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

+ **W.P.(C) 2905/2013**

SHISH RAM

..... Petitioner

Through: Mr. H.K. Chaturvedi, Advocate with
Mr. Sagar Chaturvedi, Advocate.

versus

UOI AND ORS

..... Respondents

Through: Mr. Anuj Aggarwal, ASC with
Ms. Sakshi Kalia, Advocate for R-
BSF.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

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12.11.2018

CM APPL. 46643/2018

1. With the consent of parties, the application is allowed, and the writ petition is taken up for early hearing.

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2. The challenge in the present writ petition is to the order dated 10th October 1998 passed by the Commandant, 129 Battalion, Border Security Force, dismissing the Petitioner from service.

3. There were two charges for which the Petitioner was subjected to a trial by Summary Security Forces Court ('SSFC'). The charges pertained to two acts of insubordination committed on the same day against one Sub-

Inspector (SI) S. N. Singh. It is stated that at around 12:30 pm on 23rd September 1998, he used objectionable language when he was refused liquor which he had asked for on behalf of one cook, Ajit Sheel. The second charge is on the same day around at 1:30 pm, he again used objectionable language challenging SI S. N. Singh to use his power against the Petitioner.

4. According to the Respondents, the Petitioner pleaded guilty to the first charge but claimed trial for the second charge. He was, at his request, permitted to engage one Mr. A. S. Malik as his Defence Assistant to assist him in the trial. It is the case of the Respondents that he was given the full opportunity to defend himself. By the end of the proceedings, he was awarded the punishment as noted hereinbefore. His appeal against the said order was initially dismissed, leading to him challenging that order before this Court.

5. Although, initially, this Court set aside the dismissal order, the Respondents took that order in appeal to the Supreme Court which then restored W.P.(C) 24/2000 filed by the Petitioner to the High Court for a fresh consideration. By an order dated 7th August 2012, a Division Bench of this Court disposed of the writ petition by directing the Respondents to supply to the Petitioner the complete record of the trial conducted before the SSFC and that on receipt of such record, the Petitioner would be permitted to file an appeal before the Appellate Authority.

6. Pursuant thereto, the Appellate Authority passed a fresh order dated 11th January 2013, rejecting the Petitioner's submissions and confirming his dismissal from service. It is this order of the Appellate Authority that has

been challenged by the Petitioner in the present writ petition.

7. The Petitioner questioned, in the first instance, the stand of the Respondents that he pleaded guilty to the first charge. It is pointed out by him that there was no signature of the Petitioner on the proceedings where it was noted that he had pleaded guilty to the first charge.

8. The case of the Respondents as per its counter affidavit is that Petitioner did in fact plead guilty to the first charge. It is further pointed out by the Respondents that at the relevant point of time in 1998, Rule 142 (2) of the Border Security Force Rules 1969 ('BSF Rules') had not been inserted. Therefore, there was no legal requirement for obtaining such signature.

9. The Court indeed finds that there was no legal requirement at the relevant time of the person pleading guilty having to sign the proceedings. This requirement was inserted only on 25th November 2011. This being a disputed question of fact which cannot be examined in the present petition, the Court proposes to proceed on the basis that the Petitioner had in fact plead guilty to the first charge framed against him. Further, the Appellate Authority noted in the impugned order that even according to the Petitioner, he had been "directed to plead guilty of first charge and accordingly he wrote application dated 10th October 1998 when he was under custody for trial". Consequently, the Court does not accept this plea of the Petitioner.

10. It is then pleaded that the person who was engaged by the Petitioner as his Defence Assistant was not permitted to cross-examine the prosecution witnesses. In reply, it is pointed out by the Respondents that he was indeed

given a full opportunity to defend himself. This again is a disputed question of fact and, therefore, it is not possible for this Court to determine whether in fact, when the inquiry took place in 1998, the Petitioner's Defence Assistant was provided such opportunity.

11. It is next submitted that the Petitioner was not informed that he had the right to engage a legal practitioner in terms of Rule 63 of the BSF Rules. A reference is made in particular to Rule 63(1) read with 63(5) of the BSF Rules. While Rule 63(1) states that an accused shall be afforded a proper opportunity to prepare his defence and be allowed proper communication with his defending officer or counsel and with his witnesses. Rule 63(5) pertains to a request having been made by the accused for examination of a witness that he may wish to call in his defence and the Commandant having to accede to such request. There is no specific rule that mandates that the accused must be informed that he has right to a legal practitioner to defend him. Consequently, the Court is unable to find any illegality on this basis.

12. Finally, learned counsel for the Petitioner contends that the punishment of dismissal from service is disproportionate, considering the actual acts of insubordination for which the Petitioner was held guilty. Learned counsel for the Respondents, on the other hand, refers to the fact that the Petitioner had been punished summarily on seven previous occasions and it was the cumulative effect of his past record as well as him pleading guilty in the present instance to the first charge and being found to be guilty of both charges that has warranted the punishment.

13. Having considered the above submissions, this Court is of the view that

the punishment of dismissal from service for the aforementioned two acts of insubordination does appear to be wholly disproportionate. The Court finds merit in the contention of the learned counsel for the Petitioner that on the aspect of punishment, the Respondent authorities should once again consider the case of the Petitioner in accordance with law.

14. Consequently, the impugned order of the Appellate Authority confirming the dismissal of the Petitioner from service is hereby set aside and to the above limited extent of the appropriate penalty, the matter is remanded to the Appellate Authority for reconsideration. The Appellate Authority will, preferably after hearing the Petitioner, pass a fresh order on the issue of punishment uninfluenced by the earlier orders and communicate to the Petitioner the fresh decision not less than eight weeks from today. If the Petitioner is aggrieved by the said decision, it will be open to him to seek appropriate remedies in accordance with law.

15. The petition is disposed of accordingly.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

NOVEMBER 12, 2018

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