

(2016) 11 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1672 of 2008

Mohd Mahibur Rahamn

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-11-2016

Acts Referred:

Border Security Force Act, 1968 — Section 16(c), Section 40, Section 46, Section 46, Section 74(2)

Constitution of India, 1950 — Article 20(2), Article 226

Citation : (2017) LIC 1876

Hon'ble Judges : Mr. Alok Aradhe, J.

Bench : Single Bench

Advocate : Mr. Navneet Dubey, Advocate, for the Petitioner; Mr. Ravinder Gupta, CGSC, for the Respondents

Final Decision : Dismissed

Judgement

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Mr. Alok Aradhe, J.—In this writ petition preferred under Article 226 of the Constitution of India read with Section 103 of the Constitution of

State of Jammu and Kashmir, the petitioner inter alia has assailed the validity of order dated 09.02.2002, by which the penalty of dismissal from

service has been imposed on the petitioner after holding the General Security Force Court proceeding against the petitioner. The petitioner also,

seeks a direction to the respondents to reinstate him in service with all consequential benefits and to accord him promotion to the post of Head,

Constable. In order to appreciate the petitioner's grievance, few facts need mention, which are stated infra.",

2. The petitioner was enrolled in the Border Security Force on 16.04.1987 as Constable (General Duty). The petitioner at the relevant time i.e. on,

25th-26th of September, 2000 was posted at the Forward Defence Location of the Border Security Force in Poonch Sector along with one",

Manoj Kumar of 4 Grandeurs of Army. It is alleged that the petitioner has fired five bullets from his SLR upon the said Manoj Kumar in a state of,

intoxication. On the aforesaid ground, on 09.10.2000 the petitioner was charged with commission of offences under section 16(c) and section 40",

of the Border Security Force, Act 1968 ((hereinafter to be referred as the Act). The petitioner was tried by the Summary Security Force Court on",

11.10.2000 and was convicted for commission of the said offences and was sentenced to undergo imprisonment for a term of 89 days in force,

custody along with further punishment of dies-non for the 89 days and loss of increment for a period of one year. However, vide order dated",

08.12.2000, the respondents annulled the Summary Force Court trial and sentence dated 11.10.2000 on the ground of lack of jurisdiction, as the",

same was violative of Section 74 (2) of the Act.,

3. The petitioner was again put in open arrests and in close arrests by the Commandant 93 Battalion of the BSF and was ordered to undergo fresh,

trial by a General Security Force Court. The petitioner was again charged for the commission of offences under section 16 (c) and section 46 of,

the Act on the allegation that the petitioner had fired upon Manoj Kumar in a state of intoxication and the charge under Section 307 of RPC i.e.,

attempt to murder was also levelled against the petitioner. The petitioner was tried by the General Security Force Court, which found that the",

charge of intoxication against the petitioner was not proved. Accordingly, the charge under section 16 (c) was dropped. The charges under section",

20 (a) and 20(c) were also not found to be proved by the General Security Force Court. However, charge under section 46 of the Act found to",

be proved and the petitioner was sentenced to undergo six months imprisonment with further punishment of dismissal from the service. Thereupon,",

the petitioner preferred an appeal. The Director General of the BSF remitted the jail sentence of six months of the petitioner but upheld the,

punishment of dismissal from service. In the aforesaid factual background, the petitioner has approached this Court seeking relief as stated supra.",

4. Learned counsel for the petitioner submitted that the conviction and sentence of the Summary Security Force Court dated 11.10.2000 could not,

be cancelled on the technical ground like lack of jurisdiction and, therefore, order of cancellation of conviction and sentence imposed by the",

Summary Security Force Court vide order dated 08.12.2000 is patently illegal. It is further submitted that there lack of jurisdiction as the trial of,

the petitioner took place at the place of incident. It is further submitted that Section 74 (2) of the Act, which has been invoked for cancellation of",

conviction and sentence, does not apply to the case of the petitioner as section 16 (c) and section 40 of the Act have not been mentioned under",

section 74(2) of the Act. It is also submitted that trial by the General Security Force Court is barred by Section 75 of the Act and is violative of,

Article 20 of the Constitution of India.,

5. It is argued that the petitioner was validly convicted and sentenced by the Summary Security Force Court and the petitioner cannot be punished,

for the second time in respect of the same charges. It is also submitted that the conviction and sentence of the petitioner by the General Security,

Force Court dated 31.12.2001 is barred by section 403 of Code of Criminal Procedure on the ground of issue estoppel. Lastly, it is urged that the",

conviction under section 46 of the Act is perverse in view of the fact that charge of intoxication was not proved and, therefore, the other part of the",

charges could not have been proved. In support of the aforesaid submissions, reliance has been placed on the decision of the Supreme Court in the",

case of Manipur Administration, Manipur v. Thokchom Bira Singh, AIR 1965 SC 87.",

6. On the other hand, learned counsel for the respondents submitted that ingredients of both the charges are different, therefore, the doctrine of",

double jeopardy does not apply to the fact situation of the case. In support of his submissions, learned counsel for the respondents has relied on",

the decisions of the Supreme Court in the cases of A.A Mulla and ors. v. State of Maharashtra and anr., 1996 (4) Crimes (SC) 125, State",

of Rajasthan v. Hat Singh and ors. (2003) 2 SCC 152, State of Karnataka through CBI v. C. Nagarajaswamy, AIR 2005 SCW 5240,",

State of Goa v. Babu Thomas, AIR 2005 SC 3606, Mr. Banwari Lal Yadav v. Union of India and anr., 134 (2006) DLT 353, Monika",

Bedi v. State of A. P. (2011) 1 SCC 284, Sangeetaben Mahendrabhai Patel v. State of Gujarat and anr. (2012) 7 SCC 621, State of",

NCT of Delhi v. Sanjay, (2014) 0 Supreme (SC) 53171, Nadimuddin v. State of M.P., 2016 CriLJ 1408.",

7. I have considered the submissions made by the learned counsel for the parties and have perused the record of the inquiry produced by the,

learned counsel for the respondents. Before proceeding further it is apposite to take note of the relevant statutory provisions. Sections 16, 40, 46",

and 74(2) of the Act read as under: ,

16. Offences punishable more severely on active duty than at other times.-Any person subject to this Act who commits any of the following",

offences, that is to say,-",

(a) forces a safeguard, or forces or uses criminal force to a sentry; or",

(b) breaks into any house or other place in search of plunder; or,

(c) being a sentry sleeps upon his post, or is intoxicated; or",

(d) without orders from his superior officer leaves his guard, picket, patrol or post; or",

(e) intentionally or through neglect occasions a false alarm in camp or quarters, or spreads or causes to be spread reports calculated to create",

unnecessary alarm or despondency; or,

i) BSF Act, 1968 Section 16(c)", "When A Sentry Being Intoxication In that he,

at FDL 431 on 25.09.2k at about 2015 hrs. when sentry

at the said picquet, was found intoxicated.

ii) BSF Act, 1968 Section 40.", "An Act Prejudicial To Good Orders And Discipline Of

The Force.

In that he,

At 2015 hrs on 25.9.2k under the influence of liquor fired

05 (five) rounds of SLR mm by his personnel weapon

SLR butt No. 568 body No. D-2631 on No. 2693389

2K Gdr. Manoj Kumar of 'D' Coy 04 Grenadier at FDL-

431.

BSF Act 1968 Section 46,

Committing a civil offence that is to say attempt to murder punishable under

section 307 of RPC,

In that the petitioner at FDL 431 on 25.09.2000 fired five shots of 7.62 mm SLR at No. 2693892k Grenadier Manoj Kumar of 04 Grenadiers,

who was deployed at the same FDL with intent to kill him.,

Charge Sheet No. II,

First Charge,

BSF Act 1968 Section 20(a),

Using criminal force to his superior officer,

In that the petitioner at Bn. HQ 93 Bn. BSF Achhad on 10.07.01 at about 1800 hrs struck with his fist on the chest of No. 87755010 HC KC,

Singh of same unit.,

Second Charge,

BSF Act 1968 Section 20(c),

Using insubordinate language to his superior officer.,

In that the petitioner at Bn. HQ 93 Bn. BSF Achhad on 10.07.01 at about 1800 hrs used insubordinate language to No. 87755010 HC KC Singh,

by saying ""isko kay pata hai, pata nahin kis ullu ke pathe ne havildar bana diya hain"" and words to that effect.""",

10. The petitioner thereupon was tried by the General Security Force Court. The petitioner engaged a lawyer to defend his case. The offence,

mentioned in the first charge sheet i.e. section 46 of the Act read with section 307 of RPC was found to be proved, but offences under section",

20(a) and section 20(c) of the Act were not found to be proved due to lack of evidence. The General Security Force Court thereupon sentenced,

the petitioner to suffer imprisonment for six months and for dismissal from service. On an appeal being preferred by the petitioner, sentence of six",

months was set aside but punishment of dismissal from service was upheld by the appellate authority. Thus, from the above narration facts and",

material available on record, it is evident that in fact the charge under section 46 of the Act ought to have been framed at the first instance.",

However, the same was framed under sections 16 and 40 of the Act. The Summary Security Force Court proceeding was rightly set aside as the",

Summary Security Force Court, in view of bar contained under section 74(2) of the Act, has no power to try the offence under section 46 of the",

Act. Therefore, the contention of the petitioner that section 74(2) of the Act could not be invoked for holding that the Summary Security Force",

Court's proceeding, was per se illegal, cannot be accepted.",

11. From the close scrutiny of the charges levelled against the petitioner, which were tried by the Summary Security Force Court and the General",

Security Force Court, it is evident that the ingredients of the offences are different, therefore, neither the provisions of the section 75 of the Act nor",

Article 20 of the Constitution of India, are applicable in the facts of the case. On the same analogy, the principle of issue estoppel does not apply",

to the fact situation of the case. The findings with regard to the commission of offence under section 46 of the Act are based on meticulous,

appreciation of evidence on record and this Court in exercise of powers under Article 226 of the Constitution of India read with section 103 of the,

Constitution of State of Jammu and Kashmir cannot act as an appellate authority. Therefore, the submission of the learned counsel for the",

petitioner that conviction under section 46 of the Act is perverse, also sans substance.",

12. In view of the preceding analysis, I do not find merit in this writ petition. The same fails and is hereby dismissed.",