

(2011) 07 CAL CK 0039

Calcutta High Court

Case No: F.M.A. No. 348 of 2010

Robert Xess

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: July 18, 2011

Acts Referred:

- Border Security Force Act, 1968 - Section 117, 46, 74(2)
- Border Security Force Rules, 1969 - Rule 158

Citation: (2011) 4 CHN 176

Hon'ble Judges: Shukla Kabir, J; Pranab Kumar Chattopadhyay, J

Bench: Division Bench

Advocate: Debdatta Basu and Kaberi Sengupta, for the Appellant; Sudhakar Biswas, for the Respondent

Final Decision: Allowed

Judgement

Pranab Kumar Chattopadhyay, J.

This appeal has been preferred at the instance of the writ petitioner-appellant assailing the judgment and order dated 12th March, 2008 passed by a learned Judge of this Court whereby the said learned Judge dismissed the writ petition on merits.

2. From the records, we find that the appellant herein at the relevant time was serving in the Border Security Force as "Constable" and was posted at 136 Battalion of Border Security Force at Roshanbagh in the district of Murshidabad, West Bengal. We also find from the records that the appellant herein was on duty along with other two constables namely Sri M. Munnaswamy and Sri Roshan Kumar Singh at Indo-Bangladesh Border on 24th July, 2005.

3. It is the ease of the appellant-petitioner that while discharging the duties at the said Indo-Bangladesh Border on 24th July, 2005, he found some miscreants armed with deadly weapons trying to cross over to Bangladesh with smuggled cattle. It has been submitted by the learned Advocate of the appellant that the said appellant

raised alarm and tried to apprehend the miscreants, but the said miscreants fled away leaving a Polythene packet which contained some cash money. It is the specific case of the appellant that in spite of his best effort, he could not connect the Area Commandant through Radio Set but after sometime when the Company Commandant came to the spot, the appellant narrated the entire incident and handed over the Polythene packet to the said Commandant. The Commandant thereafter prepared the seizure memo on 24th July, 2005 showing recovery of an amount of Rs. 13,150/- from the appellant and other two constables namely, Sri M. Munnaswamy and Sri Roshan Kumar Singh. On the next date i.e. on 25th July, 2005 an order was issued directing the Deputy Commandant of the Unit to prepare record of evidence against the aforesaid constables including the appellant herein for committing an offence u/s 46 of the Border Security Force Act. The record of evidence was thereafter prepared on 28th July, 2005 and the Commandant of the area by the order dated 30th July, 2005 directed the Deputy Commandant to prepare an additional record of evidence within 31st July, 2005. The Commandant subsequently by an order dated 1st August, 2005 forwarded the chargesheet, copies of records of evidence as well as additional records of evidence to the appellant herein informing him about the commencement of the trial in Summary Security Force Court on 2nd August, 2005. The appellant and the aforesaid two other constables were arrested on 2nd August, 2005 and tried by the Summary Security Force Court on 2nd August, 2005. The final order of punishment was thereafter issued by the Commandant on 4th August, 2005 holding the appellant guilty of the charges and the Court sentenced him to suffer rigorous imprisonment for one year Civil Prison and also directed his dismissal from service. An appeal was preferred u/s 117 of the Border Security Force Act before the Appellate Authority which was however, not disposed of for a considerable period. After a specific order was passed by this Court in another writ petition being W.P. No. 2636 (W) of 2006, the said appeal was ultimately disposed of by the Appellate Authority namely, the Director General of Border Security Force on 25th April, 2006 whereby the said Appellate Authority rejected the appeal filed by the wife of the appellant herein.

4. Challenging the final order of punishment which was ultimately affirmed by the Appellate Authority, a writ petition was filed by the appellant herein which was finally disposed of by the judgment and order under appeal passed by the learned Single Judge on 12th March, 2008. The appellant, however, already suffered the imprisonment in the meantime pursuant to the said order of punishment passed by the Summary Security Force Court.

5. The learned Advocate for the appellant submits that the proceedings initiated against the appellant herein were conducted in clear violation of the mandatory provisions of the Border Security Force Act 1968 and the Rules framed thereunder. Learned Counsel of the appellant specifically submits that the appellant was held guilty and punishment was imposed on him in absence of adequate evidence. Learned Counsel of the appellant also submits that the Authorities concerned

proceeded against the appellant from the very inception not only in clear violation of the provisions of the Border Security Force Act and the Rules framed thereunder but also did not comply with the principles of natural justice and procedural justice by not giving adequate opportunity to the appellant to cross-examine the vital witness.

6. Mr. Debdatta Basu, learned Advocate of the appellant submits that the respondents-authorities did not even comply with the mandatory provisions of Border Security Force Rules by not attaching the explanatory memorandum in compliance with Rule 158. The said Rule 158 is set out hereunder:

58. Memorandum to be attached to proceedings.-- Where a Summary Security Force Court tries an offence which shall not ordinarily be tried without reference to an authority mentioned in sub-section (2) of section 74, an explanatory memorandum shall be attached to the proceedings.

7. In view of the aforesaid provision of Rule 158 when a Summary Security Force Court tries an offence an explanatory memorandum has to be attached to the proceedings.

8. Learned Counsel representing the respondent-Border Security Force Authority fairly admits that the explanatory memorandum was not attached to the proceedings. Thus the respondent Authority failed to comply with the mandatory requirement under the Rules. When Rule provides something has to be done in a particular manner then the same has to be done in the same manner and no other procedure or manner can be followed or adopted.

9. Furthermore, it is not in dispute that the informant was admittedly not examined as witness, as a result whereof the appellant herein being one of the accused persons was denied opportunity to cross-examine the vital witness. Learned Single Judge although held that the accused person, namely the appellant herein did not suffer any prejudice on account of denial of the opportunity to cross-examine the informant, the same are not acceptable as the informant was a vital witness to the incident and the accused person being the appellant was deprived of the opportunity to cross-examine a vital witness like the informant since the respondent Authority decided not to examine the said informant as witness.

10. From the aforesaid discussions, it appears that the appellant was tried in the Summary Security Force Court in clear violation of the provisions of the Rule 158 as the explanatory memorandum was not attached to the proceedings which was a mandatory requirement under the Rules. Furthermore, a vital witness like the informant was not examined in course of trial of the appellant in the Summary Security Force Court only to deny opportunity to the accused persons including the appellant herein to cross-examine a vital witness.

11. For the aforesaid illegalities and/or irregularities, we are of the opinion that the impugned order of punishment cannot be sustained in the eye of law and, therefore, we quash the impugned order of punishment inflicted on the appellant herein on 4th August, 2005 which was subsequently affirmed by the appellate authority namely, Director General of Border Security Force on 25th April, 2006.

12. For the identical reasons, the impugned judgment and order under appeal passed by the learned Single Judge is also set aside.

13. This appeal therefore, stands allowed.

14. Since we have quashed the order of punishment issued against the appellant, the respondents are directed to reinstate the appellant in service forthwith and pay him all admissible salaries and allowances from the date of joining the duties. In view of quashing of the order of punishment, the appellant herein should be treated as "on duty" all through without payment of any back wages since the appellant herein was kept out of service pursuant to the order of punishment passed by the Summary Security Force Court which was subsequently approved by the appellate authority and affirmed by the learned Single Judge although the said order of punishment has been quashed today by us while allowing the appeal. The respondents are also directed to regularise the period during which the appellant could not perform the duties due to the pendency of the proceeding before the Summary Security Force Court and pursuant to the impugned order of punishment, by granting him extraordinary leave.

15. In the facts and circumstances of the present case, there will however, be no order as to costs.

16. After pronouncement of the judgment, the learned Advocate of the respondent-Border Security Force Authority prays for stay of the operation of the aforesaid judgment and order.

17. We however, do not find any reason for granting any such stay. Therefore, the prayer for stay is refused.

18. Xerox certified copy of the order, if applied for, be given to the parties at an early date.