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

Reserved on 15th March, 2019

Decided on: 26th March, 2019

+ **W.P.(C) 4680/2006**
CONSTABLE UMA SHANKARAN Petitioner
Through: Mr M.G. Kapoor, Advocate.

versus

UNION OF INDIA AND ORS. ... Respondents
Through: Dr Ashwani Bhardwaj, Advocate for
UOI.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Petitioner who was working as Constable in the Border Security Force ('BSF') in the 62nd Battalion, has challenged the proceedings, the findings and the sentence of the Summary Security Force Court ('SSFC') on 5th January, 2005, dismissing him from service. He has also challenged the order dated 22nd November, 2005 passed by the Director General ('DG'), BSF (Respondent No.2), rejecting his appeal against the above order.

2. The background facts are that the Petitioner was enrolled in the BSF on 30th July, 1983. The charge against him was that whilst he was deployed at the Border Outpost ('BOP'), Ramnagar, Chandnichak, Bohraghat during

December 2002, he sent two bank drafts dated 3rd December, 2002 and 5th December, 2002 in the sum of Rs.10,000/- each to his brother Manikantan in Kerala. He was charged with having been in possession of “pecuniary resources disproportionate to his known source of income” for which he could not satisfactorily account, thereby committing an offence punishable under Section 13 (1) (e) of the Prevention of Corruption Act, 1988 (‘PC Act’) read with Section 13 (2) thereof. Consequently, the Petitioner was charged with an offence punishable under Section 46 of the Border Security Force Act, 1961 (‘BSF Act’).

3. After the stage of recording of evidence (‘ROE’) was completed, the Deputy Inspector General (HQ), Berhampur Sector, BSF, by an order dated 23rd December, 2004, directed trial of the Petitioner by the SSFC. According to the Petitioner, on the evening of 3rd January 2005, he was handed over a copy of the charge-sheet and the ROE. He was to intimate the ‘friend of the accused’ by 10 am on 4th January, 2005. Shri Rajender Singh Assistant Commandant (‘AC’) in the 62nd Bn of the BSF was appointed as ‘friend of the accused’.

4. According to the Petitioner, despite knowing well that inadmissible evidence had been recorded in the ROE, and there was no evidence to support the charge against the Petitioner, Shri Singh advised the Petitioner to plead guilty telling him that the Commandant had promised that if the Petitioner pleaded guilty, he would be dealt with leniently. The Petitioner claims that in order to avoid the Commandant’s wrath, he pleaded guilty and was awarded, on 5th January, 2005, the sentence of dismissal from service by

the SSFC. Thereafter his statutory petition under Section 117 of the BSF Act was rejected by the DIG on 22nd November, 2005.

5. Rule was issued in the present writ petition on the first day of its listing i.e. 27th March, 2006. An application seeking to urge additional grounds was allowed on 3rd December, 2008.

6. Mr M.G. Kapoor, learned counsel appearing for the Petitioner first pointed out that the Commandant who tried the Petitioner as the SSFC belonged to the 63rd Bn whereas the Petitioner belonged to the 62nd Bn. He submitted that the attachment of the Petitioner to 63rd Bn for trial by the SSFC was illegal. He submitted that there is a violation of Rule 51 of the BSF Rules, 1969 ('BSF Rules') and that the ROE ought to have been returned to the Petitioner's Commandant i.e. 62 Bn who then ought to have exercised the option available to him under Rule 51 of the BSF Rules. He further submitted that with the alleged offence having been committed on 3rd and 5th December, 2002, the Petitioner was tried on 5th January, 2005 which itself revealed that there was no grave and compelling cause to be tried by the SSFC. Reliance is placed on the judgment in *Union of India v. Vishav Priya Singh (2016) 8 SCC 641*.

7. Mr. Kapoor explained that earlier the Petitioner faced proceedings in July, 2002 under Section 40 of the BSF Act alleging that he was in possession of the resources disproportionate to his known sources of income, after he had sent demand drafts (DDs) in the sum of Rs.35,000/-. The Petitioner was given the punishment of 'reduced to rank i.e. from HC to Constable'. The present case involved the sending of the two DDs totalling to Rs.20,000/- to

his brother in December, 2002.

8. Mr Kapoor submitted that although in the present case the Petitioner pleaded guilty, it was necessary for the SSFC to have strictly complied with the requirement of Rule 148 of the BSF Rules. Relying on the decisions in ***Rampal v. Union of India*** (decision dated 26th July, 2004 in W.P.(C) No.2287/2001), ***Nirmal Lakra v. Union of India (2003) 1 SLJ 151 (Delhi)*** and ***Ex Constable Raj Kumar v. Union of India ILR 2008 Supp (Del) 148***, he submitted that any breach thereof would result in vitiating the entire trial by the SSFC.

9. In reply, Dr. Bhardwaj, learned counsel appearing for the Respondents submitted that the Petitioner's unit moved to Manipur in August, 2004 and he accordingly was attached with the 63rd Bn for disciplinary purpose. These orders of attachments were not challenged. He also referred to the previous track record of the Petitioner. He had made withdrawals of the amount from his account and was unable to explain its sources. He referred to the decision of the Supreme Court in ***Union of India v. Dinesh Kumar AIR 2010 SC 1551***.

10. Discussing the evidence, Dr Bhardwaj pointed out ASI Shanthi Jaya Kumari (PW-1) gave the joining details and address of the Petitioner, Bidyut Das (PW-2) confirmed the details of the bank drafts prepared in favour of the brother of the Petitioner; HC Nanak Chandra Sharma (PW-3) talked about the presence of the Petitioner in the unit between 1st November and 14th December, 2002. PW-4 produced the pay records and details of the drafts prepared. The Petitioner declined to cross examine the above

witnesses and admitted to having sent the two DDs.

11. According to Mr Bhardwaj, the salary received by the Petitioner for the months of October and November, 2002 were Rs.10,500 and 5,600 and as per the records he had received Rs.7762/- and 5999 respectively for the above two months. Further, the Petitioner claimed to have received Rs.5,000/- from HC Amar Singh but did not produce him as a defence witness. Dr. Bhardwaj submitted that the Petitioner had pleaded guilty and the procedure outlined in the BSF Rules was duly followed. Dr. Bhardwaj referred to the decisions dated 20th January, 2015 in W.P.(C) No.2663/2012 (*Harphool Kumawat v Union of India*) and 28th January, 2015 in W.P.(C) No.6426/2000 (*Keshav Singh v Director General, BSF*) where it was held that in similar circumstances, no illegality was committed by the SSFC. He submitted that given the past history of misconduct by the Petitioner, there was no scope for interference by this Court with the impugned order of the SSFC.

12. The above submissions have been considered. The central issue involved in the present matter is whether there was compliance with the letter and spirit of the BSF Rules, particularly, where the Petitioner is stated to have pleaded guilty.

13. The Court has perused the original record produced before it. It is seen that the SSFC did record the guilty plea of the Petitioner. At the relevant point in time, the proviso to Rule 142 (2) of the BSF Rules had not been introduced and, therefore, no illegality was attached to the failure of the SSFC to obtain the signatures of the Petitioner on the order sheet recording

the plea of guilt.

14. The record of proceedings further reveals that the SSFC, while recording the plea of guilt, repeated verbatim the exact wording of Rule 142 (2) viz., that before recording the plea the SSFC ascertained that the Petitioner understood the nature of the charge and informed him of the effect of that plea.

15. Rule 143 (2) (a) of the BSF Rules mandates what should be done next and it reads as under:

“(2) (a) After the record of the plea of ‘Guilty’ on a charge (if trial does not proceed on any other charges) the Court shall read the record or abstract of evidence and annex it to the proceedings, or if there is no such record or abstract, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence.”

16. The expression “the Court shall read the record or abstract of evidence” requires the SSFC not merely ‘read’ the record but actually examine it and thereafter “record sufficient evidence to enable it to determine the sentence”. This is not a mechanical exercise. The SSFC is expected to examine the evidence to determine whether the guilty plea is consistent with such evidence.

17. In the present case, the four witnesses who were examined for the prosecution did not speak a word about the Petitioner being in possession of any money disproportionate to his known resources of income. This is not a case where a raid was conducted on the quarters occupied by the Petitioner

and he was found in possession of money which he could not account for. The two DDs drafts were made from the savings account maintained by the Petitioner with the bank concerned. It should have been possible for the SSFC to call for the statement of the bank account and examine whether there were credit entries in the said account, which were not the Petitioner's salary. This would have clearly indicated whether the Petitioner was getting money from other sources. He could have then be confronted with such statement and asked to explain the source of such credits. This basic step was not followed in the present case.

18. It is pointed out by Mr Kapoor that at the relevant time the Petitioner was posted in a field area where everything including shelter, food and clothing are free. During the entire calendar year 2002, the Petitioner drew Rs.65781/- as salary. From October to December 2002, even as per the prosecution, he drew a salary of Rs. 19,272. The Petitioner had received a letter from home about his mother suspected of being having cancer and kidney failure and undergoing investigation at the University Medical Centre in Bangalore. He had initially sent Rs.10,000/- by way of a DD on 3rd December 2002. Since more money was required, he borrowed Rs.5,000/- from HC Amar Singh and in lieu thereof gave Amar Singh an authority letter to withdraw Rs.5,000/- from the Petitioner's salary for December, 2002. On 5th December, 2002, another DD for Rs.10,000/- was sent by the Petitioner. All of this was mentioned in the ROE. He had also produced the medical records pertaining to the treatment of his mother. However, these were not referred to when the matter was referred for trial by the SSFC.

19. It must be noticed at this stage that in *Union of India v. Vishav Priya Singh* (*supra*), the Supreme Court dealt with both aspects, viz., whether the Summary Court Martial ('SCM') convened by one Commandant can be completed by another. On this aspect it was held that it was competent and permissible for the Commandant of the other unit to which the accused is attached or sent an attachment during the course of trial by such accused by convening, constituting and completing SCM in the manner known to the law i.e. strictly confines to Section 116 and 120 of the Army Act, 1950. The second aspect was the convening of the SCM itself. Here the Supreme Court fully endorsed and affirmed the view of the High Court that "SCM is an exception and it is imperative that a case must be made out for immediacy of action. The reasons to convene an SCM must be followed by well articulated reasons or the record itself must justify such resort."

20. As far as the latter aspect is concerned, in the present case, no justification is shown for convening the SSFC in January 2005 when the incident took place in December 2002. No attempt has been made by the Respondents to justify the convening of the SSFC on the basis of the ROE which was recorded in December 2002 itself.

21. With the evidence recorded not supporting the case of the Respondents that the Petitioner was in possession of assets disproportionate to his known sources of his income, the impugned order of the SSFC dismissing him from service suffers from serious legal infirmity. In similar circumstances, holding that there was no evidence to justify his conviction, this Court in *Ram Pal v. Union of India* (*supra*) granted relief to the Petitioner with

reinstatement with all consequential benefits. Likewise, in *Ex.Head Constable Moti Singh v. Union of India* (decision dated 15th March, 2017 in W.P.(C) No.3847/2006), *Nirmal Lakra v. Union of India* (*supra*) and *Ex.Constable Raj Kumar v. Union of India* (*supra*), this Court set aside dismissal orders passed by the SSFC after committing procedural illegalities.

22. The reliance placed by Dr. Bhardwaj on *Union of India v. Dinesh Kumar* (*supra*) is to no avail for the reason that the Supreme Court in that case decided the question whether the SSFC was required to give reasons in support of its verdict in terms of Rule 149 of the BSF Rules. ? The Supreme Court answered the question in the negative. In the present, what vitiates the impugned order of the SSFC is not so much its failure to give reasons but the failure to strictly comply with the mandatory requirement of Section 143 (2) (a) of the BSF Rules, in the case of a person who is arrayed before the SSFC pleading guilty. In the present case, that procedure has not been strictly followed.

23. The mere fact that in the past the Petitioner faced proceedings for a similar infraction and was punished, will not relieve the burden on the Respondents to prove the charges against the Petitioner in accordance with law and on the basis of credible evidence. The Respondents have failed to discharge that burden in the present case.

24. For the aforementioned reasons, this Court sets aside the impugned orders of the SSFC, the Appellate Authority and the Revisional Authority and directs that the Petitioner be reinstated forthwith in service with all

consequential benefits including fixation of seniority and calculation of the pay and pension of the Petitioner be done in the manner as he was never removed from service. The Petitioner, however, would not be entitled to any arrears of pay.

25. The petition is allowed in the above terms with cost of Rs.20,000/- which shall be paid by the Respondents to the Petitioner within four weeks from today.

S.MURALIDHAR, J.

I.S.MEHTA, J.

MARCH 26, 2019
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