

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

SWP No.1672/2008

Date of decision: 29.11.2016

Mohd Mahibur Rahamn

vs.

Union of India and ors.

Coram:

Hon'ble Mr. Justice Alok Aradhe, Judge

Appearing counsel:

For the petitioner (s) : Mr. Navneet Dubey, Advocate

For the respondent(s) : Mr. Ravinder Gupta, CGSC

(i)	Whether to be reported in Press, Journal/Media:	Yes/No
(ii)	Whether to be reported in Journal/Digest:	Yes/No

In this writ petition preferred under Article 226 of the Constitution of India read with Section 103 of the Constitution of State of Jammu and Kashmir, the petitioner *inter alia* has assailed the validity of order dated 09.02.2002, by which the penalty of dismissal from service has been imposed on the petitioner after holding the General Security Force Court proceeding against the petitioner. The petitioner also seeks a direction to the respondents to reinstate him in service with all consequential benefits and to accord him promotion to the post of Head Constable. In order to appreciate the petitioner's grievance, few facts need mention, which are stated infra.

2. The petitioner was enrolled in the Border

Security Force on 16.04.1987 as Constable (General Duty). The petitioner at the relevant time i.e. on 25th-26th of September, 2000 was posted at the Forward Defence Location of the Border Security Force in Poonch Sector along with one Manoj Kumar of 4 Grandeurs of Army. It is alleged that the petitioner has fired five bullets from his SLR upon the said Manoj Kumar in a state of intoxication. On the aforesaid ground, on 09.10.2000 the petitioner was charged with commission of offences under section 16(c) and section 40 of the Border Security Force, Act 1968 ((hereinafter to be referred as the Act). The petitioner was tried by the Summary Security Force Court on 11.10.2000 and was convicted for commission of the said offences and was sentenced to undergo imprisonment for a term of 89 days in force custody along with further punishment of disnon for the 89 days and loss of increment for a period of one year. However, vide order dated 08.12.2000, the respondents annulled the Summary Force Court trial and sentence dated 11.10.2000 on the ground of lack of jurisdiction, as the same was violative of Section 74 (2) of the Act.

3. The petitioner was again put in open arrests and in close arrests by the Commandant 93 Battalion of the BSF and was ordered to undergo fresh trial

by a General Security Force Court. The petitioner was again charged for the commission of offences under section 16 (c) and section 46 of the Act on the allegation that the petitioner had fired upon Manoj Kumar in a state of intoxication and the charge under Section 307 of RPC i.e. attempt to murder was also levelled against the petitioner. The petitioner was tried by the General Security Force Court, which found that the charge of intoxication against the petitioner was not proved. Accordingly, the charge under section 16 (c) was dropped. The charges under section 20 (a) and 20(c) were also not found to be proved by the General Security Force Court. However, charge under section 46 of the Act found to be proved and the petitioner was sentenced to undergo six months imprisonment with further punishment of dismissal from the service. Thereupon, the petitioner preferred an appeal. The Director General of the BSF remitted the jail sentence of six months of the petitioner but upheld the punishment of dismissal from service. In the aforesaid factual background, the petitioner has approached this Court seeking relief as stated supra.

4. Learned counsel for the petitioner submitted that the conviction and sentence of the Summary Security Force Court dated 11.10.2000 could not be cancelled on the technical ground like lack of

jurisdiction and, therefore, order of cancellation of conviction and sentence imposed by the Summary Security Force Court vide order dated 08.12.2000 is patently illegal. It is further submitted that there was no lack of jurisdiction as the trial of the petitioner took place at the place of incident. It is further submitted that Section 74 (2) of the Act, which has been invoked for cancellation of conviction and sentence, does not apply to the case of the petitioner as section 16 (c) and section 40 of the Act have not been mentioned under section 74(2) of the Act. It is also submitted that trial by the General Security Force Court is barred by Section 75 of the Act and is violative of Article 20 of the Constitution of India.

5. It is argued that the petitioner was validly convicted and sentenced by the Summary Security Force Court and the petitioner cannot be punished for the second time in respect of the same charges. It is also submitted that the conviction and sentence of the petitioner by the General Security Force Court dated 31.12.2001 is barred by section 403 of Code of Criminal Procedure on the ground of issue estoppel. Lastly, it is urged that the conviction under section 46 of the Act is perverse in view of the fact that charge of intoxication was not proved and, therefore, the other part of the charges

could not have been proved. In support of the aforesaid submissions, reliance has been placed on the decision of the Supreme Court in the case of **Manipur Administration, Manipur v. Thokchom Bira Singh, AIR 1965SC 87.**

6. On the other hand, learned counsel for the respondents submitted that ingredients of both the charges are different, therefore, the doctrine of double jeopardy does not apply to the fact situation of the case. In support of his submissions, learned counsel for the respondents has relied on the decisions of the Supreme Court in the cases of **A.A Mulla and ors. vs. State of Maharashtra and anr., 1996 (4) Crimes (SC) 125, State of Rajasthan v. Hat Singh and ors. (2003) 2 SCC 152, State of Karnataka through CBI vs. C. Nagarajaswamy, AIR 2005 SCW 5240, State of Goa v. Babu Thomas, AIR 2005 SC 3606, Mr. Banwari Lal Yadav vs. Union of India and anr., 134 (2006) DLT 353, Monika Bedi vs. State of A. P. (2011) 1 SCC 284, Sangeetaben Mahendrabhai Patel vs. State of Gujarat and anr. (2012) 7 SCC 621, State of NCT of Delhi vs. Sanjay, (2014) 0 Supreme (SC) 53171, Nadimuddin vs. State of M. P, 2016 CriLJ 1408.**
7. I have considered the submissions made by the learned counsel for the parties and have perused

the record of the inquiry produced by the learned counsel for the respondents. Before proceeding further it is apposite to take note of the relevant statutory provisions. Sections 16, 40, 46 and 74(2) of the Act read as under:

“16. Offences punishable more severely on active duty than at other times.-Any person subject to this Act who commits any of the following offences, that is to say,-

- (a) forces a safeguard, or forces or uses criminal force to a sentry; or
- (b) breaks into any house or other place in search of plunder; or
- (c) being a sentry sleeps upon his post, or is intoxicated; or
- (d) without orders from his superior officer leaves his guard, picket, patrol or post; or
- (e) intentionally or through neglect occasions a false alarm in camp or quarters, or spreads or causes to be spread reports calculated to create unnecessary alarm or despondency; or
- (f) makes known the parole, watchword or countersign to any person not entitled to receive it; or knowingly gives a parole, watch-word or countersign different from what he received shall, on conviction by a Security Force Court:-

(A) If he commits any such offence when on active duty, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and

(B) If he commits any such offence when not on active duty, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

“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.

46. Civil offences. Subject to the provisions of section 47, any person subject to this Act who at any place in, or beyond India, commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Security Force Court and, on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.”

“74. Powers of a Summary Security Force Court-

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court for the trial of the alleged offender, an officer holding a Summary Security Force Court shall not try without such reference any offence punishable under any of the sections 14, 17 and 46 of this Act, or any offence against the officer holding the court.”

07. From the perusal of the record, it is evident that on 25.09.2000, the petitioner was deputed for night sentry duty in pair along with an Army Jawan, namely, Manoj Kumar. However, during

the duty time, the petitioner left his place of duty with the excuse of having dinner and instead started consuming liquor. The petitioner did not turn for sentry duty, thereupon, the said Manoj Kumar went to the bunker to call him to resume his duty but the petitioner being in a state of intoxication started abusing him and thereafter when he was told by Manoj Kumar that he is going to make report against him, the petitioner got infuriated and fired five shots towards Manoj Kumar. The petitioner was thereupon charged under sections 40 and 16(c) of the Act. The order of punishment dated 02.11.2000 was passed. The Summary Security Force Court proceeding was sent to the Law Officer Grade-I for review, who gave his opinion that the proceeding suffers from legal infirmities, taking into account totality of the evidence and particulars of charge, the petitioner should have been charged for committing a civil offence under section 46 of the BSF Act read with section 307 of RPC i.e. attempt to murder. Thereupon, the Summary Security Force Court proceedings were set aside due to lack of jurisdiction and it was directed that the charge under section 46 of the Act i.e. attempt to murder punishable under section 307 RPC be framed against the petitioner.

08. It is pertinent to mention here that the petitioner pleaded guilty to both the charges. Thereupon,

the petitioner was placed under suspension vide order dated 27.12.2000. At this stage it is relevant to take note of the charges framed against the petitioner by the Summary Security Force Court as well as General Security Force Court, which are reproduced as under:

(i) Charge framed by the Summary Security Force Court:

"The accuse No. 871081755 Const. MD. M Rehman, 'F' Coy 93 Bn. BSF is charged with:-

- | | |
|--------------------------------|--|
| i) BSF Act, 1968
Sec. 16(c) | <p><u>WHEN A SENTRY BEING INTOXICATION</u>
In that he,

at FDL 431 on 25.09.2000 at about 2015 hrs. when sentry at the said picquet, was found intoxicated.</p> |
| ii) BSF Act, 1968
Sec. 40. | <p><u>AN ACT PREJUDICIAL TO GOOD ORDERS AND DISCIPLINE OF THE FORCE.</u>
In that he,

At 2015 hrs on 25.9.2000 under the influence of liquor fired 05 (five) rounds of SLR mm by his personnel weapon SLR butt No. 568 body No. D-2631 on No. 2693389 2K Gdr. Manoj Kumar of 'D' Coy 04 Grenadier at FDL-431."</p> |

(ii) The Charges framed by the General Security Force Court:

"CHARGE SHEET NO. 1.

BSF Act 1968 Section 46

Committing a civil offence that is to say attempt to murder punishable under section 307 of RPC

In that the petitioner at FDL 431 on 25.09.2000 fired five shots of 7.62 mm SLR at No. 2693892k Grenadier Manoj Kumar of 04 Grenadiers who was deployed at the same FDL with intent to kill him.

CHARGE SHEET NO. II

FIRST CHARGE

BSF Act 1968 Section 20(a)

Using criminal force to his superior officer

In that the petitioner at Bn. HQ 93 Bn. BSF Achhad on 10.07.01 at about 1800 hrs struck with his fist on the chest of No. 87755010 HC KC Singh of same unit.

SECOND CHARGE

BSF Act 1968 Section 20(c)

Using insubordinate language to his superior officer.

In that the petitioner at Bn. HQ 93 Bn. BSF Achhad on 10.07.01 at about 1800 hrs used insubordinate language to No. 87755010 HC KC Singh by saying "isko kay pata hai, pata nahin kis ullu ke pathe ne havildar bana diya hain" and words to that effect."

09. The petitioner thereupon was tried by the General Security Force Court. The petitioner engaged a lawyer to defend his case. The offence mentioned in the first charge sheet i.e. section 46 of the Act read with section 307 of RPC was found to be proved, but offences under section 20(a) and section 20(c) of the Act were not found to be proved due to lack of evidence. The General Security Force Court thereupon sentenced the petitioner to suffer imprisonment for six months and for dismissal from service. On an appeal being preferred by the petitioner, sentence of six months was *set aside* but punishment of dismissal from service was upheld by the appellate authority. Thus, from the above narration facts and material available on record, it is evident that in fact the charge under section

46 of the Act ought to have been framed at the first instance. However, the same was framed under sections 16 and 40 of the Act. The Summary Security Force Court proceeding was rightly set aside as the Summary Security Force Court, in view of bar contained under section 74(2) of the Act, has no power to try the offence under section 46 of the Act. Therefore, the contention of the petitioner that section 74(2) of the Act could not be invoked for holding that the Summary Security Force Court's proceeding, was per se illegal, cannot be accepted.

10. From the close scrutiny of the charges levelled against the petitioner, which were tried by the Summary Security Force Court and the General Security Force Court, it is evident that the ingredients of the offences are different, therefore, neither the provisions of the section 75 of the Act nor Article 20 of the Constitution of India, are applicable in the facts of the case. On the same analogy, the principle of issue estoppel does not apply to the fact situation of the case. The findings with regard to the commission of offence under section 46 of the Act are based on meticulous appreciation of evidence on record and this Court in exercise of powers under Article 226 of the Constitution of India read with section 103 of the Constitution of State of Jammu and Kashmir cannot act as an appellate

authority. Therefore, the submission of the learned counsel for the petitioner that conviction under section 46 of the Act is perverse, also sans substance.

11. In view of the preceding analysis, I do not find merit in this writ petition. The same fails and is hereby dismissed.

(Alok Aradhe)
Judge

Jammu
29.11.2016
Karam Chand