

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on : 20.04.2022
Pronounced on : 28.04.2022

WP(C) No.255/2020
CM No.460/2020

Rovinder Singh ...Petitioner(s)

Through:- Mr. Mushtaq Ahmed Dar, Advocate

V/s

Union of India and others ...Respondent(s)

Through:- Mr. Nazir Ahmad Bhat, CGSC

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. With the consent of learned counsel for the parties, the petition is admitted to hearing and in view of the pure question of law involved, the same is taken up for final disposal.

2. In this petition, the petitioner, a BSF personnel, who is facing criminal trial before the General Security Force Court is aggrieved and has challenged, inter alia, orders dated 27th July, 2018 and 25th September, 2018 passed by the Chief Judicial Magistrate, Bandipora, whereby the charge-sheet presented against the petitioner before the Chief Judicial Magistrate has been transferred and handed over to the General Security Force Court [“GSFC”] constituted under the Border Security Force Act,

1968 [“the Act”]. The petitioner has also assailed the order of GSFC, whereby the application moved by the petitioner for issuance of certified copies of the proceedings including statement of prosecution witnesses has been rejected by relying upon Rule 129 of the Border Security Force Rules, 1969[“the Rules”]. The petitioner has infact challenged the *vires* of Rule 129 of the Rules on the ground that it infringes fundamental right of fair trial guaranteed to the petitioner under the Constitution of India.

3. On this petition coming up for consideration, this Court vide order dated 05.02.2020 while granting time to the respondents to file their objections also provided that the respondents may proceed in the matter of trial but shall not pass any final order until further orders. It is submitted that the GSFC has concluded the proceedings but the final orders could not be passed due to interim directions passed by this Court. Mr. Mushtaq Ahmad Dar, learned counsel appearing for the petitioner, thus, restricted his arguments only to the extent of seeking declaration that the Rule 129 of the Rules is inconsistent with part-III of the Constitution of India and that the denial of certified copies of the statements recorded during trial before the GSFC infringes his fair trial right guaranteed under Article 21 of the Constitution.

4. The gist of submissions made by the learned counsel for the petitioner can be put in the following manner-

- i) Section 87 of the Act read with Section 76 of the Evidence Act, 1872 confers a right on the petitioner to obtain certified copies of the public documents. Statements of witnesses, it is contended, are public documents and, therefore, the respondents could not have

rejected his application for certified copies of such statements by placing reliance on the impugned Rule.

- ii) Rule 129, impugned in this petition, violates the fair trial right guaranteed to the petitioner under Article 21 and 22 of the Constitution.
- iii) The impugned Rule, which takes away the right of the accused facing trial under the Act to obtain certified copies of the statements of the prosecution witnesses recorded by the GSFC till the findings and sentence is confirmed when such confirmation is required, is arbitrary and discriminatory, in that, the accused facing trial under the Code of Criminal Procedure before the Court of Sessions or Judicial Magistrate, who is similarly situated, is not so debarred.
- iv) That, as is provided under Section 1 of the Evidence Act, the Act applies to all judicial proceedings in or before any Court including Court-martial other than Court-martial convened under the Army Act, Naval Discipline Act/the Indian Navy (Discipline) Act, 1934 or Air Force Act. The Parliament by enacting Rule 129 of the Rules cannot override the provisions of Indian Evidence Act, 1872 and, therefore, Rule 129 of the Rules to the extent of its repugnancy with Section 1 and 76 of the Indian Evidence Act is bad in the eye of law and, therefore, deserves to be declared *ultra vires* the Evidence Act as well.

5. *Per contra*, Mr. Nazir Ahmad Bhat, learned CGSC, who has filed objections on behalf of the respondent Nos. 1 to 7 argues that Rule 129 of the Rules framed under Sub Section 1 and 2 of Section 141 of the

Act is saved by Article 33 of the Constitution of India. It is contended that in terms of Article 33 of the Constitution, the Parliament is conferred power to modify the fundamental rights contained in part-III of the Constitution in their application to the members of Armed Forces; or members of the forces charged with maintenance of public order; or the persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence etc etc. He, therefore, argues that BSF Act and the Rules framed thereunder in particular Rule 129 shall be deemed to have been made by law enacted by the Parliament. He, therefore, submits that when it comes to the application of fundamental rights to the members of the Armed Forces or Forces charged with maintenance of public order, the Parliament is well within its power to restrict or curtail such fundamental rights by law and this is exactly what is done by the Parliament in terms of the impugned Rule. He argues that the BSF Act and the Rules framed thereunder is a special law enacted by the Parliament to provide for the constitution and regulation of the armed force of the Union for securing security of the borders of India and, therefore, overrides the general law i.e. Indian Evidence Act, 1872. He, therefore, urges this Court to reject the plea of the petitioner and, accordingly, dismiss the petition.

6. Having heard learned counsel for the parties and perused the relevant provisions of law cited before me, it is necessary to first set out few facts material to the determination of questions of law raised by the learned counsel for the petitioner.

On 27.11.2017, the petitioner while being posted in 1055 BSF Arty Regiment was detailed as guard at Arty Magazine in the BSF Campus Bandipora (J&K) along with HC Dipak Awghad (Guard Commander) and Ct. Guddu Singh, Gurpal Singh and Sant Kumar. While the petitioner was on duty a sound of burst fire was heard in the BSF campus. HC Dipak Awghad, who was also Guard Commander of Arty Magazine got wake up and went to the sentry post. He found the petitioner missing from the post. Later it was found that the petitioner had shot dead HC Chander Bhan. The matter was reported to the police and FIR No.163/2017 dated 27.11.2017 under Section 302 RPC was registered against the petitioner in the Police Station, Bandipora. The police, after investigation, presented the challan before the Chief Judicial Magistrate, Bandipora. The Chief Judicial Magistrate, Bandipora being of the opinion that the case was exclusively triable by the Sessions Court committed the case to the Principal Sessions Judge, Bandipora. Learned Principal Sessions Judge, Bandipora finding that the petitioner belonged to armed force and the committal Court had not complied with the mandatory provisions of law by offering an opportunity to the concerned Commanding Officer of the accused to exercise his option for trial, vide order dated 27.06.2018 remitted the matter back to the Chief Judicial Magistrate, Banipora to do the needful. The respondents exercised their option to try the accused before the BSF Court constituted under the Act and, accordingly, filed appropriate application on 09.09.2018. The plea of the respondent was accepted and the Chief Judicial Magistrate, Bandipora vie order dated 25.09.2018 transferred the criminal challan to the respondents.

The Record of Evidence was prepared by the Unit Commander against the petitioner and the competent authority i.e. Inspector General, Kashmir Frontier, BSF directed the matter to be placed before the General Security Force Court, which was convened on two charges i.e. (i) charge under Section 45 of the Act for committing a civil offence that is to say murder punishable under Section 302 RPC and (ii) charge under Section 16(d) of the Act for leaving his picket without orders from his superior officers. Trial before the GSFC commenced on 13.11.2019 and completed on 07.03.2020. The GSFC found the petitioner guilty on both charges and sentenced him to suffer imprisonment for life and to be dismissed from service. Findings and sentence of the GSFC have been announced in the open Court but the same are subject to confirmation by the confirming authority. It appears that during the pendency of the trial before the GSFC, the petitioner moved an application on 02.12.2019 before the GSFC and prayed for certified copy of the challan along with allied documents as also the certified copy of the statements of prosecution witnesses recorded during trial. The application was resisted on the ground that copy of the challan as also documents demanded by the petitioner including the statements of prosecution witnesses were not public document and, therefore, no certified copy could be given to the petitioner. It was contended by the prosecution that the petitioner, at all reasonable times before the Court is closed, was entitled to inspect the proceedings of the GSFC in terms of Rule 120 of the Rules. Reliance was also placed on Rule 129 of the Rules to deny copies of the proceedings till order or sentence is confirmed by the confirming authority.

7. It appears and also as contended by the learned counsel for the petitioner, the GSFC declined to issue certified copy of the proceedings including statements of the prosecution witnesses in the light of the objections raised by the learned prosecutor based on the provisions of Rule 129 of the Rules.

8. In the backdrop of above factual matrix, the question of *vires* of Rule 129 of the Rules needs to be addressed having regard to the rival contentions. However, before analyzing the arguments of the learned counsel for and against the sustainability of constitutionality of the impugned provision, it is necessary to have a look on the salient provisions of law obtaining on the subject. The trial before the GSFC is regulated by the provisions of the Act and the Rules framed thereunder. With regard to the applicability of the provisions of the Indian Evidence Act, Section 87 of the Act lays down as under:-

“87. General Rule as to evidence---The Indian Evidence Act, 1872 (1 of 1872), shall, subject to the provisions of this Act, apply to all proceedings before a Security Force Court.”

9. From a plain reading of Section 87 of the Act, it clearly transpires that general rules of evidence contained in the Indian Evidence Act shall, subject to the provisions of the Act, apply to all proceedings before the GSFC. That means any provision in the Act laying down and providing any Rule of evidence would override the contrary provisions in the Indian Evidence Act. That apart, the Act is a special enactment providing for constitution and regulation of an armed force of the Union for

ensuring the security of the borders of India and other matters connected therewith and, therefore, the provisions of the Act would prevail over the general provisions of the Indian Evidence Act wherever there is found any repugnancy between the two.

10. The doctrine of *Generalia Specialibus Non-Derogant* i.e. the provisions of special law prevail over the general law is attracted in the case. This also takes care of the argument of Mr. Mushtaq Ahmed Dar, learned counsel for the petitioner that provisions of Indian Evidence Act are applicable to all judicial proceedings before in or before any Court including Court-martial except the Court-martial under the Army Act, Naval Discipline Act, Air Force Act etc etc as provided under Section 1 of the Evidence Act itself.

11. Next comes Section 76 of the Indian Evidence Act, which enjoins a public officer having the custody of a public document, which any person has a right to inspect, with a duty to give that person, on demand, a certified copy thereof. Before proceeding further it would be appropriate to set out Section 76 of the Indian Evidence Act, which reads thus:-

“76. Certified copies of public documents.-----Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees there for, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.”

12. With a view to appreciate the provisions of Section 76 of the Evidence Act, we need to understand the definition of public document given in Section 74 of the Evidence Act. Section 74 of the Evidence Act reads as under:-

“74. Public documents.-----The following documents are public documents: --

- (1) Documents forming the acts, or records of the acts --
 - (i) of the sovereign authority,
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
- (2) Public records kept in any State of private documents.”

13. From a reading of Section 74 of the Evidence Act, it is clear that the documents forming the acts and records of the acts (i) of the sovereign authority, (ii) of official bodies and tribunals, and (iii) of public officers, legislative, judicial and executive of any part of India or of the Commonwealth or of a foreign country including public records kept in any State of private documents. In terms of Section 106 of the Act, proceedings before the GSFC are judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code and the GSFC shall be deemed to be a Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898. The Court exercising judicial functions including the General Security Force Court would be public office for the purposes of Section 74 and, therefore, in terms of Section 76, such public officer presiding over the Court or Judicial Tribunal would be bound to provide certified copy of the public document, on demand, which any person has a right to inspect. It is in compliance to Section 76 of the

Evidence Act that any person, who has a right to inspect the Court proceedings is entitled to obtain certified copies of the documents/proceedings pending before a Court of law. On the same analogy, I am of the considered view that General Security Force Court convened under the Act would be obliged to act under Section 76 of the Indian Evidence Act subject of course to the contrary provision, if any, contained in the Act.

14. *Prima facie*, but for the provision of Rule 129 of the Rules, the petitioner is entitled to obtain certified copies of the proceedings as well as statements of the prosecution witnesses recorded during trial before the GSFC. The plea of the respondents that since the proceedings before the GSFC are in the nature of judicial proceedings, therefore, not a public document is without any substance and cannot be accepted in law.

15. It is pertinent to mention that in terms of Rule 120 of the Rules, the accused facing trial before the GSFC is entitled to inspect the proceedings at all reasonable times before the Court is closed to consider finding.

16. As stated above, provisions of evidence contained in the Indian Evidence Act are applicable to all proceedings before a General Security Force Court, however, their application is subject to the provisions of the Act. Rule 129 of the Rules impugned herein, framed under the Act is clearly inconsistent with and in derogation from rules of evidence contained in Sections 74 and 76 of the Indian Evidence Act, in that, it restricts right of the accused to obtain, on demand, copy of the proceedings

of the Court until confirmation of the finding and sentence when such confirmation is required and before the proceedings are destroyed.

17. In view of the clear provisions of Rule 129, the accused is not entitled to obtain copies of the proceedings including statements of the prosecution witnesses recorded therein till the proceedings are concluded by the Court and the same are confirmed by the confirming authority. To this extent Rule 129 clearly supplant the provisions of Section 76 of the Indian Evidence Act. In terms of Section 87 of the Act, as explained above, it is permissible. The argument of learned counsel for the petitioner to the contrary is without substance and, therefore, rejected.

18. This brings me to the vital and very crucial question with regard to the *vires* of Rule 129 of the Rules raised by the learned counsel for the petitioner. Indisputably and undoubtedly, Article 21 of the Constitution of India guarantees fair trial right to the petitioner. It provides that **“no person shall be deprived of his right of personal liberty except according to procedure established by law.”** A criminal trial, which may result in depriving a person of not only of his personal liberty but also his life, has to be fair, unbiased and without any prejudice for or against the accused. [See **Nahar Singh Yadav v. Union of India, (2011) 1 SCC 307**]. It is trite law that an accused person must be given sufficient time and facility for preparing his defence and breach of this safeguard of fair trial would invalidate the trial having been held in violation of Article 21 of the Constitution of India.

19. A trial whether before a Criminal Court or before a General Security Force Court, which does not provide fair and proper opportunities

allowed by law to prove innocence violates the right to life and liberty guaranteed to the citizens and non-citizens by Article 21 of the Constitution of India. Apart from various fair trial rights guarantees to an accused facing a criminal trial, right to cross-examine or to have examined witnesses against him and to obtain attendance and examination of the witnesses on his behalf under the same conditions as witnesses against him is well recognized both in International Human Rights Law as well as the domestic law. The right to cross-examine a witness with adequate time and facilities for production of his defence is necessary concomitant of right to fair trial guaranteed to an accused facing a criminal charge.

20. True it is that under the Act and the Rules framed thereunder, particularly, in terms of Rules 120 and 123 of the Rules, an accused either himself or through his counsel has a right to inspect the proceedings but inspection of proceedings cannot be equated with the providing of certified copies of the statements of the prosecution witnesses. The accused, and if he is represented, his counsel, are entitled to prepare cross-examination of the next witness or rest of the witnesses yet to be examined in the light of statements made by the prosecution witnesses so far. In the absence of having the copies of the statements of the prosecution witnesses recorded, it would also not be possible for the defence counsel to adequately prepare defence. Copies of the proceedings, particularly statements of the prosecution witnesses recorded during trial, would be required by the accused before he enters his defence. It is not possible for the accused or for that matter his counsel to remember all what is said by the prosecution witnesses for and against him so that he could adequately and effectively

prepare his defence. Human memory, as is well said, is short lived and may at times fail a person. I am, thus, of the considered view that failure of the Court to provide, on demand, copies of the proceedings including the statements of prosecution witnesses recorded during trial shall prejudice the accused in the matter of preparation of his adequate and effective defence and, therefore, violates fair trial right of the accused.

21. Rule 129 of the Rules, as it is, does take away vital fair trial right of an accused tried under the Act and, therefore, would fall foul of Article 21 of the Constitution of India. As is contended by Mr. Nazir Ahmad Bhat, learned counsel appearing for the respondents, Article 33 empowers the Parliament to take away, abridge or modify the rights conferred by part-III of the Constitution of India in their application to the members of the armed forces and the members of the forces charged with maintenance of public order. At this point, it becomes necessary to refer to the provisions of Article 33 of the Constitution, which, for facility of reference, is set out herein below:-

“33. Power of Parliament to modify the rights conferred by this Part in their application etc Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,

[\(a\)](#) the members of the Armed Forces; or

[\(b\)](#) the members of the Forces charged with the maintenance of public order; or

[\(c\)](#) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

[\(d\)](#) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.”

22. From a perusal of Article 33 of the Constitution, it is abundantly clear that the Parliament is empowered to modify the rights conferred by para-III of the Constitution and to determine to what extent any of the rights conferred by the said part shall, in their application to the members of armed forces or members of the force charged with maintenance of public order etc be restricted or abrogated so as to ensure **proper discharge of their duties and the maintenance of discipline among them.**

23. While there is no dispute that Article 33 empowers Parliament to restrict or abrogate fundamental rights in their application in relation to armed forces, para-military forces and the police etc, it may be noted that Article 33 does not itself restrict or abrogate any right. Their abrogation or restriction depends on parliamentary legislation. The Parliament, which is empowered under Article 33 to frame such legislation, cannot act to curtail fundamental rights of the members of the armed forces **unless it is so required to ensure proper discharge of their duties and maintenance of discipline among them.** The power of Parliament under Article 33 is, therefore, absolute but hedged by the condition that it would be used only if required to ensure proper discharge of duties of the force and maintenance of discipline among its members.

24. Pertinent question that would arise in the context of the controversy in hand is whether the provisions of Rule 129 of the Rules are necessitated to ensure proper discharge of duties by members of the Border Security Force and the maintenance of discipline among them. Undoubtedly, Border Security Force, which is constituted under the Act is

a disciplined force raised for ensuring security of borders of India and for matters connected therewith. This is so evident from the preamble of the Act. However, I fail to understand as to how by restricting right of the accused to obtain certified copies of the proceedings and the statement of prosecution witnesses recorded during trial against an accused, which is a fundamental right of fair trial of the accused, would help in proper discharge of the duties of members of the force and how it will help in maintaining discipline among them. The fair trial right of an accused is an individual right conferred on the accused facing trial and has nothing to do with the maintenance of discipline in the force or is not in any manner in derogation of proper discharge of duties by members of the force. It is, thus, not correct to say that the Parliament under Article 33 has unbridled and overarching power to enact law abridging or modifying the fundamental rights or any of them, in their application, to the members of the forces. Such power ought to be and must be exercised only to ensure proper discharge of duties by the members of the armed forces and maintenance of discipline among them.

25. Viewed from this angle, I do not find that Rule 129 of the Rules is in any manner aimed to ensure proper discharge of duties by the members of the Border Security Force and maintenance of discipline among them and, therefore, could be saved on the strength of Article 33 of the Constitution of India. In the view I have taken herein above, I am fortified with the judgment of Hon'ble the Supreme Court of India in the case of **Ministry of Defence v. Babita Punniya, (2020) 7 SCC 469**.

26. The discussion on Article 33 of the Constitution in the context of modification or abridgement of fundamental rights of the members of the armed forces or force charged with maintenance of public order etc is contained in para 56 to 62 of the judgment, the crux whereof is that the constitution empowers the Parliament to determine by law extent to which the rights conferred by part III of the constitution shall be restricted or abrogated in their application, inter alia, to the members of the armed forces or the forces charged with maintenance of public order only if it is necessary to ensure proper discharge of their duties and maintenance of discipline among them.

27. For the foregoing reasons, challenge by the petitioner to Rule 129 of the Border Security Force Rules, 1969 succeeds and the impugned Rule is declared *ultra vires* part III of the Constitution, particularly Article 21 of the Constitution. Proceedings against the petitioner concluded by the General Security Force Court are quashed from the stage of leading defence evidence. The matter shall be taken up by the General Security Force Court from the stage of conclusion of the prosecution evidence. The petitioner shall be provided certified copies of the proceedings as also the copies of the statements of prosecution witnesses recorded during trial against or in favour of the petitioner before asking the petitioner to enter his defence.

The General Security Force Court shall proceed with the trial as aforesaid and conclude the proceedings with reasonable dispatch, of course, strictly as per the provisions of the Act and the Rules framed thereunder.

28. With the aforesaid observations and directions, the writ petition shall stand disposed of.

(Sanjeev Kumar)
Judge

SRINAGAR

28.04.2022

Vinod.

Whether the order is speaking: Yes/
Whether the order is reportable : Yes