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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15th March, 2019

Decided on: 12th April, 2019

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W.P.(C) 19014/2006 & CM APPL. 19244/2018

R.S.KADIAN

..... Petitioner

Through: Ms.V.Mohana, Sr.Advocate with
Ms.Garima Bajaj, Ms.Aakanksha
Kaul & Ms.Nikita Capoor,
Advocates.

versus

UNION OF INDIA AND ORS

.... Respondents

Through: Mr.Ruchir Mishra with
Mr.MukeshK.Tiwari & Mr.Abhishek
Rana, Advocates.

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W.P.(C) 3010/2010

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**CORAM: JUSTICE S. MURALIDHAR
JUSTICE SANJEEV NARULA**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Petitioner who is a Commandant with the Border Security Force ('BSF') has, in the first writ petition W.P. (C) 19014 of 2006, challenged an order dated 2nd February, 2006 passed by the Deputy Inspector General ('DIG') in the Summary Court of Inquiry ('SCOI') proceedings ordering that the Inspector General's (IGs) displeasure be conveyed to the Petitioner.

2. W.P. (C) 19014 of 2016 also seeks a quashing of a show cause notice dated 9th September, 2006 issued by the DIG calling upon the Petitioner to explain why they should not be asked to resign in terms of Rule 20 of the Border Security Force Rules, 1969 ('BSF Rules') read with Section 10 of the Border Security Force Act ('BSF Act'). Subsequently, during the pendency of the present writ petition, an order dated 17th June, 2009 was passed by the Director General (DG), BSF on the SCN, retiring the Petitioner from service with pensionary benefits. The writ petition was amended to challenge the said order. IN terms of the interim orders of this Court, the said order dated 17th June 2009 was not given effect to, awaiting the orders of this Court.

3. In the second writ petition, W.P. (C) 19014 of 2010, the Petitioner challenges an order dated 23rd March 2010 passed by the DG and communicated by the Commandant (Personnel) 10 CGO complex New Delhi, de-attaching the Petitioner from CPF's canteen and posting him to SHQ, Kupwara. A challenge is also made to the order dated 12th April 2010

passed by the DIG (Admn) initiating a court of inquiry (COI) against the Petitioner to enquire into the circumstances under which the Petitioner failed to attend to his duties in the Central Police Canteen (CPC) from 3rd July 2009 to 26th February 2010. By an interim order dated 4th May 2010 this Court stayed the COI.

Background facts

4. The background facts are that the Petitioner joined the BSF on 17th September, 1994 as an Assistant Commandant (AC). Subsequently in the regular course he was promoted as Commandant. At the time of the filing of the writ petition on 18th December, 2006 he was posted as Commandant at the headquarters DIG, BSF, Kupwara in Jammu & Kashmir (J&K). He had been posted there since August, 2003. The Petitioner states that he received 8 rolls of Commendations and has distinguished career in the BSF.

5. During the August, 2001-03 the Petitioner was Commanding 01 Battalion, BSF at Taligudi (Cooch Behar, West Bengal) under the HQ, DIG, BSF, Cooch Behar and further under the HQ, IG, BSF, North Bengal Frontier. The incident which triggered the SCOI is set out in the impugned orders and notes in the file produced by the Respondents before this Court.

6. It is stated that on 7th November, 2002 when Constable Pradip Dey of 01 Battalion returned home after duty, his wife told him that Constable Mahabir Singh along with Constable T.M. Gopal Ram had visited their house and commented about the alleged bad character of Constable Pradip Dey and his wife. That very night Constable Pradip Dey reported the matter to Subedar

A.S. Jamwal who took him to Shri V.K.Singh, DC who was the Company Commander who further reported the matter to the Petitioner.

7. On 9th November, 2002 Constable Pradip Dey, Constable Mahabir Singh and Constable T.M.Gopal Ram were summoned to the office of the Petitioner. The version of the Petitioner is that the Constable Mahabir Singh admitted to his fault and begged for pardon. Since the matter had been settled amongst themselves, the Petitioner instructed Subedar Jamwal to brief the troops in the roll call to not commit such mistakes. However, the version of the Respondent is that the Petitioner suggested to Constable Pradip Dey that he should have come straightway to the Petitioner rather than the following “a long channel”. After that the Petitioner is alleged to have asked Constable Pradip Dey as to what type of punishment he expected the Petitioner to award Constable Mahabir Singh. To this Constable Pradip Dey is alleged to have replied that action should be taken as per rules.

8. On the evening of 9th November, 2002 it is alleged that in the evening roll call under the instructions of Subedar Jamwal and in his presence, Sub-Inspector (SI) Ramchander stripped Constable Mahabir Singh, Constable/Tailor Gopal Ram and Constable Pradip Dey completely naked. The further allegation is that 275 personnel were attending the roll call and the daughter and brother-in-law of Constable Mahabir Singh were also standing nearby.

9. On 10th January, 2003 Constable Pradip Dey submitted a written complaint to the DG, BSF stating that he had no desire to live further on account of the humiliation. He prayed that he should either be discharged

from service or posted out from 01 Battalion BSF to be free of his mental agony.

10. On receipt of the above complaint, the DG, BSF sought a factual report from the IG, BSF, North Bengal Frontier within whose command 01 Battalion was deployed. The matter was then inquired by a senior by the ADIG of G (IIT) Branch who submitted a report on 12th February, 2003 stating that the disgraceful act of striping naked the three personnel not only caused embarrassment to him and their families but also there was resentment and fear in the troops of 01 Battalion BSF against the Petitioner.

11. The Petitioner's version is that Subedar Jamwal compelled SI Ramchander to strip the three men naked and not to report the incident to the adjutant or the Petitioner or any other officer. After 3-4 days Constable Pradip Dey brought the notice of the said incident to Shri L.P.Sharma, the Deputy Commandant (DC)/Adjutant who then reported the matter to Petitioner. Thereafter the Petitioner informed Shri D.L.Choudhary, DIG, BSF, Cooch Behar. As desired by the DIG, the three constables were asked to submit a written report to the adjutant, which they refused to submit. Subedar Jamwal who continued to conceal the incident was inquired by Shri L.P. Sharma, DC.

12. According to the Petitioner on 20th December, 2002 the matter was again brought to the notice of the DIG and as per his directions Constable Pradip Dey and Constable Mahabir Singh were heard in the Petitioner's office in the presence of Shri L.P. Sharma DC/Adjutant, Shri Raj Kumar DC,

Subedar/Head Clerk S. Shome, SI Desh Raj, HC Paramhans Singh, Constable K.N.Babu and Constable Triveni Das. According to the Petitioner, the victim Constables refused to submit anything in writing. A report was then submitted to the DIG regarding ordering an SCOI into the incident and initiating disciplinary action against Constable Mahabir Singh and Constable Pradip Dey.

13. On 31st December, 2002 a signal was received from the HQ, DIG, BSF Cooch Bihar directing the Petitioner to order a COI into the incident. Shri Raj Kumar, DC was appointed as the Recording Officer on 1st January, 2003. The statement of Subedar A.S. Jamwal was recorded on 3rd January, 2003.

14. On 23rd January, 2003 a Savingram (message) was received from HQ, BSF, North Bengal Frontier cancelling the COI. The DIG was directed to order Record of Evidence (ROE) against Subedar Jamwal, Subedar Mohinder Singh and SI Ram Chander. All six persons i.e. (three accused and the three victims) were sent to the DIG for hearing on 31st January, 2003. Further they were attached to the 41 Battalion BSF where they remained till November, 2003.

15. On 8th February, 2003 three accused subordinate officers were charge-sheeted. ROE was ordered on charges under Sections 25 and 40 of the Border Security Force Act (BSF Act). During the pendency of the ROE, the Headquarters BSF, North Bengal Frontier ordered a Staff Court of Inquiry (SCOI) to inquire into the incident, as far as the Petitioner's involvement

was concerned.

16. On 17/21st April, 2003 in the SCOI the statements of the Petitioners and the three subordinate officers were recorded. Again on 14th May, 2003 the Petitioner's statement and statement of his defence witnesses were recorded. In the SCOI that was completed on the next day i.e. 15th May, 2003 the Petitioner was blamed for failing to take cognizance of the offence and trying to suppress the full facts of the case. The SCOI opined that punishment of 'IG's displeasure' be conveyed to the Petitioner. This was however not communicated to the Petitioner till much later.

17. On 22nd May, 2003 the ROE against the three subordinate officers was completed. On 26th July, 2003 the Petitioner was posted out from the 1st Battalion, BSF to the Headquarters DIG, BSF, Group - I where he reported on 22nd August, 2003. He was attached to the HQs IG, BSF, Shillong for disciplinary action. The Petitioner reported to the HQs IG, BSF, Shillong on 8th September, 2003.

Charges against the Petitioner

18. On 24th February, 2004 an ROE was ordered against the Petitioner on five charges. The first charge was that at around 1600 hrs on 9th November, 2002 at the Headquarters 1st Battalion BSF, Teliguri (Cooch Behar) he had ordered Subedar A.S.Jamwal of his unit to strip off Constable Pradip Dey, Constable Mahabir Singh and Constable (Tailor) Gopal Ram of the same unit during roll call by directing as under:-

"saheb in teenon constables, ko aaj roll call mein sabke samne

bahar nikalna aur poora nanga karna", or words to that effect, fully knowing his order to be improper and without any authority."

19. The second charge was that at around 8.30 hrs on 31st January, 2003 at Headquarters, 1st Battalion, BSF, Teliguri (Cooch Behar), he had improperly directed SI Ram Chandra Singh not to disclose the fact of the stripping of the above named three Constables at the roll call of 9th November, 2002 and take the responsibility of the said incident on himself while deposing at the inquiry.

20. The third charge was that at 1000 hrs on 20th December, 2012 at HQ-01 Battalion, BSF Teliguri he had used abusive language against Constable Mahabir Singh and Constable Pradip Dey by saying

"b_ aap logon ko kab se bol raha hun likh kaar de" or words to give to that effect, when these two Constables refused to give in writing that they were asked to remove their shirt and trousers only in the roll call of 09 Nov'02"

21. The fourth charge was that he had on 12th November, 2002 improperly directed Constable/ Tailor Gopal Ram not to report the incident of stripping off which took place during the roll call of 9th November, 2002 to anyone.

22. The final charge was that on 3rd December, 2002 and subsequent dates he had improperly coerced Constable Pradip Dey to give in writing that nothing had happened to him during the roll call on 9th November, 2002 "knowing fully well that the said Constable was stripped naked under his own orders".

23. According to the Petitioner there was serious illegality committed in the ROE which was objected to by the Frontier HQ. As a result an additional ROE was ordered against the Petitioner which was completed on 8th December, 2004. The witnesses admitted that while they were at the 41st Battalion, BSF the accused subordinate officers were guiding them to prepare their statement as per their desire and it was decided to shift the blame on to the Petitioner, this conspiracy was hatched by Subedar Jamwal.

The GSFC proceedings

24. The Director General (DG) ordered a General Security Force Court ('GSFC') proceeding on 10th February, 2005. On 22nd February, 2005 the department ordered the Petitioner's trial through GSFC on four charges. It must be noted here that of the original five charges, two were dropped and one new charge was added. The Petitioner was placed under arrest.

25. On 10th March, 2005 the prosecution closed its evidence after examining 17 witnesses. The witnesses/accused Jamwal, Mohinder Singh and Constable Pradip Dey admitted during cross-examination that a conspiracy was hatched to implicate the Petitioner. The Petitioner's statement was recorded in the proceedings before the GSFC as under:

“Inspector A.S. Jamwal made his first statement in this case, in the battalion's Court of Inquiry on 03 Jan 2003, in which he never stated that I ordered him to strip these constables. In fact, Inspector AS Jamwal did not state anything against me, which goes to prove that he fabricated his statement subsequently in order to save his skin, by implicating me in the case. Inspector A S Jamwal, during cross-examination in the ROE identified having made this statement, which forms part of the ROE

proceedings.”

26. It appears that during the GSFC proceedings, the statements made by the witnesses did not support the case of the prosecution. It appears that Inspector Jamwal told SI Sanjeev Singh Dadwal prior to the roll call that *“aaj roll call mein aisa tamasha dekhaunga jo aaj tak naa bsf mein hua hain, aur naa hoga”* or words to the effect.” SI Sanjeev Singh Dadwal disclosed the above conversation to Constable Mahabir Singh, Constable/Tailor Gopal Ram, SI Ram Chandra Singh and Inspector Mohinder Singh in February/March 2003 when they were together at the 41st Battalion, BSF for inquiry of the incident. These witnesses confessed these facts which further pointed out to their being a pre-meditated conspiracy hatched by Inspector Jamwal. Further during cross-examination the Petitioner stated

“It is correct to say that Accused (i.e. Me) did not specifically tell him (i.e. Jamwal) to strip naked the three Constables”.

27. Thus, according to the Petitioner, no case made out as such against him in the GSFC.

28. As far as SI Ram Chander Singh is concerned, he claimed that neither he nor did the Petitioner give any order of stripping to Inspector Jamwal in his presence. HC Vijay Kumar disclosed that on 31st January, 2003 at around 09.15 hrs Inspector Jamwal had asked him to give a statement in his favour which was refused by him.

29. Before the GSFC Constable Pradip Dey stated that

“I did not coerce or pressurize him on 04 Dec 2002 or subsequent dates to forget about the stripping incident and give in writing that no such incident has taken place in the roll call. But, he again reverted back to his earlier falsehood by saying that, I did not tell him to this effect. It is clear that, he has been improving his statement from time to time.”

30. Constable/Tailor Gopal Ram denied being called by the Petitioner till November, 2002 to the residence of the Petitioner. He in fact denied having been so called either on 12th November, 2012 or any other date. This was supported by the statements of HC Paramhans Singh (now SI) and L.P. Sharma DC/Adjutant before the GSFC. SI Desh Raj stated in the ROE that Constable Mahabir Singh was never brought to the residence of the Petitioner on 19th December, 2002 at around 6.30 p.m.

31. On 10th March, 2005 the Petitioner submitted a plea of ‘no case to answer and stoppage of trial’ under Rule 92 of the BSF Rules. This was accepted by the Court and the Petitioner was already acquitted of all charges. According to the Petitioner, despite being acquitted on 10th March, 2015 by the GSFC, he was still kept under illegal arrest.

GSFC Revision Trial

32. On 22nd August, 2005 not being satisfied with the GSFC the department ordered a Revision Trial for the Petitioner alone on all four charges and to examine 8 fresh witnesses. Out of these 8 fresh witnesses 5 were defence witnesses and the remaining 3 were not relevant to the charges. The proceedings of the GSFC were again entered into after the Petitioner being

acquitted of the charges. The relevant findings read as under:

“Findings

The Court having attentively considered the observations of the Convening Authority in revision order and submission made by the Defending Officer in respect of the matter raised in the revision order do respectfully adhere to its earlier findings.

Announcement of findings

The Court being reopened, the accused is again brought before the Court. The decision of the Court to adhere to its earlier findings is announced in an open Court as being subject to the confirmation.

Signed on 22nd August, 2005 at SHQ BSF, Mawpat, Shillong.”

33. However, when these proceedings were sent to the Inspector General, BSF as a Confirming Officer, he recorded on 2nd February, 2006 as under:

“I do not confirm the findings of the court on all the four Charges being against the weight of the evidence.”

34. On 7th February, 2006 the Petitioner gave a detailed representation to the DG, BSF protesting against the non-confirmation of the GSFC trial.

Consideration by Respondents of the course of action

35. The documents produced before this Court by the Respondents reveal what exactly transpired after the DG refused to confirm the GSFC proceedings. One course suggested by the ADIG, (Confidential) on 24th February, 2006 was to go in for a ‘*de novo* trial’. This was after noting that “after going through the GSFC proceedings it is evident that there is very weak evidence as regards the main charge i.e. Charge –I.” It was noted that

“however, it is agreed that despite sufficient evidence available in ROE it has not been brought on record before the Court.” It was suggested that there is no bar against the *de novo* trial “and even the Supreme Court has upheld that in many cases without prejudice to the accused” and at the same time it was noted that “however, the *de novo* trial was ethically against our own judicial system, which if recommended, will perhaps raise a lot of doubt on the functioning of our own Security Force Trials”.

36. The DIG (Personnel) in his note on 3rd March, 2006 was against invoking Rule 20 he noted as under:

“It is a critically poised GSFC case, wherein the Court has admitted a “Plea of no evidence”, even in the revision trial. Ftr. IG (the confirming authority), had not confirmed the findings of the court being against the weight of available evidence and have alternatively recommended administrative action by invoking Rule-20 of the BSF Act and Rules.

The other co-accused involved in the incident have been awarded severe punishment ranging from five to eleven years forfeiture of services for the purpose of pension/two years forfeiture of service for the purpose of promotion.

Invoking Rule-20 is considered too harsh whereas the other option of issuance of DG’s displeasure to the officer may not be sound commensurate with culpability of the crime.

Convening of De-novo trial will surely raise apprehension regarding delivery of Justice in the eyes of Judiciary in our force. Hence De-novo trial, in my opinion, should be applied only as a last resort. Thus issuance of DG’s displeasure may be the only option left, if felt suitable.”

37. The Chief Law Officer, DIG then penned his note on 17th April, 2006

opining as under:

“It may be mentioned here that de-novo trial would not be legally sustainable. Issue of DG’s displeasure or IG’s displeasure would also not be advisable considering the gravity of the offences against the officer. The way entire proceedings have been conducted give a very strong feeling that the Court had deliberately tried to save the officer by ignoring the evidence which was available on record. On the other hand, all the three SOs who acted under the orders of the accused have been tried and convicted. In my humble opinion the only option which is just and reasonable to meet the ends of justice, in the instant case is to invoke the provisions of Rule 20, to be read with Sec 10 of the BSF Act.”

38. He even suggested amending rule 106 by adding a new sub-Rule 9 on the following lines:-

“(9) Where findings have not been confirmed even on revision on the ground of being perverse or against the weight of evidence, the competent authority may, in appropriate cases, invoke Rule 20 or 22, as the case may be, or take such other action as deemed just and proper under the circumstances of the case;

Provided that the process to initiate action commences within one year from the date of non-confirmation of the finding (s);

Where no action is initiated within one year from the date of non-confirmation of the finding(s) or sentence by the competent authority, such proceedings shall be deemed to have attained finality.”

39. The matter then went before the DIG (Pers.) who agreed that “we may recommend invoking Rule 20 to read with Section 10 of the BSF Act to MHA for dismissal of the officer from service with pension.” The DG, BSF

then made the following note on 26th April, 2006

“I have gone through the proceedings of the GSFC and also the preceding notes recorded in the file. The officer was tried by GSFC, followed by a revision of findings, but the Court, on both the occasions, had allowed the ‘plea of no case’ U/R 92 despite sufficient evidence being available on record. Under the existing provisions there cannot be any further revision or trial of the officer. I am, therefore, satisfied that the trial of the officer is inexpedient. Considering the gravity of the offences, further retention of the officer in service is undesirable. I, therefore, recommend his case for termination of service U/R 20, to be read with Section 10 of the BSF Act. The officer may be asked to resign and in case he fails to do so, he may be retired compulsorily. The case may be sent to the MHA for approval before issuing show cause notice to the officer.”

Impugned Show Cause Notice

40. Apart from issuing a show cause notice (SCN) to the Petitioner proposing termination of his services with pensionary benefits, it was decided to seek an explanation from the Presiding Officer, Members and Law Officers of the GSFC “as to how they failed to take cognizance of the evidence on record despite remand of GSFC proceedings for revision by the Confirming Authority.” The BSF was also asked to clarify “what action has been proposed to be taken against Shri L.P. Sharma, Dy. Comdt/Adjt for pressurizing/threatening the victims to change their statements, at the behest of the Comdt (accused).”

41. On this basis on 9th September, 2006 the DG, BSF issued a SCN under Rule 20 read with Section 10 of the BSF Act to the Petitioner asking him to submit his defence to the proposal why he should not be called upon to

resign him from the post.

42. The Petitioner submitted a detailed reply on 23rd October, 2006 referring to the evidence and pointing out that the case against him was not substantiated at all. He stated that he had a strong defence which he had produced at the time of the ROE. He referred to the statement of Shri R.K. Thakur, the then IG, BSF, Siliguri who had appeared and witness in the ROE and stated that: “I did not receive any report suggesting that the Commandant (i.e. me) was pressurizing anyone not to disclose the facts.”

43. The Petitioner stated that in addition he had the tape-recordings of most of the material prosecution witnesses which corroborated what he had stated in his defence and what had also emerged in the Court. Additionally he pointed out as under:

“13. I have put in a total of more than 22 years of service. Under my command my battalion was adjudged the best in the frontier and second best battalion of the force in the prestigious General Chaudhary Trophy, and of more than 30 inspections conducted during my command, all but one were graded “very good” – the one exception was graded as “good”. In addition, I have been awarded 3 commendation rolls by the DG BSF and 5 by the IG in recognition of my services. (*In ROE, statement of Sh. RK Thakur, Inspector General (Retd.) as DW-16 at lines 15 to 18 of page 112, and 8 to 12 of page 113*).

14. For the last three and a half years, I and my family have continuously been under stress, firstly for administrative action ordered against me in the form of IG’s displeasure, than secondly for disciplinary action ordered when the department did not agree to this administrative action, and thirdly for reverting back to this administrative action on my acquittal through the Court. This

treatment is being meted out to me in spite of my honourable acquittal through the Court, and on being abundantly clear that there was a conspiracy hatched in this case by fabricating statements, wherein help of Advocates was also taken by the conspirators.”

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44. It is at this stage that the WP(C) No. 19014/2006 filed in this Court challenged the show cause notice. Notice was issued in the petition on 19th December, 2006. On 31st January, 2007 an interim order was that “pending further orders from this Court and till 26th February, 2007 the Respondent was not passed any orders pursuant to the show cause notice.”

45. Thereafter, on 26th February, 2007 the following order was passed:

“We have heard learned counsel for the parties at some length. It is interesting to note that the petitioner and the respondents both place reliance upon the decision of the Supreme Court in ***Union of India & Ors. vs. Harjeet Singh Sandhu (2001) 5 SCC 593*** in which their Lordships have clarified the legal position as regards the permissibility of taking administrative action against a delinquent officer in the event of the proceedings before the Security Force Court/court martial did not in the opinion of the confirming authority go on record. It is argued on behalf of the petitioner that while the power to take administrative action under Section 10 of the BSF Act r/w Rule 20 of the BSF Rules cannot be disputed in the light of the law declared by the Supreme Court in the above decision, any action which the respondents may propose to take in exercise of the said power can be questioned as malafide, inexpedient or unjustified and also on the ground that the exercise of power is a fraud on the power vested in the authority concerned.

The respondents have not admittedly passed any order

pursuant to the impugned show cause notice although the petitioner has already submitted a reply to the same. As a matter of fact, this Court has vide order dated 31.1.2007 restrained the respondents from passing any order pursuant to the show cause notice. Having heard learned counsel for the parties today, we are inclined to modify that order. We accordingly direct that the respondents shall be free to pass an appropriate order pursuant to the impugned show cause notice. The same shall not be given effect to without the permission of this Court. We further direct that upon the order being made and served, the petitioner shall be free to suitably amend the writ petition challenging the validity of the said order. The needful shall be done by the petitioner within two weeks from the date the order is communicated to him. This writ petition is, in the meanwhile, adjourned to be posted again on 30.4.2007.

Order dasti.”

Subsequent developments

46. On 21st August, 2007 the Court issued Rule D.B. in the matter. On 22nd August, 2007 the Petitioner gave a written representation requesting for a posting out of Kupwara and preferably to Delhi. He made another representation for posting to Delhi on 14th March, 2008. In the meanwhile on 1st March, 2008 the Petitioner's wife suffered a massive brain stroke and expired in the hospital on 20th March, 2008. Although he was not posted to Delhi he was attached to Delhi with effect from 31st March, 2008 for one year in the Central Police Canteen.

47. On 2nd May, 2008 the Petitioner made a further representation for the posting at Delhi so that he could meet his domestic obligations. On 22nd

May, 2008 the Petitioner was superseded for promotion to the rank of additional DIG when his junior was promoted as such. On 26th May, 2008 the Petitioner protested against the above action but received no reply.

48. It is stated on 28th June, 2008 the Petitioner underwent an eye operation in New Delhi and suffered a post operative complication as a result of which he was on medical leave upto 19th August, 2008. In the meanwhile, the CEO of the Central Police Canteen sent a letter to the DG, BSF stating that since the Petitioner services were likely to be terminated and also since he had undergone an operation in his eye, he should be replaced with another officer.

49. On 24th July, 2008 the Petitioner was issued a notice to the Petitioner in terms of the Rule 20(4)(d) of the BSF Rules read with Section 10 of the BSF Act calling upon the Petitioner to resign from service. It was however added in para 6 of the said notice as under:

“The effect of this order shall remain deferred till the permission is granted by Hon’ble High Court of Delhi to give effect to the same i.e. the termination will be operative from the date of permission granted by Hon’ble High Court to do so in compliance to direction of Hon’ble Delhi High Court dtd 26 Feb 2007.”

50. On 27th August, 2008 the Petitioner sought to amend the present writ petition to challenge the aforementioned order dated 24th July, 2008 which was served on him on 20th August, 2008.

51. On 10th September, 2008 the Petitioner was de-attached from the Central

Police Canteen pre-maturely and was directed to report back to Kupwara. On 15th September, 2008 the Petitioner protested against the de-attachment order pointing out that he had not been allowed to complete the attachment period of even one year. He filed CM No.13078/2008 in the present writ petition. On 19th September, 2008 notice was issued and it was directed that “till the next date of hearing further action in pursuance to the detachment order dated 10th September, 2008 is stayed.” This interim order was continued till 20th May, 2009 on which date the following order was passed:-

“The de-attachment order dated 10.9.2008 was stayed on 19.9.2008 on account of the illness of the wife of the petitioner. The wife of the petitioner is no more. Learned counsel for the petitioner states that the petitioner has two daughters – the younger one in Class 9th while the elder one has written her Class 12th exam.

In the present proceedings, we cannot keep the petitioner permanently posted at Delhi and the petitioner would have to be posted as per norms. In case the petitioner has any grievance in respect of any particular posting that would be a separate cause of action. At the request of the learned counsel for the petitioner, we grant liberty to the petitioner to make any representation in respect of posting.

However, given the peculiar facts and circumstances of the case, the de-attachment order should not be given effect to till 15.8.2009.

Application stands disposed of.

Dasti.”

52. In the meanwhile on 31st October, 2008 the Petitioner sought an oral

hearing. After the order dated 20th May, 2009 the Petitioner again represented by letter dated 3rd June, 2009 for posting to Delhi as he was eligible for it. On 5th June, 2009 the CEO of the CPC was relieved and the Petitioner was asked to look after the job till further orders. However, the charge was not given to him.

53. On 17th June, 2009 the Directorate General, BSF passed an order retiring the Petitioner from service with pensionary benefits. However, the effect of the order was to remain deferred till permission was granted by this Court in terms of the order dated 26th February, 2007.

54. The Petitioner then applied for stay of the said order and to amend the writ petition. These amendment applications were allowed on 17th November, 2009. On 24th November, 2009 the amended writ petition was filed in the Court. Meanwhile, the Petitioner was not allowed to do any work in the CPC and kept representing against it.

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55. On 26th March, 2010 the Petitioner was issued a movement order that he should report to Kupwara. On 12th April, 2010 an order was issued addressed to the Petitioner at his native place in Rewari that a one man inquiry had been initiated by the BSF to inquire into the failure of the Petitioner to attend to his duties in the CPC, Delhi from 3rd July, 2009 to 26th February, 2010. The Petitioner then applied to this Court by filing CM No. 5831/2010 in the present petition for stay of the said order.

56. Meanwhile, the second Writ Petition being WP(C) No. 3010/2010 questioning the said order was filed, in that view of the matter on 4th May, 2010 when CM No. 5381/2010 was listed. Counsel for the Petitioner sought leave to withdraw the said application.

57. On that very date, notice was issued in WP(C) No. 3010/2010 and there was stay of the Court of Inquiry that Respondents were directed to place before the Court the action taken by them on the several representations of the Petitioner.

58. Thereafter, the Petitioner joined duties of Kupwara and continued to work there. The Court is informed that at present the Petitioner is discharging duties at Kolkata.

Orders of this Court

59. For some reason, despite the two writ petitions being listed before various benches of this Court they could actually not be taken up for final hearing. The final hearing of the present petitions commenced before this Bench on 31st January, 2019.

60. On 5th February, 2019 the following order was passed:

“1. Learned counsel for the Respondent has brought the entire record of the case to the Court, with the relevant pages flagged along with an index.

2. The Court considers it appropriate to permit counsel for the Petitioner to inspect the record in the chamber of the counsel for the Respondent on a date and time mutually convenient, within

the next one week. Copies of whatever documents are sought by the counsel for the Petitioner will be provided to her to enable the counsel for the Petitioner to prepare a compilation of the relevant documents along with a note for being produced before the Court on the next date.

3. List on 7th March 2019 at 2.15 pm.

4. Matter be treated as part-heard.”

61. Pursuant thereto inspection of the record was allowed. Compilations were prepared by both parties and submitted to the Court along with the written notes of arguments. The arguments concluded on 15th March, 2019 when orders were reserved.

Submissions on behalf of the Petitioner

62. Ms. V. Mohana, learned senior counsel for the Petitioner made the following submissions:-

i) the impugned notice issued by the Respondents calling upon the Petitioner to resign from service under Rule 20 (4) (d) of the BSF Rules dispensing with inquiry notwithstanding his acquittal twice by the GSFC on the same charges was without jurisdiction, legal and arbitrary.

ii) The Staff Court of Inquiry (SCOI) was itself illegal the recording officer blamed the Petitioner by invoking Rule 173(8) of the BSF Rules even before the Petitioner was allowed to produce his defence witnesses. The occasion to invoke Rule 173(8) was only after statements of all witnesses were recorded.

iii) The illegal SCOI became the basis of future action against the Petitioner on the administrative side the IG, BSF had directed that IG's warning be issued to the Petitioner for failing to take cognizance of the incident and suppressing the full facts of the case. The IG also ordered disciplinary action against the three subordinates who had in fact stripped naked the three constables on 9th November, 2002. Inexplicably the DG, BSF over-turned the IG's order and directed the disciplinary action be taken against the Petitioner. This was wholly illegal and uncalled for.

iv) The ROE against the Petitioner on 22nd February, 2004 was on basis of charges which were entirely different from the lapses attributed to the Petitioner by the SCOI. The Recording Officer in the ROE allowed witnesses to produce their previously written statements. The Headquarters, DG, BSF objected to this and ordered for an additional ROE. While conducting the additional ROE the Recording Officer again committed an illegality by allowing witnesses to keep pieces of papers previously written for their assistance. These witnesses made statements by referring to those papers.

v) None of the witnesses who appeared in the GSFC on two occasions supported the case of the prosecution. They even went on to accept that they had lied before the GSFC. It is in those circumstances, the GSFC allowed the prayer of the Petitioner that he should not be called upon to make his defence under Rule 92 of the BSF Rules and he was acquitted upon the charges.

vi) The GSFC also recommended action against the three prosecution witnesses namely Subedar Jamwal, Constable Mahabir Singh and Constable Pradip Dey for making false statements before the GSFC. Between April and June, 2005 three separate GSFCs were held against the aforementioned three subordinate officers. They were all found guilty of stripping the constables and punish mildly by forfeiting the service by a few years for purposes of promotion and pension.

vii) As far as the Petitioner was concerned, the Respondents on 22nd August, 2005 ordered a revision trial and in this again the GSFC acquitted him. On 9th September 2006, all of a sudden the Petitioner was issued a SCN under Rule 20(4)(d) of BSF Rules, 1969 read with Section 10 of BSF Act. There was no material on the basis of which the said provision could be invoked.

viii) The SCN issued thereunder was malafide and based on irrelevant grounds. Apart from the principles of double jeopardy getting attracted the entire action was violative of the principles of natural justice.

ix) The actual perpetrators of the offence have been found guilty by the GSFC and have been awarded a mild punishment of loss of seniority. However, the Petitioner who is not involved in the incident at all and despite being acquitted twice by the GSFC is sought to be terminated. There was no question of change of circumstances for impracticability.

x) There was also no question of inexpediency because the Petitioner has already been tried twice on the same charges. Sections 107 and 108 of the

BSF Act requiring confirmation of a sentence by an empowered officer was enacted for the purposes of checking misuse or arbitrariness. It was not meant to perpetuate arbitrariness. The fact that the members of the GSFC have themselves been issued a SCN speak of the malafides of the Respondents.

xi) Reliance was placed by Ms. Mohana on the decisions in *Union of India v. Harjeet Singh Sandhu (2001) 5 SCC 593*, *Tarsem Singh v. State of Punjab (2006) 13 SCC 581*, *Major Radha Krishnan v. Union of India (1996) 3 SCC 507* and the decision dated 28th September 2015 of this Court in WP (C) No. 7611/2003 (*Yacub Kispotta v. Director General, BSF*).

Submissions on behalf of the Respondents

63. Mr. Ruchir Mishra, learned counsel appearing for the Respondents, submitted that the requirements of Rule 20 of the BSF Rules were completely fulfilled in the present case. The record before the GSFC was itself material on the basis of which the action was warranted thereunder.

64. He placed considerable reliance on the decisions in *Chief of Army Staff v. Major Dharam Pal Kukrety (1985) 2 SCC 412* and pointed out that the mere acquittal of the Petitioner by the GSFC could not preclude the Respondents from taking action under Rule 20 of the BSF Rules. He further placed reliance on the decisions dated 16th October, 2008 in WP(C) 2003/2006 (*S.S. Shekhavat v. Union of India*).

65. Mr. Mishra took the Court through the evidence recorded before the

GSFC and submitted that this constituted sufficient material to proceed against the Petitioner under Rule 20 of the BSF Rules. The above submissions have been considered.

Analysis of relevant provisions

66. The scheme of the BSF Act is that there are three kinds of Security Force Courts under Section 64 of the BSF Act, 1968. These are (a) General Security Force (GSFC) (b) Petty Security Force Courts (PSFC) and (c) Summary Security Force Courts (SSFC). The trial of personnel is conducted by the GSFC which can, after a person is held guilty of a major offence punishable under the Act, award him a sentence. On the other hand, SSFC is for lesser offences and has limited powers as regards sentences.

67. The ordering of the GSFC is a matter of discretion under the Border Security Force Rules, 1969 (BSF Rules). A Record of Evidence (ROE) is prepared by the officer recording the ROE or by another officer deputed to do so. This happens under Rule 48(1) of the BSF Rules. A certificate is appended by the officer recording the ROE after the completion of that exercise.

68. There are four options available to the authority on being presented with the ROE. Under Rule 51(A) (3) he may (i) dismiss the charge; or (ii) dispose of the case summarily he has so empowered; or (iii) refer the case to the competent superior officer for disposal; or (iv) apply to a competent officer or authority to convene a GSFC for trial of the accused.

69. In the present case after the ROE there was a SCOI in terms of Rule 170 of the BSF Rules. The case of the Petitioner is that even before his witnesses could be examined in defence, the officer recording the SCOI proceeded to conclude the inquiry and recommend action.

70. Rule 173 (8) reads as under:

“(173)(8) Before giving an opinion against any person subject to the Act, the Court will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him, and make a statement and call witnesses in his defence.

Provided that this provision shall not apply when such inquiry is ordered to enquire into a case of absence from duty without due authority.”

71. Another administrative action is the issuance of ‘displeasure and warning’ under Rule 176-A. In the present case that was invoked and at one stage it was directed to communicate to the Petitioner the IG’s displeasure.

72. That the GSFCs both in the initial trial and in the revision trial found the Petitioner not guilty of the charges is an accepted fact. In fact that is the reason why the Respondents resorted to Rule 20 of the BSF Rules and in particular Rule 20(4) read with Rule 20(2). Rule 20 reads as under:

“20. Termination of service of officers by the Central Government on account of misconduct.

(1) When it is proposed to terminate the service of an officer under section 10 on account of misconduct, he shall be given an opportunity 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 Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(2) When after considering the reports on an Officer's misconduct, the Central Government or the Director General, as the case may be, is satisfied that the trial of the Officer by a Security Force Court is inexpedient or impracticable, but is of the opinion, that the further retention of the said officer in the service is undesirable, the Director General shall so inform the officer together with particulars of allegation and report of investigation (including the statements of witnesses, if any, recorded and copies of documents if any, intended to be used against him) in cases where allegations have been investigated and he shall be called upon to submit, in writing, his explanation and defence: Provided that the Director- General may withhold disclosure of such report or portion thereof if, in his opinion, its disclosure is not in the interest of the Security of the State.

(3) In the event of the explanation of the Officer being considered unsatisfactory by the Director General, or when so directed by the Central Government, the case shall be submitted to the recommendation of the Director General as to the termination of the Officer's service in the manner specified in sub-rule (4).

(4) When submitting a case to Central Government under the provisions of sub-rule (2) or sub-rule (3), the Director-General shall make his recommendation whether the Officer's service should be terminated, and if so, whether the officer should be—

(a) dismissed from the service; or

(b) removed from the service; or

(c) retired from the service; or

(d) called upon to resign;

(5) The Central Government, after considering the reports and the officer's defence, if any, or the judgment of the criminal court, as the case may be, and the recommendation of the Director-General, may remove or dismiss the officer with or without pension or retire or get his resignation from service, and on his refusing to do so, the officer may be compulsorily retired or removed from the service with pension or gratuity, if any, admissible to him.

73. Section 10 referred to in the said rule of the BSF Act reads as under:

“Subject to the provisions of this Act and the rules, the Central Government may dismiss or remove from the service any person subject to this Act.”

74. It would therefore appear that Rule 20 in conjunction with Section 10 is invoked under the conditions specified in Rule 20(2). The individual ingredients of Rule 20 BSF Rules are as under:

i) There should be a report on an officer's misconduct.

ii) On considering such report the Central Government or the Director General (DG) as the case may be should be satisfied that the trial of the officer by a Security Force Court is inexpedient or impractical.

iii) However, such officer should be of the opinion that further retention of the said officer in service is undesirable.

iv) On forming such opinion the DG shall so inform the officer.

v) While informing the officer of such opinion the DG will provide to the officer

a) particulars of allegation;

(b) to report of investigation (including the statements of witnesses if any recorded and copies of documents if any intended to be used against him) in cases where allegations have been investigated;

vi) the DG shall call upon the officer to submit it in writing an explanation in his defence.

75. The DG may then under Rule 20 (4) give his recommendation to the Central Government whether the officer should be (a) dismissed from service or (b) removed from service or (c) retired from service or (d) called upon to resign. The Central Government after considering the reports and the officer's defence or the judgment of the Criminal Court as the case may be and the recommendations of the DG may follow either of the recommendations. If they call upon the officer to resign and he refuses to do so the officer may be compulsory retired or removed from service with pension or gratuity, if any admissible to him.

No material against the Petitioner

76. It will thus be seen that the *sine-qua non* for invoking Rule 20 (2) is report on an officer's misconduct. On repeatedly being asked whether there was in fact any report of the officer's misconduct, Mr. Ruchir Mishra kept referring to the proceedings of the GSFC themselves. Even when asked if there is any report of investigation, he again drew the attention of the court

to the proceedings before the GSFC and prior to that the ROE.

77. The report that Rule 20 (2) talks of is a report of the officer 'misconduct'. If the report relied upon indicates the contrary, in other words, if the report does not prove the officer's misconduct then it would not be a report that forms the basis of action under Rule 20(2). Where the GSFC proceedings on two occasions have found the Petitioner not to be guilty of the offence then obviously the GSFC proceedings themselves cannot form the basis for the action under Rule 20(2) of the BSF Rules. There will have to be some material not considered by the GSFC which forms the basis of the action under Rule 20(2) of the BSF Rules.

78. Even when Rule 20(2) talks of 'report of investigation' (including statements of witnesses) these are documents that are "intended to be used against" the officer sought to be removed/terminated. This again cannot be the very GSFC proceedings which were resulted in his exoneration on two occasions. There will have to be some material other than that considered by the GSFC which points to the officer's misconduct.

79. From the notes on file and the orders passed on the administrative side it appears that a view was expressed by the Respondents that there was adequate material before the GSFC, which somehow the GSFC either missed or deliberately overlooked and which could have proven the misconduct of the Petitioner.

80. That very same material has been carefully perused by this Court with

the assistance of Mr. Ruchir Mishra. Viewed from any angle there is nothing in the statements of any of the witnesses before the GFSC which even prima facie indicates to the involvement of the Petitioner in the incident of stripping of the three Constables by his subordinates. In other words there is no evidence which goes to show that he actually instructed Subedar A.S. Jamwal to carry out the said act of stripping. The crucial evidence in this regard is totally missing. In the absence of any material that could have actually proven the misconduct of the Petitioner and unless such material was referred to in the order proposing action under Rule 20(2) and such material if provided to the Petitioner, the action under Rule 20(2) could not have been taken.

Discussion of case law

81.1 At this stage, the Court considers it necessary to discuss in some detail the decision of the Supreme Court in ***Chief of Army Staff v. Major Dharam Pal Kukrety*** (*supra*). There the Respondent, a permanent Commissioned Officer of the Indian Army, was tried by a General Court Martial (GCM) on certain charges. The GCM acquitted him of the charges. The GOC of the area declined to confirm and sent the matter back to the GCM for a revision. The GCM after hearing both sides once again found the Respondent not guilty of the charges. The GOC then reserved confirmation of the finding of the revision by superior authority viz., the GOC in Central command who again did not confirm the finding.

81.2 The charges against the Respondent the finding and non-confirmation thereof were promulgated as required by Rule 71 of the Army Rules.

Thereafter the Chief of Army staff issued notice under Rule 14 of the Army Rules stating that since a fresh trial by the Court martial is inexpedient and the Respondent's misconduct as disclosed in the proceedings rendered his further retention in service undesirable, the Respondent should be asked to submit his explanation in defence. Along with the said notice copies of the extracts of the notice and the court martial proceedings were forwarded to the Respondents.

81.3 The Respondent's writ petition was allowed by the Allahabad High Court. The appeal by the Chief of Army Staff against the said decision was allowed by the Supreme Court and it was held that

- (i) the action of the Chief of Army Staff issuing the impugned notice was neither without jurisdiction nor unwarranted in law.
- (ii) In the absence of any confirmation, whether of the original finding or of the finding by revision, the finding was not valid.
- (iii) Since there were decisions against the holding of a fresh court martial when finding of a court martial on revision was not confirmed, ordering a fresh trial by court martial was both inexpedient and impractical. The only option available was to take action under Rule 14.
- (iv) It was however noted that the Chief of Army Staff ought to take into account the conduct in behaviour of the Respondent during the intervening period and they have been in conformity with good order and military discipline and high traditions of the Indian Army the Chief of Army Staff should consider the desirability proceeding further in the matter.

81. 4 The one distinguishing feature as far as the present case is concerned is

that unlike the Allahabad High Court in ***Kukrety***, this Court has not interdicted the SCN. This Court has permitted the SCN to be carried to its logical conclusion i.e., the passing of an order in relation thereto by the Respondents. The Court has only directed that it should not be given effect to till further orders of this Court. The judicial review of the order so passed under Rule 20 (2) is the exercise presently undertaken. Consequently, while the decision in ***Kukrety*** may be relied upon by the Respondents to argue that the power to take action under Rule 20 (2) was not precluded it also by no means precludes this Court from judicially reviewing the order passed thereunder.

82.1 In ***S.S. Shekhavat v. Union of India*** (*supra*) the Petitioner was a Commissioned Officer in the Indian Army. He was served with a charge sheet containing five charges alleging supply of unhygienic meat to the troops and management by mixing water in the carcasses. He was tried by a GCM which exonerated him of all the charges. The confirming authority did not confirm the said verdict instead exercised the right of judicial revision under Section 160 of the Army Act and remanded the matter to the GCM with directions.

82.2 On remand the GCM recorded additional evidence examined some more documents but again reiterated its verdict holding the Petitioner not guilty of the charges. The Respondents again did not confirm the report of the GCM. A SCN was issued to the Petitioner calling upon to him to explain why administrative action to convey appropriate censure of the GOC in C should not be taken against him. Notwithstanding the objection of the

Petitioner the SCM Respondents awarded him Censure of ‘Severe Displeasure (recordable).’

82.3 The Petitioner contended before this Court that such a course of action was not available to the Respondents, ‘that it had no sanction of law and was a time barred action.’ Further it had come in the way of his promotion to the rank of Lt. Colonel. His representation challenging the action under Section 16 (2) of the Army Act was rejected by the competent authority.

82.4 This Court referred to the decision in *Dharam Pal Kukrety* and the earlier decisions in *Harjeet Singh Sandhu* and *Major Radha Krishnan* (*supra*). This Court then summarised the legal position as under:

“a) It is not mandatory for the Confirming Authority to confirm the findings of a Court Martial given on the 2nd occasion after remand of the case in exercise of the power exercised by the said authority under Section 160 of the Army Act.

b) Unless the findings of the Court Martial holding an accused “guilty” or “not guilty” are confirmed, the accused can neither be treated as “guilty” nor can be treated as “not guilty” for the offences alleged against him despite his trial.

c) There is no provision under the Army Act or the rules which empowers holding of a fresh Court Martial when the finding of a Court Martial is not confirmed even for the 2nd time.

d) In an appropriate case, where holding of fresh court martial is impracticable or inexpedient; the Chief of Army Staff is authorized to take action against the incumbent under Section 19 of the Act r/w Rule 14 of the Army Rules which empowers the Chief of Army Staff even to terminate the service of the incumbent, of course subject to the order passed by the Central

Government in this regard.

e) However, the existence of this power may also include passing of a lesser sentence other than termination of services including award of censure in view of their policy decision (supra) in cases covered by para 5 and 6 thereof.

f) The term used in Sub-rule 2 of Rule 14 which says that a fresh Court Martial is impracticable or not reasonably practicable has an element of subjectivity in arriving at the satisfaction by the Chief of Army Staff/ GOC in C and/or the Central Government as the case may be, regarding the misconduct committed by an accused and needs to be reached after taking into consideration the then prevailing facts and other circumstances as also the reports of court martial and the misconduct of the accused.

g) As held in *Sandhu's* case, situation may arise where it may be impracticable or inexpedient to have a fresh Court Martial within the time prescribed under Section 122 of the Army Act, yet there may be cases where the power vested in the Army Authorities under Section 19 read with Rule 14 cannot be excluded even if the report of the GCM is not confirmed for the 2nd time.

h) Exercise of such power may be vitiated as an abuse of power in a given case. Such power cannot be exercised only because the findings or the sentence does not meet the expectations of the Confirming Authority. The power available to the Authorities under Section 19 read with Rule 14 stands vitiated if it is shown to be a colourable exercise of power or an abuse of power which at times has been described in administrative law as fraud of power, or is only an attempt to enforce will of superior authorities without justification.

i) A misconduct committed number of years ago, for which action was not taken promptly within the prescribed period of limitation may also be a factor to vitiate such proceedings. However that would all depend on the facts and circumstances of the case and no hard and fast rules can be laid down in this

behalf.

j) Exercise of such power is always subject to judicial review in accordance with the well settled principles of law governing review of Administrative action. As and when it is shown that the exercise of power is vitiated by mala fide and found to be based upon irrelevant consideration, or is found to be a clear case of externs or what is sometimes called fraud of power it may be set aside.

k) Normally the discretion so exercised must be presumed to have been rightly exercised and is not to be readily interfered with, even if two views are possible.

l) In terms of policy letter No. 32908/AG/DV-I power of awarding of censure is very much available to the Chief of Army Staff/GCC in appropriate case where it is not practicable or expedient to hold a fresh Court Martial; provided the offence alleged to have been committed are offences involving moral turpitude, fraud or dishonesty and must be tried by Court Martial or by a Civil Court.

m) Award of Censure has also been described as Custom of Service even though such award is not part of statute but the award of the same would also be guided by the Policy framed in this regard and is subject to para 5 and 6 of the same.”

82.5 The Court did not stop there but proceeded to consider whether the “competent authority had sufficient material before it to arrive at the satisfaction to award such a punishment on administrative side in the facts of the present case and that the case is not a case of exercising fraud in Administrative Action.”

82.6 The Court then examined the evidence and came to the following

conclusion:

“On having gone through the original record which contains the process of reasoning as well as analysis of evidence and reference to relevant instructions which were not followed and have been simply ignored by the Court Martial in returning the findings of Not Guilty, we are of the view that the respondents were justified in forming the opinion to award the punishment of censure to the petitioner in respect of the subject matter of the present writ petition. We are satisfied that in the present case the reasons which have been gone into in the minds of the concerned Army authorities are sufficient to have adopted the course of action in passing the impugned order more so because the Show Cause Memo has been issued about the administrative lapses and lack of supervision on the part of the petitioner. The case is clearly covered by para 6 of the Policy Guidelines for imposition of Censure in such cases.”

83. In the present case while it is true that it was open to the Respondents to resort to Rule 20 after exoneration of the Petitioner by the GSFC twice, the Respondents are obliged to satisfy the Court that the necessary conditions for invocation of Rule 20 stood fulfilled.

84. At this stage, it must be noticed that the decision in *Tarsem Singh v. State of Punjab* was in the context of the subjective satisfaction of the authority that it is “not reasonable practical to hold an inquiry”. This was also reiterated in the subsequent decisions in *Preeti Pal Singh v. State of Punjab (2006) 13 SCC 314* where it was held that existence of an exceptional situation must be shown to exist “on the basis of relevant materials” as emphasized in *Tarsem Singh* the subjective satisfaction of the authority had to be based on ‘objective criteria.’

85. In the present case even if the Court is able to accept the plea of the Respondents that with the GSFC having held the Petitioner not guilty of the charges twice, it was not practical to order another court martial, the fact remains that Rule 20 (2) also required there to be sufficient material in the form of a misconduct report of an officer or a report of investigation on the basis of which the action under Rule 20 could be initiated. The Court is not able to accept the plea of the Respondent that the very orders of the GSFC and the evidence placed before it which resulted in acquittal of the Petitioner of the same charges could form either the 'report of the officer's misconduct' or the report of investigation which Rule 20(2) talks of. It appears that these reports were to be relevant for the purposes of the authority satisfaction on two counts: i) it is inexpedient or impracticable for another trial by a Security Force Court (ii) retention of the officer in services undesirable. If the report points to the opposite, it could not be treated as relevant material to arrive at the above satisfaction on two counts.

86. Notwithstanding the above this Court on examining the entire evidence which the Court is asked to treat as the report of the officer's misconduct is unable to be persuaded that any reasonable person given the same material would be satisfied subjectively, if objective criteria were to apply that it is undesirable to retain the Petitioner in service. There is absolutely no material whatsoever that would persuade the Court to come to such conclusion.

87. In this context it must be noticed that in *S.S. Shekhavat* on examining the material this Court was able to concur with the authorities on the undesirability of the Petitioner being retained in service. In the present case,

however, the Court is not so satisfied. The notes on file do show that the Respondents acted arbitrarily by seeking to subject the Petitioner to severe punishment even while letting off the subordinates who were actually involved in the incident of stripping of the Constables with milder punishment.

Action is malafide

88. There is merit in the contention of the Petitioner that the action taken against him was malafide. The manner in which the Respondents have gone about straining the language of the provision to justify their action places credence to the submission of the Petitioner that the action was colourable exercise of power based on extraneous considerations.

89.1 In *Amiya Ghosh v. the Union of India (2017) 1 Calcutta LT 1* the Petitioner a Constable of the BSF was found not guilty by the GSFC on a very serious charge of causing the death of a minor girl. The confirming authority did not concur with the finding of the GSFC and passed a revision order requiring the GSFC to again try the case. The GSFC again reiterated the earlier finding of not guilty. Thereafter, Section 11 of the BSF Act read with Rule 22 was invoked and a show cause notice was issued to the Petitioner calling upon him to explain why administrative action should not be initiated against him.

89.2 That SCN was challenged before the Calcutta High Court. After analysing the relevant case law and the provisions the High Court summarised the legal position and in that process held that recourse could be

held to Rule 22 of the BSF Rules even where findings were returned by the GSFC. It was held that the conclusions recorded by the confirming authority that the findings of the GSFC are ‘not convincing’ and “perverse” and against the weight of evidences reflected his *ipse dixit* because it did not actually advert specifically to the points of disagreement.

89.3 The Court then proceeded to examine the merits of the case and the evidence and came to the conclusion that indeed there was no evidence to proceed against the Petitioner. They again therefore decided not to revert the matter to the confirming authority and set aside the show cause notice.

90. In the present case as already noticed, the Court has permitted the Respondents to proceed to the next date after the SCN cause notice. No reasons for disagreeing with the GSFC’s conclusions have been given except saying

“In the present case, in spite of sufficient evidence and material being available on record, the GSFC gave the findings which were against the weight of evidence. The competent authority i.e. DG BSF did not find your explanation to be satisfactory and was of the opinion that your further retention in the service was undesirable and that you should be called upon to resign and in case of your failure to do so you should be retired from service with pensionary benefits under the provision of BSF Rule 20 read with Section 10 of the BSF Act and accordingly decided to forward the case to Central Govt.”

91. The aforementioned reasons are hardly convincing particularly when the entire evidence has been analysed by the GSFC to come to the conclusion that the Petitioner is not guilty of the charges for which he was tried.

Conclusions in W.P. (C)19014 of 2006

92. For all of the aforementioned reasons, the Court finds no justification whatsoever in the Respondents passing the order dated 17th June, 2009 terminating the services of the Petitioner with pensionary benefits. Accordingly, the said order dated 17th June, 2009 is set aside.

93. In that view of the matter, it is not necessary for the Court to separately set aside the SCN which led to the passing of the above order dated 17th June 2009. The Petitioner is directed to be considered for promotion to the next higher post on the basis that he was not terminated him from service with all consequential benefits and seniority including arrears of pay. His promotion will relate back to the date on which his juniors were promoted.

Findings in W.P. (C) 3010 of 2010

94. As far as W.P. (C) 3010 of 2010 is concerned, the first prayer in that writ petition has been rendered infructuous more or less with the Petitioner having been posted now to Calcutta.

95. As far as the second prayer is concerned, the ordering of a COI into the failure of the Petitioner to attend his duties in the CPC cannot any longer be enquired into for the simple reason that he was not allotted any duties in the CPC. It will be raking up a dead and stale claim.

96. There is also merit in the contention of the Petitioner that when the Petitioner sought copies of the handing/taking over certificates, charge

assumption, relinquishment reports etc. through the RTI, he was not provided those documents. He filed an appeal to the Appellate Authority of the RTI Act. Vide letter dated 22nd December, 2010 the reply was that

“Shri S.K. Tyagi, Commandant took over the charge of CEO cum GM from Shri R K.Singh instead of petitioner, which was erroneously mentioned due to clerical mistake, and as such documents requested are not available with Respondents.”

97. The above action of the Respondents in alleging that the Petitioner handed over charge of CEO-cum-GM to Sh. S.K. Tyagi on 20th July, 2009 stands falsified in the above manner.

98. Further as pointed out by the Petitioner if it is the case of the Respondents that the Petitioner abandoned his post in the CPC, then they had to necessarily issue a SCN in terms of Section 62 of the BSF Act alleging his absence. Under Section 61 of the BSF Act, a CEO had to be ordered after one month of alleged absence. The Petitioner was never declared a deserter under Section 62 (2) if indeed he was absent from 3rd July, 2009 as alleged. The COI was ordered against the Petitioner nine months after his alleged absence from 3rd July, 2009 in contravention to the Section 61 & 62 of the BSF Act read with the applicable rules. There is also merit in the contention that the one man inquiry has been ordered contrary to Rule 172 of the BSF Rules. The impugned order proposing the one man inquiry lacks the material particulars to justify its invocation.

99. For all of the aforementioned reasons, the Court sets aside the impugned order dated 12th April, 2010 passed by Respondent No.6 for proposing the

COI against him. W.P. (C) 3010 of 2010 is allowed. The pending application, if any, is also disposed of.

100. In each of the writ petitions, costs of Rs. 50,000/- will be paid by the Respondents to the Petitioner within a period of eight weeks from today.

S. MURALIDHAR, J.

SANJEEV NARULA J.

APRIL 12, 2019

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