

(2019) 02 DEL CK 0076

In the Delhi High Court

Case No : Civil Writ Petition No. 2510, 7843 Of 2015

Om Parkash And Anr

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 07-02-2019

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Sashastra Seema Bal Rules, 2009 — Rule 45, 45(1), 46, 51, 62, 140, 140(1), 144, 144(2)
Border Security Force Rules, 1969 — Rule 142(2), 145(3)
Sashastra Seema Bal Act, 2007 — Section 22(A), 51(1)(c), 87

Citation : (2019) 02 DEL CK 0076

Hon'ble Judges : S.Muralidhar, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Pawan Kumar Sharma, Sarvesh Singh, Kanika Madan, Dev P. Bhardwaj, Anubha Bhardwaj, Jatin Teotia, M.K.Bhardwaj, Priyanka M.Bhardwaj, M.D.Jangra

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J

1. These are two writ petitions arising from a similar set of facts and are accordingly being disposed of by this common judgment.

2. The two Petitioners in Writ Petition (C) No. 7843/2015 are Om Parkash (Petitioner No.1) and Onkar Chand (Petitioner No.2). Writ Petition (C) No. 2510/2017 is by Shishpal Singh. The prayer in these two petitions is similar. Both petitions seek the quashing and setting aside of the findings of the Summary Force Court ("SFC") dated 18th September, 2012 holding them guilty of the charges (as will be discussed hereafter) and the consequential orders dated 18th June, 2013, 20th June, 2013 and 28th June, 2013 removing them from service. The three Petitioners are also seek the setting aside of the orders dated 2nd July, 22nd July and 11th September, 2014 rejecting their respective appeals.

3. The background facts are that Om Prakash was recruited on 30th March, 1987 as Constable (GD) with the Shasatra Seema Bal ("SSB") whereas Onkar Chand was appointed as such on 5th September, 1997. As far as Shishpal Singh was concerned, he was appointed to the post of Constable/Cook in the SSB on 25th February, 2006. In 2010, these three Petitioners were deployed as personal staff of Shri A.K. Negi, Inspector General (IG)/(Admn.) of the SSB and they were staying in the servants' quarters.

4. On 8th January, 2011 there was incident of theft of some jewellery at the residence of Mr. Negi which was discovered by his wife. An FIR was registered on 9th January, 2011 at Police Station ("PS"), Defence Colony. According to the Petitioners the police inquiry found nothing as far as the involvement the Petitioners was concerned. However, the Commanding Officer ordered a Court of Inquiry (CoI). On 5th May, 2011 an Inquiry report was submitted alleging that these three Petitioners along with Ct/GD Suresh Kumar had been involved in acts of misconduct which had emerged during the police inquiry into the incident of theft.

5. On the basis of the above CoI, the Commandant passed an order on 1st June, 2011 ordering a Record of Evidence ("ROE"). Each of the Petitioners was issued a summons dated 4th June, 2011 to attend the ROE.

6. On 14th June, 2011 the ROE was submitted. Thereafter an order was passed by the Commandant Shri Manmohan Singhon 6th July 2012 for conducting an SFC on 10th July 2012. As far as Om Prakash and Onkar Chand were concerned, they were charged with having indulged in illegal sexual activity with a prostitute brought by Ct/ GD Suresh Kumar at the residence of the IG "during the month of August, 2010". As far as Shishpal Singh was concerned, he was charged with having committed an identical illegal sexual activity at the same place on 4th January, 2011.

7. All three Petitioners were sent up before the SFC presided over by the Commandant Manmohan Singh. This Court has perused the original record of the proceedings before the SFC. It reveals that on 17th July, 2012 the Commandant drew up "proceedings on a plea of guilty" which reads as under:

"Proceedings on a Plea of Guilty

Further proceedings on a plea of Guilty with respect to first charge in respect of accused CT/Cook Shishpal Singh, CT/GD Om Prakash and CT/Cook Onkar Chand.

Before recording a finding of Guilty, the Court explains all the four accused the charges, the Court read and explains to the accused the meaning of charges to which they have pleaded guilty and ascertains that the accused understands the nature of the charges to which they have pleaded guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court satisfied itself that the accused understands the charges and the effect of that plea and the difference in

procedure which will be followed consequent to the said plea. The Court satisfies himself that the accused understands the charges and the effect of their plea of Guilty to the charge particularly the difference in procedure."

The provisions of Rule 144(2) of SSB Rules, 2009 are complied with. Guilty first charge in respect of No. 0066837 CT/Cook Shishpal Singh. The accused No. 0066837 CT/Cook Shishpal Singh is found "Guilty" of the first charge. Guilty first charge in respect of No. 8765700 CT/GD Om Parkash The accused No. 8765700 CT/GD Om Parkash is found "Guilty" of the first charge.

Guilty first charge in respect of No. 9766640 CT/Cook Onkar Chand

The accused No. 9766640 CT/Cook Onkar Chand is found "Guilty" of the first charge.

The record of evidence is read (translated) explained and marked Exhibit-"K" signed by the Court and attached to the proceedings."

8. The typed sheet is signed by the Commandant Manmohan Singh at the right hand bottom. It is, therefore, seen that all three Petitioners pleaded guilty. In the same proceedings each of the Petitioners were asked if they wish to make any statement in reference to the charge or in mitigation of the punishment. Nowhere in the entire record of proceedings is there any signature of any of the Petitioners. There is then a discussion of the track record of each of the Petitioners and the co-accused Suresh Kumar.

9. The last portion of the record of proceedings before the SFC is titled "sentence by Court". While Suresh Kumar was awarded the punishment of dismissal from service, each of the three Petitioners was awarded punishment of "removal from service under Section 51 (1) (c) of the SSB Act, 2007." The Reviewing Officer confirmed the above sentence on 3rd June, 2013.

10. The main grounds of challenge to the aforementioned order of removal of the Petitioners is that the mandatory procedure outlined are SSB Rules, 2009 has not been complied with.

11. At this stage, it is necessary to discuss what the procedure under the SSB Rules entails. Rule 45 provides that in case of a person other than an officer and a subordinate officer the case in the first instance is to be heard of an officer not below the rank of an Assistant Commandant. Rule 46 provides that "a commanding officer of an above the rank of Commandant may hear the charge of persons under his command in accordance with the provisions of Rule 45 (1) and he is empowered to award any punishment which is otherwise empowered award in respect of persons of and below the rank of Head Constables. Rule 51 provides for preparation of the ROE.

12. Rule 62 talks of the convening of the Court. One of the options available is for an order to be passed by the Commanding Officer for trial by SFC.

13. The procedure before the SFC is outlined in Chapter-11 of the SSB Rules

2009. There are two rules here which are relevant for the present petitions. One is Rule 140 which reads as under:

"140. Arraignment of accused- (1) After the Court and interpreter (if any) are sworn or affirmed as mentioned above, the accused shall be arraigned on the charges framed against him.

(2) The charges on which the accused is arraigned shall be read and if necessary, translated to him, and explained and he shall be required to plead separately to each charge."

14. The other is Rule 144 which reads as under:-

"144. General plea of "Guilty" or "Not Guilty"-

(1) The accused persons' 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 after 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 and follow the charge to which the accused has pleaded guilty without requiring the accused to plead thereto, and a record to that effect shall be made in the proceedings of the Court."

15. Consequently, there is a mandatory requirement of Rule 140 (2) of the SSB Rules, 2009 that where the accused is arraigned before an SFC the charges on which he swearing "shall be read and if necessary, translated to him and explained and he shall be required to plead separately to each charge." This is not a mechanical exercise. The record will have to show that this step was actually complied with. There must be something in the record in the form of an acknowledgement by the person arraigned that the charges were in fact read over and explained to him. The mere recording by the Commandant, acting as SFC, that this was complied with, with there being no signature or endorsement of the person arrayed makes it difficult to accept that this mandatory requirement was complied with.

16. Likewise under Rule 144 (2) of the SSB Rules, 2009 where the person arrayed pleads guilty there are several steps that are required to be taken by the

SFC before recording that plea. These steps involved the Court (i) ascertaining that the accused understands the nature of the charge to which he has pleaded guilty (ii) Informing him of the general effect of that plea (iii) in particular the meaning of the charge to which he has pleaded guilty (iv) explaining the difference and procedure when he pleads guilty (v) advise him to withdraw that if it appears from the record or abstract the evidence or otherwise that the accused ought not to plead guilty.

17. Here again the typed statement in the record of the proceedings repeating the language of Rule 144 (2) of the SSB Rules, 2009 without there being any signature or endorsement of the accused makes it difficult for the Court to accept that the above mandatory requirement has been complied with.

18. The legal position in this regard is well-settled. In a decision dated 1st October, 2015 in WP (C) No.7369 of 2013 (Vinod Singh v. Director General, SSB) this Court was considering the validity of an order of dismissal of a Constable/GD by an SFC in the SSB. There the Petitioner was placed under suspension on 31st March, 2011 on certain allegations of grave misconduct i.e. he had committed an offence under Section 22(A) of the SSB Act, 2007. The SSC was constituted and in the course of its proceedings the Petitioner is stated to have pleaded "guilty". According to the Petitioner there he never took such a plea and that he was never informed of the charges or the evidence proposed to be led. There again he was dismissed from service and his appeal was also rejected. This Court referred to an earlier decision in Devender Kumar v. Union of India 2012 SSC Online Del 2807, where identical provisions of the BSF rules were discussed. The decision L.N.K Gurdev Singh v. Union of India 2008 ILR (6) Delhi 124 which was a case involving the Army was also discussed. The said decision held that in the absence of signatures of an accused pleading guilty of the charges, the trial itself would be vitiated.

19. In Vinod Singh v. Director General, SSB (supra), this Court called for the original records and noted that "the signatures of the present Petitioner as well as the other accused who too stood trial for the charges, were not recorded." There was nothing to show that the "record of proceedings of SFC were even served upon the Petitioner." It was noted that "the record of proceedings was apparently read and explained to the Petitioner/accused" and that the answer given by the accused in response to a question regarding punishment was "apparently on the compliance of Rule 145 (3)." The Court however noted that "even this document does not bear the signatures of the accused."

20. The Court then discussed the decisions in L.N.K Gurdev Singh (supra) and Devender Kumar (supra) and came to the following conclusions:

"14. We are of the opinion that in the present case, the absence of the petitioner's signatures and the tenor of his appeal - made to the higher authorities lead us to infer that in fact the plea of guilt was never taken. This is also supported by the fact that the petitioner did not plead guilty when the

record of evidence was taken down. The original files shown to us do not inspire any confidence. Having regard to this circumstance, we are of the opinion that the consequences spelt out in Section 87 of the Act, i.e. that an accused once tried for an offence cannot be subjected to the trial for the same charge squarely apply. In the opinion of this Court, the infirmity in the entire proceeding is of such a nature as to go to the root of the jurisdiction of the SFC. Section 87 is also by way of a safeguard mandated by Article 20(3) of the Constitution. We underline this aspect because the members of the Force are no different from the other citizens of the country. The member of a Force charged with criminal offences can be tried either by a competent criminal court or the SGFC. The consequence of a jurisdictional irregularity of the kind which has transpired in this case would not entitle the State or any authority to conduct fresh proceedings. If such were the consequence as seems to be the ratio in *Mohd. Safi v. State of West Bengal* 1965 (3) SCR 467 and *State of Karnataka through CBI v. C. Nagarajaswamy* 2005 (8) SCC 370, the consequence of a fatal infirmity in the trial or proceedings by the SFC can be no different."

21. Consequently, in *Vinod Singh v. Director General, SSB* (supra) the orders under challenge were quashed and the Petitioners were directed to be reinstated with continuity of service and all consequential benefits but without arrears of salary.

22. The Court would also like to at this stage notice other decisions of this Court. In a decision dated 6th August, 2012 in WP (C) No.2681 of 2000 (*Anil Kumar v. Union of India*) it was opined that in terms of the BSF Rules, 1969 which were in force when the trial took place, there was no requirement of obtaining the signatures upon an accused pleading guilty. Nevertheless, this Court in that case opined that:

"Prudence demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we had hastened to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment. Posing the question: What would the surrounding circumstances be? We had opined that the Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross-examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading

guilty and simultaneously pleading for mercy at the trial. We had noted various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial."

23. The said decision was again discussed in *Devender Kumar* (supra) where again Rule 142 (2) of the BSF Rules was discussed. It was held as under:

"On the facts of the instant case, signatures of the petitioner not being obtained beneath the plea of guilt and the petitioner taking a stand that he never pleaded guilty, in the backdrop facts of the case and in light of the law declared in *Anil Kumar*'s case (supra) and for the additional reason the second limb of Rule 142(2) of the BSF Rules 1968 has not been complied with, compels us to allow the writ petition and quash the conviction and sentence imposed upon the petitioner and as a consequence we direct the petitioner to be reinstated in service with all consequential benefits."

24. In that case, as was done later in *Vinod Singh*, the Court did not order a fresh inquiry since the error was in the nature of a "jurisdictional irregularity" which "would not entitle the State or any authority to conduct fresh proceedings." In that context reference was made to the decisions in *Mohd. Safi v. State of West Bengal* 1965 (3) SCR 467 and *State of Karnataka through CBI v. C. Nagarajaswamy* (2005) 8 SCC 370.

25. In the present case, the three Petitioners have claimed innocence and have questioned the entire proceedings. They have alleged that the evidence was fabricated and that each of them was falsely implicated. In order to examine if there was substance in this plea, the Court has perused the original record. In the ROE statements of four witnesses were recorded. Three of them viz., *Krishan Dutt*, *Rasik Lal* and *Bagru Dass* - failed to support the prosecution. None of them spoke of any incident involving illegal sexual activity with a prostitute indulged in by any of the Petitioners, or for that matter even *CT/GD Suresh Kumar*- either in the month of August, 2010 or January, 2011 at the residence of Mr. Negi.

26. The only witness who made a statement to that effect was *Rigzin Dorjey* (P-4). However, his presence on the date of the alleged incident i.e. 26th August, 2010 along with *Ct/GD Suresh Kumar* was contradicted by the statement of *Krishan Dutt* who stated that when *Suresh Kumar* went on long leave he was replaced by *Rigzin Dorjey*. This made the presence of *Rigzin Dorjey* along with *Suresh Kumar* at the residence of Mr. Negi on 26th August, 2010 highly doubtful. It raised an even more serious doubt whether he at all could have been privy to the incident that allegedly happened on that date in the residence of Mr. Negi.

27. In any event, *Rigzin Dorjey* does not talk of any incident of 4th January, 2011 involving *Ct/GD Suresh Kumar* or any of these Petitioners. In sum the evidence of *Rigzin Dorjey* is totally insufficient to bring home the guilt of any of these Petitioners.

28. With this kind of an ROE, it is difficult to accept that these Petitioners simply pleaded guilty. The absence of anything in the record which would convincingly show compliance with the letter and spirit of the Rule 144 (2) of the SSB Rules qua the three Petitioners persuades this Court to hold that these Petitioners should not be taken to have actually pleaded guilty. The original record produced before the Court does not inspire confidence that there was compliance with the requirement of Rule 144 (2) of the SSB Rules in letter and spirit.

29. For the aforementioned reasons, this Court has no hesitation in setting aside the impugned orders dated 18th September 2012 finding each of the Petitioners guilty of the charges for which they were arraigned before the SFC. The orders dated 18th June 2013, 20th June 2013, 28th June, 2013 removing Shishpal Singh, Om pParkash and Onkar Chand respectively from service hereby set aside.

30. Consequently, the orders dated 2nd July, 22nd July and 11th September, 2014 rejecting their respective appeals are also hereby set aside. The Petitioners are directed to be reinstated within a period of eight weeks from today with all consequential benefits including continuity of service and grant of notional increment, seniority, fitment etc. except arrears of salary.

31. The writ petitions are allowed in the above terms. No order as to costs.