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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 5210/2019 and CM APPL. 23055/2019 (stay)**

RITESH SONI

..... Petitioner

Through: Ms.Saahila Lamba, Advocate.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr.Gaurav Rohilla, Sr. Govt. Counsel
along with Mr.Shivanshu Tiwari, DC.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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10.12.2019

Dr. S. Muralidhar, J.:

1. The challenge by the Petitioner in the present case is to an order dated 6th August, 2018 passed by the Deputy Inspector General ('DIG'), SHQ of the Border Security Force ('BSF'), Siliguri directing the Commandant 155th BN BSF to conduct a *de novo* trial on the charge sheet issued to the Petitioner. The Petitioner also challenges an order dated 18th April, 2019 issued by the Respondents in rejecting the Petitioner's representation against the commencement of the trial against him *de novo*.

2. The background facts are that the Petitioner, an Assistant Sub Inspector (Ministerial) ['ASI(M)'] had enrolled in the BSF on 29th December, 2009 as Head Constable (Ministerial). After completion of his basic training, he was

posted to 120 BN BSF on 20th June, 2010. He was thereafter posted to the SHQ, BSF Raiganj on 25th November, 2011. While he was posted there, he was promoted as ASI(M) on 1st April, 2015.

3. The Petitioner gave a complaint to the DG BSF, New Delhi on 26th April, 2015, alleging harassment at the hands of an Assistant Commandant (Ministerial) posted at SHQ, BSF Raiganj. Even while the complaint has been pending, the Petitioner was posted to the 155th BN BSF on 3rd July, 2015.

4. On the complaint given by the Petitioner a one-man Staff Court of Inquiry ('SCOI') was ordered by the DIG, BSF Raiganj by an order dated 7th August, 2015. In terms of the remarks of the Inspector General ('IG') BSF North Bengal on the SCOI proceedings, a disciplinary action was directed to be initiated against the Petitioner under the BSF Act and Rules, 1969. On 23rd June, 2017 a charge sheet under Section 34 (a) of BSF Act, 1968 was issued to the Petitioner. The charge against him was that of making a false accusation against a person subject to the BSF Act knowing such accusation to be false. The Commandant ordered that a Record of Evidence ('RoE') be conducted.

5. On completion of the RoE, the Petitioner was summarily tried by the Commandant on 9th October, 2017 for committing an offence under Section 34 (a) of BSF Act, 1968. The Petitioner was awarded a punishment of 'reprimand'.

6. In exercise of the powers vested in him under Section 55 (2) of the BSF Act, 1968, the DIG SHQ BSF, summary trial proceedings were set aside on account of a number of illegalities in conducting the summary trial, and particularly not availing the consent of the Petitioner for disposal of the case on Form I Part I of Rule 180 of the BSF Rules; non-arraignment of the Petitioner on charge in terms of Rule 138 of the BSF Rules; and recording “Yes” in place of “Guilty or not Guilty”, as per the pleading of accused. The DIG SHQ BSF Siliguri directed the Commandant of the 155th BN BSF to conduct a *de novo* trial with due diligence & by following proper procedure as per the BSF Act and Rules on the basis of the RoE dated 6th August, 2018 already conducted by the SHQ BSF Siliguri.

7. The Petitioner then made a representation on 30th November, 2018 which was rejected by the DG, BSF by the second impugned order dated 30th November, 2018.

8. We have heard the submissions of Ms. Saahila Lamba, learned counsel appearing for the Petitioner and Mr. Gaurav Rohilla, learned counsel appearing for the Respondents.

9. The short question to be addressed is whether the impugned order, by which a *de novo* trial has been directed to be conducted against the Petitioner is bad in law?

10. The impugned order reveals that after the Petitioner was issued the punishment of ‘reprimand’, at the end of the SSFC, when the matter

travelled to the DIG, he noticed a number of illegalities in the conduct of the trial, including that of not availing the consent of the Petitioner for disposal of case on Form I Part I of BSF Rule 180; non-arraignment of the accused on charge in terms of Rule 138 of the BSF Rules and recording “Yes” in place of “Guilty or not Guilty”.

11. In its judgment dated 2nd June, 2006 in W.P.(C) 10446 of 2004 (***Banwari Lal Yadav v. Union of India***) a Division Bench of this Court in similar circumstances applied the principle of *autrefois acquit* enshrined in Article 20 (2) of the Constitution and Section 300 (1) of the Code of Criminal Procedure, 1973, which is also similar to Section 75 of the BSF Act, and observed as under:

“13. In our considered view, there is a clear distinction, albeit a fine one, between cases where a court has no jurisdiction to try the offence, as for example, if the court is not competent to try the offence for want of sanction for prosecuting the accused or if the composition of the court is not proper as required for that type of court or if the court is illegally constituted of unqualified officers, and cases where the trial ipso facto is unsatisfactory as for example if during the course of the trial, inadmissible evidence is admitted or admissible evidence is shut out or proper procedure is not followed and the trial is consequently marred by grave irregularities which operate to the prejudice of the accused. In the former category of cases the trial would be nonest, being null and void from its very inception. In other words, there would be no trial in the eyes of law. In the latter category of cases, however, in our view, it would be deemed that the accused has withstood the trial and as such he cannot be tried again.”

12. The above judgment was followed by this Court in a subsequent

judgment dated 24th December, 2014 in W.P.(C) 11736 of 2006 (**Rakesh Kumar Singh v. Union of India**).

13. Learned counsel for the Respondents sought to distinguish the judgment in **Banwari Lal Yadav** (*supra*) by drawing attention to para 22 thereof which reads as under:

“22. The object and intent of Section 75 which has been incorporated in the BSF Act is clearly to prohibit a second trial of the accused, whether by the Security Force Court or by a criminal court, in all cases where the accused has been convicted or acquitted of an offence by a Security Force Court or by a criminal court or has been dealt with under Section 53 or Section 55. Section 75 consequently imposes a bar on second trial where the first trial was by a court of competent jurisdiction, though not where the first trial was void ab initio.”

14. Learned counsel for the Respondents urged that in the present case, the illegality on account of which the *de novo* trial was ordered was in effect an acknowledgment that the initial trial was rendered *non est*. In his submission, therefore, a *de novo* trial did not stand precluded.

15. The Court is unable to agree with the above submission of learned counsel for the Respondents. As pointed out in **Banwari Lal Yadav** (*supra*), as long as the initial trial is initiated before the Competent Court vested with jurisdiction to undertake the trial, the subsequent irregularities would not result in the entire trial being declared *non est*, permitting a fresh trial on the same charge. In **Banwari Lal Yadav** (*supra*), illustratively, it was noted that the initial trial will be considered *non est* if:

“13... the court is not competent to try the offence for want of

sanction for prosecuting the accused or if the composition of the court is not proper as required for that type of court or if the court is illegally constituted of unqualified officers.”

16. In the present case none of aforesaid contingencies exist. On the other hand, the second set of contingencies pointed out in ***Banwari lal Yadav*** (*supra*) are germane to the present case:

“13...cases where the trial ipso facto is unsatisfactory as for example if during the course of the trial, inadmissible evidence is admitted or admissible evidence is shut out or proper procedure is not followed and the trial is consequently marred by grave irregularities which operate to the prejudice of the accused”.

17. The Court is left with no manner of doubt that in the present case the illegalities pointed out in the impugned order dated 6th August, 2019 fall in the latter category of the cases pointed out in ***Banwari lal Yadav*** (*supra*). In other words, the fact that the Petitioner withstood the trial cannot be wiped out. There is an express bar in law in trying the Petitioner again for the same offence. Consequently, the impugned order dated 6th August, 2018 and the subsequent order dated 18th April, 2018, rejecting the Petitioner's representation are hereby set aside.

18. The writ petition is allowed in the above terms. The application is disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 10, 2019/rr