

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-20396-2018 (O&M)

Date of decision: 12.07.2019

Indo Tibetan Border Police Force

....Petitioner

Versus

State of Haryana and others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Satya Pal Jain, Additional Solicitor General of India with
Mr. Aditya Sanghi, Advocate
for the petitioner.

Mr. Deepak Grewal, DAG, Haryana.

Mr. Parvesh Tyagi, Advocate
for respondent No.2.

ARVIND SINGH SANGWAN, J. (Oral)

Prayer in this petition is for setting aside the order dated 24.01.2018 (Annexure P-1) passed by the trial Court/Additional Sessions Judge, Jhajjar, whereby an application filed by the petitioner i.e. Indo Tibetan Border Police Force (for short 'ITBP Force'), to allow it to try the accused/respondent No.3 Parveen Kumar, Assistant Commandant and accused/respondent No.4 Ram Bharat Kushwah, Second in Command, by the Force Court as per the provisions of Indo Tibetan Border Police Force Act, 1992 (for short 'Act of 1992'), instead of their regular trial by the Court

of Sessions, governed by the Code of Criminal Procedure (for short 'Cr.P.C.'), was dismissed.

Brief facts of the case are that FIR No.46 dated 28.10.2014 under Section 306 IPC, Police Station Bahadurgarh, District GRP Ambala Cantt, was registered against respondents No.3 & 4 with the allegations that on 27.10.2014, an information was received from Railway Station, Assaudha-Sampla that one person has committed suicide, who was later on identified as Madan Lal. From the bag of deceased, a suicide note was recovered and complainant Pawan Kumar gave an application to the police that his brother Madan Lal has informed that he is being pressurized by the ITBP force officials and left with no other option, he has committed suicide. Names of respondents No.3 & 4 were mentioned in the suicide note, as the persons responsible for committing suicide. On the basis of some, aforesaid FIR was registered. The police conducted the investigation and thereafter, submitted the challan against respondents No.3 & 4. The petitioner i.e. employer of respondents No.3 & 4 filed an application before the trial Court for transfer of case to the Force Court to try them under the Act of 1992, instead of their regular trial by the Court of Sessions, Jhajjar.

The trial Court, vide order dated 24.01.2018, dismissed the application. The operative part of the order reads as under: -

“The counsel for the accused by relying on Section 475 Cr.P.C. has submitted that there is no delay on the part of the ITBP Force in moving the present application because the concerned Magistrate did not deliver the accused together with the

statement of the offence to the Commanding Officer of the Unit to which they belong as is referred under subsection (2) of Section 475 Cr.P.C. The counsel relied on the following rulings:-

1. State of J& K Versus Lakhwinder Kumar & Ors. Criminal Appeal No.624 of 2013, (Special Leave Petition(Crl.) No.5910 of 2012 as well as Crl. Appeal No.625 of 2013 (SLP (Crl.) No.5911 of 2012) titled Gulam Mohammad Sheikh Versus State of J.K.& Ors., decided on 25th April, 2013.

2. Criminal Reference by Versus State of Kerala, Crl. Ref. No.3 of 2005, decided on 1st day of March, 2007(Kerala High Court).

The counsel for the complainant at the time of argument submitted that the present application moved by the ITBP Force is nothing but a mockery of law. ITBP Force was very much aware of the present trial. The present application has been moved at the fag end of the limitation period stated under Section 88 of the Act for giving benefit of limitation to the accused persons.

The counsel for the complainant has submitted that as per Section 84 of the Act, A General Force Court is competent to try the case in the case in hand. The Section 77 of the Act states that a General Force Court may be convened by the

Central Government or the Director-General or by any officer empowered in this behalf by a warrant of the DirectorGeneral. The Section 80 of the Act states that A General Force Court shall consist of not less than five officers. The Section 96 of the Act states that all trials by a General Force Court or by a Petty Force Court, as soon as the Court is assembled, the names of the Presiding Officers and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the Court.

The above Sections i.e. 77, 80, 84, 88 and 96 show that the trial of the case before the Force Court would not start w.e.f. from the present application moved by the ITBP Force but would start after the completion of the requirements laid-down by the above Sections and by the time the aforesaid requirements are met by the ITBP Force, the limitation of three years would expire which would benefit none but the accused persons.

The counsel for the complainant at the time of argument submitted that the ITBP Force was very much aware with regard to the proceedings of the present case because not only Madan Lal, who committed suicide but the accused persons also belong to ITBP Force. In this scenario, Section 93 of the Act impliedly comes into play. The Section 93 of the Act states that :

93. Power of Criminal Court to require delivery of offender.- (1) When a Criminal Court having jurisdiction is of the opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 92 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings, pending a reference to the Central Government.

(2).....

As per Section 93 of the Act, the officer referred to in Section 92 of the Act (the Director-General or the Additional Director-General or the Inspector-General) would be impliedly deemed to have consented for the trial of the case in hand before the Criminal Court.

The counsel for the complainant has relied upon the following rulings:

1 Ajit Singh Versus State of Punjab, AIR 1970 (P&H), 351.

2 Rajvir Singh Versus Secretary, Ministry of Defence and Ors., AIR 2012 (SC) 935.

3 Balbir Singh and anr. Versus State of Punjab (1995) 1 SCC 90.

4 General Officer Commanding Versus CBI & Anr.

Criminal Appeal No.257 of 2011 with Criminal Appeal No.55 of 2006, Additional Director General Versus Central Bureau Investigation decided on 1st May, 2012 (SC).

After hearing the rival contentions, this Court is of the view that when Sections 92 and 93 of the Act are read together then it can be concluded that Criminal Court having jurisdiction has not at all be barred from trying the accused.

The discretion whether the accused is to be tried by the Force Court or by the Criminal court has been vested in in the Director-General or the Additional Director-General or the Inspector-General or General officer in Command in whose command the accused is serving.

It is expected that the aforesaid discretion is exercised by the above officer within a reasonable time. The reasonable time here means before the cognizance of the case is taken by the Criminal Court.

In the case in hand, the FIR was lodged on 28.10.2014. The police after conclusion of the investigation filed the charge-sheet under Section 173 Cr.P.C. against the accused person on 20.01.2015. The criminal Court i.e. the Sessions Court took the cognizance of the offence on 11.02.2016, the date on which the charges were framed against the accused persons.

On the basis of the above discussion, it can be concluded that the officer Director General or others should have exercised their discretion stated in Section 92 of the Act and 93 of the Act before 11.02.2016.

The present discretion, which has been exercised by the ITBP Force Director General or others when statutory period of limitation of three years about to expire, suffers from delay and latches. The aforesaid delay and latches tends to give advantage to the accused persons because by the time General Force Court will come into existence for trying the accused persons; the period of limitation of three years mentioned under Section 88 of the Act would expire. The Section 88 of the Act makes it clear that no trial by the Force Court of any person shall be commenced after the expiration of the period of three years from the date of offence. There is every probability that the accused persons would save themselves by evoking the provisions of Section 88 of the Act, which would tantamount to mockery and injustice to the complainant. It is a settled law that justice must not only be done but must also seen to be done.

It is admitted case that deceased Madan Lal was the employee of ITBP Force and that the accused persons are also the employees of the ITBP Force. Therefore, the defence that the ITBP Force was not aware about the proceedings before

the Magistrate cannot be entertained by this Court at this stage.

The Section 475 of the Code of Criminal Procedure, 1973 will come into play only when the discretion is exercised by the Director General or other officer under Section 92 of the Act. When Section 475 Cr.P.C. Section 92 of the Act and Section 93 of the Act are read together, then it can be concluded that the Director General or others by not exercising their discretion and by maintaining silence almost for a period of three years have waived off requirement of the provisions of Section 475 Cr.P.C.

Before parting, it would be worthwhile to mention that in the case in hand as many as eight witnesses have appeared for their testimonies, which again shows that the above application for transferring of the case to the Force Court ITBP Force suffers from delay and latches. For the foregoing reason, the authorities relied upon by the representative of the ITBP Force and the counsel for the accused are not applicable to the case in hand.

Consequently, the above application for transferring the case in hand to the ITBP Force stands dismissed.”

The present petition has been filed challenging the aforesaid order passed by the trial Court.

Learned senior counsel for the petitioner has submitted that as

per provisions of Section 92 of the Act of 1992 read with Section 475 Cr.P.C., the trial of respondents No.3 & 4 is liable to be transferred to the Force Court for conducting the trial.

For a reference, Section 92 of the Act of 1992 as well as Section 475 Cr.P.C. are reproduced as under: -

“92. Choice between criminal court and Force Court.- When a criminal court and a Force Court have each jurisdiction in respect of an offence. it shall be in the discretion of the Director-General, Additional Director-General or the Inspector-General or the Deputy Inspector-General or the Additional Deputy Inspector-General within whose command the accused person is serving or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted, and if that officer decides that they shall be instituted before a Force Court to direct that the accused person shall be detained in Force custody.”

“475 Cr.P.C. - Delivery to commanding officers of persons liable to be tried by Court- martial.

(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and

shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court- martial.

Explanation.- In this section-

(a) " unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(b) " Court- martial" includes any tribunal with the powers similar to those of a Court- martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situated within the State be brought before a Court- martial for trial or to be examined touching any matter pending before the Court- martial."

Learned senior counsel has argued that the trial Court has wrongly dismissed the application on the ground of delay and in fact there is no delay on the part of the petitioner in filing the application, as the Illaqa Magistrate did not hand over the accused along with the statements to the Commanding Officer of the Unit, where they are serving, in terms of Section 475 (2) Cr.P.C. It is further argued that the application has been dismissed on technical ground alone and considering it to be procedural delay, the trial Court should have passed an order in the manner that there is

no delay.

In reply, learned State counsel, on instructions from the Investigating Officer and assisted by learned counsel for respondent No.2-complainant, has however opposed the prayer of the petitioner and has filed the status report by way of affidavit of Deputy Superintendent of Police, Railways (H), Faridabad dated 03.07.2019, informing the status of the case, in which it is specifically stated that the trial is at the final stage, as only 03 prosecution witnesses are left to be examined. It is argued that the trial Court has passed a well reasoned order, as the FIR was registered on 28.10.2014; report under Section 173 Cr.P.C. was submitted on 20.01.2015 and the Court of Sessions took cognizance of the offence, at the time of framing of charge i.e. on 11.02.2016, against the accused persons and thereafter, the trial started and therefore, the application filed by the petitioner for transfer of the trial, could have been filed before framing of the charge, while exercising powers under Sections 92 & 93 of the Act of 1992.

Learned counsel for respondent No.2-complainant has relied upon a judgment of the Hon'ble Supreme Court in **Balbir Singh and anr. Vs. State of Punjab, (1995) 1 SCC 90**, wherein a similar view was taken.

After hearing learned counsel for the parties, I find no merit in the present petition.

- (a) As noticed above, the charges were framed on 11.02.2016, when the Sessions Court took cognizance and the application in hand was moved by the petitioner much thereafter and

therefore, the trial Court has rightly held that it is liable to be dismissed on account of delay.

- (b) As per the status report filed in the Court today, out of 31 prosecution witnesses, 28 PWs have been examined and the case is at the fag end.
- (c) Even at the time of passing of the impugned order dated 24.01.2018, the trial Court has noticed that 08 PWs have already been examined and therefore, the application filed by the petitioner-ITBP Force is liable to be dismissed on account of unexplained delay.

Finding no illegality in the impugned order dated 24.01.2018 and also considering the advance stage of the trial, I find no ground to interfere in the impugned order passed by the trial Court.

Accordingly, the present petition is dismissed.

[ARVIND SINGH SANGWAN]
JUDGE

12.07.2019
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Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No