

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
Constitutional Writ Jurisdiction
Appellate Side

W.P.A. No. 1446 of 2022

With C.A. N No. 1 of 2023

Pranab Barman

VS

The Union of India, Ministry of Home Affairs & Ors.

Before : The Hon'ble Justice M.V. Muralidaran

Mr. Kumar Shantanu

----- for the petitioner.

Mr. Sudipto Kumar Mazumder, Ld. DSGI,

Mr. Ajoy Kumar Singhania,

----- for the Union of India.

Hearing concluded on :

11.01.2024

Judgment On :

25.01.2024

M.V. Muralidaran, J.:

This writ petition has been filed by the petitioner challenging the order dated 4.6.2021 thereby sentencing the petitioner to suffer imprisonment for five years and to be dismissed from the service, which was upheld by the appellate authority vide order dated 30.11.2021.

2. The case of the petitioner is that he joined BSF at Koraput as trainee on 15.9.2011 and after passing out, resumed his duties at SHQ BSF, Koraput and thereafter, posted at SHQ, BSF, Jalpaiguri as Constable/Fitter. While he was on leave from 27.3.2020, one Kundan Kumar Rana, Head Constable requested the petitioner to allow him to stay and use the family quarters of the petitioner and the petitioner on good faith allowed the Kundan Kumar Rana to use the family quarters. In the month of July, Kundan Kumar Rana, after receiving the Government quarters allotted in his name, shifted his family adjacent to the petitioner's quarters. After Kundan Kumar Rana shifted, the petitioner found some articles missing from his quarters and, as such, he enquired the same with Kundan Kumar Rana, to which some quarrel had

taken place between them and, lastly on 23.11.2020, Kundan Kumar Rana returned all the missing articles to the petitioner. On 20.11.2020, Kundan Kumar Rana lodged a complaint alleging that on 8.11.2020 at around 17.30 hours, the petitioner attempted sexual assault on his minor daughter aged 9 years. In this regard, Court of Inquiry was conducted by the Deputy Commandant, 143 Bn BSF for the alleged complaint on 25.1.2021. Thereafter, Record of Evidence was conducted under Rule 48 of the BSF Rules, 1969 and examined the witness. According to the petitioner, the Recording Officer failed rather once again denied opportunity to the petitioner to call witnesses in his defense and thus violated the provisions of Rule 48(4) of the BSF Rules. The Recording Officer failed to comply with Rule 5(1) of the BSF Rules.

3. The petitioner stated that the prosecution case is based on the lies pedaled by PW1 to PW3 and there are contradictions and highly improbable conjectures far from truth to malign the petitioner due to personal grudge. It cannot be proved by the statement of PW2 that the petitioner was present in the place of occurrence of the alleged incident. On 6.4.2021, a charge sheet was issued against the petitioner stating that the petitioner has committed aggravated sexual assault on a girl child punishable under Section 10 of the POCSO Act, 2012. According to

the petitioner, the charge sheet dated 6.4.2021 is sans any authority of law, as the same was issued by the Deputy Inspector General SHQ BSF Jalpaiguri in violation of Rule 53. On 10.5.2021, GSFC assembled and finally vide order dated 4.6.2021, the GSFC found the petitioner guilty of the charges under Section 46 of the BSF Act read with Section 10 of the POCSO Act and awarded him punishment to suffer imprisonment for five years in a civil prison and dismissed him from service.

4. Aggrieved by the said order, the petitioner submitted pre-confirmation petition dated 8.6.2021 to the Inspector General, North Bengal Frontier and another pre-confirmation petition on 10.6.2021 to the Additional DG (EC), BSF, Kolkatta to review the sentence awarded to him vide order dated 4.6.2021. Vide Memo dated 13.10.2021, the IG North Bengal Frontier issued an addendum stating that the confirming authority being ADG, HQ, SDC (EC), BSF, Kolkata has decided to remand the case for revision trial and the same has been fixed with effect from 22.10.2021 at SHQ BSF, Jalpaiguri. On 25.10.2021, the revision GSFC adhered to its previous sentence dated 4.6.2021 and the same was confirmed by ADG (EC), BSF, Kolkatta on 30.11.2021. Challenging the same, the present writ petition is filed.

5. The respondents 1 to 7 filed affidavit-in-opposition stating that during his service tenure in BSF, the petitioner was awarded seven cash rewards/CCs and awarded one punishment on 15.3.2019 for committing an offence under Section 22C of the BSF Act besides his trial by the GSFC on serious charge under Section 46 for committing a civil offence that is to say committing aggravated sexual assault on a girl child punishable under Section 10 of the POCSO Act. The SHQ BSF, Jalpaiguri ordered a COI to investigate into the complaint made by the father of the victim. The said COI was conducted wherein the petitioner was also afforded due opportunity as provided under Rule 173(8) of the BSF Rules. The COI found the petitioner blameworthy in the matter and recommended to initiate strict disciplinary action against him which was also agreed by the DIG, SHQ. During the conduct of COI, BSF Rules were duly complied with and the petitioner was given opportunities to cross examine the witnesses and also to give additional statement or evidence and to produce witnesses in his defence.

6. It is stated that the petitioner has cross examined the witnesses and also gave additional statement of defence, but he declined to produce any witness. On 17.2.2021, the petitioner was heard under Rule 45 by the Commandant (OC Troops) on the charge under Section 46 of the BSF

Act. After hearing, the Commandant remanded case for preparation of ROE against the petitioner and ROE against the petitioner was prepared as per the provisions of Rule 48 of the BSF Rules wherein also the petitioner was afforded opportunities for his defense. During the conduct of the ROE, all the relevant provisions of the BSF Rules were complied with .

7. It is further stated that the petitioner has also availed the opportunity and cross examined some of the prosecution witnesses. After completion of the ROE and having gone through the same, the DIG, SHQ, BSF Jalpaiguri, exercising his discretion under the BSF Rules 51(3)(iv), recommended to dispose of the disciplinary case against the petitioner by holding GSFC. Thereafter, charge sheet against the petitioner was prepared as per the provisions of Rules, 53, 54 and 56 of the BSF Rules. The petitioner was tried by GSFC with effect from 10.5.2021 to 4.6.2021 on a charge under Section 46 of the BSF Act. Following due procedure and due appraisal of the evidence on record, the Court found the petitioner guilty of the charge framed against him and further sentenced him to suffer imprisonment for five years and to be dismissed from service.

8. It is stated that the revision GSFC trial was held with effect from 22.10.2021 to 25.10.2021 and after the revision trial, the Court adhered to its earlier finding of guilty on the charge as well as the earlier sentence awarded to the petitioner. On 8.6.2021, the petitioner submitted pre-confirmation petitions against his conviction and sentence awarded by the GSFC which was duly considered by the ADG (EC) BSF, Kolkatta and rejected being devoid of merit vide order dated 30.11.2021. The finding and sentence of the Court was confirmed by the confirming authority on 30.11.2021 and promulgated to the petitioner on 13.12.2021 and the petitioner was struck off from the strength of SHQ BSF Jalpaiguri with effect from 13.12.2021 FN and further handed over to District Correctional Home, Jalpaiguri on the same day to undergo the sentence of imprisonment on a proper warrant.

9. It is further stated that there is sufficient and cogent evidence on record in the GSFC trial proceedings to substantiate the charge against the petitioner on which he had been convicted by the GSFC in accordance with the BSF Act and Rules. The whole proceedings were exercised under the provisions of the BSF Act and BSF Rules and the grounds mentioned by the petitioner in the present writ petition are devoid of merits and the

petitioner is not entitled to any of the reliefs as prayed in the writ petition. Hence, the writ petition is liable to be dismissed.

10. Assailing the impugned orders, the learned counsel for the petitioner submitted that the petitioner is innocent and he has been falsely implicated in the case out of grudge and previous rivalry. In fact, the petitioner was not present inside the BSF campus on the alleged day of incident. The charge sheet has to be prepared by the Commandant and not the DIG. He would submit that after the receipt of complaint, COI is conducted on the order of the Commandant and on the basis of the COI, the charge sheet is issued by the Commandant and, thereafter, the Commandant orders for ROE proceedings. Hence, it is mandatory provision under Rule 53(ii) of the BSF Rules that charge sheet has to be signed and issued by the Commandant and the discrepancy in the same vitiates the entire trial.

11. The learned counsel further submitted that there is a prescribed form of application for a SFC which has to be signed by the Commandant, but in the case on hand, the DIG has signed the said form.

12. The learned counsel would submit that as per the mandate of Section 19(6) of the POCSO Act, every offence under the Act has to be reported to the Child Welfare Committee and the Special Court. However, the respondent authorities have violated the mandatory provisions and acted whimsically by violating the principles of natural justice. No medical examination of the victim was held. As per Section 28 of the POCSO Act, only the Special Court has jurisdiction to try the offences and that the POCSO Act has an overriding effect over all other Acts, including the BSF Act. There were discrepancies in the statements of all the prosecution witnesses which was discarded by the authorities.

13. The learned counsel then submitted that the Law Officer of the GSFC in his summing up under BSF Rules did not advise the members of the GSFC who are general duty officers to examine the state of the victim girl with care. As such, the witnesses are susceptible to tutoring.

14. Lastly, the learned counsel submitted that the petitioner's involvement in the alleged incident cannot be proved by the prosecution and on mere presumptions/assumptions the petitioner was awarded severe punishment by the GSFC. The GSFC has mis-appreciated the evidence on record. There is no cogent evidence to charge the petitioner

with the said offence and the authorities have failed to appreciate the inconsistency in the statements of witnesses. Further, the petitioner was not given opportunity to call sentries to prove his innocence. The GSFC has failed to consider the fact that the BSF Campus are guarded 24 hours by sentries at all entry and exit gates and the petitioner was not allowed to call the sentries who were on duty on the date of the alleged incident as defense witnesses or prosecution witnesses as it could have been easily proved that the petitioner entered the BSF Campus somewhere at 1746 hours as is evident from the CDR. Even for the sake of argument it is assumed that the Special Criminal Court and GSFC has concurrent jurisdiction to try the petitioner, the case based on circumstantial evidence and involving several complicated questioning of law ought to have been sent to the Special Court for trial. Arguing so, the learned counsel for the petitioner prayed for setting aside the impugned orders.

15. Per contra, the learned Deputy Solicitor General submitted that the COI is a fact finding body, which enables the authorities to determine as to whether there is a triable issue in the matter or not. If after the conclusion of the COI, the competent authority finds any material substance to proceed further, then he may proceed further by conducting

hearing on the charge under Rule 45 of the BSF Rules and may order ROE to collect further evidence on the charge.

16. The learned Deputy Solicitor General submitted that the COI was conducted as per Rule 173 of the BSF Rules wherein the petitioner was also afforded due opportunities. Further, the COI found the petitioner blameworthy in the matter and recommended to initiate strict disciplinary action against him. In fact, the petitioner was given opportunity to cross examine the witnesses and also permitted to give additional statement or evidence. After hearing, the case was remanded for preparation of ROE against the petitioner and the ROE against the petitioner was also prepared wherein also the petitioner was afforded sufficient opportunity for his defense as provided in the Rules.

17. As far as the allegation of the petitioner that the Recording Officer denied him the opportunity to call for the witnesses in his defense is concerned, the learned Deputy Solicitor General submits that during the conduct of ROE, all relevant provisions of Rule 48 and 48(4) were duly complied with and during the compliance of the said Rules, the petitioner was given an opportunity to produce the witnesses, however, he failed to produce any witness.

18. The learned Deputy Solicitor General urged that the prosecution witnesses, especially the victim girl in her deposition categorically stated and identified the petitioner and the evidence of the victim girl is to the effect that while she was passing him in the passage of the building, held her by left hand/shoulder and pressed her right breast twice.

19. According to the learned Deputy Solicitor General, it cannot be said that in all probability the petitioner could not have been present at the alleged place of offence inside the SHQ BSF Jalpaiguri Campus at the time of the alleged offence. It is on record that the petitioner was available in the BSF Campus Jalpaiguri at 1747 hours or so.

20. The learned Deputy Solicitor General would submit that all the legal requirements as well as precautions as provided under the POCSO Act were ensured by the GSFC while examining the child witness. The BSF Campus at Jalpaiguri is in two parts, divided by a highway, in which one part of the Campus contains family accommodations. The Force personnel normally visits one side of the Campus to the other side by crossing the highway. Therefore, practically it is almost impossible for the sentries to maintain any entry of in or out of every Force personnel,

who is a resident of the Campus. The grounds raised by the petitioner are misconceived and unfounded and the respondent BSF authority has rightly imposed the punishment on the petitioner. Thus, a prayer has been made to dismiss the writ petition.

21. This Court considered the rival submissions and also perused the materials available on record.

22. The facts behind the disciplinary proceedings against the petitioner is that, in the evening of 08.11.2020 i.e. at about 1730 hrs, while the daughter of Kundan Kumar Rana of SHQ BSF Jalpaiguri was returning to her house through the passage, the petitioner, who was already standing there, held her shoulder and pressed her breast twice. After hearing the shocking incident, her mother informed her father, who in turn reported the incident to his superior authority of SHQBSF Jalpaiguri on 20.11.2020.

23. The petitioner has been tried by the GSFC on the aforesaid charge under Section 46 of the BSF Act, 1968 for committing a civil offence, that is to say, committing aggravated sexual assault on a girl child punishable u/s 10 of the POCSO Act, wherein after due appraisal of the evidence on record, the Court found the petitioner 'guilty' of the

charge and further sentenced him to suffer imprisonment for five years and to be dismissed from service.

24. It appears that the SHQ BSF Jalpaiguri ordered a Court of Inquiry vide dated 24.11.2020 to investigate into the aforesaid matter. The said COI found the petitioner blameworthy in the matter and further recommended to initiate strict disciplinary action against him, which was also agreed to by the IQF Jalpaiguri in his final remarks of the said COI proceedings. On 17.02.2021, the petitioner was heard under Rule 45 of the BSF Rules on a charge under Section 46 of the BSF Act for committing the offence aforesaid. After affording reasonable opportunity of hearing to the petitioner, ROE was prepared. After completion of the ROE proceedings and having gone through the same, the competent authority i.e. the DIG, SHQ BSF Jalpaiguri, being the Commandant, exercising his discretion under Rule 51(3)(iv) of the BSF Rules, recommended to dispose of the disciplinary case against the petitioner by holding GSFC and, accordingly, submitted an application under Rule 52 of the BSF Rules to the superior authority i.e. Inspector General, BSF, North Bengal Ftr for convening the GSFC against the petitioner. The Inspector General, BSF, North Bengal Ftr examined the case in consultation with the Law Officer and decided to hold GSFC trial against the petitioner on

the aforementioned charge. Thereafter, following the due procedure, the petitioner was tried by the GSFC w.e.f. 10.05.2021 to 04.06.2021 on the charge under Section 46 of the BSF Act, 1968 for "Committing a civil offence that is to say, committing aggravated sexual assault on a girl child punishable u/s 10 of the POCSO Act".

25. It also appears that on being arraigned by the Court, the petitioner pleaded 'Not Guilty' to the charge against him. Thereafter, the Court proceeded on plea of 'Not Guilty' and following the due procedure and due appraisal of the evidence on record found the petitioner 'Guilty' of the charge levelled against him and further sentenced him to suffer imprisonment for five years and to be dismissed from service, subject to confirmation by the confirming authority. The confirming authority, exercising his power under Section 113 of the BSF Act remanded the case for revision trial vide Revision Order dated 12.10.2021 to clarify some points. The revision GSFC trial of the petitioner was held w.e.f. 22.10.2021 to 25.10.2021 and after the revision trial, the Court adhered to its earlier finding of 'Guilty' on the charge as well as earlier sentence awarded to the petitioner. The finding and sentence of the Court were again announced in the open Court subject to confirmation by the confirming authority and forwarded to the confirming authority for

decision. Meanwhile, the petitioner has also submitted pre-confirmation statutory petitions dated 08.06.2021, dated 10.06.2021 and dated 28.10.2021 against his conviction and sentence awarded by the GSFC, which were duly considered by the confirming authority and rejected the same as devoid of merit under order dated 30.11.2021. The said order was also promulgated to the petitioner on 13.12.2021 and thereafter he was struck off from the strength of SHQ BSF Jalpaiguri w.e.f. 13.12.2021 FN and further handed over the petitioner to District Correctional Home, Jalpaiguri (WB) on the same day to undergo the sentence of imprisonment on proper warrant.

26. Though the learned counsel for the petitioner contended that the petitioner is innocent and he has been falsely implicated in the case out of the grudge and previous rivalry, nothing has been produced by the petitioner to prove the same. The argument of the petitioner is that as per Rule 173 of the BSF Rules, the COI was ordered by the Commandant (Adm), hence, the charge sheet has to be issued by the Commandant and not the DIG as per Rule 53(ii) of the Rules. Even the ROE proceedings under Rule 48 was ordered by the Commandant.

27. The argument of the learned counsel for the petitioner is that after receiving any complaint, the COI is conducted on the order of the Commandant and on the basis of the COI, the charge sheet is issued by the Commandant and thereafter the Commandant orders for ROE proceedings. Hence, it is mandatory that charge sheet has to be signed and issued by the Commandant and any discrepancy in the same vitiates the entire trial.

28. This Court is of the considered view that the petitioner having participated in the COI and ROE and having cross-examined the prosecution witnesses in respect the allegation levelled against him, now cannot turn around and say that there are discrepancies in the issuance of the charge sheet.

29. The next contention of the learned counsel for the petitioner is that as per Section 19 of the POCSO Act, every offence under the said Act has to be reported to the Child Welfare Committee and the Special Court and only the Special Court has jurisdiction to try the offences under the POCSO Act and further the POCSO Act has an overriding effect over all other Acts, including the BSF Act.

30. It is to be mentioned that in the Schedule in terms of Section 2(c) of the POCSO Act, which contains the list of Armed Forces and Security Forces. The Border Security Force Act, 1968 is mentioned at Sl. No.(e) in the said Schedule. Since the petitioner has committed sexual assault on a girl child within the limits of the area of SHQ BSF Jalpaiguri Campus where he was deployed, being a person belonging to the Armed Force of the Union, the petitioner had committed the aggravated sexual assault as enumerated in the POCSO Act.

31. It is well known fact that the BSF Act is a Special Act and by virtue of the provisions of Section 46 of the BSF Act, civil offences committed by the member of the Force at any place in or beyond India are deemed to be offences committed under the BSF Act and if charged under Section 46 of the BSF Act, the same are triable by the SFC including a GSFC. A conjoint reading of Sections 46 and 47 of the BSF Act would reveal that the GSFC has all the jurisdiction to try a Force personnel. Therefore, the submission of the learned counsel for the petitioner that only the Special Court has jurisdiction to try the offences under the POCSO Act cannot be countenanced.

32. A reading of Section 80 of the BSF Act reveals that if the designated authority of the Force decides to try a person subject to the BSF Act, then the said authority can even claim a criminal case in respect of that person from the Criminal Court which may also have jurisdiction to try that person and such claim prevails. In the instant case, the charge sheet against the petitioner was prepared as per the provisions of Rules 53, 54 and 56 of the BSF Rules. A bare perusal of the GSFC trial proceedings would also reveal that all the legal requirements as well as precautions as provided under the POCSO Act were ensured by the GSFC while examining the victim. Therefore, this Court is of the view that there is no defect in issuance of the charge sheet to the petitioner, including the authority who has issued the charge sheet.

33. As far as the issue of making an entry at the BSF Campus gate in relation to the petitioner on the fateful day is concerned, in normal practice, a Force person, who is a permanent resident of the Campus and has a valid Force Identity Card, his regular in/out entry for going out of the Campus for visiting the market etc. for his normal routine works is not being made by the sentry at the gate. Entry of only civilian visiting the Campus or the Force personnel moving out of the duty station with written movement order is being made in the relevant register in the

Unit/HQ GD. As rightly argued by the learned Deputy Solicitor General, the BSF Campus at Jalpaiguri is in two parts, divided by a highway, in which one part of the Campus contains family accommodations. The Force personnel normally visit one side of the Campus to the other side by crossing the highway. Therefore, it is impossible for the sentries to maintain any entry of in or out of every Force personnel, who is a resident of the Campus. In view of the above, the argument of the learned counsel for the petitioner that GSFC has failed to appreciate the CDR and the petitioner's involvement in the incident not proved by the prosecution and on mere assumption/presumption the petitioner was awarded punishment by the GSFC, cannot be countenanced.

34. There are enough and cogent evidence available on record in the GSFC trial proceedings to substantiate the charge against the petitioner on which he had been convicted by the GSFC in accordance with law under the BSF Act and the Rules. That apart, the offence committed by the petitioner is a crime against the society as well as an indisciplined act in the Force parlance. The motto of the Court was not only to give justice to the victim and the society, but also to maintain the non-negotiable aspect of discipline of the Force. An indisciplined person

cannot be allowed to continue in the BSF Force, which is a disciplinary Force.

35. Nothing has been produced and/or canvassed by the petitioner that there are procedural irregularities in conducting the trial by the GSFC warranting judicial review. Since the writ petition does not disclose any procedural irregularity during the conduct of the trial by the GSFC, the writ petition is liable to be dismissed.

36. Time and again, the Hon'ble Apex Court held that though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution of India, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution of India.

37. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:

- a. the enquiry is held by a competent authority;

- b. the enquiry is held according to the procedure prescribed in that behalf;
- c. there is violation of the principles of natural justice in conducting the proceedings;
- d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
- e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
- f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion.
- g. the disciplinary authority had erroneously failed to admit the admissible and material evidence.
- h. the finding of fact is based on no evidence.

38. Under Article 226 of the Constitution of India, the High Court shall not:

- (i) re-appreciate the evidence.

- (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law.
- (iii) go into the adequacy of the evidence;
- (iv) go into the reliability of the evidence;
- (v) interfere, if there be some legal evidence on which findings can be based.
- (vi) correct the error of fact however grave it may appear to be;
- (vii) go into the proportionality of punishment unless it shocks its conscience.

39. It was not at all open to the High Court to re-appreciate the evidence in exercise of its jurisdiction under Article 226 of the Constitution of India. As stated supra, there were no discrepancies found in the statements of prosecution witnesses in the entire disciplinary proceedings. Moreover, the evidences of PW1 to PW3 had corroborated each other and even at the time of cross examination, the testimony of prosecution witnesses had gone unchallenged.

40. In the instant case, sufficient evidence is available on record in the FSFC trial proceedings to substantiate the charge against the petitioner on which he had been convicted by the GSFC in accordance with law. In other words, a perusal of the GSFC trial proceedings demonstrates that the Court has thoroughly considered the evidence available on record including the sworn/unsworn statement of the accused and after thoughtful consideration, the Court found sufficient evidence available on record to prove the charge against the petitioner and, accordingly, the Court has rightly found the petitioner guilty of the charge against him.

41. It was not open to the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, to go into the proportionality of the punishment so long as the punishment does not shock the conscience of the Court. Taking into consideration the gravity of the offence committed by the petitioner, the authority has rightly imposed the punishment to suffer imprisonment for five years and to be dismissed from the service and the same has been rightly affirmed by the appellate authority also. There are no valid grounds to interfere with both the order of the original authority and the order of the appellate authority. Resultantly, the writ petition fails.

42. In the result, WPA 1446 of 2022 is dismissed. There shall be no order as to costs.

(M.V. Muralidaran, J.)