

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Appellate Side)

M.A.T. 174 of 2022
With
I.A. No. CAN/1/2022

Shri Sanjay Kumar

Vs.

Union of India & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Kausik Chanda

For the Appellants : Mr. Kishore Dutta, Ld. Sr. Adv.
Mr. Srijib Chakraborty, Adv.
Mr. Pankaj Agarwal, Adv.
Mr. Jibantaraj Dan Roy, Adv.
Mr. Paramita Maity, Adv.

For the Respondents : Mr. Rudra Jyoti Bhattacharyya, Adv.
Mr. Debjani Ghosal, Adv.

Heard On : 17.02.2022, 21.02.2022, 22.02.2022,
23.02.2022, 24.02.2022 and 25.02.2022

CAV On : 25.02.2022

Judgment On : 09.03.2022

Arijit Banerjee, J.:

1. The writ petitioner has preferred this appeal against an interim order dated February 11, 2022, passed in W.P.A. 2310 of 2022, whereby the writ petitioner's prayer for an interim order of stay of the trial proposed to be held by the General Security Force Court (GSFC), was rejected. The Learned

Single Judge granted limited protection to the writ petitioner to the effect that the result of the trial by GSFC as against the writ petitioner shall abide by the result of the writ petition. Direction was given for exchange of affidavits.

2. The incident that prompted the respondent authorities to initiate proceedings against the writ petitioner is that during the intervening night of 11th /12th April, 2019, cattle was sought to be smuggled from India to Bangladesh. Members of the Border Security Force (BSF) intervened. As a result, the smuggling activities were thwarted. However, allegedly there was stone pelting by the smugglers directed towards the members of the BSF who suffered injury. An FIR was lodged by a member of the BSF against unknown persons. A criminal case was initiated against unknown persons. After investigation, the police filed an **FRT**. On the basis of such **FRT**, the concerned Magistrate closed the criminal case.

3. Subsequently, a charge sheet dated January 31, 2022 was issued by the competent authority against the writ petitioner under Section 40 of the Border Security Force Act, 1968. Section 40 reads as follows:-

“40. Violation of good order and discipline.- Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may

extend to seven years or such less punishment as is in this Act mentioned.”

4. The charge sheet contains three charges which are as follows.-

FIRST CHARGE
BSF ACT-1968,
SECTION -40

AN ACT PREJUDICIAL TO GOOD ORDER AND
DISCIPLINE OF THE FORCE

in that he,

On 11 April, 2019, at about 1850 hrs, while performing duty as Second-in-command of 85 Bn BSF gave illegal instructions telephonically from his Mob No. 7739577117 to his subordinate officer, No. 873657710 ASI(G) Ravindra Kumar, Offg Inspector(G) of 85 Bn BSF on his mobile No. 7894983557 to facilitate cattle smuggling from India to Bangladesh through the AoR of BOP Sodepur, 85 Bn BSF on the night intervening 11-12 April, 2019.

SECOND CHARGE
BSF ACT- 1968,
SECTION - 40

AN ACT PREJUDICIAL TO GOOD ORDER AND
DISCIPLINE OF THE FORCE

in that he,

On 11 April 2019, at about 1830 hrs, while performing duty as Second-in-Command of 85 Bn BSF induced his subordinate officer, No. 100092637 Inspector (GD) J Jebaraj of ‘C’ Coy telephonically by making Whatsapp call from his mobile No.

7739577117 to the mobile No 9600420796 used by J Jebaraj to facilitate cattle smuggling from India to Bangladesh through the AoR of BOP Sodepur on the night intervening 11-12 April, 2019.

THIRD CHARGE
BSF ACT -1968,
SECTION – 40

AN ACT PREJUDICIAL TO GOOD ORDER AND
DISCIPLINE OF THE FORCE

In that he,

after he had telephonically instructed No. 873657710 ASI(G) Ravindra Kumar, Offg Inspector (G) of 85 Bn BSF and No. 100092637 Inspector (GD) J Jebaraj to tell No. 948550069 HC(G) Raju Shahi of 85 Bn BSF to talk to him on Whatsapp and when HC(G) Raju Shahi called him on whatsapp sometime between 1900-2000 hrs on 11th April, 2019, the accused officer induced him to facilitate smuggling of cattle from India to Bangladesh through the AoR of BOP Sodepur, 85 Bn on the night intervening 11-12 April, 2019.

In short, the charge is that the writ petitioner gave instructions to his subordinate officers in the Force for facilitating cattle smuggling from India to Bangladesh.

5. The Competent Authority decided to proceed against the writ petitioner before the GSFC. The writ petitioner approached the Learned

Single Judge challenging the proposed proceedings before the GSFC. He prayed for an interim order of stay of the proceedings which was declined as noted above. Being aggrieved the writ petitioner is before us by way of the present appeal.

6. Appearing in support of the appeal, Mr. Kishore Dutta, learned senior advocate, assisted by Mr. Srijib Chakraborty, Learned Advocate, urged four points:-

- (i) The respondents are estopped from proceeding with the GSFC trial after having lodged a criminal case before the competent Criminal Court, upon exercising their discretion under Section 80 of the BSF Act, 1968. Once FIR was lodged and criminal action was initiated before the criminal Court, the respondents ought to have proceeded under the provisions of the Code of Criminal Procedure to complete the process. They could not fall back on the provisions of the BSF Act. They did not dispute the final report submitted by the Basirhat police station regarding the incident by filing naraji petition or otherwise. Having once exercised option to proceed before the Criminal Court, the respondents could not proceed before the Security Force Court.
- (ii) Under Rule 42(a) of the BSF Rules, 1969, the respondents are barred from convening GSFC trial against the appellant since admittedly there is active involvement of known civilians in

the alleged act of smuggling. In this connection Learned Advocate relied on a decision of the Delhi High Court in the case of ***Bhanu Pratap Singh Vs. Union of India, (2014) SCC Online Del 4768.***

- (iii) The decision of the concerned authority under Rule 51A of the BSF Rules, 1969, to apply to the Competent Officer or authority to convene a GSFC for the trial of the appellant, suffers from the vice of non-application of mind. Rule 51A reads as follows:-

“[51 A. Disposal of case against an officer or a subordinate officer after preparation of record of evidence or abstract of evidence. – (1) Where an officer has been detailed to prepare the record of evidence or abstract thereof, he shall forward the same to [the officer or authority who] ordered for its preparation.

[(2) If the officer or authority considers the evidence recorded insufficient but considers that further evidence may be available, he may remand the case for recording additional evidence.]

[(3) The officer or authority mentioned above, after going through the record or abstract of evidence, including additional evidence, if any, may –

- [(i) dismiss the charge after recording the reasons therefor];**

- (ii) dispose of the case summarily if he is so empowered; or
- (iii) refer the case to competent superior officer for disposal; or
- (iv) apply to a competent officer or authority to convene a General Security Force Court for the trial of the accused.]”

Learned Advocate submitted that no reason has been recorded as to why action under sub-rule 3(iv) was decided to be taken. Formation of opinion based on reasoned satisfaction has to be read into the Rules in view of the options provided therein and the principles of natural justice which have not been expressly excluded.

- (iv) Several BSF Personnel have been found blame worthy in relation to the same incident. Ordinarily proceedings should be initiated against all such personnel and joint trial should be conducted under Rule 55 of the 1969 Rules. Most of the blame worthy BSF personnel would be witnesses in the proceedings against the appellant. It is highly possible that such witnesses will not depose freely on the apprehension of incriminating themselves in future proceedings which may be initiated against them. Unless all the accused persons who are charged with identical allegations are tried together, there will be a chance of conflicting decisions by different Courts.

7. In addition to the aforesaid and without prejudice to the same, the appellant also submitted that his basic right to appoint a Defence Officer of his choice is being denied by the respondent authorities.

8. Before recording the response of Mr. Bhattacharyya, Learned Advocate for the respondents, to the appellant's first point noted above, we set out here-under Section 80 of the BSF Act, for the sake of convenience:

“80. Choice between criminal court and Security Force Court.-

When a Criminal Court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the 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 Security Force Court, to direct that the accused person shall be detained in Force Custody.”

Mr. Bhattacharyya submitted that two FIRs were lodged by the COY Commander against unknown persons for offence committed under Sections 323, 325, 326, 352 and 353 of the Indian Penal Code for assaulting and using criminal force for preventing the BSF personnel from performing their duties, read with Sections 186 and 189 of the Penal Code and Section 11 of Prevention of Cruelty to Animals Act, 1960. No complaint was filed against the BSF personnel

and no FIR was registered against them. Therefore, it is incorrect to say that the authorities exercised options to proceed against the accused BSF personnel before the Criminal Court and hence cannot proceed against them including the appellant before the GSFC.

9. Responding to the second point of the appellant, Mr. Bhattacharyya, Learned Advocate, submitted that Rule 42 of the BSF Rules, 1969 is not applicable in the present case. Firstly, there can be no question of claiming the case from Criminal Court as no BSF personnel was named in the FIR pursuant to which action was initiated before the criminal Court. Secondly, all the three charges against the appellant in the GFSC trial are under Section 40 of the BSF Act, 1968, for passing illegal instructions to his subordinates and there is no mention of any civilian in the particulars of charges framed for the GSFC trial.

10. With regard to Rule 51A of the 1969 Rules, Mr. Bhattacharyya submitted that no reasoned order is required for applying to the Competent Officer or Authority to convene a GSFC for the trial of the accused. An application is made under Rule 52 of the 1969 Rules by the concerned Commandant and thereafter subsequent action is taken by the Superior Authority under Rule 59 of the BSF Rules, 1969.

11. As regards Rule 55, Learned Counsel submitted that each accused person has been dealt with under the BSF Act for their respective acts and omissions and it is the discretion of the Disciplinary Authority to decide the mode of action considering the gravity of the respective charges. Action

against all the blame worthy persons have been concluded except one Inspector Jebaraj. The Competent Authority has decided to try him before the GSFC. The appellant has no right to insist that Jebaraj be tried jointly with him.

12. As regards appointment of a Defence Officer of the choice of the appellant, Mr. Bhattacharyya submitted that initially three names were suggested by the appellant. All the three persons expressed there unwillingness to defend the appellant before the GSFC. Although the authorities were not obliged to do so, in fact, they provided another opportunity to the appellant to suggest further names of persons of his choice for acting as Defence Officer. Pursuant thereto, five names were suggested by the appellant. However, written willingness of only one of such persons was furnished by the appellant. The authorities have ascertained from the concerned frontier where that person, namely Sanjeeb Kumar, is posted, that he is un-available, being engaged in election duty. The appellant has not furnished the written willingness of the other four persons. The appellant was expressly given liberty to engage a civil lawyer of his choice and he is still at liberty to do so. The grievance made by the appellant on this score is baseless.

Court's view:-

13. We have given our anxious consideration to the rival contentions of the parties.

14. The first point urged by Learned Counsel for the appellant is that since the respondent authorities exercised their discretion under Section 80 of the BSF Act, 1968, to proceed before the Criminal Court, they are precluded from subsequently proceeding before the Security Force Court. We are unable to agree with this submission for the simple reason that the subject matter before the Criminal Court was totally different from the subject matter in the GSFC trial. The criminal action, which ended by filing of **FRT** by the Investigating Officer, was initiated on the basis of FIR lodged by the COY Commander against unknown persons. The charge against such unknown persons was obstructing BSF personnel in discharge of their duties and also cruelty to animals. There was no complaint against any BSF personnel including the appellant. Hence, it is incorrect to say that the respondent authorities proceeded against the concerned BSF personnel including the appellant in the Criminal Court. The charge in the GSFC trial is under Section 40 of the BSF Act, which has been set out hereinabove. In effect the said Section provides that any person in the Force, who is guilty of any act or omission which is prejudicial to good order and discipline of the Force shall, upon being convicted by a Security Force Court, be liable to be sentenced for imprisonment for a term of up to 7 years. Usually a citizen of the country accused of committing a criminal offence has to be tried in the criminal Courts. However, a special power has been given to the authorities under the BSF Act to try members of the Force who are subjected to the Act, before Security Force Courts for criminal offences. Hence, Section 80 provides an option to the authorities to either proceed in the Criminal Court or in a Security Force Court, against a member of the Force who is accused

of commission of a criminal offence under the law of the land. It may or may not be correct that if the respondent authorities choose to proceed against an accused member of the Force in a criminal Court on certain charges, subsequently, on the same charges, the authorities cannot subject the accused to GSFC trial. We are not called upon to decide this question, since there was no charge against the appellant before the Criminal Court. Further, on a bare reading of Section 40 of the BSF Act it is clear that it is only the Security Force Court which has jurisdiction to try a member of the Force charged with an offence under the said Section as it says “on conviction by a Security Force Court”, the accused will be liable to be punished. The BSF is entrusted with the extremely important and sensitive duty of protecting the borders of our country and ensuring that illegal activities are not carried on at the borders. This concerns the security and sovereignty of the country. The members of BSF are expected to discharge their duties with utmost honesty, integrity, dedication, discipline and responsibility. Otherwise, the interest of the National will be compromised. That is one of the reasons why special powers have been granted under the BSF Act to deal with members of the Force accused of any kind of indiscipline, before Special Force Courts. In our view, such proceedings should be interfered with very sparingly and only in cases where the same are patently illegal or perverse, which is not the case here.

15. The second point urged on behalf of the appellant is that under Rule 42(a) of the BSF Rules, 1969, the respondents are barred from convening GSFC trial against the appellant as there is active involvement of civilians in

the alleged act of smuggling. It is true that some of the witnesses in the case have named civilians who are allegedly involved in the incident of smuggling. However, in so far as the charge against the appellant under Section 40 of the BSF Act is concerned, there is no question of trying any civilian. Proceedings under Section 40 of the BSF Act in essence constitute disciplinary action against members of the Force who have indulged in activities unbefitting of a member of the Force.

Learned Counsel for the appellant submitted that the incident that resulted in filing of FIR by the COY Commander and the incident which prompted the authorities to initiate action against the appellant under Section 40 of the BSF Act, is one and the same. Since civilians are involved in the incident, Rule 42(a) of the BSF Rules would be a bar to the authorities proceeding against the appellant before a Security Force Court. We are not able to agree with Learned Counsel. One incident can give rise to several kinds of consequences in law. One single incident or action/inaction of a person may amount to commission of breach of contract, commission of a tortious Act and commission of a criminal offence by that person. Breach of contract and the tortious Act will be adjudged by a Civil Court as both attract civil consequences. The criminal offence will obviously be tried by a Criminal Court attracting penal consequences. Professor Glanville Williams, in his classic treatise entitled "Learning the Law" has given a concrete example. A railway signal man, while on duty, falls asleep. As a result two trains collide resulting in death of passengers. This incident may amount to breach of contract on the part of the signal man (breach of implied term of

his contract of employment that he will diligently discharge his duties and not sleep off during duty hours); it may also amount to commission of the tort of negligence on his part; and, it may also amount to commission of a criminal offence (culpable homicide not amounting to murder or man slaughter).

16. In the present case, the GSFC trial on the basis of charges brought under Section 40 of the BSF Act, would not involve any civilian or a person who is not a member of the Force or not subject to the BSF Act. Hence, the second contention of the appellant is also rejected.

17. The appellant's third contention that the officer, to whom the recorded evidence was sent under Rule 51A of the BSF Rules, did not apply his mind in taking the decision to apply to a Competent Officer or authority to convene a GSFC for the trial of the appellant, also has no merit. That Rule empowers the concerned officer, upon considering the recorded evidence or abstract of evidence, to dismiss the charge after recording reasons; or, dispose of the case summarily if he is so empowered; or refer the case to a competent Superior Officer for disposal; or apply to a Competent Officer or authority to convene a GSFC for the trial of the accused. The rule postulates giving of reasons only if the concerned officer dismisses the charge. In the other cases, it is the subjective satisfaction of that officer on the basis of which he takes the decision. The decision to apply to a Competent Officer or authority to convene a GSFC for the trial of the accused would *ipso facto* indicate that the concerned officer was satisfied that there is sufficient evidence on record to justify a GSFC trial of the accused. Thereafter an

application is made under Rule 52 of the BSF Rules and subsequently action is taken by the Superior Authority under Rule 59. Hence, the third point of the appellant is also devoid of merits.

18. The fourth point of the appellant is in relation to Rule 55 of the 1969 Rules, which reads as follows:-

“55. Joint Charges. – (1) Any number of accused may be charged jointly and tried together for an offence averred to have been committed jointly by them.

(2) Any number of accused though not charged jointly may also be tried together for an offence averred to have been committed by one or more of them and abetted by other or others.

(3) Where the accused are so charged under sub-rule (1) or sub-rule (2), any one or more of them may be charged with, and tried for, any other offence with which they could have been charged under sub-rule (1) of Rule 53”.

In our opinion, the aforesaid rule merely grants liberty or discretion to the authorities to hold a joint trial in respect of more than one accused person for an offence alleged to have been committed jointly by them. It does not confer any right on the accused persons to claim a joint trial nor imposes any obligation on the authorities to hold a joint trial. It has been submitted by Learned Counsel for the authorities that action against all the persons who were found to be blame worthy in the Staff Court of Inquiry have been concluded excepting for one Jebaraj and the appellant. We have

seen the charge sheet issued to Jebaraj. The charges, though under Section 40 of the BSF Act, are factually different from the charges brought against the appellant. Had the charges been identical with the charges brought against the appellant, perhaps the appellant might have argued with some force that the authorities should, in exercise of their discretion under Rule 55 of the BSF Rules, conduct a joint trial of the appellant and Jebaraj. But that is not the case. This point of the appellant also fails.

19. Finally what remains for consideration is whether or not the appellant was granted sufficient opportunity to engage a person of his choice to defend him at the GSFC trial. Rule 63(2) of the BSF Rules provides that a Defending Officer shall be appointed to defend an accused who has been remanded for trial unless the accused states in writing that he does not wish such an appointment to be made. Rule 122 (1) of the BSF Rules provides as follows:-

“(1) At any General or Petty Security Force Court an accused person may be represented by a counsel or by any officer subject to the Act who shall be called “the defending officer” or assisted by any person whose services he may be able to procure and who shall be called “the friend of the accused”.

20. Rule 123(1) provides that an accused person intending to be represented by a counsel shall give to his Commandant or to the Convening Officer the earliest practicable notice of such intention, and, if no sufficient notice has been given, the Court may, if it thinks fit, on the application of the prosecutor, adjourn to enable him to obtain a counsel on behalf of the

prosecutor at the trial. In the facts of the present case we find from records that the appellant had been asked to name three persons belonging to the force to Act as his counsel. The appellant did so. All the three persons express their unwillingness to defend the appellant. A further opportunity was given to the appellant to name five persons of his choice one of whom could act as Defending Officer. The appellant named five persons. He furnished the willingness of one of them, namely, Sanjeeb Kumar. However, it has been ascertained from the concerned frontier that Sanjeeb Kumar is unavailable because of election duties. The appellant has not furnished the written willingness of the other four persons.

21. Learned Advocate for the respondents submitted that the appellant was asked more than once to appoint a civil lawyer of his choice but he has not done so. He is still at liberty to appoint any civil lawyer to defend himself, if he is unhappy with the defending officer that the authorities have appointed to defend him.

22. We find that sufficient opportunity has been given to the appellant to engage a person of his choice to Act as “the friend of the accused”. He cannot have any legitimate grievance on that score. However, in any event, he will be at liberty, even at this stage, to engage any civil lawyer to defend him at the GSFC trial.

23. For the reasons aforestated the appeal fails and is dismissed. The interim order stands vacated. There will be no order as to costs.

24. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(Kausik Chanda, J.)

(Arijit Banerjee, J.)