

CASE NO.:
Appeal (crl.) 788-789 of 1999

PETITIONER:
Shiv Parshad Pandey

RESPONDENT:
C.B.I. Through Director, New Delhi

DATE OF JUDGMENT: 05/03/2003

BENCH:
N.Santosh Hegde & B.P.Singh

JUDGMENT:
J U D G M E N T

SANTOSH HEGDE, J.

These appeals are filed against the judgment and order dated 14th of September, 1988 made by the High Court of Punjab and Haryana at Chandigarh in Criminal Revision No.805 of 1998 and Criminal Misc. No.21520-M of 1997. In those proceedings, the appellant had challenged the order dated 8.7.1998 made by the learned Special Judge, C.B.I., Patiala by which charges were framed against the appellant under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The appellant sought for quashing of the said charges framed by the learned Special Judge, C.B.I., Patiala. But the High Court by the impugned order had dismissed the said petitions.

The facts necessary for the disposal of these appeals are as follows:

The appellant belongs to the Indian Police Service from Madhya Pradesh Cadre. While so serving, the appellant was deployed on deputation in the Border Security Force (BSF) in the year 1992. While he was in the BSF, one Assa Singh made a complaint to the authorities of the BSF alleging certain misconduct of accepting illegal gratification for showing official favour against the appellant. Based on the said complaint of Assa Singh, a court of enquiry was ordered by the BSF authorities on 27th of June, 1995 and an Additional DIG/Commandant STC BSF Khargaon was appointed as Staff Court of Inquiry (SCOI) for that purpose. The said SCOI examined certain witnesses including the complainant Assa Singh and made a recommendation to the higher authorities that necessary disciplinary action may be taken against the appellant herein as per law. On the said recommendation of SCOI, the Inspector General, BSF, Jalandhar on 13th of May, 1996 recommended that instead of initiating further action the appellant may be awarded Director General's "Severe Displeasure" for the misconduct committed by the appellant.

Before any further action could be taken either on the recommendations of the SCOI or the DIG, the appellant was repatriated to his parent cadre of M.P. Police on 16th of July, 1996. In the meantime, the complainant Assa Singh filed another complaint against the appellant before the C.B.I., on the same fact on which he had made the earlier complaint to the BSF authorities. The CBI on completing investigation filed a charge-sheet before the competent court on 23rd of April, 1997. Based on the report filed by the CBI, the Special Judge, CBI, Patiala on 8.7.1998 framed charges and issued the charge-sheet to the appellant. It is against the said framing of charges the appellant had filed quashing petition before the High Court of Punjab and Haryana. Since the Special Judge refused to stay the proceedings before him

during the pendency of the petition before the High Court, the appellant also filed a connected Misc. Petition praying for staying of the proceedings before the Special Judge, CBI, Patiala. It is those petitions which were disposed of by the High Court by the impugned order.

Before the High Court the appellant had contended in view of the provisions of Section 52 read with Section 57 of the Border Security Force Act, 1968 (the BSF Act), the appellant cannot be prosecuted before the Special Judge because the appellant was already tried and awarded a minor punishment of severe displeasure under Section 53 of the BSF Act, therefore, there cannot be a second proceeding on the very same charge under the Prevention of Corruption Act by the CBI. The High Court noticing the fact that the award of DG's "Severe Displeasure" by the DIG BSF was only a recommendation and not actually an award of punishment under the BSF Act rejected the said contention advanced on behalf of the appellant. It also noticed the fact that what transpired before the BSF authorities was only a court of enquiry which was a preliminary fact finding step as per the BSF Act and before any steps could be taken for awarding any punishment to the appellant under the BSF Act, he was repatriated to his parent department. In the said factual background, the High Court held that Section 75 of the BSF Act cannot be attracted, consequently dismissed the petitions before it.

Shri P.S.Mishra, learned senior counsel appearing for the appellant before us contended that the Special Judge, CBI, Patiala had no jurisdiction to try the case once initiated before the BSF authorities under the said Act. He contended that in view of Section 80 of the BSF Act, the Criminal Courts have no jurisdiction to try an offence allegedly committed by the appellant when he was serving in the BSF. He also contended that even the preliminary question as to whether Security Force Court had jurisdiction or not cannot be decided by a Criminal Court because that is a question which has to be decided by the court under the BSF Act only. His further contention is that in the instant case the BSF authorities have invoked their jurisdiction and after an inquiry wherein the witnesses were cross-examined on behalf of the appellant made a recommendation which was partially accepted by the IG who recommended awarding of Director General's "Severe Displeasure" thus the proceedings having been taken to a logical conclusion, the Criminal Courts have no jurisdiction to try the appellant on the very same charge which was once tried under the BSF Act.

Per contra, Shri P.P.Malhotra, learned senior counsel appearing for the respondent contended that in view of the fact that the appellant was repatriated from BSF to his parent department, he ceased to be an officer who is subject to the provisions of the BSF Act, therefore, there is absolutely no bar for the CBI to entertain a complaint against the appellant. Countering the other legal arguments, Shri Malhotra contended in regard to offences coming under the provisions of Prevention of Corruption Act, it is the Criminal Courts of ordinary jurisdiction which has the necessary authority to try a person accused of such offence under the said Act, therefore, the contention of the learned counsel for the appellant that the Criminal Courts under the ordinary law do not have the authority to decide the question of initial jurisdiction cannot be accepted. He also contends that the authorities under the BSF Act have not initiated any trial on the complaint of Assa Singh and what was done was only to hold a preliminary fact finding exercise, hence, the argument of the appellant that there was a trial and a punishment under the BSF Act cannot be accepted.

For deciding the various issues which arise for our consideration in these appeals, it is necessary for us to examine certain provisions of the BSF Act and Rules. Section 3 of the said

Act reads thus :

"3. Persons subject to this Act

(1) The following persons shall be subject to this Act, wherever they may be, namely :-

(a) Officers and Subordinate Officers; and
(b) Under-officers and other persons enrolled under this Act.

(2) Every person subject to this Act shall remain so subject until retired, discharged, released, removed or dismissed from the Force in accordance with the provisions of this Act and the rules."

This section describes the persons who are subject to the BSF Act. Sub-section (2) of this section makes it very clear that a person once subject to that Act shall remain so subject only until he retired, discharged, released, removed or dismissed from the Force in accordance with the provisions of this Act and the Rules. Thus it is to be noted here that as per this section once the appellant ceased to serve the BSF in accordance with the provisions of the Act and the Rules he ceases to be a person subject to that Act. In the instant case, the appellant was deployed to serve in the BSF while he was serving in the Indian Police Service and on his repatriation to his parent department, he ceases to be an officer with the BSF, therefore, by virtue of Sections 3(2) of the BSF Act, the appellant ceases to be a person subject to the BSF Act from such date of his repatriation.

Section 77 of the Act reads thus : -

"77. Trial, etc. of offender who ceases to be subject to this Act

(1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in Force custody and tried and punished for such offence as if he continued to be so subject.

(2) No such person shall be tried for an offence unless his trial commences within six months after he had ceased to be subject to this Act;

Provided that nothing contained in this sub-section shall apply to the trial of any such person for an offence of desertion or for any of the offences mentioned in Section 17 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a Security Force Court."

This section authorises the Border Security Force to arrest and initiate proceedings and punish an offender who was subject to the Act provided such person is tried for an offence under the Act within six months after he has ceased to be subject to the Act.

In the case in hand, we notice that the appellant had ceased to be a person subject to the BSF Act from 16.7.1996 and the authorities under the said Act have not commenced any trial against the appellant till a period of six months after his repatriation to his parent cadre for that matter till date. Of course, learned counsel for the appellant has contended that the initiation of the fact finding enquiry referred to herein above would amount to commencement or initiation of the trial. This argument of the learned counsel will be dealt by us at an appropriate stage.

Section 80 of the Act reads thus :-

"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."

This section prima facie supports the argument of the appellant to the extent when a Criminal Court and a Security Force Court both have jurisdiction in respect of the same offence the discretion to proceed or not to proceed under the BSF Act lies with the Director General, or other officers specified therein within whose command the accused person is serving. It must be noticed herein that this Section applies only to such persons who "is serving" in the Border Security Force and not to a person who ceases to be an officer of the BSF at the relevant time. On facts we have noticed that the Special Court, CBI took cognizance of the complaint only after the appellant ceased to be subject to the Act and after he was repatriated to his parent department that too much later than six months of the period mentioned in Section 77(2) of the BSF Act. Therefore, even this Section 80 would not apply to the facts of this case.

Section 81 of the BSF Act reads thus :-

"81. Power of criminal court to require delivery of offender

(1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 80 at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings, pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted, for the determination of the Central Government whose order upon such reference shall be final."

This section also, in our opinion, applies only to an offender who is subject to the BSF Act or against whom the security force has initiated action under Section 77 of the Act within the period of limitation prescribed therein. In the instant case, neither the petitioner at the time the Criminal Court decided to proceed against him was subject to the Act nor any trial was initiated by the authorities under the said Act. Therefore, this section also does not apply to the facts of the case.

The appellant then relied on certain Rules framed under the BSF Act. They are Rule 41, Rule 45B, Rule 51A, Rule 53, Rule 65, Rule 66, Rule 170, to Rule 174.

Rule 41, we notice, applies only when Section 80 comes into play which as already noticed by us, does not apply to the facts of the case, hence, Rule 41 also would not apply.

Rule 45B refers to procedure to be adopted at a hearing of a charge against an officer which is relied upon by the appellant to show that a proceeding against the appellant had already been

initiated by his Commandant. This Rule shows that after a preliminary enquiry if the Commandant is satisfied on the preliminary report he may dismiss the charge, if he comes to the conclusion that there is no material against the offender or if he comes to the conclusion on facts of the case that it is not advisable to proceed further with the charge. In the instant case, on the facts we have noticed after the SCOI who was empowered to enquire into the complaint of Assa Singh submitted a report wherein he recommended initiation of proceedings against the appellant, the DIG on receipt of this report took a contrary view and recommended Director General's severe displeasure. It was then open to an authorised officer either to accept the recommendation of the Inquiry Officer or that of the DIG but in the instant case matter remained in the cold storage till the appellant was repatriated out of BSF to his parent post or for that matter even till date. Therefore, it can be said that on receipt of the complaint from Assa Singh, authorities under the BSF Act have only initiated the preliminary action which is only an initial procedure contemplated under Rule 45B and beyond that nothing was done either to drop the proceedings, dismiss the charge or to commence a trial as contemplated under the BSF Act.

Rule 51A refers to a procedure after hearing of the charge under Rule 45B and this stage comes after preparation of record of evidence. This Rule requires when an officer detailed to prepare the record of evidence or abstract thereof, he will have to forward the said record of evidence to the officer who ordered for its preparation. This rule also provides that when such officer who receives the record of evidence after going through the said record may dismiss the charge, dispose of the case summarily if he is so empowered, or refer the case to the competent officer for disposal or may even apply to a competent officer to convene a General Security Force Court for the trial of the accused.

In the instant case, pursuant to an order issued to the officer concerned (SCOI) to prepare a record of evidence in regard to the charge made against the appellant said officer had prepared the record of evidence and forwarded the same to the IG, BSF who referred the case to the competent superior officer for disposal, of course, with his recommendation to impose a severe displeasure of the Director General. But the competent officer that is the Director General had not taken any action either to accept the recommendation of the officer who recorded the evidence and who recommended to initiate proceedings against the appellant or that of the IG who recommended the imposition of a minor punishment of recording a severe displeasure. The fact therefore is that the competent officer under the BSF Act had not in fact initiated a trial as contemplated under the above rule.

Rules 53(2) to 106 which falls in Chapter 8 and 9 of the Rules provides for procedure to be followed when a competent officer decides to refer the charge for a trial under the BSF Act. In the instant case, it is a fact that no such procedure was initiated nor a trial as contemplated under the Act and Rules was even contemplated by the competent officer.

Bearing in mind the above provisions of the Act and the Rules applicable to the facts in this appeal, if we consider the argument of the learned counsel for the appellant, then we notice as on the date when Special Court, CBI took cognizance of the complaint against the appellant, he was not a person subject to the BSF Act and the competent authority under that Act had not initiated any trial against the appellant. What actually had happened was that on a complaint made by Assa Singh, a preliminary fact finding enquiry was initiated which body recommended further proceedings against the appellant, but the IG who received the report recommended the awarding of a minor punishment of severe reprimand. But the competent authority did not accept either of the recommendations but allowed the appellant

to be repatriated to his parent department, consequently on the lapse of six months after his repatriation under Section 77(2) of the BSF Act, the BSF authorities ceased to have any disciplinary jurisdiction on the appellant since he ceased to be subject to the said Act. After that period, the appellant became subject to other laws of the land. Therefore, the Special Court, CBI had the jurisdiction to entertain a complaint against the appellant. The further argument of the appellant that because of Section 80 and 81 of the BSF Act it is only the Security Forces Court under the BSF Act that has the jurisdiction to try the appellant has also to be negatived. The next argument of the learned counsel for the appellant is that in fact the authorities under the BSF Act had already punished the appellant by recommending the recording of a severe displeasure of Director General, therefore, the CBI or for that matter the Special Court could not have entertained another complaint of Assa Singh on the same facts which would amount to a second trial. We have already noticed that the recommendation of IG for severe displeasure was never accepted by the competent authority, hence, there is no question of a second trial by the CBI Court. Herein, we may notice that the competent authority has also not accepted the recommendation of the SCOI for further proceedings, hence, entire proceedings against the appellant before the competent authority stood abandoned without being taken to any logical conclusion.

The learned counsel then argued in law initiation of preliminary fact finding enquiry itself amounts to a trial. Therefore, it should be held that when the appellant stood transferred to his parent department the proceedings under the BSF Act had already been initiated, therefore, it is only the BSF authorities who could conclude the said trial under Section 77 of the Act and the Special Court CBI could not have taken cognizance on a complaint of Assa Singh since the trial had already been started by the BSF authorities. This argument proceeds on the basis that a trial contemplated under the BSF Act had commenced on the complaint of Assa Singh by the initiation of a preliminary enquiry. Therefore, we will have to examine whether by starting a fact finding enquiry, does a trial commence under the provisions of the BSF Act. A perusal of the provisions of the Act and the Rules referred to hereinabove, in our opinion, makes it clear that initiation of a preliminary enquiry which is only to find out the existence of a case against the accused to initiate a trial would not amount to the commencement of a trial under the BSF Act. As a matter of fact, Rule 66 clearly indicates that commencement of a trial takes place when an order convening the court and the names of the officers appointed to try the accused is read in the hearing of the accused in accordance with Section 84 of the Act. The provisions of Chapter VII of the BSF Act read with Rules 52, 53 and 65 of the Rules clearly indicate that a trial under the Act could only start after the requirements of the said provisions of the Act and Rules are complied with. We have already noticed that the said requirements of the Act and Rules in the instant case have not been complied with nor for that matter the competent authority had taken a decision to initiate a trial. As a matter of fact, we are of the considered view the said competent authority had abandoned the proceedings against the appellant, therefore, we do not think the learned counsel for the appellant is correct in contending alternatively that a trial under the Act had actually commenced and was pending. As a matter of fact when exactly a trial under the BSF Act commences stands decided by the judgment of this Court in the case of Union of India & Ors. vs. Major General Madan Lal Yadav (Retd.) (1996 4 SCC 127). In the said case considering the similar provision as to the commencement of a trial in the Army Act, 1950, this Court held : "In the light of the above discussion, we hold that the trial commences the moment GCM assembles to consider the charge

and examines whether they would proceed with the trial. The preceding preliminary investigation is only part of the process of investigation to find whether a charge could be framed and placed before the competent authority to constitute GCM".

From the above declaration of law made by this Court, it is clear until and unless the competent authority convenes the GCM and the GCM assembles to consider the charge and examines whether they would proceed with the trial, the trial does not commence. This judgment has also in specific terms held that the preliminary investigation conducted in such cases do not amount to commencement of trial. As noticed by us herein above, in the instant case, since the competent authority has not even decided to convene a General Court Martial, we are of the considered opinion that the argument of the learned counsel for the appellant that a trial has commenced by the initiation of a preliminary enquiry cannot be accepted. We may notice that the learned counsel for the appellant has placed reliance on the following judgments of this Court in the case of Delhi Special Police Establishment, New Delhi vs. Lt. Col. S.K.Loraiya (1972 2 SCC 692), Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Usha Ranjan Roy Choudhury & Anr. (1986 Suppl. SCC 190) and Union of India through Major General H.C.Pathak vs. Major S.K.Sharma (1987 3 SCC 490) these cases pertain to officers who were still serving in the forces, and the jurisdiction of civil courts to try such officers of the Force and not in regard to officers who have ceased to be officers of the Force, therefore, we do not think the above judgment will be of any assistance to the appellant.

For the reasons stated above, we are of the opinion that since the appellant had ceased to be an Officer of the BSF on the date of his repatriation, he was no more subject to the BSF Act. We are also of the opinion that the authorities under the BSF Act had not initiated any trial against the appellant on the complaint of Assa Singh. Consequently, a Special Judge, CBI had the jurisdiction to take cognizance of the report filed by the CBI and also to frame charges against the appellant.

In the said view of the matter, these appeals fail and the same are dismissed.