

(2014) 02 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1281 Of 2007 and IA No. 2260 Of 2007

Asif Baba

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Border Security Force Act, 1968 — Section 2(d), 31, 46, 47

Criminal Law (Amendment) Act, 1952 — Section 6, 7

Prevention of Corruption Act, 1988 — Section 13(1)(e), 13(2), 13(e), 13(e), 3

Citation : (2014) 3 JKJ 405

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Advocate : M.A. Rathore, Advocate for the Appellant; Karnail Singh, Advocate for the Respondent

Judgement

Hasnain Massodi, J.—Shri Mohammad Asif Baba - petitioner herein, was enrolled in Border Security Force (BSF) on 2nd July 1997. On

6th February 2007, at about 9.45 hours, petitioner while posted with 193 Battalion at BOP Jayantipur, West Bengal was allegedly found in

possession of Rs. 1,42,500/-. The alleged recovery was made when officiating Commandant of Battalion, accompanied by other members of

Force raided residential premises of petitioner in his absence and recovered from his bed-hold-all the afore-stated amount. The recovery

prompted an inquiry into the matter. The report of inquiry (ROE) was prepared. Petitioner is said to have pleaded guilty. His plea was recorded

and punishment of dismissal from service imposed on petitioner. Petitioner preferred a Statutory Petition against dismissal order before Director

General, BSF. The grounds urged in the petition did not find favour with

competent authority and petition was rejected on 2nd August 2007.

2. Petitioner questions order No. Estt/MA/SSFC/07/4205-15 dated 17th March 2007, whereby punishment of dismissal from service was

imposed and order No. Disc/29/S-Petition/2007/13122-23 dated 16th July 2007, whereby petitioner's prayer for reinstatement was rejected, in

writ petition on hand on the ground that inquiry and Summary Security Forces (SSF) Court's proceedings were conducted in violation of the

Border Security Force Act, 1968 (BSF Act) and Rules made thereunder. Petitioner, insists that procedural rights available to him were not

adhered to by respondents. It is pleaded that allegation levelled against petitioner did not per se constitute offence punishable under Section 13(e),

Prevention of Corruption Act, 1988. It is next pleaded that even if allegation levelled is taken to constitute aforesaid offence, petitioner was to be

tried before Special Court, constituted under the Act and SSF Court had no jurisdiction to deal with the matter muchless convict petitioner and

award sentence of dismissal from services.

3. Petitioner insists that allegation levelled does not fall within purview of Section 46 BSF Act and therefore, outcome of SSF Court proceedings is

not sustainable under law. Highlighting procedural irregularities committed during inquiry and subsequent trial, petitioner pleads that Commandant,

who presided over SSF Court, was complainant on whose instructions Officiating Commandant had allegedly raided his residential quarter and

recovered amount in question, and therefore, Commandant was not competent to preside over SSF Court. The SSF Court is said to have avoided

to examine the important witnesses like Selection Grade Constable and Constable Jayprakash as their evidence would have knocked/bottom out

of the case set up against petitioner.

4. The petitioner also questions nature of sentence awarded on the ground that dismissal from service is not one of the punishments prescribed

under the Act. It is pleaded that in terms of BSF Act, a member of Force may be taken back into Force after he serves the sentence and

punishment of dismissal from service does not leave such an option with the authorities. The orders impugned in the petition are also questioned on

the ground that finding returned by SSF Court was not confirmed by higher authorities. Petitioner also throws challenge to competence of

respondent No. 5 to impose punishment in question.

5. Respondents take a threshold objection to maintainability of petition on the ground that orders impugned in the petition were admittedly passed

outside territorial limits of jurisdiction of this Court and the Court lacks jurisdiction to deal with the matter. Respondents insist that all procedural

safeguards were made available to petitioner and that trial was conducted in accordance with procedure prescribed under the Act and Rules made

thereunder. It is pleaded that as petitioner could not account for Rs. 1,42,500/- recovered from his residence, he was rightly charged of offence

punishable under Section 13(e), Prevention of Corruption Act. Respondents plead that petitioner was afforded full and fair opportunity to defend

himself and it was only after he failed to adduce any evidence to explain the possession of amount recovered, the petitioner was held guilty and

penalty imposed. Respondents deny that Section 46 BSF Act and Section 13(e), Prevention of Corruption Act, 1988, were not applicable to the

case and petitioner was required to be tried under Section 31 BSF Act.

6. Petitioner in his rejoinder filed on 23.05.2008, controverted all the averments made in the counter affidavit to the writ petition. It is denied that

SSF Court was a forum to try the case and pleaded that offence punishable under Section 13 (e), Prevention of Corruption Act, 1988, was to be

tried by Special Court under the Act. The offence punishable under Section 13(e), Prevention of Corruption Act, 1988, read with Section 13(2),

Prevention of Corruption Act, 1988, according to petitioner, is not a civil offence within meaning of BSF Act and Rules made thereunder.

Petitioner reiterates that mere recovery of Rs. 1,42,500/-, even if taken to be correct, will not constitute offence under Section 13(e), Prevention

of Corruption Act, 1988, so as to conclude whether petitioner was in possession of assets disproportionate to his known income. It is pleaded that

petitioner's assets and income from all known sources were to be added up and compared and only thereafter petitioner declared to be in

possession of assets disproportionate to his known income. It is pleaded that even after the SSF Court proceedings were concluded and petitioner

held guilty of offence punishable under Section 13(e), Prevention of Corruption Act, 1988, an opportunity was to be given to petitioner to show

cause against proposed punishment and orders impugned are liable to be

quashed for the reason that no such opportunity was given to petitioner.

7. I have gone through the pleadings and have heard learned counsel for parties.

8. The objection as regards maintainability of petition must recede to the background after petition has been formally admitted to hearing. Petition

has been formally admitted to hearing on 15th September 2007. It is well settled law that any preliminary objection to the maintainability of the

petition does not survive once petition is admitted to hearing. Reference in this regard may be made to Eastern Coalfields Ltd. Vs. Dugal Kumar, .

9. This takes us to other grounds urged in the petition. Main plank of petitioner's case is that having regard to charge levelled against petitioner,

SFF Court had no jurisdiction to proceed in the matter muchless held petitioner guilty of offence alleged against him. It may be recalled that

petitioner faced charge of having committed offence punishable under Section 13(1)(e), Prevention of Corruption Act, 1988. Petitioner's case is

that Special Judge Anticorruption has exclusive jurisdiction to try accused alleged to have committed offence under Prevention of Corruption Act

(P.C. Act) and that such jurisdiction does not lie with S5F Court.

10. Section 3, P.C. Act empowers Central Government and State Government to appoint as many Special Judges as may be necessary for such

area or areas or for such case or group of cases as may be specified in the notification to try the offences, namely (a) any offence punishable under

This act, and (b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a). Section 4

provides that offence specified in sub-section 1 of Section 3 shall be tried by Special Judges only. It would be advantageous to reproduce Section

4(1) hereunder:

4. Cases triable by special Judges. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any

other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.

11. Section 6 and 7, Criminal Law (Amendment) Act of 1952 corresponds to Section 3 and 4, P.A. Act, 1988, though brought on Statute Book

in the background of P.C. Act 1947. Bare look at aforesaid provisions would reveal that offence alleged against present petitioner is exclusively

triable by Special Judge Anticorruption having jurisdiction over the area where

act was committed or otherwise competent to try petitioner. This, however, does not end the matter. Petitioner, we know, was a BSF personnel, and therefore, subject to BSF Act, 1968. It is required to be seen whether BSF Act would warrant petitioner's trial before SSF Court, notwithstanding Section 3 and 4, P.C. Act.

12. Section 46, BSF Act is relevant to the controversy and may be extracted. It reads:-

46. Civil offences. - Subject to the provisions of section 47, any person subject to this Act who at any place in, or beyond, India commits any civil

offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a

Security Force Court and, on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned

for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, assigned for the offence by the law in force in India, or imprisonment for a term

which may extend to seven years, or such less punishment as is in this Act mentioned.

13. The expression ""civil offence"" in terms of Section 2(d), BSF Act means an offence which is triable by a Criminal Court. There is no scope for

any disagreement on the conclusion that offence under P.C. Act is a civil offence. If Section 46, BSF Act is read in isolation, a person, alleged to

have committed an offence under P.C. Act, subject to the Act is to be tried by SSF Court. As civil offence alleged against him in terms of Section

46, BSF Act, is to be deemed to be an offence under BSF Act. In such case, an accused is to be charged of offence alleged against him under

P.C. Act read with Section 46, BSF Act.

14. However, when we read Section 4, P.C. Act and Section 46, BSF Act conjointly, only irresistible conclusion to be drawn is that a person

subject to BSF Act, alleged to have committed an offence under P.C. Act, is to be tried by Special Judge Anticorruption and not SSF Court. I

hold so for the reason that while language used in Section 4 in P.C. Act makes Special Judge a Court of exclusive jurisdiction even in case of a

person subject to BSF Act, same is not true about Section 46 BSF Act.

15. Let us for a while revisit Section 4, P.C. Act. The expression used is ""Notwithstanding anything contained.....in any other law for the time

being in force,.....shall be tried by special Judges only (emphasis supplied). When we give closer look to Section 46 BSF Act, we do not find

expression highlighted above to have been used by law makers. Section 46, BSF Act unlike Section 4, P.C. Act, does not begin with ""non

obstante clause"". Viewed thus, Section 4, P.C. Act has an overriding affect on Section 46, BSF Act as it is one of laws rendered ineffective

because of non obstante clause as regards trial of a person for offence under P.C. Act, and falling within expression ""any other law for the time

being in force"". Petitioner, therefore, was to be tried for commission of offence punishable under Section 13(1)(e), P.C. Act, before Special Judge

Anticorruption, otherwise having jurisdiction to try petitioner and SSF Court did not have jurisdiction to try petitioner much less impose the

sentence. While holding so, I draw support from Major E.G. Barsay Vs. The State of Bombay, , Sudhir Shantilal Mehta Vs. C.B.I., .

16. The other argument advanced by for petitioner relates to very foundation of prosecution case against petitioner. It is argued by learned counsel

for petitioner that even when allegations levelled against petitioner and material in support of such allegations is taken as gospel truth, offence under

Section 13(1)(e), P.C. Act, is not made out. Mr. Rathore states that only because petitioner was found in possession of an amount while serving at

BOP Jayantipur, West Bengal, there was no reason to rush to conclusion that petitioner was in possession of assets disproportionate to his known

sources of income. It is pointed out that in such a case, officer investigating or enquiring into the matter has to give the person an opportunity to

identify and disclose his known sources of income and only after income is matched with assets found in possession of such person, the authority is

to conclude whether assets match income or exceed income and therefore, are disproportionate. It is argued that no such exercise was made in the

present case and mere recovery of amount, made authority to conclude that it was a case of assets disproportionate to known sources of income.

Since I have taken a view that petitioner ought to have been tried before Special Judge Anticorruption concerned and that SSF Court did not have

jurisdiction to try petitioner, respondents are to be given liberty to launch prosecution against petitioner. Against said backdrop, it would not be

appropriate to say whether material collected during inquiry or investigation did prima facie establish allegations levelled against petitioner.

17. The other ground urged in the petition relates to adherence to principles of natural justice by respondents. Learned counsel for petitioner states

that SSF court was presided over by officer at whose instance a junior officer had allegedly raided residential quarter of petitioner and made

alleged recovery. It is argued that trial before SSF court is vitiated on the said ground alone on the principle that no one can be judge of his own

cause and justice must not only be done, it must be seen to be done.

18. Learned counsel insists that officer presiding over SSF court had acted in dual capacity of prosecutor and the judge, and having ordered

search of petitioner's residence, should have stayed away from the proceedings. The finding recorded on the plea that SSF court had no

jurisdiction to try petitioner, makes it unnecessary to deal with this aspect of the case. Once it is held that SSF court had no jurisdiction to try

petitioner and that petitioner was to be tried before Special Judge Anticorruption, the issue as to who presided over SSF court loses importance.

19. For the reasons discussed above, writ petition is allowed and order No. Estt/MA/SSFC/07/4205-15 dated 17th March 2007 and No.

Disc/29/S-Petition/2007/13122-23 dated 16th July 2007, are quashed. Resultantly, respondents are directed to allow petitioner to resume his

duty. The intervening period shall be settled in accordance with rules, occupying the field. Respondents would be free to investigate/enquire into the

matter and having regard to outcome of investigation/enquiry, lay report - Final report or charge sheet, as the case may be, before Special Judge

Anticorruption having jurisdiction to try petitioner. Disposed of.