

V.S. Hamsa Vs. Director General, Border Security Force and ors.

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Court : Kerala

Decided On : Nov-06-1996

Reported in : 1997CriLJ878

Judge : K.G. Balakrishnan and; B.N. Patnaik, JJ.

Acts : [Border Security Force Act, 1968](#) - Sections 3 and 77; Army Act - Sections 123 and 123(2); [Constitution of India](#) - Article 32; Army Rules

Appeal No. : W.A. No. 1433 of 1996

Appellant : V.S. Hamsa

Respondent : Director General, Border Security Force and ors.

Advocate for Def. : K. Kochu Pappu, Govt. Pleader

Advocate for Pet/Ap. : N. Nandakumara Menon, Adv.

Disposition : Appeal dismissed

Judgement :

K.G. Balakrishnan, J.

1. Petitioner in O.P. 246/95 is the appellant. He prayed that there shall not be any criminal prosecution and investigation against him on the basis of Ext. P6 and also the FIR 53/95 of R.K. Puram Police Station, New Delhi on the ground that these

proceedings are illegal and void. The appellant was a member of the Border Security Force and he retired from that service on 31-10-93. According to respondents, in an enquiry conducted by the D.I.G. (HQ) FHQ it was found that the appellant involved himself in some recruitment scandal and, therefore, criminal proceedings were initiated against the appellant and steps were taken to arrest him. On 7-1 -94 two officers of the B .S.F. came to Thiruvananthapuram and on 9-1 -94 with the help of local Sub Inspector the appellant was arrested and the B.S.F. officers took him to Delhi. According to the respondent, the appellant managed to escape from custody while he was undergoing treatment in a hospital. According to the appellant he was released by the B.S.F. officers. Now, the contention advanced by the appellant is that he is no longer a member of the Border Security Force and therefore any proceedings initiated under the B.S.F. Act, 1968 are void and the appellant cannot be subjected to any such proceedings.

2. The above argument is based on Section 3 of the B.S.F. Act. Under Section 3 it is stated that officers and subordinate officers and under-officers and other persons enrolled under this Act are the persons subject to this Act. Clause (2) of Section 3 says that 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. So, on the basis of Section, 3 it is contended that the appellant had already been discharged from service as early as on 31 -10-93 and therefore no proceedings shall be taken against him. But the contention of the appellant is not acceptable in view of Section 77 of the Act. Section 77 reads, as follows:

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 subsection 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.

The above Section shows that if the trial has commenced within a period of six months proceedings could be taken against the persons who have retired from service. Section 77 says that an offence under this Act while subject to this Act and if he had ceased to be so subject he could be taken into custody and tried and punished for such offence provided the trial commences within six months after he had ceased to be subject to this Act.

3. In the instant case learned counsel for the appellant contended that the trial has not started so far and therefore Section 77 also is not applicable to the facts of this case. It is true that going by the relevant provisions contained in the Act trial commences when a Judge is appointed and further steps are taken for examination of the witnesses. But one important aspect to be noted is that the arrest of the appellant was effected as early as on 9-1-94 and that was within a period of three months of retirement of the appellant. If the appellant had not escaped from custody it can be reasonably assumed that the trial could have been commenced within a period of six months of the date of retirement of the appellant. The appellant successfully prevented the authorities from commencing any trial against him. The appellant is not entitled to avail the benefit of his own wrong. Therefore, the appellant is not entitled to get the benefit of Section 77 of the Act.

4. The Hon'ble Supreme Court in a similar situation that arose under the Army Rules held that the trial commenced when the General Court Martial assembles and examination of charge is undertaken and not when oath is administered to the members. It was further held that the accused himself being responsible for delay by escaping from detention, he cannot take advantage of his own wrong and so that trial had not been commenced within 6 months prescribed under the Act. That was a case where steps were initiated against the accused under Section 123 of the Army Act and he was kept under open arrest from that date onwards.

He retired from service on 31-8-1986 as Major General. On 22-9-86 the respondent was issued charge-sheet and recording of the summary evidence commenced on 25-9-86. The respondent filed a habeas corpus petition before the Supreme Court under Article 32 of the Constitution and refused to cross-examine witnesses examined at preliminary enquiry held between 20-10-86 and 25-10-96. The case was closed for prosecution on 20-11-86. The respondent was given 14 days time to prepare his case. But he did not file the list of his defence witnesses and the respondent made all dilatory tactics and at last the General Court Martial directed that the respondent be produced on 26-2-87. By the time the respondent had escaped from the lawful military custody and warrant was issued for his arrest and the respondent voluntarily surrendered on 1-3-87 and thereafter contended that the trial had not commenced within a period of 6 months and therefore the proceedings were illegal. The Supreme Court held thus:

The words 'trial commences' employed in Section 123(2) shall be required to be understood in the light of the scheme of the Act and the Rules. Trial means act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial.

The Supreme Court further held:

The respondent had frustrated the trial by escaping from detention and reappeared after the limitation for trial of the offence was barred. Therefore, disallowing the trial on ground of delay would amount to putting a premium on avoidance', See the decision reported in *Union of India v. Maj, Gen. Madan Lal Yadav* (1996) 4 SCC 127 : AIR 1996 SC 1340.

In view of the above decision also the appellant is not entitled to the reliefs prayed for in the O.P. and it has been rightly dismissed. Writ appeal is without any merit and it is dismissed.

