

(2016) 05 GAU CK 0096

In the Gauhati High Court

Case No : Writ Petition (C) No. 7016 of 2015 and 5904 of 2010

Bhoopendra Pratap Singh Parihar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-05-2016

Acts Referred:

Border Security Force Act, 1968 — Section 107, Section 48, Section 80
Border Security Force Rules, 1969 — Rule 160, Rule 41
Constitution of India, 1950 — Article 226

Citation : (2016) 6 GauLJ 450 : (2016) 6 GauLR 550

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : Mr. S.C. Keyal and Ms. A. Gayan, Advocates, for the Respondent; Mr. B.D. Konwar Asstt. S.G.I., Mrs. J.M. Konwar, Mr. R. Kalita, Mr. R. Saloi Ms. S. Bhuyan and Ms. K. Mahanta, Advocates, for the Petitioner

Final Decision : Disposed Off

Judgement

Ujjal Bhuyan, J. - Both WP(C) Nos. 5904/2010 and 7016/2015, being inter-connected, were heard together and are being disposed of by this common judgment and order.

2. For the sake of convenience, facts narrated in WP(C) No. 7016/2015 are referred to hereunder.

3. Petitioner had joined Border Security Force (BSF) as Assistant Commandant on 05.10.1987. In the course of his service, he was promoted to the rank of Commandant which post he held till his superannuation on 30.04.2016. At the relevant point of time petitioner served as Officer Commandant of 162 Battalion BSF and was stationed in the State of Jammu and Kashmir.

4. While deployed at Udampur in the State of Jammu and Kashmir, 162 Battalion BSF was running a CSD canteen. In the month of February, 2009, a Board of Officers had carried out checking of canteen stores. During such

checking discrepancies of more than Rs.5 lakhs were noticed as also surplus of canteen stores worth Rs.11447.70.

5. A Staff Court of Inquiry was thereafter ordered which opined that misappropriation/embezzlement of canteen fund worth Rs. 5,19,117.30/- had occurred in the Unit canteen of 162 Battalion BSF. Sri S.K. Das, Canteen NCO and Sri Sudesh Kumar Sharma, salesman were held to be directly responsible for such misappropriation/embezzlement. Petitioner being the Commandant was found to be guilty of lack of supervision thereby creating scope for such misappropriation and embezzlement. Therefore, Staff Court of Inquiry recommended stern disciplinary action against Sri S. K. Das and Sri Sudesh Kumar Sharma for misappropriation in Unit Canteen. Action under the Border Security Force (BSF) Act, 1968 was recommended against the petitioner, Sri Gopal Krishan, Deputy Commandant and Sri Swaran Singh, Assistant Commandant for supervisory lapse. Administrative action was recommended against Sri B. M. Panth, Sri Hukum Singh and Sri Manish Verma.

6. On the findings and opinion of the Staff Court of Inquiry, Inspector General, BSF, Frontier Head Quarter, Jammu and Kashmir directed disciplinary action against the petitioner and the others mentioned by the Staff Court of Inquiry and also directed recovery of the misappropriated/embezzled amount from them in the proportion mentioned. In so far petitioner was concerned, direction was issued for recovery of 60% of the misappropriated amount from him.

7. Following the same, adjustment order was issued in respect of the petitioner attaching him at Silchar with Station Head Quarter, Guwahati for disciplinary purpose.

8. At that stage, petitioner approached this Court by filing WP(C) No. 5904/2010 challenging the decision to recover 60% of the misappropriated amount from him. In the course of the said proceeding, as the Central Govt. was seeking time to file affidavit, on the submission of learned counsel for the petitioner that the authorities were taking steps to impose penalty on the petitioner, this Court passed interim order dated 22.12.2010 directing that no consequential penalty order should be passed against the petitioner, in pursuant to disciplinary proceeding without the leave of the Court. Respondents have filed interlocutory application for vacation of the said interim order which has been registered as IA No. 2072/2015 and is pending.

9. On 12.01.2011 charge-sheet was issued by the Deputy Inspector General, BSF, Guwahati Sector framing three charges against the petitioner. As per the first charge, petitioner had dishonestly misappropriated property belonging to a regimental institution and thus violated Section 30(b) of the BSF Act. The second charge related to an act of omission on the part of the petitioner prejudicial to maintenance of good order and discipline in the force and thus violated Section 40 of the BSF Act. The third charge related to exacting money from a person without authority in violation of Section 31 (b) of the BSF Act.

10. It appears that Record of Evidence was prepared against the petitioner on the three charges framed against him as noticed above which was examined by the Deputy Inspector General, BSF, Guwahati Sector and as per his recommendation dated 10.09.2011, the first and the third charges were dismissed as there was no evidence to substantiate the two charges. In so far the second charge was concerned, it was found that there were some evidence of trivial nature against the petitioner for omitting to exercise proper supervision over functioning of the Unit canteen. He therefore recommended closure of the Record of Evidence proceeding by taking administrative action against the petitioner.

11. It further appears that such recommendation was not accepted by the higher authority where after the Record of Evidence was re-examined. Ultimately, it was decided to hold General Security Force Court proceeding against the petitioner. This time two charges were framed against the petitioner as under:-

"First Charge

Without Proper Authority Exacting Money From A Person

Bsf Act, 1968 Section-31(b)

in that he,

at Bn HQ, Udhampur, from November, 2007 to December, 2008, while commanding 162 Bn BSF without proper authority exacted money ranging from Rs. 10,000/- to Rs.15,000/- per month from No. 870071405 HC Santosh Kumar Das, the Canteen NCO of the same Bn.

Second Charge

An Omission Prejudicial To Good Order And Discipline of The Force

Bsf Act, 1968 Section-40

in that he,

at Bn HQ, Udhampur, between 11th September, 2007 and 23rd December, 2008 while commanding 162 Bn BSF, improperly omitted to exercise proper supervision over the functioning of Unit Canteen which resulted into misappropriation of sale proceeds amounting to Rs. 3,23,527.00 (Rupees three lakh twenty three thousand five hundred and twenty seven) only and stores/ items worth Rs. 1,85,597.24/- (Rupees one lakh eighty five thousand five hundred ninety seven and paise twenty four) only."

12. General Security Force Court was constituted as per BSF Act, 1968, and BSF Rules, 1969. Petitioner was tried at Sector Head Quarter, Falakata from 17.06.2014 to 25.07.2014 for the charge under Section 40 of the BSF Act. Thereafter, the General Security Force Court passed the following sentence on 25.07.2014 subject to confirmation of the finding and sentence by the competent authority:-

- (a). to be reprimanded;
- (b). to take rank and precedence as if his appointment as Commandant bore the date 25th day of February, 2005;
- (c). to forfeit 5 years of service for the purpose of pension.

13. It is stated that the finding and sentence of the General Security Force Court has not been confirmed by the confirming authority in view of the stay order passed by this Court.

14. Mr. B. D. Konwar, learned Sr. counsel for the petitioner submits that holding of General Security Force Court was untenable in view of the opinion of the Staff Court of Enquiry as well as the recommendation of the Deputy Inspector General, BSF, Guwahati Sector. As per the Staff Court of Enquiry, the only lapse that was found of the petitioner was that of supervisory lapse. There was no question of misappropriation or embezzlement of the canteen fund by the petitioner. Therefore directing recovery of 60% of the misappropriated amount from the petitioner is not justified. Record of Evidence proceedings have been examined and re-examined only to ensure that a case for holding General Security Force Court against the petitioner could be made out. Because of the impugned action, petitioner's promotion from Commandant to Deputy Inspector General has been held up, as a result of which he would lose 3 years of additional service in the BSF. In the course of the hearing, Mr. Konwar had pointed out that petitioner would attain superannuation on 30.04.2016 and after his superannuation the proceedings under the BSF Act cannot be continued against him. In fact in the hearing on 28.04.2016 this Court had framed a question as to whether because of the intervening superannuation of the petitioner the General Security Force Court proceeding which is yet to be confirmed in terms of Section 107 of the BSF Act could be validated, continued and completed post-superannuation and an ancillary question was also raised as to whether after superannuation petitioner would be within the disciplinary control and jurisdiction of BSF.

15. Learned counsel for the parties have made elaborate submissions in this regard.

16. Mr. Konwar has also brought to the notice of the Court that Sri Santosh Kr. Das had filed a petition before the Director General, BSF against his trial by General Security Force Court and by order dated 11.08.2015 the punishment of rigorous imprisonment for one year and dismissal from service imposed by the General Security Force Court was altered to rigorous imprisonment of 3 months and giving effect to the appointment of the said person as Head Constable from 10.01.2009. He submits that since the main person who was charged with misappropriation of canteen fund has been dealt with so leniently, question of punishing the petitioner by the General Security Force Court does not and would not arise. He therefore prays for appropriate intervention by the Court in the matter.

17. On the other hand, Mr. S. C. Keyal, learned Assistant Solicitor General refers to the provisions contained in Section 107 of the BSF Act and submits that until and unless the proceedings of the General Security Force Court are confirmed by the appropriate authority, the decision of the General Security Force Court would not be effective. Therefore, the writ petitions filed are pre-mature and should not be entertained by the Court. He also submits that notwithstanding the superannuation of the petitioner, since the proceedings of the General Security Force Court were initiated while he was in service, intervening superannuation of the petitioner would have no bearing on the proceedings and outcome of the General Security Force Court.

18. Submissions made have received the due consideration of the Court. Also perused the materials on record.

19. Section 64 of the BSF Act provides for three kinds of Security Force Courts including General Security Force Court with which this litigation is concerned. Under Section 72, a General Security Force Court shall have the power to try any person subject to the BSF Act for any offence punishable thereunder and to pass any sentence authorised thereby. Section 48 provides for punishments that may be awarded by the Security Force Courts which starts from stoppage of pay and allowances to death. Under Section 77 if an offence under the BSF Act had been committed by any person while being subjected to the BSF 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. However, there is restriction on commencement of trial post retirement if such trial is not commenced within 6 months after a person ceased to be subject to the BSF Act. When a criminal Court and a Security Force Court each have jurisdiction in respect of an offence committed, the discretion would be that of the Director General or the designated authorities to decide before which Court the proceedings should be instituted. Section 87 clarifies that the Indian Evidence Act, 1872 shall apply to all proceedings before a Security Force Court. Section 106 provides that a trial by a Security Force Court shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 IPC and the Security Force Court shall be deemed to be a Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898. Section 107 provides that no finding or sentence of a General Security Force Court shall be valid except so far as it may be confirmed as may be provided by the BSF Act. According to Section 108, the finding and sentence of a General Security Force Court may be confirmed by the Central Government or by any officer empowered in this behalf by warrant of the Central Government. Section 111 deals with power of confirming authority to mitigate, remit or commute sentences. It provides that the confirming authority may when confirming the sentence of a Security Force Court mitigate or remit the punishment thereby awarded or commute such punishment for any punishment or punishments lower in the scale as laid down in Section 48. Under Section 113 the confirming authority has the power to revise the finding or sentence of a Security Force Court. Section 117

provides for remedy against order, finding or sentence of Security Force Court. Any person 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 such finding or sentence and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness or legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates. A person aggrieved by a finding or sentence of any Security Force Court which has been confirmed may file a petition before the Central Government or the Director General or any prescribed officer superior in command to the confirming authority and the said authority as the case may be may pass such order thereon as may be considered fit. The Central Government, the Director General or any prescribed officer may annul the proceedings of any Security Force Court on the ground that they are illegal and unjust.

20. Regarding choice or discretion between Security Force Court and criminal Court, Section 80 of the BSF Act has to be read with Rule 41 of the BSF Rules which lays down guidelines as to how to proceed in such a matter. Rule 101 lays down the procedure on conviction. It provides that upon finding of guilt and conviction, the General Security Force Court should take evidence whenever possible and record the general character and other particulars of the charged person. While determining the sentence the General Security Force Court is also required to take note of any recognised act of gallantry or distinguished conduct of the charged person (accused) and likewise any previous conviction or punishment awarded to him. Rule 102 says that the General Security Force Court shall award a single sentence in respect of all the offences of which the accused is found guilty and such sentence shall be deemed to be awarded in respect of which it can be legally given and not to be awarded in respect of which it cannot be legally given. Rule 106 deals with confirmation and promulgation. A perusal of Rule 106 would go to show that a confirming authority may for reasons to be recorded withhold confirmation in a particular case. It may in a given case, accept, reduce or remit the sentence.

21. From the materials on record what transpires is that the petitioner was tried by a General Security Force Court following which he has been convicted for a charge under Section 40 of the BSF Act which deals with violation of good order and discipline. Following such conviction, he has been sentenced to be reprimanded, to treat him as Commandant w.e.f. 25.02.2005 and to forfeit 5 years of service for the purpose of pension. Of course, such conviction and sentence is yet to be placed before the confirming authority.

22. From the scheme of the Security Force Courts as provided under the BSF Act which includes General Security Force Court, it is evident that proceedings before the Security Force Court are judicial proceedings and akin to criminal trial. In fact the authority under Section 80 read with Rule 41 has the discretion to choose either to have a trial under the Security Force Courts or to go for a trial under the criminal Courts. Provisions of the Evidence Act are applicable to proceedings

before the General Security Force Court. Therefore, proceedings before the General Security Force Court are criminal proceedings consequence of which may lead to conviction and imposition of punishment prescribed in Section 48 of the BSF Act which includes the ultimate penalty of death. Therefore, a proceeding before the General Security Force Court or for that matter any Security Force Court cannot be equated with a departmental proceeding to mean that such proceeding would come to an end after severance of master servant relationship between the employer and the employee following superannuation. Being a proceeding of criminal nature trying criminal culpability of a charged person, it would be continued notwithstanding any intervening development such as superannuation of the charged person (accused).

23. Having said that, unlike a criminal Court, the conviction and sentence imposed by the General Security Force Court does not attain finality until and unless it is confirmed by the confirming authority as per Section 107 of the BSF Act read with Rule 106 of the BSF Rules. A careful analysis of the provisions contained in Section 107 of the BSF Act and Rule 106 of the BSF Rules would go to show that the power of the confirming authority is plenary in the sense that it has the power either to confirm the proceeding or to remand the proceeding back to the General Security Force Court for a fresh decision by exercising the power of revision or to alter the conviction and sentence or even to annul the proceedings if it finds the proceedings of the General Security Force Court to be illegal and unjust. Until and unless the conviction and sentence imposed by the General Security Force Court is confirmed by the confirming authority, such conviction and sentence would have no legal consequence. Therefore, having regard to the amplitude of this power, such power vested in the confirming authority is not to be exercised in a mechanical manner but has to be exercised reasonably with due application of mind to the relevant factors as part of the criminal proceeding conducted through the General Security Force Court.

24. Factually, there is one more aspect of the matter. From the documents placed on record, it appears that one of the higher authorities had pointed out, and rightly so, that the order for recovery of 60% of the misappropriated canteen money from the petitioner before the conclusion of the General Security Force Court proceedings would tantamount to pre-judging the issue. Therefore, the direction to recover such amount from the petitioner appears to be not at all justified at this stage of the proceeding.

25. Having regard to the discussions made above and on due consideration, the interim order passed by this Court on 22.12.2010 in WP(C) No. 5904/2010 is lifted. Matter would now be placed before the confirming authority in terms of Section 107 of the BSF Act, 1968 read with Rule 106 of the BSF Rules, 1969. Petitioner may submit a detail response on the procedure followed by the General Security Force Court and on the evidence considered while imposing the conviction and sentence. Such written response should be submitted by June 30, 2016. The confirming authority shall consider the written response of the

petitioner along with the record of the General Security Force Court proceeding in accordance with law keeping in mind the observations made above before taking a final decision in this regard. The decision so taken shall be communicated to the petitioner. However, the order for recovery of 60% of the misappropriated canteen money from the petitioner would stand quashed.

26. Subject to the observations and directions made above, writ petitions are disposed of.