

FMA 178 of 2019
With
IA. No. CAN 4 of 2020

Union of India & Ors.
Vs.
Smt. Pramila Devi

Mr. Rudrajyoti Bhattacharya
.....for the appellants

Mr. Srijib Chakraborty
Mr. Rahul Poddar
Mr. Sandip Kumar Dutta
....for the Respondent

This is an appeal by the Central Government from a judgment and order dated 15th December, 2017 made by the learned single judge of this Court in a writ application (WP No. 5689(W) of 2007) (Smt. Pramila Devi vs. The Union of India & Ors.). By this judgment and order the writ application of the respondent in the appeal was allowed.

We also record that in the Court below the appellants could not use an affidavit-in-opposition.

For proper appraisal of facts and for the ends of justice we permit them to rely on the documents in the application described as one under Order 41 Rule 27 of the Code of Civil Procedure.

The application (CAN 4 of 2020) is allowed.

The writ application challenged an order of dismissal from service of the husband of the respondent from the Border Security Force made by the Summary Security Force Court, *inter alia*, under Chapter IV of the Border Security Force Act, 1968 read with, *inter alia*, Chapter VII of the Border Security Force Rules, 1969.

The respondent's husband, Dinesh Sharma was a constable in the Border Security Force. He is now dead.

Allegedly on 21st March, 2001 at 10.40 hrs. he was found in "a state of intoxication". On 23rd March, 2001, three charges were served upon him. The first was that allegedly he absented from duty without leave, on 22nd March, 2001 from 6.00 to 11.00 p.m. The second charge was that on 21st March, 2001 he left the unit lines without proper permission. The third was that he was found in "a state of intoxication" on 21st March, 2001 at 11.00 p.m.

On 30th March, Dinesh was dismissed from service.

The learned single judge allowed the writ application on two principal grounds. His lordship in the impugned judgment and order expressed the opinion that adequate opportunity was not given to Dinesh to answer the show-cause or the charge-sheet.

Secondly, the learned judge found the punishment of dismissal to be excessive and disproportionate.

The Union of India is in appeal before us from this judgment.

Learned counsel for the appellants has placed before this Court the types of punishment that can be imposed on a delinquent as mentioned in Section 48 under Chapter IV of the said Act.

The said Section is inserted below:

“ 48. Punishments awardable by Security Force Courts – (1) Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say, -

(a) death;

(b) imprisonment which may be for the term of life or any other

lesser term but excluding imprisonment for a term not exceeding three months in Force custody;

(c) dismissal from the service;

(d) imprisonment for a term not exceeding three months in Force custody;

(e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer;

(f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;

(g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(h) fine, in respect of civil offences;

(i) server reprimand or reprimand except in the case of persons below the rank of an under-officer;

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;

(k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;

(1) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good.

(2) each of the punishments specified in sub-section (1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale.”

Learned counsel has also placed in detail the procedure for investigation and summary disposal of for cases for alleged misconduct by an officer accused under Chapter VII of the Border Security Force Rules, 1969, specially Rules 45A and 45B, which provide details of procedure regarding the hearing of charges against an accused person.

There is also scope of imposition of minor punishment which was pointed out by Mr. Chakraborty, learned counsel for the respondent by referring to Section 53 of the said Act.

What is most important in our opinion is Section 49 of the said Act which is as follows:

“49. Alternative punishments awardable by Security Force Courts – Subject to the provisions of

this Act, a Security Force Court may, on convicting a person subject to this Act of any of the offences specified in sections 14 to 45 (both inclusive) award either the particular punishment with which the offence is started in the said sections to be publishable or, in lieu thereof, any one of the punishments lower in the scale set out in section 48 regard being had to the nature and degree of the offence.”

Learned single judge has held that the rules of natural justice were not properly complied with. To this, learned counsel for the appellants submitted that when the procedure under the said Act was for framing of charges, hearing of charges, which included an opportunity to the respondent's husband to cross examine the witnessess for the prosecution there was substantial compliance with the rules of natural justice. The respondent's husband of the writ petitioner did not avail of this opportunity.

Even if we accept the submission of learned counsel for the appellants the question still remains as to whether the punishment was proportionate.

The respondent, as the wife of the accused, is defending the appeal.

The retiral benefits of the delinquent have been withheld because of this punishment.

For a particular act like intoxication the authority, the Security Force Court has the power of imposing the punishment of dismissal. Under Section 49, it has also the power to impose a lesser punishment. Thus in the award of punishment, in our opinion the authority is required to exercise its discretion in each case according to its facts, judiciously and reasonably.

Here, the accused is dead. His family is financial need. Any misuse of discretion in awarding punishment would result in financial deprivation for the family for no fault of theirs.

In our opinion, the discretion under Section 49 was not properly exercised by the said authority.

If the offence complained of is proved, we agree with the learned single judge that the punishment appears to be excessive and disproportionate.

For those reasons we affirm the impugned judgment and order of the learned single judge with the only modification that the appellants shall within

six weeks from date revise the order of punishment against the respondent's husband Dinesh Sharma by imposing an appropriate minor punishment. The retiral benefits of the respondent's husband are to be released by the appellant to the respondent within 3 months from date.

The appeal is disposed of accordingly.

Urgent certified photocopy of this order, if applied for, be supplied to the parties upon completion of usual legal formalities.

(I.P. MUKERJI, J.)

(SUBHENDU SAMANTA, J.)