



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

% *Date of decision: January 25, 2024*

+ **W.P.(C) 788/2024 & CRL.M.(BAIL) 114/2024**

(1) **PRAKASH CHAND SHARMA** Petitioner
Through: Mr. Nitin Joshi, Mr. Vaibhav
Thaledi, Mr. K.K. Sharma, Mr.
Harsh Singh and Mr. Sunil Kumar
Sharma, Advocates

Versus

UNION OF INDIA AND ORS Respondents
Through: Mr. Ajay Kumar Pandey, Sr. Panel
Counsel with Mr. Rajat
Choudhary, Advocate and Mr.
Shubham Prasad, Govt. Pleader
and Mr. M. Raja Khan, Law
Officer, GDE-I/ Commdt. And Mr.
Hamendra Singh, Law Officer, Dy.
Commdt. BSF.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J. (O R A L)

1. Succinctly put, the petitioner after joining Border Security Force [hereinafter referred to as “**BSF**”] as SI/JE (Elect) on 16.06.1993 got various promotions over the time. Lastly, the petitioner joined HQ South Bengal Frontier BSF on 27.01.2020 and continued as a Deputy Commandant (Elect) wherein he was subjected to a Staff Court of Inquiry



[hereinafter referred to as “**SCI**”] initiated on 28.03.2022 for accepting bribe from Civil Contractors, and was found guilty. As such, a Record of Evidence [hereinafter referred to as “**ROE**”] under *Rule 48* of the BSF Rules, 1969 was directed to be prepared against the petitioner and a trial by way of convening a General Security Force Court [hereinafter referred to as “**GSFC**”] was also ordered by the Convening Authority-respondent no.4 under the BSF Act, 1968 [hereinafter referred to as “**BSF Act**”] wherein the following three charges under *Section 46*, BSF Act were framed against him:-

*“CHARGE I: Committing a civil offence 1 that is to say being a public servant attempted to obtain bribe for improper & dishonest performance of an official duty punishable under Section 7 (a) of the Prevention of Corruption Act, 1988 (amended in 2018) [hereinafter referred to as “**PC Act**”]*

CHARGE II: Committing a civil offence that is to say being a public servant obtained undue advantage without consideration from person concerned in proceeding or business transacted by such public servant punishable under Section 11 PC Act.

CHARGE III: Committing a civil offence, that is to say being a public servant obtained bribe for improper & dishonest performance of an official duty, punishable under Section 7 (a) PC Act.”

2. Pursuant thereto, vide order dated 21.04.2023, the GSFC found the petitioner 'Not Guilty' in respect of *Charge I* but found him 'Guilty' in respect of *Charge II* and *Charge III*. Thus, the petitioner was sentenced to undergo imprisonment for a term of three years alongwith fine of Rs.10,000/- and he was dismissed from service by way of a reasoned order.



3. The petitioner challenged the above order by preferring an appeal under *Section 108* of the BSF Act, to the Additional Director General, Eastern Command, BSF-respondent no.3 [hereinafter referred to as “**ADG**”], who confirmed the aforesaid sentence by way of a reasoned order dated 20.11.2023.

4. The petitioner challenged the above order, this time by way of a ‘Post Confirmation Petition’ to the Director General, BSF-respondent no.2 [hereinafter referred to as “**DG**”] and sought remission and suspension of his sentence. The request for suspension of his sentence, was dismissed by the DG by way of an order dated 10.01.2024.

5. Resultantly, the petitioner has filed the present petition under *Article 226* of the Constitution of India seeking quashing of order No.03/04/2023/CLOBSF/11-14 dated 10.01.2024 rejecting the application of suspension of sentence of the petitioner till the actual disposal of his 'Post Confirmation Petition' dated 3.12.2023 under *Section 117(2)* of the BSF Act as also his suspension of sentence for an additional period of two weeks after disposal of his 'Post Confirmation Petition' to enable him to take recourse to the legal remedies as available under the law.

6. The learned counsel for the petitioner submits that no witness before the ROE has either deposed of any demand of illegal gratification by the petitioner or has submitted any bills cleared by the petitioner in lieu of any gratification. The learned counsel also submits that the conviction of the petitioner is, in fact, based on unclear doctored clips with no audio recordings thereto.

7. The learned counsel the petitioner further submits that in any event



the petitioner is yet to be proven guilty as his 'Post Confirmation Petition' is still pending. He then submits that taking into account that the petitioner has already undergone more than 325 days in custody out of the total period of 3 years of imprisonment awarded to him and also that the petitioner had surrendered on time, after being granted interim suspension, his remaining sentence ought to be suspended. He then further submits that the petitioner cannot be relegated to a disadvantageous position by virtue of his employment because any other Criminal Court would have generally suspended his sentence under these circumstances.

8. *Per-contra*, learned counsel for the respondents submits that the present petition is not maintainable as the petitioner has not challenged the order of conviction and the order on sentence passed by the GSFC. Further, relying upon ***Pawan Kumar Rathod vs Union of India & Ors.***¹ learned counsel for the respondents submits that as per *Article 33* of the Constitution of India, the members of the Armed Forces cannot claim fundamental rights as ordinary citizens and shall be governed by the Acts enacted by the Parliament.

9. Thence, relying upon ***Preetpal Singh vs State of Uttar Pradesh & Anr.***², learned counsel for the respondents submits that once there is a finding of guilt in the post-trial appeal, the question of innocence does not arise nor does the principle of bail being the rule and jail being an exception, being applicable. He then submits that the petitioner has also availed the remedy under *Section 117(2)* of the BSF Act and he has

¹ 2007:DHC:1093-DB

² (2020) 8 SCC 645



already made a submission to dispose of the same within 12 weeks.

10. This Court has perused the documents and also heard the learned counsel for the parties as well as gone through the judgments cited by them.

11. Interestingly, at the time of hearing, learned counsel for the petitioner at the outset submits that he shall confine his reliefs and arguments to for his release suspending the sentence till the actual disposal of his 'Post Confirmation Petition'.

12. In light of the aforesaid, this Court is proceeding accordingly.

13. In effect, the petitioner by virtue of the present petition, is calling upon this Court to exercise judicial review, *albeit*, treating it as an appeal. This Court under *Article 226* of the Constitution of India can neither sit as an appellate authority or a fact finding authority or render findings on facts or reappreciate the evidence recorded after they have already been duly considered and adjudicated and before being dismissed by a well-reasoned order passed by the GSFC and confirmed by the ADG later, moreover, when the parameters for adjudicating an appeal are very much different from the scope of a judicial review. While hearing the present petition this Court cannot consider the grounds raised and the arguments addressed by the learned counsel for the petitioner as this Court has an extremely limited scope of judicial review.

14. Reliance in this regard is placed upon ***B. C. Chaturvedi vs. Union of India and Ors.***³ wherein, the Hon'ble Supreme Court has held as under:-

“12. Judicial review is not an appeal from a decision but a review

³(1995) 6 SCC 749



of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re- appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has co- extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India v. H.C. Goel [(1964) 4 SCR 781], this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.”

15. This Court also finds able support in ***State Bank of India and***



Ors. Vs. Ramesh Dinkar Punde⁴ wherein, the Hon'ble Supreme Court has held as under:-

“9. It is impermissible for the High Court to re-appreciate the evidence which had been considered by the Inquiry Officer a Disciplinary Authority and the Appellate Authority. The finding of the High Court, on facts, runs to the teeth of the evidence on record.

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12. From the facts collected and the report submitted by the Inquiry Officer, which has been accepted by the Disciplinary Authority and the Appellate Authority, active connivance of the respondent is eloquent enough to connect the respondent with the issue of TDRs and overdrafts in favour of Bidaye.

13. We are, therefore, clearly of the view that the High Court was erred both in law and on facts in interfering with the findings of the Inquiry Officer, the Disciplinary Authority and the Appellate Authority by acting as a court of appeal and re- appreciating the evidence.”

16. We also find able support in **Bharat Coking Coal Limited and Ors. Vs. AMR Dev Prabha and Ors.⁵** wherein, it has been held as under:-

“28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need

⁴(2006) 7 SCC 212

⁵ (2020) 16 SCC 759



for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former)."

17. Even otherwise, *admittedly*, the Post Confirmation Petition of the petitioner is still pending as in an earlier petition filed by the very same petitioner, this Court vide order dated 09.01.2024 in W.P.(C) No.146/2024 titled ***Prakash Chand Sharma vs Union of India & Ors.*** directed it "...to be decided within twelve weeks as an outer limit..."

18. *De-hors*, coming to the facts involved, this Court finds that it is an admitted fact that the dispute involved revolves around Rs.10,000/- cash qua which different witnesses have deposed varied version, so much so, the said depositions are not corroborated. Furthermore, it is but strange that more than one witness has resiled from the statement deposed before the ROE. Also, it is not in dispute that the petitioner was very much present at the place and on the day of the incident as also that a sum of Rs.10,000/- exchanged hands as also that the ingress and egress of one of the witnesses is captured to the same place wherein the petitioner was very much present.

19. Lastly, as the petitioner is belonging to one of the Armed Forces i.e. BSF and was posted in an area which called for due care and precaution and in view of *Article 33* of the Constitution of India whereby it is for the Parliament to determine as to what extent fundamental rights shall be applicable to the members of Armed Forces. Thus, the petitioner cannot claim parity with ordinary citizens. Reliance in this regard is placed upon ***Pawan Kumar Rathod (supra)*** [para 12]. In view thereof,



reliance placed by the learned counsel for the petitioner upon *Preetpal Singh (supra)* is also misplaced.

20. Therefore, in view of the aforesaid factors, discussions thereof and the reasoning therein are sufficient for this Court to reject the present petition, especially under *Article 226* of The Constitution of India and also while the 'Post Confirmation Petition' of the petitioner is still pending. It is, thus that upon considering the factual matrix involved and the well settled position of law, this Court finds no reason for interference at this stage.

21. Accordingly, the present petition alongwith the pending application, is dismissed. It is made clear that the post confirmation petition shall be decided without being influenced by any observation made on merits in this order.

SAURABH BANERJEE, J

V. KAMESWAR RAO, J

JANUARY 25, 2024
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