC proceedings concerning Rokade Nitin in this regard. It was submitted that though Wadile deposed as PW-11, a juxtaposition of statement in that enquiry with the statement recorded in the course of enquiry held against Subhash Kumar would show that he conveniently omitted mention of the original scuffle. Underlining that this inconsistency was significant and had been overlooked, learned counsel submitted that in the heat of the moment, when BSF personnel started quarrelling for petty reasons, the resultant injuries suffered by one or all of them had to be taken into account and that in the given circumstances of the case, it could not be held that the petitioners were the only ones worthy of being blamed. In this regard, learned counsel submitted that other testimonies of other eyewitnesses such as Constable P. Govindan, HC Joginder, HC Ramadasan, HC C.K. Magendran bring out a different story. It is stated that the fact that the victim Wadile suffered injuries ought not to be determinative because admittedly he too inflicted injuries upon the petitioners.

5. Learned counsel further submitted that even if it were held that the SSFC proceedings concluded correctly that they were guilty, the penalty of

dismissal was too harsh and severe and has to be called as disproportionate. It was submitted that Rokade Nitin had 8 years' service whereas Subhash Kumar had 17 years' service and would have otherwise been eligible for pension upon completion of 20 years of service. Given that the nature of duties were onerous, the allegation and the resultant aftermath should not have led to the penalty of dismissal in this case.

6. Learned counsel for the BSF points out that the victim Wadile was consistent in his deposition in both the enquiries. It was pointed out that the origin of dispute was unclear yet Wadile was clear in the evidence that his unintentional behaviour in brushing with or hitting Subhash Kumar led to the latter taking offence, abusing him and the subsequent escalation of scuffle. Learned counsel submitted that the entire incident brought out facts that reveal two clear sets of circumstances. The first incident occurred in front of himself when a verbal altercation between Subhash Kumar and Wadile took place, leading to a minor scuffle. This ultimately resulted in Wadile entering the mess and later on going to the barracks. He was pursued there by the two petitioners who were armed with aluminium pipes and extended steel blade which they liberally used upon him. This led to Wadile's profuse bleeding. In fact he had to be rushed to the hospital after the BSF doctor examined him in the MI Room and was kept overnight in the room to be discharged subsequently. Learned counsel also submitted by all accounts, victim Wadile was seriously injured as he bled profusely.

7. It was next submitted that the petitioners cannot now claim of unfair procedure because in the very first instance they declined the assistance of defence representative. Learned counsel also submitted that proper

opportunity was given to the petitioners and in some cases they did cross-examine some witnesses. Taking into account all these facts, essentially the nature of the injury and the likelihood of indiscipline, the competent authority and the appellate authority's opinion that the penalty was commensurate with the offence was proved.

8. The materials in the form of testimonies of witnesses who deposed in the proceedings show that on 28.06.2008 in the evening, Wadile proceeded to a PCO booth to phone his native place; when he reached there, Rokade Nitin and Subhash were sitting near the PCO booth. Both appeared to have been drunk; they started abusing him. Wadile returned to the Company battalion, to avoid any conflict. On reaching back, he started to talk with another personnel; while so, Subhash Kumar crossed him, intentionally brushing past, and pushing him aside. Wadile took exception and protested. Subhash Kumar then said "*jubaan kholta hai, main abhi tere ko dikhata hoon*" and started hitting the complainant near the mess by hitting him in the stomach. Wadile tried to defend himself and picked a *Karchie* (serving ladle) lying near the mess; thereupon Subhash Kumar picked up a burning piece of wood from the *Chulha* (stove) and tried to attack Wadile. At that stage, HC Joginder Singh, Mess Commander intervened and the incident ended. The victim was advised to sit behind the *Lunger* (a kind of common counter serving food). Fifteen minutes later, both the petitioners (Subhash Kumar and Rokade Nitin) returned, started abusing Wadile and threatened to kill him. Again the Mess Commander asked them not to abuse Wadile and asked them to leave. At this they shouted "*yeh mess tere baap ka nahin hai*,

mera bhi hai". The complainant, to save himself, remained in the mess thereafter for some time.

9. After about half an hour, considering that everything had returned to normal, the victim went to jawans barrack to keep his utensils. When he was inside the barrack, Subhash Kumar and Rokade Nitin came towards him. Subhash Kumar was in possession of a long aluminium rod (of the kind used to hold up tents, extendable) whereas, Rokade Nitin had the aluminum base plate of the tent extendable. They approached Wadile, shouting "*maaro saale ko*". Considering their aggressive demeanor, in self defence Wadile picked up a suitcase and threw it towards them. Both tried to hit him with the rod and the aluminum base plate. The aluminum rod got stuck in the rope tied inside the barrack. According to Wadile if the aluminium rod were to have hit him, it could have proved fatal. Wadile managed to run to save himself but was pursued by the petitioners. On the way, HC C.K. Magendran, the Company CHM who had reached near the door, tried to stop Subhash Kumar and Rokade Nitin by blocking their way at the gate. They managed to surround the complainant; Subhash Kumar then hit Wadile with aluminium rod on left portion of head and left shoulder and Rokade Nitin hit him on the right side of the head with the aluminium base plate. Due to the attack by both of them, the complainant sustained injuries and started bleeding from his head. He bled so profusely that his clothes were drenched and he was considerably weakened. He was rescued by others and was evacuated by Constable B.D. Wazulkar to unit MM Room. On arrival at unit MI Room, he was administered requisite first aid and was referred to MI Room of 102 Bn BSF for further treatment and management. He was later

evacuated to G.B. Hospital Agartala where he was examined by the Doctors and a C.T, Scan and X-Ray was also conducted. He remained admitted in the Hospital for about 3 days.

10. Several witnesses corroborated the version of the victim, Wadile. These included Joginder Singh, C.K. Magendran and HC Ramadasan. Neither petitioner disputed that they were independent witnesses; some of them were also cross-examined. During the hearing, there was no suggestion that these witnesses were partisan or bore any ill will against the petitioners. Head Constable Ramadasan had this to say, in the cross-examination:

“Yes, I saw Const Subhash Kumar and Const Rokade attacking Const. Wadile Subhash with the aluminum pipe and aluminum base plate extendable. As I managed to pull out Const Wadile Subhash, I saw him bleeding profusely from his head. His clothes were drenched in blood.”

HC Hanumana Ram too, in cross examination corroborated that the complainant sustained serious injuries. Sunil Kumar, the Asst. Commandant deposed how he was told that the complainant's condition was reportedly serious according to the doctor who examined him and consequently he had to be rushed to Agartala for hospitalization.

11. The entire conspectus of facts, which emerges from the depositions of witnesses who made statements in the two enquiries, is with regard to the violent incidents that occurred on 28.06.2008. In one inquiry, ten witnesses recorded statements; in the other eleven did so. Still, there were no material discrepancies in the overall picture that emerged from a cumulative reading of the SSFC proceedings: that being that both the petitioners behaved with unprovoked aggression which escalated to the extent that without any aid,

the complainant might well have been fatally injured or at the least, maimed for life. That he had to be hospitalized is also not disputed. Having regard to all these, this Court is satisfied that the incident did occur in the manner alleged; the depositions of the witnesses during SSFC established it. The petitioners' contentions are, therefore, rejected on this aspect.

12. The next question is whether the petitioners were denied natural justice in the sense that they had inadequate or ineffective defence representation. Here it is necessary to notice that in the case of Rokade Nitin, the respondents asked him whether he wanted the service of a defence assistant, by letter dated 18.08.2008. On 19.08.2008, he responded, declining the request and refusing the services of a defence assistant. Similarly, Subhash Kumar refused to avail the services of a defence assistant or "friend" on 22.10.2008. The Court further notices that in both cases, the petitioners exercised their rights to the best of their abilities and cross-examined witnesses. In these circumstances, the charge of denial of principles of natural justice is baseless and insubstantial.

13. The question of proportionality of an administrative or disciplinary order has been the subject matter of discussion in several judgments. In *B.C. Chaturvedi vs Union of India* (1995) 6 SCC 749, the Supreme Court stated that acting under any review jurisdiction the Courts can review the question of penalty but should be extremely circumspect and spare in the use of its power. The Supreme Court also stated that even if the findings or conclusion of a penal order in a given case is found to be shockingly disproportionate, the Court should ordinarily remit the matter for consideration by the concerned administrative authority or decision maker.

This type of reasoning was appears to have been followed in a subsequent ruling, i.e. *Om Kumar & Ors. vs. Union of India* AIR 2000 SC 3689.

14. There are also cases where Courts have exercised discretion under Article 226 of the Constitution and having regard to the given facts and circumstances of the case substituted the penalties, after finding that the penalty to be excessive or shockingly disproportionate. The Supreme Court appears to have applied the principle of proportionality, after articulating it as a relevant public law standard, in *Ranjit Thakur v. Union of India and Others*, [1987] 4 SCC 611 where the question of proportionality in awarding punishment under the Army Act was in issue. It was observed that:

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be 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 logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

15. *B.C. Chaturvedi* (supra) indicated a somewhat different approach, suggesting that whenever the penalty is disproportionate, the Courts must normally remit the matter to the employer, for reconsideration of the issue, holding that:

"The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own

conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof"

This Court observes that a reading of subsequent decisions of the Supreme Court indicate that there is no inflexible rule that whenever a penalty, in disciplinary proceedings are found to be shockingly disproportionate, the Courts have to necessarily remit the question for reconsideration by the administrative or disciplinary authority. Furthermore, for the court to conclude that penalty in a given case is incommensurate, it must be “*shockingly disproportionate*”, i.e such that no reasonable man placed in like circumstances, would have imposed on the individual.

16. The facts here clearly show that the petitioners indulged in unprovoked and wanton aggression which injured Wadile considerably. They had sufficient time to cool their tempers but they chose to, or were unable to get hold of themselves. Several force personnel intervened at three distinct points of time. Were it not for their assistance, the complainant might have either lost his life or suffered permanent disablement. While members of the BSF have to be fit and – when called upon to do so, show necessary force- they are not expected to indulge in wantonly unruly and aggressive behavior. Left unchecked, it would lead to breakdown of

discipline. Given these imperatives, this Court is satisfied that the penalty imposed in their cases was not disproportionate.

The petitions are accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

OCTOBER 29, 2015

