

(1996) 07 DEL CK 0043
In the Delhi High Court
Case No : Cril. W. No. 429 of 1993

Sukhwinder Singh

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 03-07-1996

Acts Referred:

Citation : (1996) CriLJ 3892

Hon'ble Judges : A.K. Srivastava, J

Bench : Single Bench

Advocate : R.P. Sharma, for the Appellant; Keshav Dayal , Ms. Barkha Babbar and Javed N. Rao, for the Respondent

Judgement

A.K. Srivastava, J.

1.This writ under Article 226 of the Constitution of India has been filed by one Sukhwinder Kumar, a Constable in Border Security Force, with a prayer that a writ, order or direction in the nature of certiorary be issued quashing all the proceedings of a trial against him with all the consequential benefits.

2. The facts leading to the filing of this writ petition are as under :-

The petitioner was employed as Constable in the Border Security Force in the year 1986. He was transferred as Constable Driver in the Boarder Security Force Workshop at Baramulla in the State of Jammu and Kashmir in the year 1991. Thereafter one Subedar (Inspector) Ganga Ram Dogra joined as in charge of that workshop. In the night of 13th December, 1991 the said Inspector Ganga Ram Dogra was fatally shot at in the premises of that workshop. Fact finding Court of Enquiry was conducted and thereafter a General Security Force Court was convened at Baramulla to try the petitioner for allegedly committing murder of said Ganga Ram Dogra. That Court was convened by the Inspector General, Border Security Force, Kashmir Front. After trial, the petitioner, on conviction has been sentenced to life imprisonment and dismissal from service by Court order dated 20-11-1992. The findings and sentence of the General Security Force

Court have been confirmed by the appropriate authority as required under the Border Security Force Act, 1988.

3. The case of the prosecution in the aforesaid trial was that on the fateful day, the petitioner had returned to Baramulla from temporary duty and was consuming Rum in his barrack along with Sub-Inspector Dayal Singh and Head Constable Kesar Singh. At about 8.30 p.m. the deceased came there. The petitioner offered him Rum but the deceased declined to take, which irritated the petitioner. Thereafter at about 11.15 p.m. the deceased along with Sub-Inspector Dayal Singh and H.C. Kesar Singh left the barrack. The accused followed them and fired three shots one of which hit the deceased, who succumbed to the injury shortly thereafter. The accused surrendered before the DIG, S.S. Buttar, on that very night at 2.15 a.m.

4. The defense of the petitioner was that on the said day he was drinking Rum along with other Constables; that the deceased came there, that initially there took place some discussion between the deceased and the petitioner but later on that discussion turned into heated arguments and the deceased abused the petitioner. Thereafter the deceased along with Dayal Singh and HC Kesar Singh left the barrack. The accused followed them with a loaded rifle but on the way he slipped and one shot got fired from the rifle. Thereafter Head Constable Dayal Singh lifted the rifle and fired two shots towards the deceased and then threw the rifle. He then exhorted the petitioner to flee from the spot and the petitioner acted accordingly.

5. The entire proceedings made by the General Security Force Court and the confirmation of the findings and sentences thereof have been challenged in this petition on the grounds, inter alia;

(1) that the BSF Authorities have usurped the jurisdiction of Section 80/81 of the Border Security Force Act;

(2) that the BSF authorities compelled the petitioner to examine himself as a witness against him in violation of Article 20(3) of the Constitution of India;

(3) that the entire proceedings against the petitioner by the General Security Force Court were biased as they were under the influence of the concerned Deputy Inspector General, Border Security Force, who had declared the petitioner guilty of the crime;

(4) that the concerned Commandant did not comply with the mandatory provisions of Border Security Force Rules with specific reference to Rule 45;

(5) that the concerned Commandant acted on invalid record of evidence while recommending to the DIG/IG of the Border Security Force for convening the General Security Force Court;

(6) that the recommendations and constitution of the General Security Force Court were bad in law;

(7) that even though the charge was of murder, the concerned authorities took the matter very casually and that also to the prejudice of the petitioner;

(8) that no legally trained and experienced Executive Officer was provided to the petitioner to defend his case;

(9) that even if the fatal shot was fired by the petitioner, there was no requisite intention on his part to kill the deceased as he was not in that state of mind due to heavy amount of liquor having already taken by him; and,

(10) that the petitioner could at best be held guilty for culpable homicide not amounted to murder.

6. The Union of India through Home Secretary, and the Director General Border Security Force (for short "Director General"), are the respondents. Reply to this petition has been filed on their behalf. It has been categorically stated in the reply that when the incident of homicide took place a fact finding inquiry technically called "Court of Enquiry" was held to investigate all the aspects of the case and to arrive at a definite conclusion. In that fact finding inquiry persons were examined as witnesses and the petitioner had also given his statement, as a witness. As such there was no violation of any provisions of Article 20(3) of the Constitution of India. It is further stated in the reply that an FIR was lodged with the concerned police station but nothing progressed there and ultimately, the Border Security Force Authorities took a decision to investigate and try. So far as challenge on the grounds of the provisions of Sections 80 and 81 of the Border Security Force Act are concerned, the stand of the respondents is that initial jurisdiction over a member of the Force is that of the Security Force Courts and it was within the discretion of the Border Security Authorities to have the trial of the case against the petitioner through General Security Force Court. It is further stated that since the criminal Courts having jurisdiction in the case did not give any written notice to the Border Security Authorities, there was no question for such authorities to have acted in accordance with Section 81 of the said Act. It has also been stated in the reply that the General Security Force Court trial was conducted strictly in accordance with the provisions of the said Act and the Rules made there under and there was no irregularity, legal or procedural, before, during or after the trial. In relation to the allegations of the petitioner regarding his deficient legal defense, the reply of the respondents is that the petitioner was notified in writing well before the trial that he was at liberty to engage a counsel of his own choice. The petitioner gave a panel of five Officers and requested one of them to be made available to defend him during the trial. Shri Harpal Singh, Commandant 06 Bn BSF was at Serial No. 1 in the said penal and he was made available to the petitioner so as to defend him in the trial. Not only that, the petitioner accused had also engaged Shri K. S. Bali, a private Advocate as a defense counsel. But later on the petitioner accused submitted to the General Security Force Court that he had disengaged his private counsel and that he did not intend to engage any other private counsel as he had full faith in his Defending Officer provided to him by the BSF Authorities.

7. In addition to the aforesaid replies, the respondents took the following two preliminary objections :

(i) This Court has no territorial jurisdiction to entertain this petition as the cause of action had arisen in the State of Jammu and Kashmir. According to them, the trial was held at Baramulla in Jammu and Kashmir under the orders of Inspector General, Border Security Force, Kashmir Ftr and confirmation of the findings and sentences of the General Security Force Court required under the provisions of the said Act, was done by Inspector General, Border Security Force Kashmir and the promulgation of findings and sentences were also done in the unit of Baramulla in the State of Jammu and Kashmir. Further the statutory pre-confirmation petition submitted by the petitioner was also disposed by the Inspector General, Border Security Force, Srinagar. The plea of the respondents thus is that from the above, it would be seen that all actions were taken within the territory of the State of Jammu and Kashmir. It has also been contended that the petitioner hails from the State of Punjab and is presently lodged in the Jail of Jammu.

(2) The petitioner has not exhausted the remedy available to him u/s 117(2) of the Border Security Force Act, 1968 against his conviction and sentence. Thus, the petitioner has not availed of the aforesaid statutory remedy and, Therefore, without exhausting his statutory remedy, he is not entitled to file this petition.

8. The learned counsel for the respondents vehemently urged before me that in view of the above preliminary objections, the petition is liable to be dismissed and there is no need to enter into the merits of the grounds taken by the petitioner.

9. The petitioner filed rejoinder to the reply filed by the respondents. The rejoinder averments of the petitioner against the preliminary objections are as follows :-

This Court has full jurisdiction in the matter. The power to convene Border Security Force Court rests primarily in the Central Government and Director General, in terms of Section 65 of the Border Security Force Act. This power has further been delegated by the Director General to the Inspectors General concerned and the Inspectors General convene these Courts in the capacity of delegates of the Central Government and the Director General. It has further been said that these Courts are not Courts of record and are ad hoc tribunals created for the purpose of trial and on conclusion of trial they are dissolved. As such these Courts have no fixed jurisdiction like the Courts constituted under the Code of Criminal Procedure and the records of the trial held by Border Security Force Courts are centrally held in the office of Director General, at Delhi. Thus in view of above, this Delhi High Court has jurisdiction to entertain this petition.

10. Regarding the second preliminary objection, it has been contended that the remedy provided u/s 117(2) of the said Act is a discretionary one and in a case like this where the petitioner has been put through a totally illegal and

unconstitutional trial where his liberty has been taken away the petitioner should not be asked to approach the Central Government, the Director General, or any prescribed Officer superior in Command to the one who confirmed the findings or sentences for relief as it would have resulted in further waste of time and efforts and that this preliminary objection has been rendered redundant by the conduct of respondents themselves. It has been submitted that if the respondents were guided by fair and just considerations, they could have granted relief to the petitioner on receiving a copy of this writ petition itself and the fact that they are contesting the matter it tantamounts to rejection by the respondents of the grounds of the petition under the aforesaid Section.

11. Since there is a serious objection to the territorial jurisdiction of this Court to deal with this writ petition, it would be very appropriate to deal with this objection first and to consider and decide upon the second preliminary objection and the grounds taken in this writ petition challenging the order of conviction and sentence only when it is found that this Court has territorial jurisdiction to decide this writ petition. On going through the pleadings of the parties the following are the undisputed facts and circumstances :-

(1) The incident of homicide of Inspector G. R. Dogra took place at Baramulla which is in the State of Jammu and Kashmir.

(2) General Security Force Court was convened under the orders of the Inspector General of the Border Security Force Kashmir front.

(3) The trial took place at Baramulla.

(4) The statutory confirmation of the findings or the sentences awarded by the General Security Force Court was made by Inspector General Border Security Force posted at Srinagar in the State of Jammu and Kashmir.

(5) The petitioner has not preferred any petition to the Central Government under sub-Section (2) of Section 117 of the said Act and has instead, being aggrieved by the aforesaid findings and sentences against him, filed this writ petition.

12. Under the provisions of Article 226 of the Constitution of India, the power of a High Court to issue certain writs or directions shall be exercised throughout the territories in relation to which it exercises jurisdiction. Article 214 says that there shall be High Court for each State. Article 241 :- says that Parliament may by Law constitute a High Court for a Union Territory. The Delhi High Court Act, 1966 provides for a High Court for the Union Territory of Delhi. It is referred to as High Court of Delhi. This Court naturally has jurisdiction in relation to the Union Territory of Delhi. Therefore, it is to be examined whether in the present matter any cause of action has arisen in the Union Territory of Delhi.

13. The learned counsel for the petitioner does not say that High Court of Delhi has territorial jurisdiction in respect of any cause of action having arisen in the territories of the State of Jammu and Kashmir but his contention is that in view

of the provisions of Border Security Force Act, any trial made by any General Security Force Court may be subject to the jurisdiction of the Delhi High Court as the Central Government is at Delhi and the office of the Director General, Border Security Force, is also at Delhi. According to him, the Border Security Force Courts have no fixed place of sitting and the Courts can hold sitting, make trial and pass sentence in any part of the country. He also contends that u/s 65 of the said Act General Security Force Courts are convened either by the Central Government or by the Director General or by any Officer empowered in this behalf by warrant of the Director General. Thus according to him, when the Officer empowered in this behalf convenes any General Security Force Court, he acts as a delegate of the Director General and, Therefore, under legal fiction, the Court shall be deemed to have been convened by the Director General at Delhi. Though he admits that the Inspector General posted in Jammu and Kashmir had convened the concerned General Security Force Court, that the concerned General Security Court held its sittings at Baramulla in Jammu and Kashmir and had passed the sentence of conviction at Baramulla and that the Inspector General Border Security Force at Srinagar had confirmed the findings and sentence of the said Court at Srinagar but he contends that in spite of the above factual position, the petitioner has a right to approach Delhi High Court to challenge all the proceedings against him. He relies on the provisions of Sections 65, 107 and 108 of the Border Security Force Act. The thrust of his arguments is that since everything done against him has been done as a delegate of Director General the same will be deemed to have been done, under legal fiction, by the Director General, who is posted at Delhi.

14. The learned counsel for the respondents has submitted that the aforesaid arguments of the learned counsel for the petitioner are not sustainable. According to him, no such legal fiction can be created to give jurisdiction to the Delhi High Court to entertain this petition.

15. Since the learned counsel for the petitioner has relied on the provisions of Sections 65, 107 and 108 of the Border Security Force Act, the provisions of the same are being reproduced hereunder :-

"65. Power to convene a General Security Force Court : A General Security Force Court may be convened by the Central Government or the Director-General or by any officer empowered in this behalf by warrant of the Director General.

107. Finding and sentence not valid unless confirmed. No finding or sentence of a General Security Force Court or a Petty Security Force Court shall be valid except so far as it may be confirmed as provided by this Act.

108. Power to confirm finding and, sentence of General Security Force Court : The findings and sentences of General Security Force Courts may be confirmed by the Central Government or by any officer empowered in this behalf by warrant of the Central Government.

16. On a bare reading of Section 65 of the said Act it would appear that General

Security Force Court may be convened; (1), by the Central Government or, (2), by the Director General or (3), by any Officer empowered in this behalf by warrant of the Director General. The above three functionaries do not appear to act on behalf of each other. The Central Government acts independently, the Director General acts independently and the officers empowered also act independently. Regarding the third functionary, the legal requirement is that until and unless he is empowered in this behalf by warrant of the Director General, he shall have no statutory power to convene General Security Force Court but the moment he is so empowered, he becomes one of the three Authorities u/s 65, who can convene a General Security Force Court. He acts neither on behalf of the Central Government nor on behalf of the Director General. Therefore, the plea of the learned counsel for the petitioner that when the Inspector General Border Security Force posted in Jammu and Kashmir convened General Security Force Court to try the petitioner, he was acting on behalf of Director General may not be accepted. He acted independently as one of the three Authorities which could convene a General Security Forces Court.

17. So far as the statutory provision of confirmation is concerned, there also I am not in agreement with the learned counsel for the petitioner that the Inspector General Border Security Force at Srinagar had confirmed the findings and sentences of the General Security Forces Court against the petitioner on behalf of the Central Government. Here also Section 108 of the said Act clearly provides that the findings and sentences of General Security Force Court may be confirmed by; (1), Central Government or (2), by any Officer empowered in this behalf by warrant of the Central Government. Here again I may say that any officer empowered in this behalf by the warrant of the Central Government acts independently and does not act on behalf of Central Government. His is one of the two Authorities envisaged in the aforesaid Section 65 of Act.

18. Therefore, in view of above, I am not in agreement with the learned counsel for the petitioner that the convening of the General Security Force Court, the trial made and sentence given by the General Security Force Court and the confirmation of the findings or sentences of the General Security Force Court by Inspector General, B.S.F., Srinagar would be deemed to have been made at Delhi giving territorial jurisdiction to this Court to deal with this petition.

19. In my view, since everything in the matter took place in the territories of, the State of Jammu and Kashmir, this Court has no jurisdiction to entertain this writ petition. Accordingly, on the first preliminary objection this petition fails.

20. Since this Court has no jurisdiction to entertain this petition, I do not propose to enter into the merits of the second preliminary objection and into the merits of the case in order not to prejudice the respective contentions of the parties to the writ petition.

21. This petition is dismissed.

22. There shall be no order as to costs.

23. Petition dismissed.