

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

MAT 932 of 2023

Union of India & Ors.
-Versus-
Ashok Kumar Som

For the Appellants in : *Mr. Rajdeep Majumder,*
[MAT 932 of 2023] *Mr. Anirban Mitra,*
Mr. Moyukh Mukherjee.

For the Respondent in : *Mr. Swarnandu Ghosh,*
[MAT 932 of 2023] *Mr. Bidhayak Lahiri,*
Ms. Bhaswati Lahiri.

Hearing is concluded on : *11th December, 2024.*

Judgment On : **9th January, 2025.**

Tapabrata Chakraborty, J.

1. The present appeal has been preferred by Union of India and its functionaries challenging the judgment dated 24.11.2022 delivered by the

learned Single Judge in the writ petition preferred by one Ashok Kumar Som (hereinafter referred to as Ashok) being WPA 2076 of 2008.

2. The facts in brief are as follows. Ashok was initially appointed to the post of Constable under the 46 battalion (in short, 46 Bn) of the Border Security Force (hereinafter referred to as BSF) on 13.03.1985. While he was working in the post of Head Constable, the Commandant of the 46 Bn being the respondent no.6/ the appellant no.5 herein suspended Ashok *vide* memo dated 10.06.2007 in contemplation of a disciplinary proceeding. Thereafter, pursuant to a memo dated 23.07.2007 issued by the appellant no.5, the Record of Evidence (in short ROE) proceedings were initiated. The ROE was prepared upon hearing Ashok and granting him opportunity to cross-examine the prosecution witnesses and to produce defence witnesses. Upon conclusion of the said proceedings, the copies of the same were served upon Ashok *vide* memo dated 19.09.2007 issued by the appellant no.5. Thereafter *vide* memo dated 20.09.2007, the appellant no.5 took a decision to try Ashok by holding a Summary Security Force Court (in short SSFC). Ashok was thereafter tried by SSFC and *vide* memo dated 21.09.2007, the said appellant no.5 imposed a punishment of dismissal from service and Ashok was struck off from the strength of 46 Bn. Aggrieved by the said order, Ashok submitted a statutory petition on 10.10.2007 and the same was dismissed by an order dated 31.12.2007. Challenging *inter alia* the order of the appellate authority, Ashok preferred the writ petition in the year 2008 and the same was disposed of about 14 years thereafter by the judgment impugned in the present appeal.

3. Records further reveal that the stay application filed in connection with the appeal was disposed of by an order dated 01.04.2024. The operative part of the said order runs as follows:

‘Prima facie, we do not find any reason to interfere with the order passed by the learned Single Judge. However, the appellants upon depositing a sum of Rs. 18 lacs with the learned Registrar General within a period of three weeks from date shall be entitled to stay of operation of the impugned order till the disposal of the appeal. There shall be an unconditional stay of operation of the impugned order for a period of three weeks However, in the event the aforesaid sum is deposited in the meantime, the stay shall continue till the disposal of the appeal’.

Pursuant to such direction the amount of Rs. 18 lacs was deposited by the appellants.

4. Drawing our attention to the definition of Commandant as provided under Section 2 (f), Section 70 of the BSF Act and Rule 51 (3) (iii) of the Border Security Force Rules, 1969 (in short, BSF Rules), Mr. Majumder, the learned Assistant Additional Solicitor General submits the Commandant of the unit is the sole person competent to constitute and conduct the SSFC. Neither in the statutory petition nor in the writ petition it was alleged that the Commandant of the unit had no jurisdiction to issue the chargesheet or to hold the SSFC and as such the impugned judgment was delivered considering an issue alien to the pleadings. Such argument, as advanced, was glossed by the learned Single Judge and no finding was returned on the same.

5. He argues that no prejudice had been caused to Ashok since the Commandant of Ashok's unit issued the chargesheet and held the SSFC. It is not a case that the Ashok was denied cross-examination of the witnesses or was prevented from citing his defence witnesses. In the said conspectus, there had been no violation of the principles of natural justice.

6. Placing reliance upon an unreported judgment delivered by the Hon'ble Supreme Court in case of *Union of India versus Shri Dickson Chand Marak*, Mr. Majumder argues that the said judgment is clearly applicable to the facts of the present case. In the said judgment the question involved was as to '*whether the Commanding Officer of the respondent suffered from any disability or disqualification from trying the respondent as Summary Court as he had signed and issued the charge sheet*'. The said question was answered in the negative. In view thereof, the finding of the learned Single Judge to the effect that '*an officer who issued a chargesheet against a proposed delinquent cannot act as the Court where such charge is to be proved*', is not sustainable. A similar issue was also considered by the Hon'ble Delhi High Court in the case of *Deepak versus Director General of Border Security Force and Ors.*, reported in (2023) SCC OnLine Del 7980 and a finding was returned that the Commandant of the unit was empowered to issue the chargesheet and to preside over the trial.

7. He argues that the allegations levelled by Ashok as regards denial of sufficient time to prepare his defence and to face the SSFC was rightly discounted by the learned Single Judge observing *inter alia* that Ashok was granted sufficient opportunity to cross-examine the witnesses at the ROE

and the provisions of Rules 48 and 63 of the BSF Rules were scrupulously followed. The allegation that sufficient reasons were not disclosed towards imposition of the penalty of dismissal of service was also discounted placing reliance upon the judgment delivered by the Hon'ble Supreme Court in the case of *Union of India Vs. Dinesh Kumar*, reported in (2010) 3 SCC 161.

8. He argues that the appellant no.5 had every jurisdiction to issue the charge sheet and to preside over the trial. Merely because the charge sheet had been signed by the Commandant, would not make him an interested party moreso when he was not even a witness to the alleged incident. Reliance has also been placed upon a judgment delivered by a learned Single Judge of this Court in the case of *Anil Kumar Tiwari Vs. The Union of India & Ors.*, reported in 2019 SCC Online Cal 2339.

9. *Per contra* Mr. Ghosh, learned advocate appearing for Ashok denies and disputes the contention of Mr. Majumder and submits that there is no specific mandate in the statute that only the Commandant of a particular unit has the jurisdiction to conduct a disciplinary proceeding or to hold the SSFC. In support of such contention, he has drawn our attention to the opening words '*unless the context otherwise requires*' in Section 2(1) and the provisions of Section 64, 68, 69 and 70 of the BSF Act.

10. Drawing our attention to Rule 46 of the BSF Rules, he argues that the Commandant '*otherwise personally interested in the case*' shall not deal with the same. Herein the Commandant of 46Bn having issued the chargesheet and having acted as the Interpreter in the proceedings, ought not to have conducted the SSFC. In the said conspectus, it cannot be ruled out that the

Commandant of the unit was otherwise personally interested in the case and as such the learned Single Judge rightly observed that '*such procedure would strike a death knell to the basic principles of natural justice*' and that '*holding of the Summary Security Force Court by the same officer who had issued the charge-sheet is patently erroneous and is antithetic to the basic tenets of natural justice such that it shocks the conscience of this Court*'. Even if a power is given to a body without specifying that the rules of natural justice should be observed in exercising it, the nature of the power would call for its observance. In support of such contention reliance has been placed upon the judgment delivered in the case of *Mohinder Singh Gill versus Chief Election Commission, New Delhi and Ors.*, reported in 1978 (1) SCC 405.

11. Placing reliance upon the judgment delivered in the case of *Union of India & Ors. versus B.N. Jha*, reported in (2003) 4 SCC 731, he argues that the duty to act fairly is the theme of the principles of natural justice. In the present case the appellant no.5 issued the charge sheet and conducted the SSFC. He was thus in a position where bias may be assumed. Such assumption applies to all tribunals and bodies which are given jurisdiction to determine judicially the rights of the parties. In such circumstances, the appellant no.5 ought to have recused himself from conducting the SSFC.

12. He contends that any person who has a personal stake in an inquiry must keep himself aloof from the conduct of the inquiry. The order of dismissal stands vitiated as the person who issued the chargesheet was deciding as to whether he has rightly issued the charge sheet imputing

misconduct upon the employee or as to whether the employee was not guilty of the misconduct alleged. In support of such argument, reliance has been placed upon the judgment delivered by the Hon'ble Supreme Court in the case of *Arjun Chaubey Vs. Union of India & Ors.*, reported in *AIR 1984 SC 1386*. Such legal proposition has not been dealt with in *Union of India Vs. Shri Dickson Chand Marak (supra)* and as such the same cannot be construed as a precedent in the facts of this case, moreso when the said judgment was delivered without considering the proposition of law laid down in the cases of *Mohinder Singh Gill (supra)* and *Union of India & Ors. versus B.N. Jha (supra)*.

13. We have heard the learned advocates appearing for the parties at length and we have given our anxious consideration to the facts and circumstances of the case.

14. The submissions of Mr. Ghosh primarily flag the following issues. First, the principles of natural justice have been a casualty in the proceedings. Second, the appellant no.5 has disclosed a predisposition against the appellants almost bordering on a real likelihood of bias. Law is settled on the point that natural justice is not a straightjacket formula. Natural justice should not be defined in a doctrinaire manner or method and compliance with its principles shall depend on the facts and circumstances of each case.

15. In the writ petition no plea was set up that the appellant no.5 was not legally competent to preside over SSFC. In the proceeding there was no

allegation of personal bias or a legal likelihood of bias against the appellant no.5. At no stage of the proceeding or in the statutory appeal it was urged by Ashok that he should be tried by a Commandant of any other unit. The appellant no.5 was also not a witness to the alleged incident and as such it cannot be urged that Ashok was prejudiced as the said appellant no.5 had conducted the SSFC. It is neither a General Security Force Court nor a Petty Security Force Court where Ashok's case was tried and decided. In the present case the SSFC had been convened by the Commanding Officer according to the provisions of the BSF Act.

16. A perusal of the impugned judgment would clearly reveal that the Ashok's allegation as regards denial of sufficient time to prepare his defence, failure on the part of the authorities to prove offer and acceptance of bribe, non-disclosure of reasons in the order imposing penalty and that the SSFC had not properly appreciated the evidence, were all discounted by the learned single Judge. Indisputably, such findings have not been challenged by Ashok.

17. The present appeal is thus restricted to the sole issue as to whether the appellant no.5 having issued the chargesheet could have tried the writ petitioner as a Summary Court. The said issue is no longer *res-integra* and has been decided by the Hon'ble Supreme Court in the case of *Union of India Vs. Shri Dickson Chand Marak (supra)*. In the said case the Hon'ble Supreme Court was deciding an appeal preferred against a judgment passed by the Division Bench of the High Court dismissing a writ appeal against an order passed by the learned Single Bench by which the writ petition was allowed

and the order of dismissal was set aside. The respondent in the said appeal was appointed as a constable in BSF. Alleging possession of assets disproportionate to his known sources of income, a chargesheet was issued and subsequently he was tried by SSFC and a dismissal order was issued against him. The learned Single Bench of the High Court set aside the order of dismissal since the Commanding officer of the respondent tried him as a Summary Court. The facts in the said judgment are almost identical to the facts of this case and it cannot be urged that the same is distinguishable in facts. The said judgment was delivered placing reliance upon the judgments delivered in the cases of *Union of India vs. Dinesh Prasad*, reported in (2012) 12 SCC 63 and *Union of India vs. Vishav Priya Singh*, reported in (2016) 8 SCC 641. In the case of *Union of India vs. Dinesh Prasad (supra)* wherein also the *lis* was that the very Commandant of the Battalion, who signed and issued the charge sheet, convened and presided over the summary court-martial and on conclusion of which the punishment of dismissal from service was imposed. The legal position expounded by the Hon'ble Supreme Court in the case of *Union of India Vs. Shri Dickson Chand Marak (supra)* renders the judgment impugned in the present appeal unsustainable.

18. Mr. Ghosh has placed heavy reliance upon the decisions of the Hon'ble Supreme Court in the cases of *Mohinder Singh Gill and Another versus Chief Election Commission, New Delhi and Ors.*, reported in (1978) 1 SCC 405, *Union of India & Ors. versus B.N. Jha*, reported in (2003) 4 SCC 531 and *Arjun Chaubey Vs. Union of India & Ors.*, reported in AIR 1984 SC 1356 in support of his submission that the order of dismissal from service by

SSFC was in violation of principles of natural justice. We are afraid none of these decisions have any application to the facts of the present case.

19. The argument of Mr. Ghosh that the judgment delivered in the case of *Union of India Vs. Shri Dickson Chand Marak (supra)* cannot be treated as a binding precedent is, however, not acceptable to us inasmuch as in the said judgment the Hon'ble Supreme Court upon arriving at a categoric finding that the Commandant, who issued the chargesheet, has the jurisdiction and competence to conduct the SSFC, set aside the judgment impugned therein. Such finding neither can be construed as a direction under Article 142 of the Constitution nor an obiter. The judgment delivered in the case of *Union of India Vs. Shri Dickson Chand Marak (supra)* constitutes a binding precedent within the meaning of Article 141 of the Constitution. The finding arrived at by the Hon'ble Supreme Court in the said judgment is neither a remark made nor an opinion expressed by the Court upon the cause by way of an illustration, argument, analogy or expression and as such the same cannot also be construed as an obiter.

20. For the reasons discussed above, the directions contained in the judgment dated 24.11.2022 quashing the orders impugned in the writ petition being WPA 2076 of 2008 and the observation that Ashok would be entitled to reinstatement and/or back wages and other benefits, are set aside.

21. The Registry is directed to refund the amount deposited by the appellants pursuant to the earlier direction of the Court dated 01.04.2024 along with the interest accrued thereon.

22. The appeal is, accordingly, disposed of.

23. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)