
(2005) 06 GAU CK 0014
In the Gauhati High Court
Case No : Writ Petition (C) No. 469 of 2003

Amal Bhushan Deb

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Army Act, 1950 — Section 153
Army Rules, 1954 — Rule 14, 14(2), 71
Border Security Force Act, 1968 — Section 106(8), 107, 108, 113, 141
Border Security Force Rules, 1969 — Rule 101, 102, 22, 22(3)
Central Civil Services (Pension) Rules, 1972 — Rule 41
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 302, 353

Citation : (2006) GLT 867 Supp

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee and P.K. Ghosh, for the Appellant; K. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—The legality of the order dated 21.05.2001 removing the Petitioner from service with pensionary benefits under Rule 22(3) of the Border Security Force Rules, 1969 (hereinafter referred to "the BSF Rules" for short) is called into question in this writ petition.

2. The factual matrix giving rise to this writ petition is not in dispute. Prior to his removal, the Petitioner was serving as Sub-Inspector in the Boarder Security Force (hereinafter called "BSF"). On 26/27.06.1993, while the Petitioner was deployed at Kishtwar, certain allegations were made against him for commission of offences punishable u/s 46 of the Border Security Force Act, 1968 (hereinafter called "the BSF Act" for short) read with Sections 302 and 353 of I.P.C. The first charge against him is that while he was at Tourist Hostel Complex, Kishtwar as an officiating Company Commander of E" Coy. of 123 Bn. BSF, he caused the

death of three civilians by firing. The order charge is that while at parade ground at Kishtwar in June, 1993, the Petitioner used criminal force against one Sri Abdul Quyoan Dar of SHQ Police Station, Kishtwar, who is a public servant, when the said SHQ had asked for handing over three suspected militants. The Petitioner was asked to show cause against the charges levelled against him, which was replied to by him by denying the charges against him. It would appear that in connection with the aforesaid charges, General Security Force Court (hereinafter called "GSFC for short) was constituted to try the Petitioner. The GSFC, which held its proceeding from 15.02.1997 to 25.02.1997 returned a verdict of not guilty subject to confirmation. The confirming authority, after considering the findings of the GSFC, had taken the view that the findings were against the weight of the evidence on record and hence, ordered for revision of the findings. In accordance with the aforesaid order, the GSFC resembled and after reconsidering the matter again held the Petitioner not guilty of the charges levelled against him. The confirming authority apparently did not accept the verdict returned by the GSFC and decided to proceed against him under Rule 22(2) of the BSF Rules and thereupon issued a notice to the Petitioner to show cause as to why a punishment of removal from service with pensionary benefits should not be imposed upon him. The Petitioner submitted representation against the proposed punishment. It would appear that after considering the representation of the Petitioner, the confirming authority imposed the proposed punishment and removed him from service with pensionary benefits. At this stage, it may be noticed that the payment of pensionary benefits was not made to the Petitioner for sometime due to problems of interpretation concerning the said Rules, 22(2) of BSF Rules. However, the pensionary benefits were ultimately released in favour of the Petitioner on 07.08.2002 at the rate of two third of actual entitlement under the provisions of Rule 41 of the Central Civil Services (Pension) Rules, 1972 vide PPO No. 240550226332. Aggrieved by the order of removal, the Petitioner is approaching this Court by way of this writ petition.

3. In the show cause notice issued by the Respondent No. 4, it was stated by him that the Petitioner was unfit for further retention in service and tentatively proposed to remove from service with pensionary benefits under Rule 22 of the BSF Rules. The Respondent No. 4 decided to issue the said notice as he was of the considered view that the findings of the GSFC are grossly against the weight of the evidence on record and, as such, such the findings were not confirmed. The contention of Mr. K.N. Bhattacharjee, learned senior counsel for the Petitioner is that under BSF Act and the Rules made thereunder, there is an initial option either to have the Petitioner tried by a GSFC or to take action against him under Rule 22(3) of the BSF Rules and that in his case, the option having been exercised to try him by a GSFC, the Respondent No. 4 is not competent to take recourse of Rule 22(3) after the Petitioner has been acquitted both at the time of original trial and on revision. The learned Counsel further submits that since the Petitioner had in fact been tried by GSFC, which both at the time of original trial and on revision had returned a verdict of "not guilty", it cannot be said that it

was inexpedient or impracticable to try the Petitioner by a GSFC and, therefore, the impugned order of removal is without any jurisdiction. On the other hand, Mr. K. Bhattacharjee, learned Assistant SG appearing for the Respondents has strenuously urged that the instant case is squarely covered by the principles laid down by the Apex Court in Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, Drawing my attention to Rule 22(3) of the BSF Rules, he further submits that the provisions of Rule 14(2) of the Army Rules, 1954 are in pari materia with the aforesaid provisions of the BSF Rules and, therefore, the Respondent No. 4 does not commit any illegality in issuing the impugned order. He, therefore, prays that the writ petition being devoid of substance is liable to be dismissed.

4. Before proceeding further, it will be useful to refer to and reproduce hereunder the provisions of Rule 22 of the BSF Rules as under:

[22. Dismissal or removal of persons other than officer on account of misconduct- (1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, to show cause in the manner specified in Sub-rule (2) against such action:

Provided that this sub-rule shall not apply-

(a) where the service is terminated on the ground of conduct which has led to his conviction by a Criminal Court or a Security Force Court; or

(b) where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable, to give the person concerned an opportunity of showing cause.

(2) When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence:

Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion, its disclosure is not in the public interest.

(3) The competent authority after considering his explanation and defence if any may dismiss or remove him from service with or without pension :

Provided that a Deputy Inspector-General shall not dismiss or remove from service, a Subordinate Officer of and above the rank of a Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to be Director General.]" 5. A cursory look at Sub-Rule (3) of Rule 22 plainly shows that the foundation of the jurisdiction of the Respondent No. 4 to issue a show cause notice is the satisfaction of the competent authority after considering the

reports of the misconduct of an officer that the trial of the officer by a GSFC is inexpedient or impracticable and the opinion formed thereby that the further retention of the officer in the service is undesirable. In this case, the Petitioner was tried by a GSFC which found him not guilty of any charge levelled against him. Section 75 of the BSF Act prohibits the trial by a GSFC or by a Criminal Court against the person for the same offence or on the same facts where such a person has been convicted or acquitted by Criminal Court. The provision relating to confirmation and revision are provided in Chapter 8 of the BSF Act and the relevant provisions are found at Sections 107, 108 and 113, which are as follows:

107. Finding and sentence not valid, unless confirmed. - No finding or sentence of a General Security Force Court or a Petty Security Force Court shall be valid except so far as it may be confirmed as provided by this Act.

108. Power to confirm finding and, sentence of General Security Force Court- The findings and sentences of General Security Force Courts may be confirmed by the Central Government or by any officer empowered in this behalf by warrant of the Central Government.

113. Revision of findings or sentence.- (1) Any finding or sentence of a Security Force Court which requires confirmation may be once revised by order of the confirming authority and on such revision, the Court, if so directed by the confirming authority, may take additional evidence.

6. Section 141 of the BSF Act confers upon the Central Government the power to make rules for carrying into effect the provisions of the Act. Therefore, it will be appropriate to set out the relevant provisions, which are at Section 105 and Section 106(8)(a) and (b) of the BSF Rules:

105. Revision- (1)(a) Where the finding is sent back for revision u/s 113, the Court shall re-assemble in open Court, the revision order shall be read and if the Court, is directed to take fresh evidence such evidence shall be taken in open Court.

(b) Where such fresh evidence is recorded otherwise than at the instance of the accused shall be given a further opportunity to lead evidence in respect of matters brought out in such fresh evidence.

(c) The prosecutor and the accused shall be given a further opportunity to address the Court in respect of the fresh evidence led.

(d) The Law Officer may also give a further summing up.

(2) Whether the revision of finding does not involve taking of fresh evidence, the accused shall be given an opportunity to address the Court in respect of matter raised in the revision order.

(3)(a) The Court shall then deliberate on its finding in closed Court and if the Court does not adhere to its former finding, it shall revoke the finding and sentence and record a new finding and if such new finding involves a sentence

pass sentence afresh.

(b) Where the original finding was one of "Not guilty", the Court shall, before passing sentence comply with Rules 101 and 102.

(4)(a) Where the sentence alone is sent back for revision, the revision order shall be read in open Court and the accused given an opportunity to address the Court in regard to matters referred to in the revision order.

(b) The Court shall then reconsider its sentence in closed Court and if it does not adhere to the sentence, revoke the sentence and pass sentence afresh.

(5) Where the sentence alone is sent for revision the Court shall not revise the finding.

106. Confirmation and promulgation (8)(a) When a confirming authority has confirmed a finding and a sentence of a Court or has withheld confirmation thereof, it shall send the record of the proceedings to the Commandant of the accused for promulgation to the accused of the finding and sentence or the fact that the confirmation has been withheld as the case may be.

(b) The fact of promulgation shall be recorded on the record of the proceedings in the form set out in Appendix IX.

7. From the aforesaid provision, it becomes clear that u/s 113 of the BSF Act, the confirming authority has the power to direct a revision only once and on such revision, there is no further power with the confirming authority, if he does not agree with the findings of revision to direct a second revision of such findings. In the absence of any such confirmation, whether of the original finding or of the finding on revision, by the operation of Section 107, the finding is not valid. The aforesaid show cause notice issued by the Respondent No. 4 discloses that the findings of the original proceeding and of the findings on revision made by the GSFC have not been confirmed and, therefore, such findings cannot be held to be valid. It may be noted that as a person subject to the BSF Act, who has been acquitted or convicted of an offence by a Security Force Court or by a criminal Court, is immune from fresh trial for the same offence by a Security Force Court in terms of Section 75 of the BSF Act. However, no express provision is found in the BSF Act which empowers the holding of a fresh Security Force Court when the finding of a Security Force Court on revision is not confirmed. Three decisions, rendered by the Allahabad High Court, Punjab and Haryana High Court and Jammu and Kashmir High Court, referred to by the Apex Court in Major Dharam Pal Kukrety (supra) have held that when the finding and sentence passed by the Court-martial are not confirmed by the confirming authority, the second trial by a Court-martial is barred. The aforesaid High Courts in those cases were dealing with the provisions of Army Act, 1950 and Air Force Act, 1950 which are in pari materia with Section 75 of the BSF Act.

8. For better appreciation of the controversy involved, it will be necessary to deal with Major Dharam Pal Kukrety (supra). The Petitioner in Major Dharam Pal

Kukrety (supra), a permanent commissioned Officer of the Indian Army, was tried by a general Court-martial on certain charges. The Court-martial on considering the evidence found the Petitioner not guilty of all the charges. The GOC, M.P, Bihar and Orissa Area, who was the confirming authority, instead of confirming the verdict remanded the finding for revision. The same general Court-martial after hearing both the sides and considering the observations of the GOC once again found the Petitioner not guilty of all the charges. Ultimately, the GOC-in-C, Central Command did not confirm the finding. Thereupon the charges made against the Petitioner, the finding and the non-confirmation thereof were promulgated as required by Rule 71 of the Army Rules. The Chief Army Staff thereupon issued a notice under Rule 14 of the Army Rules stating that he, being satisfied that a fresh trial by a Court-martial was inexpedient, was of the opinion that the Petitioner's misconduct as disclosed in the proceedings rendered his further retention in the service undesirable and called upon him to submit his explanation and defence. The Petitioner was also supplied with abstracts of evidence and the Court-martial proceedings. The show cause notice was challenged by the Petitioner before the High Court under Article 226 of the Constitution of India. A preliminary objection was raised by the Army authorities therein contending that the writ petition was not maintainable as it premature. The High Court allowed the petition. This is what the Apex Court held:

In view of Section 153 of 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. In the absence of any such confirmation, whether of the original finding or of the finding on revision, by reason of the provisions of Section 153 the finding is not valid. Therefore, in the case of the Respondent, the finding of the general Court-martial on revision not having been confirmed was not valid.

The Apex Court also held:

There is, however, no express provision in the Army Act which empowers the holding of a second revision or a fresh Court-martial when the finding of a Court-martial on revision is not confirmed. When therefore, the finding of a Court-martial even on revision is perverse or against the weight of evidence on record the Central Government or the Chief of the Army Staff can have resort to Rule 14 of the Army Rules. Such a course is not prohibited under the Army Act or Rules, though it is open to the Central Government or the Chief of the Army Staff to have recourse to that rule in the first instance without directing trial by a Court-martial of the concerned officer. A trial by a Court-martial can be said to be inexpedient or impracticable in such a case having regard to the dictionary meaning of the words "inexpedient" and "expedient".

The Apex Court further observed:

In the present case, the Chief of the Army Staff had, on the one hand, the finding of a general Court-martial which had not been confirmed and the Chief of

the Army Staff was of the opinion that the further retention of the Respondent in the service was undesirable and, on the other hand there were decisions of three High Courts against holding of a fresh Court-martial when finding of a Court-martial on revision is not confirmed and the point was not decided by a definitive pronouncement of the Supreme Court. In such circumstances, to order a fresh trial by a Court-martial could certainly be said to be both inexpedient and impracticable and the only expedient and practicable course, therefore, open to the Chief of the Army Staff would be to take action against the Respondent under Rule 14, which he did.

9. The observations made by the Apex Court in the aforesaid case, to my mind, completely answer the contention of the learned Counsel for the Petitioner in this case. In the instant case also, the finding of the GSFC on revision, not having been confirmed, cannot be held to be valid. Since there is no express provisions under the BSF Act or the Rules made thereunder, which empowers the holding of a second revision or a fresh GSFC when the finding of the GSFC on revision was not confirmed on the authority of the law laid down by the Apex Court in *Major Dharam Pal Kukrety (supra)*, it can be safely said that it was neither inexpedient (sic. expedient) nor impracticable (sic. practicable) to retry the Petitioner and that the only expedient and practicable course open to the Respondent No. 4 was to take recourse to Rule 22(3) of the BSF Rules. Having adopted such a course of action as permissible by law, the Respondent No. 4 has removed the Petitioner from service with pensionary benefits. There is no infirmity in the course of action taken by the Respondent No. 4 in issuing the impugned order. It may be noted that the challenge of the Petitioner in this writ petition is confined to the power of the Respondent No. 4 in taking a resort to Rule 22(3) of the BSF Rules after returning a verdict of not guilty by the GSFC on revision. No challenge is made by him on the propriety or otherwise of the other aspect of the proceeding against him.

10. In the light of the foregoing, this writ petition is without any substance and is, therefore, dismissed. However, on the facts and circumstances of this case, there shall be no order as to costs.