

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

Before:

The Hon'ble Justice Lapita Banerji

W.P.A. 24260 of 2022

David Masih

Vs.

Director General, BSF & Ors.

For the petitioner : Mr. Manjit Singh, Adv.
Mr. Gaganjyoti Singh, Adv.
Mr. Biswajit Mal, Adv.
Mr. Abhishek Bagal, Adv.

For the U.O.I. : Ms. Chandreyi Alam, Adv.
Ms. Runu Mukherjee, Adv.

Heard On : 14.12.2022.

Judgment On : 21.12.2022.

Lapita Banerji, J.:- The petitioner was an Assistant Sub-Inspector (ASI) with the Border Security Force (for short, "BSF"). The petitioner completed 32 years of service in 2021. The petitioner was accused of cattle smuggling. The charges against the petitioner were commission of offences under Section 46 (committing a civil offence) and under Section 7 (accepting bribe by a public servant) of the Prevention of Corruption Act, 1988. The petitioner was also charged under Section 40 (committing an act prejudicial to good order and discipline of the Force) of the BSF Act, 1968.

2. Initially, the General Security Force Court (GSFC) acquitted the petitioner. The co-accused of the petitioner was directed to suffer 89 days of rigorous imprisonment in the custody of the Force.

3. The said Order of Acquittal by GSFC was reviewed under Rule 121 of the BSF Rules, 1969. The Additional Chief Law Officer/Reviewing Authority advised the Confirming Authority (one Pankaj Kumar Singh), IPS and the then Additional Director General, ADG (Eastern Command), BSF to review the findings of the GSFC. The said findings were reviewed and remanded to GSFC in respect of the petitioner. The Confirming Authority/Pankaj Kumar Singh recommended that various aspects in the Order of Revision dated June 2, 2021 should be taken into account before re-assessing the case of the petitioner. However, it was made clear that in no way the discretion of the Court to arrive at any finding was interfered with by the Confirming Authority. In revision, the GSFC found the petitioner guilty on both charges and sentenced him to *“Rigorous imprisonment for 3 years and also dismissal from service”*.

4. Thereafter, the said sentence was sent to the Reviewing Authority/the Additional Chief Law Officer and was forwarded to the Confirming Authority/Y.B. Khurania, IPS, ADG, BSF (Eastern Command). The Confirming Authority confirmed the findings and the sentence was promulgated by Promulgation Certificate dated August 24, 2021.

5. The petitioner filed a post-confirmation petition/Appeal under Section 117(2) of the BSF Act, 1968. The said petition was received on November 12, 2021. In the meantime, the said Pankaj Kumar Singh, IPS became the Director

General, BSF. Under Section 117(2) of the BSF Act, he became the authority competent to decide the post-confirmation petition submitted by any person aggrieved with the finding/sentence of GSFC. The said Pankaj Kumar Singh/DG considered the post-confirmation petition and concluded that there was no illegality/irregularity in the findings of GSFC. The post-confirmation petition/appeal was rejected by Pankaj Kumar Singh as being devoid of merits. The appellate order/decision on the post-confirmation petition was signed by one Anurag Kumar/L.O. Grade-II for and on behalf of DG, BSF/Pankaj Kumar Singh.

6. Mr. Singh, Learned Counsel appearing on behalf of the petitioner submits that the 1st Confirming Authority was the same person who later was the Appellate Authority. There is procedural impropriety in conducting the proceedings because a person cannot sit in Appeal over his own decision. Furthermore, the Order of the Appellate Authority was passed by a Deputy Commandant/L.O. Grade-II and not the DG, BSF, which was also impermissible in law.

7. He submits that the hearing of the petitioner's Appeal was deliberately delayed and therefore, the petitioner had to file the previous writ petition being W.P.A. No.11698 of 2022 for speedy disposal of the Appeal. By an Order dated July 25, 2022 a Coordinate Bench directed expeditious disposal of the appeal received on November 12, 2021. The same was disposed of after 10 months on September 22, 2022 pursuant to the directions of The Hon'ble Court. Thereafter, the petitioner was constrained to file the present writ petition being

W.P.A. 24260 of 2022 since the Order dated September 22, 2022 is vitiated due to lack of procedural impropriety.

8. Mrs. Alam, Learned Counsel appearing on behalf of the Union of India contended that no procedural impropriety has been committed even though the initial Confirming Authority, pursuant to whose recommendation the GSFC reviewed the order of acquittal and the Appellate Authority was the same person. She submitted that once the GSFC reviewed their decision and held the petitioner to be guilty and awarded the necessary punishment, the same was confirmed by one Y.B. Khurania and not Pankaj Kumar Singh, who had initially refused to confirm the decision of the GSFC. Therefore, the second Confirming Authority was not the same as the Appellate Authority who had finally passed the Order on September 22, 2022.

9. She submitted that no prejudice has been suffered by the petitioner since there was an application of mind independently by the GFSC and the second confirming authority.

10. Having considered the rival submissions of the parties and the materials placed on record, the Court finds that:

(a) The initial Confirming Authority, Pankaj Kumar Singh, ADG, BSF was the Appellate Authority after being promoted to the post of DG, BSF.

(b) Upon his recommendation, the Order of Acquittal passed by General Security Force Court was reviewed and an Order of Punishment was promulgated.

(c) Pankaj Kumar Singh/ADG analyzed the evidence, considered the merits of the matter, applied his mind and found that the Order of 'Acquittal' should be reviewed by the GSFC.

(d) It is clearly established that an opinion as to the guilt of the petitioner was already formed in the mind of the ADG/Pankaj Kumar Singh and hence he recommended review of the order of 'acquittal' instead of confirming the same.

(e) Once Pankaj Kumar Singh applied his mind to the petitioner's case, he was not in a position to fairly consider the petitioner's case in Appeal.

(f) The 1st Confirming Authority on the basis of whose opinion the petitioner was re-tried, could not act as the Appellate Authority.

(g) If such a course is allowed to be maintained, then, it would undeniably give rise to a genuine apprehension of bias against the petitioner.

(h) Justice should not only be done but also seen to be done.

(i) The Appellate Authority/DG should have taken recourse to Section 117(2) of the BSF Act and referred the petitioner's case to an independent authority who did not have the occasion to review or in any way assess the petitioner's case at any prior point of time.

(j) Therefore, the contention that the Initial confirming authority/Pankaj Kumar Singh was not the second Confirming

Authority, and hence the order of the appellate authority should not be interfered with, cannot be accepted in the present circumstances.

11. In the light of the discussions above, the Impugned Order passed by the Appellate Authority on September 22, 2022 is vitiated on the ground of apprehension of bias and procedural impropriety. The Impugned Order dated September 22, 2022 is therefore set aside and/or quashed.

12. It is not lost upon this Court that the appellant had spent one and half years in civil prison already out of a period of 3 years of rigorous imprisonment. The appeal/post-confirmation petition was disposed of almost 10 months after filing of the same and that too upon intervention of the Hon'ble Court.

13. The petitioner has rendered more than 32 years of service. Therefore, this Court directs that the appeal/post-confirmation petition of the petitioner as already received by the competent authority on November 12, 2022, be disposed of on merits within 4 weeks from date by an Independent Authority. It is made clear that this Court has not gone into the merits of the appeal.

14. Since the petitioner has already languished in civil prison for more than one and half years and in view of the fact that the Order of the Appellate Authority is already quashed by this Court and a direction is given to an Independent competent authority to consider the petitioner's Appeal again, the prayer for bail/suspension of sentence under Section 130 of BSF Act if made, by the petitioner before the appropriate forum will be considered within two

weeks of making of the application. It is made clear that the said Pankaj Kumar Singh if still the DG, BSF will not be considered to be an independent/appropriate authority for consideration of the prayer for suspension of sentence/grant of bail.

15. Factors like petitioner's wife being unwell and is suffering from acute depression and that the petitioner has 4 daughters, out of which, 3 are unmarried may be taken into account while considering the prayer for bail/suspension.

16. The prayer for suspension of the sentence of the petitioner may be considered keeping in mind the Division Bench Judgment of the Delhi High Court passed in CM No.16686 of 2011 in W.P.(C) No.7357 of 2011 **(Mahesh Prasad Singh vs. Union of India)**.

17. With the directions aforesaid, the writ petition being **WPA 24260 of 2012** is **disposed of**.

18. All parties to act on server copy of this Order as downloaded from the official website of this Hon'ble Court.

19. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance of all the requisite formalities.

(Lapita Banerji, J.)