

(2017) 02 GAU CK 0007
In the Gauhati High Court
Case No : Case No. WP(C) 7950 of 2016

Ranajit Kumar Saha

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 10-02-2017

Acts Referred:

Assam Rifles Act, 2006 — Section 49, Section 55
Prevention of Corruption Act, 1988 — Section 7

Citation : (2017) 2 GauLT 102

Hon'ble Judges : Mr. Michael Zothankhuma, J.

Bench : Single Bench

Advocate : R. Mazumdar, Advocate, for the Petitioners; S.C. Keyal, ASGI, for the Respondents

Final Decision : Allowed

Judgement

Mr. Michael Zothankhuma, J. (CAV) - Heard Mr. R. Mazumdar, learned counsel for the petitioners in both the cases. Also heard Mr. S.C. Keyal, learned Assistant SGI for the Union of India. As the issues in both the writ petitions are similar, both the cases are being disposed of by this common judgment and order.

2. The issues involved is whether an Assam Rifles personnel/officer can be tried by the General Assam Rifles Court, herein after referred to as "GARC" or whether he should be tried by a Special Court established under the Prevention of Corruption Act for charges of corruption/offence which, is punishable under the Prevention of Corruption Act, 1988. The petitioner in WP(C) No. 7950/2016 is a Subedar (Building and Roads) in the Assam Rifles while the petitioner in WP(C) No. 7963/2016 is a Naib Subedar (Building and Roads) in the Assam Rifles.

3. Based on a purported sting operation, an electronic media broadcast was aired in Malayalam Channel Mathrubhumi News and Tehelka.com on 24/25 September, 2014 alleging corruption in Assam Rifles. In the electronic media broadcast, one contractor, namely, Mr. CC Mathew had made a statement that personnel of Assam Rifles were bribed to get their contract works done. A Court of Enquiry

was conducted by HQ IGAR (East) at Srikona, Silchar, followed by recording of Summary of Evidence.

4. The allegation against the petitioner in WP(C) No. 7950/2016 is that on 04.08.2014, the petitioner had agreed/attempted to accept Rs.20,00,000/- as gratification, other than legal remuneration, from Mr. C.C. Mathew, a contractor of the Assam Rifles, through Subedar (Building & Road) Gautam Chakraborty of Head Quarters, Sector 9, Assam Rifles.

5. The allegation made against the petitioner in WP(C) No. 7963/2016 is that on 11.08.2014, he accepted Rs. 1,03,000/- as gratification, other than legal remuneration, from Mr. C.C. Mathew, a contractor of the Assam Rifles.

6. The petitioners counsel submits that the subsequent to the Court of Enquiry and Summary of Evidence taken by the respondents, a General Assam Rifles Court had been constituted to try the charges of corruption punishable under the Prevention of Corruption Act, 1988.

7. The petitioners counsel submits that the General Assam Rifles Court had taken cognizance of the issue of corruption which had been brought out by Malayalam Channel Mathrubhumi News and Tehelka.com and accordingly framed charges against the petitioners under Section 49 and 55 of the Assam Rifles Act, 2006, punishable under Section 7 of the Prevention of Corruption Act, 1988. The charges framed against the petitioners in both the cases were under Section 49 and 55 of the Assam Rifles Act, 2006, punishable under Section 7 of the Prevention of Corruption Act, 1988.

8. The petitioners have made a challenge to the charge framed against them and have taken the ground that the GARC cannot try the case against the petitioners, as the jurisdiction to try an offence punishable under Section 7 of the Prevention of Corruption Act, 1988 lies only with the Special Court, established/appointed under the Prevention of Corruption Act. The petitioners counsel submits that the trial of the case against the petitioners by the General Assam Rifles Court is being challenged on three grounds, namely :-

1. During the Court of Enquiry and Summary of Evidence taken, no opportunity to cross-examination the complainant of the case was given to the petitioners.

2. The composition of the General Assam Rifles Court has been done in violation of Section 90 of the Assam Rifles Act, 2006, inasmuch as, the members of the GARC do not have the required rank to be a member of the General Assam Rifles Court.

3. The General Assam Rifles Court cannot try a case punishable under the Prevention of Corruption Act, 1988.

9. The petitioners counsel also submits that the Jammu & Kashmir High Court, in the case of Asif Baba v. Union of India reported in 2014 (3) JKJ 405, had held that a BSF personnel can be tried only by a Special Judge under the Prevention

of Corruption Act, 1988 and not by a Summary Security Force Court, when the said personnel is alleged to have committed an alleged offence punishable under the Prevention of Corruption Act. He submits that the basis for the decision was in view of Section 46 of the BSF Act read-with Sections 3 and 4 of the PC Act, 1988. The petitioner's counsel submits that Section 46 of the BSF Act, 1968 is exactly similar to Section 55 of the Assam Rifles Act, 2006 and as such, the judgment of the Jammu & Kashmir High Court will apply to the present case and consequently to an Assam Rifle personnel/officer.

10. Learned counsel for the petitioners submits that the grievance of the petitioners with regard to the holding of the trial by the GARC was challenged by the petitioners as per Section 139 of the Assam Rifles Act, 2006. The same having been rejected by the respondents vide order dated 09.01.2017, the petitioners have no other alternative remedy available for redressal of their grievance, except to approach this Court.

11. Mr. S.C. Keyal, learned Assistant SGI, on the other hand submits that the Director of General Assam Rifles Court had taken suo moto cognizance of the electronic media broadcast, aired by the Malayalam Channel Mathrubhumi News and Tehelka.com that showed the statement of Mr. CC Mathew that bribes had been paid to Assam Rifles personnel.

12. Mr. S.C. Keyal, submits that the person who conducted the video recording of the interview was cross-examined by the petitioner's counsel.

13. The Assistant SGI also submits that even if it is assumed that the petitioners have not cross-examined the person who recorded the video, the evidence collected by a Court of enquiry, is not admissible as evidence, as it is not really a Court, but an Assembly of officers who are to collect evidence if required and to report such matters which may be referred to them. The Assistant SGI also submits that evidence recorded in a Court of Enquiry was thus not admissible evidence against a person subject to the Army Act, nor shall any evidence, respecting the proceedings of the "court of enquiry", be given against any such persons except upon the trial of such a person for wilfully giving false evidence before the Court of Enquiry. In this respect the Assistant SGI placed reliance upon the Division Bench judgment of this Court in No. 4205277p Ex Sepoy Dharam Nath Yadav v. The Co. Pratham Bihar 1 Bihar C/099 Apo reported in 2011 4 GLR 649.

14. The Assistant SGI also submits that a perusal of the composition of the members of the General Assam Rifles Court goes to show that the lowest ranking member of the Court was one Deputy Commandant, who is higher in rank than an Assistant Commandant. Also the said Deputy Commandant had his stint earlier as an Assistant Commandant. As the other Court members were holding a post higher in rank than Assistant Commandant, they had all fulfilled the requirement of Section 90 of the Assam Rifles Act, 2006 and qualified to be members of the General Assam Rifles Court. The Assistant SGI also submits that

the petitioners not having made a challenge to the composition of the GARC members under Rule 70 of the Assam Rifles Rules, 2010, the petitioners could not be now allowed to make a challenge to the composition of the GARC. The Assistant SGI also placed reliance upon a Division Bench Judgment of the Himachal Pradesh High Court in Piar Singh v. Union of India and Ors., reported in 1985 Cri.L.J. 860, which held that there was no infirmity with an Army man, covered by the Army Act, being tried by a General Court-martial, with respect to an offence punishable under the Prevention of Corruption Act, 1988.

15. In respect of the petitioners counsel's submission that the GARC could not have tried a case under the Prevention of Corruption Act, 1988, the Assistant SGI submits that the said question has been decided by this Court in WP(C)71(K) of 2016, i.e., Sri Gautam Chakraborty v. Union of India and 7 Ors., which was disposed of on 13.06.2016. The Assistant SGI also submits that the Army Act has been made applicable to certain forces under the Central Government, which includes the Assam Rifles. He thus submits that in view Section 25 of the Prevention of Corruption Act, 1988, there is no infirmity in the trial of the petitioners by the GARC.

16. The learned Assistant SGI also submits that as per the Section 102 of the Assam Rifles Act, 2006, DGAR is empowered to either hold a Assam Rifles Court or to send the same to a criminal Court. The Assistant SGI submits that as the respondents have taken the decision to hold the trial under the GARC, as per Section 102 of the Assam Rifles Act, 2006, there is no infirmity in holding the trial under the GARC.

17. I have heard the learned counsels appearing for the parties.

18. The charges framed against the petitioners are under Section 49 and 55 of the Assam Rifles Act, 2006. The charge under Section 55 has been made punishable under Section 7 of the Prevention of Corruption Act, 1988 as per the charge sheet.

19. Section 55 of the Assam Rifles Act, 2006 is reproduced below :-

Section 55. Civil offences-Subject to the provisions of section 56, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by an Assam Rifles Court and, on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as in this Act mentioned.

20. Section 2 (e), 2(h), 2 (p), Section 3 (3), 3 (5), Section 55, 90 & 102 of the Assam Rifles Act, 2006 are reproduce below :-

Section 2 (e):- civil offence means as offence which is triable by a criminal court;

Section 2(h) "criminal court" means a court of ordinary criminal justice in any part of India;

Section 2(p) "member of the Force" means an officer, a subordinate officer, an under-officer or other enrolled person and includes the persons on deputation

Section 3 (3) Notwithstanding anything contained in sub section(1), any person who is employed in the Force on deputation from the regular Army as defined under clause (xxi) of section 3 of the Army Act, 1950 (46 of 1950) shall not be subject to this Act and shall, during the period of such deputation, be deemed to be subject to the Army Act, 1950 :

Provided that such person in regard to his duties and discipline shall be deemed to be under the command of the member of the Force under whose command such person for the time being is placed :

Provided further that, in case of such person, for the purposes of his duties and discipline, the expression "active duty" defined in clause (a) of sub-section (1) of section 2 shall be deemed to be the "active service" as defined in clause (i) of section 3 of the Army Act, 1950 (46 of 1950) for taking any action against him under the provisions of the said Army Act.

Section 3 (5) Every person subject to this Act shall remain so subject until retired, discharged, released, removed or dismissed from the Force in accordance with the provisions of this Act and the rules.

21. Thus a reading of the above provisions of the Assam Rifles Act, 2006 shows that an offence triable by a criminal Court can be tried by the GARC. However, a reading of Section 3 and 4 of the Prevention of Corruption Act, 1988 clearly states that only a Special Judge appointed by the Central Government or State Government under the Prevention of Corruption Act will have the jurisdiction to try all offences punishable under the Prevention of Corruption Act.

Section 3 and 4 of the Prevention of Corruption Act, 1988 states as follows :-

Section 3 :

Power to appoint special Judges- (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely :-

(a) any offence punishable under this Act; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any

of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974).

Section 4:

Cases triable by special Judges.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.

(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis.

The charge sheet/charges framed against the petitioners also shows that the offence is punishable by Section 7 of the Prevention of Corruption Act, 1988. As such, the offence under the Prevention of Corruption Act would have to be dealt with only by the Special Judge appointed under the Prevention of Corruption Act, 1988.

22. The exception to the trial of personnel of certain armed forces by a Court other than the special Court established/appointed by the Central Government or State Government, will be applicable only in cases that come within the fold of Section 25 of the Prevention of Corruption Act, 1988. Section 25 of the Prevention of Corruption Act, 1988 is reproduced below :-

Section 25 :- Military, Naval and Air Force or other law not to be affected.-

(1) Nothing in this Act shall affect the jurisdiction exercisable by, or the procedure applicable to, any court or other authority under the Army Act, 1950 (45 of 1950), the Air Force Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), the Border Security Force Act, 1968 (47 of 1968), the Coast Guard Act, 1978 (30 of 1978) and the National Security Guard Act, 1986 (47 of 1986).

(2) For the removal of doubts, it is hereby declared that for the purposes of any such law as is referred to in sub-section (1), the court of a special Judge shall be

deemed to be a court of ordinary criminal justice.

23. A reading of Section 25 of the Prevention of Corruption Act, 1988, goes to show that nothing in the Prevention of Corruption Act will affect the jurisdiction exercisable by, or the procedure applicable to, any court or other authority mentioned in Section 25 as the Court of the Special Judge was to be deemed to be a Court of ordinary criminal justice. However, on a perusal of Section 25(1), the same goes to show that there is no mention of the Assam Rifles Act, 2006. The Assistant SGI had submitted a document, which showed that the Army Act, 1950 had been made applicable to the persons governed by the Assam Rifles Act, 1941 vide notifications No. SRO 117 of 28.02.1960 and 318 of 06.12.1962, as amended by SRO 325 of 31.08.1977. However, the Assam Rifles Act, 1941 has been repealed by the Assam Rifles Act, 2006 and the same was notified on 06.11.2006 in the Gazette of India and became applicable from 20.02.2009. No document has been produced by the respondents counsel to show that the Army Act, 1950 has been made applicable to personnel governed by the Assam Rifles Act, 2006. The Repeal and Savings Clause of the Assam Rifles Act, 2006 does not provide that the Army Act, 1950 would be made applicable to any appeal, application, trial, enquiry or investigation made subsequent to the coming into force of the Assam Rifles Act, 2006 or that the earlier notifications would continue to have force with respect to the Assam Rifles Act, 2006.

24. Nothing is produced showing that the Army Act has been made applicable to the Assam Rifles after the coming into force of the Assam Rifles Act, 2006. Section 4 of the Army Act makes applicable its provisions to certain forces under the Central Government. The Central Government had made applicable the Army Act in respect of the Assam Rifles governed under the Assam Rifles Act, 1941 by invoking Sub-Section 1 of Section 4 of the Army Act, 1941. However, in the absence of any such notification issued by the Central Government under Section 4(1) of the Army Act in respect of the Assam Rifles, after the coming into force of the new Assam Rifles Act, 2006, this Court is of the view, that as per the provisions of Sections 3, 4 and 25 of the Prevention of Corruption Act, 1988 and the reasons discussed above, the petitioners have to be tried by a Special Judge appointed by the Central Government or the State Government in respect of an offence punishable by Section 7 of the Prevention of Corruption Act, 1988. Accordingly, a GARC cannot try a case in respect of the above.

25. In respect of the petitioners' submission that the case of *Asif Baba v. Union of India* reported in 2014 (3) JKJ 405, decided by the Jammu and Kashmir High Court supports the case of the petitioners, this Court finds that the Jammu and Kashmir High Court had held that a BSF personnel had to be tried by a Special Judge of exclusive jurisdiction, even in a case of a person subject to the BSF Act, in view of Section 4 of the PC Act, 1988 read with Section 2(d) and 46 of the BSF Act, 1968. The expression "civil offence" in terms of Section 2(d) of the BSF Act means an offence, which is triable by a Criminal Court. As a civil offence in terms of Section 46 of the BSF Act is deemed to be an offence under the BSF Act, the

accused has to be charged with the offence alleged against him under the PC Act, read with Section 46 of the BSF Act. As Section 4 of the PC Act starts with a non-absolute clause, the same has an over-riding effect over Section 46 of the BSF Act. This Court finds that the Jammu and Kashmir High Court had made the said decision only on the basis of Sections 3 and 4 of the PC Act, 1988. The Jammu and Kashmir High Court had not taken into consideration Section 25 of the PC Act, 1988 wherein it provides that the PC Act would not affect the jurisdiction exercisable or the procedure applicable to any Court or authority under the Border Security Force, 1968, wherein a special Judge was deemed to be a Court of ordinary criminal justice. Thus the judgment of the Asif Baba (supra) is per incuriam and in my opinion, not applicable to the facts of this case.

26. In respect of the submission made by the Assistant SGI that the GARC had the jurisdiction to try the case of the petitioners in view of the judgment of the Himachal Pradesh High Court in the case of Piar Singh (supra) is accepted by this Court. The reason being that the person involved was an army man, governed by the Army Act. Accordingly, in view of Section 25 of the Prevention of Corruption Act, 1988 read with Section 69 of the Army Act, there was no infirmity with the General Court Martial trying the case of the said army man. The case of Piar Singh (supra) however does come to the aid of the respondents as the petitioners herein are Assam Rifles Officers governed by the Assam Rifles Act, 2006 and no notification under Section 4(1) of the Army Act has been made applicable to persons governed by the Assam Rifles Act, 2006.

27. In respect of WP(C)71(K)/2016, i.e., Sri Gautam Chakraborty v. Union of India and 7 Ors., this Court finds that the issue of whether persons covered by the Assam Rifles Act, 2006 could be tried by a GARC had not been gone into, in view of the fact that the petitioner in that case had not filed an application under Section 139 of the Assam Rifles act, 2006 regarding the above issue. This Court thus directed the petitioner to avail the alternative remedy under Section 139(1) of the Assam Rifles Act, 2006, before making a challenge with respect to the present subject matter in dispute in writ jurisdiction. Accordingly, this Court had disposed off WP(C)71(K)/2016 vide judgment and order dated 13.06.2016, giving liberty to the petitioners therein to approach the appropriate authority under Section 139 of the Assam Rifles Act, 2006, who was to dispose off the same within a specified period.

28. The language used in Section 55 of the Assam Rifles, Act, 2006, Section 46 of the BSF Act, 1968 and Section 69 of the Army Act, 1950 are all similar. The interpretation of the above Sections of the three Acts makes it clear that persons, who are governed by the provisions of the above three Acts and who commit any civil offence, i.e., an offence triable by a Criminal Court, will be regarded by a fiction of having committed an offence against the said Act and accordingly, the person can be tried by a Court constituted under the said Acts, if he is charge-sheeted. The persons who are governed by the three Acts will thus have to be tried as per the provisions of the three Acts under which they are

governed for any civil offence, which is triable by a Criminal Court. However, in view of Sections 3 and 4 of the Prevention of Corruption Act, 1988, the jurisdiction to try those persons under the above three Acts is taken away in respect of offences committed under the Prevention of Corruption Act, 1988. However, in view of Section 25 of the Prevention of Corruption Act, 1988, the jurisdiction exercisable and the procedure applicable to a Court under the Army Act, 1950 and the BSF Act, 1968 is saved and a person who is charged of having committed an offence punishable under the Prevention of Corruption Act can be tried by a Court under the Army Act, 1950 and the BSF Act, 1968, as the Court of the Special Judge, Prevention of Corruption Act is deemed to be a Court of ordinary criminal justice. This is, however, not the case with respect to a person governed by an Assam Rifles, Act, 1960 as the jurisdiction exercisable under the Assam Rifles, Act, 2006 is not saved, as the same is omitted from the ambit of Section 25 of the Prevention of Corruption Act, 1988. Accordingly, the petitioners cannot be tried by the GARC for offences punishable under the Prevention of Corruption Act, 1988. The petitioners would have to be tried by the Special Judge appointed by the Central Government or State Government under the Prevention of Corruption Act, 1988.

29. Due to the finding made by this Court in respect of issue No. 3, that the GARC cannot try a case involving a person governed by the Assam Rifles, Act, 2006 and who has been charged with corruption, punishable under the Prevention of Corruption Act, 1988, in view of Section 25 of the Prevention of Corruption Act, 1988, this Court is not going into the first two issues raised by the petitioners as that would only be of academic interest.

30. The writ petitions are accordingly allowed.