

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 18232 of 2003

**Hazer Biswas
Vs.
Union of India & Ors.**

For the petitioner : Mr. Ram Krishna Bhattacharya

For the respondents : Ms. Sarda Sha

Heard on : 20.06.2023

Judgment on : **20th June, 2023.**

Raja Basu Chowdhury, J:

1. The present application has been filed, inter alia, challenging the order dated 23rd October, 2003 issued by the Director General, Border Security Force (in short, BSF).
2. It is the petitioner's case that the petitioner was appointed as a Constable in the BSF in 84-Battalion in the year 1981. In course of his employment he was transferred and posted at several places and he worked as per direction of the higher authorities.

3. In the year 1992, the petitioner was transferred and posted at 12-Battalion, Simanagar, Nadia. While working as Naik at Simanagar, he claims to have been falsely implicated in a case initiated on 8th July, 1993, on the basis of a complaint made by one Gorak Nath Prosad before the Deputy Inspector General, B.S.F., Calcutta, alleging therein that on 29th September, 1992, the petitioner had outraged the modesty of his minor daughter.
4. Following the aforesaid, the petitioner was placed under suspension and a charge-sheet dated 30th November, 1993 was issued. After holding a Summary Trial, before Summary Security Force Court, the petitioner was dismissed from service and struck off from the strength of the unit with effect from 3rd January, 1994 (AN).
5. The petitioner claims that subsequently, vide order dated 5th March, 1994, the Competent Authority, being the DIG, Security, Headquarters, Calcutta, on a review of the Summary Trial before the Summary Security Force Court (in short, SSFC), in the writ petitioner's case had set aside the proceedings, including conviction and sentence on the ground of procedural irregularities in the said proceedings and had accordingly directed reinstatement of the petitioner without prejudice to the rights and contentions of the parties.

6. Following the aforesaid, the petitioner was reinstated in service and was also put under suspension vide order dated 11th May, 1994. Simultaneously, a charge-sheet under Rule 53(2) of the BSF Rules, 1969 (hereinafter referred to as the said Rules) was served on the petitioner. It was categorically provided therein that the proceedings shall be held before SSFC. The aforesaid charge is reproduced herein below:

"CHARGE SHEET

Rule – 53(2)

The accused No.81844028 LNK (Now NK) Hazer Biswas of 12 Bn BSF (now attached with 92 Bn BSF) is charged with:-

BSF ACT

Sec - 46

**COMMITTING A CIVIL OFFENCE THAT IS TO SAY
USING CRIMINAL FORCE TO A WOMAN WITH
INTENT TO OUTRAGE HER MODESTY
PUNISHABLE U/S 354 IPC.**

In that he,

While performing the duties of Nursing Asistant in 12 Bn BSF M I Room, on 29th Sept' 92; used criminal force to Miss X, age 12 Yrs, daughter of No.74002877 LNK Gorakh Nath Prasad of 12 Bn BSF (Now posted to 173 Bn BSF) intending to outrage her modesty.

*PLACE : HQ92 BN BSF
Dated : 11/05/1994*

*(VIMAL MOHAN)
COMMANDANT
92 BN BSF*

To be tried by SSFC”

Note: In this order the name of the minor girl has been masked and renamed as Miss X.

7. Simultaneously, the petitioner was also served with a notice dated 12th May, 1994, intimating that the proceedings of the court shall take place on 14th May, 1994 and the petitioner shall be entitled as per the provisions of the BSF Act and Rules framed thereunder to choose any friend who can remain present during trial.
8. After conclusion of such proceedings, by an order dated 8th June, 1994, sentence was promulgated by the court and the petitioner was dismissed from service and accordingly, struck off from the strength of the 12-Battalion with effect from 8th June, 1994.
9. Challenging the aforesaid order of dismissal, a writ petition was filed before this Hon’ble Court, which was registered as C.O. 701 (W) of 1994.
10. By an order dated 1st April, 1998, a coordinate Bench of this Hon’ble Court was pleased to dismiss the said application ex parte on merit, inter alia, by holding as follows:-

“This ground of challenge amongst other substantially is that the second Departmental

enquiry is invalid and illegal since he was exonerated from allegations of misconduct after holding the enquiry which found him not guilty. Moreover, it has been further stated that the charge sheet issuing Authority has no jurisdiction to issue the charge-sheet.

It appears that the summary trial was held under the provision of law. All these points must have been taken care of therein and it is not now open to agitate upon the jurisdiction after participating in the said summary trial. In that view of the matter, I dismiss this writ petition.

There will be no order as to costs”.

The petitioner had, however, questioned the said order in review, which was registered as RVW 2383 of 1998.

11. By an order dated 8th May, 2003, a coordinate Bench of this Hon'ble Court by overruling the question of maintainability of the said application was, *inter alia*, pleased to hold that although the challenge thrown by the petitioner as regards the enquiry based on the second charge-sheet on the selfsame ground appears to be quite substantial which goes to the root of the matter, yet after examining the order of reinstatement, it had become apparent that the said order was set aside on the ground of procedural irregularity and the writ petitioner having been reinstated without prejudice to the rights and contentions of the parties, the Court did not find any

infraction of any of the provisions of the law which could warrant a review. However, at the same time, the Co-ordinate Bench of this Hon'ble Court while dismissing the review application permitted the petitioner to prefer the statutory appeal by modifying its earlier order.

12. Pursuant to the leave granted by the coordinate Bench of this Court, the petitioner appears to have preferred an appeal from the aforesaid order. By an order dated 23rd October, 2003, the Appellate Authority had disposed of the appeal on merit. The said appellate order forms the subject matter of challenge in the present proceedings.

13. Mr. Bhattacharya, learned advocate representing the petitioner submits that the Appellate Authority did not decide the questions raised by the petitioner in the appeal. According to Mr. Bhattacharya, the Appellate Authority did not take into consideration that the entire proceedings has been proceeded without there being any complaint lodged on behalf of the minor girl. There had been infraction of Rule 46 of the said Rules, inasmuch as, the petitioner had been attached to another unit. According to him, attachment to another unit is only possible, provided the conditions mentioned therein are satisfied. This according to Mr. Bhattacharya, vitiated the enquiry. It is still

further submitted that the petitioner was not permitted to choose a friend of the accused. The defence witnesses statements were not recorded and the petitioner was not permitted to cross-examine the prosecution witnesses in a proper manner. There had been a delay in lodging the complaint and on the basis of such complaint, no enquiry ought to have been initiated. Further the petitioner could not have been subjected to double jeopardy for self-same allegation.

14. In the facts as stated above, it is submitted that the enquiry proceedings, which otherwise stand vitiated should be quashed and set aside.

15. *Per contra*, Ms. Sha, learned advocate representing the respondents has produced before this Court the original enquiry proceedings. According to her, the enquiry was conducted as per the rules. The petitioner was granted opportunity and had participated in the enquiry proceedings. The petitioner was given reasonable opportunity to defend. It is not the case of the petitioner that the principle of natural justice had been violated. She says that the issue whether the disciplinary proceedings can be initiated and proceeded against the petitioner after the petitioner had been reinstated, has already been decided by a Co-ordinate Bench of this Court. Such an issue could no longer be challenged by the writ

petitioner by filing a fresh writ application. In the aforesaid facts, it is submitted that the writ petition should be dismissed.

16. I have heard the learned advocates appearing for the respective parties and considered the materials on record. I find that in the present case the writ petitioner had been charge-sheeted as per Rule 53(2) of the BSF Rules and put under suspension on 11th May, 1994 following his reinstatement vide order dated 5th March, 1994. He was tried in a proceeding before the SSFC, which culminated in an order of removal dated 8th June, 1994 whereby his name was struck off from the 12th Battalion. Challenging the same, a writ petition was filed and the same was registered as CO/CR No. 701(W) of 1994.

17. As noted above, a Co-ordinate Bench of this Court by a judgment and order dated 1st April, 1998, was, *inter alia*, pleased to dismiss the said application, though ex parte, on merits. Subsequently, although a review application was filed, such review application was not entertained. However, while dismissing such application the coordinate Bench of this Hon'ble Court by an order dated 8th May, 2003, while taking note of the objection raised by the writ petitioner as regards the jurisdiction and/or authority of the respondents to initiate a second proceedings was, *inter alia*, pleased to overrule the same by observing as follows:-

“At the first blush point raised by him appeared to me is quite substantial as this legal provision goes to the very root of the matter. I find I did not on earlier occasion decide as to legality and validity on the aspect of subsequent charge-sheet on the self-same charges.

So I have examined the order of reinstatement and withdrawal of dismissal order was not on merit but on account of some procedural irregularity and lapses. The order of reinstatement was passed without prejudice to the rights and contentions of the parties, meaning thereby reserving the right to proceed afresh which is not precluded under the Rules and Section. So I do not find any infraction of any provision of the law, so as to declare there is an error apparent on the face of the records in dealing with such provisions of law in my judgment and order.

As such the review application fails and the same is hereby dismissed, however, without awarding any costs”.

18. The Co-ordinate Bench of this Court further by the selfsame order while modifying its previous order permitted the petitioner to prefer an appeal.
19. The petitioner, pursuant to the liberty granted by the coordinate Bench of this Court had preferred an appeal before the Appellate

Authority which ultimately culminated in the order dated 23rd October, 2003.

20. I find that the petitioner had contended that the petitioner was not permitted to choose a friend of the accused. Unfortunately, the petitioner could not identify any contemporaneous document in this regard. The record of the proceedings would reveal that by a notice dated 12th May, 1994, the Deputy Commandant while intimating the petitioner, the date and time of the proceedings to be held before the SSFC, had permitted the petitioner to choose a friend who can remain present during the trial.

21. Although, the petitioner by relying on page 41 of the writ petition claims that the petitioner had exercised such option, there are no contemporaneous documents to demonstrate that the petitioner was denied the right to choose a friend of the accused. The enquiry proceedings do not reflect any objection made by the petitioner in this regard.

22. Apart from the aforesaid, the petitioner claims that the Appellate Authority did not address the issue raised by the petitioner that the statement of the defence witnesses were not at all recorded. It has also been contended that the petitioner was not permitted to cross-examine the prosecution witnesses in a proper manner. I have perused and have considered the records of the proceedings which

have been produced. I find not only the statement of prosecution witnesses including the minor girl were recorded but the petitioner was permitted to cross-examine the minor girl. The extent of cross-examination of the minor would reveal that the petitioner in his cross-examination had left no stone unturned. I, however, find that the minor girl had stuck to her testimony during cross-examination that she had given in her examination-in-chief. I find that the statement of the minor girl corroborates the prosecution case and the charge-sheet. I also find that although the proceeding was said to be conducted in a summary manner, at each and every stage, the procedural rules and rules of natural justice have been complied with. I also note that the defence witnesses were examined and re-examined by the petitioner and their statements have been duly recorded.

23. Ordinarily, in a case of juridical review, Court is not called upon to examine evidence. In this case, since the petitioner had alleged that the entire proceedings had been initiated without there being any complaint lodged on behalf of the minor girl and since the allegation against the petitioner was serious in nature, I had examined the records and did not find any glaring inconsistency either in the deposition of the prosecution witnesses or in the prosecution case.

24. I find that lot of stress has been laid by the Mr. Bhattacharya to inter alia contend that the petitioner had been attached to another unit and the same has the effect of vitiating the enquiry proceedings. In order to appropriately appreciate the aforesaid provision, the relevant provision from the BSF Rules is extracted herein below:-

“46. Attachment to another unit. – The Commandant shall not deal with any case –

(i) Where the offence with which the accused is charged is against the Commandant himself, or

(ii) Where the Commandant is himself a witness in the case against the accused, or

(iii) Where the commandant is otherwise personally interested in the case and the accused shall be attached to another battalion or unit for disposal of the case under the order of the Deputy Inspector-General:

Provided that a Commandant shall not be disqualified from hearing a charge merely because the offence was committed against the property of a Force Mess, band or institution of which the Commandant is a member or trustee or because the offence is one of disobedience of such Commandant's orders:

[Provided further that a person may also be attached to any Battalion, Unit Headquarter or Establishment on the ground of any service exigency

under orders of his Deputy Inspector-General or any other superior officer or Authority]”.

25. In my view, the aforesaid provision has been engrafted in the BSF Rules to remove failure of justice. Admittedly, in this case, the petitioner was attached to another unit to remove any allegation of unfairness. The proceedings cannot stand vitiated on such ground.
26. The issue whether a second enquiry could be conducted against the petitioner is no longer *res integra*. The Co-ordinate Bench had decided such an issue and has held that there is no irregularity in holding a fresh enquiry as the petitioner was reinstated without prejudice to the right of the parties meaning thereby reserving the right to proceed afresh.
27. The proceedings before the SSFC does not suffer from any glaring inconsistency and the same appears to have been held in a free and fair manner and there is nothing to the contrary. The Appellate Authority had duly considered the petitioner's case and had dismissed the same by a detailed judgment. I further find that the petitioner had participated in the proceedings before the SSFC, without raising any objection. There also does not appear to be any inherent lack of jurisdiction of the SSFC to conduct the proceedings. I do not find any irregularity in the order passed by SSFC or by the Appellate Authority dated 23rd October, 2003. No case for interference has been made out. The writ application fails.

28. The writ application, being WPA 18232 of 2003 is accordingly dismissed.

29. There shall be no order as to cost.

30. The original records of the proceedings are hereby returned to the learned advocate for the respondents.

(Raja Basu Chowdhury, J.)

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