

Mukesh Kumar Sharma Vs. Uoi and ors

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Court : Delhi

Decided On : Dec-14-2012

Judge : Gita Mittal

Appellant : Mukesh Kumar Sharma

Respondent : Uoi and ors

Advocate for Def. : Mr. Utkarsh Sharma, Mr. B.V. Niren

Advocate for Pet/Ap. : Mr. Ankur Chhibber

Judgement :

5 * IN THE HIGH COURT OF DELHI AT NEW DELHI + W.P.(C) 318/2012 and CM No.671/2012 Date of decision:

14. h December, 2012 % MUKESH KUMAR SHARMA Petitioner Through : Mr. Ankur Chhibber, Adv. versus UOI AND ORS Through : Respondents Mr. Utkarsh Sharma, Adv. for Mr. B.V. Niren, Adv. CORAM: HON'BLE MS. JUSTICE GITA MITTAL HON'BLE MR. JUSTICE J.R. MIDHA GITA MITTAL, J.

(Oral) 1. The petitioner has assailed the signal dated 1 st December, 2012 issued by the respondents informing him that the summary proceedings initiated against him have been set aside by the competent authority with further directions for holding a General Force Court against the petitioner. The petitioner also assails the signal dated 14th December, 2011 sent by the respondents stating that the petitioners trial was tentatively scheduled in the second week of January, 2012.

2. The respondents purported to have exercised jurisdiction under the Indo Tibetan Border Police Force Act, 1992 (ITBPF Act, 1992) and the rules framed thereunder. The challenge by the petitioner rests primarily on the contention that the proposed action of the respondents was statutorily prohibited under Section 87 of the ITBPF Act inasmuch as the respondents had no authority or jurisdiction to try the petitioner for the second time, once he has been dealt with under Section 58 of the ITBPF Act, 1992.

3. To the extent necessary, the facts giving rise to the petition are briefly noticed hereafter.

4. The petitioner was enrolled in Indo Tibetan Border Police (ITBP in short) on 31st August, 1988 as a Sub-Inspector. While posted on 15th January, 2009 with the 32nd Battalion of the ITBP, the petitioner was given the responsibility to arrange the vehicles on hire basis for transportation of troops/stores from Shivpuri to Chandigarh as the unit was not having adequate vehicles. Two buses and two trucks were hired for this purpose and the troops were moved accordingly. Thereafter, certain complaints were received by the Director General of the ITBP with regard to hiring of the civil transport by the petitioner.

5. A record of evidence was held against the petitioner on the allegations of having committed offence under Section 33(f) of the ITBPF Act. It is noteworthy that the charge against the petitioner was that in the month of January, 2009 at Chandigarh, he did not proceed the Bill-T, the transportation bill and receipt of the transportation charges for the troops of 32nd Battalion for which reason, the processing of TA claims could not be effected immediately resulting in financial loss to the ITBP personnel. The record of evidence held the charge against the petitioner as having been proved and recommended disciplinary action against him.

6. Pursuant thereto, the respondents exercised jurisdiction under Section 58 of the ITBP Act and issued a memorandum to the petitioner informing him that the competent authority had decided to dispose of the matter against the petitioner by summarily trying him under Section 58 of the statute on the following charge: Charge Sheet The accused, No.880100074 Mukesh Kumar Sharma,

AC/GD of 32 Bn is charged with. First Charge Under Section 33(f) ITBPF ACT 1992. Doing a thing with intent to cause wrongful loss to others. In that he, In the month of January, 2009 at Chandigarh did not provide the Bill-T and receipt of the transportation charges to the troops of 32nd Bn for which the process of their TA claims could not be processed immediately and they suffered financial loss. Place: Special Frontier, ITBP Date:

26. 07.2011 s/d Inspector General Special Frontier, ITBPF 7 The petitioner was summarily tried on 29th July, 2011 by the competent authority who was the Inspector General (Special Frontier). By an order dated 8th August, 2011, the petitioner was awarded a sentence to be reprimanded. It is undisputed that the petitioner accepted the punishment handed out to him and did not assail the same by way of statutory appeal.

8. The matter appears to have thereafter been placed, as required under Section 59 of the ITBP Act, 1992, before the Director General, ITBP who was the statutory reviewing authority. It appears that the Director General, ITBP considered the matter under Sections 49 and 246 of the ITBP Act and rules thereunder and set aside the summary trial proceedings. A further direction was issued by the Director General to hold a General Force Court trial against the petitioner. This order was communicated to the petitioner by a signal dated 1st December, 2011. Thereafter a further signal was issued on 14th December, 2011 informing the petitioner that the General Force Court would be convened with effect from 14th January, 2012.

9. Learned counsel for the petitioner has challenged the aforesaid orders passed by the Director General, ITBPF on the ground that the second trial of the petitioner is statutorily prohibited by Section 87 of the Act and that the action of the respondents is illegal and beyond jurisdiction.

10. Learned counsel for the respondents has, on the other hand, urged that the order passed under Section 58 of the Act of the statute was not final and was subject to a mandatory statutory review under Section 59 of the ITBPF Act, 1992. The reviewing authority who, in the instant case was the Director General of the ITBP, was fully competent to review the same and to make such directions as were deemed appropriate in the circumstances of the case.

11. Before dealing with the rival contentions, it is essential to note the competence of the authorities as statutorily prescribed. In this regard, reference deserves to be made to the provisions of Sections 58(1)(a) & (1)(b), 59(1), 87(1) & (2) and Rules 46 of the ITBP Rules, 1994 which have been placed before us. The same deserves to be considered in extenso and reads as follows:Pag

20. 22 and Rules separately 58. Punishment of persons of or below the rank of Commandant by Inspectors-General and others.- (1) An officer not below the rank of Inspector-General may, in the prescribed manner, proceed against an offices of or below the rank of Commandant who is charged with an offence under this Act and award one or more of the following punishments, that is to say,(a) forfeiture of seniority, or in the case of any of them whose promotion depends upon length of service, forfeiture of service for the purpose of promotion for a period not exceeding one year, but subject to the right of the accused previous to the award to elect to be tried by a Force Court; (b) service reprimand or reprimand. xxx 59. Review of proceedings.- (1) In every case in which punishment has been awarded under Section 58, certified true copies of the proceedings shall be forwarded, in the prescribed manner, by the officer awarding the punishment to the prescribed superior authority who may, if the punishment awarded appears to him to be illegal, unjust or excessive, cancel, vary or remit the punishment and make such other direction as may be appropriate in the circumstances of the case. xxx 87. Prohibition of second trial.- (1) When any person, subject to this Act has been acquired or convicted of an offence by a Force Court or by a Criminal Court or has been dealt with under section 56, he shall not be liable to be tried again for the same offence by a Force Court or dealt with under the said sections. (2) When any person, subject to this Act, has been acquired or convicted of an offence by a Force Court or has been dealt with under section 56 or section 58, he shall not be liable to be tried again by a Criminal Court for the same offence or on the same facts. (Read with Rule 76, 142).

12. So far the relevant rules are concerned, the same read as under:46. Procedure for summary disposal of charge against officers.- (1) Where an Officer is remanded for the summary disposal of a charge against him, he shall be provided substance of evidence available against him or a copy of the record or

abstract of evidence, if prepared, alongwith a copy of the charge-sheet as soon as practicable and in any case not less than 24 hours before the commencement of the proceedings. (2) The officer dealing with the case under section 58 shall, unless the accused has consented in writing to dispense with the attendance of witnesses, hear the evidence in the presence of the accused who shall have the right to cross examine witnesses. The accused shall have the right to call any witness and make a statement in his defence. (3) Proceedings shall be recorded as far as practicable in accordance with the Form in Appendix XIV, and in every case in which the punishment is awarded, the proceedings alongwith substance of evidence or record or abstract of evidence as the case may be, shall be forwarded to the next higher authority through the Judge Attorney General or any officer authorized by him who may, if the punishment awarded appears to him to be illegal, unjust excessive or inadequate, vary or remit the punishment or set aside the proceedings or enhance the punishment, or make such other directions as may be appropriate in the circumstances of the case: Provided that before enhancing the punishment the accused shall be given an opportunity to show cause why his punishment should not be enhanced. xxx (Emphasis Supplied) 13. As per the statutory scheme, in case the respondents conduct summary proceedings (under Section

58) against the accused person and propose to levy a punishment of forfeiture of seniority or forfeiture of service for a period not exceeding one year, the accused person has a right under Sub-section (1) of Section 58 to elect to be tried by a Force Court previous to the award.

14. As per the legislative scheme, a person who is charged with an offence is either to be dealt with under Section 58 of the statute and summarily proceeded against or he would be subject to a trial by a Force Court under Chapter 7 of the ITBPF Act, 1992 which provides for various kinds of Force Courts.

15. Section 58(1)(b) permits the competent authority holding the summary proceedings to hand out the punishment of severe reprimand or reprimand. No such provision for election to be tried by Force Court is contained therein. So far as the petitioner was concerned, a decision was taken to deal with the petitioner

by summary proceedings under Section 58 of the Force Court by the authority competent to do so.

16. It cannot be disputed that Section 59 of the statute envisages that the proceedings recorded under Section 58 are mandatorily to be forwarded by the person awarding the punishment to the prescribed supervisory authority who may, if the punishment awarded appears to him to be illegal, unjust or excessive, cancel, vary or remit the punishment or make such other direction as may be appropriate in the circumstances of the case. The issue, therefore, which requires to be considered is as to what could be the spirit and intendment of the expressions illegal, unjust, excessive and make such other directions as may be appropriate in the circumstances of the case as appear in the statute. We may note that the same expressions find mention in Rule 46 of the ITBP Rules, 1994. In addition to the statutory power to cancel, vary or remit the punishment, rule 46 has additionally enabled the reviewing officer to set aside the proceedings or enhance the punishment provided that before enhancing the punishment, the accused is required to be given an opportunity to show cause as to why his punishment could not be enhanced.

17. So far as the expressions illegal, unjust, excessive or inadequate are concerned, Mr. Ankur Chhibber, learned counsel for the petitioner has pointed out that the ITBPF Act, 1992 has borrowed these expressions from Section 87 of the Army Act, 1950. These expressions used in the Army Act have been explained in the Manual of Indian Military Law. We find that Section 59 of the ITBPF Act, 1992 is para materia with Section 87 of the Army Act, 1950. Section 87 of the Army Act enables a superior military officer to conduct a review of the punishment awarded under Sections 83, 84 and 85 of the enactment. If it appears that the punishment awarded by summary trial under the Army Act is illegal, unjust and excessive, such reviewing authority is empowered to cancel, vary or remit the punishment and make such other direction as may be appropriate in the circumstances of the case. These expressions are defined in the notes below Section 87 of the Army Act, 1950 contained in the Manual of Indian Military Law as follows:- Section 87. Review of proceedings If any punishment awarded under any of the sections 83, 84 and 85 appears to a superior military authority as defined in section 88 to be

illegal, unjust or excessive, such authority may cancel, vary or remit the punishment and make such other direction as may be appropriate in the circumstances of the case. NOTES (1) (a) A punishment is wholly illegal if (i) the finding of guilty cannot be upheld or (ii) the only punishment awarded is of a kind which cannot be awarded for the offence charged (e.g., stoppage of pay and allowances for an offence which is not alleged to have occasioned any loss); or (iii) where the punishment awarded is of a kind which the authority dealing with the case is not authorized to award. (b) Where the punishment is wholly illegal it must be cancelled and appropriate directions made by the superior military authority.

2. (a) A punishment is excessive when it is in excess of the punishment authorized by law for the offence i.e., where it is of a kind which the authority dealing with the case is authorized to award for the offence charged but is greater in amount than he is authorized to award e.g., if an authority under AA.s. 83, 84, 85 were to award stoppages greater than the amount of the loss proved to have been occasioned by the offence. (b) In such cases the superior military authority specified in AA.s. 88 can vary the punishment by reducing the amount of punishment to an amount which is authorized by law.

3. Where the punishment though not in excess of the punishment authorized appears to be unjust or severe, the superior military authority has the power to remit the whole or part of the punishment. If the whole of the punishment is remitted there will be nothing left except the finding which will stand good and the accused will suffer the forfeitures or penalties which are consequential on conviction.

4. Make such other direction, as may be appropriate in the circumstances of the case : These words would enable the superior military authority to mitigate or commute the punishment where it is unjust or excessive.

18. It is trite that subordinate legislations cannot confer power or create jurisdiction beyond the statutory provisions. Section 59 is also concerned with the review of punishment which has been awarded under Section 58 and enables the prescribed supervisory authority to act in a matter where it appears to him that the punishment awarded is not appropriate and to proceed in that matter to cancel,

vary or remit the punishment or make such other directions. It is important to note that neither Section 59 nor Rule 46 envisage a second trial of a person but confine themselves to dealing with the illegality, unjustness, excessiveness or inadequacy of the punishment which has been awarded. It is evident from the intendment, scheme and purport of Section 59 that the same does not envisage a second trial and is confined in its application and consideration to the punishment which has been awarded in a summary manner.

19. Rule 46 cannot be interpreted to be read beyond what is statutorily prescribed under Section 59 of the ITBPF Act, 1992.

20. We are supported in the view which we have taken by the pronouncement of the Division Bench of this Court reported at 134 (2006) DLT 353. *Banwari Lal Yadav v. Union of India & Anr.* where the court was concerned with similar action taken by the authorities under the BSF Act and the Rules framed therein. The BSF Act contains Section 75 which was similar to Section 87 of the ITBPF Act, 1992. In *Banwari Lal Yadav (supra)*, on the plea of guilt, the petitioner was tried, convicted and sentenced to dismissal from service in a trial by a Summary Force. The respondents found that there was errors in the trial and the plea of guilt was wrongly recorded. The proceedings of the Summary Force Court were set aside and it was directed that he be tried afresh on a plea of not guilty.

21. In *Banwari Lal Yadav (supra)*, the Division Bench of this court placed reliance on a pronouncement of the Supreme Court in *Chief of Army Staff & Ors. v. Major Dharam Pal Kukrety*, AIR 198.SC 70. and held that under the Army Act, a person cannot be said to have been acquitted or convicted by a court-martial until the finding of guilty or not guilty in his case has been confirmed by the confirming authority. There is, however, no express provision in the Army Act which empowers the holding of a fresh court-martial when the finding of a court-martial on revision is not confirmed. It was held therefore, that the direction to try *Banwari Lal Yadav* afresh was contrary to law and was set aside and quashed.

22. We may also note the finding of the court in para 13 of *Banwari Lal Yadav (supra)* which would guide adjudication in the present case as well which reads as follows: 13. In our considered view, there is a clear distinction, albeit a fine one,

between cases where a court has no jurisdiction to try the offence, as for example, if the court is not competent to try the offence for want of sanction for prosecuting the accused or if the composition of the court is not proper as required for that type of court or if the court is illegally constituted of unqualified officers, and cases where the trial ipso facto is unsatisfactory as for example if during the course of the trial, inadmissible evidence is admitted or admissible evidence is shut out or proper procedure is not followed and the trial is consequently marred by grave irregularities which operate to the prejudice of the accused. In the former category of cases the trial would be no nest, being null and void from its very inception. In other words, there would be no trial in the eyes of law. In the latter category of cases, however, in our view, it would be deemed that the accused has withstood the trial and as such he cannot be tried again.

23. There is no dispute at all before us that the officer who conducted the summary proceedings against the petitioner under Section 58 was not competent to do so. Given the fact that the authority to whom the proceedings were forwarded under Section 59 was merely reviewing the punishment which was awarded, it has to be held that the order by them directing the fresh trial by the Force Court was completely without jurisdiction and legally unsustainable given the specific bar under Section 87 of the Act.

24. In view of the above, the signal dated 1st December, 2012 and 14th December, 2011 are hereby set aside and quashed. As a result, all proceedings held by the respondents pursuant to the said signals are rendered void ab initio and are so declared. The petitioner shall be deemed to have continued in service as if the same was not interdicted or influenced by the signals dated 1 st December, 2011 and 14th December, 2011. The petitioner shall be entitled to all consequential benefits which may enure to him. This writ petition is allowed in the above terms. CM No.671/2012 In view of the order passed in the writ petition, this application shall stand disposed of. Dasti to parties. GITA MITTAL, J J.R. MIDHA, J DECEMBER 14 2012 aj