Dr. Sushil Kumar Vs. Union of India and ors

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Court : Rajasthan Jodhpur

Decided On : Mar-27-2014

Appellant : Dr. Sushil Kumar

Respondent : Union of India and ors

Judgement :

S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 1/16 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

ORDER
S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s Union of India and ors. Date of Order :::

27. h March, 2014 PRESENT HON'BLE Dr. JUSTICE VINEET KOTHARI Appearance: Mr.K.K. Shah, for the petitioner. Mr.V.K. Mathur with } Mr.Lokesh Mathur, } Mr.Aniruddh Purohit, } for the respondents. -- REPORTABLE BY THE COURT:

1. The present writ petition was filed by the petitioner, Dr. Sushil Kumar, the Chief Medical Officer, II Grade serving the respondent - Border Security Force with the following prayers in this Court on 25.2.2014: It is, therefore, most respectfully prayed that this writ petition may kindly be allowed with costs and by issuance of

an appropriate writ, order or direction, the GSFC re-trial may kindly be quashed and set aside.. 2. Upon issuance of notices, the respondents have filed S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 2/16 reply in this Court on 19.3.2014. During the pendency of the present writ petition, certain subsequent developments on record have taken in the present case, which persuade this Court to relegate this matter back to the respondent No.2 - the Director General, Head Quarter, BSF, New Delhi.

3. The charges levelled against the petitioner were as under: FIRST CHARGE BSF Act, 1968 U/S46COMMITTING A CIVIL OFFENCE THAT IS TO SAY CRIMINAL MISCONDUCT FOR HAVING BEEN, AS A PUBLIC SERVANT, IN POSSESSION OF PECUNIARY RESOURCES DISPROPORTIOINATE TO HIS KNOWN SOURCES OF INCOME, FOR WHICH HE CAN NOT SATISFACTORILY ACCOUNT FOR, AN OFFENCE SPECIFIED IN SECTION131)(e) OF THE PREVENTION OF CORRUPTION ACT, 1988, PUNISHABLE U/S132) OF THE SAID ACT. While serving in 86/143 and 141 Bn. BSF at Sriganganagar (Raj/Handwara) J&K), between 09/01/08 to 29/09/09, got deposited through cash and transfer, Rs.61,56,354/- (Sixty one lakh fifty six thousand three hundred fifty four only), as per details given in Annexure 'A. to the charge sheet, in his Saving bank Account No.30266800681 in SBI, JCT Mills, Sriganganagar, out of which, Rs.37,04,328/- (Thirty seven lakh four thousand three hundred twenty eight only), being his salary, loan etc., Rs.24,52,026/- (Twenty four lakh fifty two thousand twenty six only), was an amount disproportionate to his known sources of income, which he could not satisfactorily account for. S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 3/16 SECOND CHARGE BSF Act, 1968 U/S46COMMITTING A CIVIL OFFENCE THAT IS TO SAY CRIMINAL MISCONDUCT, WHILE BEING A PUBLIC SERVANT, ANY OTHER PERSON FOUND IN POSSESSION OF PECUNIARY RESOURCES ON HIS BEHALF DISPROPORTIOINATE TO HIS KNOWN SOURCES OF INCOME, FOR WHICH HE CAN NOT SATISFACTORILY ACCOUNT FOR, AN OFFENCE SPECIFIED IN SECTION131)(e) OF THE

PREVENTION OF CORRUPTION ACT, 1988, PUNISHABLE U/S132) OF THE SAID ACT. In that he, while service in 86/143 and 141 Bn BSF at Sriganganagar (Raj)/ Handwara (J&K), between 09.01.08 to 21/10/09, his wife Dr. Pinky Kumar, held Rs.5,65,528/- (Five lakh sixty five thousand five hundred twenty eight only), as per details given in Annexure 'B' attached to the Charge sheet, in her Saving Bank account No.30266801142 in SBI, JC Mills Sriganganagar, on his behalf, an amount disproportionate to his known sources of income, which he could not satisfactorily account for. THIRD CHARGE BSF Act, 1968 U/S41e) OBTAINING GRATIFICATION FOR HIMSELF AS A MOTIVE FOR PROCURING ANY ADVANTAGE In that he, at officers' mess, Ftr. HQ, BSF, Jodhpur, on 09/07/2008, accepted a sum of Rs.15,000/- from No.02115873 HC/RO Bhanwar Lal Jatrana of 66 Bn BSF, for clearing him in medical examination for SI (CPOs). S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 4/16 FOURTH CHARGE BSF Act, 1968 U/S46COMMITTING A CIVIL OFFENCE THAT IS TO SAY, BEING A PUBLIC SERVANT, ACCEPTING FROM ANY PERSON, FOR HIMSELF, ANY GRATIFICATION WHATEVER, OTHER THAN LEGAL REMUNERATION, AS A MOTIVE FOR SHOWING IN THE EXERCISE OF HIS OFFICIAL FUNCTIONS, FAVOUR TO ANY PERSON, PUNISHABLE U/S7OF THE PREVENTION OF CORRUPTION ACT, 1988. In that he, at officers' mess, Ftr HQ, BSF, Jodhpur, on 12 and 13 July 2008, accepted an amount of Rs.3,000/- and Rs.32,000/- respectively (total-35,000/0_ in two installments, from Sh. Bansi Lal S/O Balu Ji Sharma, Village - Darai, Chittorgarh, Rajasthan, through HC/ RO Bhanwar Lal Jatrana of 66 Bn BSF, for clearing Sh. Balkrishna Kudkiya S/O Sh. Laxman Lal, R/O Begun, Chittorgarh, Rajasthan in Medical examination for SI (CPOs). FIFTH CHARGE BSF Act, 1968 U/S46COMMITTING A CIVIL OFFENCE THAT IS TO SAY, BEING A PUBLIC SERVANT, ACCEPTING FROM ANY PERSON, FOR HIMSELF, ANY GRATIFICATION WHATEVER, OTHER THAN LEGAL REMUNERATION, AS A MOTIVE FOR SHOWING IN THE EXERCISE OF HIS OFFICIAL FUNCTIONS, FAVOUR TO ANY PERSON, PUNISHABLE U/S7OF THE PREVENTION OF CORRUPTION ACT, 1988. In that he, At officers' mess, Ftr HQ, BSF, Jodhpur, on 13th S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 5/16 July 2008, accepted an amount of Rs.30,000/- from Sh Bheru Lal Nagar S/O late Sh Bal Chand Nagar R/o village - Biryakhedi Kalan, the- Jhalara Patan, Dist. Jhalawar Rajasthan, through HC/RO Bhanwar Lal Jatrana of 66 Bn BSF, for clearing him in the medical examination for SI (CPO's)..

4. In the earlier Court martial held against the petitioner on 21.2.2012, the present petitioner, Dr. Sushil Kumar was acquitted of the charges No.1 to 3 and was found guilty of charges No.4 and 5 and the order of dismissal from service was passed against him on 21.2.2012. Against this order, a pre-confirmation appeal was filed by the present petitioner as per Section 117(1) of the Border Security Force Act, 1968. While the said appeal was still pending, the said Authority, namely, the Director General, HQ, BSF, New Delhi passed a revisional order on 28.1.2014 in exercise of his powers under section 113 of the said Act of 1968 and directed fresh court martial to be held for the charges No.1 to 3 in which the present petitioner was earlier acquitted on 21.2.2012 and accordingly, a fresh court martial was held against the petitioner on 10.2.2014 and in pursuance of the findings of the new court martial, an order was again passed imposing sentence of one year of imprisonment with dismissal from service against the petitioner on 7.3.2014. The petitioner again filed another pre-confirmation appeal against this subsequently passed order on 7.3.2014, on 10.3.2014, which is also said to be pending consideration with the same authority, namely, the Director General, S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 6/16 HQ, BSF.

5. The learned counsel for the petitioner, Mr.K.K. Shah vehemently submitted that the revisional order could not have been passed by the said Authority on 28.1.2014 while the pre-confirmation appeal against the previous findings of the court martial and the order dt.21.2.2012 was pending with the said Authority and since the copy of the revisional order has not been supplied to him, he has challenged all the proceedings, which have taken place subsequently in the present case against the petitioner including the challenging the proceedings before revised court martial held against him on 10.2.2014 and the subsequent

order of one year imprisonment and dismissal of services passed against him on 7.3.2014. These subsequently passed orders have not been placed on record and therefore, these submissions as orally made by the learned counsel for the petitioners have been noted by this Court.

6. The learned counsel for the respondents, Mr. Lokesh Mathur and Mr. Anirudh Purohit on behalf of Mr. V.K. Mathur have submitted that the Director General, HQ, BSF is seized of the proceedings in the pre-confirmation appeal filed by the present petitioner on 10.3.2014 and is yet to pass appropriate orders thereon. Mr. Lokesh Mathur also submitted that Rule 129 of the BSF Rules, 1969 framed under the BSF Act, 1968 permits copies to be given on demand only after confirmation order is passed by the competent S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 7/16 authority and therefore, copies of the proceedings in the matter have not been supplied to the petitioner. They however, submitted that the Director General would consider the pre-confirmation appeal filed earlier against the order dtd.21.2.2012 and also against the order dtd.7.3.2014 in exercise of its powers under Section 117 of the Act.

7. After hearing the learned counsels at Bar and upon perusal of the writ petition as of now framed and as filed in this Court on 25.2.2014 and after that certain subsequent developments having taken place in the form of subsequent Court Martial, though held prior to filing of the writ petition on 10.2.2014, resulting in adverse order on 7.3.2014 after filing of the writ petition, this Court is of the opinion that till the highest Authority of the respondent - Border Security Force, namely, Director General, HQ, BSF, New Delhi passes an appropriate speaking order in the matter after giving a proper and reasonable opportunity of hearing to the present petitioner in exercise of his statutory powers under Section 117(1) of the Act, it would be premature for this Court to pronounce upon the merits of contentions raised before this Court by the petitioner in the present case, lest it prejudices either of the parties in the said properly instituted proceedings before the Director General, HQ, BSF, New Delhi under Section 117(1) of the Act.

8. On a specific query of the Court, the learned counsels for the respondents were unable to point out any specific statutory S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 8/16 provisions under the Act of 1968 or the Rules of 1969 negativing, giving of an such opportunity of personal hearing to the petitioner or delinquent official by the Director General, HQ, BSF.

9. On the other hand, the learned counsel for the petitioner relied upon the order of Division Bench of this Court in the case of Sub. Major V.S. Tiwari V/s Union of India - DB Civil Misc. Application No.70/2003 in D.B. Civil Special Appeal No.383/2003 decided on 18.7.2003 directing the respondent No.2 - the Chief of Army Staff to provide an opportunity of hearing to those petitioners while supsending their sentence in the same order dtd.18.7.2003.

10. The learned counsel for the respondents also submitted relying upon the decision of Hon'ble Supreme Court in the case of Union of India V/s Ex-Constable Amrik Singh reported in 1991 Crl.L.J.664 in which while dealing with the post confirmation appeal/remedy availed by the the delinquent under Section 117(2) of the BSF Act, the Hon'ble Apex Court distinguishing some of the other judgments of the Apex Court held that the principles of natural justice need not be imported in the said provision under Section 117(2) of the Act and the respondent was only entitled to file petition, but disposal of the said petition does not attract the principles of natural justice. The Court further noted that the respondent was tried by observing the due process of law which was confirmed and it was only post confirmation petition which was filed under Section 117(2) of the Act. S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 9/16 This contention and reliance placed by the learned counsel for the respondents on the aforesaid judgment is found to be distinguishable from the facts of the present case. Here the remedy and appeal filed by the present petitioner is pre-confirmation appeal under Section 117(1) of the Act and not under Section 117(2) of the Act. The post-confirmation application of mind on the part of Director General of BSF is second round of such confirmation and the Court

therefore, found that the petitioner was also given a liberty to defend in the court martial by leading his own evidence also 11. As against this higher Authority while hearing a pre- confirmation appeal can be therefore directed by this Court to provide an opportunity of hearing to the petitioner and the judgment of the Hon'ble Apex Court in the case of Amrik Singh (supra) having a different factual matrix was applicable only at the later stage after confirmation of punishment or the sentence as imposed on the delinquent and is not applicable to the present case. The Hon'ble Supreme Court in various other judgments has also held that the principles of natural justice can be read into the unoccupied fields and unless they are excluded by specific statutory provisions in negative in the statute, the principles of natural justice can be read into such statutory provisions. Therefore, the direction of this Court to provide an opportunity of hearing to the petitioner does not come in conflict with the aforesaid judgment of Hon'ble Supreme Court in the case of S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 10/16 Amirk Singh (supra) and on the other hand is supported by various judgments of Hon'ble Apex Court and this Court, some of which are discussed below.

12. This Court in an income-tax matter in the case of M/s Maheshwari Agro Industries Vs. Union of India & Ors. reported in (2012) 346 ITR375: (2012) 2 RLW1912 while holding that the Commissioner of the Income-tax (appeals) had an inherent power to entertain the stay application in a pending appeal against the rejection of the stay petition by the Assessing Authority read into the unoccupied field, the principles of natural justice and following various precedents of the Apex Court and English decisions, the Court held as under:

28. The Hon'ble Supreme Court in the case of Institute of Chartered Accountants of India Vs. L.K. Ratna & Ors. reported in AIR 1987 SC71held as under: -

16. It is next pointed out on behalf of appellant that while Regulation 15 requires the Council, when it proceeds to act under S. 21 (4), to furnish to the member a copy of the report of the Disciplinary Committee, no such requirement is incorporated in regulation 14 which prescribes what the Council will do when it

receives the report of the Disciplinary Committee. That, it is said, envisages that the member has no right to make a representation before the Council against the report of the Disciplinary Committee. The contention can be disposed of shortly. There is not in Regulation 14 which excludes the operation of the principle of natural justice entitling the member to be heard by the Council when it proceeds to render its finding. The principles of natural justice must be read into the unoccupied interstices of the statue unless there is a clear mandate to the contrary.. 31. In the land mark decision delivered on 11.03.1968, S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 11/16 the three Judges bench of Hon'ble Supreme Court in the case of M.K. Mohammed Kunhi (supra), in unanimous opinion authored by Grover, J, dealing with words as he may think fit., which were available to the ITAT also while deciding appeals before it and in the face of absence of clear provisions for grant of stay against the disputed demand of tax, the Apex Court held that such power is inherent in the appellate powers and the Tribunal should be deemed to have such power under Section 254 of the Act. Quoting from Domat's Civil Law Cushing's Edition, Vol. 1 at page 88, the Hon'ble Supreme Court noted the following quotation: It is the duty of the judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it.

. Further relying on the Maxim Cui jurisdiction date est, ea quoque concessa essee videntur, sine quibus jurisdictio explicari non potuit., which means where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced.

. Noticing that in some of the earlier judgments, the court expressed the difficulty that appellate tribunal did not possess the power to stay the recovery during the pendency of the appeal, with reference to the judgment in the case of Vetcha Sreeramamurthy Vs. Income-tax Officer, Vizianagaram & Anr. reported in (1956) 30 ITR252(AP) and relying upon Halsbury's Laws of England, third edition, volume

20, page 705, wherein it is stated that no tax is payable while the assessment is the subject-matter of an appeal, except such part of the tax assessed as appears to the S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 12/16 Commissioners seized of the appeal not to be in dispute. Ultimately, relying upon the provision of Section 255 (5) of the Act, which empowers the appellate Tribunal to regulate its own procedure, the Court proceeded to hold that appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. The conclusions of the Hon'ble Supreme Court in para 13 and 14 of Mohd. Kunhi's judgment are quoted below for ready reference: -

13. Section 255 (5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when section 220 (6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its executions and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

14. A certain apprehension may legitimately arise in the minds of the authorities administering the Act that, if the Appellate Tribunal proceed to stay recovery of taxes or penalties payable by or imposed on the assessee as a matter of course, the revenue will be put to grant loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunal. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether

to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 13/16 allowing the recovery proceedings to continue during the pendency of the appeal.. 36. A reasonable construction agreeable to justice and reason is to be preferred to an irrational construction. The Court has to prefer a more reasonable and just interpretation for the reason that there is always a presumption against the law maker intending injustice and unreasonability/ irrationality, as opposed to a literal one and which does not fit in with the scheme of the Act. In case the natural meaning leads to mischievous consequences, it must be avoided by accepting the alternative construction. (Vide: Bihar State Council of Ayurvedic and Unani Medicine v. State of Bihar - (2007) 12 SCC728and Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India- (2009) 2 SCC1].

37. The Court has not only to take a pragmatic view while interpreting a statutory provision, but must also consider the practical aspect of it. (Vide: Union of India v. Ranbaxy Laboratories Ltd.- (2008) 7 SCC502 38. In Narashimaha Murthy v. Susheelabai - (1996) 3 SCC644 the Court held as under:-

20. ... The purpose of the law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and eternal sense of it that makes the law meaningful.

39. In Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate - AIR 1958 SC353 it has been held thus:

9. ... the definition clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act.

40. In Sheikh Gulfan v. Sanat Kumar Ganguli - AIR 1965 SC1839it has been held as follows:- 19. ...Often enough, in interpreting a statutory S.B. Civil Writ Petition

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27. 03/2014 14/16 provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material....

41. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. Justice means justice between both the parties. Justice is the virtue, by which the Court gives to a man what is his due. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. The underlying idea is of balance. It means to give to each his right. Therefore, while tempering the justice with mercy, the Court has to be very conscious that it has to do justice in exact conformity with the statutory requirements.

42. Thus, it is evident from the above referred law, that the Court has to interpret a provision giving it a construction agreeable to reason and justice to all parties concerned, avoiding injustice, irrationality and mischievous consequences. The interpretation so made must not produce unworkable and impracticable results or cause unnecessary hardship, serious inconvenience or anomaly. The court also has to keep in mind the object of the legislation.. 13. This Court while not interfering in the present matter at this stage advisedly, is of the considered opinion that the petitioner should be relegated back before the respondent No.2 - the Director General, HQ, BSF, Delhi with a direction to the said Authority to provide an opportunity of personal hearing to the present petitioner with his authorized representative or counsel and then pass S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 15/16 appropriate speaking order on both of the pre-confirmation appeals filed by the petitioner dealing with the reasons and contentions put forth by the petitioner before the said Appellate Authority. The respondent No.2, Director General, HQ, BSF may issue requisite notice to the petitioner to appear before him with his authorized representative or the counsel on any given date as

per his convenience and it is expected that the said exercise of passing the appropriate orders on such pre-confirmation appeals filed by the petitioner in terms of Section 117 (1) of the Act will be passed within a period of three months from today. The said authority may also consider the application for suspension of sentence of one year imposed upon the petitioner vide order dtd.7.3.2014, if such application is filed by the petitioner before him urgently within a period of two weeks from the date of filing of the same. If the petitioner raises an objection as to the jurisdiction of the respondent No.2 - the Director General, HQ, BSF himself to decide such pre- confirmation appeals, the said authority will decide such question of his own jurisdiction also and pass appropriate orders thereon in accordance with law and if he decides to refer the matter to the higher authority or even the concerned Ministry, he will be free to pass such orders and in that eventuality, the aforesaid directions will be applicable to such referred authority.

14. With the aforesaid observations and directions, the present writ petition is disposed of. No order as to costs. A copy of S.B. Civil Writ Petition No.1586/2014 Dr. Sushil Kumar V/s State of Rajasthan and ors. Order dt:

27. 03/2014 16/16 this order be sent to the parties concerned forthwith. (Dr. VINEET KOTHARI), J.

ss/- 3