

(2005) 02 CAL CK 0022

In the Calcutta High Court

Case No : CAN No. 7211 of 2004 and M.A.T. No. 1971 of 2004

Deputy Inspector General, Border Security Force

APPELLANT

Vs

Ashok Kumar Mishra and Others

RESPONDENT

Date of Decision : 02-02-2005

Acts Referred:

Border Security Force Act, 1968 — Section 11(2), 115, 74(5)
Border Security Force Rules, 1969 — Rule 160, 161, 22

Citation : (2005) 2 CHN 638

Hon'ble Judges : Altamas Kabir, Acting C.J.; Asit Kumar Bisi, J

Bench : Division Bench

Advocate : Pradip Ghosh and Dipankar Dutta, for the Appellant; Kalyan Bandopadhyaya and Mintu Goswami, for the Respondent

Judgement

1. This appeal at the instance of the Deputy Inspector General, Border Security Force, North Bengal Frontier Headquarter, Siliguri, has been filed against the judgment and order dated 18th February, 2004 passed by the learned Single Judge in W.P. No. 12508(W) of 2003, allowing the writ application and quashing the show-cause notice issued by the Commandant, 97 Battalion, Border Security Force. The present application has been made for stay of the order and judgment of the learned Single Judge impugned in the appeal.

2. Appearing in support of the application for stay, Mr. Pradip Ghosh, learned Senior Counsel contended that in the instant case after the writ petitioner had been acquitted of the charges levelled against him by the Summary Security Force Court (hereinafter referred to as the "SSFC"), the matter was referred to the Commandant (SHQ), the Officiating DIG of the concerned area, in terms of Rule 160 of the Border Security Force Rules, 1969. After going through the proceedings of SSFC, the said authority differed with the findings of the SSFC and observed that under the circumstances, the SSFC proceedings is not approved being against the weight of evidence. The said authority went on to direct the Commandant to invoke the provision of Rule 22 of the Border Security

Force Rules and to proceed to terminate the services of the writ petitioner administratively after following the due process of law. It is after the said order was passed by the Officiating DIG that the Commandant issued the show-cause notice dated 1st August, 2003 to the writ petitioner requiring him to show-cause as to why his services should not be terminated, by virtue of the powers vested in the said Commandant u/s 11(2) of the Border Security Force Act, 1968 read with Rule 22 of the Border Security Force Rules, 1969. It was also observed that considering the contents of the show-cause notice, it was not expedient and impracticable to hold a trial by the SSFC resulting in invocation of the provisions of Rule 22 of the aforesaid Rules.

3. As mentioned hereinbefore, the said show-cause notice along with the invocation of Rule 22 of the Border Security Force Rules, was the subject-matter of challenge in the writ petition.

4. The learned Single Judge after considering the various provisions of the Act and the Rules, came to the conclusion that once the writ petitioner had been acquitted of the charges levelled against him, it was no longer open to the concerned authorities to invoke the provisions of Rule 22, which contemplated the awarding of punishment without holding a separate proceeding by the SSFC. On such findings, the learned Single Judge quashed the impugned notice to show cause issued on the basis of the orders passed by the Officiating DIG upon disagreeing with the findings of the SSFC.

5. Appearing in support of the application for stay, Mr. Ghosh contended that the learned Single Judge had erred in not considering the provisions of Section 115 of the Border Security Force Act, 1968, which, according to Mr. Ghosh, would have to be read with Rule 22 of the Border Security Force Rules, 1969 so as to give a harmonious construction to the provisions of the Act or the Rules in a case where the concerned authority differed with the findings of the SSFC and was of the view that the delinquent deserved to be punished. Mr. Ghosh submitted that this is an issue which requires consideration in the appeal and that, as an interim measure, the judgment and order passed by the learned Single Judge was required to be stayed.

6. Opposing the application on behalf of the writ petitioner, Mr. Kalyan Bandopadhyaya, learned Senior Advocate, submitted that the learned Single Judge had not committed any error in allowing the writ application upon coming to a finding that once a finding of not guilty" was pronounced in a proceeding by the SSFC, it was no longer open to the authority to reverse such finding as the statute did not empower the authority to do so.

7. At this stage, it may be indicated that Mr. Pradip Ghosh had conceded that the proceedings of Rules 160 and 161 of the Border Security Force Rules, 1969 would not be applied to the facts of the instant case, since the provisions were in favour of an accused and interference under the said Rules, can only be made to prevent an injustice caused to the accused by reason of any grave irregularity in

the proceedings or otherwise.

8. Referring to Section 115 of the 1968 Act, Mr. Bandopadhyaya submitted that even in the said section the use of the phrase "set aside the proceedings" would have to be read in conjunction with Rule 161 of the 1969 Rules, in favour of the accused. Apart from the above, Mr. Bandopadhyaya also contended that having once taken recourse to a trial before the SSFC, it was no longer open to the authorities to invoke the provisions of Rule 22 of the 1969 Rules, which contemplated a situation where no such trial by SSFC was either practicable or expedient. According to Mr. Bandopadhyaya, the Officiating DIG had erroneously directed the Commandant to invoke the provisions of Rule 22 and the show-cause notice issued on the basis thereof, had, therefore, been rightly quashed by the learned Trial Judge.

9. Mr. Bandopadhyaya urged that no order, as prayed for, should be passed on the application for stay and, in fact, the entire appeal was misconceived.

10. We have carefully considered the submissions made on behalf of the respective parties with regard to the provisions of the Act and the Rules and in particular the applicability of Section 115 of the Act read with Rule 22 of the Rules and we are inclined to agree with Mr. Bandopadhyaya that the provisions of Rule 22 were erroneously invoked by the authorities, inasmuch as, a trial by SSFC had already been conducted and an acquittal order had been passed in favour of the writ petitioner/respondent.

11. We accept Mr. Bandopadhyaya's contention that if at all Rule 22 had to be invoked, it could have been invoked at the initial stage without holding the trial by the SSFC.

12. The provisions of both the Act and the Rules are in favour of an accused and upon a harmonious construction of the provisions, referred to hereinabove, the only conclusion that one can reach is that once an accused is acquitted of the charges levelled against him by the SSFC, it is no longer open to the authorities to reverse the findings of the SSFC during the trial.

13. It may also be indicated that the Act and the Rules do not also provide for confirmation of the findings and sentence of a Summary Security Force Court, unless the trial is held by an officer 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. It is only in such cases that a finding and sentence of SSFC is required to be confirmed, which is not so in the instant case.

14. We are not, therefore, inclined to stay the operation of the order impugned in the appeal and the application for stay is accordingly, dismissed. Since practically nothing remains to be decided in the appeal, the same is also treated as on day's list, on consent of the parties, and is disposed of. However, the order with regard to costs imposed by the learned Single Judge, shall not be given effect to.

15. There will also, however, no order as to costs.

16. Xerox certified copy, if applied for, be given early.