

(2001) 02 DEL CK 0057

In the Delhi High Court

Case No : L.P.A. No. 341 of 1998 and L.P.A. No. 291 of 1998

Union of India and another

APPELLANT

Vs

Major Singh and Chander Pal Singh

RESPONDENT

Date of Decision : 19-02-2001

Acts Referred:

Citation : (2001) 3 AD 376 : (2001) 58 DRJ 282

Hon'ble Judges : Mahmood Ali Khan, J; Dalveer Bhandari, J

Bench : Division Bench

Advocate : Ms. Anjana Gosain, for the Appellant; Mr. R.P. Sharma, for the Respondent

Judgement

Dalveer Bhandari, J.—By this common judgment we propose to dispose of LPA Nos 341 of 1998 and 291 of 1998 as the questions of law arising in them are common. Both these LPAs have been preferred by the Union of India and the Director General, Border Security Force.

2. The short question which arises for the determination of this court in these appeals is whether the Appellate Authority enjoys the powers and jurisdiction to impose the punishment in the nature of "removal from service" which is not enumerated and Serialized as one of the punishments u/s 48 of the Border Security Force Act (in short "BSF Act").

3. The respondents in these appeals were tried by the Summary Security Force Court on a charge u/s 19(a) of BSF Act for remaining absent without leave. During the course of their trials, the respondents pleaded guilty and the court awarded them the sentence of dismissal from service.

4. The respondents herein preferred statutory petitions before the Director General, Border Security Force under Sections 117(2) and 128 of the BSF Act. While exercising the appellate powers the Director General, Border Security Force converted the sentence of "dismissal" to that of "removal from service". The respondents aggrieved by the order of the Director General, Border Security

Force preferred a writ petition under Article 226 of the Constitution of India. After hearing the learned counsel appearing for the parties, the learned Single Judge set aside the order passed by the Appellate Authority and remitted the matter to the Appellate Authority to reconsider the appeal of the respondents afresh on merits.

5. The Union of India and the Director General of the BSF aggrieved by the judgment of the learned Single Judge dated 15.5.1998 preferred these appeals. The appellant submitted that u/s 117(2) the Director General, while exercising the appellate powers, is not bound to confine his order to the punishments enumerated u/s 48 of the BSF Act. In other words no fetters can be placed on him in exercise of the appellate powers.

6. It is submitted in the appeals that the Learned Single Judge has failed to comprehend the provisions of the BSF Act in correct perspective. In order to appreciate the controversy involved in the entire case, it would be appropriate to reproduce Section 48 of the BSF Act:-

48. Punishments awardable by Security Force Courts: (1) Punishment may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say,-

(a) death;

(b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody;

(c) dismissal from the service;

(d) imprisonment for a term not exceeding three months in Force custody;

(e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer;

(f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;

(g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(h) fine, in respect of civil offences;

(i) severe reprimand or reprimand except in the case of persons below the rank of an under-officer;

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;

(k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of

such dismissal;

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good.

(2) Each of the punishments specified in sub-section(1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale.

7. Learned counsel for the appellants Ms.Anjana Gosain submitted that while exercising the appellate jurisdiction u/s 117(2) and 128 of the Act, the Director General, Border Security Force is not bound to confine his order to the punishments as Serialized u/s 48 of the BSF Act. The Appellate Authority can exercise the powers enumerated under Sections 117(2) and 128 and other Sections also. Section 117(2) reads as under:-

117. Remedy against order, finding or sentence of Security Force Court:

(1) XXX XXX XXX (2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any Security Force Court which has been confirmed, may present a petition to the Central Government, the Director-General, or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Director-General, or the prescribed officer, as the case may be, may pass such order thereon as it or he thinks fit."

8. According to the learned counsel for the appellants, the Director General in exercise of appellate jurisdiction has powers to modulate the punishment according to the facts and circumstances of each case. The legislature has given freedom to the Director General to give any punishment which he deems fit and proper in the facts and circumstances of each case.

9. In the instant case the Director General arrived at a conclusion that the punishment of "dismissal" was rather harsh and disproportionate and in the facts and circumstances of the case, appropriate punishment ought to have been the "removal from service" in which there would be no legal bar for the respondents to get another job with other government organisations or public undertakings.

10. Learned counsel for the UOI also referred to Sections 10 and 11 the Act to demonstrate that in these Sections apart from the expression "dismissal" the expression "removal" has also been incorporated. The submission of the learned counsel for the appellants is that the option of "removal" has also been incorporated in the Act. Therefore, while awarding the sentence of "removal from service", the Director General has not travelled beyond the ambit of the Act.

11. Ms. Gosain also submitted that if the Central Government or the Director General of the BSF were to confine only to the punishments enumerated u/s 48, then there was no need for incorporating Section 128 of the Act. Section 128 of the Act reads as under:-

128. Pardon and remission: When any person subject to this Act has been

convicted by a Security Force Court of any offence, the Central Government or the Director General or, in the case of a sentence, which he could have confirmed or which did not require confirmation, an officer not below the rank of Deputy Inspector General within whose command such person at the time of conviction was serving, or the prescribed officer may,--

(a) either with or without conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded; or

(b) mitigate the punishment awarded; or

(c) commute such punishment for any less punishments mentioned in this Act;

(d) either with or without conditions which the person sentenced accepts, release the person on parole."

12. In deciding the petitions of the respondents the Central Government or the Director General of the BSF has exercised the powers under Sections 117(2) and 128 of the Act on the petitions filed under Sections 117(2) and 128 of the Act. The powers u/s 128 of the Act have been specifically given by the legislature so that an appropriate sentence could be passed by the Appellant Authority looking to the peculiar facts and circumstances of the case.

13. In case the Central Government or the Director General of the BSF have to confine their powers only to Section 48, then it may lead to injustice in many cases where according to the peculiar facts and circumstances, they may not be able to award just and appropriate sentence. The legislature in its wisdom has incorporated this provision to give powers to the Central Government or the Director General of the BSF to pass a sentence which is eminently just, proper and appropriate looking to the peculiar facts and circumstances of the case. Ms. Gosain also submitted that u/s 128(b) of the Act while exercising powers the concerned authority can modify the punishment awarded. In the instant case the Director General has modified the punishment from dismissal to removal and no fault can be found with the exercise of the powers by the Director General.

14. Learned counsel for the appellant submitted that the learned Single Judge has placed fetters on the powers of the Central Government or the Director General of BSF which are clearly not envisaged by the legislature. She further submitted that the provisions of the Act have to be interpreted and construed in a manner so as to give meaning to the provisions of Section 128 of the Act and the true intention why this provision was incorporated in the Act has to be appreciated.

15. Learned counsel for the appellants, Ms. Anjana Gosain has placed reliance on the provisions of the Army Act and the rules framed there under. To strengthen her submission she submitted that these provisions of the Army Act and Rules are *pari materia* with the Act and Rules of this Act (BSF Act). She stated that Section 71 of the Army Act deals with punishments awarded by the Court Martial. Similarly Section 48 of the BSF Act also deals with the punishment. She

submitted that Section 164(2) of the Army Act is akin to Section 117(2) of the BSF Act. Similarly Section 179 of the Army Act is akin to Section 128 of the BSF Act.

16. Learned counsel for the appellant in support of her contention has placed reliance on a Division Bench judgment of this court reported as *R.N.Srivastava v. Union of India & Others* reported in 1982(3) SLR 133. In this case the petitioner - an army official - was released from service with effect from 17.10.1978. After the Court Martial the petitioner was awarded sentence of dismissal from service. The petitioner therein filed representation u/s 164(2) of the Army Act. The order of dismissal passed by the Court Martial was confirmed by the COAS. The Central Government modified the sentence from dismissal to release from service. The contention of the learned counsel for the appellant is that in the said judgment of *R.N.Srivastava* (supra) the "release" being a lesser punishment than the punishment of "dismissal" was awarded by the confirming authority. The Central Government was justified in passing an order of "release" as it was a lesser punishment than the sentence of "dismissal" passed by the confirming authority. She submitted that when the official could be released under the Army Act then similarly the respondents herein can be granted sentence of "removal" instead of "dismissal" and no infirmity can be found with the order passed by the Director General, Border Security Force. On the strength of this judgment, she submitted that the learned Single Judge has gravely erred in interfering with the order and remitting the matter to the Appellate Authority.

17. In the case of *R.N.Srivastava* (supra) the Court observed that while exercising the powers u/s 164(2) the Central Government may pass such order as it may think fit. In the instant case also similar words have been incorporated by the legislature. The Court further observed that u/s 164 the Central Government was empowered to affirm the order of dismissal or modify it to one of cashiering which is provided specifically u/s 71. The punishment of cashiering results in discharge from the army and it is considered far more grave and serious as against the case of release from service. The Court observed "Thus release being a lesser punishment than the punishment of dismissal awarded by the confirming authority, Section 164(2) clearly permitted the passing of such an order of release as it was a lesser punishment than that passed by the confirming authority."

18. Learned counsel for the appellants submitted that in view of the authoritative judgment of the Division Bench, the learned Single Judge was not justified in holding that the Appellate Authority could have awarded only those punishments which are enumerated u/s 48 of the Act. It is submitted that the learned Single Judge was bound by the decision of Division Bench.

19. Learned counsel for the respondent Mr.R.P.Sharma, supported the judgment of the learned Single Judge and submitted that the Director General while exercising the appellate power could only give punishment as Serialized u/s 48 of the Act. Mr.R.P.Sharma, learned counsel for the respondent further submitted

that the Appellate Authority can pass sentence which are within the competence of the Summary Security Force Court. He placed reliance on the judgment of Hon"ble Supreme Court titled Jagat Bahadur Singh Vs. State of Madhya Pradesh, . The Hon"ble Supreme Court held that the Appellate Court as such can pass only the sentence which are within the competence of the trying court. The court was of the opinion that the power of the Appellate Court to make an order is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the Appellate Court the power to do only that which the lower Court could and should have done.

20. Learned counsel for the respondent submitted that the order of the learned Single Judge was eminently just and proper and does not call for any interference. He submitted that where an Appellate Authority while exercising its powers u/s 117(2) decides to commute the sentence awarded by the Court Martial to a lesser sentence, it can pass only that sentence which is enumerated in Section 48 of the Act. He submitted that the Appellate Authority while considering the sentence of dismissal from service, a stigmatic termination, decided to commute the same to a lesser sentence, but while doing so the Appellate Authority passed the sentence of Removal which does not find any place in Section 48 of the Act. He also submitted that a sentence substituted or commuted by the Appellate Authority in lieu of the one passed by the trial court would be illegal if the same could not be awarded by the Court Martial.

21. Learned counsel for the respondent submitted that u/s 117(2) of the Act the Appellate Authority could pass any order "it thinks fit", cannot confer on such authority, the powers to inflict a punishment that is not provided under the relevant provisions of the law, viz. Section 48 of the Act.

22. Learned counsel for the respondent submitted that in the case of R.N.Srivastava (supra) it was not disputed that the Central Government while disposing of the representation u/s 164(2) of the Army Act affirmed the order of dismissal or modified the same to one of cashiering which is provided in Section 71. Mr. Sharma also submitted that the difference between the sentence of cashiering and dismissal was not properly explained to the Hon"ble Court. He submitted that the entire spectrum of provisions of the Army Act and Rules as well as the provisions of the Criminal Procedure Code relevant to the issue involved in that case were not placed before their Lordships. The sentence of cashiering which can only be awarded to the officers finds place in sub-clause (e) indicating thereby that the sentence of cashiering was severer in degree than the sentence of dismissal. He further submitted that the sentences have been given in order of scale/degree of severity.

23. Learned counsel for the respondents submitted that the cashiering is more stigmatic termination of service than dismissal and as such the Appellate Authority in that case could not have legally passed severer sentence of cashiering than the one of dismissal awarded by the trial court. There is no provision of enhancement of sentences either in the Army or in BSF Acts.

Therefore, the Central Government in that case could not have passed the severer sentence of cashiering. Learned counsel for the respondent submitted that Army Rule 22 deals with release and there is no similar provision in the BSF Act or rules. The sentence of removal has neither been provided for in Section 48 nor any other provision of the BSF Act. Therefore, the aforesaid authority is not applicable to the present case.

24. We have carefully perused the relevant provisions of the BSF Act and Rules and appreciated the rival submissions advanced by the learned counsel for the parties.

25. In the Summary Security Force Court, the respondents pleaded guilty and they were awarded sentence of dismissal from service. On the respondents' preferring statutory petition u/s 117(2) and 128 of the BSF, the Director General, BSF converted the sentence of dismissal to that of removal from service. The learned Single Judge set aside the order passed by the Director General, BSF and remitted the petitions to the respondents for deciding them afresh on merits.

26. On careful reading of Section 117(2) of the Act, we do not find that the Central Government or the Director General are under an obligation to confine its or his order only to the punishments enumerated u/s 48 of the Act. The legislature in its wisdom has used the words that the Central Government, the Director General or the prescribed officer, as the case may be, may pass such order thereon as it or he thinks fit". These words have to be given proper meaning and the interpretation. By plain reading of this Section, it is abundantly clear that the legislature has given ample freedom, liberty and discretion to the Central Government, the Director General or the prescribed officer to pass such order or orders as it or he thinks fit, meaning thereby that any order which is considered just, proper and appropriate in the facts and circumstances of the case, can be passed by any of these authorities.

27. In case the legislature wanted the Central Government or the Director General or the prescribed officer to confine its or his order only to the various offences enumerated and Serialized u/s 48, in that event the legislature would have specifically mentioned this in the Act. The Courts have to make serious endeavor to clearly discern the legislative intention while interpreting any provision of the Act. This is the fundamental rule of the interpretation of the statute.

28. In our considered opinion, the Central Government, the Director General or the prescribed officer is not bound to confine it or his order to the punishment enumerated u/s 48 of the Act, in other words no fetters not envisaged by the legislature can be placed on the Central Government or the Director General or the prescribed officer in exercise of the power u/s 117(2) and 128 of the Act.

29. The legislature has given the liberty and freedom to the Central Government, the Director General and the prescribed officer to pass, just, proper and appropriate order according to the peculiar facts and circumstances of each case.

We can clearly see the laudable object behind giving this freedom and discretion to the authority exercising powers under Sections 117(2) and 128 of the Act. It is not always possible to visualise all the situations, contingencies and circumstances. Therefore, certain amount of freedom, liberty and discretion have rightly been given to these authorities by the legislature which cannot be legitimately curbed by the Court.

30. Section 128 of the Act gives power, to the Central Government or the Director General, of pardon and remissions. The powers are very extensive and wide. They can accept pardon or remit the whole or any part of the punishment awarded. When the legislators in their wisdom have given such wide powers under the provisions of Section 128, then it would hardly be proper or appropriate for the courts to interpret them differently. Giving restrictive meaning or the interpretation to Section 117(2) would necessarily render Section 128 of the Act redundant.

31. u/s 128, the Central Government or the Director General also enjoy power to mitigate the punishment. They have also been given power to commute such punishment for any less punishment. The authorities have also been given powers either with or without condition, release the person on parole. The framers of the statute in their wisdom have given such wide and extensive powers to the Central Government and to the Director General under Sections 117 & 128 of the Act, then it would hardly be appropriate or proper to take away these powers by giving restrictive meaning or interpretation to the provisions of the Act. The Courts are under an obligation to discern the legislative intention and give interpretation to the provisions of the Act accordingly.

32. The legislators in their wisdom have specifically incorporated the word "removal" in Sections 10 & 11 of the Act. We are of the considered opinion that no infirmity can be found with the order of the Director General while converting the sentence from dismissal to removal. He has in fact not travelled beyond the ambit of the Act. The learned Single Judge has erred in setting aside the order of the Director General and remitting the matter for reconsideration afresh on merit.

33. In the interest of justice, it has become imperative to set aside the order of the learned Single Judge and consequently the order of the Director General is revived.

34. The appeals filed by the Union of India are allowed. However, in the facts and circumstances of this case, we direct the parties to bear their own costs.