Baljinder Singh Vs Union of India

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Oct. 21, 2005

Acts Referred: Border Security Force Act, 1968 â€" Section 117

Citation: (2006) 1 RCR(Civil) 605 : (2006) 1 RCR(Criminal) 789

Hon'ble Judges: Surya Kant, J

Bench: Single Bench

Advocate: G.S. Ghuman, for the Appellant; Anil Rathi, Additional Central Government Standing, for the Respondent

Final Decision: Dismissed

Judgement

Surya Kant, J.
The Petitioner has come up with a prayer to quash the Summary Security Force Court proceedings (Annexure P-7)

whereby apart from sentencing the Petitioner to undergo rigorous imprisonment for six months in civil jail, he was also dismissed from the service of

Border Security Force. As a consequential relief, the Petitioner seeks his reinstatement in service along with all the monetary benefits.

2. The Petitioner was enrolled as a Constable (General Operator) in BSF on January 10, 1995. While he was attached with 42nd Battalion,

stationed at Border Outpost Sowarwali near Fazilka, it is alleged that he unauthorizedly loaded 69.5 meters of underground cable valuing

approximately Rs. 15,290/- on an Eichor tractor-trolley bearing No. PB-03-0444 with the help of one Karnail Singh - a civilian. The underground

cable was despatched to Fazilka market in order to earn some money by disposing it of there. The underground cable was government property

meant for supplying electricity to border flood-light poles. The Petitioner, at the relevant time, was responsible for counting and maintaining of the

underground cable wires. The aforesaid incident of theft was also reported vide complaint dated 23.8.2001 (Annexure P-1) by the Company

Commander to the SHO, Police Station Sadar Fazilka on the basis of which a formal FIR was registered. In the aforementioned complaint, it was

alleged that the Petitioner in connivance with a civilian, namely, Karnail Singh and one more unknown person, had committed the theft. On the next

day, i.e. 24.8.2001, Respondent No. 3 - the Commandant, 47th Battalion convened a Court of Inquiry headed by K.N. Mishra, Assistant

Commandant of 47th Battalion ""to enquire into the circumstance under which the Petitioner unauthorizedly loaded and despatched 185 mm UG-

cable of 69.5 meters length on civilian tractor (Eicher) trolley No. PB-03-0444..., and to find out the possible involvement of other personnel, if

any, and the destination of despatch of the said UG- cable and to apply Rule 173(8) of the BSF Rule, if need be.

3. The Court of Inquiry after examining 17 witnesses including the Petitioner, gave an opinion that the Petitioner was responsible for the theft in

question. The Court of inquiry proceedings, photostat copies of which have been placed on record as Annexure P-2, further reveal that an

opportunity to say or make any statement in his deference and to produce any documents in support of his defence or to call any witness in his

defence at that stage was given to the Petitioner ""to which be declined to do so"". The Presiding Officer also ""certified that Rule 173(8) was

complied with"". Based upon the opinion of the Court of Inquiry, the Commandant 42nd Battalion, the third Respondent prepared an offence report

(Annexure P-3) against the Petitioner followed by an order dated 5.9.2001 (Annexure P-4) whereby the Deputy Commandant of the Unit was

detained to conduct ""Record of Evidence"" (ROE) as per the details mentioned in the accompanying charge-sheet.

4. The proceedings of the Record of Evidence (the photostat copies Annexure P-6), further reveal that six prosecution witnesses including Karnail

Singh - a civilian - were produced and on each occasion, opportunity to cross-examine these witnesses was afforded to the Petitioner but he

declined to avail the same. The Petitioner duly acknowledged the fact that opportunity to cross- examine the witnesses was given but declined by

him. The Petitioner was thereafter given an opportunity to make his own statement in terms of Rule 48(3) of the BSF Rules, 1969 (in short the

Rules) but the proceedings reveal that he did not want to make any such statement. Upon a question by the Presiding Officer as to whether he

wanted to produce any witness in his defence, the Petitioner answered that ""no, I do not want to produce any witness"". These proceedings were

thereafter concluded by the Deputy Commandant-cum-Recording Officer by certifying that Rule 48 of the rules was duly complied with.

5. Thereafter, the Summary Security Force Court was assembled on September 11, 2001 for the Petitioner''s trial. These proceedings are also

placed on record as Annexure P-7. In reply to question No. 1, namely, as to whether or not he was guilt of the charges, the Petitioner is stated to

have confessed that he was ""guilty"". The Summary Security Force Court then concluded as follows:

Accused having pleaded guilty to the charge, the Court read and explains to the accused the meaning of that charge to which he has pleaded guilty

and ascertains that the accused understands the nature of the charge to which he has pleaded guilty. The Court also informs the accused the

general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court satisfies itself that the

accused understands the charge and the effect of that plea and the difference in procedure which will be followed consequent to the said plea. The

Court satisfies itself that the accused understands the charge and the effect of his plea of guilty to the charge particularly the difference in

procedure.

The provisions of BSF Rule 142(2) are complied with.

6. The proceedings further reveal that after the Petitioner had been found guilty of the charge, he was given an opportunity to make statement in

reference to the charge or in mitigation of the punishment to which also he replied that he did not want to make any statement nor he wanted to

produce any witness. The proceedings finally culminated into imposition of sentence/punishment a reference to which has already been made.

7. Aggrieved at the aforesaid decision of the Summary Security Force Court, the Petitioner preferred a statutory petition u/s 117 of the Border

Security Force Act, 1968 along with an application u/s 130 of the Act for suspension of the sentence imposed upon him. His appeal, however,

was turned down by the Director General, Boarder Security Force - Respondent No. 2 vide order dated 30.4.2002 (Annexure P-9). The

Petitioner thereafter served the Respondents with a Justice Demand Notice (Annexure P-10) but having received no response thereto, has

approached this Court.

7. Notice of motion was issued and in response thereto, written statement on behalf of the Respondents has been filed.

8. I have heard Shri G.S. Ghuman, learned Counsel for the Petitioner and Shri Anil Rathi, learned Additional Central Govt. Standing Counsel for

the Union of India and have perused the record with their assistance.

9. In order to make out a case of gross violation of principles of natural justice, learned Counsel for the Petitioner vehemently contended that the

action taken against the Petitioner stands vitiated for the reason that in total disregard to the mandate of Rule 176 of the Rules, copies of the

proceedings of the Court of Inquiry (Annexure P-2) were not supplied to the Petitioner though the said Court of Inquiry gave its opinion against

him. Reference has been made to para 10(a) of the written statement in which it is admitted that the copy of the Court of Inquiry proceedings was

not supplied to the Petitioner as he ""did not apply"" for the same. Shri Ghuman further contended that the Court of Inquiry was conducted in total

violation of Rule 173(8) of the Rules as no opportunity to cross-examine the witnesses was given to the Petitioner. It has also been contended that

there is no application of mind while issuing the charge-sheet, Annexure P-7, which is a replica of the original charge-sheet (Annexure P-5) and

bears the same date. Reference to Section 80 of the Act has also been made to contend that since a civilian was the Petitioner"s co-accused, the

trial for the alleged offence ought to have been held before the Criminal Court under the Code of Criminal Procedure and not before the Summary

Security Force Court. According to Shri Ghuman, learned Counsel for the Petitioner, the order dated 30.4.2002 (Annexure P-9) rejecting the

Petitioner"s statutory petition is also unsustainable being a non-speaking and crypatic order. Shri Ghuman also referred to Section 81 of the Act in

order to contend that once FIR had been registered by the police, Summary Security Force Court could not have tried the Petitioner without prior

permission of the Illaqa Magistrate. According to Shri Ghuman, the proceedings of the Court of Inquiry as well as the Summary Security Force

Court are further vitiated for the reason that officers subordinate to the Commandant, namely, i.e. in the rank of Assistant Commandant or Deputy

Commandant were authorized to proceed against the Petitioner though under the Act/Rules, the Commandant alone was competent. In support of

his aforementioned contentions, Shri Ghuman placed reliance upon the judgments of the Apex Court in (i) Lt.-Col. Prithi Pal Singh Bedi and

Others Vs. Union of India (UOI) and Others, (ii) State of Madhya Pradesh Vs. Surbhan, (iii) State of Uttar Pradesh and Others Vs. Ramesh

Chandra Mangalik, and (iv) Union of India and Ors. v. B.N. Jha, 2003 (3) SLR 365.

10. On the other hand, Shri Rathi, learned Counsel for the Respondents referred to the proceedings of the Record of Evidence and contended that

the Petitioner having admitted his guilt, which is as good as a confessional statement, has no locus standi to contend that principles of natural justice

have not been complied with. According to Shri Rathi, the Petitioner was given full opportunity to cross-examine the witnesses which he refused to

avail and he also did not take advantage of the opportunity to produce defence evidence. It is, thus, contended that the Petitioner now cannot be

permitted to raise such disputed questions of fact which cannot be gone into by this Court in exercise of its writ jurisdiction. Reliance has been

placed by him upon judgment of the Apex Court in the case of Union of India v. Himmat Singh Chahar, 1993 (3) RSJ 256, a Division Bench

judgment of this Court in Kulwinder Singh v. Union of India and others, 2003 (4) SCT 59 (P&H) : 2004 (2) SLR 31 and a Single Bench

judgments of this Court in the cases of Ex. Sepoy Ranjit Singh v. Union of India and others, 2004 (1) RCR (Crl.) 138 : 2004 (1) SCT 136 (P&H)

: 2004 (1) RSJ 647; and Union of India v. State of Punjab, 1999 (3) RCR (Crl.) 365.

11. From the facts and contentions notices above, it emerges that two sets of inquiries were held against the Petitioner. Firstly, there was a Court

of Inquiry ordered by the Commandant 42nd Battalion on the next day of the occurrence, i.e. 24.8.2001. As provided in Rule 174 of the Rules, a

Court of Inquiry is held to investigate into any ""disciplinary matter"" or ""any matter of importance"". In addition, a Court of Inquiry can also be held in

all cases falling under Sub-rule (2) of Rule 174 which includes cases of ""financial irregularities, losses, theft and misappropriation of public or force

property...."". The Court of Inquiry is required to be held as per the procedure laid down in Rule 173 which reads as follows:

173. Procedure of Courts of inquiry: (1) The proceedings of a Court of inquiry shall not be open to the public. Only such persons may attend the

proceedings as are permitted by the Court to do so.

(2) The evidence of all witnesses shall be taken on oath or affirmation.

(3) Evidence given by witnesses shall be recorded in narrative form unless the Court considers that any questions and answers may be recorded as

such.

(4) The Court may take into consideration any documents even though they are not formally proved.

(5) The Court may ask witnesses any question, in any form, that they consider necessary to elicit the truth and may take into consideration any

evidence, whether the same is admissible under the Indian Evidence Act, 1872 (1 of 1872) or not.

(6) No counsel, or legal practitioner shall be permitted to appear before a Court of inquiry.

(7) Provisions of Section 89 shall apply for procuring the attendance of witnesses before the Court of inquiry.

(8) Before giving an opinion against any person subject to the Act, the Court will afford that person the opportunity to know all that has been

stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

(9) The answers given by a witness to any question asked before the Court not shall be admissible against such a witness on any charge at any

subsequent occasion except a charge of giving false evidence before such Court.

(emphasis applied)

12. There can be no exception that in terms of Sub-rule (8) reproduced above, a Court of inquiry, before it gives any opinion against a person, is

required to afford an opportunity to such person concerned: (i) to know all that has been stated against him; (ii) cross-examine the witnesses who

have given evidence against him; (iii) make a statement; and (iv) call witnesses in his defence. Rule 175 provides that the authority who ordered the

Court of Inquiry, upon receipt of the proceedings, may either pass final orders himself, if so empowered, or refer them to a superior authority.

Further, Rule 176 provides as follows:

176. Copies of Court of inquiry proceedings - A person subject to the Act against whom the Court of inquiry has given an opinion or who is being

tried by a Security Force Court on a charge relating to matters investigated by the Court of inquiry, shall be entitled to copies of the proceedings of

the Court of inquiry unless the Director General orders otherwise.

13. On the other hand, Summary Security Force Court proceedings are to be held in accordance with the procedure laid down in Chapter XI of

the Rules. It will be apposite to refer Rule 139, 142 and 145, which read as follows:

139. Objection by accused to charge - The accused, when required to plead to any charge, may object to the charge on the ground that it does

not disclose an offence under the Act, or is not in accordance with these rules.

142. General plea of ""Guilty"" or ""Not Guilty"" - (1) The accused person"s plea of ""Guilty"" of ""Not Guilty"" (or if he refuses to plead ot does not

plead intelligibly either one or the other). a plea of ""Not Guilty"" shall be recorded on each charge.

(2) If an accused person pleads ""Guilty"", that plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain

that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in

particular of the meaning of the charge to which he had pleaded guilty, and of the difference in procedure which will be made by the plea of guilty

and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead

not guilty.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after Sub-rule (2) has been

complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the

charge to which the accused has pleaded guilty without requiring the accused to plead thereto, and a record to that effect shall be made in the

proceedings of the Court.

145. Procedure after plea of ""Not Guilty"" - (1) After the plea of ""Not Guilty"" to any charge is recorded the evidence for the prosecution will be

taken.

(2) At the close of the evidence for the prosecution the accused shall be asked if he has anything to say in his defence, or may defer such address

until he has called his witnesses.

(3) The accused may then call his witnesses including also witnesses to character.

14. In the light of these rules, it needs to be examined as to whether or not in the present case the procedure as laid down for the Court of Inquiry

and/or for the Summary Security Force Court has been substantially followed.

15. The Court of Inquiry proceedings (Annexure P-2) reveal that 17 witnesses including the Petitioner were examined. Their statements were read

over to them in the language they understood and were duly signed by them in the presence of independent witnesses. The concluding part of these

proceedings which has a material bearing on the fate of this case reads as follows:

APPLICATION OF RULE 173(8)

Court hereby giving you an opportunity whether you want to say or make any statement in your defence or to produce any documents in support

of your defence or to call any witness in your defence at this stage to which he declined to do so.

Recorded Independent

Accused

by me witness

Sd/- Sd/- Sd/-

(K.N. (HC

(CT/Genopr

Mishra) RameshChand)

No. 8607629, Baljinder

AC/PO.

42 BN BSF Singh)

No.

95076852

Certified that Rule 173(8) complied with.

Sd/- (K.N. Mishra) AC/PO

It is true that the expression ""cross-examine the witnesses"" is not mentioned in the above reproduced note, however, the fact that the Petitioner

himself has signed and acknowledged the opportunity given to him to lead defence evidence etc., thus, he could put up a note of protest against

denial of opportunity coupled with the fact that the Presiding Officer has certified the compliance of Rule 173(8) of the Rules, leaves no doubt in

one"s mind that the plea as if the Petitioner was not afforded an opportunity to cross-examine Karnail Singh - the civilian - during the course of

Court of Inquiry proceedings, is merely an afterthought.

16. Another vital contention which goes to the root of the matter pertains to non-compliance of Rule 176 of the Rules, namely, non-supply of the

copies of the proceedings of the Court of Inquiry. Whereas learned Counsel for the Petitioner contended that Respondent No. 3 was obligated in

law `to supply'' copies of these proceedings, the Respondents contend that the Petitioner never `demanded'' the same. In my view, the expressions

shall be entitled to copies of the proceedings of the Court of Inquiry unless the Director General orders otherwise"" as contained in Rule 176 are of

significant importance. It appears that the right to seek copies of the proceedings of the Court of Inquiry has been given to a delinquent in order to

ensure that he can effectively participate in the trial proceedings before the summary Security Force Court and no prejudice is caused to him.

However, the fact that the Director General, BSF is entitled to refuse the supply of copies of the Court of Inquiry proceedings, clearly indicates

that there is no obligation is cast upon the authorities to supply copies of these proceedings to the delinquent and it is for him to apply and seek

copies thereof. Further, prior permission of the Director General before supplying such copies is also visible, who, in turn is competent to decline

such request. It is not the case of the Petitioner that he had applied for the copies of the Court of Inquiry proceedings yet the same were denied to

him, no advantage of Rule 176 can be taken by him at this stage.

17. There is yet another aspect of the matter. As observed earlier, the object of getting copies of the Court of Inquiry proceedings is to have

effective participation in the trial proceedings before the Summary Security Force Court. A perusal of the Summary Security Force Court

proceedings (Annexure P- 6) reveals that after recording the statement of each witness, a note has been given that ""the accused is provided an

opportunity to cross-examine the witness but he declines to do so"". This note has been duly signed and acknowledged by the Petitioner. The

Petitioner thereafter declined ""to make any statement"" and also refused to ""produce any witness"". Before conclusion of the proceedings, he

confessed his guilt of the charge, a detailed reference to which has already been made. The Petitioner, thus, having refused to avail the opportunity

to cross-examine the witnesses or to produce his own evidence and rather having admitted his guilt, cannot be permitted to turn around and say

that he has been held guilty in derogation to the principles of natural justice and fair play. Further, the note recorded by the Summary Court in

terms of Rule 142 of the rules, suggests that the Petitioner did not object to the charge framed against him though such a right is conferred under

Rule 139. Similarly, the procedure laid down under Rule 145 also appears to have been complied with.

18. The scope of interference in such like matters has been well explained by the Apex Court in Himmat Singh Chahat"s case (supra), wherein

their Lordships observed as follows:

5..... It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial proceeding the High

Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding

out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of

justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the

authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an

Appellate Authority permitting the High Court to re- appreciate the evidence and in coming to a conclusion that the evidence is insufficient for the

conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High

Court exercised under Article 227 against an order of an inferior Tribunal.....

19. No other point was urged by Learned Counsel for the parties.

For the reasons aforementioned, I do not find any merit in this petition which is accordingly dismissed.

Petition dismissed.