

(1995) 12 DEL CK 0017

In the Delhi High Court

Case No : Civil Writ Petition No. 1380 of 1975

Piare Lal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-12-1995

Acts Referred:

Citation : (1995) 12 DEL CK 0017

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Judgement

Vijender Jain, J.—The petitioner was enrolled as constable in the Punjab Armed Police on 15.11.1962 and then joined Border Security Force as Head Constable in the year 1968 and was confirmed in the BSF as Head Constable with effect from 14.11.1972.

2. On the intervening night of 30/31-3-1974 in appreciation and recognition of his good work during the ambush laid down in the area of BOP Dal Forward and capturing 37 Kgs. of Opium, the petitioner was given appreciation certificate on 30.4.1974. Another certificate was issued to him in recognition of exceptionally good work done and displaying exceptional industry and acuteness during the year 1973-74 under CRP Rule 53-A, Clause (d). The petitioner was awarded the certificate in appreciation to the incident which occurred on the intervening night of 30/31-3-1974 when he along with his other colleagues opened fire on a gang of smugglers who were trying to cross the border post and in the process captured 37 Kgs. of Opium though the smugglers escaped.

3. Mr. V. P. Sharma, learned counsel for the petitioner, has challenged the proceedings initiated against the petitioner pursuant to Rule 48 of the Border Security Force Rules wherein the record of evidence was prepared, on many grounds. He has also assailed the dismissal of service of the petitioner pursuant to Rule 26 of the Rules on the ground that once the petitioner was proceeded by invoking Rule 48 of the BSF Rules initially and record of evidence was prepared for 11.9.1974 till 25.9.1974 the respondent could not make out a case on the

basis of record of evidence recorded under Rule 48 of the Rules to get rid of the petitioner by invoking Rule 26 of the Rules and terminating the services on the ground of unsuitability in terms thereof on 26.2.1975. Mr. Sharma has contended that once the authorities have decided to take recourse to Rule 48 they should have either ordered for an action contemplated under the BSF Act and the Rules framed there under for a trial or have referred the matter to an appropriate Court having jurisdiction. Mr. Sharma has further contended that assuming that the Commandant was appointing authority of the petitioner the Commandant has not applied his mind but has simply complied with the orders of the superiors as termination of petitioner was decided on 8.1.1975 and, Therefore, show cause notice dated 16.1.1975 in terms of Rule 26 and order of compulsory retirement dated 26.2.1975 was merely a formality and contrary to the provisions of BSF Rules.

4. Mr. Sharma has further contended that it is unconceivable that on the one hand the respondents themselves have given appreciation certificates for gallantry of the petitioner and on the basis of same action he could be punished on the testimony of Mukhtiar Singh who was a known smuggler and enough evidence was led before the respondent that the said Mukhtiar Singh had an altercation with the petitioner and that if the allegation of Mukhtiar Singh was correct then it is unconceivable that he could have opened fire on the said Mukhtiar Singh and Sajan Singh if he had accepted the money as alleged. Mr. Sharma has further contended that the allegations against petitioner constituted a criminal offence punishable u/s 31 of the Border Security Force Act, 1968 and triable by both criminal Court and security force Court and as such a decision was required to be taken as to before which Court the proceedings could be instituted in terms of the provisions of Section 80 of the BSF Act, 1968, and Rule 41 of the BSF Rules, 1969 and non-compliance of these provisions has vitiated the subsequent investigation and summary disposal and recording of evidence under Rule 48 of the Rules and, Therefore, the impugned orders are null and void.

5. In support of his submissions, learned counsel for the petitioner has cited Lt. Col. Jagga Singh v. Union of India & Anr. 1995 (4) A D (Del) 333; Ex.-EM Vinod Prasad v. Union of India & Ors. Civil Writ Petition No. 3782 of 1994 decided on 13.3.1995 and Sgt. Jeevan Kumar & Ors. v. Union of India & Ors. Writ Appeals No. 78, 141, 152 of 1992 decided on 4.3.1992 by Karnataka High Court.

6. On the other hand, Mr. Datar, learned counsel for the respondent has contended that during the course of recording of evidence S. I. Kulbir Singh has deposed that in the month of September 1974 he came to know about the involvement of the petitioner and on the basis of said report the proceedings were initiated against the petitioner. Mr. Datar has further contended that there is no bar for initiation of proceedings under Rule 26 of the Rules even when the respondent has initiated recording of evidence pursuant to Rule 48 of the Rules. In support of his contention he has also cited the case of Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, . Mr. Datar has submitted that it was found

that the petitioner was unsuitable to be retained in the Border Security Force and was thus retired under Rule 48 of the BSF Rules.

7. I have given my careful consideration to the submissions made by learned counsel for both the parties.

8. Supreme Court in Chief of Army Staff's case (supra) has authoritatively held that :

"That being the position, what then is the course open to the Central Government or the Chief of the Army Staff when the finding of a Court-Martial even on revision is perverse or against the weigh of evidence on record? The High Court in its judgment under appeal has also held that in such a case a fresh trial by another Court-Martial is not permissible. The crucial question, Therefore, is whether the Central Government or the Chief of the Army Staff can have resort to Rule 14 of the Army 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, there is no provision in the Army Act or in Rule 14 or any of the other rules of the Army Rules which prohibits the Central Government or the Chief of the Army Staff from resorting in such a case to Rule 14. Can it, however, be said that in such a case a trial by a Court-Martial is inexpedient or impracticable? The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient; disadvantageous in the circumstances, unadvisable, impolitic". The same dictionary defines "expedient", inter alias as meaning "advantageous, fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term "expedient" inter alias as meaning "characterised by suitability, practicability, and efficiency in achieving a particular end : fit, proper, or advantageous under the circumstances.

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 the above three High Court decisions and the point was not concluded by a definitive pronouncement of this 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. The action of the Chief of the Army Staff in issuing the impugned notice was, Therefore, neither without jurisdiction nor unwarranted in law".

9. That being the position the arguments advanced by learned counsel for the respondent that it was open to the authorities to have recourse to Rule 26 is correct. But after initiating proceedings under Rule 48 what was the material before respondent to come to a conclusion that it was not possible to declare the petitioner unsuitable or it was expedient to proceed under Rule 26 of the Rules.

On my repeated queries to the learned counsel for the respondent as to what was the material which warranted the authorities to invoke Rule 26 regarding petitioner, nothing was brought before this Court except the statement of S. I. Sukhbir Singh recorded in the record of evidence in the month of September 1974. On the one hand, respondent had awarded the petitioner commendations for the incident that took place on the intervening night of 30/31-3-1974 in the absence of any material showing that it was impracticable and inexpedient to follow normal procedure which was followed invoking of Rule 26 in the present case seems wholly arbitrary and unjustified. Once the respondent has initiated action pursuant to Rule 48 and has prepared record of evidence they could have pursued the same to its logical conclusion in terms of the Rules. Though, there is no inherent lack of jurisdiction in issuing or invoking Rule 26 by the respondent but that invocation must be on the basis of certain material wherein it must be brought to the notice as to why it was expedient to invoke Rule 26, nothing has been brought to the notice of this Court in this regard.

10. The respondents themselves have admitted in paragraph 4 of the counter which they have filed that the petitioner was not tried at all after the preliminary step of the record of evidence but he was proceeded under Rule 26 of the Rules, which reads :-

"Retirement of enrolled persons on grounds of unsuitability. - Where a Commandant is satisfied that an enrolled person is unsuitable to be retained in the Force the Commandant may, after giving such enrolled person an opportunity of showing cause (except where he considers it to be impracticable to give such opportunity), retire from the Force the said enrolled person".

11. It is evident that retirement of person on the ground of unsuitability does cast a stigma. In Jagdish Mitter Vs. The Union of India (UOI), , Supreme Court held :-

"No doubt the order purports to be one of discharge and as such, can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But, it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts a stigma on the appellant and in that sense, must be held to be an order of dismissal and not a mere order of discharge".

12. Therefore, in the present case, when the respondent has proceeded pursuant to Rule 48 and record of evidence was prepared, in the absence of any material on record to show that it was inexpedient to remove the petitioner on the basis of summary of evidence by convening of Court-martial or other proceedings as provided under the Act and Rules framed thereunder, implicate retiring the petitioner under Rule 26 was arbitrary and the action of the respondent cannot be sustained in the eyes of law. In purported exercise of administrative powers under Rule 26 in respect of allegation of misconduct and trial thereby for general Court martial, respondent could not override the statutory bar of the relevant

Rules in this regard. No administrative act can discard, destroy and annual statutory provisions. The statutory provisions cannot be circumvented merely on an administrative opinion that it is impracticable to hold a trial by General Court-Martial once the process has stated. Otherwise in all cases there is a danger of abuse of powers which have been given under Rule 26 of the Rules. Rajasthan High Court in the case of Major Radha Krishna v. Union of India & Ors. 1993 (7) SLR 43 held :-

"Trial by Court martial and notice for termination of service u/s 19 of the Army Act read with Rule 14 of the Army Rules cannot be invoked unless the Chief of the Army Staff recorded his satisfaction about the inexpediency or impracticability of the trial of the petitioner by Court martial after consideration of the report recording the misconduct of the petitioner. When no reason for arriving at such a decision are given and the delinquency related to the year 1982-83 and thereafter delinquent continued in service without any complaint then in those circumstances notice seems to have been issued only to overcome difficulty created by the judgment of the Court and is not based on relevant considerations. In such circumstances the opinion of the Chief of Army Staff is based on wholly irrelevant and extraneous considerations. Therefore, show cause notice was liable to be quashed".

13. In this case no reason has been assigned nor given at the time of arguments by learned counsel for the respondent as to why the proceedings were not allowed to be continued after record of evidence was prepared by the respondent pursuant to Rule 48, nor any material has been brought before the Court as to how the Commandant or the DIG satisfied themselves that action be initiated under Rule 26 for the discharge on the ground that normal procedure was inexpedient or impracticable.

14. For the reasons stated above, the impugned notice dated 16.1.1975, order No. 2027-30 dated 26.2.1975 prematurely retiring the petitioner on the grounds of unsuitability and letter No. O&S/G-44/75/P-416 dated 8.1.1975 are quashed. Rule is made absolute. The petitioner shall be entitled to all consequential promotions and will be entitled to arrears of salary. Respondents are directed to pay full back wages and all the service benefits to the petitioners from the date he was removed from service illegally within a period of three months. No order as to costs.