

(2006) 04 J&K CK 0011
In the Jammu And Kashmir High Court

Rajvir Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-04-2006

Acts Referred:

Border Security Force Act, 1968 — Section 40, 46, 55, 59, 65

Citation : (2007) 1 JKJ 177

Hon'ble Judges : B.A. Khan, Acting C.J.; J.P. Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

J.P. Singh, J.—This Letters Patent Appeal is directed against judgment dated September 15, 2005 delivered by a learned Single Judge of

this Court in OWP No. 289/1998 dismissing appellant-Rajvir Singh's writ petition seeking quashing of order dated 21-10-1997, whereby he was

convicted by General Security Force Court (GSFC, for short) and sentenced to rigorous imprisonment for one year and dismissal from service, on

the following charges for infraction of Ss. 46 and 40 of the Border Security Force Act. 1968:

First Charge BSF Act Section 46

COMMITTING A CIVIL OFFENCE, THAT THAT TO SAY, BEING A PUBLIC SERVANT, AGREES TO ACCEPT,

GRATIFICATION, OTHER THAN LEGAL REMUNERATION, FOR SHOWING, IN EXERCISE OF HIS OFFICIAL FUNCTIONS,

FAVOUR TO ANY PERSON, PUNISHABLE u/s 161 RFC

In that he, at Nowhatta on 10-6-95, while performing the duties of Subedar (G) of 07 Bn BSF, agreed to accept Rupees 3 lakh from Shri

Mehrajuddin Ahangar, son of Shri Ghulam Mohd. Ahangar R/o Kaka Bazar, Nowhatta, Srinagar for himself, a gratification, other than legal

remuneration, as a motive for showing in exercise of his official functions, favour to any person, to wit, release of one detainee namely Shri Nazir

Ahmed Soli, a chief of 'A1- Jihad outfit, from the BSF custody.

Second Charge BSF Act Section 40

AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

In that he, at Nowhatta on 10.6.95, while performing the duties of Subedar (G) of 07 Bn BSF, improperly and without authority, released an

apprehended militant Nazir Ahmed Sofi, a chief of 'AL- JEHAD' outfit, from the BSF custody.

Third Charge BSF Act Section 40

AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE.

In that he, at Nowhatta, on 10.6.95 while performing the duties of Subedar (G) of 07 Bn BSF, improperly replaced an apprehended militant Nazir

Ahmed Sofi son of Shri Habibullah, a chief of 'AL-JEHAD' outfit, in BSF custody, with his brother Shri Basir Ahmed Sofi son of Habibullah Sofi

R/o Sheikh Mohalla, Srinagar.

2. Shri Sunil Sethi, appearing for the appellant, submitted that General Security Force Court had not been properly convened because Shri CM.

Bhat, Inspector General, Border Security Force, was not competent to convene GSFC. This, according to the learned Counsel, was in violation of

Section 65 of the Border Security Force Act, 1968 and, thus, vitiated the trial. Shri Sethi pointed out another violation in the trial of the appellant

and referred to Rule 59 of the Border Security Force Rules, 1969, to urge that advice of the Chief Law Officer or Law Officer had not been taken

by the superior authority before convening the GSFC. Relying on Rule 55(2) of the Border Security Force Rules, learned Counsel submits that

there should have been a joint trial of the appellant/writ petitioner with Karan Singh, Deputy Commandant. Further grievance of the appellant,

argues the learned Counsel, is that appellant had not been provided sufficient opportunity to summon his defence witnesses and that the defending

officer had not discharged his functions so as to defend the appellant/writ petitioner well. The last submission of Shri Sethi was that charge No. 1

having not been proved, the other two charges would automatically fall because these were dependent on the main charge, being charge No. 1. Shri

Sethi made a feeble attempt to urge that the finding of the General Security Force Court was not supported by reasons. According to Shri Sethi,

learned Single Judge has not taken note of the violation of Border Security Force Act and Rules framed thereunder and, as such, the judgment

impugned in the appeal warrants to be set aside and writ allowed.

3. Shri Ajay K. Gandotra, appearing for Union of India, submitted that the trial of the appellant had been conducted in accordance with law/and

the requisite provisions of the Border Security Force Act and Border Security Force Rules had been complied with in letter and spirit. He

controverted the submissions of Shri Sethi by urging that the original records would belie the submissions raised by the learned Counsel for the

appellant.

4. We have considered the submissions of learned Counsel for the parties and gone through the records of the case as also the written arguments

filed by Shri Ajay K. Gandotra, Additional Central Government Standing Counsel.

5. Submissions of Shri Sethi in regard to the alleged violation of Rules 59 and 55(2), could not have been dealt with by the learned Single Judge

because no such plea was taken by the appellant in his writ petition. Although the appellant/writ petitioner had not raised any specific case

projecting violation of specific Sections of Border Security Force Act and Border Security Force Rules in his writ petition except violation of

Section 65 of the Border Security Force Act, 1968, yet we find that the learned Single Judge has laboured hard in referring to various Rules on the

subject to satisfy his lordship as to whether or not there has any violation of the Rules. Learned Single Judge has observed in the impugned

judgment that he had repeatedly asked learned Counsel appearing for the writ petitioner as to which particular provision of Border Security Force

Act and/or Border Security Force Rules had been violated by making the records available to him, but no such illegality or irregularity is recorded

to have been pointed out by the learned Counsel.

6. Going by the Law of Pleadings, we would not have permitted Shri Sethi to raise a new case in his appeal before us, yet in order to see as to

whether or not any violation of the Rules, as pointed out by the learned Counsel

for the appellant, could be substantiated on the basis of records available with us, we heard Shri Sethi on the question of violation of the Rules,

7. We will now proceed to deal with the submissions raised by Shri Sethi seriatim.

8. The first submission of Shri Sethi regarding violation of Section 65 of the Border Security Force Act, 1968, is that Mr. C.M. Bhat, IG, BSF, Srinagar, had not been authorised by the DG, BSF, to convene the General Security Force Court and, as such, the proceedings conducted by the GSFC were illegal and without jurisdiction. We do not find any force in the submission of Shri Sethi because of the specific plea taken by the respondents that IG, BSF, Srinagar, who had ordered convening of the General Security Force Court, stood empowered in this behalf by warrant of the DG, BSF. The warrant produced by Shri Gandotra along with the written submissions has been perused by us. It reads thus:

WARRANT FOR CONVENING GENERAL SECURITY FORCE
COURT UNDER THE BORDER SECURITY FORCE ACT. 1968
(UNDER SECTION 65) To

The Inspector General, Border Security Force,
Kashmir Frontier, Srinagar.

In pursuance of the provisions, of the Border Security Force Act, 1968 (47 of 1968), I do hereby empower you, or the officer on whom your command may devolve during your absence, not under the rank of Deputy Inspector General, from time to time, as occasion may require, to convene General Security Force Court for the trial, in accordance with the said Act and the Rules made there under, of any person under your command, who is subject to the Force Law and is charged with any offence mentioned in the said Act, and is liable to be tried by a General Security Force Court.

And for so doing, this shall be, as well to you as to all others whom it may concern a sufficient warrant.

Given under my hand at New Delhi, this 24th day of July, 2004.

Sd/-

(AJAI RAJ SHARMA),
DIRECTOR GENERAL,

BORDER SECURITY FORCE.

9. Mr. C.M. Bhat was the Inspector General, Border Security Force, Kashmir Frontier, Srinagar, and in terms of the warrant, was competent and

duly authorised to convene General Security Force Court. Submissions of Shri Sethi, thus, does not hold good and is, accordingly, rejected.

10. The second submission of Shri Sethi regarding violation of Rule 59 of BSF Rules, 1969, appears to be misconceived, because first proviso

appended to Section 59(2) would come in operation only if the IG, BSF, had no power to convene a General Security Force Court. This proviso,

in our opinion, would be attracted only if the convening authority considered that a higher type of Court should be convened which he was not

empowered to convene such a Court. This, however, is not the position in the present case because IG, BSF, was himself competent and

empowered to convene the General Security Force Court and in that view of the matter, the proviso was not attracted in his convening the General

Security Force Court. This submission of Shri Sethi though raised, without laying any factual basis therefor, too fails.

11. Next submission of Shri Sethi that Rule 55(2) was required to be followed in the case and a joint trial of the appellant with Karan Singh, PW,

was warranted, may now be examined. Rule 55 of the Border Security Force Rules, 1969 reads thus:

55. Joint charges. - (1) Any number of accused may be charged jointly and tried together for an offence averred to have been committed jointly by them.

(2) Any number of accused though not charged jointly may also be tried together for an offence averred to have been committed by one or more

of them and abetted by other or others.

(3) Where the accused are so charged under Sub-rule (1) or Sub-rule (2), any one or more of them may be charged with, and tried for, any other

offence with which they could have been charged under Sub-rule (1) of Rule 53.

12. Perusal of Section 55 shows that this Rule would operate only if an offence was found to have been committed jointly by two accused, who

had been sought to be charged jointly. From the facts appearing on the records of this case, we do not find that Karan Singh and the appellant had

been alleged to have committed the offence jointly. Rule 55, in our opinion,

would not, thus, be attracted in the present case. We find from the pleadings of the petitioner that he had not set up any such case, as is being projected before us, in the writ petition, for, all he had projected in the writ petition was that Karan Singh was being tried separately only with a view to bring him as a prosecution witness against the appellant in the trial. The writ Court, after going through the records of the General Security Force Court as also the Court of Inquiry, had, however, held that charge against Karan Singh and the appellant was dissimilar. Whereas, Karan Singh had been charged for his-failure to have proper supervision over his subordinates, the appellant was charged of releasing an apprehended militant, Nazir Ahmed Sofi, Chief of ""Al-Jehad"" outfit, from BSF custody by replacing him with his brother Bashir Ahmed Sofi, for a consideration of Rupees three lacs. We, thus, do not find any violation of Rule 55 of the Border Security Force Rules, 1969, because the two (Karan Singh and the appellant) were not alleged to have committed any offence jointly. This submission of Shri Sethi is, accordingly, rejected.

13. Shri Sethi, thereafter, projected that the appellant was deprived of his right to summon the defence witnesses. Although this plea too was not raised specifically in the writ petition, yet we permitted Shri Sethi to point out from the records as to how any prejudice had been caused to him and as to whether or not the appellant had been denied opportunity to summon the defence witnesses. After going through the records, it was discovered that the defence witness, namely Vijay Shanker Singh, regarding whom it was urged that he was not permitted to be produced as defence witness, had, in fact, been given up by the defending officer. We do not find any grievance having been raised in the writ petition against the conduct of the defending officer as such.

14. We, on the other hand, find that the defending officer had been complimented by the appellant in paragraph 16 of the writ petition in saying that although the defending officer had a little time at his disposal to prepare his case, still to the best of his ability in the field area, he had cited S.L. Goswami Vs. State of Madhya Pradesh, and AIR 1975 SC 975, which according to the appellant, had been brushed aside by the GSFC. It, thus, appears that the grievance of the petitioner was not against the defending officer, in any manner whatsoever, but was in respect of the GSFC,

which according to the appellant, had not considered the law handed down by Hon'ble Supreme Court. The grievance of the appellant/writ

petitioner in the writ petition was, however, in another direction, in that, the appellant/writ petitioner had alleged that he was not provided proper

opportunity to defend himself, so that he could engage some civil Lawyer for the purpose of defending himself during the trial. This averment of the

appellant/writ petitioner in the writ petition has been dealt with by the learned Single Judge in detail and with particular reference to letter No.

Estt/GSFC/RS/142/97/8702 dated 21-9-1997, whereby the appellant/writ petitioner had been granted opportunity to engage a private Lawyer to

defend his case. Learned Single Judge has dealt in detail as to whether or not the appellant/writ petitioner was given proper opportunity to defend

himself during the trial. We are satisfied with the discussion of learned Single Judge on the issue. We further find from the records that the appellant

had opted to appear as his own witness and had made a statement on oath before the General Security Force Court too, besides examining

number of defence witnesses. The appellant had been permitted even to recall those witnesses whom he wanted to re-cross-examine. The

prosecution evidence, defence evidence and the statement of the accused as his own witness, were before the General Security Force Court,

which, on the evaluation of evidence, had recorded a finding of ""guilty"" against the accused. We do not find any thing on the records to even infer

that the appellant had not been provided proper opportunity to defend himself. We, therefore, do not laid any material on records to accept the

plea of Shri Sethi that the defence witnesses had not been permitted to be summoned and that the appellant had been denied proper opportunity to

defend himself.

15. Next plea of Shri Sethi that charge No. 1 having been dismissed as not proved, the second and third charges could not, in law, be said to have

been proved, too is fallacious. Charge No. 1 is independent of the other two charges, which refer to the actual act of release of the militant by the

appellant from BSF custody by substituting him with his brother. Failure of the first charge in regard to the receipt of an amount of Rupees three

lacs as illegal gratification would not, in our opinion, have any affect on the proof of second and third charges against the appellant.

16. Last plea raised by Shri Sethi that reasons have not been given by the General Security Force Court before recording its finding and sentence

against the appellant, may now be examined. It has been provided in Rule 97 of the BSF Rules that the Law Officer shall sum up the evidence and

advise the Court on the law relating to the case in open Court. Rule 98 provides that the Court shall deliberate on its finding in closed Court in the

presence of the Law Officer. The opinion of each member of the Court as to the finding shall be given by word of mouth on each charge separately

starting with the junior most in rank. Rule 99 prescribes finding on every charge upon which the accused is arraigned, shall be recorded simply as a

finding of ""Guilty"" or ""Not Guilty"". This finding has to be announced forthwith in the open Court as provided by Rule 99(9). The Border Security

Force Act and the- Border Security Force Rules, as they stood at the time of the trial of the appellant, did not contemplate supplying of reasons at

the time of recording a finding of guilty and sentence. Support in this behalf may be had from S.N. Mukherjee Vs. Union of India, . It was only in

2003 that Rule 99 of the BSF Rules was amended, which now prescribes giving of reasons in support of the findings. The appellant cannot be

given any benefit of the amendment because the Rules in force at the time of the trial did not contemplate reasoned finding. This submission of Shri

Sethi too, thus, fails.

17. We find that the learned Single Judge, while referring to almost all the relevant Rules, which were required to be followed before

commencement and during the course of holding trial under the Border Security Force Act and Rules framed thereunder, had been found to have

been followed on the basis of records. Learned Single Judge had even gone through the evidence led by the prosecution, although this was not so

required in view of the judgments in Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), ; and Union of India and Others Vs.

Himmat Singh Chahar, cited in his Lordship's judgment, to come to the conclusion that the evidence on record was sufficient to reach conclusion

which had been arrived at by the GSFC. Learned Single Judge, in our opinion, has done all, what could have been done, even in the absence of

requisite pleadings, to find as to whether or not there was violation of any provision of Border Security Force Act or Border Security Force Rules

and as to whether or not there was any evidence sufficient to sustain the conviction. Learned Single Judge has recorded his satisfaction that the evidence on records was sufficient to justify conviction of the appellant/writ petitioner.

18. In view of the above discussion, and factual finding of the GSFC and learned Single Judge, we do not find any merit in this appeal, which is, accordingly, dismissed.