

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 7<sup>th</sup> July, 2021**

+ **W.P.(C) 6180/2021**

**SANJAY YADAV**

**..... Petitioner**

Through: Dr. Surender Singh Hooda, Adv.

Versus

**UNION OF INDIA & ORS.**

**..... Respondents**

Through: Mr. Harish Vaidyanathan Shankar &  
Mr. Sahaj Garg, Adv. with Major  
Arjun Katoch.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**HON'BLE MR. JUSTICE AMIT BANSAL**

**[VIA VIDEO CONFERENCING]**

**RAJIV SAHAI ENDLAW, J.**

**CM No.19576/2021 (for exemption)**

1. Allowed, subject to just exceptions and as per extant rules.
2. The application is disposed of.

**W.P.(C) 6180/2021 & CM No.19575/2021 (for stay)**

3. The petitioner, a Deputy Inspector General (DIG) in the respondents Border Security Force (BSF) and under trial by a General Security Force Court (GSFC), has filed this petition seeking mandamus, directing the respondents BSF to summon the defence witnesses as requested by the petitioner in his representation dated 11<sup>th</sup> June, 2021.

4. It is the case of the petitioner, that (i) the Ministry of Home Affairs (MHA) issued Office Memorandum (OM) dated 21<sup>st</sup> September, 2016 on the subject of "Deployment of Central Armed Police Forces (CAPFs)

Personnel at the Residences of Retired Officers” and issued directions for withdrawal of all such personnel from residences of retired officers; (ii) the aforesaid OM dated 21<sup>st</sup> September, 2016 has never been complied with and on the date of filing of the petition also, hundreds of CAPFs personnel were deployed at the residences of retired as well as serving officers; (iii) as per the aforesaid OM dated 21<sup>st</sup> September, 2016, the punishment prescribed for misuse of BSF manpower, is only of monetary recovery from officer concerned; (iv) on 6<sup>th</sup> November, 2018, a Staff Court of Inquiry (SCOI) was ordered against the petitioner, based on a complaint made by one Constable Bhupender Sharma, alleging misuse of manpower by the petitioner and further alleging that the petitioner got his personal work done from BSF constables; (v) on 21<sup>st</sup> May, 2021, a chargesheet was served upon the petitioner and recording of evidence was ordered and conducted; (vi) thereafter, the petitioner was directed to be tried by a GSFC; (vii) the petitioner has been charged as under:

*“First Charge BSF Act, Sec-40: An act prejudicial to good order & discipline of the force in that he, while as the DIG SHQ BSF, Bhilai, during the period from Jan’2017 to May’2018, had improperly and without authority engaged/deployed BSF personnel for supervising the construction and related work of his personal house at Plot No.3/275, Sector-O, Mansarowar Yojana Lucknow, UP.*

*Second Charge BSF Act, Sec-40: An act prejudicial to good order & discipline of the force in that he, while as the DIG SHQ BSF, Bhilai, during the period from April’2017 to May’2018, did not pay sum of Rs.69,624/- to No.042551391 Const Bhupender Sharma of*

*125 Bn BSF, which was incurred for the personal work at his native place Sohalla, Agra as well as the construction site of his personal house at Plot No.3/275, Sector-O, Mansarowar Yojana Lucknow, UP.*

***Third Charge*** *BSF Act, Sec-38: Having been duly affirmed before a court of inquiry making a statement which he knew to be false in that he, on 05 Jan 2019, at THQ IG BSF (Spl Ops) Chhattisgarh, when examined as a witness before a Staff Court of Inquiry constituted to investigate the complaints made by No.042551391 Const Bhupender Sharma of 125 Bn BSF (now 183 Bn BSF) against him, stated on affirmation that he had not engaged, BSF personnel for the construction of his house at Plot No.3/275, Sector-O, Mansarowar Yojana Lucknow, UP, which he knew that the said statement was false.”;*

(viii) the GSFC convened on 21<sup>st</sup> May, 2021 and assembled on 1<sup>st</sup> June, 2021; (ix) on 7<sup>th</sup> June, 2021, the petitioner submitted a representation to the Convening Authority, seeking permission to call certain defence witnesses; (x) the Convening Authority, vide order dated 9<sup>th</sup> June, 2021 directed the petitioner to submit the said request to GSFC; (xi) on 11<sup>th</sup> June, 2021, the petitioner submitted a request to GSFC, for summoning witnesses, giving detailed reasons for summoning the said witnesses; (xii) vide order dated 14<sup>th</sup> June, 2021, permission to summon the witnesses was denied; (xiii) on 15<sup>th</sup> June, 2021, the petitioner represented under Rule 64(4) of the Border Security Force Rules, 1969 (BSF Rules); another representation was made on 18<sup>th</sup> June, 2021; (xiv) on 1<sup>st</sup> July, 2021, the GFSC orally informed the

petitioner that the representations of the petitioner for summoning defence witnesses had been rejected; (xv) no written order was however provided to the petitioner; (xvi) one part of the defence of the petitioner is, that deployment of BSF personnel at private houses of high ranking BSF officers including retired officers, is a “practice in vogue”; complaints against such deployment / misuse of manpower are received in routine but are neither acted upon nor are the deployed personnel recalled; (xvii) even on the date of filing of this petition hundreds of BSF personnel were serving at the residences of serving and retired senior BSF officers; no action is taken against deployment of BSF personnel at the houses of senior BSF officers, because the same is not considered to be misutilization of manpower and is considered to be a norm; (xviii) the defence witnesses sought to be summoned by the petitioner will lead evidence, not only to prove all the aforesaid, but also prove that the initiation of action against the petitioner is consequent to criminal conspiracy; (xix) though the petitioner represented against the denial of opportunity to summon the defence witnesses to the Director General, BSF, but to no avail; (xx) the Director General, BSF has failed to decide the representation of the petitioner; (xxi) the prosecution evidence is about to close and if the witnesses are not provided to the petitioner, the GSFC will proceed to consider the evidence without affording the opportunity to the petitioner to lead evidence in his defence; (xxii) the petitioner seeks to lead evidence to the effect that deployment of CAPFs personnel at private residences of serving and even retired officials of CAPFs is a “practice in vogue” and the same is not considered to be an act prejudicial to good order and discipline of the force; (xxiii) the OM dated 21<sup>st</sup> September, 2016 supra of MHA directing recall of

all such personnel deployed at the residences of retired officers and further directing that in case the personnel were not recalled, such retired officers must bear the expenses thereof, also indicates that the practice is not considered to be an act prejudicial to good order and discipline of the force and is widely practiced; (xxiv) the OM dated 21<sup>st</sup> September, 2016 supra has never been complied with and hundreds of BSF personnel continue to be deployed at the residences of retired and serving officials; (xxv) the respondents BSF, inspite of receipt of several complaints from time to time of deployment of BSF personnel by senior officers at their residences, have never acted on the same and have never considered the same to be an offence; (xxvi) in fact, one such complaint was made with respect to the Presiding Officer of the GSFC also but no action was initiated against him despite the inquiry finding the allegations to be true; (xxvii) one of the prosecution witnesses in the GSFC has already deposed of such deployment at the residences of one retired officer of BSF; (xxviii) the respondents BSF have singled out the petitioner for initiation of action in the matter, owing to the bias against the petitioner; (xxix) without the petitioner being given an opportunity to examine the said witnesses, trial would not be fair, as required by *Natasha Singh Vs. Central Bureau of Investigation (State)* (2013) 5 SCC 741; (xxx) the evidence sought to be led by the petitioner is material; and, (xxxi) the evidence ought not to be pre-judged and before even the witnesses are permitted to be examined, relevancy thereof ought not to be seen.

5. We have considered the aforesaid pleadings of the petitioner. The petitioner has been charged with, abuse in his official functioning, of the

manpower in the respondents BSF and without being entitled thereto, deploying personnel of BSF to carry out his household chores. According to the petitioner, his such acts do not amount to violation of good order and discipline of the force, within the meaning of Section 40 of the Border Security Force Act, 1968 (BSF Act), because deployment of personnel to do the chores at the residences of senior officers of BSF is a “practice in vogue” rampant in BSF and for which none else has been charged or punished. The petitioner seeks to examine the witnesses to prove the said “practice in vogue”. However, according to the respondents BSF, such actions / conduct of the petitioner amount to violation of good order and discipline of the force.

6. The petitioner however has not filed this petition, seeking quashing of the charges against him by making out a case of his actions being permitted in law or as part and parcel of the service conditions or amenities and facilities to which the petitioner under the service conditions is entitled. The petitioner, inspite of verbose pleadings, has not cited any Rule or other provision, under which the petitioner, as a senior officer of BSF bearing the rank of DIG, is entitled to deploy personnel of the CAPFs under his command at his residence, to do household chores. The counsel for the petitioner, even during the hearing has not been able to show any such entitlement of the petitioner.

7. In a service like BSF, all emoluments, facilities, benefits and entitlements of a post are documented and from the factum of the petitioner, neither in the petition nor during the hearing having been able to show any such entitlement to deploy personnel to carry out his household chores at

his residence, the necessary corollary is that there is no such entitlement of the petitioner. This fact is also borne out from the OM dated 21<sup>st</sup> September, 2016 supra of the MHA, condemning such practice, which according to the petitioner also is prevalent, though in the context of retired higher officials of CAPFs.

8. Reference in this regard may also be made to the Fifth Report of June, 2007 of the Second Administrative Reforms Commission of the Government of India on the subject of “Public Order”. The said Fifth Report notices that, (i) nearly 87% of police personnel are constables; (ii) constable is the lowest level at which recruitment takes place; (iii) the educational requirement for selection of constables, is a School Leaving Certificate; (iv) a Constable can generally expect only one promotion in a lifetime and normally retires as a Head Constable; (v) Constables have become ‘machines’, carrying out the directions of their superiors, with little application of mind or initiative; (vi) Constables are often forced to perform menial duties as orderlies to senior officers and such situations tend to dehumanise policemen, affecting their self-esteem; and, (vii) the continuation of the orderly system reduces constables to the status of domestic servants. The Report therefore recommended removal of the orderly system, to enable the Constabulary to focus on their prime duty of policing and recommended immediate abolition of the orderly system.

9. The High Court of Gauhati also in ***Rambrikash Singh Vs. State of Arunachal Pradesh*** 2003 SCC OnLine Gau 477 noticed continuation of the system of constable orderlies without any authority of law. The High Court of Karnataka, in ***Dr. S. Krishnamurthy, IPS (Retd.) Vs. State of Karnataka***

2014 SCC OnLine Kar 12004 also noticed that the report of the Sixth Pay Commission had observed that the orderly system functional in police force is quite discriminatory and reminiscent of British colonial era, which affects the morale of the police personnel who are trained to become security personnel but are employed as cooks/drivers. A Division Bench of the High Court of Uttarakhand in *Arun Kumar Bhadoria Vs. State* MANU/UC/0583/2018 also noticed the continuation of orderly system prevalent in police.

10. There is thus enough material for us to take a view that there is no authority in law for the actions or conduct with which the petitioner has been charged.

11. The petitioner, by examining witnesses, wants to prove that others also have committed the same acts with which he has been charged and no action has been taken thereagainst.

12. The argument of the counsel for the petitioner is one of discrimination. However under the law relating to discrimination, there is no concept of negative equality. It is not open to a charged person to contend that others who are also guilty, have not been charged and thus he is being discriminated against. Reference, if any, required in this regard may be made to the decision in *Union of India Vs. International Trading Co.* (2003) 5 SCC 437, wherein it was held that two wrongs cannot make a right; a party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong; it would not be setting a wrong right, but would be perpetuating another wrong; in such matters, no discrimination is involved. It was further stated that the

concept of equal treatment on the logic of Article 14 of the Constitution of India could not be pressed into service in such cases and what the concept of equal treatment presupposes is existence of similar legal foothold; it does not countenance repetition of a wrong action, to bring both wrongs on a par. Furthermore it was held, that even if hypothetically it is accepted that a wrong has been committed in some other cases, by introducing a concept of negative equality, one cannot strengthen their case; they have to establish the strength of their case on some other basis and not by claiming negative equality. Reference in this regard may also be made to the decisions in *Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain* (1997) 1 SCC 35, *State of Bihar Vs. Upendra Narayan Singh* (2009) 5 SCC 65, *Fuljit Kaur Vs. State of Punjab* (2010) 11 SCC 455, *Union of India Vs. M.K. Sarkar* (2010) 2 SCC 59, *State of Orissa Vs. Mamata Mohanty* (2011) 3 SCC 436 and *Basawaraj Vs. The Spl. Land Acquisition Officer* AIR 2014 SC 746.

13. Once it is so, the only right of the petitioner, if others similarly placed as him are also indulging in same acts as him and have not been proceeded against therefor, is to make a complaint thereof and if no action is taken on the said complaint, to take it to its logical conclusion. Once there is nothing to show that the conduct with which the petitioner has been charged has the authority of law, law in our view does not require an opportunity to be given to the petitioner to prove that others also have indulged in the same illegality as him and no action has been taken against them.

14. As aforesaid, the only right of the petitioner is to complain of the offences / violations committed by them and to pursue the said complaint.

Merely because others also are abusing the manpower of BSF and are forcing constables in BSF to perform household chores, would not undo such act / conduct, if any, on the part of the petitioner.

15. We are also unable to agree with the counsel for the petitioner, that the judicial / quasi-judicial fora is bound to grant opportunity for recording of evidence, whether it be relevant or irrelevant. Once it is found that the evidence, which the petitioner seeks to lead, will not have any effect on the culpability of the petitioner, the proceedings of the GSFC cannot be permitted to be dragged on in recording of such evidence.

16. As far back as in ***D.P. Maheshwari Vs. Delhi Administration*** (1983) 4 SCC 293, the Supreme Court deprecated the practice of taking preliminary pleas/objections in disciplinary proceedings and inviting decision thereon and carrying the matter to the High Courts under Article 226 of Constitution of India and at times even till the Supreme Court and all of which delays the decision of the real dispute for years, at times for over a decade. It was further held that the High Courts, in exercise of jurisdiction under Article 226, before entertaining such challenge, should ask themselves, whether such threshold part-adjudication is really necessary and whether it will not lead to woeful consequence. It was held that all issues, whether preliminary or otherwise, should be decided together. In ***Special Director Vs. Mohd. Ghulam Ghouse*** (2004) 3 SCC 440, in relation to the legality of a Show-Cause Notice, the Supreme Court observed that when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure

that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner at the threshold by the interim protection granted. Reference may also be made to the decisions in *State of Uttar Pradesh Vs. Brahm Datt Sharma* (1987) 2 SCC 179, *National Council for Cement & Building Materials Vs. State of Haryana* (1996) 3 SCC 206 and *Union of India Vs. Kunisetty Satyanarayana* (2006) 12 SCC 28. In *Chanan Singh Vs. Registrar, Co-op. Societies, Punjab* (1976) 3 SCC 361, it was held that till a punitive action is taken against an employee, writ petition is premature in as much as it is not known, what the outcome of disciplinary proceeding will be and which even if against the employee, has a remedy of departmental appeal thereagainst. Reference may also be made to the decisions of this Court in *Suman Roy Chowdhury Vs. Union of India* MANU/DE/1973/2020 (DB) and *Biswasri Mukherjee Vs. Punjab and Sind Bank* MANU/DE/0638/2021 (DB).

17. Thus, though we have made observations hereinabove but dismiss this petition, reasoning that the pleas as taken by the petitioner herein shall remain open to the petitioner in the challenge, if any, to the final order, if against the petitioner.

Dismissed.

**RAJIV SAHAI ENDLAW, J**

**AMIT BANSAL, J**

**JULY 07, 2021**  
'gsr'..