

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

Judgment reserved on : 15th March, 2010
Date of decision: 3rd June, 2010

+ **W.P.(C) No.7875/2007**

Balwinder Singh Petitioner
Through Mr. Amit Kumar, Advocate &
Mr. Jawahar Lal, Advocate

versus

UNION OF INDIA & ORS. Respondents
Through Ms. Barkha Babbar, Advocate with
Mr. Yadhunath Singh, Deputy
Commandant

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. By way of the present writ petition, the petitioner has assailed the findings and sentence dated 14th October, 1997 of the Summary Security Force Court (`SSFC' hereafter) as well as the order dated 26th September, 2007 passed by the Director General of the Border Security Force, respondent no.2 herein, upholding the same.
2. The petitioner was enrolled as a constable with the Border Security Force Court on or about 26th/27th December, 1988. In the year 1996, the petitioner was posted at the Station Headquarters, BSF Siliguri and was attached to the 137th Battalion of the BSF. While so serving with the 137th Battalion, the petitioner was served with a

charge sheet dated 12th April, 1996 issued by the commandant of the battalion under Rule 53(2) of the Border Security Force Act, 1969 (BSF Act, 1969 hereafter) making the following allegations against the petitioner:-

“Charge No.1 BSF ACT SECTION-40

AN ACT PREJUDICIAL TO GOOD ORDERS AND DISCIPLINE OF THE FORCE (At about 1630 hrs on 08.04.1996 at B.S. Bari BOP picked up quarrel with Bus Driver, Conductor and passengers of NBSTC Bus No. WST-2384.)

Charge No.2 BSF ACT SECTION-26

INTOXICATION (At about 1630 hrs. on 08.04.1996 was found in a state of intoxication at BS Bari BOP)”

3. The commandant directed trial of the petitioner on these charges by a Summary Security Force Court (`SSFC' hereafter). The petitioner was found guilty in these proceedings and was dismissed from service by an order passed on 1st June, 1996.

4. The petitioner was thereafter served with a communication dated 27th August, 1996 from the Headquarters, 137th Battalion, BSF informing him that the Inspector General, BSF, North Bengal had set aside the trial proceedings on the ground of illegality. As a result, by an order dated 11th October, 1996, the respondents reinstated the petitioner into service w.e.f. 8th September, 1996 and adjusted him against an existing vacancy of constable in the 34th Battalion BSF. The period of the petitioner's absence w.e.f. 1st June, 1996 to 7th September, 1996 was regularised by granting 99 days earned leave.

5. A fresh offence report was prepared against the petitioner as per Rule 44 of the BSF Rules. The petitioner was allegedly heard by the Commandant of the 34th Battalion on 26th May, 1997 in

compliance with Rule 45 of the BSF Rules. The petitioner was now served with an order dated 26th May, 1997 issued by the officiating commandant of this battalion, informing him that he was charged under Sections 40 & 26 of the BSF Act, 1968 and that Shri P.S. Bhatti would prepare the record of evidence against him in compliance with Rule 48 of the BSF Rules.

6. The record of evidence was prepared by this officer and placed before the commandant of the 34th Battalion. The record of evidence was considered by the commandant and an order dated 2nd October, 1997 was passed by him. It was thereby directed that the petitioner would be tried by an SSFC on 4th October, 1997, tentatively for offences committed on 8th April, 1996 under Sections 40 & 26 of the BSF Act, 1968. The petitioner was directed to intimate the names of persons from whom he wanted one to be appointed as a friend of the accused. Additionally, a copy of the chargesheet and the record of evidence was enclosed.

7. The chargesheet dated 27th September, 1997 would show that it was identical to the charge sheet of 12th April, 1996 served on the petitioner for which the petitioner had been tried earlier. The only difference between the two was in the battalion of the issuing authority.

8. The petitioner was kept in close arrest between 3rd October, 1997 when the SSFC began its proceedings till 17th October, 1997 when the findings of guilt on both the charges against him was returned. On the same date, the petitioner was sentenced to dismissal from service by the SSFC.

9. The petitioner assailed the findings and sentence of the SSFC

by way of writ petition being WP (C) No.130/2002 before the High Court of Punjab & Haryana. The respondents had, inter alia, objected to the maintainability of the writ petition on grounds of territorial jurisdiction. In view thereof, in the hearing on 16th January, 2007, counsel for the petitioner sought leave to withdraw the petition with liberty to file the same before this court. The petitioner was so permitted.

10. In this background, the petitioner earlier approached this court on 24th February, 2007 by way of the WP (C) No.1754/2007. On 1st May, 2007, this writ petition was permitted to be withdrawn giving leave to the petitioner to approach the competent authority by way of a petition under Section 117 of the BSF Act, 1968. The petitioner consequently filed a petition dated 18th July, 2007 before the Director General of the BSF under Section 117 of the BSF Act, 1968. This petition has been rejected by the Director General by an order passed on 26th September, 2007. Aggrieved thereby, the petitioner has assailed the findings and sentence dated 14th October, 1997 of the Summary Security Force Court as well as the order dated 26th September, 2007 by way of the present writ petition.

11. The petitioner, inter alia, challenges not only the said orders but also the very initiation of the proceedings on the ground that the petitioner could not have been prosecuted and punished more than once for the same offence; that the action of the respondents tantamounts to double jeopardy and infringes the protection conferred upon the petitioner under Article 20 (2) of the Constitution of India. In this regard, the petitioner also places reliance on the provisions of Section 75 (1) of the BSF which prohibits a second trial

of the petitioner on same charges.

12. The primary ground of challenge is laid on the submission that the petitioner has been denied a reasonable facility to make his defence by not providing a proper friend of the accused who is statutorily mandated under rule 157 to assist the petitioner in preparing his defence to the charges and allegations levelled against him.

13. The petitioner has also contended that the findings of the SSFC are based on no evidence at all and that there is no material to sustain the charges levelled against the petitioner and the findings of guilt. The petitioner has also made a grievance that he was never medically examined in support of the allegation that he was intoxicated and therefore any oral evidence to this effect has to be summarily rejected.

14. It is vehemently contended that Rule 148 of the BSF Rules mandates that after the evidence for the prosecution and defence has been heard by the Security Force Court, it shall give its opinion as to whether the accused is guilty or not guilty of the charge or charges and consequently the SSFC had to record reasons in support of its findings. In the instant case, the court has recorded no reasons at all in support of the findings of guilt of the petitioner on the first and second charge. In this behalf Mr. Amit Kumar, learned counsel places reliance on the pronouncement of this court in **102 (2003) DLT 415 (DB) Nirmal Lakra & Anr. Vs. Union of India** and the judgment dated 21st November, 2008 passed in LPA No.409/2004 **Raj Kumar Vs. Union of India** (Paras 14 & 15). It is contended that findings and sentence imposed on the petitioner is violative of the specific

provisions in the rules and is legally not sustainable.

15. The further submission is that the appellate authority by furnishing reasons cannot rectify the core defect in the order of the disciplinary authority which has to be tested on reasons which it alone discloses. Any reasons by the appellate authority would be of no consequence. In this regard, reliance has been placed on the authoritative pronouncement of the Apex Court reported at **(1978) 1 SCC 405 Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner New Delhi & Ors.**

16. An additional ground to assail the proceedings of the SSFC urged on behalf of the petitioner is a challenge to the same based on violation of Rule 109 which casts a duty on the court as well as prosecutor to ensure that the rights of the accused are adequately protected. Sub rule (3) of Rule 109 requires that the court shall give reasonable facility to the accused in making his defence which, it is contended, the petitioner has been denied.

17. It has also been objected by the petitioner that Rule 134 of the BSF Rules was also violated for the reason that the evidence was not recorded in a language which the petitioner understood. A grievance is made that the petitioner was a lay person and was illiterate without having any knowledge of the English language who was not given any assistance by the friend appointed by the respondent.

18. Learned counsel for the petitioner has also assailed the findings and sentence of the SSFC on the ground that the same are based on no evidence at all. It is urged that identical statements of official witnesses have been recorded which suggests that they are tutored and that the evidence of only one civilian witness was recorded and

even he contradicted himself in the cross-examination.

19. Ms. Barkha Babbar, learned counsel appearing for the respondents has explained that on the date of the incident on 8th April, 1996 the petitioner was attached with the 137th Battalion BSF for Border Patrol (Motor Cycle-driver). The first record of evidence was prepared against the petitioner as charged under Sections 40 and 26 of the BSF Act, 1968 by orders of the Commandant, 137th Battalion, BSF who also tried the petitioner on 1st June, 1996 as a Summary Security Force Court for committing the said offences and found him guilty and imposed the sentence of dismissal.

20. It has been contended that under Rule 16 of the BSF Rules, 1968, disciplinary powers in respect of a person are vested in the commandant of the battalion where such person is posted. The petitioner had been only attached for certain duties with the 137th Battalion and as such, had been wrongly tried by the commandant of this battalion. The proceedings of the court were consequently found to be suffering from illegality by the DIG BSF, Siliguri, who passed the order dated 11th October, 1996 setting aside the SSFC.

21. In this regard Ms. Barkha Babbar, learned counsel for the respondent contends that the petitioner was not acquitted after a trial by the first Summary Security Force Court or by any criminal court. It is further explained that the petitioner had not been dealt with under Section 53 or Section 55 of the BSF Act but the proceedings against him were merely set aside on technical grounds. The submission is that for this reason, the fresh trial of the petitioner by the commandant of the 34 battalion where he was posted, was legally permissible. Ms. Babbar contends that the plea of the same being

prohibited under Section 75 of the BSF Act, 1968 or being violative of Article 20(2) of the Constitution was misconceived and untenable.

22. Learned counsel for the respondents has submitted that Rule 6 of the Border Security Force Rules provides a residuary power so far as the matters not specifically provided in the rules are concerned. It has been contended that by virtue of rule 6 of the BSF Rules, it is lawful for the competent authority to do such thing or take such action as may be just and proper in the facts and circumstances of the case with regard to any matter not specifically provided for. The submission is, therefore, that the de novo trial to the petitioner was legally permissible.

23. We may at the outset consider the objection to the legality of the de novo trial of the petitioner on the ground that the same was prohibited by virtue of Section 75 of the BSF Act. Section 75 of the BSF Act prohibits a second trial of a person who has been acquitted or convicted of any offence by a security court or by a criminal court or has been dealt with under Section 53 or Section 55 for the same offence by a security force court or dealt with under the said sections. Section 75 reads as follows:-

Section 75 - Prohibition of second trial

(1) When any person subject to this Act has been acquitted or convicted of an offence by a Security Force Court or by a criminal court or has been dealt with under section 53 or under section 55, he shall not be liable to be tried again for the same offence by a Security Force Court or dealt with under the said sections.

(2) When any person, subject to this Act, has been acquitted or convicted of any offence by a Security Force Court or has been dealt with under section 53 or section 55, he shall not be liable to be tried again by a criminal court for the same offence or on

the same facts.

24. Mr. Amit Kumar, learned counsel for the petitioner has placed reliance on the pronouncement of this court reported at **134 (2006) DLT 353 (DB) Banwari Lal Yadav Vs. Union of India & Ors.** in support of this submission.

25. In the instant case, the petitioner was convicted by the first SSFC by an order dated 1st June, 1996 for commission of offences under Sections 26 & 40 and punishment of dismissal from service was imposed on him. Subsequently, by an order dated 27th August, 1996, the petitioner was informed about the orders passed by the Inspector General, BSF, North Bengal setting aside the first trial on ground of illegality and the petitioner was directed to rejoin duties immediately.

26. This court had occasion to deal with a similar issue in the judgment reported at **Banwari Lal Yadav Vs. Union of India & Ors. (supra)** wherein, upon a careful consideration of the statutory provisions as well as several pronouncements of the Supreme Court, it was concluded that a distinction was required to be drawn with regard to the reasons for which the first trial proceedings were marred. On the question which has been raised before this court, the court held as follows:-

“10. The mainstay of the petitioner's case is that the SSFC trial proceedings having been set aside and he having been reinstated in the service, it was not open to the respondents to order a fresh trial against him for the same offence.

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13. In our considered view, there is a clear distinction, albeit a fine one, between cases where a court has no jurisdiction to try the offence, as for example, if the court

is not competent to try the offence for want of sanction for prosecuting the accused or if the composition of the court is not proper as required for that type of court or if the court is illegally constituted of unqualified officers, and cases where the trial ipso facto is unsatisfactory as for example if during the course of the trial, inadmissible evidence is admitted or admissible evidence is shut out or proper procedure is not followed and the trial is consequently marred by grave irregularities which operate to the prejudice of the accused. In the former category of cases the trial would be non est, being null and void from its very inception. In other words, there would be no trial in the eyes of law. In the latter category of cases, however, in our view, it would be deemed that the accused has withstood the trial and as such he cannot be tried again.

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22. The object and intent of Section 75 which has been incorporated in the BSF Act is clearly to prohibit a second trial of the accused, whether by the Security Force Court or by a criminal court, in all cases where the accused has been convicted or acquitted of an offence by a Security Force Court or by a criminal court or has been dealt with under Section 53 or Section 55. Section 75 consequently imposes a bar on second trial where the first trial was by a court of competent jurisdiction, though not where the first trial was void ab initio.

23. We are fortified in coming to above conclusion from Section 161 of the BSF Act which provides as under:

161. Action by the Deputy Inspector General-

(1) Where the Deputy Inspector General to whom the proceedings of a Summary Security Force Court have been forwarded under Rule 160, is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise, he may,

(a) set aside the proceedings of the court; or

(b) reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in Section 48 and return it to the unit of the accused for promulgation.

24. A bare glance at the provisions of the aforesaid section shows that what is envisaged is the setting aside of proceedings by the Deputy Inspector General where grave irregularity has been committed by a Summary Security Force Court, thereby causing injustice to the

accused. The provisions of the said section do not envisage the setting aside of the proceedings in a case where the court had no jurisdiction in the first place to deal with the matter, as for example where the court was illegally constituted or incompetent to deal with the matter on account of want of sanction by the competent authority or otherwise. The trial initiated by such a court against the accused would be non est in the eyes of law, and quite obviously cannot stand in the way of initiation of de-novo trial."

(Emphasis supplied)

27. In the instant case, it has been explained that the proceedings before the initial SSFC were illegal on the ground that they were contrary to the provisions of Rule 16(3) of the BSF Rules. The same was set aside not on any such ground that the trial was unsatisfactorily conducted but for reasons of lack of inherent jurisdiction in the court. In view thereof, the prohibition under Section 75 was clearly neither attracted nor applicable and the objection on behalf of the petitioner to the effect that de novo trial of the petitioner by the SSFC was barred as misconceived and is hereby rejected.

28. So far as his trial by the Summary Security Force Court is concerned, the primary grievance of the petitioner is that Rule 157 of the BSF Rules, 1969 entitled the petitioner to take the assistance of any person including a legal practitioner as he may consider necessary. Instead of permitting the petitioner to take the assistance of a legal practitioner, or any other competent person, the respondents thrust the services of Shri P.S. Bhatti upon the petitioner. The petitioner contends that Shri Bhatti could not have been appointed as the friend of the accused in the SSFC for the reason that he had prepared the record of evidence and nurtured a bias against the petitioner. A challenge has been laid to the proceedings of the SSFC on the ground that the petitioner has thereby been denied a

reasonable opportunity to defend himself and the trial would stand vitiated on this ground alone.

The petitioner has vehemently complained that Rule 157 of the BSF Rules has, therefore, been violated vitiating the proceedings and rendering the orders and sentence of the SSFC and the orders dated 26th September, 2007 of the respondent no.2 illegal.

29. Before examining the challenge to the findings and sentence of the SSFC on the grounds urged, it is essential to examine the nature of the rights of a person as the petitioner who is arraigned before the SSFC.

30. Article 21 of the Constitution of India mandates that no one shall be deprived of his life or liberty except in accordance with the procedure prescribed by law.

The order of dismissal from service impugned by way of the present writ petition impact the petitioner's employment and his source of livelihood. The Supreme Court has held in a catena of cases that the term "life" used under Article 21 of the Constitution of India includes the right to livelihood and so many other facets of life. Reference in this behalf can be made to the pronouncement of the Supreme Court reported at **AIR 1986 SC 180 Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.** The Supreme Court observed as follows:-

"32. xxx An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and

meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.”

31. It is trite therefore that the right to livelihood which is an essential and integral part of the right to life constitutionally guaranteed under Article 21 cannot be taken away other than by a procedure established by law.

32. On the issue as to whether members of the armed forces can absolutely exercise and enforce their fundamental rights against the state, the Constitution Bench of the Supreme Court in **MANU/SC/0047/1963 : AIR 1965 SC 247 : (1964) 5 SCR 931 Ram Sarup vs. UOI & Anr.** held that Article 33 of the Constitution of India expressly empowers the Parliament to determine by law the extent to which any of the rights conferred by Part III of the Constitution, in their application, inter alia, to the members of the armed forces, shall be restricted or abrogated to ensure the proper discharge of their duties and the maintenance of discipline among them. The Parliament can therefore, in exercise of powers conferred by Article 33 of the Constitution of India restrict or abrogate the fundamental rights guaranteed under Part III of the Constitution in their application to the members of the armed forces. Such restriction or abrogation is dependent on specific parliamentary legislation and only law passed by resort to Article 33 can overshadow the rights guaranteed by Articles 21 and 22 of the Constitution of India.

33. Placing reliance on these principles laid down by the Constitution Bench, in the subsequent pronouncement reported at **MANU/SC/0233/1982 : AIR 1982 SC 1413 : (1982) 3 SCC 140 Lt. Col. Prithi Pal Singh Bedi vs. UOI & Ors.**, it was held that every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as having been enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act. The Court rejected the submission that the law which prescribed procedure for trial of offences by Court Martial must satisfy the requirement of Article 21 because the procedure is prescribed by law and if it stands in derogation of Article 21, to that extent Article 21 in its application to the armed forces is modified by enactment of the procedure in the Army Act itself. These principles have been reiterated in **(2003) 9 SCC 630 UOI & Ors. vs. Ex.Flt. Lt. G.S. Bajwa.**

34. So far as the rights of members of security forces as the Border Security Force and the permissibility and scope of challenge to the proceedings of the security force courts by way of proceedings under Article 226 are concerned, the Division Bench of the Guwahati High Court had occasion to consider the same in the pronouncement reported at **MANU/GH/0170/2007 : (2007) 1 GLT 903 Director General, Border Security Force vs. Iboton Singh (KL).** In para 14 & 15, it was held as follows:-

“14. While considering the scope of judicial review by the High Court in matters of the proceedings of a trial by a SFC, what is also pertinent to note is that Article 33 of the Constitution has conferred, on Parliament, the power

to abridge the fundamental rights of not only armed forces, but also of the forces entrusted with the maintenance of public order. This, however, does not mean that merely because of the fact that a person belongs to an armed force or a force entrusted with the maintenance of public order, he is denuded of the constitutional guarantees given to him by Article 21 of the Constitution, which ensures to every person a fair trial in accordance with law. Viewed from this angle, it is clear that when the procedures prescribed are followed as a mere formality by a SFC and not in substance or in its true spirit, the accused may, in an appropriate case, be held to have been denied a fair trial and such a proceeding may warrant interference by the High Court in exercise of its extra-ordinary jurisdiction under Article 226. The procedure prescribed adopted for trial by a SFC has to be tested on the touchstone of Article 21 and if the procedural safeguards given to a person from the Border Security Force, under the BSF Act and/or the BSF Rules, are violated, violation thereof would, in substance, be denial of the right to a fair trial. A person, even when he comes from the BSF, is as much a citizen as any other citizen of India and he is entitled to all such protections as have been given to him by making various laws in conformity with the provisions of Article 21. The Constitution-makers were conscious of the fact that no more restriction should be placed than what are necessary and indispensable for ensuring maintenance of discipline and proper discharge" of duties by the armed forces and the forces entrusted with the maintenance of public order. Hence, when an Indian citizen, being a member of any such forces, is tried under its own established mechanism, such as, SFC, on a charge of having committed the civil offence of 'murder' punishable under Section 302 IPC, it is the duty of the High Court to examine, when such a person approaches the High Court with an application under Article 226, to determine if, while holding the trial, the provisions of the BSF Act and the Rules made thereunder, which provide protection to the accused, have been adhered to or not and whether, for the purpose of reaching its findings, the SFC has kept itself informed of all the relevant provisions of the Evidence Act and the Indian Penal Code.

15. It is for the reasons indicated above that in *Union of India v. LT Ballam Singh* reported in [MANU/SC/0360/2002](#) : 2002(81)ECC236, the Apex Court has pointed out that even an army personnel is entitled to the protection, which the Narcotic Drugs and Psychotropic Substances Act (in short, 'the NDPS Act') gives to any other person. In other words, the protection available, in the form of Sections 42 and 50 of the NDPS

Act, shall be applicable to the case of even an army personnel, for, there is nothing, in the law, that the protection, given in the NDPS Act, are not applicable to the members of the armed forces. Logically, therefore, when the Evidence Act is applicable to the proceedings of a trial by a SFC, it is but natural to interfere, and, in fact, we have no hesitation in holding, that if the provisions of the Evidence Act are ignored or are not taken into account by a SGFC and/or when the provisions of the Indian Penal Code are not properly applied, such noncompliance may, in an appropriate case, compel the writ Court to interfere, in exercise of its powers under Article 266, with the findings, which may have been reached by either ignoring, or in ignorance of, the relevant provisions of law, particularly, when such non-compliance results in gross miscarriage of justice. This apart, and as already indicated above, the procedural safeguards, which the BSF Act and the Rules themselves provide, cannot be ignored, for, ignoring them may amount to, in a given case, denial of a fair procedure to a person accused of having committed offence under the Indian Penal Code.”

35. It is trite that so far as the procedure for disciplinary action, trials and punishment in respect of personnel of the armed forces, para military forces and security forces is concerned, the provisions of the various special statutes enacted for the purpose is fair procedure within the meaning of the expression for the purposes of ensuring the constitutional guarantees. Deprivation of livelihood, an essential concomitant of the right to life by way of any proceedings has to be by a procedure which is fair, just and reasonable. In view of the principles laid down in the aforementioned judicial pronouncements, strict compliance with the statutory prescription, rules and regulations in this behalf as well as with principles of natural justice to the extent stipulated is therefore essential.

36. Even though the legal position of administrative action against a person employed on a civilian post may not bind the present consideration, however, the principles on the importance of due

process, as laid down by the Supreme Court, may be usefully referred to. The domestic disciplinary inquiry is primarily a managerial function. The Apex Court has held that a domestic tribunal holding an inquiry has to abide by rules which apply in this behalf without being unduly influenced by the strict rules of evidence and procedural law. As noticed hereafter, the position under the BSF Act is different.

37. Even in a domestic inquiry, there may be very serious charges and an adverse verdict may result in stigmatizing the delinquent and jeopardizing his future prospects. Certainly, civil and pecuniary consequences may enure and his reputation and livelihood included in his right to life would be at stake. The observations of the Supreme Court in **(1986) 3 SCC 454 Sawai Singh Vs. State of Rajasthan** have a bearing on the present case and may usefully be extracted. The same reads as follows:-

“16. It has been observed by this Court in Suresh Chandra Chakrabarty v. State of West Bengal (1971) ILLJ 293 SC that charges involving consequences of termination of service must be specific, though a departmental enquiry is not like a criminal trial as was noted by this Court in the case of State of Andhra Pradesh v. S. Sree Rama Rao (1964) IILLJ 150 SC and as such there is no such rule that an offence is not established unless it is proved beyond doubt. But a departmental enquiry entailing consequences like loss of job which now-a-days means loss of livelihood, there must be fair play in action, in respect of an order involving adverse or penal consequences against an employee, there must be investigations to the charges consistent with the requirement of the situation in accordance with the principles of natural justice in so far as these are applicable in a particular situation.

17. The application of those principles of natural justice must always be in conformity with the scheme of the Act and the subject matter of the case. It is not possible to lay down any rigid rules as to which principle of natural justice is to be applied. There is no such thing as technical natural justice. The requirements of natural

justice depend upon the facts and circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with and so on. Concept of fair play in action which is the basis of natural justice must depend upon the particular lis between the parties. (See K.L. Tripathi v. [State Bank of India and Ors.](#) : (1984) 111 ILJ 2 SC) Rules and practices are constantly developing to ensure fairness in the making of decisions which affect people in their daily lives and livelihood. Without such fairness democratic governments cannot exist. Beyond all rules and procedures that is the sine qua non."

(Underlining supplied)

38. It is noteworthy that just as disciplinary enquiries, the security force courts are presided over by the establishment personnel only. The material placed before both is produced departmentally.

39. In this behalf, it would be useful to consider the statutory position with regard to persons subjected to the Border Security Force. Section 70 of the Border Security Force Act, 1968 (BSF Act hereafter) provides the constitution of a Summary Security Force Court ('SSFC' hereafter). It is permitted under Section 74 to try any offence punishable under the Act subject to certain stipulated exceptions. Sub-section 4 of Section 74 empowers the SSFC to pass any sentence which may be passed under the Act except the sentence of death or of imprisonment for a term exceeding the limit specified in sub-section 5. Sub section 5 of Section 74 limits the power of the SSFC so far as the period of the sentence of imprisonment which may be imposed upto a period of one year if the officer holding the SSFC has held the post of superintendent of police or a post declared by the Central Government by notification to be equivalent thereto of not less than three years or holds a post of a higher rank, or either of the said post. In any case, the sub section restricts the power of Summary Security Force Court to impose

punishment to the extent of three years.

40. So far as the scale of punishments which are awardable by a Security Force Court is concerned, the same are prescribed under Section 48 of the BSF Act, 1968 which reads as follows:-

- 48.(1) Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say:-
- (a) death;
 - (b) Imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody,
 - (c) dismissal from the service;
 - (d) imprisonment for a term not exceeding three months in Force custody;
 - (e) reduction to the ranks or to a lower rank or grade or place in this list of their rank in the case of an under-officer;
 - (f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;
 - (g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;
 - (h) fine, in respect of civil offences;
 - (i) severe reprimand or reprimand except in the case of persons below the rank of an underofficer;
 - (j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;
 - (k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;
- Punishments awardable by S e c u r i t y Force Courts BSF ACT 27
- (l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good.
- (2) Each of the punishments specified in sub-section (1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale."

41. The above gradation makes it apparent that the dismissal from service is considered less severe than imprisonment for a term

exceeding three months. It is also evident that the security force courts wield tremendous power so far as persons governed by the BSF Act are concerned.

42. Though the disciplinary enquiries do not culminate in imposition of severest sentences of death or imprisonment, the security force court is statutorily empowered under section 48 of the BSF Act to award such punishments. Certainly, extremely valuable rights of the charged person may be impacted by the punishments which are imposed which may range from the severe penalty of dismissal to forfeiture of pay under the applicable rules. As a result of the penalty, thus a charged person may lose his only means of income. As noticed above, the right to livelihood is an essential part of the right to life. Thus, procedural fairness in matters that may result in loss of means of livelihood becomes essential.

43. The instant case relates to trial for commission of offences under Section 26 & 40 of the BSF Act, 1968 and trial by Summary Security Force Court ('SSFC'). The commission of an offence under Section 26 of the BSF Act, 1968 is punishable by imprisonment extending upto six months or such lesser punishment as is prescribed under the Act. Section 48(c) and thereafter of the statute prescribe dismissal, punishment of reduction of rank and the other punishments set out hereinabove.

For commission of the offence under Section 40, the statute prescribes imprisonment for a term which may extend to seven years or such less punishment as mentioned in the Act.

44. It is noteworthy that Section 70 of the BSF Act provides that the commandant of any unit shall hold the SSFC.

45. An SSFC is statutorily provided and the procedure which is to be followed by it is statutorily prescribed under Rules 133 to 161 of Chapter XI of the BSF Rules, 1969. Essential procedural safeguards have been statutorily provided so as to ensure fairness of the procedure which is adopted and obviate arbitrariness in the proceedings.

46. The statutory scheme clearly sets out the legislative intent so far as the defence of a personnel covered under the Border Security Force Act is concerned. To facilitate defence of the accused before the courts, the statute provides for a defending officer, friend of accused and counsel at different places. Apart from a trial by the SSFC, Section 64 of the BSF Act provides for General Security Force Courts and Petty Security Force Courts as well which are constituted under sections 65 and 66 of the Act. In view of the issues relating to adequate opportunity to defend the charges raised before this court, reference requires to be made to Rule 122 and 123 which applies to the General or Petty Security Force Courts and reads as follows:-

“122. Defending Officer, Friend of Accused

and Counsel:- (1) At any General or Petty Security Force Court an accused person may be represented by a counsel or by any officer subject to the Act who shall be called “the defending officer” or assisted by any person whose services he may be able to procure and who shall be called “the friend of the accused”.

(2) The defending officer shall have the same rights and duties as appertain to a counsel under these rules and shall be under the like obligations. (R.63).

(3) The friend of the accused may advise the accused on all points and suggest the questions to be put to the witnesses, but he shall not examine or cross-examine the witnesses or address the Court.

123. Requirement for Appearance of Counsel

– (1) An accused person intending to be represented by a counsel shall give to his

Commandant or to the convening officer the earliest practicable notice of such intention, and, if no sufficient notice has been given, the Court may, if it thinks fit, on the application of the prosecutor, adjourn to enable him to obtain a counsel on behalf of the prosecutor at the trial.

(2) Where the convening officer so directs, counsel may appear alongwith the prosecutor, but in that case, unless the notice referred to in sub-rule (1) has been given by the accused, notice of the direction for counsel to appear shall be given to the accused at such time (not in any case less than seven days) before the trial as would, in the opinion of the Court, has enabled the accused to obtain counsel to assist him at the trial.

(3) The counsel, who appears before a Court of behalf of the prosecutor or accused, shall have the same rights as the prosecutor or accused for whom he appears to call, and orally examine, cross-examine, and re-examine witnesses, to put in any plea, and to inspect the proceedings and shall have the right other wise to act in the course of the trial in place of the person on whose behalf he appears, and he shall comply with these rules himself to do any of the aforesaid matters except as regards the statement allowed by sub-rule (3) of rule 93 and sub-rule (4) of rule 101 or except so far as the Court permits him so to do.

(4) When counsel appears on behalf of the prosecutor, the prosecutor if called as witness, may be examined and re-examined as any other witness."

47. It is apparent from the above that in these proceedings, an accused person has a right to be represented by a counsel or any officer of the BSF who shall be called the "defending officer". In the alternative the accused person may be assisted by any person whose services he may be able to procure who shall be called the "friend of the accused". The manner in which a counsel is to be requested for and appointed is stipulated under rule 123. Sub rule 3 of rule 123 provides that such counsel would have the same rights as the prosecutor or accused for whom he appears to call, and orally examine, cross-examine and re-examine witnesses etc.

Rule 122 (2) confers the same rights on the defending officer.

48. It is noteworthy that so far as the “friend of accused” is concerned, he has no right of audience and under sub rule 3 of rule 122 is only authorised to advise the accused on all points and suggest the questions to be put to the witnesses, but shall not examine or cross-examine the witnesses or address the court.

49. So far as trial of a person by the SSFC is concerned, rule 157 of the BSF Rules, 1969 provides as follows:-

“157. Friend of the accused.- During a trial at a Summary Security Force Court an accused may take the assistance of any person, including a legal practitioner as he may consider necessary. Provided that such person shall not examine or cross-examine witnesses or address the Court.”
(Emphasis furnished)

50. Rule 157 therefore permits an accused person who is arraigned to stand trial before the summary security force court, to take the assistance of any person during the trial who does not have right of audience before the court. The rule specifically enables the accused person to take the assistance of a legal practitioner during the SSFC. Such person is not permitted right to examine or cross-examine witnesses or address the court. Unlike rule 122(1), rule 157 does not specifically state that such person would be called friend of the accused. However, the very rule 157 is captioned as “Friend of the accused” and the powers conferred under this rule are identical to those of the friend of the accused under Rule 122.

51. Several protections of the rights of a charged person have been laid down by the Supreme Court in **AIR 1983 SC 109 Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghuvendra**

Nadkarni & Ors. wherein the procedure to be followed by the authorities conducting a disciplinary enquiry have been underlined. As noticed above, the principles laid down by the court with regard to an adequate opportunity to defend the charges in a domestic inquiry laid down by the Supreme Court do not strictly apply to a person arraigned to stand trial before a security force court. But the importance given by the courts to ensure due process, especially representation by legal counsel, even in such disciplinary proceedings cannot be sufficiently emphasised. In para 10 of the judgment, the court held as follows:-

“10. Even in a domestic enquiry there can be very serious charges and adverse verdict may completely destroy the future of the delinquent employee. The adverse verdict may so stigmatize him that his future would be bleak and his reputation and livelihood would be at stake. Such an enquiry is generally treated as a managerial function and the Enquiry Officer is more often a man of the establishment. Ordinarily he combines the role of a Presenting-cum-Prosecuting Officer and an Enquiry Officer a Judge and a prosecutor rolled into one. In the past it could be said that there was an informal atmosphere before such a domestic tribunal and that strict rules of evidence and pitfalls of procedural law did not hamstring the enquiry by such a domestic tribunal. We have moved far away from this stage. The situation is where the employer has on his payrolls labour officers, legal advisers lawyers in the garb of employees and they are appointed Presenting-cum-Prosecuting Officers and the delinquent employee pitted against such legally trained personnel has to defend himself. Now if the rules prescribed for such an enquiry did not place an embargo on the right to the delinquent employee to be represented by a legal practitioner, the matter would be in the discretion of the Enquiry Officer whether looking to the nature of charges, the type of evidence and complex or simple issues that may arise in the course of enquiry, the delinquent employee in order to afford a reasonable opportunity to defend himself should be permitted to appear through a legal practitioner. Why do we say so? Let us recall the nature of enquiry, who held it, where it is held and what is the atmosphere?

Domestic enquiry is claimed to be a managerial function. A man of the establishment dons the robe of a Judge. It is held in the establishment office or a part of it. Can it even be compared to the adjudication by an impartial arbitrator or a court presided over by an unbiased judge. The enquiry officer combines the judge and prosecutor rolled into one. Witnesses are generally employees of the employer who directs an enquiry into misconduct. This is sufficient to raise serious apprehensions. Add to this uneven scales, the weight of legally trained minds on behalf of employer simultaneously denying that opportunity to delinquent employee. The weighted scales and tilted balance can only be partly restored if the delinquent is given the same legal assistance as the employer enjoys. Justice must not only be done but must seem to be done is not an euphemism for courts alone, it applies with equal vigour and rigour to all those who must be responsible for fair play in action. And a quasi-judicial tribunal cannot view the matter with equanimity on inequality of representation. This Court in *M. H. Hoscot v. State of Maharashtra* : 1978CriLJ1678 clearly ruled that in criminal trial where prosecution is in the hands of public prosecutor, accused, for adequate representation, must have legal aid at State cost. This will apply mutatis mutandis to the present situation."

The proceedings before the Security Force Court deserve to be treated even more seriously in as much as the person concerned may not only lose his source of livelihood, but he may be deprived of his personal liberty and sentenced to imprisonment. Therefore, the respondents must strictly abide by the statutory safeguards while conducting the proceedings of the security force courts.

52. The issue which would require to be addressed is as to what is the nature of assistance which the friend appointed under Rule 157 is to render to the accused person who is standing trial before the SSFC. The expression assistance is not statutorily defined.

53. It is noteworthy that Section 8(e) of the Conservation of Foreign Exchange & Prevention of Smuggling Act, 1974 prohibits entitlement of a detainee to a legal practitioner from appearance

before the advisory board. However, keeping in view the fact that the detention of a citizen under the enactment is a serious and severe invasion of his fundamental rights guaranteed under Article 19 and 21 of the Constitution, the Supreme Court has read into Section 8(e) of the COFEPOSA Act, 1974, an entitlement of a detainee to make a request for legal assistance to the advisory board which is bound to consider such a request as and when made. The Supreme Court has considered that in order to ensure that the power of preventive detention is not used indiscriminately to settle scores or to short-circuit the process of investigation and trial of an alleged reference. **(Ref: AIR 2008 SC 2528 State of Maharashtra vs. Zubir Haji Qasim).**

The propriety of legal assistance for the detainee, its nature and sufficiency despite the statutory provision has thus been read into proceedings before the advisory board and the right of the detainee to make a request to it for the same has been provided as a safeguard to ensure that his rights are protected. The consideration of this issue in several judicial precedents would shed valuable light on the interpretation of the expression 'friend of the accused' in respect of a person who has been arraigned to stand trial before the SSFC.

54. On this issue in para 94 of the landmark judgment of the Supreme Court reported at **(1982) 1 SCC 271 A.K. Roy Vs. Union of India & Ors.**, in the context of detention under the Maintenance of Internal Security Act, 1971 and the National Security Act, the court held as follows:-

“94. Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as

to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. He may be "tonguetied, nervous, confused or wanting in intelligence", (see *Pelt v. Greyhound Racing Association Ltd.*) [1969] 1 Q.B. 125, and if justice to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. Just as a person who is dumb is entitled, as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice per se, and therefore, if a statute excludes that facility expressly, it would not be open to the tribunal to allow it. Fairness, as said by Lord Denning M.R., in *Maynard v. Osmond* [1977] 1 Q.B. 240, 253 can be obtained without legal representation. But, it is not fair, and the statute does not exclude that right, that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility."

(Underlining supplied)

55. Placing reliance on the above pronouncement, so far as the meaning of the expression 'friend of accused' is concerned, in the pronouncement of the Apex Court reported at **(1988) 1 SCC 116 *Jhoney D'Couto Vs. State of Tamil Nadu***, the court ruled on the nature of the assistance rendered by such friend in the following terms:-

"6. The rule in *A.K. Roy's case* (supra) made it clear that the detenu was entitled to the assistance of a 'friend'. The word 'friend' used there was obviously not intended to carry the meaning of the term in common parlance. One of the meanings of the word 'friend' according to the Collins English Dictionary is "an ally in a fight or cause; supporter".

The term 'friend' used in the judgments of this Court was more in this sense than meaning a person known well to another and regarded with liking, affection and loyalty. A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in this view of the matter, was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the appellant was not justified. It is not for this Court to examine and assess what prejudice has been caused to the appellant on account of such denial. This Court has reiterated the position that matters relating to preventive detention are strict proceedings and warrant full compliance with the requirements of law."

56. Adequacy of the procedure which meets the tests of Article 21 & 33 mandates that no one shall be deprived of his life and liberty except of the procedure prescribed by law. The provisions for appointment of a competent defence officer and friend of accused have been incorporated in the statute to ensure such fairness. Fair play in action would be essential and the accused person before the SSFC would be entitled to a reasonable opportunity to defend himself.

57. In view of the mandate of Rule 157, such charged person is entitled to have the assistance of even a legal practitioner. It is obvious that such legally trained mind would provide valuable inputs and advice to the person standing trial to not only with regard to the applicable legal position but also analysis of the factual matrix and assimilation of the available evidence. He would guide the direction, manner and extent of the cross-examination and could ensure that the accused person is able to see that his defence is not

compromised in any manner.

58. Investigation into an offence and summary dismissal of the case has been provided under Chapter VII of the BSF Rules. Rule 43 requires that where it is alleged that a person subject to the Act has committed an offence punishable thereunder, the allegation shall be reduced to writing in the prescribed form. Thereafter, under sub-rule 1 of rule 45, if the person charged is an enrolled person, the company Commandant is required to give the person concerned an opportunity of hearing. In these proceedings, the charge and the statement of witnesses is read over to the accused. If written statements are not available, the Commandant shall hear as many witnesses as he may consider essential to enable him to determine the issue. The accused person is required to be given an opportunity to cross-examine the witnesses and to make a statement. Under sub-rule 2 of rule 45, after hearing the charges, the Commandant may award such punishment to the accused which he is empowered to award; or dismiss the charge; or remand the accused, for preparing a record of evidence or for preparation of an record of evidence against him or remand him for trial by a SSFC.

59. Rule 48 prescribes the manner in which the record of evidence is to be prepared by a commandant or an officer detailed by him to do so. Such delegatee is also a member of the force or establishment. It is natural human conduct that a commandant who is delegating his power of recording of the evidence would normally do so to a like minded person.

60. Sub-rule (2) of Rule 48 prescribes that the statement of witnesses would be recorded in the presence of the accused who

shall have the right to cross examine all those witnesses who give evidence against him. Under sub-rule (3), after examination of all the witnesses, the accused person is liable to be cautioned and thereafter his statement is required to be taken down in writing. So far as the caution which is required to be given to the accused person, the same is prescribed under sub-rule (3) whereby the officer recording the evidence is required to inform the accused of the options available to him as to whether to make a statement or not. The accused is required to be informed that such statement as made by him, would be taken in writing and may be used as evidence against him. Only thereafter statement if any, made by him is to be taken down in writing.

61. The above narration would show that substantial statutory power and discretion is conferred on the officer recording the evidence which would enable him to give a particular slant to the evidence and the statements which he was recording or abstracting. There is sufficient opportunity also to influence and impact the statement and conduct of an accused person on the part of officer so detailed in view of the explanations and cautions he has to administer to him.

62. Once completed, the record of evidence is required to be placed before the Commandant. Under Rule 51, upon going through the record of evidence, the Commandant is empowered to inter alia dismiss the charges; or rehear the charge and award one of the summary punishments; or try the accused by a Summary Security Force Court; or apply to a competent officer or authority to convene a court for the trial of the accused. As per the statutory scheme,

substantial discretion is conferred on the Commandant under Section 70 even to take a final decision based on such record of evidence. The record of evidence, preparation whereof may be directed, is therefore of tremendous importance.

63. So far as the trial is concerned, the commandant of any unit alone is empowered to conduct the Summary Security Force Court ('SSFC' hereafter) under Section 70 of the Act.

64. It is important to note that the officer recording the record of evidence was not the authority who was to adjudicate upon the innocence or guilt of the petitioner with regard to the offence with which he was charged. However, it would still be wrong to undermine the significance and the role of the officer recording the evidence, merely because the role of preparing record of evidence is not on the same platform as that of a decision making authority. The nature of task entrusted upon such officer and its relevance in the decision making process in any disciplinary proceedings cannot be overlooked.

Therefore, even though the officer who prepares the record of evidence is not an adjudicator or the judge in the matter, however, he occupies a valuable position, as his manner of preparing the record of evidence, and noticing the statements and observations are significant enough to be able to influence the result of the consideration by the commandant merely by the manner in which he records the record of evidence and his approach in recording the same.

65. In the instant case, the commandant exercised jurisdiction under Rule 48 and detailed Shri P.S. Bhatti; for preparation of record of evidence.

66. The trial of the petitioner by the SSFC was clearly based on the record of evidence which was prepared by Shri P.S. Bhatti.

67. As already noticed above, right to livelihood is an essential part of the Article 21 of the Constitution of India. The importance of the permissible assistance to an accused person before the security force court is underlined by the statutory prescriptions. Failure to grant such opportunity would result in essentials of not only the principles of natural justice being violated but under the given statutory provisions, is a breach of the requirement of Rule 157. It tantamounts to denial of a fair opportunity of representation in the trial leading to procedural unfairness.

68. On behalf of the petitioner, it has been urged that a person detailed to prepare the record evidence would have a vested interest in securing the conviction of the petitioner. Even though we may not agree with this extreme position, inasmuch as, unless otherwise shown, a degree of impartiality and fairness of intent on the part of a person who is statutorily assigned these duties, is an essential concomitant of exercise statutory power and duties and, unless the contrary is shown. However, certainly it would be stretching this proposition to the extreme if a person who has been assigned the task of recording of evidence is appointed as a friend of the very accused person against whom he has gathered material.

69. So far as the nomination of Shri Bhatti as friend of the accused is concerned, the respondents have set up a plea that during the trial, the petitioner had stated in writing that he does not require any friend for his trial and submitted that reference in this regard can be made to a communication dated 3rd October, 1997 of the petitioner.

70. No such communication or any other material has been placed before us to substantiate the respondents plea that the petitioner refused the assistance of a friend of accused. The legislature has incorporated the provisions of friend of accused so as to ensure that the accused person is not denied a reasonable opportunity to defend himself. Even assuming that the petitioner had refused the assistance of a friend of accused, he was incarcerated and in the custody of the respondents. Fair play in action demanded that the respondents suo motu ensured that proper and adequate assistance is available to the petitioner to meet the requirement of law as well as the compliance of principles of natural justice.

71. The persons of armed forces cannot be denied of the rights provided for in the Indian Constitution. The Supreme Court has once again upheld the same in **2007 (7) SCALE 53 Sheel Kr. Roy Vs. Secretary M/o Defence & Ors.** and stated thus:-

21 It is now a well settled legal principle which has firmly been accepted throughout the world that a person merely by joining Armed Forces does not cease to be a citizen or be deprived of his human or constitutional right. This aspect of the matter has been considered by a Division Bench of the Delhi High Court in **Nirmal Lakra Vs. Union of India & Ors.** reported in **2003 (1) SLJ 151.**

It is often argued that disciplinary proceedings being quasi judicial in nature attract the principles of natural justice as the order in the proceeding involves civil consequences. The Apex Court in a catena of judgments has held that the deprivation of livelihood by an order of dismissal has to be just, fair and reasonable. As such the requirements of natural justice cannot be denied to any one. Thus, the appointment and actual assistance of a defending officer or a

friend becomes inevitable.

72. The observations of the Apex Court on the issue as to whether the fundamental right to legal aid could be denied to an appellant merely because he did not apply for legal aid, throw valuable light on the issue as to whether the alleged refusal of the petitioner to appointment of a defence assistance could justify the conduct of the respondent in thrusting Sh. Bhatti as the friend of the accused on the petitioner. In its judgment reported at **AIR 1986 SC 991 Suk Das vs. Union Territory of Arunachal Pradesh**, so far as awareness of rights of the persons are concerned, the Apex Court observed as follows :-

“6. But the question is whether this fundamental right could lawfully be denied to the appellant if he did not apply for free legal aid. Is the exercise of this fundamental right conditioned upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now it is common knowledge that about 70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor finds themselves can be alleviating to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of

the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose.”

73. It is settled that the right to legal aid and speedy trial are part of the guarantee of human rights envisaged by Article 21 of the Constitution of India (Ref.: **AIR 1991 SC 1 State of Maharashtra Vs. M.P. Vaish; MANU/SC/0119/1978 : 1978 Crl. L. J. 1678 M.H. Hoskot Vs. State of Maharashtra; 1991 Crl.L. J. 2717 A.R. Antulay Vs. R.S. Nayak & Anr.**)

74. In view of the restricted right of members of the armed forces and paramilitary forces and abrogation of an absolute right to legal assistance which stands limited by statutory provisions especially during the trials by court martials and security force courts, the rights of a person arraigned before a special court as a court martial or the security force courts, which are similar, assumes special importance.

75. The legislative intent is apparent. It recognises the rights of the accused to contest the charges for which he is tried and to take the assistance of any person including a legal practitioner, who he may consider necessary.

76. Our attention has been drawn by Mr. Amit Kumar, learned counsel for the petitioner to the pronouncement of this court reported at **MANU/DE/1209/2002 Mahavir Singh Vs. UOI** wherein on ground of failure to give opportunity to defend himself before the SSFC under the Border Security Force Act, 1968, the order of termination of services of the petitioner was set aside. In this case,

the court held that the trial of the Summary Security Force Court is not merely an empty formality to accomplish and that fairness and impartialities are absolutely imperative for any trial. In this case, the friend of the accused of the petitioner was appointed on the very day when the trial started and concluded. In these circumstances, the order of termination was set aside and the petitioner directed to be reinstated with all consequential benefits.

77. In the pronouncement of this court reported at **MANU/DE/0324/1998 Ex. Constable Mohinder Singh Vs. UOI & Ors.** also, similar allegations as in the present case against the friend of the accused were made. It was stated that the services of the person sought to be appointed as friend of the accused were not provided and the person appointed did not render any assistance to the petitioner. It was held that the respondents had made mockery of the system.

78. Section 8 of the Border Security Force Act makes the provisions of the Indian Evidence Act applicable to all proceedings before a Summary Security Force Court.

79. The petitioner was placed in close arrest on 3rd October, 1997. It is noteworthy that the petitioner before this court was only a constable-driver and certainly could not be expected to be knowledgeable about disciplinary proceedings, his legal rights or the technical rules of evidence. The respondents have also not indicated that the petitioner knew the English language or was in any manner familiar or conversant with it. There is not even a suggestion that the petitioner was aware of his rights under the Constitution or understood the statutory provisions.

80. The trial was conducted at the 34th battalion BSF and related to an occurrence which allegedly took place at Changrabhanda near the border outpost. The trial was admittedly held at the aforesaid formation where he was posted, which obviously, would be at or near a border position. The petitioner therefore had no access to family or friends or legal advice to give him in the matter.

81. The respondents have alleged that the petitioner refused to be assisted by a friend. Even assuming that the petitioner had given any such writing, in the absence of any material from the side of the respondents to the effect that the petitioner had been made aware of his rights, such writing would be of no consequence.

82. In any case, the respondents did not accept or act upon the petitioner's alleged refusal to be assisted by a friend of the accused for the reason that it is respondents own case that a friend of the accused was appointed by them in purported compliance with the legal requirement. It is noteworthy that appointment of an unfit person would not only deprive an accused person of meaningful assistance but such person would also be aware of the defence of the accused person and consequently would be in a position to actively jeopardize or prejudice the defence of an accused person.

83. When the statute does not provide for legal representation or any form of assistance by a friend, the discretion lies with the adjudicating authority. The factors that must be taken into consideration in deciding the same are as follows: seriousness of the charge or penalty; whether any points of law are likely to arise; the capacity of a person to represent their own case; procedural difficulties; need for speedy decision making and the need for fairness

between the individual and the officers concerned. When the charge is of a serious and complex nature, the request of the delinquent to be represented through counsel or agent could be conceded. (**Ref.: (MANU/SC/0469/1993 : (1993) 2 SCC 115 Crescent Dyes & Chemicals Ltd. Vs. Ram Naresh Tripathi)**)

84. Rule 157 has permitted engagement of a legal practitioner as a friend of the accused. The obvious legislative intent was to ensure that the rights of an accused person may be under adjudication by a summary method and hence has permitted even engagement of a legal practitioner to assist the accused persons. In this background, assistance has to be real and meaningful. The respondents cannot get away with merely appointing just any person for this purpose.

85. Even though Rule 157 of the BSF Rules prohibits the friend of accused from examining or cross-examining witnesses or addressing the court, however, his mandate is to assist the accused person.

86. It is the necessity of even-handedness that the assistance be effective. The effective assistance by a defending officer or a friend of the accused cannot be denied to the accused in a disciplinary proceeding. The Apex Court in **(2008) 4 SCC 1 Union of India & Ors. Vs. Naman Singh Sekhawat** recognizing the need for effective assistance held thus:-

“19. In the departmental proceedings the appellant was bound to comply with the principles of natural justice. Copies of some documents were not supplied. Services of a legal practitioner, may not be a matter of right, but he was atleast entitled to the effective assistance of the departmental representative, Shri Madhukar Sharma. The same was also for all intent and purport denied.”

The assistance which is to be afforded to an accused person is

not only required to be adequate but it has to be meaningful. A person who is so appointed has to be fit to render legally permissible assistance to the accused so as to render his defense of the charges meaningful and fair. An opportunity to defend cannot be defeated by not providing as a friend of the accused, such a person who is capable of giving fair, proper and effective assistance to the accused person. The very fact that an accused person is permitted to seek assistance of even a legal practitioner would show that the assistance which is to be given to the accused person in conducting his defence is of a competent person.

87. There is nothing on record to show that the petitioner was given an opportunity to exercise this legal right which manifests the statutory implementation of the constitutional mandate of ensuring a fair opportunity to defend himself of the serious charges. This aspect of procedural fairness would impact adequacy of the opportunity to defend himself.

88. There is also substance in the petitioner's contention that there was systemic bias resulting to the appointment of Shri P.S. Bhatti as a friend of the accused. The respondents do not point out the nature of assistance given by Shri P.S. Bhatti to the petitioner in the conduct of his defence or that he was capable of giving fair, proper and effective assistance to the accused person.

89. We therefore find substance in the petitioner's contention that he has been denied a fair opportunity of defending himself on account of denial of a competent defending officer.

90. Shri Sanjay Singh, Commandant of the unit who directed the petitioner's trial was the presiding officer of the SSFC who also acted

as the interpreter for the proceedings as well as the judge who was adjudicating on the charges.

91. The petitioner had been tried, convicted and sentenced during the first trial. He was re-arraigned to be tried for a second time on the same charges.

92. Noteworthy are the provisions of Rule 137 which mandate that when evidence is given in a language which the court or accused does not understand, the evidence has to be translated to the court or accused as the case may be, in the manner in which it or he understands. The court is required to appoint an interpreter or itself take oath or affirmation prescribed to interpret at the proceedings of a Summary Security Force Court in order to ensure appropriate and adequate assistance for the conduct of the defence by an accused. The petitioner has stated that he only knows hindi or gurmukhi.

93. The record placed shows that other than the certification in a typed format by the respondents of the compliance of the mandatory statutory provisions, there is nothing to indicate that the petitioner was properly guided or made aware of his rights during the trial or that he understood the nature of the proceedings against him.

94. In the above background, compliance with the statutory mandate has to be real. No cosmetic satisfaction or compliance could meet the requirements of law and a bald certification by the respondents that statutory provisions have been complied in the given facts and circumstances with certainly does not satisfy the legal requirements.

95. The Division Bench of the Gauhati High Court in ***Director General, Border Security Force & Ors. Vs. Iboton Singh (Kh)***

(supra) considered the scope of judicial review of the findings of the Summary Security Force and had held as follows:-

“10. While considering the scope of judicial review of the findings of a SFC, it also needs to be borne in mind that a SFC is not subject to power of superintendence of the High Court under Article 227 of the Constitution of India. Though the proceedings of the SFC fall outside the purview of Article 227, these proceedings are nonetheless subject to the, overall, power of judicial review by the High Court under Article 226 of the Constitution. If a SFC has been properly convened, there is no challenge to its constitution and if the procedure, which it followed, was in accordance with the procedure prescribed by the BSF Act and the BSF Rules, the High Court would not interfere with the findings of such a Court unless the findings reached by it are perverse, that is, when the finding reached is wholly without any supporting evidence or wholly against the evidence. The proceedings of a SFC are not to be compared with the proceedings of a trial, in the ordinary criminal courts, under the Code of Criminal Procedure. A SFC remains, to a great degree, an integral and specialized part of the overall mechanism by which discipline is maintained in a 'force ', such as, BSF. It is for the special needs of such a 'force' that instead of ordinary criminal court, the offenders are tried by SFC even when the offence is punishable by Indian Penal Code. At the same time, what cannot be ignored is that a SFC functions as a Court to which the provisions of the Evidence Act are applicable. The concept of relevance of admissibility of evidence, the burden of proof, and the standard of proof, as envisaged in the Evidence Act, are applicable, without exception, to the trial of an accused by SFC. Viewed thus, it is clear that a SFC has the same responsibility, as any other criminal court, to protect the rights of an accused arraigned before it and, therefore, follow the procedural safeguards given to an accused in order to ensure that he has a fair trial.”

96. It was also held in this case **(Director General, Border Security Force vs. Iboton Singh (KL) (supra))** that normally an accused person being tried has to be informed of the offence for which he is charged with and it is to be ensured that he clearly understands the nature of the offence for which he is being tried; the case against him be fully and fairly explained to him and the accused

be afforded effective opportunity to defend himself providing for substantial compliance with the outward fairness of the law. Mere mistake in procedure and mere consequential arrears of omissions in the trial are recorded as penal by the code and the trial is not vitiated unless the accused can show substantial prejudice caused to him. Amongst the procedural laws on this subject, disregard of several provisions is considered vital.

97. It should be ascertained from the accused person whether he was aware of the basic ingredients of the offences for which he has been convicted or is being convicted and whether the main facts sought to be established against him were explained clearly and whether he got a chance to defend himself.

98. A solemn duty is cast on the Summary Security Force Court to ensure that the valuable rights of an accused person who is charged with an offence which may result in serious consequences are adequately protected.

99. In the statutory petition dated 26th September, 2007 filed by him, the petitioner has taken a plea that he was not given any reasonable opportunity to defend himself and that he was not provided with any legal assistance; that the petitioner was not provided with a friend of accused as stipulated under Rule 157 of the BSF Rules. It has further been contended that Shri P.S. Bhatti who was appointed the friend of the accused failed to explain as to what is in the interest of the petitioner during the trial.

100. It, therefore, has to be held that the petitioner has been deprived of a fair opportunity of defending himself and that the trial of the petitioner has been conducted in violation of the mandate of

Rule 157 and the aforementioned provisions of the BSF Rules, 1957. As a result, valuable rights of the petitioner under Article 21 of the Constitution of India have been infringed which is wholly impermissible. In this background, the judgment and sentence dated 14th October, 1997 of the Summary Security Force Court finding the petitioner guilty of charges and sentencing the petitioner to dismissal from service are unsustainable and are hereby set aside and quashed. The order dated 26th September, 2007 passed by the Director General of the BSF rejecting the statutory petition dated 18th July, 2007 submitted by the petitioner is therefore also contrary to law and is hereby set aside and quashed.

101. Having regard to the view we have taken on this basic ground of challenge and held that proceedings conducted by the Security Force Court, its findings and sentence as well as the impugned order of the appellate authorities are vitiated, it is unnecessary to deal with other objections of the petitioner based whereon the respondent's actions have been challenged. For this reason, we are not dealing with the same by way of the present judgment and all such issues and questions raised by the petitioner are left open for consideration in any other case.

102. As a result of the above, the question which remains to be decided is the consequential reliefs which the petitioner would be entitled upon the conviction of the petitioner and the sentence of dismissal from service having been set aside. We, therefore, direct that the petitioner would be entitled to reinstatement with continuity in service; benefit of seniority and notional promotion(s) on the date his batch mates were promoted.

103. The entitlement of the petitioner to get reinstated on account of setting aside of an order of termination of service, does not necessarily result in payment of back wages. The power of the court is discretionary which has to be exercised by a court or tribunal on the issue of backwages keeping in view the facts in their entirety and all relevant circumstances independent of the order of reinstatement into service. The Supreme Court has held that this question would be independent of the order of reinstatement. (Ref: **MANU/SC/8107/2006 : AIR 2006 SC 2466 : (2006) 4 SCC 733 UPSRTC Ltd. vs. Sarada Prasad Misra & Anr.**)

104. It has been further held that no rigid or mechanical or strait-jacket formula for award of back wages can be followed and the same depends on the facts and circumstances of each case. It cannot be laid down as to an absolute principle as to whether payment of full back wages should be allowed or not. (See para 17 of **(2006) 4 SCC 733 UPSRTC Ltd. vs. Sarada Prasad Misra & Anr.**)

105. We had occasion to consider and cull out some factors which have to be evaluated by the courts in grant of appropriate back wages in a decision rendered on 31st May, 2010 in WP (C) No.236/2000 entitled **Ex. L/NK Vimal Kumar Singh Vs. Union of India & Ors.** which reads as follows:-

- (i) the nature of employment and regular service of permanent character would not be comparable to a short or intermittent daily wage employment though it may be for 240 days in a calender year (Ref : **MANU/SC/00408/2005 : AIR 2005 SC 3966 : (2005) 5 SCC 591 General Manager, Haryana Roadways vs. Rudhan Singh**).
- (ii) If the workman has rendered considerable period of service

before his services are wrongly terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him, he may not be in a position to get another employment. However, where the total length of service rendered by workman is small, the award of back wages for the complete period i.e. from the date of termination till the date of award which is often large, would be wholly inappropriate.

(iii) Other factors like the manner and method of selection and appointment, i.e. whether it was after proper advertisement of the vacancy or inviting applications from the employment exchange; nature of appointment as to whether ad hoc, short-term, daily wage, temporary or permanent in character; any special qualification required for the job would be weighed in taking a decision regarding the award of back wages. (Ref. **(2005) 5 SCC 591 : AIR 2005 SCW 4634 : MANU/SC/0408/2005** (para 8) in **General Manager, Haryana Roadways Vs. Rudhan Singh**)

(iv) The service record of the employee maintained by the employer in **UPSRTC Ltd. vs. Sarada Prasad Misra (supra)** reflected that the services of the respondent-workman had never been found satisfactory. On an earlier occasion, his services were terminated but he was taken back giving a chance to improve. Unfortunately, the workman did not utilise the same. The workman stood warned on several occasions prior to the three incidents in question. In this view of the matter, the Supreme Court held that grant of back wages to this workman was not correct and the order of the courts below was interfered with. Therefore the service record of the employee would be a relevant factor which considering award of back wages.

(v) A very important consideration on the issue relating to grant of back wages is the fact that the employer is being compelled to pay the workman for a period during which he contributed nothing at all, for a period that was spent unproductively while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. On this aspect, the approach which is required to be taken has been succinctly put by the Supreme Court in the judgment reported at **MANU/SC/0349/2005 : AIR 2005 SC 2372 : (2005) 5 SCC 124 Allahabad Jal Sansthan vs. Daya Shanker Rai** when the court held that “no just solution can be offered but the golden mean may be arrived at”.

106. From the above discussion, it would appear that entitlement of back wages has to be guided by considerations of the factual scenario and principles of justice, equity and good conscience.

107. It is noteworthy that as per the proceedings of the Summary Security Force Court placed on record, the petitioner had not been previously convicted by any Security Force Court or criminal court. He had never been a defaulter of any kind and his general character was certified as 'satisfactory' by the respondents. The petitioner was a young man of barely about 29 years 6 months of age and had rendered satisfactory service of almost nine years as on 14th October, 1997. The petitioner had been awarded a cash reward by the BSF on 31st January, 1991 and had received a commandant's cash reward on 5th January, 1996 as well.

In view of the principles noticed hereinabove in the given facts, the petitioner is entitled to an award towards back wages. Having regard to the fact that the petitioner was dismissed since 1997 and

the period therefore involved, we are of the view that interests of justice merit that he be granted back wages to the extent of 50% of the wages he would have earned had he continued in service.

108. In view of the above discussion, the following directions are made:-

(i) The impugned orders dated 14th October, 1997 & 26th September, 2007 are hereby set aside and quashed.

(ii) The petitioner shall stand reinstated with continuity in service, seniority and notional promotion(s) on the date his batch mates were promoted and back wages to the extent of 50% of the wages he would have earned in service.

(iii) The respondent shall also pass appropriate orders regularising the petitioner's absence from service on account of the impugned orders.

(iv) The necessary orders and payment in terms of the directions made hereinabove shall be passed within six weeks.

This writ petition is allowed in the above terms.

GITA MITTAL, J

VIPIN SANGHI, J

June 3rd , 2010
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