

(2013) 01 DEL CK 0147

In the Delhi High Court

Case No : Writ Petition (C) 5874 of 2000

Birender Singh Shekher

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 07-01-2013

Acts Referred:

Citation : (2013) 134 DRJ 200

Hon'ble Judges : Sudershan Kumar Misra, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : H.D. Sharma, for the Appellant; Barkha Babbar, Advocate with Mr. Bhupinder Sharma, Dy. Commandant, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The petitioner challenges an order dated 7.2.2000 made by the Central Government in exercise of its power under Rule 21 (2) of the BSF Rules, 1969. The petitioner was compulsorily retired from service by the said impugned order. The brief facts necessary for deciding the case are that the petitioner joined the Border Security Force (BSF) on 2.1.1995 as a probationer Assistant Commandant and was posted to Murshidabad, West Bengal. On 24.5.1997, the Commandant of his Battalion ordered preparation of record of evidence (ROE) against the petitioner in respect of an allegation that he was involved in smuggling. The ROE was completed and submitted to the Commandant on 4.11.1997. In the meanwhile, on 16.9.1997, the writ petitioner was placed under suspension asking him not to leave the Headquarters without obtaining the permission of the competent authority.

On 5.12.1997, the concerned authority, i.e., the Commandant, after scrutinizing the evidence, submitted his detailed comments holding that the petitioner could not be held guilty of the 1st, 4th and 5th charges and recommended that he ought to be tried by the General Security Force Court (GSFC) for the 2nd and 3rd charge.

2. The 2nd and 3rd charges leveled against the petitioner are as below:-

SECOND CHARGE IN A DOCUMENT SIGNED BY HIM BSF ACT, SEC 35 (a) KNOWINGLY MAKING A FALSE STATEMENT.

at BOP Basumari, in that he, on 15.3.97, in the entry signed by him in the log book of BSF Jeep No. WP241804, showed that vehicle was used by him for patrol duty from 1105 hrs to 1225 hrs, which statement was as he well knew, false.

THIRD CHARGE IN A DOCUMENT SIGNED BY HIM BSF ACT, SEC 35 (b) KNOWINGLY MAKING ANY OMISSION WITH INTENT TO DEFRAUD.

at BOP Basumari, in that he, on 23rd March, 97, in the entry about patrol party made at Srl. No. 03 in General diary of BOP and signed by him, with intent to defraud, omitted to mention the name of EF B/B Kameswar Thakur in that patrol party consisted of himself, Ct Arun Kumar, Ct/Dvr Mewa Ram and said EF B/B Kameswar Thakur.

3. However, the BSF was of the opinion that chargesheet had to be issued in respect of the charges. The first pertained to accepting money as gratification other than legal remuneration as a motive for showing favour to an individual, (an offence under Section-7 of the Prevention of Corruption Act); the second pertains to an allegation of making false statement; and the third pertains to creation of a document containing omission with intent to defraud and related allegations.

4. On 24.7.1998, IG, BSF recommended that the petitioner should be tried by a GSFC. Consequently, on 29.7.1998, proceedings before that Court commenced. The GSFC, after considering the evidence of witnesses recorded during the proceedings and considering the arguments, held that the petitioner was not guilty with regard to the 1st and 3rd charges; and was guilty of the 2nd, 4th and 5th charges. He was accordingly convicted and sentenced to:

(a) take rank and precedence as if his appointment to the rank of Assistant Commandant was before the date 02.01.1998;

(b) forfeit 3 years of service for the purpose of promotion;

and

(c) to be severely reprimanded.

The proceedings of the GSFC were concluded on 18.03.1998 and the findings were forwarded to the Inspector General, South Bengal Frontier, BSF, for confirmation. That official, by an order dated 29.10.1998, confirmed the findings and sentence of the GSFC; in the same breath, however, he recorded as follows:-

I confirm the findings and sentence of the Court. However, as regards the finding on the first amongst very many others, under which the accused had met the civilians near BOP Madhobana and Gopalpur Ghat, purpose behind that meeting, the modus Vivendi, by which the accused collected the suitcase from Gopalpur

Ghat, and the ulterior motive in sending the B/B to his home, the method adopted by which the accused tried to compromise with PW-2, circumstances which led to falsification of documents at BOP Bousmari, unlikelihood of any conspiracy on the part of prosecution witnesses like Shri G.S. Rana, B/B Kameshwar Thakur and others, the non-convincing argument of the accused having given his home address only to PW-7 and Exhibit-T being from his personal diary in his own handwriting, non-recovery of food charges from PW-7, if he was not away on temporary duty and not taking of disciplinary action against B/B, of his own, if he had absented; shows that he had not gone to Delhi of his own, are sufficient to show to make one to believe in the involvement of the accused in the transaction of Rs. 80,000/- notwithstanding the fact that the persons ignorance and resiled from their earlier statements before the court. Hence, the finding of the court and acquittal of the accused on this charge is not on merit. The above circumstances sharply points accusingly towards the honesty and integrity of the accused. The accused had hardly put in about 4 years of service, and in the backdrop of serious malfeasance, cited above, I am of the view that no useful purpose would be served, by ordering a Revision of Finding; at the same time, I strongly feel that it would not be desirable to keep such an officer, in a Force like BSF. Consequently, I recommend his case for termination of service by Central Govt. in view of the aforementioned circumstances on the ground of unsuitability under BSF Rule 21.

5. The writ petitioner was served with notice for initiation of action under Rule 21 of the BSF Rules as amended w.e.f. 1990. This notice proposed that he either resign or face compulsory retirement from the service, for act not amounting to misconduct. The petitioner represented against the notice on 19.6.1999 and argued that initiation of action under Rule 21 was unwarranted having regard to the circumstances and particularly the fact that he had faced a full trial before the GSFC, which had not recommended termination or dismissal. On 7.2.2000, the Central Government issued a notice directing the petitioner to submit his resignation within 30 days failing which he was to be compulsorily retired under Rule 21 (3) of the BSF Rules. The petitioner did not respond to this notice. Consequently, on 17.5.2000, the impugned order was made by the Central Government compulsorily retiring the writ petitioner.

6. It is contended by the petitioner in support of the writ petition, as well as by his counsel who argued in Court today, that recourse to Rule 21 (3) to compulsorily retire the official in the facts and circumstances was unwarranted.

Learned counsel relied upon the fact that the competent officer, i.e., Inspector General, by his order dated 29.10.1998, had confirmed the findings and sentence of the Court which recommended three kinds of penalties. With that, the BSF was precluded from taking any further action or imposing any penalty or adverse order on the petitioner in respect of the same misconduct which was the basis of proceedings before the GSFC. Learned counsel relied upon Rule 20 and juxtaposed it with Rule 21 saying that in the event the BSF was of the opinion

that the petitioner had committed misconduct, the proper course for it to have adopted was to initiate an enquiry and impose any of the penalties under Rule 20. Having done that and also having confirmed the findings of the GSFC (which held that he was not guilty in regard to matters for which he was ultimately retired), it was not open for the authorities to have sought recourse to Rule 21.

7. Mr. H.D. Sharma, Advocate also urged that the procedure adopted by the BSF in this case was unfair. Elaborating on this, it was urged that while confirming the findings of the GSFC, the Inspector General concerned, i.e., the competent authority made a detailed note based on a reappraisal of materials on records. While doing so, that authority did not put the petitioner on notice. In these circumstances, the material which otherwise was taken into consideration and on the basis of which inferences were drawn and findings rendered by the GSFC were virtually overturned and adverse material was inferred by the IG even after confirming the recommendations of the GSFC. This in turn formed the basis of the recommendations by the Director General to the Central Government under Rule 21. By the time notice was issued under Rule 21, the adverse nature of the observations was a matter of record. Arguing that this was inherently unfair to the petitioner who was justified in assuming that the penalties inflicted on him (given effect to as a consequence of confirmation of the GSFC order), would be final, he was penalized in regard to matters that were not found against him.

8. Learned counsel for the respondents relied upon the notice issued by the Central Government under Rule 21 (3) and submitted that at that stage the writ petitioner had already been made aware of the note recorded by the competent authority even while recommending confirmation of the GSFC proceedings. The respondents, therefore, contended that charge of unfairness in the proceedings is without basis. It was also highlighted that the writ petitioner's conduct was less than satisfactory within barely a year of his joining the duties. Learned counsel drew attention of the Court to the annexure to the notice dated 10.05.1999, issued under Rule 21 (2), and mentioned that besides the proceedings of the GSFC, the service record of the petitioner contained adverse entries both with regard to his integrity, as well as with regard to his functioning and aptitude.

9. This Court has considered the submissions of the parties. Section 10 of the Border Security Force (BSF) Act, 1968 empowers the Central Government, subject to the provisions of the said enactment and Rules framed, to dismiss or remove from service any person subject to the Act. The Rule 20 of the 1969 Rules enables the Central Government to terminate officers on account of misconduct. The punishments, which can be validly imposed by the Central Government, include dismissal, removal, retirement or the officer being called upon to resign. Before proceeding to pass an order under Rule 20, BSF has to follow the procedure prescribed in Rules 65-106 of the 1969 Rules. These rules prescribe the procedure in holding of GSFC. After the recommendations of the GSFC are received, the same has to be confirmed under Rule 106. It is only after

following this procedure that the Central Government is entitled to pass an appropriate order having regard to the findings and the confirmation of such findings under Rule 20.

10. In this case there is no dispute that the writ petitioner was issued a notice and the procedure mandated by Rules 65-106 was followed. Even though at the initial stage, the Commanding Officer had recommended action in respect of two charges, the enquiry went into all the charges. The GSFC in its findings held the petitioner guilty in respect of three charges, i.e., charge nos. 2, 4 & 5. However, while confirming these findings, the competent officer, i.e., the Inspector General appended his observations about the materials, which had been brought on record in the form of evidence including that of the alleged complainant/witness. The said Inspector General was of the opinion that this was a matter to be brought to the notice of the Director General, who could take a decision on whether to make a reference under Rule 21 to the Central Government. Ultimately, a reference was made and the Central Government proceeded to issue notice. The petitioner, as is evident from the previous discussion, is aggrieved by the fact that having been inflicted with some penalty, he is virtually being terminated in respect of the charges, which held not proved and not confirmed under Rule 106.

11. The ground of alleged arbitrariness or unfairness in regard to the procedure adopted by the confirming officer, i.e., the petitioner was not put to notice about the likelihood of such an adverse noting in the opinion of the Court is not made out. The concerned authority under Rule 106 has to "record its decision". In the present case, the competent authority, i.e., the Inspector General was of the opinion that the findings in so far as they implicate the petitioner in respect of three charges, had to be confirmed and he did so. However, in respect of other two charges, the authority was of the opinion that instead of relegating the matter for a fresh enquiry or trial on account of his disagreement, which in his opinion was inappropriate, he proceeded to advert to Rule 21 and recommended that the action be considered. Had no action been taken by the Director General or even the Central Government, surely, the writ petitioner would not have been aggrieved by the recording of the note. However, that recommendation as it were, were accepted and reference was made to the Central Government. By that stage, the writ petitioner was already in possession of the record of confirmation which contained the adverse note made in regard to the findings by the inspector General concerned. Therefore, this Court is of the opinion that while responding to the notice under Rule 21, the petitioner was not dealt with unfairly and that he had full opportunity to question the observations and recommendations made by the inspector General/competent authority. Those observations were of a prima facie nature.

12. As far as the first and perhaps the wider question as to the jurisdiction of the competent authority to seek recourse to Rule 21, after the concerned charge was gone into by the GSFC is concerned, this Court is of the opinion that having

regard to the circumstances that in this case, the writ petitioner was a probationer who had faced the charges relevant to his alleged illegal smuggling, the issue raised need not be gone into, it is very well established that as regards the suitability of the probationer, to be continued in the service, the employer has greater autonomy in taking a decision, in exercise of such decision, at least on the facts and circumstances of this case, the respondent was justified in concluding that the petitioner no longer was suitable to be continued in service. The materials on record which were put to the writ petitioner are of such a nature that the view taken can hardly be faulted as unreasonable. In view of the above discussions and findings, no relief can be granted in the writ petition which is held to be meritless. The same is, therefore, dismissed without any order as to costs.