

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
ATJAMMU**

(Through Virtual Mode)

**SWP No. 135/2005
CM No. 5679/2020**

**Reserved on 11.03.2024
Pronounced on: 15.04.2024**

**Sumanta Dutta aged 30 years
S/O Late Sudhangsu,
R/O Village Raj Chandrapur,
P/O Ghoshpara, District Howra,
West Bengal.**

.....Petitioner(s)

Through :-

Mrs. Surinder Kour, Sr. Advocate with
Ms. Manpreet Kour, Advocate

v/s

- 1. Union of India, through Home Secretary,
Ministry of Home Affairs,
Govt. of India, New Delhi.**
- 2. Director General of BSF, CGO Complex,
Lodhi Road, New Delhi.**
- 3. Inspector General of BSF,
Frontier HQ, Baramulla, C/O 56 APO.**
- 4. Dy. Inspector General of BSF,
Sector HQ, Baramulla, C/O 56 APO.**
- 5. Commandant, 55 Bn BSF (THQ), C/O 56 APO.**Respondent(s)

Through :-

Mr. Vishal Sharma, DSGI with
Mr. Anishwar Koul, CGSC

CORAM: HON'BLE MR. JUSTICE M A CHOWDHARY, JUDGE

JUDGMENT

- 1. Petitioner through the medium of this petition filed in terms of Article 226 of the Constitution of India, seeks following reliefs:**
 - i) To quash Order No. Estt/THQ/55Bn/SSFC-SD/04/13354-62 dated 29.11.2004 issued by the Commandant 55 Bn BSF by which the petitioner has been awarded punishment of dismissal from service and also to quash the Summary Security Force Court Proceedings and the charges framed against the petitioner, by issuance of writ of Certiorari;**
 - ii) To issue direction to the respondents to consider the case of the petitioner for re-instatement and to allow the petitioner to join and perform his duties on the post of Constable on which the petitioner was working prior to his dismissal from service and to release the salary in favour of the petitioner and to give all other consequential**

benefits to the petitioner for which the petitioner is entitled and also to treat the period from the date of dismissal to the date of the petitioner re-joins the duty as 'on duty' by issuance of writ of mandamus:

- iii) To issue direction to the respondents restraining them to implement the order dated 29.11.2004 and restraining the respondents to fill up the post of petitioner by making appointment or adjustment and also restraining the respondents to treat the period w.e.f 29.11.2004 to the date the petitioner re-joins the duty as 'break in service' by issuance of writ of prohibition;
- iv) To issue direction to the respondents to produce all the record of Departmental Proceedings and Summary Security Force Court Proceedings, before this Court by issuance of writ of mandamus;
- v) To declare the Order No.Estt/THQ/55Bn/SSFC-SD/04/13354-62 dated 29.11.2004 and departmental proceedings and also the Charges against the petitioner, as unconstitutional, ultra-vires and contrary to the provisions of BSF Act and Rules by issuance of writ of mandamus.

2. The case of the petitioner as pleaded and projected by him, is that he was enrolled in the Border Security Forces (BSF) on 13.04.1988 as a Constable having No.880073226, undergone training at STC Shillong (Training Centre, Shillong), thereafter he remained posted at different places i.e. Bareilly, West Bengal, Srinagar, Manipur, Shillong and Sopore (Srinagar) and the work of the petitioner was appreciated by the superiors under whom the petitioner remained posted from time to time and he had earned I.G and, D.I.G. awards, besides six cash rewards. It has been pleaded that false and frivolous allegations were levelled against the petitioner U/S 46 of the BSF Act and the charge sheet was framed on 27.11.2004 on the allegation of committing a civil offences to minor/little girls with intention to outrage their modesty and the allegations were that on 31.07.2004, while attached with frontier Headquarter BSF Baramulla, petitioner allegedly involved in the molestation of minor/little girls at Old Golf Ground, Sector Headquarter BSF Baramulla intending to outrage their modesty; that the allegations were levelled by the wife of one Dy.Commandant Ajith Kumar V and this was not mentioned by the respondents; that the petitioner was

not allowed to produce the witnesses in his defence i.e Constable K P Pandey, Constable Yogesh Mehta of 55 Bn and Constable Khem Chand of 191 Bn, while Constable Bhajan Singh has stated in favour of the petitioner; that the respondents have not appreciated that nobody has even stated anything against the petitioner, while the little girls have also not stated anything against the petitioner, moreover, the said Dy Commandant has also beaten the petitioner and the inquiry was done by 109 Bn, but nothing has been mentioned in the order. The respondents have also conducted vigilance inquiry through Head Constable Jai Bhagwan of Frontier Headquarter Baramulla and nothing was proved against the petitioner; that the Commandant has issued an order dated 27.11.2004 by virtue of which the petitioner was placed under close arrest.

3. The grievance projected by the petitioner is that the respondents have not conducted any proper inquiry as required under the provisions of BSF Act and the Rules and without affording an opportunity of being heard to the petitioner issued an Order dated 29.11.2004, whereby punishment of dismissal from service has been awarded to the petitioner and he was struck out from the strength. Aggrieved of this order, the petitioner filed an appeal before the DG of BSF on 07.12.2004 but till date the appeal has not been decided and it was finally prayed that the petition be allowed and the order impugned be quashed.
4. Pursuant to notice, the respondents have filed their response, wherein they have stated that the present petition is not maintainable as the petitioner has not come to this Court with clean hands, in as much as, he has suppressed the true facts, as such, the petition is required to be dismissed; that the petitioner remained deployed in different places of West Bengal, Srinagar,

Manipur, Shillong and Sopore and during the years 1996 to 1998 the petitioner was awarded three punishments under sections 19(b), 32(b) and 40 of the BSF Act; that the petitioner was further attached with FTR HQ BSF Baramulla and was performing the duties of Security aid to Sh.K.P.Singh, Assistant Comdt (Lit), BSF Frontier Headquarter, Baramulla where some complaints were received by Ajith Kumar V, Dy Comdt(Ops), Sector Headquarter (SHQ) BSF Baramulla, who was looking after administrative matters of BSF Sector School, Singhpura, Baramulla, that some of the school children of the aforesaid school, in the last week of July 2004, were molested by some BSF Jawan, inside the campus during evening hours.

5. On the complaints of the school children, Vigilance Branch of SHQ BSF Baramulla was informed to watch upon such activities and on 31.07.2004 at about 1900 hrs, some school children who were playing in the Golf Ground came running to Ajith Kumar V, Dy Comdt(Ops) and told him that they have caught the person, who had been molesting them, identified as CT Sumanta Dutta-petitioner herein. The above constable was allegedly involved in molestation of minor/little girls having age group of 7 to 9 years of the BSF Campus SHQ BSF Baramulla; that as per record Sh. Ajith Kumar V, DC(Ops) SHQ BSF Baramulla informed Inspector (Vig) Hiren Halder of SHQ BSF Baramulla, who inquired/questioned the accused Constable Sumanta Dutta, he initially could not give satisfactory reply but on continued questioning, he finally admitted that he used to molest the little girls.
6. It is further stated that in accordance with the order dated 24.11.2004 of DIG BSF Baramulla, the petitioner had been tried by Summary Security

Force Court on 29.11.2004 at THQ 55 Bn BSF Sopore (Kashmir) for committing a civil offence to minor/little girls with intention to outrage their modesty punishable under section 354 J&K Ranbir Penal Code (RPC); that on being found 'guilty' for the charge, sentence was passed 'to be dismissed from service' and it was finally prayed that the writ petition may kindly be rejected.

7. Mrs. Surinder Kour, learned senior counsel appearing for the petitioner vehemently, argued that the respondents have not conducted any proper inquiry as required under the provisions of BSF Act and the Rules and without affording an opportunity of being heard to the petitioner issued impugned Order dated 29.11.2004 by virtue of which, punishment of dismissal from service has been awarded to the petitioner and the petitioner was struck out from the strength; that the petitioner during his service period has remained posted at different places i.e. Bareilly, West Bengal, Srinagar, Manipur, Shillong and Sopore (Srinagar) and his work was appreciated by the superiors under whom the petitioner remained posted from time to time and he also has earned I.G award, D.I.G. award and six cash rewards; that as per Rule 43 of the BSF Rules, where it is alleged that a person subject to the Act 1[other than an officer or a Subordinate Officer] has committed an offence punishable thereunder the allegation shall be reduced to writing in the form set out in Appendix IV, but the aforesaid Dy Commandant without providing any opportunity of being heard, has passed the impugned order; that the Commandant of the petitioner had to hear the petitioner under Rule 45 of the BSF Rules, which provides that:

“1. The charge shall be heard by the Commandant of the Accused in the following manner:

- i) the Charge and statements of witnesses if recorded shall be read over to the accused.
 - ii) if written statements of witnesses are not available, he shall hear as many witnesses as he may consider essential to enable him to determine the issue;
 - iii) Wherever witnesses are called by the Commandant, the accused shall be given an opportunity to cross-examine them.
 - iv) Thereafter, the accused shall be given an opportunity to make a statement in his defence.
2. After hearing the charge under sub-rule(1), the Commandant may:-
- i) Award any of the punishments which he is empowered to award; or
 - ii) Dismiss the charge; or
 - iii) Remand the accused, for preparing a record of evidence or for preparation of an abstract of evidence against him; or
 - iv) Remand him for trial by a Summary Security Force Court.”

8. Mrs. Surinder Kour, learned senior counsel for the petitioner further argued that as per Rule 142 (1) of the BSF Rules, the accused person’s plea of “Guilty” or “Not Guilty” or if he refuses to plead or does not plead intelligibly either one or the other, a plea of ‘Not Guilty’ shall be recorded on each charge. In the present case, the petitioner has not pleaded guilty and the respondents have to follow the procedure under the provisions of BSF Rules. She has further argued that the petitioner had been dismissed from service by the Commandant of 55 Bn of BSF claiming to be as Summary Security Force Court on 29.11.2004 without following due course of law as provided under BSF Act and the Rules framed thereunder. While referring to the different Rules, she has argued that for a civil offence u/s 46 of the BSF Act, the offending official cannot be tried summarily, in view of the Rule 47 of the BSF Rules and that the evidence is to be recorded after following due procedure and only a General Security Forces Court was required to be convened in terms of Rule 59. She finally prayed that the impugned dismissal order passed by the Summary Security Force Court be

set aside and the respondents be directed to reinstate the petitioner to his job with all consequential benefits. In support of her arguments, learned senior counsel for the petitioner has placed reliance on the judgments of Hon'ble Apex Court in case titled '**Union of India & Ors, vs B. N. Jha**', reported as **AIR 2003 SC 1416**, in '**B. S. Hari Commandant vs Union of India & Ors**', reported as **2023 Live Law (SC) 303**, in '**Ranjit Thakur vs Union of India**', reported as **1987 AIR (SC) 2386**, in '**Lt.Col.Prithi Pal Singh Bedi & Ors vs Union of India & Ors**', reported as **1982 AIR (SC) 1413**, in '**S.R.Tewari vs Union of India & Anr**', reported as **2013(4) Supreme 457**, in '**State of Uttar Pradesh & Ors vs Saroj Kumar Sinha**', reported as **(2010) 2 SCC 772**. She has also relied upon the judgment of the Orissa High Court in '**Kalipada Acharya vs Union of India & Ors**', reported as **2019(1) ILR (Cuttack) 103** as well as the judgment dated 16.11.2023 passed by a Coordinate Bench of this Court in '**Balwinder Singh vs Union of India & Ors**'.

9. Mr. Vishal Sharma, learned DSGI, *ex adverso*, argued that the present petition is not maintainable as no legal statutory or fundamental right of the petitioner has been violated; that the petitioner has not come to the Court with clean hands as he has suppressed the true facts and as per Section 117(2) of the BSF Act, there is a provision of submitting the petition/appeal which is under consideration of the DG BSF and without waiting for its disposal, the petitioner approached this Court prematurely, as such, the petition is required to be dismissed in limine. Arguing on the merits of the case, learned DSGI submits that all the Rules have been religiously followed in the trial of the petitioner by the Competent Forum and the contention that the petitioner had suffered any prejudice during his trial is

un-founded. that in the case the offence report was prepared as required under Rule 43 and the petitioner as accused was heard on charge in terms of Rule 44 of the BSF Rules; that witnesses had been examined in his presence and report of enquiry was prepared, the petitioner as accused had been allowed to cross examine all the witnesses, the charge was framed, the list of witnesses was furnished, statements of witnesses were recorded and the petitioner as accused had declined to cross examine the witnesses Deputy Commandant Ajith Kumar, Inspector Vigilance, constables M. V. Roy and S K Sathpathi, who had been examined during trial; that even during ROI, three minor girls had been examined including the victim of molestation and thereafter accused was also examined with all the cautions and that Rule 55 of the BSF Rules was duly followed.

10. Mr. Sharma further argued that since the Rule 48 had been invoked during the summary proceedings, as such, there was no need to follow Rule 49 which is contended by the petitioner's counsel not to have been followed, as the same was not applicable, simply for the reason, that Rule 48 being applicable had been invoked. He has further argued that the Summary Security Force Court had been convened in accordance with law and all the witnesses had been examined and an opportunity of examining the witnesses had also been provided to the petitioner; that the petitioner as accused had also been asked to enter upon his defence and that he had examined one witness in defence. The Summary proceedings had been conducted in presence of Hiramani Singh, who had been engaged as a friend for the petitioner after seeking his option. He has lastly argued that the petitioner had been tried fairly by the Summary Court in terms of Rule 74(2) of the BSF Rule and the Commandant as Summary Security Force

Court was competent to conduct the trial of the petitioner; that the Summary Court had been constituted by DIG BSF on 24.11.2002 and the procedure as prescribed under the Rules had been strictly followed by the Summary Court; that in view of the evidence led against the petitioner before the Court below, it had been abundantly proved that the petitioner had outraged the modesty of the minor girls on various occasions punishable under section 354 RPC (Local Penal Law in the erstwhile State of J&K), which constituted a civil offence under section 46 of the BSF Act.

11. Heard learned counsel for the parties, perused the record and considered the matter.
12. On direction, scanned copy of the record from the Summary Security Force Court with regard to trial proceedings of the petitioner was produced for perusal. Vide Order No. Estt/SHQ'B'/SSFC/SD/04/26995 dated 24.11.2004, Deputy Inspector General SHQ BSF Baramulla under the provisions of 74(2) of the BSF Act 1968 read with Rule 158 of the BSF Rules 1969, accorded permission for trial of the petitioner Constable Sumanta Dutta as 55 Bn BSF by Summary Security Force Court by his Commandant for committing a civil offence u/s 46 of the BSF Act 1968. Pursuant to the aforesaid order, a Summary Security Forces Court was convened by the Commandant R K Thapa of 55 Bn BSF at Sopore on 29.11.2004 in presence of Sh. R K Hiramani Singh Assistant Commandant 55 Bn BSF as friend of the accused and the petitioner on being arraigned as accused pleaded 'not guilty' to the charge of molestation of minor/little girls at Old Golf Ground SHQ BSF Baramulla intending to outrage their modesty at 1900 hours on 31.07.2004, while attached with FTR HQ BSF Baramulla. During proceedings, Ajith Kumar V DC(Ops) constable Roy

MV of SHQ Baramulla, Sub (Vig) Santosh KS of Frontier HQ, 'X' (to hide her identity) a 7 year old girl, 'Y' a 6 year old girl and 'Z' a 9 year old girl (to hide their identities) were examined, as witnesses.

13. All the witnesses examined in support of a charge made incriminating statements including the victims (minor girls). After recording of statements of the witnesses, the petitioner as accused was again examined asking as to whether he intends to examine any witness in his defence and he besides himself crossing the witness box, examined Ct. Bhajan Singh as his defence witnesses.
14. The Summary Security Force Court after recording the evidence and also observing that in the year 1996 the petitioner had been awarded seven days extra guard duty, in the year 1998 was awarded eight days RI in force custody and had also been rewarded cash awards by IG BSF, DIG BSF and Commandant during his service, recorded the sentence dismissing the petitioner from service, vide impugned order.
15. Since the learned senior counsel for the petitioner has not argued on the merits of the evidence as the impugned order of dismissal has been challenged before DG BSF and she restricted her arguments only on the point of competence to try the petitioner by a Summary Security Force Court as the learned counsel for the petitioner has vehemently argued that the only General Security Force Court is competent to conduct the trial of the petitioner with regard to a civil offence. She has also drawn the attention of the court that procedural rules have also not been observed by the Summary Security Force Court.
16. Under the scheme of the BSF Act, 'civil offence' has been defined in terms of section 2(d) to mean an offence which is triable a 'criminal Court'. The

'criminal Court' has also been defined under section 2(g) to mean a Court of ordinarily criminal justice in any part of India. Section 46 which deals with 'civil offences' stipulates that subject to provisions of section 47 any person subject to BSF Act 1968 who commits any 'civil offence' shall be deemed to be guilty of an offence against the said Act and if charged therewith under section 46 of the BSF Act 1968, shall be liable to be tried by a Security Force Court and on conviction be punishable as mentioned in sub-clauses (a) & (b) of the said Section. Section 47 specifically speaks about the 'civil offence' not triable by a Security Force Court. Section 64 states about kinds of the Security Force Courts, namely, (a) General Security Force Court, (b) Petty Security Force Court and (c) Summary Security Force Court. Sections 65 and 66 deal with power who convene a General Security Force Court and Petty Security Force Court respectively, whereas Section 67 states about the contention of warrants issued under sections 65 and 66. Section 70 deals with Summary Security Force Court, whereas Section 80 deals with choice between criminal Court and the Security Force Court and stipulates that when the criminal court and the 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 a accused person shall be detained in force custody.

17. Under the scheme of the BSF Rules 1969 and in particular Rule 47 of these Rules speaks about charges not to be dealt with Summarily and stipulates

that a charge for an offence under section 14 or Section 15 or clauses (a) & (b) or Section 16 or Section 17 or clause (a) of Section 18 or clause (a) of Section 20 or clause (a) of Section 24 or Section 47 (other than that for simple heart or theft or a charge for abetment of an attempt to commit any of the offences shall not be dealt with summarily). Therefore, an offence under Section 46 (within that of simple heart or theft) shall not be dealt with summarily as provided under Rule 47 meaning thereby that an offence under Section 354 RPC under which a charge was framed against the petitioner shall not be dealt with summarily under the provisions of Rule 47 of the BSF Rules 1969.

- 18.** On a close reading of Rule 47, it clearly provides that accused can be tried summarily for the 'civil offences' of simple heart and theft only, meaning thereby that except simple heart and theft, no other offence shall be dealt with summarily under Rule 47, as such, the offence under Section 354 RPC of which the petitioner had been charged was excluded from the purview of the meaning of Section 46 of 'civil offence' and cannot be tried by a Summary Security Force Court as classified under Section 64 read with Section 70 of the BSF Act 1968.
- 19.** The only question which falls for consideration of this Court to be decided in this petition is that, whether the petitioner who was guilty of committing 'civil offence' under section 46 of the BSF Act 1968 punishable under section 354 RPC and consequentially whether Summary Security Force Court had got jurisdiction to try such offence is to be replied.
- 20.** In view of the aforesaid facts and circumstances of the case, this Court is of the considered view for the aforesaid reasons that the Summary Security Force Court was not competent and lacked jurisdiction to try 'civil

offences' under Section 46 of the BSF Act 1968 except simple heart or theft thereby the punishment of dismissal from service so imposed on the petitioner cannot be sustained in the eyes of law.

21. Most of the citations referred and relied upon, on behalf of petitioner, are with regard to duty of the Security Force Courts to follow various procedural BSF rules. This court, however, is of the opinion that, when this court has already held that the petitioners summary trial was illegal for want of jurisdiction by the Summary Security Force Court, these pleas with regard to contravention of Rules is not required to be gone into.

22. For the foregoing reasons and the observations made hereinabove, this Court is of the considered view that the imposition of punishment of dismissal from service vide impugned **Order No. Estt/THQ/55Bn/SSFC-SD/04/13354-62 dated 29.11.2004** by the Summary Security Force Court, without jurisdiction, is nullity in the eyes of law and accordingly, the same is hereby quashed alongwith all the proceedings. As a consequence thereof, the petitioner is entitled to be re-instated in service. Since the civil offence of outraging the modesty of school girl children punishable under Section 354 RPC, is a serious charge, the respondents shall be at liberty to proceed against the petitioner in a competent Security Force Court, afresh. The payment of back wages shall be subject to the fact, as to whether the respondents choose to prosecute the petitioner or not and in case they do not prosecute him, the petitioner shall be entitled to full back wages from the date of dismissal till his reinstatement.

23. Writ petition alongwith pending applications(s) is, thus, **allowed**. No order as to costs.

(M A Chowdhary)
Judge

JAMMU
15.04.2024
Vijay

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

