

10.08.2023
DL-4
(PP)
Sws.M

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 18440 of 2023

Shri Sanjay Kumar
Vs.
Union of India & Ors.

Mr. Srijib Chakraborty,
Mr. Pankaj Agarwal,
Mr. Aditya Mondal,
Ms. Champa Pal
...for the petitioner.

Mr. Sauvik Nandy,
Ms. Tanusree Ghosh
....for Union of India.

The petitioner has challenged a show cause notice dated June 20, 2023. The said show cause notice was issued by the Deputy Inspector General on behalf of DG, BSF seeking reply from the petitioner on the proposal for termination from service on account of misconduct. The petitioner was working in the rank of Second-in-Command with the Border Security Force (BSF). On 11th April, 2019 cattle were smuggled from India to Bangladesh from the Sodepur border and Soladana under the control of 85 Bn, BSF. Three articles of charges were framed against the petitioner, which are reproduced hereinbelow:

FIRST CHARGE BSF ACT, 1968 SECTION-40	AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE In that he, On 11 th April 2019, at about 1850 hrs, while performing duty as Second-in-Command of 85 Bn BSF gave illegal instruction telephonically from his Mob No.7739577117 to his subordinate officer, No.873657710 ASI (G) Ravindra Kumar, Offg Inspector (G) of 85 Bn BSF on his mobile No.7894983557 to facilitate cattle smuggling from India to Bangladesh through the AoR of BOP Sodepur, 85 Bn BSF
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SECOND CHARGE BSF ACT, 1968 SECTION-40	<u>on the night intervening 11-12 April 2019.</u> AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE In that he, On 11 th April 2019, at about 1850 hrs, while performing duty as Second-in-Command of 85 Bn BSF induced his subordinate officer, No.100092637 Inspector (GD) J Jebaraj of 'C' Coy telephonically by making whatsapp call from his mobile No.7739577117 to the mobile no.9600420796 used by J Jebrj to facilitate cattle smuggling from India to Bangladesh through the AoR of BOP Sodepur <u>on the night intervening 11-12 April 2019.</u>
THIRD CHARGE BSF ACT, 1968 SECTION-40	AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE In that he, After he had telephonically instructed No.873657710 ASI (G) Ravindra Kumar, Offg Inspector (G) of 85 Bn BSF No.100092637 Inspector (GD) J Jebaraj to tell No.958550069 HC(G) Raju Shahi of 85 Bn BSF to talk to him on whatsapp and when HC(G) Raju Shahi called him on whatsapp sometime between 1900-2000 hrs on 11 th April 2019, the accused officer induced him to facilitate smuggling of cattle from India to Bangladesh through the AoR of BOP Sodepur, 85 Bn BSF <u>on the night intervening 11-12 April 2019.</u>

The petitioner was tried by the General Security Force Court (GSFC). The petitioner pleaded “*not guilty*” to the aforesaid 3 charges. Upon conducting the trial and holding the examination of witnesses for prosecution and defence, the GSFC found the petitioner *guilty* of the first and second charges but “*not guilty*” of the third charge. Reasons were recorded for such findings. The GSFC sentenced the petitioner “to take rank and precedence as if his appointment as Second-in-Command bore the date, first day of June 2022”. The said sentence was sent before the Confirming Authority for confirmation. The Confirming Authority scrutinised the trial proceedings of the GSFC. It observed that the finding of “*not guilty*” on the third charge was against the weight of evidence on record and the sentence awarded by the Court on the first and second charges were also very

lenient and not commensurate to the gravity of the charges proved against the officer.

Accordingly, as per the provision of Section 113 (1) of the BSF Act, 1968 the case of the petitioner was remanded for revision of findings of the third charge. Also it had to be considered whether the sentence awarded on the second and third charges was commensurate to the gravity of the charges.

The revision trial was conducted with effect from August 8, 2022 to August 10, 2022. The GSFC found that the petitioner was “*not guilty*” on the third charge but sentenced afresh on the aforesaid first two charges. The petitioner was sentenced “to take rank and precedence as if his appointment as Second-in-Command bore the date of 1st day of August, 2022” and “to forfeit 5 years of service for the purpose of pension”. The finding and sentence were announced subject to confirmation.

The Additional DG having gone through the GSFC trial proceedings and revisional trial proceedings had observed the finding of the GSFC on the third charge even on revision is against the weight of evidence on record. As such, the Confirming Authority has not confirmed the finding of third charge being against the weight of evidence. The finding of “*guilty*” in respect of first and second charges were confirmed. The Confirming Authority also did not confirm the sentence awarded on the first

and second charges being very lenient and “*not commensurate*” to the seriousness of the and gravity of the charges.

In the show cause notice, it is clearly recorded that as per Section 113 of the BSF Act, 1968 the finding and sentence of the GSFC may be revised only once by the order of Confirming Authority. Under Section 107 of the BSF Act, 1968, no finding or sentence of GSFC **shall** be valid except so far as it may be confirmed under the provisions of the Act. Further, under Section 75 of the BSF Act, 1968, when any person has been *acquitted* or *convicted* of an offence by a GSFC or by a criminal court or has been dealt with under Section 53 or 55 of the Act, he *shall not* be liable to be tried again for the same offence by a Security Force Court.

Therefore, the Additional DG being the Confirming Authority under the Act proposed *termination* of service of the petitioner on account of *misconduct* under Rule 20 of the BSF Rules, 1967 read with Section 10 of the BSF Act, 1968. Section 10 of the 1968 Act deals with the *termination* of service by the Central Government.

Mr. Chakraborty, learned counsel appearing on behalf of the petitioner submits that the show-cause issued under Rule 20 of the BSF Rules is without jurisdiction. The Authorities could not have only stated that any further trial was not permissible by

the Security Force Court under the BSF Act, 1968 and BSF Rules, 1969.

He submitted that only in case where trial was held to be impractical or inexpedient, the show-cause under Rule 20 could have been issued by the DG.

He further submitted that even though a previous writ petition was moved before the High Court of Chhattisgarh being WPS No. 4924 of 2023, the same was withdrawn by the petitioner. Therefore, the order dated July 26, 2023 passed by a Co-ordinate Bench in the High Court at Chhattisgarh, could not operate as *res judicata* in the present proceedings. The petitioner is not liable for 'forum shopping'.

Mr. Nandy, learned counsel appearing on behalf of the Union of India submits that the present writ petition is not maintainable since the same show-cause notice has been challenged by the petitioner before a different High Court. The petitioner upon realising that no interim order may be passed in his favour sought to withdraw the said writ petition with liberty to file a reply to the show-cause dated June 20, 2023. Such a conduct of the writ petitioner should not be condoned by this Court.

Considering the rival submissions of the parties and the materials placed on record, this Court is of the view that the object and tenor of the prayers in the present writ petition and the one filed before the

Chhattisgarh High Court are more or less similar because in both the writ petitions the petitioner has sought for quashing of the show-cause notice dated June 20, 2023. The petitioner has prayed for granting of an interim order of injunction restraining the Respondent Authorities from proceeding with the proposed termination as stated in the show-cause notice. The petitioner has also prayed for a writ of prohibition for prohibiting the Respondent Authorities from taking any further action in accordance with the show-cause notice dated June 20, 2023.

The submission made by Mr. Chakraborty that since the order does not reflect that the Chhattisgarh High Court on July 26, 2023 refused the interim order, it cannot be contended that the interim order was even prayed for before the said High Court. With due respect such submission cannot be accepted by this Court. This Court is of the opinion that upon finding that the Chhattisgarh High Court would not grant an interim prayer, the petitioner sought to withdraw the writ petition with a liberty to file a reply to the show-cause. The prayers made in the first writ petition is the basis of the opinion held by this Court.

To the mind of this Court, the petitioner has indulged in 'forum shopping' and has approached this High Court with unclean hands again, on the self-same cause of action.

This Court also finds that there is no lack of jurisdiction in issuing the show-cause notice dated June 20, 2023 by the Addl. DG. The DG/ Addl. DG was within his authority under Rule 20 of the BSF Rules, 1969 to issue the said show-cause notice.

Since the Confirming Authority did not confirm the penalty awarded by the GSFC as far as charges 1 and 2 were concerned and did not confirm the finding as far as charge 3 was concerned, there was no valid order in the eye of law in terms of Section 107 of the BSF Act, 1968. The DG gave his reasons even if brief, for not accepting the findings of the GSFC while issuing the show-cause under Rule 20 of the BSF Rules.

Mr. Chakraborty places reliance on a judgement by Co-ordinate Bench of this High Court reported in 2016 SCC OnLine Cal 6177: (2017) 1 Cal LT 1 (**Sri Amiya Ghosh vs. The Union of India & Ors.**).

With due respect, the case of **Amiya Ghosh** (*supra*) does not aid the petitioner's case in any way. In that case the petitioner was held "*not guilty*" by GSFC. The Confirming Authority did not concur with the finding of the GSFC. A 'Revisional Order' was passed requiring the GSFC to reconsider the earlier findings upon consideration of several aspects of the matter. The GSFC again returned the verdict of "*not guilty*". Then the Additional Director General, being

the second Confirming Authority found the verdict of “*not guilty*” by GSFC to be not acceptable.

In the present case, the petitioner has been found to be “*guilty*” on 2(two) charges. The entire trial was held and the witnesses were examined. Therefore, there the question of reversal of a finding of “*not guilty*” to “*guilty*” by a show-cause notice without assigning the reason for such reversal does not and cannot arise.

Mr. Chakraborty draws the attention of this Court to page 397 of the writ petition to contend that by an order dated September 1, 2022 the Confirming Authority/Addl. D.G. did not confirm the 3rd charge for being against the ‘*weight of evidence*’. He confirmed the findings of the Court in respect of first and second charges but not the sentence of the GSFC for being “*very lenient*” and “*not commensurate*” with the *seriousness / gravity* of the charges. The Addl. D.G. did not confirm the findings/sentence of the GSFC on revision on August 10, 2022 by giving cursory reasons.

He emphatically submits that the present case is similar to that of **Amiya Ghosh** (*supra*) as only by quoting that the finding of GSFC is *perverse* and against ‘*weight of evidence*’ the authorities could not seek to discharge their liability of giving reasons for such non-confirmation.

Upon perusal of the records it appears that the Additional Director General/Confirming authority by its order dated July 29, 2022 directed reassembly of GSFC on August 8, 2022 by giving a detailed reasoning why the finding of '*not guilty*' on the third charge and the sentence/penalty awarded on the first and second charges should be reconsidered. Such detailed order of the confirming authority is annexed at pages 594 to 599 of the writ petition.

While considering the finding on the third charge, the GSFC was required to consider the relevant portion of the statements made by PW-4 “while I was going towards barracks,asked me to do what whatever Inspector J. Jebraj told” by the confirming authority.

GSFC was asked to rely on the deposition of PW-10 wherein he stated relevant facts regarding third charge as under “At about 2300 hours..... associates of some cattle smugglers”.

Attention of the GSFC was also invited to the portion of the statement made by ASI (GD)/PW -3 “then the accused said.....asked to him to talked to the accused”.

The confirming authority was of the opinion that GSFC needed to carefully and closely appreciate the deposition of the main witness/PW-5 whereby he stated that the accused asked him to direct “‘G’ personnel to call the accused”. The Court was

required to consider that there was no occasion for PW-4 to depose falsely when he was asked by PW-3 and PW-5 to talk to the accused. The Court should have appreciated that all the communications were made on WhatsApp. The defence did not even make a statement that PW – 4 deposed falsely. Various other factors have been discussed in detail as to why the finding of ‘*not guilty*’ on the third charge should be reconsidered.

On the issue of sentence awarded to the accused on the first and second charges being *lenient* the confirming authority was of the opinion that the same was not *commensurate to the gravity* of the charges because the duty of the BSF is to:

- (i) promote a sense of security among the people living in border areas
- (ii) prevent trans-border crimes, unauthorised entry into or exit from the territory of India.
- (iii) prevent smuggling and any other illegal activity.

Since the accused was found ‘*guilty*’ of directing the sub-ordinates to allow and facilitate cattle smuggling of a very large scale instead of stopping the same on the night of 11th –12th August, the sentence was considered to be very *lenient* and *not commensurate to the gravity* of offence.

This Court relies on the judgement of **Amiya Ghosh** (*supra*) to come to the finding that after application of mind to the materials on record, analysing the evidence adduced by the parties and drawing inferences/conclusions as are collectively based on due consideration of such materials/evidence on record, the confirming authority directed the GSFC to be reassembled again for conducting the proceedings on revision.

Mr. Nandy refers to a judgement reported in (1987) 2 SCC 179 (**State of Uttar Pradesh vs. Brahm Datt Sharma and another**) and a judgement reported in (2006)12 SCC 28 (**Union of India and another vs. Kunisetty Satyanarayana**) to submit that it is a well settled proposition of law that ordinarily no writ lies against a charge-sheet or show-cause. The reason why ordinarily a writ should not be entertained against a mere show-cause notice or charge-sheet is that it is premature in nature. A mere show-cause or charge-sheet does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any parties, unless the same has been issued by a person who has no jurisdiction to do so.

This matter was mentioned to be taken out of turn on the ground that the show-cause has been issued by an authority who had no jurisdiction to do so.

In the judgement of **(Amiya Ghosh vs. Union of India & Ors.)** reported in (2017) 1 CLT 1 on which Mr. Chakraborty heavily placed reliance on, it was held that the confirming authority did not lack the jurisdiction to issue the Impugned show-cause notice. Accordingly, the contention of the writ petitioner that the confirming authority lacked the jurisdiction to even issue the Impugned notice was overruled in the said judgement.

Upon hearing the submissions of the parties and the materials placed on record, this Court is of the view that the DG did not lack jurisdiction to issue the said show-cause for termination under the Rule 20 of the BSF Rules, 1969 as discussed earlier. Therefore, this Court has no hesitation to hold that the authority who issued the show-cause notice acted within the terms of the 1969 Rules and had jurisdiction to issue the same.

Accordingly **WPA 18440 of 2023** is **dismissed** as being premature.

Before parting with the discussion it was not out of place to observe that this Court has not appreciated the conduct of the writ petitioner in agitating the self-same cause of action before two different Courts of law.

Since no affidavits have been called for in the writ petition, the allegations contained therein be

deemed not to have been admitted by the respondents.

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Hon'ble Court.

Urgent certified website copies of this order, if applied for, be made available to the parties subject to compliance with all requisite formalities.

(Lapita Banerji, J.)