

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

% **Date of decision: 23<sup>rd</sup> July, 2021**

+ **W.P.(C) 6927/2021**

**COMMANDANT/GD RAJESH KUMAR TOMAR..... Petitioner**

Through: Mr. Vivek Sheel, Adv.

Versus

**UNION OF INDIA & ORS.**

**..... Respondents**

Through:

**CORAM:**

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

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

**[VIA VIDEO CONFERENCING]**

**RAJIV SAHAI ENDLAW, J.**

**CM 21873/2021 (for exemption)**

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

**W.P.(C) 6927/2021 & CM 21872/2021 (for interim direction).**

3. The petitioner, a Commandant (GD) in the respondents Indo-Tibetan Border Police (ITBP) and against whom, on 28<sup>th</sup> October, 2020 a General Security Force Court (GSFC) has been convened, has filed this petition, (i) impugning the order dated 12<sup>th</sup> April, 2021 of the Director General, ITBP and the order dated 16<sup>th</sup> February, 2021 of the Convening Authority of the GSFC; and, (ii) for declaration, that the proceedings conducted against the petitioner in pursuance to the convening order dated 28<sup>th</sup> October, 2020 of the Convening Authority, are unlawful for all practical purposes.
4. We have heard the counsel for the petitioner.

5. The counsel for the petitioner has argued, that (i) the GSFC was constituted vide order dated 28<sup>th</sup> October, 2020 and assembled on 18<sup>th</sup> November, 2020; (ii) as per Section 80 of the ITBP Act, 1992, GSFC has to have minimum five members and as constituted, had five members; (iii) the trial of the petitioner before the GSFC commenced with effect from 2<sup>nd</sup> December, 2020; (iv) the petitioner was “arraigned” under Rule 73, on 30<sup>th</sup> December, 2020; (v) the petitioner, before pleading to the charge, elected to submit statutory plea of jurisdiction under Rule 74 of the ITBP Rules, 1994, that GSFC had no jurisdiction to try the petitioner; (vi) the GSFC recorded evidence of the petitioner on the said plea of the petitioner and the prosecutor also adduced evidence in reply; (vii) thus, the trial continued post “arraignment” of the petitioner; (viii) on 11<sup>th</sup> February, 2021, GSFC found that one of its five members was disqualified from being a member of the GSFC; with such disqualification, GSFC fell short of the stipulated coram of five, under Section 80 of the ITBP Act; (ix) GSFC, on 11<sup>th</sup> February, 2021, wrote to the Convening Authority that one of the members of the GSFC suffered from disqualification to be a member of the GSFC and without him, the GSFC had fallen short of the coram stipulated in Section 80 of the ITBP Act; the GSFC thus, on 11<sup>st</sup> February, 2021 adjourned the proceedings *sine die* and referred the matter to the Convening Authority for passing appropriate orders; (x) the Convening Authority, vide impugned order dated 16<sup>th</sup> February, 2021, *inter alia* ordered:-

- “ *Whereas, Court assembled on dated 18.11.2020 and the trial commenced on dated 02.12.2020.*
- *Whereas, charge sheet was read over to the accused and he was asked to make a plea as per Rule 73 of ITBP Rules 1994.*

- *And whereas, accused before pleading guilty or not guilty to the charges made a special plea to the jurisdiction under Rule 74.*
- *And whereas, when the GFC trial procedure was at the stage of Rule 74, it came to the notice of Court as referred to undersigned vide letter No-02 dated 11.02.2021.*
- *And whereas, the PO of GFC vide letter No-02 dated-11.02.2021 has conveyed that by virtue of signing of affidavit before Hon'ble High Court J&K at Jammu in WP(C) No-890/2020 titled Rajesh Kumar Tomar V/s Union of India and others, by Sh. Davinder Singh, DIG, SHQ(SNR) is disqualified. Hence the court fallen short of quorum stipulated U/S 80.*
- *And whereas, as per the provision contained in Rule 116(2) An officer shall not be added to a Court after the accused has been arraigned. In the instant case since the accused has not yet pleaded guilty or not guilty to the charges and as such he has not yet been arraigned, as per the definition of arraignment given in the Rule 73 ITBPF Rules 1994.*
- *And whereas, the undersigned has considered view since the accused has not yet been arraigned, if fresh member are added to the court, the quorum stipulated U/s-80 of the ITBPF Act 1992 is met and the trial can proceed further. Now therefore following members are hereby detained under Rule 68(11) of ITBPF Rules, 1994 as member to serve on the said court, that has been convened vide convening order dated 28.10.2020.*

*Sh. Gambhir Singh Chauhan, DIG, Central Ftr Bhopal.*

*Sh. Mandhir Ekka, DIG, Northern Ftr, Dehradun.*

*As this addendum to the convening order supra is hereby issued under my hand and seal. ”;*

and, (xi) the petitioner, being aggrieved from the aforesaid order, represented to the Director General, under Section 131 of the ITBP Act and who has vide impugned order dated 12<sup>th</sup> April, 2021, rejected the representation of the petitioner, reasoning as under:-

*“3. Whereas, the accused vide his petition dated 10.03.2021 under section 131 (1) has raised an issue that under section 83 of the ITBP Act, no member can be added and thus present GFC trial should have been dissolved.*

*4. As per scheme of the ITBP Act and the Rules made thereunder, once order convening the court is issued, Force Court assembles and satisfies itself as per Rule 67. Thereafter, Court is opened and the trial commences. At this stage, the order convening the Court and names of officers appointed to try the accused are read in the hearing of the accused and he is given an opportunity to object to any of the members, if he so wishes. In this case, the accused did not object to any members. Thereafter, members of the Court were sworn /affirmed, as the case may be.*

*5. The stage of arraignment came where the charges were read over to the accused and he was asked to plead to the charges. At this stage, the accused did not tender his plea to the charges and instead raised a plea to jurisdiction of the Court as per Rule 74 of ITBPF Rules, 1994.*

*6. During the course of scrutiny of the documents for replying to the plea to jurisdiction, the prosecution found out that Sh. Davinder Singh. DIG, Member III had filed an affidavit on behalf of the Department in the writ petition filed by the accused. Matter was raised before the Court and thereafter the Court keeping in view absolute fairness and transparency to the cause of justice decided to refer the matter to the Convening Authority with its recommendation.*

*The Convening Authority replaced Sh. Davinder Singh, DIG, Member-III by a suitable member namely Sh. G.S. Chauhan, DIG. Sh. G.S. Chauhan, DIG was accordingly drafted in the Court in place of Sh. Davinder Singh, DIG, Member-III. The Court thereafter again gave an opportunity to the accused to object to Sh. G.S. Chauhan, DIG which the accused availed and thereafter Sh. G.S. Chauhan was affirmed and the Court, after duly substitution, proceeded in the matter.*

*7. The plea of the accused that after disqualification of Sh. Davinder Singh, DIG, Court ought to have been dissolved as per Section 83 of the ITBPF Act, 1992 does not appear to be correct. Section 83 supposes a stage where trial has commenced that means the stage of arraignment is also complete whereupon a member cannot be added to the trial and, thus, Court is to be dissolved if it is reduced below minimum.*

*8. Arraignment is provided under Rule 73 of ITBPF Rules, 1994 which is reproduced as under:-*

***"73. Arraignment-***

*(1) When the Court and the Judge Attorney(if any) have been sworn, the charge will be read to the accused and he shall be asked whether he pleads guilty or not guilty to the charge or charges.*

*(2) If there is more than one charge against the accused he shall be required to plead separately to each charge.*

*(3) If there is more than one charge-sheet against the accused before the Court, the Court shall proceed with the charges in the first of such charge-sheets and shall announce its finding hereon and if the accused has pleaded guilty, comply with rule 80, before it arraigns him upon the charges in any subsequent charge-sheet."*

9. "Arraignment" consists of (a) calling upon the accused by his number, rank, name and description as given in the charge-sheet and asking him "Is that your number, rank, name and unit (or description)?" (b) reading the charge to him; and (c) asking him whether he is guilty or not guilty.

10. As already noted, the issue which was raised by the Court for consideration of the Convening Authority was whether a member can be added at the GFC to fill up the vacancy created after disqualification of a member of the Court namely Sh. Davinder Singh, Member-III. Since the arraignment was not yet complete as the accused had not pleaded to the charges, as provided under Rule 73 of ITBPF Rules, the Convening Authority, in the interest of justice, decided to fill up the vacancy created by disqualification of Sh. Davinder Singh, DIG. Such action on the part of the Convening Authority is absolutely fair and in the interest of justice. Besides, accused has not been prejudiced in any manner as all the members of the Court were sworn/affirmed, as the case may be, after the accused was given an opportunity to object to their presence at the GFG. Fact of the matter is that the accused did not raise any objection to any member of the Court, on both the occasions.

11. Matter has been examined in detail. DG, ITBP, being the competent authority, has come to the conclusion that after disqualification of Sh. Davinder Singh, DIG, Member No.3, inclusion of Sh. G.S. Chauhan, as member of the Court to complete the quorum did not infringe any of the legal provision as process of arraignment was not yet complete and thus Rule 116(2) is not applicable in the case. DG, ITBP has thus, rejected the petition dated 10.03.2021."

6. The argument of the counsel for the petitioner is, that upon the officer, who was a part of the GSFC and who on 11<sup>th</sup> February, 2021 was found to be disqualified from being a member of the GSFC, ceasing to be a member of the GSFC, the Convening Authority could not have substituted the said officer by another officer, since the petitioner already stood “arraigned”. It is argued, that per Rule 116(2) of the ITBP Rules as under:-

*“(2) An officer shall not be added to a Court after accused has been arraigned.”,*

and the impugned orders, adding an officer to the GSFC, are violative of the said Rule 116(2).

7. On enquiry, whether “arraigned” is defined in the ITBP Act or in the ITBP Rules, attention is invited to Rule 73 (as already reproduced in the order of the Director General set out hereinabove).

8. The question for consideration is, whether the impugned orders, substituting an earlier member of the GSFC who was discovered to be disqualified, with another, is violative of Rule 116(2) supra. The answer to the said question, in turn depends on the question, when can an ITBP personnel facing a GSFC, be said to have been “arraigned”.

9. We have examined the scheme of the Rules aforesaid qua the proceedings before the GSFC, with

- (i) Rule 67 providing for Assembly and swearing of the Court;
- (ii) Rule 68 as under:

*“68. Commencement of Trial-(1) The order convening the Court and the names of the officers*

*appointed to try the accused shall be read in the hearing of the accused who shall be given an opportunity to object to any of those officers in accordance with the provisions of section 96.*

*(2) When a Court is to try more than one accused whether separately or jointly, each accused shall be given an opportunity to object to any officer on the Court in accordance with sub rule (1) and shall be asked separately whether he has any such objection.*

*(3) An accused shall state the names of all the officers to whom he objects before any objection is disposed of.*

*(4) If more than one officer is objected to, the objection to each officer shall be disposed of separately and the objection to the lowest in rank shall be disposed of first.*

*(5) An accused may make a statement and call any person to make a statement in support of his objection.*

*(6) An officer to whom the accused has objected may state in open Court any thing relevant to the objection of the accused whether in support or in rebuttal thereof.*

*(7) An objection to any officer shall be considered in closed Court by all the other officers on the Court and the officer objected to shall not be present at that time.*

*(8) When an objection to an officer is allowed under subsection (3) of section 96 that officer shall forthwith retire and take no further part in the proceedings.*

*(9) When an officer objected to retires and there is duly qualified waiting member in attendance, the*

*presiding officer shall immediately appoint him to take the place of the officer who has retired.*

*(10) The Court shall satisfy itself that a waiting member who takes the place of a member of the Court is of the required rank and not disqualified under the Act and shall give the accused an opportunity to object to him and shall deal with any such objection in accordance with the Act and these rules.*

*(11) If as the result of the allowing of an objection to a member there are insufficient officers available to form a Court in compliance with the provisions of the Act, the Court shall report to the convening officer without proceeding further with the trial and the convening officer may either appoint an officer as a member to fill the vacancy or convene a fresh Court to try the accused.” ;*

- (iii) Rule 69 providing for Swearing or affirming of members of the GSFC;
- (iv) Rule 70 providing for Swearing or affirmation of Judge Attorney and other officers;
- (v) Rule 71 providing for Objection to Interpreter or Shorthand Writer;
- (vi) Rule 72 providing for Objection to Judge Attorney and Prosecutor;
- (vii) Rule 73 titled “Arraignment” being as reproduced above;
- (viii) Rule 74 as under:-

*“74. **Plea to Jurisdiction.**-(1) The accused, before pleading to the charge, may After a plea regarding the jurisdiction of the Court, and in such a case*

*(a) the accused may adduce evidence in support of the plea and the prosecutor may adduce evidence in answer thereto: and*

*(b) the prosecutor may address the Court in answer to the plea and the accused may reply to the prosecutor's address.*

*(2) If the Court allows the plea it shall adjourn and report to the convening officer.*

*(3) When the Court reports to the convening officer under this rule, the convening officer shall :*

*(a) if he approves the decision of the Court to allow the plea, dissolve the Court;*

*(b) if he disapproves the decision of the Court; either :-*

*(i) refer the matter back to the Court and direct them to proceed with the trial; or*

*(ii) convene a fresh Court to try the accused.”;*

(ix) Rule 75 permitting an accused to, before pleading, object to the charge framed against him;

(x) Rule 76 permitting an accused to, before pleading to the charge, offer a plea that the trial is barred under Sections 87 or 88 of the Act;

(xi) Rule 77 providing for two or more accused to apply for separate trials, again before pleading to the charge;

(xii) Rule 78 providing for the accused to apply for trial on separate charges;

(xiii) Rule 79 providing as under:-

*“79. **Pleading to the charge.**-(1) After any plea under rules 74 and 76, any objection under rule 75 and any applications under rules 77 and 78 have been dealt with, the accused shall be required subject to sub-rule (2) to plead either guilty or not guilty to each charge on which he is arraigned.*

*(2) Where a Court is empowered by section 105 to find an accused guilty or an offence other than that charged or guilty of committing the offence in circumstances involving a less degree of punishment or where it could After hearing the evidence, make a special finding of guilty, subject to exceptions or variations in accordance with rule 100, the accused may plead guilty to such other offence or to the offence charged as having been committed in circumstances involving a less degree of punishment or to the offence charged subject to such exceptions and variations.”;*

- (xiv) Rule 80 providing for the procedure when the accused pleads guilty;
- (xv) Rule 81 providing for alternative charges;
- (xvi) Rule 82 providing for more than one charge;
- (xvii) Rule 83 providing for “change of plea”; and,
- (xviii) Rules 84 to 97 providing for procedure, on the accused pleading not guilty, including for examination of witnesses on the charge.

10. The counsel for the petitioner has argued, (a) that Rule 116(2) bars adding an officer to the GSFC after the accused has been “arraigned” and “arraignment”, as per Section 73, is only asking the accused, whether he pleads guilty or not guilty; and, (b) the petitioner, prior to taking the objection under Rule 74, had already been “arraigned” within the meaning of Rule 116(2) read with Rule 73 and no officer could thus have been added to the GSFC, as has been done vide impugned orders dated 12<sup>th</sup> April, 2021 and 16<sup>th</sup> February, 2021.

11. We are unable to agree. The scheme aforesaid noticed permits the accused to, after the charge has been read out to him and before he pleads guilty, to take the objections as to jurisdiction, charge etc., as provided in Rules 74 to 78. Needless to state, that if no such objection is taken, the accused would immediately, after the charge is read out to him, plead guilty or not guilty thereto. However if an objection is taken, the pleading of guilty or not guilty by the accused is deferred till the decision on the said objection.

12. The objections under Rules 74 to 78 are in the nature of preliminary objections, though qua some, recording of evidence is also permitted. However such recording of evidence is confined to the objection and not on the charge, inasmuch as till then, the accused has not even pleaded guilty or not guilty.

13. If the said objection fails, the accused, under Rule 79 aforesaid is required to plead either guilty or not guilty. However if the objection succeeds, under Rule 74, the GSFC has to report to the Convening Authority and the Convening Authority, if approves of the decision of the GSFC on the objections, required to dissolve the Court and / or to convene a fresh Court to try the accused.

14. The admitted position is, that though the charge has been read out to the petitioner by the GSFC and he has been asked whether he pleads guilty or not guilty to the charge, the petitioner has not yet pleaded guilty or not guilty. The GSFC, when one of its members was discovered to be disqualified, was still at the stage of recording evidence on the objection of the petitioner to the jurisdiction of GSFC. Such disqualification, though not

on an objection of the petitioner within the meaning of Rule 68(3), is nevertheless a disqualification within the meaning of Rule 68(8), and Rule 68(9) itself provides for substitution of the disqualified member by a member in waiting. Since in the present case there was no “waiting member in attendance” within the meaning of Rule 68(9), Rule 68(11) was followed and a report submitted to the Convening Authority. Rule 68(11) empowered the Convening Authority to appoint an officer as member to fill the vacancy or to convene a fresh Court to try the accused. The Convening Authority is thus found to have acted in accordance with Rule 68(11) and the Director General, ITBP is found to have rightly dismissed the petition of the petitioner under Section 131(2) of the ITBP Act.

15. Rule 68, though titled “Commencement of Trial” does not in its body provide therefor. The provisions for trial are contained in the Rules following Rule 79, after the accused has pleaded guilty or not guilty. The Rules immediately following Rule 68, on the contrary provide merely for swearing in of members and for disposal of preliminary objections permitted to the accused.

16. The purport of Rule 116(2) prohibiting addition of an officer to the GSFC after the accused has been arraigned, is to ensure that the officers before whom trial on the charges against the accused is recorded, are the officers who decide on the said charge. This, even otherwise forms the fulcrum of adjudication/quasi adjudication process, with the decision being required to be given only by a judicial officer/authority who has heard the parties. It has been held in ***Gullapalli Nageswara Rao Vs. Andhra Pradesh State Road Transport Corporation*** AIR 1959 SC 308, ***Rasid Javed Vs.***

*State of U.P.* (2010) 7 SCC 781, *Automotive Tyre Manufacturers Association Vs. Designated Authority* (2011) 2 SCC 258 and *Union of India Vs. Shiv Raj* (2014) 6 SCC 564, that where the decision is rendered by an officer/authority other than the officer who has heard the party, whether in compliance of principles of natural justice or in compliance of a Rule, such a decision is a nullity. The principle of law is, that if one person hears and the other decides, then the personal hearing becomes an empty formality.

17. Merely because, on the objection of the petitioner under Rule 74, to the jurisdiction of the GSFC, testimonies of some witnesses of the petitioner as well as the prosecutor may have been recorded, under the Rules, is not a bar to the substitution of a disqualified member of the GSFC. It is significant, that Rule 116(2) also bars addition to the GSFC after the accused has been arraigned and not after recording of evidence on objections under Rule 74 has commenced. The reason is obvious. The objections under Rules 74 to 78, as aforesaid are in the nature of preliminary objections, evidence whereon is recorded and which objections are decided before the accused has even pleaded guilty or not guilty. The trial on the charges commences after the accused has pleaded not guilty. The Scheme of the ITBP Rules prohibits change in constitution of the GSFC only at that stage and rather, vide Rule 68(11) expressly permits such change at earlier stages. There is no challenge in this petition to any of the Rules. All the Rules aforesaid have to be read harmoniously and if the construction thereof, as contended by the counsel for the petitioner, is accepted, the same will render otiose Rule 68(11).

18. We have also enquired from the counsel for the petitioner, the prejudice suffered by the petitioner from the impugned orders.

19. The counsel for the petitioner has contended that the Rules aforesaid being mandatory in nature, have to be complied with, irrespective of whether cause any prejudice or not. Reliance in this regard is placed on *Union of India Vs. A.K. Pandey* (2009) 10 SCC 552.

20. We have perused the said judgment and find the same to be concerned with Rule 34 of the Army Rules, 1954 prescribing minimum 96 hours interval between the accused being informed of charge for which he is to be tried and his arraignment. The said provision was held to be mandatory, considering the purpose behind the same. It was held that the purpose is that the accused be given adequate time to give a cool thought to the charge for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. It was further held that merely because the accused in that case pleaded guilty, was of no avail since he was required to be given minimum 96 hours to take the said decision also. It was in these facts that it was held that the mandatory provision had been breached. However in the facts of the present case, the petitioner has neither pleaded nor has the counsel for the petitioner, inspite of query, informed, the prejudice suffered by the petitioner.

21. Rather, the judgment cited by the counsel for the petitioner, on the aspect of “arraignment”, appears to be against the petitioner and indicates that the arraignment, in the context of ITBP Rules, is complete not merely when, in accordance with Rule 73 the charge is read out to the accused and

the accused is asked whether he pleads guilty or not guilty to the charge, but when the accused, under Rule 79 pleads either guilty or not guilty to the charge “on which he is arraigned”. If in the interregnum between Rule 73 and Rule 79, any objections under Rules 74 to 78 are dealt with by the GSFC, arraignment remains incomplete and the accused cannot be said to have been “arraigned” within the meaning of Rule 116(2) of the ITBP Rules. “Arraignment”, in our view, comprises of both, Rule 73 and Rule 79 and merely on the charge being read to the accused and the accused being asked whether he pleads guilty or not guilty to the charge and before the accused has answered thereto, the accused cannot be said to have been arraigned.

22. In the facts and circumstances aforesaid, Rule 74, mandating the Convening Authority to, if agreeing with the decision of the GSFC on an objection under Rule 74 of the accused, dissolve the Court and convene a fresh Court to try accused, to which also attention was drawn, has no application. It is not the case of the petitioner that the GSFC has rendered any decision on the objection of the petitioner under Rule 74 or that the said decision has been accepted by the Convening Authority.

23. It cannot be lost sight of, that if proceedings such as of GSFC in the Armed Forces are delayed indefinitely, the same can play havoc on the discipline which is necessary for effective performance of the duties of the Armed Forces. The petitioner, on an earlier occasion also had approached this Court by way of W.P.(C) No. 6227/2021, which was disposed of vide order dated 8<sup>th</sup> July, 2021. Filing of this petition, without disclosing the prejudice if any suffered by the petitioner, is found to be yet another step to

delay the GSFC proceedings. It cannot be lost sight of that the GSFC proceedings, with several officers forming part thereof, are a drain on the activities of the Armed Forces and unusual delay in the same is injurious to the functioning of the Armed Forces.

24. We are thus unable to find any error in the impugned orders dated 12<sup>th</sup> April, 2021 and 16<sup>th</sup> February, 2021 or any merit in the petition, which is dismissed.

**RAJIV SAHAI ENDLAW, J**

**AMIT BANSAL, J**

**JULY 23, 2021**  
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