

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.451 of 2014
Arising out of
Civil Writ Jurisdiction Case No. 14113 of 2007

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1. The Union of India, Ministry of Home Affairs, Directorate General of Border Security Force, through the Director General, Border Security Force, Lodhi Road, New Delhi- 110003.
 2. The Director General, Border Security Force, Lodhi Road, New Delhi- 110003.
 3. The D.I.G./Chief Law Officer, the Directorate General, Border Security Force, Lodhi Road, New Delhi- 110003.
 4. The Commandant 113 BN, Border Security Force, Gandhi Dham, Gujarat (Presently at Seemanagar, West Bengal).

.... Respondents -Appellant/s

Versus

Yasodhar Kamat, son of late Sori Lal Kamat, resident of Village Suriahi, P.O.- Sume, P.S. Phulparas, District- Madhubani.

.... Petitioner- Respondent/s

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Appearance :

For the Appellants : Mr. Sanjay Kumar, A.S.G.

For the Respondent : Mr. Uma Kant Shukla, Senior Advocate
Mr. Shakti Suman Kumar, Advocate
Mr. Rajesh Ranjan, Advocate

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA
and
HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

C. A. V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)

Date: 11-08-2016

The challenge in the present Letters Patent Appeal is to an order passed by the learned Single Bench of this Court on 29th July, 2013 whereby the writ application filed by the respondent herein (for short, 'the petitioner') was allowed and the order of dismissal passed by the Commandant, 113 BN, Border Security Force (hereinafter referred to as "B. S. F.") dated 3rd of May, 2007 and order in appeal

passed by the Director General, B.S.F. dated 13th June, 2007 were set aside.

2. The petitioner was appointed as constable in B.S.F. on 2nd of January, 1990. The immediate cause of the order of punishment against him is that he applied for leave from 9th of February, 2007 to 1st of March, 2007 as his niece was kidnapped on 6th of February, 2007. It is the case set up by the petitioner that during the period of his leave, his niece was traced out, but the petitioner had to spend some more time for her settlement at her marital house. He made a request to his controlling officer for extension of leave. He was given an impression that his causal leave would be converted into earned leave. The petitioner joined on 4th of April, 2007, i.e. after 33 days of over stay of leave.

3. He was served with the charge-sheet on 16th of April, 2007. It is further pleaded by the petitioner that during the course of disciplinary proceedings, he made a request for forgiving him. The grievance of the petitioner is that during the course of disciplinary proceedings, no notice was adduced on behalf of the department nor any opportunity of adducing defence evidence was afforded and that an order of dismissal was passed on 3rd of May, 2007. The appeal was also rejected.

4. In the counter affidavit, it is, *inter alia*, asserted that



the petitioner was tried summarily 11 times for absence from duty since his enrolment and awarded punishments. The punishment includes rigorous imprisonment for varying period for 7 to 28 days. Apart from conviction, 8 cases of over stay of leave were regularized. He has also been convicted by the Security Force Court under Section 19(b) of the Border Security Force Act, 1968 on 16th of November, 2006 for 23 days of overstay of leave. He was awarded punishment of rigorous imprisonment in Force custody apart from forfeiture of three years of service for the purpose of promotion. Thus, it is alleged that the petitioner is a habitual offender and that he was given opportunities to improve his discipline but to no avail. Therefore, for his act of indiscipline, his retention in the Force is not desirable.

5. It is further stated that in his 17 years and 3 months of service, he had overstayed leave 21 times. It is further pointed out that the Commandant heard the petitioner under Rule 45 of the Border Security Force Rules, but petitioner declined to cross-examine the witnesses and to make a statement in his defence, but pleaded guilty to the charge. The record of evidence was prepared in his presence and within the hearing of the petitioner and he was given an opportunity under Rules 48(2), 48(3) and 48(4) to cross-examine the prosecution witnesses, but he did not cross-examine any of the witnesses. Since the petitioner pleaded guilty, no witness was examined during trial.



Reference was made to the statement admitting his guilt. Unit Adjutant Sri V. S. Shekhawat in his statement, which was on record, is that the petitioner did talk to him on Mobile phone for extension of leave and he in turn asked the petitioner to apply for extension of leave through telegram for a week or so. The niece of the petitioner was traced on 27th February, 2007, but he did not join and overstayed the leave till 4th April, 2007 which was unjustified.

6. The petitioner was served copy of record of evidence proceedings and copy of charge-sheet on 30th April, 2007 and also given to select any officer of the Unit as friend of the accused. Sri S. K. Sharma, Assistant Commandant, was chosen by the petitioner as friend of the accused. On that basis, the order of punishment was passed by the Commandant and the order of dismissal affirmed by the Director General of B.S.F.

7. Learned Single Bench set aside the order of dismissal for the reason that the order of dismissal for over stay of 33 days cannot be justified when the petitioner has been punished for earlier misconduct. Therefore, he cannot be punished twice for the same offence. It is also noticed that though in the order of dismissal passed by the Commandant, there is no reason forthcoming, but in order of appeal, the reason forthcoming is plea of guilt suffered by the petitioner. Learned Single Judge found that in view of Rule 142 of the



Rules, it was mandatorily required to inform or advice the petitioner regarding consequences of plea of guilty. Since the petitioner was simply a Constable, therefore, it was necessary for the authority concerned to inform him regarding complication as well as consequences of his pleaded guilty which was not done by the authority concerned.

8. The statement of the petitioner as given by him has been extracted by the learned Single Bench. A perusal of the facts on record along with his statement shows that the petitioner was granted leave from 9th of February, 2007 to 1st of March, 2007 and that his niece was recovered on 27th of February, 2007. As per his statement, he sent a request for extension of leave only on 21st of March, 2007 and contacted his Unit Adjutant on 25th/26th of April, 2007. His stand is that he overstayed only on the assurance of extension of leave from the Unit Adjutant.

9. We find that the stand of the petitioner is not a sufficient explanation for his overstay of his leave. His niece was recovered during the period of sanctioned leave, but he requested his Unit Adjutant only on 25th or 26th of April, 2007. The earliest request made by him for extension of leave is on 21st of March, 2007. Thus, after 1st of March, 2007 till 20th of March, 2007 he has not taken any step for extension of leave and thereafter contacted Unit Adjutant only

on 25th or 26th April, 2007. Thus, the statement of the petitioner is admission of over stay of leave.

10. The reasoning given by the learned Single Bench that the petitioner is only a Constable and that he was never warned of the consequences of such statement is not tenable for the reason that the petitioner as a member of the disciplined Force knew the consequences of over stay of leave inasmuch as in 17 years of his service, he has overstayed his leave for 21 times out of which 12 times he has been convicted. A person, who has track record of overstaying the leave cannot be presumed that he was not aware of the consequences of overstay of leave. Still further, Sri S. K. Sharma was appointed as friend of the accused as chosen by him. Therefore, it cannot be said that the petitioner was not aware of the consequences of pleading guilty.

11. The other reasoning given by the learned Single Bench is that the earlier punishments cannot be taken into consideration as he cannot be punished twice for the same offence. We do not find any merit in the said reasoning. He is not being punished for the same offence twice, but the previous conduct of remaining absent from duty which has been taken into consideration. While awarding punishment, the previous conduct is a relevant consideration. Even otherwise, the petitioner is a member of disciplined force. Any

overstay of leave is a serious misconduct on which alone, the punishment of dismissal could be inflicted upon the petitioner. It is not a case of double jeopardy but to take into consideration the conduct of the petitioner while awarding punishment.

12. In a recent judgment in Civil Appeal No. 1133 of 2016 Union of India & Ors. Versus Diler Singh decided on 30.6.2016, the Supreme Court held as follows:-

“22. The learned counsel for the respondent has submitted that even if the charges have been proven, the punishment of dismissal in the obtaining factual matrix is absolutely harsh and shocking to the conscience. It is his submission that the punishment is disproportionate. The respondent was a part of the disciplined force. He has left the campus without prior permission, proceeded to the market, consumed liquor and quarrelled with the civilians. It has been established that he had consumed liquor at the market place, and it has been also proven that he has picked up quarrel with the civilians. It is not expected of a member of the disciplined force to behave in this manner. The submission, as has been noted earlier, is that the punishment is absolutely disproportionate. The test of proportionality has been explained by this Court in *Om Kumar and others v. Union of India*, (2001) 2 SCC 386 *Union of India and another v. G. Ganayutham*, (1997) 7 SCC 463 and *Union of India v. Dwarka Prasad Tiwari*, (2006) 10 SCC 388. In *Dwarka Prasad Tiwari (supra)*, it has been held that unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court/tribunal, there is no scope for interference. When a member of the disciplined force deviates to such an extent from the discipline and behaves in an untoward manner which is not conceived of, it is difficult to hold that the punishment of dismissal as has been imposed is disproportionate

and shocking to the judicial conscience.

23. We are inclined to think so as a member of the disciplined force, the respondent was expected to follow the rules, have control over his mind and passion, guard his instincts and feelings and not allow his feelings to fly in fancy. It is not a mild deviation which human nature would grant some kind of lenience. It is a conduct in public which has compelled the authority to think and, rightly so, that the behaviour is totally indisciplined. The respondent, if we allow ourselves to say so, has given indecent burial to self-control, diligence and strength of will-power.....”

13. Learned counsel for the appellants relied upon an order passed by the Hon’ble Supreme Court reported as Union of India and others Versus Narain Singh, (2002) 5 SCC 11 in respect of scope of judicial review over the orders passed by the authorities under the B.S.F. Act. It was held to the following effect:

“7. This Court has, in the case of *Union of India v. Sardar Bahadur, (1972) 4 SCC 618*, held that there are limits to the powers which can be exercised by a Single Judge under Article 226 of the Constitution and, similarly, there are limits to the powers of a Division Bench while sitting in appeal over the judgment of a Single Judge. This Court has held that where there are relevant materials which support the conclusion that the officer is guilty, it is not the function of the High Court to arrive at an independent finding. It has been held that if an enquiry has been properly held the question of adequacy or reliability of evidence cannot be canvassed before the High Court.

9. As seen above, the Division Bench notes that the charges against the respondent are proved and that the charges are of serious nature. Once the Court came to the conclusion that the charges were proved and



that the charges were of a serious nature, it was not the function of the Court to interfere with the quantum of punishment. The Division Bench was wrong in holding that factors viz. (a) the person is coming from which place (b) his family background, and (c) his service record etc. were to be kept in mind. In our view, the Division Bench was also wrong in holding that if a poor person pleads guilty to the misconduct, then extreme penalty of dismissal is uncalled for. In our view a court must not lightly interfere with sentences passed after a properly conducted enquiry where the guilt is proved. Reduction of sentence, particularly in military, paramilitary or police services can have a demoralising effect and would be a retrograde step so far as discipline of these services is concerned. In this case the charges being of a serious nature the penalty was commensurate with the charges. Further the Division Bench has itself noted that this was the third time the respondent was punished.”

14. On the other hand, learned counsel for the petitioner relies upon another judgment reported as Girish Bhushan Goyal Versus BHEL and another, (2014) 1 SCC 82 to contend that the order of punishment is disproportionate to the gravity of misconduct. We do not find that such judgment is relevant for deciding the issues raised in the present case as in the aforesaid case, the employee was of a Public Sector Undertaking and not a member of the Disciplined Force.

15. As a member of B.S.F., the petitioner is subject to strict discipline, apart from the fact that the principles of natural justice are not applicable to such member of B.S.F. Reference may be made to a judgment of the Supreme court reported as Union of India And Others Versus Ex Constable Amrik Singh, 1991(1) SCC 654. It was held to the following effect:-

“7. From the above discussion it emerges that in cases of special enactments like Army Act, all the principles of natural justice cannot be imported. The same ratio applies to a petition under Section 117(2) of the Act also. We may also point out here that Chapter XIII consisting of Rules 167 to 169 of the BSF Rules deals with petitions filed under Section 117 of the Act. Even in them there is nothing to indicate that a hearing has to be given before disposal of a petition.

8. As noted above, under Section 117(2) the respondent is only entitled to file a petition but the disposal of such a petition does not attract principles of natural justice. The respondent has been tried by observing the due process of law and the verdict of the Security Force Court was confirmed and it is only a post-confirmation petition that was filed under Section 117(2) of the Act and the authority which disposed of the same is not a court and every order passed administratively cannot be subjected to the rigours of principles of natural justice.”

16. Therefore, we find that the order of the learned Single Bench cannot be sustained. The same is, thus, set aside. Consequently, the writ application is dismissed. The Letters Patent Appeal, thus, stands allowed.

(Hemant Gupta, J.)

Ahsanuddin Amanullah, J. I agree.

(Ahsanuddin Amanullah, J.)

Sunil

AFR/NAFR	
CAV DATE	04.08.2016
Uploading Date	11.08.2016
Transmission Date	