

(2007) 04 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (C) No. 99 of 2003

Asraf Ali Mondal

APPELLANT

Vs

Commandant, 135 BN. BSF and Others

RESPONDENT

Date of Decision : 13-04-2007

Acts Referred:

Air Force Act, 1950 — Section 120, 152
Border Security Force Act, 1968 — Section 113, 113(2), 114, 115, 117
Border Security Force Rules, 1969 — Rule 13(1), 13(2), 142, 142(2), 160
Constitution of India, 1950 — Article 20(2), 226

Citation : (2008) GLT 198 Supp

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : Somik Deb and T.D. Majumder, for the Appellant; P.K. Biswas and R. Debnath, for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.—Heard Mr. Somik Deb, learned Counsel along with Mr. T.D. Majumder, learned Counsel appearing on behalf of the Petitioner. Heard Mr. P.K. Biswas, learned Assistant Solicitor General assisted by Mr. R. Debnath, learned Counsel appearing on behalf of the Respondents.

2. The Present Writ Petition has been preferred under Article 226 of the Constitution for issuance of writ of mandamus seeking direction to the Respondents to scrap the second Summary Security Force proceeding instituted for the same cause of action which has already been dealt with in first summary proceeding and Petitioner has accepted the award thereof, the Petitioner has also prayed to recall second summary proceeding as the same is invalid and unsustainable in law and restrain respondents from going ahead with Second SSF Court Proceeding dated 17.12.2002 (Annexure-P/3) any further and to drop the same immediately.

3. For getting entry in Border Security Force (in short Called "BSF") the

Petitioner had undergone tests and trials and had presented testimonials and documents before the Enforcement Officer, Commandant 08 Battalion, BSF, Majdia, Shema Nagar in the District of Nadia (W.B.). The Petitioner was selected and enrolled as Constable in BSF on 24.5.1989. It appears in reference to some complaint to the BSF Authorities the Petitioner was not in possession of the genuine School certificate, since beginning. The BSF Authorities conducted a Summary Security Force Court Proceeding (in short SSF Court Proceeding) and the Commandant passed an order dismissing the Petitioner from service w.e.f. 10.08.2001. After such order, the Petitioner left the Camp and went to his native place. After lapse of an year, the Petitioner has suddenly received an order dated 09.04.2002 (Annexure-P/2) indicating that the proceedings of dismissal was set aside by Sector Head Quarter, BSF vide its letter dated 29.01.2002, therefore, he is called upon to join 135 Battalion, BSF vide letter dated 25.02.2002. In reference thereto the Petitioner joined duty on 26.08.2002 and was taken on the strength of 735 BSF w.e.f. 27.08.2002 and was posted to "A" Coy. The case for regularization of his absence was also taken up by Sector Head Quarter, BSF, Faridkot (Punjab) under the provision of the Border Security Force Rules, 1969 (in short called "BSF Rules"). It appears that the Commandant 135, Battalion BSF issued a letter dated 17.12.2002 to the Petitioner indicating initiation of proceeding in reference to Section-23 of The Border Security Force Act, 1968 (in short called the "BSF Act") for the same charges.

The text of the order enclosed as Annex-ure-P/3, however, is subject extracted as below:

Making at the time of enrolment, a wilfully false answer to a question set forth in the prescribed form of enrolment which was put him by the enrolling officer before whom he appeared for the purpose of being enrolled.

In that he,

At Seema Nagar, West Bengal, on 24th May, 1989 when appeared before Commandant 08 Bn. BSF, an Enrolling Officer, for the purpose of being enrolled for service in the Border Security Force to the question put to him "What are your qualification?" answered "Matric", whereas he knew the said answer is false.

4. The question involved in the present Writ Petition is as to whether in the facts & circumstances second SSF Court proceeding under the "BSF Act" and under the "BSF Rules" may take place for the same charges and offences against the Petitioner for which the Petitioner has already been dealt with in earlier first SSF Court Proceeding and was dismissed by Commandant, BSF, however, was called upon to join duty as if he had never been dismissed because earlier SSF Court Proceeding itself was set aside by Superior Officer/DIG, BSF in exercise his inherent statutory power provided under the Section 115 of "BSF Act" read with Rule-161 of "BSF Rules"?

5. According to the Petitioner, he participated in the SSF Court Proceeding conducted earlier and was awarded punishment, therefore, under "BSF Act" &

"BSF Rules", the Petitioner can not be tried against after he had ceased as the "BSF" Personnel. According to him consequent upon his dismissal, the Petitioner shall not be liable to be tried again for the same offences or charges in view of the provisions of prohibition of Second trial provided in Section 75 of "BSF Act".

6. According to the learned Counsel for the Respondents, during the process of recruitment, the testimonials and records presented by the Petitioner were checked by the reviewing Officer and from the certificate produced by him, he was having matric pass qualification. The Petitioner also divulged that he was matric as the same was also mentioned in his signed enrolment form. Since the Petitioner had shown to be matric i.e. the minimum qualification required for a constable, therefore, on his disposition, the Petitioner was considered for selection and was recruited as Constable, however, but for his such disclosure he could not have been enrolled as Constable in BSF at the very initial stage. However, in reference to the complaint by Nurul Islam Biswas, the genuineness of the matriculate certificate of the Petitioner was got verified by the West Bengal Board of Secondary Education Authority who in turn intimated that on the Roll Number disclosed by the Petitioner; the name of Swapan Kumar Dey, S/o Benay Kumar Dey was recorded instead of the name of the Petitioner. As such complaint was verified. Since, the Petitioner has submitted false educational certificate and had claimed to be matric at the time of enrolment contrary to the fact that he was not matric, therefore, record of evidence against the Petitioner was ordered for giving false answer at the time of enrolment as such, an offence punishable under Section-23 of the "BSF Act". After recording of evidence in presence of the Petitioner and after hearing the Petitioner a prima facie case was found against him and he was tried in SSF Court Proceeding on 10.08.2001. During the trial, the Petitioner had pleaded guilty to the charge and the Court after finding him so guilty, sentence of dismissal of the Petitioner from service was awarded by Commandant vide order dated 10.08.2001. According to the respondents since the mandatory provisions of Rules-142(2) of "BSF Rules", were not observed in SSF Court Proceeding, the DIQ BSF (Faridkot), Punjab being the superior competent officer had set aside the "SSF Court" Proceeding in exercise of his power under Section-115 read with Rule-161 and accordingly the Petitioner was re-instated in to service w.e.f. 27.04.2002. Since after setting aside of SSF Court Proceeding the dismissal order dated 10.08.2001 of Petitioner has become non-est or redundant, therefore, subsequent proposed action of fresh/denovo SSF Court Proceeding as indicated in the letter dated 17.12.02 (Annexure-P/3) was proceeded with.

7. According to the learned Counsel for the Respondents, the reinstatement of the Petitioner in service was neither a consequence of acquittal or conviction for the charges of offences under Section-23 of the "BSF Act" when the earlier proceeding was set aside and its outcome became non-est, therefore, the Petitioner was to be tried under denovo trial and in substance the Petitioner's such trial was not illegal. Consequent upon setting aside of the Proceeding/Trial by the DIG BSF, in exercise of his statutory power on the ground of non-

observance of requirement of Rule 142 of "BSF Rules" the dismissal order dated 10.08.2001 shall be treated to be non-existent, the Petitioner was recalled and his absence period was regularized. However, by doing this, BSF Authorities are not debarred from taking subsequent fresh action for the same offence against the Petitioner as the offence against the Petitioner was persisting and alive.

8. For convenience it is necessary to refer relevant provisions of BSF Act" as well as "BSF Rules" as follows.

S-3. Persons subject to this Act-

(1) The following persons shall be subject to this Act, wherever they may be, namely-

(a) Officers and Subordinate Officers; and

(b) Under-officers and other persons enrolled under this Act

(2) Every person subject to this Act shall remain so subject until retired, discharged, released, removed or dismissed from the Force in accordance with the provisions of this Act and the rules.

S -11. Dismissal, removal or reduction by the Director General and by other Officers--(1) The Director General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector -General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer or such rank or ranks as may be prescribed.

S-23. False answers on enrolment--Any person having become subject to this Act who is discovered to have made at the time of enrolment a wilfully false answer to any question set forth in the prescribed form of enrolment which has been put to him by the enrolling officer before whom he appears for the purpose of being enrolled, shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.

S-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, this is to say-

(a) death

(b) imprisonment which maybe 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;

S-50. Combination of punishments--A sentence of a Security Force Court may award in addition to, or without any one other punishment, the punishment specified in Clause (C) of Sub-section (1) of Section 48, and any one or more of the punishments specified in Clauses (e) to (1)(both inclusive) of that sub-section.

S-53. Minor Punishments?Subject to the provisions of Section 54, a commandant or such other officer as is, with the consent of Central Government, specified by the Director-

General may, in the prescribed manner, proceed against a person subject to this Act, otherwise than as an officer or a subordinate officer, who is charged with an offence under this Act and award such person, to the extent prescribed, one or more of the following punishments, that is to say;

- (a) Imprisonment in Force custody up to twenty-eight days;
- (b) detention up to twenty-eight days;
- (c) confinement to the lines up to twenty-eight days;
- (d) extra guards or duties;
- (e) deprivation of any special position or special emoluments or any acting rank or reduction to a lower grade of pay;
- (f) forfeiture of good service and good conduct pay;
- (g) severe reprimand or reprimand;
- (h) fine up to fourteen days" pay Let a notice issue calling upon the respondents to show cause as to why a rule shall not be issued as prayed for, and/or as to why such further order or other orders shall not be passed as to this Court may deem fit and proper. Any one months;
- (i) deductions from his pay of any sum required to make good such compensation for any expenses, loss, damage or destruction caused by him to the Central Government, or to any building or property as may be awarded by his commandant.

S-55. Punishments of persons of and below the rank of subordinate officers by Deputy Inspector-General and others: (1) An officer not below the rank of the Deputy Inspector-General or such other officer as is, with the consent of the Central Government, specified by the Director-General may, in the prescribed manner, proceed against a person of or below the rank of a subordinate officer who is charged with an offence under this Act and award one or more of the following punishments, that is to say-

- (a) forfeiture of seniority, or in the case of any of them whose promotion depends upon the length of service forfeiture of service for the purpose of promotion for a period riot exceeding twelve months, but subject to the right of

the accused previous to the award to elect to be tried by a Security Force Court;

(b) severe reprimand or reprimand;

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

(2) In every case in which punishment has been awarded under Sub-section (1), certified true copies of the proceedings shall be forwarded, in the prescribed manner, by the officer awarding the punishment to the prescribed superior authority who may, if the punishment awarded appears to him to be illegal, unjust or excessive, cancel, vary or remit the punishment and make such other direction as may be appropriate in the circumstances of the case.

S-70. Summary Security Force Court-

(1) A Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court.

(2) The proceedings shall be attended throughout by two other persons who shall officers or subordinate officers or one of either, and who shall not as such, be sworn or affirmed.

S-75. Prohibition of second trial-

(1) When any person subject to this Act has been acquitted or convicted of an offence by a Security Force Court or by a criminal court or has been dealt with u/s 53 or u/s 55, he shall not be liable to be tried again for the same offence by a Security Force Court or dealt with under the said Sections.

(2) When any person, subject to this Act has been acquitted or convicted of an offence by a Security Force Court or has been dealt with u/s 53 or Section 55, he shall not be liable to be tried again by a criminal court for the same offence or on the same facts.

S-77. Trial, etc., of offender who ceases to be subject to this Act-

(1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in Force Custody and tried and punished for such offence as if he continued to be so subject.

(2) No such person shall be tried for an offence, unless his trial commences within six months after he had ceased to be subject to this Act; provided that nothing contained in this sub-section shall apply to the trial of any such person for an offence of desertion or for any of the offences mentioned in Section 17 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a Security Force Court.

S-113. Revision of finding and sentences on board a ship--(1) Any finding or sentence of a Security Force Court which requires confirmation may be once

revised by order of the confirming authority and on such revision, the court, if so directed by the confirming authority, may take additional evidence.

(2) The court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.

(3) In case of such, unavoidable absence the cause thereof shall be duly certified in the proceedings, and the court shall proceed with the revision, provided that, if a General Security Force Court, it still consists of five officers, or, if a Petty Security Force Court, of three officers.

114. Finding and sentence of a Summary Security Force Court --(1) Save as otherwise provided in subsection (2), the finding and sentence of a Summary Security Force Court shall not require to be confirmed, but may be carried out forthwith.

(2) If the officer holding the trial is of the rank of Superintendent of Police or of a rank declared under Clause (a) of Sub-section (5) of Section 74 as equivalent thereto or of a lower rank has held such rank for less than five years, he shall not, except, on active duty, carry into effect any sentence, until it has received the approval of an officer not below the rank of Deputy Inspector-General.

S-115. Transmission of proceedings of Summary Security Force Courts-- The proceeding of every Summary Security Force Court shall, without delay, be forwarded to the officer not below the rank of Deputy Inspector-General within whose command the trial was held, or to the prescribed officer, and such officer, or the Director-General or any of ficer empowered by him in this behalf may, for reason based on the merits of the case, but not on merely technical grounds, set aside the proceedings, or reduce the sentence to any other sentence which the court might have passed.

S-117. Remedy against order, finding or sentence of Security Force Court-

(1) Any person subject to this Act who considers himself aggrieved by any order passed by any Security Force Court may present a petition to the officer or authority empowered to confirm any finding or sentence of such Security Force Court, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality of propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any Security Force Court which has been confirmed, may present a petition to the Central Government, the Director-General, or the prescribed, as the case may pass such order thereon as it or he thinks fit.

BSF Rules:

R-13. Procedure for enrolment, mode of enrolment and other matter connected therewith--(1) Upon the appearance before the enrolling officer of any person

desirous of being enrolled, the enrolling officer shall read and explain to him, or cause to be read and explained to him in his presence, the conditions of service for which he is to be enrolled; and shall put to him the questions contained in the form of enrolment set out in Appendix I and shall, after having cautioned him that if he makes a false answer to any such question he shall be liable to punishment under the Act, record or cause to be recorded his answer to each such question.

(2) If, after complying with the provisions of Sub-rule (1) and such other directions as maybe issued in this behalf by the Director-General from time to time, the enrolling officer is satisfied that the person desirous of being enrolled, fully understands the questions put to him and consents to the conditions of service, and if the said officer is satisfied that there is no impediment, he shall sign and shall also cause such person to sign the enrolment paper, and such person shall thereupon be deemed to be enrolled.

(3)(a) Every person enrolled as a member of the Force under Sub-rule (2) shall be administered an oath or affirmation in the form set out in Appendix I.

(b) The oath or affirmation shall as far as possible be administered by the Commandant of the person to be attested or in the unavoidable absence of the Commandant by the person authorized in writing by the Commandant in this behalf.

(c) The oath or affirmation shall be administered when the person to be attested has completed his training.

R-142. General plea of "Guilty" or "Not Guilty"--(1) The accused person's plea of "Guilty" or "Not Guilty" (or if he refuses to plead or 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 has 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 alter 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 follows the charge to which the accused has pleaded guilty without requiring the accused to plea thereto, and a record to that effect shall be made in the proceedings of the Court.

R-160. Review of proceedings --The proceedings of a Summary Security Force Court shall, immediately on promulgation be forwarded through the Chief Law

Officer, or a Law Officer to the Deputy Inspector-General under whom the accused may have been serving.

R-161. Action by the Deputy Inspector-General --(1) Where the Deputy Inspector General to whom the proceedings of a Summary-Security Force Court have been forwarded under Rule 160, is satisfied that injustice has been done to the accused by reasons of any grave irregularity in the proceedings or otherwise, he may-

(a) Set aside the proceedings of the Court; or

(b) Reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in Section 48 and return it to the unit of the accused "for promulgation".

(2) Where no action under Sub-rule (1) has been taken he shall countersign the proceedings.

(3) The proceedings shall, after its promulgation [under Sub-rule (1) or countersignature under Sub-rule (2), be forwarded to the Chief Law Officer for custody.

9. Learned Counsel for the Petitioner has further submitted as below:

(a) Since the Petitioner was dealt with earlier for offence in SSF Court Proceeding and was convicted by way of dismissal, then Second Trial or Second SSF Court Proceeding for same offence is prohibited u/s 75 of BSF Act.

(b) The SSF Court Proceeding or Trial for offence was earlier proceeded with and concluded against the Petitioner and a dismissal order dated 10.08.2001 was passed, as such, the Petitioner has ceased to be subject to the BSF as well as "BSF Act" in view of Section-77(I) of "BSF Act".

(c) In view of the provisions of Section-77(2) of BSF Act the Petitioner shall not be tried for an offence beyond six months after he had ceased to be subject of "BSF Act".

(d) In view of the order dated 29.01.2002 the SSF Court proceeding was cancelled and BSF Authorities vide letter dated 25.02.2002 has recalled the Petitioner to join to duty and the Petitioner joined from 27.08.2002, therefore, the retrial or the commencement of trial against the Petitioner for the same offence by issuance of letter dated 17.12.2002 beyond one year from the date of his ceasing as BSF personnel i.e. beyond one year from 10.08.2001 is not permissible in view of the provisions of Section-77(2) of "BSF Act" more so, when trial did not commence within six months after the Petitioner had ceased to be subject to "BSF Act".

(e) After setting aside the proceedings thereof by DIG BSF in exercise of his power of review u/s -115 read with Rule-161 no fresh retrial or denovo proceeding could be initiated in absence of any express provision for denovo

enquiry provided in the Act & Rules.

(f) In exercise of power under Section-115 and Rule-160 read with Rule-161, the action of DIG BSF was to be confined only on two aspects (i) to set aside the proceedings of the Court (ii) to reduce the sentence or commute punishment awarded to one lower in the scale of punishment. Besides these, DIQ BSF is not empowered to make an observation or to give any direction. The DIG has no power to confirm the verdict or sentence or punishment awarded by the SSF Court Proceeding.

(g) In exercise of power under Section-115 read with Rule-161, the DIQ BSF can not make observations indicating in his order that there is no bar to start denovo proceeding against the Petitioner as making such observation tantamounts over reaching his jurisdiction.

(h) Allahabad High Court in 1973 (1) Cri. 485 G.B. Singh v. Union of India in similar circumstances where a Writ Petition was preferred by the Writ Petitioner against the direction to convene second General Court Martial for his retrial in reference to the earlier charge for which he had already been tried in General Court Martial under "The Air Force Act, 1950" the Court observed that second trial is not permissible. On the other hand, according to learned Counsel for the respondents many of the provisions of "BSF Act" and The Air Force Act are pari-materia. As Section-120 of Air Force Act, 1950 deals with the provisions of prohibition of second trial and Section 152 of Air Force Act, 1950 provides that no finding or sentence of a general, district or summary general court-martial shall be valid unless confirmed as provided by the Act. But no such similar provision exist in "BSF Act", besides this, Section-114 of "BSF Act", provides that findings and sentence of Summary Security Court Proceeding shall not require to be confirmed but may be carried out forthwith and since in the light of Section-152 of Air Force Act the decision of Allahabad High Court was given in G.B. Singh (supra), therefore, the ratio and decision of that case is not applicable to the present case in hand.

10. (A). Learned Counsel for the Petitioner has placed reliance on the decision of the Supreme Court in State of Assam and Another Vs. J.N. Roy Biswas, Roy Biswas where delinquent official after having been reinstated without any reason then the delinquent can not be subject to another proceeding in absence of rule authorizing to that effect by the State Government. In this respect also Mr. P.K. Biswas, learned Counsel for respondent, Union of India has submitted that above decision of J.N. Roy Biswas (supra) was considered in subsequent Judgment of Supreme Court in Anand Narain Shukla Vs. State of Madhya Pradesh, . and was held that the second enquiry was permissible when the reversion of Government Servant was quashed on technical ground.

According to the learned Counsel for the Respondents following relevant paragraphs of Anand Narain Shukla (supra) shall meet the requirement.

Para-2: Mr. D.N. Mukherjee, learned Counsel for the Appellant urged only two

points before us, (1) that after the earlier order of reversion was quashed by the High Court and after the Appellant was reinstated, no second enquiry on the very same charges could be held and no second order of reversion could be legally and validly made; and (2) that Appellant was entitled to the full salary for the period of suspension.

Para-3: We find no substance in either of the points urged on behalf of the Appellant. The earlier order was quashed on a technical ground. On merits a second enquiry could be held. It was rightly held. The order of reinstatement does not bring about any distinction in that regard. The Government had to pass that order because the earlier order of reversion had been quashed by the High Court. Without reinstating the Appellant, it would have been difficult, perhaps unlawful, to start a fresh enquiry against the Appellant. The observations of this Court in the last paragraph of the judgment in *State of Assam and Another Vs. J.N. Roy Biswas*, are not applicable to the facts of the present case and do not help the Appellant at all.

(B) According to Mr. Somik Deb, learned Counsel, the Petitioner has ceased to be the BSF personnel and subject to "BSF Act" on 10.08.2001 by virtue of his dismissal by Commandant, as such, was not entitled to avail any remedy provided under Section-117 of "BSF Act" which is available to a person subject to "BSF Act" aggrieved by order, finding, sentence of SSF Court Proceeding. On the other hand, according to learned Counsel for the respondents such interpretation and proposition is erroneous because any person aggrieved by conviction or finding or sentence, may be punishment including dismissal, avail remedy under Section-117; Unless any person has finally been declared or acknowledged as ceased to "BSF" and "BSF Act" one may avail remedy under Section-117. Since the BSF Authorities have not declared the Petitioner as "ceased" for "BSF", therefore, remedy of Section-117 of "BSF Act" was available to the Petitioner.

(C) In view of the Section-77(2) of "BSF Act" no trial could be commenced against any person for offence in derogation to the statutory period of 6 (six) months provided for commencement of trial against that person after he has ceased to be the subject of "BSF Act". In this respect learned Counsel has placed reliance of *Shiv Parshad Pandey Vs. C.B.I. through Director, New Delhi*,

In *Shiv Prasad Pandey (supra)*, the Writ Petitioner was deployed to serve in BSF while being an officer of Indian Police Service, who on repatriation to his parent department was held to be ceased to be a person subject to "BSF Act" from the date of his repatriation to the parent department.

Any disciplinary proceeding or action for an alleged offence of the Writ Petitioner irrespective of gravity of offence done by him in BSF, can not be proceeded after his repatriation to the parent department in reference to Section-77(2) of "BSF Act" after 6 (six) months after such Writ Petitioner has ceased to be the BSF and subject to the "BSF Act".

According to Mr. P.K. Biswas, learned Assistant Solicitor General, the facts of Shiv

Prashad Pandey (supra) is different and distinguishable as the said decision is not applicable in the present case. The question of prescribed period of commencement of the trial for an offence beyond 6 (six) months came in consideration as Shiv Prashad Pandey had ceased to be the subject to "BSF Act", since, he had already been repatriated to his parent department and in those circumstances any commencement of trial for his involvement in the offence in the BSF was barred beyond six (6) months, whereas, in the present case the SSF Court proceeding was set aside by DIG, BSF vide order dated 29.01.2002 in exercise of his power under Section-115 read with Rule-161, more so, consequent upon setting aside of SSF Court Proceeding, there shall be non-existence of dismissal order of the Petitioner in the eye of law, as it has become non-est as if it was never passed as such denovo SSF Court Proceeding irrespective of any observation or comment by DIG BSF was not bar.

11. I have heard learned Counsel for the parties, I have also perused the documents, I find that for the offence SSF Court proceeding was earlier conducted against the Petitioner and order dated 10.08.2001 of dismissal was passed by the Commandant which on being forwarded to DIG, BSF was considered in exercise of his power under Section-115 of the "BSF Act" read with Rule-161 of "BSF Rules" and the entire SSF Court proceeding was set aside for lack of observance of the requirement of Rule-142 of "BSF Rules". Since DIG, BSF was not supposed to confirm the verdict of SSF Court Proceeding in view of the Section-114 and the action of DIG BSF was within the ambit and scope of the provisions of Section-115 read with Rule-160 & 161. Therefore, after setting aside of SSF Court proceeding, the natural fall out is that there exist no dismissal order in the eyes of law thereafter. The Petitioner's initial dismissal by Commandant has not become final as it was in continuity, subsequently dealt with by superior officer DIG BSF and the Petitioner can not be treated as ceased from BSF and ceased to "BSF Act", therefore, he could have availed the remedy under Section-117 of "BSF Act" which he failed. In the facts & circumstances, the BSF Authorities were not debarred to start denovo or retrial by way of SSF Court proceeding for the same offence and BSF Authorities are not prohibited for second trial as such Section-75 shall not be attracted. The Petitioner shall be treated as neither have been acquitted nor convicted for the same charge in earlier SSF Court proceeding as the same was set aside by DIG BSF. Therefore, respondents can not be restrained from taking the proposed steps and the letter dated 17.12.2002 (Annexure-P/3) can not be dropped.

The order of the DIG BSF shall not tantamount to have been passed as an appellate authority or beyond the scope of the provisions of BSF Act & Rules.

12. No other point has been pressed into service. Learned Counsel for the Appellant has also not argued anything in reference to Article 20(2) of the Constitution.

13. In my respectful consideration, after quashing of earlier SSF Court proceeding, the BSF authorities are rightly at liberty to initiate fresh SSF

proceeding, for same offence, therefore, without making any comments on the merits of the case, it is suffice to say, that under the provisions of BSF Act & Rules the action of BSF authorities need no interference. Therefore, the present Writ Petition being devoid of merits is accordingly dismissed.

14. Consequent upon the dismissal of the Writ Petition, the earlier stay order granted by this Court shall also not exit is therefore automatically vacated.