

(2014) 12 DEL CK 0272
In the Delhi High Court
Case No : WP(C) No. 11736 of 2006

Rakesh Kumar Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-12-2014

Acts Referred:

Border Security Force Act, 1968 — Section 117, 16(c), 75
Constitution of India, 1950 — Article 20, 20(2), 226

Citation : (2015) 5 AD 492 : (2015) 1 AD 293 : (2015) 218 DLT 285 : (2015) LabIC 2893 : (2015) 1 LLN 645

Hon'ble Judges : Najmi Waziri, J; Kailash Gambhir, J

Bench : Division Bench

Advocate : Virender K. Singh, Advocate for the Appellant; Barkha Babbar, Advocate for the Respondent

Judgement

Kailash Gambhir, J.—In this writ petition filed under Article 226 of the Constitution of India, the petitioner seeks to challenge the order dated 08.08.2002, which rejected his statutory petition and his dismissal from service by the order dated 27.02.2001.

2. The case of the petitioner is that while discharging his duties as a Constable in BSF, he was allegedly found asleep on duty at 23:35 hours on 12.08.2000; because of such dereliction in duty, he was tried by the Summary Security Force Court (for short "SSFC") and was found guilty of the charge under Section 16(c) of the Border Security Force Act, 1968 (hereinafter referred to as "the BSF Act"). The petitioner was dismissed from service and on the same date, i.e. 04.09.2000 he was struck off from the strength of 162 Battalion, BSF. Against this order the petitioner filed an appeal before the DIG, BSF, Malda. Vide order dated 19.10.2000, the DIG, BSF, Malda while setting aside the said order, observed that the first proceeding held by the SSFC was devoid of merits. In terms of this order, the petitioner was reinstated in the service by the respondents and was directed to report to the Commandant of 162 Battalion. Furthermore, his absence from duty w.e.f. 04.09.2000 to 29.10.2000 was

regularised by granting him leave vide order dated 03.10.2000.

3. The grievance of the petitioner is that after being charged and tried for the said misconduct, he was once again charged and tried for the same. Vide order dated 27.02.2001 he was once again dismissed from service by the SSFC. The order dated 27.02.2001 passed by SSFC was again assailed by the petitioner by filing a statutory appeal under Section 117 of the BSF Act. However, this time the appeal was rejected by the concerned DIG vide order dated 08.02.2002.

4. Mr. Virender K. Singh, the learned counsel appearing for the petitioner submits that the petitioner could not have been punished twice for the same offence/incident, particularly, when the DIG in the statutory appeal filed by the petitioner, vide order dated 19.10.2000 held that the first SSFC proceedings were devoid of any merit and the respondents never challenged this Order. He argued that the respondents cannot now direct de novo proceedings against the petitioner concerning the same incident for which he has already been charged and tried by them.

5. The stand taken by the respondents in their counter affidavit is that there was a serious charge against the petitioner as he was found sleeping while on active duty as a Night Ambush Sentry. It is also the stand of the respondents that the first SSFC proceedings were dismissed on a technical ground because Shri K.K. Singh, 21C/Officiating Commandant who held the said proceedings was himself a witness to the incident in issue. In such circumstances, the respondents were not debarred from conducting a de novo trial against the petitioner. The respondents have also taken a stand that though the petitioner was found guilty of the charge, the SSFC awarded him the minimum penalty of dismissal from service w.e.f. 27.02.2001 by taking a lenient view of the matter. It is submitted that under Section 16(c) of the BSF Act, such an offence is otherwise punishable with the imprisonment for a term which may extend to 14 years.

6. Ms. Barkha Babbar, the learned counsel for the respondents submits that de novo trial conducted by the SSFC against the petitioner was perfectly legal and valid as the earlier SSFC proceedings were void and non est as it was being conducted by an officer who was a witness himself to the incident. The learned counsel also submits that the petitioner never challenged the said decision by filling any statutory appeal or a representation. The said order was passed by the DIG in exercise of the powers conferred under Rule 161 of the BSF Rules. The learned counsel has also drawn the attention of this Court to Rules 160 & 161 of the BSF Rules.

7. We have heard the learned counsel for the parties and given our careful consideration to arguments advanced by them.

8. The petitioner was enrolled in BSF as a Constable. On, 12.08.2000 he was detailed alongwith other members of the ambush party for ambush No. 4 at BOP Churiantpur. At 23:35 p.m. when Shri K.K Singh, 21C/Officiating Commandant reached the ambush point No. 4, he found the petitioner sleeping and his

personal weapon lying unattended. The petitioner was woken up by a guard personnel and when he was questioned about his conduct by the Officiating Commandant, he requested to be pardoned for the same. The petitioner was heard by the Officiating Commandant under Rule 45 of the BSF Rules and thereafter the Officiating Commandant ordered for the preparation of the record of evidence in the case. On 4th September, 2000 the petitioner was tried by the SSFC and on being found guilty of the charge under Section 16(c) of the BSF Act, he was dismissed from service. The finding and the sentence were pronounced to the petitioner on the same day; his name was struck off from the strength of 162 BN BSF with immediate effect.

9. As per the petitioner, the said order of SSFC was challenged by him and the same was set aside by the DIG, BSF, Malda as being devoid of merit. As a consequence thereof, by order dated 19th October 2000, the petitioner was reinstated in service under the provisions of Rule 161(a) of BSF Rules. After his reinstatement in service, a de-novo inquiry was held against the petitioner on the same charge and he was tried by the SSFC w.e.f. 05.02.2001 to 27.02.2001. The petitioner was found guilty for the charge and was once again awarded the same sentence, i.e. dismissal from service w.e.f. 27.02.2001.

10. A statutory petition was filed by the petitioner to challenge the order passed by the SSFC but the same was rejected by the order dated 8th February 2002 passed by the DIG. This order was challenged by the petitioner by Writ Petition being W.P. (C) No. 48122/2002 filed before the High Court of Allahabad. The said Writ Petition was dismissed by the Allahabad High Court due to lack of territorial jurisdiction. The petitioner thus approached this Court by filing the present Writ Petition challenging the order of dismissal dated 27.2.2001 and the order dated 08.08.2002, dismissing his statutory petition.

11. The principal contention raised by the learned counsel for the petitioner was that there could not have been any de novo inquiry against the petitioner on the same charge, once the first SSFC proceedings were set aside by the DIG, in exercise of its power to review in terms of Rule 160-161 of the BSF Rules 1969, by holding the said proceedings as being devoid of any merit.

12. The stand of the respondents canvassed through Ms. Barkha Babbar, Advocate was that the first SSFC trial proceeding was set aside by the DIG, BSF, Malda under Rule 161 of the BSF Rules on a technical ground being Mr. K.K. Singh, Officiating Commandant, who had conducted the first SSFC proceedings was debarred under Rule 46 of the BSF Rules to conduct the said proceedings as he was a witness himself to the misconduct of the petitioner. Therefore, there was no bar in conducting the second SSFC proceedings on the same charge.

13. In India, protection against double jeopardy is a Fundamental Right guaranteed under Article 20(2) of the Constitution of India which states that "No person shall be prosecuted and punished for the same offence more than once". The roots of the doctrine against double jeopardy are found in the well-

established Common law maxim, *Nemo debet bis vexari*, meaning that one cannot be put twice in peril for the same offence. When a person has been convicted for an offence by a competent court, the conviction serves as a bar to initiation of any further proceeding against him for the same offence.

14. In the present case also this principle applies, thus, the petitioner cannot be charged and tried for the same charge of misconduct again. However, if for some technical reasons, jurisdictional error or where the proceedings were found conducted by an incompetent authority, whether on the ground of procedural defects or otherwise, the first inquiry or punishment or exoneration is found bad in law, then there can be no bar on conducting a *de novo* trial or fresh inquiry against the delinquent employee. Thus, the question as to whether a *de novo* trial may be initiated against the delinquent employee or not would primarily depend upon the reasons for setting aside of the earlier order. The distinction between the two kind of cases has been explained in the following para of the judgment of this Court in the case of *Mr. Banwari Lal Yadav Vs. Union of India (UOI) and Another*, :

"Keeping in view the aforesaid position of law, we are of the considered view that the question as to whether a fresh trial or *de-novo* trial can be initiated against the accused would depend upon the reason for the setting aside of the earlier trial. There are clearly two kinds of cases (1) where the earlier trial was void ab initio in the eyes of law having been initiated by a court inherently lacking in jurisdiction to conduct the trial to which reference has been made hereinabove and (2) where the trial was initiated before a competent court vested with jurisdiction to conduct the trial, but subsequently the trial was vitiated on account of procedural or other grave irregularity committed in the conduct of the trial. The present case is clearly a case of the second type where the conviction is quashed not for want of inherent jurisdiction in the court, but because the trial was unsatisfactorily conducted. The petitioner who had earlier pleaded guilty to the charge, in his statement for mitigation of sentence stated that his mental condition was not proper and, Therefore, the offence committed by him had been intentionally committed. Keeping in view the said statement of the petitioner and the provisions of Rule 143(4) read with Rule 161(1) of the BSF Rules, the court would have been well advised to alter the plea of Guilty of the petitioner to Not Guilty. The court not having done so, the proceedings were hit by the provisions of Rule 143(4) of the BSF Rules and the Appellate Authority, being the Dy. Inspector General, rightly concluded that the injustice had been done to the petitioner by reason of the grave irregularity in the proceedings. The petitioner accordingly was allowed to join back his duties and the sentence of his dismissal from service was set aside. So far, the order of Dy. Inspector General possibly cannot be faulted. What, however, followed was the second trial of the petitioner and this, to our mind, keeping in view the embargo imposed by Section 75 of the BSF Act and Article 20 of the Constitution of India was clearly impermissible."

15. In *Union of India v. K.D. Pandey and others*, reported at (2002) 10 SCC 471,

the Disciplinary Authority not being satisfied with the inquiry report, had remitted the matter back for further inquiry, the Hon"ble Supreme Court held that such a practice, if allowed, would be an abuse of the process of the law:

"Learned counsel for the appellant contended that in this case the Board had examined the material on record and come to the conclusion that four of the six charges could be proved on the available material, which had not been properly examined in the earlier inquiry. In fact from the order made by the Railway Board as well as from that part of the file where the inquiry report made earlier is discussed, it is clear that specific findings have been given in respect of each of the charges after discussing the matter and, if that is so, we fail to understand as to how there could have been a remit to the inquiry authority for further inquiry. Indeed this resulted in second inquiry and not in a further inquiry on the same set of charges and the material on record. If this process is allowed the inquiries can go on perpetually until the view of the inquiry authority is in accord with that of the disciplinary authority and it would be abuse of the process of law. In that view of the matter, we think that the order made by the High Court affirming the order of the Tribunal is just and proper and, therefore, we decline to interfere with the same. The appeal is dismissed accordingly."

16. In the facts of the present case also the de novo SSFC inquiry was held against the petitioner based on the same charge and the same order of sentence i.e. dismissal from service was passed against him. The plea taken by the respondents is that said de novo SSFC inquiry was held against the petitioner because the Officiating Commandant K.K. Singh, who conducted the SSFC inquiry was barred to conduct the same under Rule 47 of BSF Rules, as he was a witness to the incident in issue. Surprisingly, the respondents have not placed on record any material to substantiate their plea. On the other hand, the learned counsel for the petitioner has placed strong reliance on the order dated 19th October 2000 wherein the DIG (BSF) Malda set aside the SSFC proceedings by holding it to be devoid of any merit. We fail to comprehend that based on what material the respondent could take a view that the first SSFC proceedings were set aside on a technical ground, due to conduct of the SSFC proceedings by the officer, who himself was a witness to the misconduct. It is equally perplexing if that was the reason, then why was the petitioner not apprised of fact beforehand. As already discussed above, de novo proceedings can be conducted only in exceptional circumstances and not as a matter of routine. In the absence of any material placed on record by the respondents, we have no hesitation in taking a view that once the DIG in exercise of its power under Rule 161 of BSF Rules, had set aside the first SSFC proceedings on the ground of it being devoid of any merit, SSFC proceeding cannot be reinitiated against the petitioner for the same charge.

17. In view of the aforesaid discussion, the present petition deserves to be and is allowed and consequentially impugned orders dated 08.08.2002 and 27.02.2001 are quashed; the respondents are directed to reinstate the petitioner back into

service with notional seniority and grant of full back wages, salary, increments and other allowances.

18. The Writ Petition is disposed off in the aforesaid terms.