

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP No. 1034 of 2017
Date of decision: 31.05.2019

Kulbir Singh

..... Petitioner

Versus

Inspector General HQ BSF Punjab and another

..... Respondents

CORAM:- HON'BLE MR. JUSTICE ARUN MONGA

**Present:- Mr. V.P. Singh, Advocate
for the petitioner**

**Mr. Pawan Kumar Longia, Advocate
for the respondents**

ARUN MONGA, J.

1. Petitioner herein seeks quashing of orders dated 16.11.2015 (Annexure P-10) and 13.02.2016 (Annexure P-11) whereby, respectively, he was dismissed from service and his statutory petition against the same was rejected. Reinstatement into service along with consequential benefits has also been sought.

2. Brief facts first. The petitioner was recruited as follower (Cook) in the year 2000 and was later re-mustered as Constable (GD) in the year 2003. While he was posted at 90BN BSF Abohar, Punjab in 2015 he got the sad news that his mother-in-law had passed away. His wife being a disabled woman could not handle the last rites so he applied for leave. His request was declined and the last rites took place on 18.10.2015, in his absence, due to which he was in mental anguish. That same day, he was found crying inconsolably by his superior officers. Sh. Surinder Tokas, then Deputy Commandant of the battalion, got furious on seeing the petitioner in such a

state and placed him under arrest on account of creating nuisance.

3. On the same day i.e. 18.10.2015, an offence report was prepared and the petitioner was charged with having used abusive language against his superior officers and violation of good order and discipline alleging that he was intoxicated while on duty. Charge-sheet dated 12.11.2015 (Annexure P-6) was issued to the petitioner. Vide impugned order dated 16.11.2015 (Annexure P-10), the petitioner was dismissed from service. He filed a statutory appeal against the dismissal order which was rejected vide impugned order dated 13.02.2016 (Annexure -11). Hence this writ petition.

4. Petitioner has averred that the superior officers have discriminated against him. He had been serving for the last 15 years and had an unblemished service record. It was only due to the news that the last rites of his mother-in-law were performed in his absence and that his disabled wife had to look after the arrangements herself which caused him to cry out loud in frustration on not being granted leave on time.

5. He further averred that the charge-sheet and the record were not supplied to him at least 24 hours prior to recording of the statements before the Summary Security Force Court as per Rule 49 (3) of the Border Security Force Rules, 1969(for brevity, BSF Rules, 1969). Even otherwise, the whole record of the case and the evidence has been prepared in English Language which was not understood by the petitioner. This is in direct violation of Rule 134 of the BSF Rules, 1969.

6. Petitioner has averred other procedural lapses such as non compliance of Rule 122(3) of the BSF Rules, 1969 which makes it mandatory to appoint a 'friend of the accused' was also not complied with. No medical examination was ever conducted to ascertain whether the charge of intoxication was made out or not against the accused. As per Rule 145 (2), the

petitioner should have been allowed to lead his defence, this opportunity was again not given to him. Rule 142(2) states that the court had to ascertain whether the accused understood the evidence led against him. As the evidence was all recorded in English, it is clear that this provision was also overlooked.

7. In their return the respondents have taken the stand that the petitioner was a habitual offender and had been punished on 15 separate occasions earlier. It is stated that on 18.10.2015, the petitioner abused his superior officers in an inebriated condition and had consumed alcohol illegally while on sentry duty. After going through the evidence of the case, it was deemed to be a fit case to be sent to the Summary Security Force Court. The Court on appreciation of the evidence and having heard the statements of the witnesses awarded the punishment of dismissal from service to the petitioner. It is pointed out that the Appellate Authority also dismissed the statutory appeal preferred by the petitioner.

8. Learned counsel for the petitioner while arguing the case has stated that the respondents have failed to follow the proper procedure as given under the BSF Rules, 1969. They failed to ensure that the proceedings against the petitioner were recorded in a language understood by him. He was not given ample opportunity to defend himself as the record was not provided to him in sufficient time as per rules. Even otherwise, the statements of two Deputy Commandants namely Sh. Anil Kumar Singh Tomar and Sh. Gurnam Singh (Annexures P-8 and P-9) were not included in the Record of Evidence (ROE) which were in favor of the petitioner. This pick and choose method adopted by the Summary Court while punishing the petitioner raises serious questions on the procedure adopted by it.

9. Learned counsel for the petitioner has also stated that even if for the sake of argument it is conceded that the petitioner was guilty of the offence

being attributed to him the punishment of dismissal from service is highly disproportionate to the offence.

10. He placed reliance on judgments rendered by Hon'ble Division Benches of the Delhi High Court in cases titled as '**Kaushal Kishor Rai and another vs. Union of India and others**' bearing W.P.(C) No. 666 of 2001 decided on 25.02.2014, '**Ex. Constable Ram Kumar vs. Union of India and another**' bearing W.P.(C) No. 10319 of 2004 decided on 03.04.2014 and '**Balwinder Singh vs. Union of India and others**' bearing W.P.(C) No. 7875 of 2007 decided on 03.06.2010. The first two deal with the non-conducting of the medical examination when there is a charge of intoxication while on duty. Balwinder Singh's case deals with the effect of procedural lapses on part of the Court while delivering punishment to the accused.

11. Learned counsel for the respondents vehemently argued that the petitioner being a habitual offender cannot seek any leniency in the punishment awarded to him. He stated that the petitioner having been found guilty on 15 different occasions earlier cannot take the plea that due to procedural lapses his delinquencies be overlooked. It is stated that in combat forces insubordination and indiscipline cannot be turned a blind eye to. A junior abusing a superior officer and then getting away with it will cause further indiscipline in the force.

12. It is further argued that even though medical examination was not conducted, there was still sufficient evidence on record to punish the petitioner. He had himself confessed to having consumed liquor and abusing his superiors during the recording of evidence and even admitted the same before the Summary Security Force Court. It is contended that courts should not ordinarily sit in appeal against enquiry proceedings. The plea taken by the petitioner that the record was in English and he could not understand the same

is taken for the first time before this court which cannot be allowed.

13. Learned counsel for the respondents places reliance on various judgments where it has been held that no new plea can be taken when the same was not agitated before the Trial Court. They are '**Central Indian Machinery Manufacturing Co. Ltd. vs. State of M.P. and another**' 1997(9) SCC 475, '**R.K.Khandelwal vs. State of U.P. and others**' 1981 AIR (SC) 1673, '**M/s BSN Joshi and Sons Ltd. vs. Nair Coal Services Ltd.**' 2006(11) SCC 548 and '**Kishori Lal vs. Sales Officer, District Land Development Bank and other**' 2011(7) RCR (Civil) 233.

14. Further reliance has been placed on judgments holding that admissions are the best form of evidence against the maker such as '**Avtar Singh and others vs. Gurdial Singh and others**' 2006(12) SCC 552 and '**Mritunjoy Sett vs. Jadunath Basak (D) by Lrs**' 2011 AIR SC (Civil) 1418. Judgments holding that departmental proceedings being quasi-judicial in nature may not be interfered with by the Courts under writ jurisdiction are '**Nand Kishore Prasad vs. State of Bihar and others**' 1978 AIR (SC) 1277 and '**G.P. Singh and others vs. Shanti Ranjan Sarkar**' 1985 CriLJ 1695. Lastly reliance has been placed on '**S.N. Mukherjee vs. Union of India**' 1990 AIR (SC) 1984 wherein it was held that administrative authority while exercising quasi-judicial functions may not record reasons where the requirement is dispensed with.

15. I have heard the learned counsel for both the parties and have gone through the pleading with their able assistance.

16. Before proceeding further with the matter, it would be educative to have a look at the relevant BSF Rules, 1969.

Rule 134 of the BSF Rules, 1969 reads as under:-

"134. Evidence when to be translated.- (1) When any evidence is

given in a language which the Court or the accused does not understand, that evidence shall be translated to the Court or accused as the case may be in a language which it or he does understand. (2) The Court shall for this purpose either appoint an interpreter, or shall itself take the oath or affirmation prescribed for the interpreter at a Summary Security Force Court. (3) When documents are produced for the purpose of formal proof, it shall be in the discretion of the Court to cause as much to be interpreted as appears necessary.”

Rule 49 of the BSF Rules, 1969, envisages as under:-

“Abstract of evidence.- (1) An abstract of evidence shall be prepared either by 2 [the officer ordering it] or an officer detailed by him. (2) (a) The abstract of evidence, shall include; (i) signed statements of witnesses wherever available or a precis thereof, (ii) copies of all documents intended to be produced at the trial. (b) Where signed statements of any witnesses are not available a precis of their evidence shall be included. (3) A copy of the abstract of evidence shall be given by the officer making the same to the accused and the accused shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rule (3) of Rule 48: Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty four hours after receiving the abstract of evidence to make his statement.”

Rule 122 of the BSF Rules, 1969 says as under:-

“122. Defending Officer, Friend of Accused and Counsel:- (1) At any General or Petty Security Force Court an accused person may be represented by a counsel or by any officer subject to the Act who shall be called “the defending officer” or assisted by any person whose services he may be able to procure and who shall be called “the friend of the accused”. (2) The defending officer shall have the same rights and duties as appertain to a counsel under these rules and shall be under the like obligations. (3) The friend

of the accused may advise the accused on all points and suggest the questions to be put to the witnesses, but he shall not examine or cross-examine the witnesses, or address the Court.”

17. It is evident that the respondents violated the provisions, *ibid*. Rule 134 of BSF Rules, 1969 clearly mandates that when any evidence is given in a language which the Court or the accused does not understand, that evidence shall be translated to the Court or accused, as the case may be, in a language which it or he does understand and for this purpose the Court shall either appoint an interpreter, or shall itself take the oath or affirmation prescribed for the interpreter at a Summary Security Force Court. No explanation has been rendered in the present case as to why the proceedings were not conducted in the language understood by the petitioner i.e. Hindi or why the translator was not provided. The purpose of such beneficial service rules is defeated if an employer is not following it and benefit thereof is denied to the employee.

18. Furthermore, there was violation of rule 49 *ibid* by the respondents inasmuch as there is nothing on record to show compliance of the proviso to Rule 49 *ibid*, which mandates that the accused shall be given reasonable time, which shall in no case be less than 24 hours after receiving the abstract of evidence, to make his statement. As stated, the evidence was recorded in English, a language not understood by the petitioner, the petitioner, therefore, deserved adequate reasonable time to revert. Non-compliance of this mandatory requirement would obviously prejudice his defence.

19. The respondents did not adhere to the provisions contained in Rule 122, *ibid*, as the petitioner was also denied opportunity of being heard

with a friend during Summary Security Force Court proceedings. Thus, the very basic principles of natural justice in adducing the evidence were overlooked as the petitioner was not given a fair and effective chance to cross-examine the witnesses whose testimony forms the basis of holding the petitioner guilty. It is nowhere disputed that the petitioner did not know the English language. Yet record does not show if as per Rule 134 of the BSF Rules, 1969, the evidence adduced in English language in Summary Security Force Court proceedings was read-over in vernacular and explained to the petitioner.

20. In the course of arguments as also in the pleadings an emphatic stand has been taken that the petitioner is a habitual offender and during his entire service career has been held guilty as many as 15 times and, therefore, the order awarding him the punishment of dismissal from service has been rightly passed. However, a perusal of the charge-sheet as also the punishment order (Annexure P-10) reflects that there is not even a whisper in respect of the past service record of the petitioner. No doubt, if the charge-sheet contained an allegation of petitioner being habitual offender, he would have had an opportunity to defend himself qua the same and the respondent-BSF was entitled to agree or disagree with the said defence and proceed accordingly. Not only the charge-sheet even the punishment order (Annexure P-10) does not mention the past service record of the petitioner i.e. being a habitual offender to be the ground of his dismissal from service. This omission in the initial punishment order (Annexure P-10) negates the contention that the past conduct of the petitioner justified the said order. It is settled position that the punishment order should speak for itself and the case cannot be improved upon by the appellate order or on the basis of pleadings filed in the Court. The stand of habitual offender only in the impugned appellate order (Annexure P-

11) and in the return filed by the respondents in response to the present writ proceedings has, therefore, to be disregarded.

21. I am also of the view that the charge of the petitioner having been found inebriated is also to be viewed with certain suspicion in the absence of any medical examination having been carried out upon the petitioner. If found intoxicated during duty hours, having regard to the nature of job of combat services, the delinquent employee, without any manner of doubt, would not deserve the sympathy either of the employer or of this Court. The same is, however, subject to certain safeguards to be observed keeping in view the basic human rights of an employee. The conclusive proof of intoxication cannot, therefore, be mere levelling of the charge or word of mouth of witnesses produced at the instance of the employer. Concrete and reliable proof thereof can only be the medical examination which is based on cogent scientific findings which are more or less irrefragable given the scientific precision of this day and age.

22. Learned counsel for the respondents has laid emphasis on the admission of the petitioner qua the delinquency of his having been found in intoxicated state. I have gone through the said confession which has been recorded in English and was recorded in the presence of Second Commandant who enjoyed position of superior authority and dominance over the petitioner in the hierarchy. The petitioner was/ is merely a Cook/ Constable and he would dare not disobey any direction of his superior and would sign on the dotted lines, without even flinching an eye-lid, regardless of the fact, whether the same was in Hindi or English. As already noted above, the petitioner does not know and understand English language. Had the confession been recorded in Hindi, it might have been a possibility, but only a possibility and nothing more, that he would have gathered the courage of raising an objection, either at

the time of signing the confession or later on, during Summary Security Force Court proceedings. That situation did not arise at all for the petitioner, owing to the respondents non-compliance of the BSF Rules, *ibid*.

23. Even otherwise, awarding of major punishment of dismissal from service is akin to economic death penalty for a delinquent employee and it has to be resorted with extra caution. Not only it is loss of livelihood for the employee, but the entire family is reduced to live in penury and made to suffer consequences for rest of their lives. Owing to the stigma attached, it is impossible for a person to get any employment elsewhere. Reliance can be placed on **Union of India & Ors. Vs. Sri Sankar Prosad Ghosh & Anr. 2008(5) SLR 170**, wherein it has been held as under:-

“13. It would be naive to say as on today, that livelihood is not a part of right to life. By this time, by a large number of decisions, it has been held by the Hon'ble Supreme Court as well as High Courts in this country that livelihood is an integral facet of right to life. In this connection, a decision of the Hon'ble Supreme Court rendered in the case of State of Himachal Pradesh v. Raja Mahendra, reported in AIR 1999 SC 1786. may be remembered.

14. Dismissal from services undoubtedly is taking away the livelihood of a person at an advanced stage because at that stage, it is impossible for a person to get any employment elsewhere as the order of dismissal will be treated as a disqualification. Loosing a job in an establishment amounts to a civil death, as the concerned person will not be in a position to earn livelihood at the advanced stage, when all his energies and endeavours have almost come to a diminishing stage.”

24. As a result of the above discussion and the reasons contained therein, the writ petition is allowed. Impugned orders dated 16.11.2015 (Annexure P-10) and 13.02.2016 (Annexure P-11) are hereby set aside. Consequently, the respondents are directed to reinstate the petitioner with continuity of service and other ancillary benefits. However, the petitioner shall not be entitled for back wages during the period he remained out of service.

(ARUN MONGA)
JUDGE

May 31, 2019

Jiten/R

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| 1. Whether speaking/ reasoned: | Yes/ No |
| 2. Whether reportable: | Yes/ No |