Deputy Inspector General, Border Security Force Vs. the State and anr.

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Court : Delhi

Decided On : Jan-04-2002

Reported in : 2002IIIAD(Delhi)433; 96(2002)DLT217; 2002(62)DRJ16

Judge : S.K. Agarwal, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 173, 446, 451, 475, 475(1) and 482; Border Security Force Act, 1968 - Sections 46, 80 and 81; Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969 - Rules 3 to 9; Indian Penal Code (IPC), 1860 - Sections 279 and 337; Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 - Rules 3 to 9; Army Act, 1950 - Sections 125 and 126

Appeal No. : Crl. M.(M) No. 2719/98

Appellant : Deputy Inspector General, Border Security Force

Respondent : The State and anr.

Advocate for Def. : Richa Kapur, Adv.

Advocate for Pet/Ap. : Anjana Gosain,; Sanjeev Sachdeva and; Priya Puri, Advs

Judgement :

S.K. Agarwal, J.

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') is directed against the order dated 21st March, 1998 passed by the Additional Sessions Judge, Delhi, dismissing the revision petition of the petitioner against the order dated 13th July, 1995, passed by the Court of Metropolitan Magistrate, dismissing application moved by the Commanding Officer under Section 80 of the Border Security Force Act, 1968 (for short, 'BSF Act') read with BSF Courts (Adjustment of Jurisdiction) Rules, 1969 (hereinafter referred to as the 'Rules') framed by Central Government under Section 475 Cr.P.C., for stay of proceedings against the accused Subhash Chander H.C. in case FIR No. 31/93, under Section 279/337 IPC, P.S. Vinay Nagar and for transfer of same to them.

2. Prosecution allegations in brief are that on 14th January, 1993 at about 5:45 P.M. accused Subhash Chander while driving BSF truck No. PCU 4842 rashly and negligently, hit motorcycle No. DHO 7447 being driven by one Roop Chand, as a result of which, he received injuries and was removed to the all India Institute of Medical Sciences for treatment. On receipt of the information, police reached the spot, recorded the statement of the injured and registered the case. During investigations motorcycle as well as BSF truck No.PCU 4842 were seized; after mechanical inspection it was given on superdari to Officer, in charge of the BSF. After arrest petitioner was released on bail by the police. One inspector of the BSF 41 Bn. stood surety for him. After completion of investigations, police submitted the report under Section 173 Cr.P.C. in the Court; cognizance was taken and summons for service on the accused were issued. Accused could be served only after issuance of bailable warrants against him. On 22nd September, 1994, accused appeared in the court and was admitted to bail. This time Bane Singh, HC No. 7122-1015 (9) 41 Bn. BSF (Headquarters) stood surety for him. The matter was listed for notice on 7th November, 1994; on that date the accused absented himself, thereforee, his surety bond was forfeited, non-bailable warrants were issued against him and notice was issued to the surety under Section 446 Cr.P.C. for 2nd February, 1995. On that date again none appeared and same process was repeated and case was listed for 3rd April, 1995. On that date, the Commanding Officer of the 41 Bn. through Shri R.V. Sinha, Advocate moved an application (dated 10th March, 1995) under Section 80 of the BSF Act, inter alia, stating therein that accused Subhas Chander had been working with the BSF and posted

under HQ 41 Bn. BSF, Dhubulia, Nadia, west Bengal and was subject to the provisions of the BSF Act and that he could be tried for the offences under the BSF Act by the BSF Court. It was pleaded that competent authority had decided on 16th February, 1995 that the accused be tried by the BSF Court; that the trial court had no jurisdiction over the matter, and it was required to transfer the proceedings to the BSF court for further action. Learned trial court rejected the application on 13th July, 1995 observing that under Section 475 Cr.P.C. in proper case the accused along with the statement of the offence, of which he is charged, is to be handed over to the Commanding Officer. The section contemplates that the accused along with the Commanding Officer must be in the Court, before the accused can be delivered. As neither of them was present, the application for delivery of the accused for trial by the BSF Authorities was not maintainable. The petitioner preferred a revision petitioner against the order dated 13th July, 1995 dismissing their application and the order dated 7th November, 1994, issuing non-bailable warrants and notice to the surety. Learned Additional Sessions Judge by impugned order dated 21st March, 1998, dismissed the revision petition holding that the accused has to be in the power and control of the Magistrate before he can be delivered to the BSF authority together with the statement of the offence of which he is charged. This order is under challenge. I have heard learned counsel for petition, learned APP for State and have been taken through the record.

3. Learned counsel for the petitioner argued that Section 475 Cr.P.C. is equivalent to Section 549 of the old Code: that Rules 3 to 9 of the Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969 are equivalent to Rules 3 to 9 in Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 and the Sections 80 and 81 of the BSF Act are equivalent to Sections 125 and 126 of the Army Act, 1950. She argued that under Section 46 of the BSF Act, offences under Sections 279/337 IPC with which accused was charged are triable both by Criminal Courts as well as BSF Courts; that under the Rules BSF authorities have the first option to try the accused for such offences; and that on receipt of the notice, BSF authorities exercised the option and decided to try the accused. In view of the same, the trial court had no jurisdiction to proceed with the trial. It was argued that the entire proceedings carried out by the trial court are null and void as mandatory notice under Rules 3 and 4 was not given by the trial court

to the commandant of the unit. It was argued that if the trial court was of the opinion that the trial should proceed in that court, despite the option having been exercised by the BSF authorities, then under the Rules, it should have referred the matter to the Central Government for determination as to which Court should try the accused. Thus it was argued that the impugned order rejecting the application of the petitioner under Section 80 of the BSF Act and requiring the Commanding Officer to produce the accused so that he can be delivered to the commandant is illegal. Reliance was placed on The Superintendent and Remembrance of Legal Affairs, West Bengal v. Usha Ranjan Roy Chowdhary, : 1986 CriLJ1248 and Gajendra Singh v. State of Rajasthan and Anr. decided on 25th April, 1995 in S.B. Crl. R.No. 337/94. Learned APP for State argued to the contrary.

4. The scope and ambit of the provisions as regards the trial of the offence committed by military personnel has been enunciated by several authoritative pronouncements of the Apex Court. The trial of the offences committed by army men under the Act draws a three-fold scheme. Certain offences enumerated in the Act are exclusively triable by court-material; certain other offences are exclusively triable by the ordinary criminal court; and certain offences are triable by both, ordinary criminal courts and the court-martial. In respect of the last category, BSF courts and the criminal courts have concurrent jurisdiction. Section 475(1) Cr.P.C. provides the procedure to avoid the conflict of jurisdiction in respect of the last category of offences. In Joginder Singh v. The State of Himachal Pradesh, : 1971 CriLJ511 , it was authoritatively laid down that for the offences which are triable both by the Criminal Courts as well as by the Military Courts, the scheme of the Rules requires that the Magistrate shall not proceed to try the military personnel unless he forms an opinion, for the reasons to be recorded in writing, and before forming such an opinion, he is required to give the requisite notice to the Commanding Officer of the accused and till the expiry of the period of notice, he is enjoined not to pass any further orders. It was further laid down that the option to try the accused rests with the military authorities and in case they exercise the option, Rules require that the accused be delivered to the Commanding Officer with the statement of the offence with which he is charged as envisaged under Section 475 Cr.P.C. (549 Old Code). It was held:-

'From a perusal of Rules 3 and 4, the scheme of these two rules appears to us to be that the Magistrate shall not proceed to try a Military personnel unless he forms an opinion for reasons to be recorded to proceed with the trial without being moved by the competent authority or the Magistrate has been so moved by the competent Military authority; but before the trial without being moved by the competent authority, he is obliged to give a written notice to the Commanding Officer of the accused and is further enjoined not to pass any of the order enumerated as (a) to (d) in Rule 4, till the expiry of the said period of the notice mentioned in Clauses (1) and (2).'

5. However, in the above case while considering the requirement of notice under Rules 3 and 4 to the Commandant of the Unit, it was observed that it would be unnecessary when the competent authorities knowing fully well about the nature of the offences against the accused, released him from military custody and handed him over to the civil court for trial. It was held:-

'Rule 4 is related to Clause (1) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under Rule 4. But, in our view, that was unnecessary. When the competent military authorities, knowing fully well the nature of the offence alleged against the appellant, had released him from military custody and handed him over to the civil authorities the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the court-martial and that he could be tried by the ordinary criminal Court.'

(emphasis supplied)

6. Before applying above principles, it is necessary to recall the facts. In this case, on 14th January, 1993, the accused committed the accident while driving the BSF truck. The truck was seized and the accused was arrested by the police and was released on bail by the police. The surety bond was executed by the official of the BSF. The truck was obtained by BSF authorities on superdari i.e., (Custody pending trial under Section 451 Cr.P.C.). After investigation, challan was filed on

29th April, 1993; accused was served through the Commandant Officer. Through letter dated 12th August, 1994 Mr.A.S. Bhatti, AC for Commandant 41 Bn. BSF requested the Magistrate that summons for appearance of the accused for 7th July, 1994 were received late and that Inspector Surender Singh Rawat who stood surety for the accused had already proceed for voluntary retirement and his village address was given. The court was requested to fix the next date of hearing and intimate the same to them giving sufficient time so that the concerned individual can attend the court. Relevant portion of the letter dated 12th August, 1994 reads as under:-

Sub: Summons

Sir,

Kindly refer to Summon No. 31/93 dated 13.7.94.

2. The aforementioned Summons recd. at this HQ on 12 AUG, 94. Whereas, as per Summons the date of hearing already expired on 13.7.94. Due to late receipt Summon the same could not be served to the individual in time. Besides, as intimated earlier, Inspector Surender Singh Rawat, has already proceeded on Vol. Retirement. Hence he is not physically present in the unit. It is requested that further communication with the above Inspector may please be made in the following address.

HOME ADDRESS:

3. In view of the foregoing, it is requested to fix N.D. of hearing and intimate giving sufficient time so that concerned individual is able to attend the court.

Your's Sincerely

Sd/- (A.S. BHATI) AC of REAR

for commandant 41 BN BSF'

7. On receipt of the said request another date was fixed by the trial court. The accused appeared before the trial court on 22.9.1994 and obtained bail and,

thereafter, he was not produced. From the above facts it is clearly stated that BSF authorities were well aware of the nature of allegations against the accused since the date of accident (14th January, 1993) when the truck was seized by the police, accused was arrested and the truck was obtained by them on superdari' (custody pending trial), and in any case, on letter dated 12th August, 1994 where the Commandant prayed for issuance of fresh summons to enable the accused to appear in the court, the accused appeared on 22nd September, 1994. In the facts and circumstances, noticed above, and as per the law laid down by the Supreme Court in Joginder Singh's case (supra), I have no hesitation in holding that the Magistrate was fully justified in proceeding with the trial and the proceedings before the ordinary criminal court cannot be said to be without jurisdiction or null and void for want of notice under Rules 3 and 4.

8. Thereafter, whenever matter was listed for hearing the accused did not appear despite non-bailable warrants against him and notice to the surety. The Commandant of the BSF again requested for time for an appropriate action. It appears that the BSF authorities on 16.2.1995, decided to try the accused in the BSF Courts and moved an application on 10th March, 1995 through their lawyer for stay of the proceedings and for transferring the same to the BSF court. The prayer clause of application reads as under:-

'It is, thereforee, respectfully prayed that the Hon'ble court be pleased to pass necessary orders/directions staying the trial proceedings of the accused Subhash Chander, HC pending before it in the case FIR No. 31/93 P.S. Vinay Nagar and further order for transfer of the same to the competent authority as per law.'

9. The approach of the BSF authorities appears to be totally erroneous. The policy of our constitutional polity is that no person is regarded above law. At the request of the Commandant of the BSF, through letter dated 12th August, 1994, another date was fixed for appearance of the accused. The accused appeared on 22nd September, 1994. Thereafter he did not appear and BSF authorities appear to have decided not to produce the accused and to hold the trial in BSF courts. In amy considered view, this is not permissible. Once they surrendered the accused before the trial court, knowing fully well the nature of allegations against him,

thereafter, they cannot be permitted to change the decision at their own whims and convenience. As the State has not chosen to challenge the order passed by the Metropolitan Magistrate or the learned Sessions Judge in revision, I think it is not necessary to examine this aspect any further. Since the initial proceedings before Magistrate were not without jurisdiction, the impugned order requiring the accused and the BSF authorities to appear before the Court to take delivery of the accused Along with the statement of the offence of which he is charged, cannot be said to be without jurisdiction or bad in law.

10. It is needless to point out that under the adjustment of jurisdiction rules, case is not to be transferred to the BSF court for trial. The courts constituted under the BSF Act are entitled to the delivery of the accused and the statement of offence of which he is charged. Judicial record or the record of Investigation Agency is not required to be transferred. This view finds support from the Division Bench decision of the Calcutta High court in The Superintendent and Remembrance of Legal Affairs, West Bengal v. C. Majumdar, 1978 Crl.L.J. 80 Further, to ensure that proper proceedings are taken against the accused the Rules require the Commanding Officer of the Competent Authority to inform the Magistrate about the action taken against the accused. There is a possibility that the Commanding Officer may not take effectual proceedings against the accused even where the Investigating Agency or the Magistrate has found a case for trial against him. To cover such exigency, Rule 7 requires that on receipt of information under Sub-rule 7(1) that the accused has not been tried or other effectual proceedings against him have not been taken, the Magistrate shall report the circumstances to the State Government to take appropriate steps to ensure that the accused person is dealt with in accordance with law. Reference in this regard can be made to the decision of the Supreme Court in Union of India v. Major S.K.Sharma, : 1987 CriLJ1912 , wherein it was held:-

The policy of the law is clear. Once the Criminal Court determines that there is a case for trial, and pursuant to the aforesaid rule delivers the accused to the Commanding Officer or the competent military, naval or air force authority, the law intends that the accused must either be tried by a court martial or some other effectual proceedings must be taken against him. To ensure that proceedings are

taken against the accused the Rules require the Commanding Officer or the competent authority to inform the Magistrate of what has been done. Rule 7(2) appears to envisage the possibility that the Commanding Officer or the competent military, naval or air force authority may not try the accused or take effectual proceedings against him even where the Magistrate has found a case for trial. To cover that exigency it provides that the State Government in consultation with the Central Government, on a report form the Magistrate to that effect, may take appropriate steps to ensure that the accused does not escape the attention of the law. The policy of our constitutional polity is that no person should be regarded as being above the law.'

11. For the foregoing reasons, I find no illegality or impropriety in the impugned orders passed by the learned courts below requiring that the accused be produced before the court so that he can be delivered along with the statement of offence of which he is charged. Ratio of the decisions cited by the learned counsel for petitioner are not applicable to the facts of this case. There is no merit in the petition and the same is dismissed.

12. However, looking into the nature of allegations and the controversy involved in the matter, petitioner is directed to produce the accused before the court concerned on 4th March, 2002 or on such subsequent date that the trial court may fix and the Court shall deliver the accused together with the statement of the offence of which he is charged, to the Commanding Officer of the Unit or his representatives for further proceedings in accordance with law. Till the next date of hearing, impugned orders issuing non-bailable warrants against the accused and notice to the surety shall remain stayed.

13. With the above observations, petition stands disposed of.