U.O.I. & Ors vs Ashok Kumar & Ors on 18 October, 2005

Author: Arijit Pasayat

Bench: Arijit Pasayat, C.K. Thakker

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           CASE NO.:
Appeal (civil)  4792 of 1999

PETITIONER:
U.O.I. & Ors.

RESPONDENT:
Ashok Kumar & Ors.

DATE OF JUDGMENT: 18/10/2005

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
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J U D G M E N T [With C.A. No.6389/2005 (Arising out of S.L.P.(C) No.21363/2005 CC No.6855 of 1999] ARIJIT PASAYAT, J.

Leave granted in S.L.P.(C) 21363/2005 @ CC No.6855 of 1999.

Both these appeals have matrix in a judgment rendered by a Division Bench of the Jammu & Kashmir High Court in a Letters Patent Appeal filed by Ashok Kumar, the respondent in Civil Appeal No. 4792 of 1999 and the appellant in the connected appeal. For the sake of convenience said Ashok Kumar is described hereinafter as the 'delinquent officer'. By the impugned judgment the High Court held that the removal of the delinquent officer from service was in violation of the provisions contained in Section 10 of the Border Security Force Act, 1968 (in short 'the Act') read with Rule 20 of the Border Security Force Rules, 1969 (in short 'the Rules). The appeal filed by the delinquent officer was allowed upsetting the judgment of the learned Single Judge who had dismissed the writ petition filed by the delinquent officer.

Factual position, filtering out unnecessary details, is as follows:

> There was a raid in the house of militants on 23rd and 24th March, 1992. The delinquent officer being Deputy Inspector General in Command was having Supervisory power over the Commandant who raided the hideout of militants. On the night intervening 23rd and 24th March 1992 house of one Mohd. Maqbool Dhar in Bemina Colony of Srinagar was raided by 23 men of the force. During the raid two militants described as 'dreaded militants' namely Javed Ahmed Shalla and Mohd. Siddiqui Soffi were apprehended. According to the authorities huge quantity of arms,

ammunitions and explosives and household articles including gold ornaments were recovered. The recovery of arms, ammunition and explosives and gold ornaments were not reflected in the seizure report sent to higher authorities. Respondent was not present at the spot and he indicated his presence at the scene of operation with a view to claim undue credit of achievements of the operation. Full quantity of seized articles was not reflected in the report. 31 major weapons were recovered but only 22 were shown. Two pistols, five AK-56 rifles, one rocket launcher and one Telescopic Rifle were not shown in the list of ammunition. Out of 31 gold ornaments 25 pieces were not shown in the list of seized articles. Second situation Report was also sent, but the same also did not reflect recovery of complete articles. To cover up these lapses another encounter was shown to have taken place and a report regarding fake encounter was sent vide No.0-7209 which indicated the recovery of some gold ornaments. Another report was also sent from office of delinquent officer declaring goods which were not declared earlier. It was admitted that recovery of some weapons was not reflected in earlier report.

Therefore, a Staff Court of Inquiry was ordered to be held on 16th May, 1992 and the delinquent officer was found responsible for following act of omission and commission:

(a) Falsely showing his presence at the scene of operation and search.

(b) Failure to make any observations regarding serious omissions and discrepancies in the unit site report and detailed report.

(c) Suppression of information regarding seizure of six weapons out of nine which were not declared by the Commandant.

(d) Suppression of information regarding seizure of household items.

(e) Suppression of information regarding seizure of a substantial quantity of gold ornaments.

(f) Failure in supervisory duties by not giving expected directions to the Commandant in regard to accounting and disposal of seized items.

On 18.9.1992 Director General recorded his satisfaction that the material witnesses connected with case will not be available and as such the trial of the delinquent officer before Security Force Court was inexpedient and impracticable and opined that further retention of the delinquent officer in service was undesirable.

On 23/25.9.1992 show-cause notice was served upon the delinquent officer as to why his services be not terminated in accordance with Rule 20 of the Rules. On 31.10.1992 he sent reply to the show cause notice. On 13.1.1993 Inspector General found that there was adequate evidence both oral and

documentary to prove the various charges against the delinquent officer and he had no satisfactory explanation to the various charges and recommended that the competent authority may call upon the delinquent officer to resign under Rule 20(4) or on his refusal to do so, compulsorily retire or remove him from service with pension and gratuity. On 6.2.1993 Director General after considering the show cause notice, reply to the show cause notice, report of the Enquiry Officer and view of Inspector General, BSF recorded his satisfaction that it was neither expedient nor practicable to conduct the trial and in exercise of his powers under Rule 20(4) of the Rules recommended to Central Government that delinquent officer be called upon to resign from service. The recommendation of the Director General, BSF that it was inexpedient or impracticable to hold inquiry and calling upon delinquent officer to resign was considered by the State Minister who expressed his view as under:-

> "It is a very serious case which has brought bad name to the BSF in the State. I agree that the penalty of removal from service without pensionary benefits should be imposed on Shri Ashok Kumar DIG, BSF as proposed above. DG, BSF should also expedite imposition of penalty against the other delinquent officers".

The Home Minister considered the entire record of the case including the recommendations of the desk officer, Director General, Minister of State's opinion and thereafter, recorded his own opinion. Home Minister accorded his approval as under:-

> "We may first remove him from service and also not being eligible for pension looking to the nature of the offence, I don't think this will be sufficient punishment. We may also prosecute him so that it may have deterrent effect."

By order dated 1.6.1993 Government of India in exercise of power conferred under Section 10 of the Act read with Rule 20(5) of Rules removed the delinquent officer from the services without pensionary benefits with immediate effect.

The delinquent officer filed a Writ Petition no.663 of 1993 in the High Court of Himachal Pradesh challenging the order dated 1.6.1993 whereby he was removed from service without pensionary benefits. The writ petition was dismissed by the Himachal Pradesh High Court by order dated 3.9.1997 on the ground that it had no jurisdiction to deal with the writ petition. Thereafter, the delinquent officer filed a Writ Petition no.1277/1997 in the Jammu and Kashmir High Court. An interim order was passed on 3.9.1997 directing the respondents in the writ petition to treat the writ petitioner to be in service with all service benefits as he was enjoying till 2.9.1997. By order dated 5.2.1999 the learned Single Judge dismissed the writ petition. The learned Single Judge's conclusions are essentially as follows:-

> (i) Plea of res-judicata cannot be accepted.
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> (ii) Delinquent officer was given full and reasonable opportunity in the Court of Inquiry which was conducted in terms of Chapter XIV of the Rules, and he was found guilty of six lapses.

(iii)The view formed by Competent Authority to dispense with holding of General Security Force Court was on the basis of material on record.

(iv) The decision to remove delinquent officer from service was not actuated by malafide consideration.

(v) Decision taken by Home Minister suffered from no infirmity, and against him no malice has been shown.

(vi) Rules of business which required matter to be placed before President of India are not applicable to the delinquent officer."

Letters Patent Appeal was filed by delinquent officer against the order of learned Single Judge.

In support of the appeal, following points were urged:

(i) There is no independent or sufficient material for taking action under Rule 20 and the material relied upon is only that which has been collected by the Court of Inquiry, the use of which is not permissible.

The respondent can be tried before the Security Force Court as the show cause notice has been served and the witnesses are also available.

(ii) Learned Single Judge has misdirected himself in recording the finding and maintaining that it was not expedient and practicable to hold inquiry.

(iii)He is a Class-1 Officer of the BSF under Ministry of Home Affairs and, therefore, as per Item No.13 of the First Schedule read with Rule 2 of the Govt. of India (Allocation of Business) Rules, 1961 he could only be removed by the Prime Minister and the President in terms of Serial No.39 of the Third Schedule read with Rule 8 of the Transaction of Business Rules, 1961.

(iv) The authorities have removed him from service without following the provisions of law contained in Section 10 of the Act read with Rule 20 of Rules, as the Central Government has neither recorded the satisfaction to the effect that it is inexpedient and impracticable to hold inquiry nor formed any opinion that his further retention in service is undesirable, for terminating the services under Rule 20 of Rules.

The Division Bench by the impugned judgment concurred with the findings expressed by the learned Single Judge so far as first three points are concerned. So far as the fourth point is concerned it was held that the Central Government was required to record satisfaction that it was inexpedient and impracticable to hold inquiry, and to form opinion relating to delinquent officer for retention in service. According to the High Court the delinquent officer had been removed from the service without following the provisions of Section 10 of the Act and Rule 20 of the Rules. The High Court noticed that two authorities are authorized to act under Rule 20 of the Rules. The procedure

to be followed to terminate the services of an officer is available under Section 10 of the Act by the Central Government on account of misconduct. The expression "as the case may be" relates to the action to be taken by the Central Government and the action to be taken by the Director General. It was held that both the authorities did not have concurrent jurisdiction; otherwise the expression "as the case may be" would be rendered surplus and meaningless. Reference was made to Section 19 of the Army Act, 1959 (in short 'Army Act') and Rule 14 of the Army Rules 1954 (in short 'Army Rules'). It was noted that the language was in pari materia, except the words "as the case may be" with corresponding Section and Rule of the Act and the Rules respectively. Therefore, it was held that use of expression "as the case may be" is significant and indicative of two different spheres of activity for two different authorities. The Director General was not the appointing authority of the delinquent officer and, therefore, it was held that only the Central Government could have taken action and not the Director General. It was incumbent upon the Central Government to record satisfaction that it was inexpedient and impracticable to hold trial, before the jurisdiction to take further action could be assumed.

In support of the appeal filed by the Union of India learned Additional Solicitor General submitted that the Division Bench of the High Court has failed to take into account the true scope and ambit of Rule 20. It was pointed out that Rule 14 of the Army Rules dealt with any category of employees, while Rule 20 of the Rules dealt with officers. It was pointed out that the Director General is given power to conduct inquiry and is also the appointing authority.

In support of the other appeal filed by the delinquent officer, apart from the supporting judgment of the Division Bench it was submitted that the Division Bench of the High Court was not justified in its conclusions so far as the other three points are concerned. Specific allegations of mala-fides were not dealt with by the High Court. It was also submitted that in any event there was no application of mind by the concerned Minister, and merely on the opinion of the Desk Officer the order was passed. Considering the limited scope for judicial review it was submitted that the view of the Division Bench is irreversible. As the basic controversy revolves round the scope and ambit of Rule 20, it is necessary to quote the same. The said Rule reads as follows:

> "20. Termination of service of officers by the Central Government on account of misconduct: (1) When it is proposed to terminate the service of an officer under Section 10 on account of mis-conduct, he shall be given an opportunity to show cause in the manner specified in sub-rule (2) against such action:-
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> Provided that this sub-rule shall not apply:-
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> (a) where the service is terminated on the ground of conduct which has led to his conviction by a criminal court or a Security Force Court; or
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> (b) where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

> (2) When after considering the reports of an Officer's misconduct, the Central Government or the Director-General, as the case may be, is satisfied that the trial of the Officer by a Security Force Court is inexpedient or impracticable, but is of the opinion, that the further retention of the said officer in the service is undesirable, the Director General shall so inform the officer together with particulars of allegation and report of investigation (including the statements of witnesses, if any, recorded and copies of documents if any, intended to be used against him) in cases where allegations have been investigated and he shall be called upon to submit, in writing, his explanation and defence;

Provided that the Director-General may withhold disclosure of such report or portion thereof if, in his opinion, its disclosure is not in the interest of the security of the State.

(3) In the event of explanation of the Officer being considered unsatisfactory by the Director-General, or when so directed by the Central Government, the case shall be submitted to the Central Government with the Officer's defence and the recommendations of the Director-General as to the termination of the Officer's service in the manner specified in sub-rule (4).

(4) When submitting a case to the Central Government under the provision of sub-rule (2) or sub-rule (3), the Director- General shall make his recommendations whether the Officer's service should be terminated, and if so, whether the officer should be, -

(a) dismissed from the service; or

(b) removed from the service; or

(c) retired from the service; or

(d) called upon to resign.

(5) The Central Government, after considering the reports and the officer's defence, if any, or the judgment of the Criminal Court, as the case may be, and the recommendation of the Director-General, may remove or dismiss the officer with or without pension, or retire or get his resignation from service, and on his refusing to do so, the officer may be compulsorily retired or removed from the service with pension or gratuity, if any, admissible to him."

Sub-rule (1) deals with the proposal to terminate the service under Section 10 on account of mis-conduct and requires an opportunity to be given to show cause in the manner stated. Operation of sub-rule (1) is ruled out in the category of cases covered by the proviso to sub-rule (1). Sub-rule (2) deals with modalities to be followed when either the Central Government or the Director-General, as the case may be, is satisfied that the trial of the Officer by a Security Force Court is inexpedient or impracticable and yet either the Central Government or the Director-General, as the case may be, is of the opinion that further retention of the concerned officer in the service is undesirable. Thereafter, comes to the role of the Director- General. He is required to

inform the officer together with particulars of allegation and report of the investigation, (including the statement of witnesses) if any, which is intended to be used against the delinquent officer in cases where allegations have been investigated. The concerned officer is given opportunity to submit his explanation and defence. Proviso to sub-rule (2) makes it clear that Director-General may withhold disclosure of such report or portion thereof if he is of the opinion that the disclosure is not in the interest of the security of the State. Sub- rule (3) relates to consideration of the explanation furnished by the concerned officer and the conclusions of the Director-General on consideration of the explanation. Either when the explanation is considered unsatisfactory by the Director-General or where it so directed by the Central Government, the case shall be submitted to the Central Government with the Officer's defence and the recommendation of the Director-General as to the termination of the officer's service in the manner provided in sub-rule (4). When a case is submitted to the Central Government under the proviso to sub-rule (2) or sub-rule (3), the Director- General is required to make recommendation whether the officer's service should be terminated and, if so, which of the four alternatives provided should be adopted. Sub-rule (5) deals with consideration of the reports and defence of the officer by the Central Government or judgment of the Criminal Court, as the case may be, and the recommendation of the Director-General. The Central Government may pass the order in terms of any of the alternatives indicated in the sub-rule (5).

The High Court is plainly in error in holding that it is only the Central Government which is competent to act in terms of sub-rule (2). Expression "as the case may be" is otherwise rendered superfluous. Both the authorities can act in terms of sub-rule (2). High Court overlooked the salient factor that any other interpretation would render reference to the Director-General meaningless.

A bare reading of Rule 20 makes the position clear that both the Director-General and the Central Government can act in different situations and consideration by the Director- General is not ruled out. Sub-rule (3) makes the position clear that the explanation is to be considered by the Director-General and only when it is directed by the Central Government, the matter shall be submitted to the Central Government with the officer's defence and the recommendations of the Director-General. When Director- General finds the explanation unsatisfactory he recommends for action. There may be cases where the Central Government directs the Director-General to submit the case. There can be a case where the Central Government finds that the explanation is unsatisfactory. In that case the Central Government may direct the case to be submitted to it. At the first stage the consideration is by the Director- General. When he finds the explanation unsatisfactory, he recommends action by the Central Government. But even if he finds explanation to be satisfactory, yet the Central Government can direct the case to be submitted to it. Recommendations in terms of sub-rule (4) are made by the Director-General and the final order under Rule 20(5) is passed by the Central Government. The expression "as the case may be" is used in sub-rule (2) and sub-rule (5). It obviously means either of the two. It is to be further noted that the order in terms of sub-rule (5) is passed by the Central Government. But the enquiry can be either by the Central Government or the Director-General, as the case may be. There is another way of looking at sub-rule (2). Where report of the officer's misconduct is made by the Director- General, the matter is to be placed before the Central Government and in all other cases the consideration is by the Director-General.

The words "as the case may be" means "whichever the case may be" or "as the situation may be". (See Shri Balaganesan Metals v. M.N. Shanmugham Chetty and Ors. 1987 (2) SCC 707). The expression means that one out of the various alternatives would apply to one out of the various situations and not otherwise.

Therefore, the High Court's conclusions that Central Government is the only authority to consider the matter whether holding of trial is inexpedient or impracticable is clearly indefensible.

Coming to the conclusion whether there was application of mind, the High Court had perused the concerned file and come to the conclusion that there was independent application of mind in passing the order of removal. Though in the appeal filed by the delinquent officer the order of removal is assailed on the ground that only the Desk Officer's opinion was endorsed without application of mind, we do not find the situation to be so. Copies of the entire file were produced before us. It is clearly indicative of the fact that though the Desk Officer's opinion was noted, there was independent application of mind and, therefore, the plea of the delinquent officer that the order suffers from the vice of non-application of mind is clearly untenable. Similarly, we find the plea of mala- fides does not appear to have been pressed before the High Court, and grievance related to other respondents and the personal allegations of mala-fides do not appear to have been urged.

Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar 2003 (4) SCC 579).

As observed by this Court in Gulam Mustafa and Ors. v. The State of Maharashtra and Ors. (1976 (1) SCC 800) mala fide is the last refuge of a losing litigant.

That being so, the delinquent officer's appeal is sans merit.

The inevitable conclusion is that the appeal filed by the Union of India deserves to be allowed. The judgment of the Division Bench taking the view contrary to that of learned Single Judge in its analysis of Rule 20 deserves to be set aside, which we direct. Similarly, the other appeal filed by the delinquent officer lacks merit and is dismissed. In the peculiar circumstances of the case, parties are directed to bear their respective costs.

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