

(2006) 08 GAU CK 0105
In the Gauhati High Court
Case No : W.A. No. 64 of 2001

Union of India (UOI) and Another

APPELLANT

Vs

Abujaher

RESPONDENT

Date of Decision : 10-08-2006

Acts Referred:

Border Security Force Rules, 1969 — Rule 13(3), 26
Constitution of India, 1950 — Article 14, 19, 21, 226

Citation : (2006) 4 GLT 323

Hon'ble Judges : R.B. Misra, J;A.B. Pal, J

Bench : Division Bench

Advocate : P.K. Biswas and S. Bhattacharjee, for the Appellant; S. Kar Bhowmik, for the Respondent

Final Decision : Allowed

Judgement

R.B. Misra, J.—We have heard Mr. P.K. Biswas, learned Assistant S.G. with Mr. S. Bhattacharjee, learned Counsel for the Appellants and Mr. S. Kar Bhowmik, learned Counsel for the Respondent.

2. This appeal is directed against the judgment and order dated 14.02.2001 passed by learned Single Judge in Civil Rule No. 249/1995 setting aside the order dated 24.3.1995 of Additional D.I.G., Commandant STC BSF, Churachandpur, whereby the writ Petitioner/Respondent herein was discharged from service on the ground that he alongwith three others were likely to be not efficient members of the Force.

3. In order to appreciate the present writ appeal, it is necessary to give in short the relevant facts. The Respondents herein with reference to the advertisement published in the local daily dated 23.5.1994 after facing interview at Shalbagan Border Security Force Headquarter (in short called "BSF") and after extensive medical examination was declared successful and was allowed to join as Constable (GD) in Border Security Force w.e.f. 27.8.1994 and was sent for statutory training. Before completion of one year, in the medical examination of

the large number of trainees, the writ Petitioner was found suffering from varicose veins (left leg). His ailment was also referred to the Senior Medical Officer and thereafter before the Commandant, who, after taking into consideration the physical examination report and medical opinion of Chief Medical Officer, arrived at a conclusion that the writ Petitioner and other three persons were not likely to become efficient members of the Force due to their physical/medical deformity noted in their reports, as such, the order impugned dated 24.3.1995 was passed by the Commandant, which was challenged in Civil Rule No. 249/1995.

4. According to the Respondent/writ Petitioner, at the time of interview and physical test, the authorities of "BSF" were fully satisfied with the physical condition of the writ Petitioner, and during medical check up while undergoing training "varicosity veins (left leg) was only noticed which was under permissible degree of defects acceptable in BSF in view of Clause 6 of Chapter-4 of Border Security Force Manual (Volume IX) Medical Directorate Booklet, however, while discharging the writ Petitioner by indicating/adding one word as the ground i.e. mentioning "Heavy Varicosity Vein (Left leg)" is not in accordance with the provisions of Border Security Force Act or Rules and as such the said order was vague and, therefore, after referring and relying on Rule 26 of Border Security Force Rules, 1969 (in short called "BSF Rules") given as below:

26. 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 when he consider it to be impracticable or inexpedient in the interest of security of the State to give such opportunity), retire such enrolled person from the Force.

The learned Single Judge was pleased to set aside the discharge of writ Petitioner vide impugned order dated 14.2.2001 with observations in para-6 as follows:

6. From the aforesaid provision it appears that before issuing an order of retirement a Commandant is to be satisfied as to the unsuitability of a B.S.F. person to retain in service and that is to be done after giving such enrolled person of opportunity of showing cause except in the circumstances where compliance of show cause became impracticable. But the said provision relates to retirement and not to discharge. In the present case, the Petitioner was discharge not retire and no opportunity of being shown cause was allowed nor there is any reason recorded as to why the process of show cause became impracticable and, as such, that the said provision is not applicable. The Petitioner has been discharged from service on the lone ground found physical deformity, but no medical board has ever been constituted to ascertain whether alleged physical deformity grew/developed during the tenure of service, after entry into service by the Petitioner or before that and how much the same affects the service. Learned Counsel for the Petitioner having referred to Annexure-2 appended with the counter filed by the Union of India, submits that in the

proceeding papers relating to recruitment it appears that the Petitioner was examined (the name appeared at SI. No. 100 with an entry that physical deformity (heavy varicose veins-left leg). But in the impugned order Annexure-5 it is written that the Petitioner suffered from physical deformity at being "Heavy varicose veins-left leg". The word "heavy" remains inserted in the impugned order of discharge without any medical check up while at the initial stage the Petitioner was found physically deformity due to varicose veins in left leg despite the rule which is indicative that this deformity is not detrimental for being enrolled as B.S.F. personal under the organization, but only to justify the discharged order the authority inserted the word "heavy" preceding to word "varicose veins" in the impugned order without obtaining any opinion of the Medical Board.

5. Learned Counsel for the Appellants has argued as follows:

(A) "Rule 26" of BSF Rules is not applicable in the case of the Respondent/writ Petitioner and as such making reliance on the same in the impugned order of learned Single Judge is not legally sustainable.

(B) In view of Rule 13(3a) of "BSF Rules", every person enrolled as a member of the Force shall have to be administered an oath or affirmation in the form set out in Appendix-I and accordingly Clause 4 of Part-II (Conditions of Service) of Appendix-I provides that, an enrolled person is liable to be discharged during the first year (First two years substituted by amendment dated 24.5.1990) of service if he is not likely to become an efficient member of the Force. Such provision was in existence way back from the year 1983, which is evident from the Annexure-2/ Part-II (Conditions of Service) enclosed with the counter affidavit preferred by the Appellants herein in C.R. 249/1995 and the Respondent/writ Petitioner had already put his undertaking on 15.9.1994 before the then Commandant in the said pro-forma.

(C) Even according to the "Recruitment Policy" issued vide circular dated 23.2.1983 (enclosed as Annexure-6 to the counter-affidavit to the C.R. 249/1995), Clause 4 indicates that a recruit should be discharged from the service within the first year of his service, as per Clause 4 of Part I of the Enrolment Form (Appendix-I to the "BSF Rules"). For convenience Clause-4 is quoted below:

4. Further, Director General, BSF is pleased to issue the following instructions in superession of para 13 of Recruitment Policy Circular dated 10th Dec." 1982 under head "WEEDING OUT OF RECRUITS".

It must be ensured that all such recruits as are unlikely to become efficient members of the Force, are weeded out of the Force at the earliest. For that purpose, periodical checks should be made to assess their suitability for retention in service. If a recruit is found incapable of becoming an efficient member of the Force, he should be discharged from the service within the first year of his service, as per Clause 4 of Part-I of the Enrolment Form (Appendix-I to the BSF

Rules). If such a recruit has completed one year of service, his service may be terminated under BSF Rule 26 by way of retirement on ground of unsuitability, after giving him a show cause notice. The following guidelines may also be kept in view while weeding out such recruits:

- a) If a recruit fails in Platoon Commanders Test, he should be warned in writing to improve.
- b) If in Coy Comdr test the individual once again fails, he should be discharged as per procedure indicated above.
- c) Any serious disciplinary case, Comdts STCs are empowered to weed out a recruit as undesirable as per the Rules.
- d) In case of minor disciplinary cases a recruit should be weeded out after two red entries within the first year of service as per procedure indicated above.

Specimen "discharge order", a show cause notice and final order of retirement under Rule 26 are given in Annexure-"A".

(D) A recruit who has completed one year of service in view of the Recruitment Policy dated 23.2.1983 (subsequently made two years by the amendment brought on 24.5.1990), could be retired under "Rule 26" of the "BSF Rules" on ground of unsuitability, after giving him an opportunity of showing cause. Since before completing one year of service, the ailment of the writ Petitioner was found to be of such nature that he was assessed as likely to be not efficient member of the Force, therefore, within the provisions of the "BSF Rules" applicable, the writ Petitioner was rightly discharged along with three others on the subjective satisfaction of competent authority i.e. Commandant and this Court should not interfere in the subjective satisfaction of the competent authority.

6. Learned Counsel for the private Respondent/writ Petitioner has, however, endeavoured to impress upon the court as below:

(A) Chapter-4 of Border Security Force Manual, Volume IX, Medical Directorate has already indicated in Clause 3 that during medical examination the category "A" (AYE) has to be indicated for medically fit and in Clause 6 even a slight degree of varicosity could be accepted in the Border Security Force and since in the medical report indicated in Annexure-3 (Counter-affidavit of Appellants to C.R. 249/1995) at Sl. No. 100, the writ Petitioner was marked as "AYE" i.e. Fit and Senior Medical Officer in Annexure-4 (Counter-affidavit to C.R. 249/1995) had also indicated that the writ Petitioner was suffering from Varicose Vein (LT), then mentioning of Heavy Varicose Veins (LT) as nature of physical deformity in the order dated 24.3.1995 is completely non-application of mind, unreasonable and arbitrary.

(B) The Ministry of Home Affairs (Directorate of BSF) in its circular dated 23.2.1983 (Annexure-6 to Counter-affidavit of Appellants herein in C.R.

249/1995) has wrongly mentioned in Clause 4 as (Clause 4 of Part-I) instead of (Clause 4 of Part-II) for Conditions of Service in Appendix-I under Rule 13(3a) of "BSF Rules". However, on this aspect learned Counsel for Appellants has submitted that in view of the observations of Supreme Court in 2003 (4) SCC 712 (High Court of Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors. non-mentioning or wrong-mentioning of a provision of law would not invalidate an order or circular if a source therefore can be found either under general law or a statute law.

(C) The discharge order dated 24.3.1995 of writ Petitioner can not be allowed to legally sustainable even on the ground of unreasonableness. In support of his contentions, that there should be reasonableness in the action of the Commandant/authority, learned Counsel for the Respondent has placed reliance on Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, of the relevant part is quoted below:

12. Now what is the test of reasonableness which has to be applied in order to determine the validity of governmental action. It is undoubtedly true, as pointed out by Patanjali, Sastri J., in State of Madras Vs. V.G. Row, that in forming his own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judge participating in the decision, would play an important part, but even so, the test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The concept of reasonableness in fact pervades the entire constitutional scheme. The interaction of Articles 14, 19 and 21 analysed by this Court in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, clearly demonstrates that the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and, as several decisions of this Court show, this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles. It has been laid down by this Court in E.P. Royappa Vs. State of Tamil Nadu and Another, and Maneka Gandhi's case (supra) that Article 14 strikes at arbitrariness in State action and since the principle of reasonableness and rationality, which is legally as well as philosophically an essential element of equality or non-arbitrariness, is projected by this article, it must characterize every governmental action, whether it be under the authority of law or in exercise of executive power without making of law. So also the concept of reasonableness runs through the totality of Article 19 and requires that restrictions on the freedoms of the citizen, in order to be permissible, must at the best be reasonable. Similarly Article 21 in the full plenitude of its activist magnitude as discovered by Maneka Gandhi's case, insist that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law and such procedure must be reasonable, fair and just. The Directive Principles concretize and give shape to the concept of reasonableness envisaged in Articles 14, 19 and 21 and other articles

enumerating the fundamental rights. By defining the national aims and the constitutional goals, they set forth the standards or norms of reasonableness which must guide and animate governmental action. Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily, subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would prima facie incur the reproach of being unreasonable.

Learned Counsel for the Respondent in view of the decision of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, has submitted that the decision of Commandant lacks reasonableness.

In our respectful consideration, the above cases shall not decide the fate of the present writ appeal as the above referred cases are in different facts and circumstances, indicative of the well settled proposition of law that the decisions of the authorities had to be based on fairness, free from arbitrariness and had to be based on reasonableness, however, in the present case the important aspect is whether this Court in exercise of its jurisdiction under Article 226 of the Constitution could sit over the subjective satisfaction of the authority/Commandant of "BSF", who has passed the discharge order dated 24.3.1995 in question in reference to the medical report, opinion of medical expert about a recruit under the relevant provisions of law where the competent authority/Commandant was free to arrive at a decision on his subjective satisfaction to discharge a recruit, who was not likely to be efficient number of the Force while physical/medical deformity of the nature of varicose vein (left leg) was persisting. The answer in our consideration to the above aspect is No. In our considered view, "Rule 26" of "BSF Rules" is not applicable as it deals about the retirement of enrolled persons on the grounds of unsuitability and since the Respondent/writ Petitioner was suffering from Varicosity vein (Left leg), such ailment and material in reference to the medical report and expert opinion was evaluated by the competent authority/Commandant, who at his subjective satisfaction decided to pass a discharge order dated 24.3.1995 in exercise of his powers under Clause 4 of Part-II of Appendix-I of 13(3a) of "BSF Rules", which cannot be said to be illegal. Therefore, setting aside of discharge of writ Petitioner by the learned Single Judge of this Court by an order dated 14.2.2001 in reference to non-observance of provisions of "Rule 26" of "BSF Rules" being an irrelevant ground and reason, (indicated in the impugned order) cannot be approved.

7. In the facts and circumstances, in view of the observations made above, the order of the learned Single Judge is set aside and the Writ Appeal is allowed.