

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

SWP No. 2013/2001

Date of decision: 31.10.2008

Tarsem Paul

Vs.

Union of India and ors

Coram:

HON'BLE MR. JUSTICE Y.P.NARGOTRA, JUDGE

Whether approved for reporting:

Appearing counsel :

For Petitioner(s)/appellants : Mr. Ajay Abrol, Advocate.

For the respondents. Mr. Ajay Sharma, Addl.CGSC

In this writ petition, petitioner has questioned the order of dismissal dated 3rd May 2001, passed by the Summary Security Force Court against him.

The facts which are not in dispute are that the petitioner was enrolled as Constable Operator in the B.S.F vide order dated 5th May 1990. He was promoted as NK. Operator on 1st of October 1991. On 10th October 1997 the rank of NK. Operator was merged into the cadre of Head Constable and thereby petitioner entered into the cadre of Head constable w.e.f. 10th October 1997. While he was posted in 10th Batalion B.S.F, he was granted 54 days earned leave w.e.f. 18.2.1998 to 16.4.1998. After the expiry of period of leave, petitioner did not report back on duty.

The petitioner was asked to rejoin duty vide registered letter No. Estt/454/10/97/327 dated 10th April 1998, but no response was received back by the Unit and even the said letter was received back undelivered.

It appears that some enquiry was made from the parents of the petitioner by the respondents from which it was revealed that he had not returned to his Home during the leave period. From the office of the Commandant, a letter was written to the SHO Police Station Kathua requesting him to investigate about the whereabouts of the petitioner, at the same time Sagar Chand -brother of the petitioner also lodged a missing report with the police station Hadbal District Kathua on 19th May 1998. The request for investigation into the whereabouts of the petitioner was repeated by the office of the commandant to the SHO vide his letter dated 30th May 1998, but of no avail.

The Deputy Commandant of the Unit conducted a Court of Enquiry in terms of Section 62 and on the basis of the findings recorded thereof, declared the petitioner as deserter w.e.f. 17th April 1998. Thereafter, a notice was issued by the Commandant to the petitioner for resuming duty immediately vide registered letter dated 29th July 1998, however, the said notice was not served upon the petitioner and was received back with the remark that he was not available at his address.

Subsequently, petitioner was dismissed from service w.e.f. 1st July 1999 (AN) vide office Order No.EStt/236/10/909/8011-35 dated 01.07.1999, issued by the Commandant. After the passing of the said order, wife of the petitioner through her advocate served a notice upon the respondents against the dismissal order.

The averments made in the said notice were considered by the respondents. The notice received by the Unit along with Para wise comments was forwarded to the Ftr. Head Quarter Punjab vide letter dated 21st October 1999, which on the opinion of the Law Officer found the dismissal of the petitioner legally not sustainable, due to the non service of the show cause notice upon the petitioner.

Accordingly, DIG SHQ BSF Faridkot vide his Order No. Estt/WP-10 Bn/2000/8690-92 dated 28.4.2000, set aside the dismissal order dated 01.07.1999, passed against the petitioner and directed Commandant 10th Bn BSF to proceed further in the matter as per the Government of India decision Nos. 10 to 12 below Rule 54 of CCS (Pension) Rules 1972. Before the Commandant could proceed in the matter, petitioner along with his brother reported at Bn HQR Fazilka (Punjab) on 11th October 2000. On 17th October 2000, he submitted a written statement in Urdu pleading that he was not in a proper frame of mind and as a result of which had not joined his duties. He was produced before the Unit SM Officer for

medical examination on 21st October 2000, and the Unit SM Officer referred the petitioner to SHQ BSF Hospital Faridkot for Psychiatric examination and wherefrom he was referred to GGSMC Hospital Faridkot and he remained there up to 17th November 2000. He was medically examined and the concerned Medical Officer after examining the petitioner gave the following opinion:-

महोदय I am of the opinion that presently he is not suffering from any psychiatric ailment and can handle firearm and ammunition. मे

On 11th December 2000, petitioner was put on offence report under Section 19 (b) of the BSF Act i.e. Rule 43 Appendix IV form, in which particulars of the alleged offences committed by the petitioner were stated.

After the offence report, the Commandant commenced the hearing of charges against the petitioner. The Commandant vide his letter dated 11th December 2000 ordered for recording of ROE (Recording of Evidence) by Sh.MPS Bhati Deputy Commandant.

Pursuant to the said order, recording of the evidence was commenced on 26th December 2000 and concluded on 22nd January 2001.

Evidence of three prosecution witnesses namely Dr.P.J.Reddy, SI Clk Bishwajit Kumar and Constable Lal Singh was recorded. The petitioner was afforded opportunity for cross-examining these witnesses, but he declined to avail the same. After

the conclusion of the first ROE i.e. ~~the~~Recording of Evidence Commandant by his order dated 25th January 2001, ordered for additional ROE (Recording of the Evidence). This ROE was held on 30th January 2001, in which further evidence of PW Bishwajit Kumar was recorded. From the record it is revealed that petitioner was afforded opportunity to cross-examine this witness as well, but he declined the cross-examination.

After the recording of the evidence, Summary Security Force Court was convened on 3rd of May 2001, for holding the trial of the petitioner for commission of offences under Section 19(b) of the BSF Act. Charges were explained to the petitioner and he was called upon to plead. On this petitioner pleaded guilty to the charge of overstaying the leave. The plea of the guilt was recorded by the Court after complying with the requirement of Rule 142(2) of the Borer Security Force Rules.

The learned Summary Security Force Court after taking into consideration the plea put forward by the petitioner and recording of the evidence, awarded the sentence of dismissal of the petitioner on 3rd of May 2001 itself.

Being aggrieved of the dismissal order, the petitioner has filed the instant writ petition.

The contention of leaned counsel for the petitioner is that proceedings right from the recording of the evidence to the passing

of the order of dismissal are contrary to the rules. He submits that in terms of Rule 49, before calling on the petitioner to make a statement, if he so desired, neither abstract of evidence was furnished to him nor time for exercising option of making a statement was allowed to him. The awarding of the sentence to the petitioner on 3rd of May 2001, itself the day on which the trial was commenced without complying with the said mandatory/statutory requirement has rendered his trial and conviction invalid.

Section 49 which deals with abstract of evidence reads as follows:-

“ 49. Abstract of evidence. (1) An abstract of evidence shall be prepared either by the 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 precise thereof.

(ii) copies of all documents intended to be produced at the trial;

(b) Where signed statement of any witnesses are not available a precise 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 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. ॐ

Mr. Sharma learned counsel for the Union contends that Rule 49 would have no application in the instant case because ॐ abstract of evidence ॐ in terms of Rule 49 was never prepared and instead the

Commandant had ordered for recording ROE (Record of Evidence) in terms of Rule 48 and, therefore, there was no legal requirement of giving any time to the petitioner-accused before calling upon him to make a statement, if he so desired.

Rule 48 which deals with Record of Evidence reads:-

“48. Record of evidence. (i) The officer ordering the record of evidence may either prepare the record of evidence himself or detail another officer to do so.

(2) The witnesses shall give their evidence in the presence of the accused and the accused shall have right to cross-examine all witnesses who give evidence against him.

Provided that where statement of any witness at a court of inquiry is available, examination of such a witness may be dispensed with and the original copy of the said statement may be taken on record. A copy thereof shall be given to the accused and he shall have the right to cross-examine if he was not afforded an opportunity to cross-examine the witness at the court of inquiry.

(3) After all the witnesses against the accused have been examined, he shall be cautioned in the following terms; ~~ह~~You may make one and whatever you state shall be taken down in writing and may be used in evidence.~~め~~ After having been cautioned in the aforesaid manner whatever the accused states shall be taken down in writing.

(4) The accused may call witnesses in defence and the officer recording the evidence may ask any question that may be necessary to clarify the evidence given by such witnesses.

(5) All witnesses shall give evidence on oath or affirmation:

(6) (a) The statements given by witnesses shall ordinarily be recorded in narrative form and the officer recording the evidence may, at the request of the accused, permit any portion of the evidence to be recorded in the form of question and answer.

(b) The witnesses shall sign their statements after the same have been read over and explained to them.

6-A. The provisions of Sec. 89 of the Act shall apply for procuring the attendance of witnesses before the officer preparing the Record of Evidence.

(7) Where a witness cannot be compelled to attend or is not available or his attendance cannot be procured without undue expenditure of time or money and after the officer recording the evidence has given a certificate in this behalf a written statement signed by such witness may be read to the accused and included in the record of evidence.

(8) After the recording of evidence is complete the officer recording the evidence shall give a certificate in the following form:-

☞Certified that the record of evidence ordered by -----Commandant -----was made in the presence and hearing of the accused and the provisions of rule 48 have been compiled with.☞

From the bare reading of Rule 48 and 49, it transpires that Rule 48 which deals with ROE (Record of Evidence) does not require granting of time of not less than 24 hours to the accused before he is called upon to make a statement, if he so desires, though the same is the requirement of Rule 49 alone.

The need for preparing Record of Evidence in terms of Rule 48 or preparation of Abstract of Evidence arises out of Rule 45.

Rule 45 reads as follows:-

“45. Hearing of the charge against an enrolled person. (1) The charge shall be heard by the Commandant of the accused-

(a) the charge and statement of witnesses if recorded shall be read over to the accused. If written statement of witnesses are not available, he shall hear as many witnesses as he may consider essential to enable him to determine the issue;

(b) the accused shall be given an opportunity to cross-examine the witnesses and make a statement in his defence.

(2) After hearing the charge under sub-rule (1), the commandant may:-

- (i) award any of the punishments which he is empowered to award.
- (ii) or dismiss the charge, or
- (iii) remand the accused, for preparing a record of evidence or for preparation of an abstract of evidence against him, or
- (iv) remand him for trial by a Summary security Force Court:

Provided that, in cases where the Commandant awards more than 7 days imprisonment or detention he shall record the substance of evidence and the defence of the accused.

Provided further that he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him it is not advisable to proceed further with it.

Provided also that in case of all offences punishable with death a record of evidence shall be taken. ॐ

In view of the provision made in Rule 45(2) the Commandant who has heard the charge against an accused has been vested with the following powers:-

- (a) to award punishments which he is empowered to award. Such punishments are minor punishments which in terms of Section 53 can be awarded by the Commandant without subjecting the accused to trial by Summary Security Force Court, or
- (b) to dismiss the charge himself or
- (c) remand the accused for preparing Record of Evidence or for preparation of an Abstract of Evidence or
- (d) remand the accused for trial by a Summary security Force Court.

The preparation of Record of Evidence is an alternative to preparation of Abstract of Evidence. The commandant in his discretion can legally opt for any of the two.

In the present case, Commandant has invoked Rule 48, in ordering for preparation of Record of Evidence, therefore, there could be no legal requirement of giving time to the accused-petitioner in terms of Rule 49. Rule 49 would not have applied. There is, therefore, no force in the contention of Mr. Abrol.

For the aforesaid reasons the petition of the petitioner deserves dismissal. Dismissed.

(JUSTICE Y.P.NARGOTRA)

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31/10/2008
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