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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : August 14, 2012*
Judgment Pronounced on: August 23, 2012

+ WP(C) 4099/2000

EX CONST. UMESH PRASAD Petitioner
Represented by: Ms. Jyoti Singh, Senior Advocate
instructed by Mr. Anil Gautam,
Advocate.

versus

UNION OF INDIA & ORS. Respondents
Represented by: Mr. Jagjit Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. The petitioner joined BSF as a constable in the year 1990, and was attached to the 79th Bn. as on January 9, 1999. He was a part of 'C' Coy of the battalion, which was posted at Border Out Post (BOP) Chainagar.

2. It is not in dispute that on January 9, 1999, the petitioner was assigned sentry duty at gate No.2 of the BOP from 06:30 hours to 12:00 hours. Insp. Mukund Singh, along with Ct. Ashok Kumar was patrolling the area from gate No.5 to gate No.2. The two claim that as they approached gate No.2, they took a hidden position in a nearby bamboo grove in order to detect any suspicious movement. That at around 07:30 hours, a man entered gate No.2 bringing along some goods. He was followed by another man carrying a net. A few other persons also entered. Insp. Mukund Singh and

Ct.Ashok Kumar claim that they emerged from the hidden spot and started shouting 'Pakro, Pakro', whereupon the said persons, whom Insp.Mukund Singh and Ct.Ashok Kumar claim to be smugglers, turned tail and ran in different directions and in spite of being pursued, managed to run away. 36 ploughs, a 1500 meter net and an old bicycle were seized. 2-I/C Sanjeev Bhanot was informed who apparently interrogated the petitioner and recorded a confession that for an illegal gratification in sum of ₹400/- the petitioner had permitted the smugglers to bring into the territory of India from Bangladesh the seized goods.

3. It is the case of the petitioner that Insp.Mukund Singh, the Officiating Coy.Commander, was in connivance with smugglers and permitted them to carry out illegal activities from across the border, for which it was he who received illegal gratification and shared a part thereof with superior officers and that he had been framed.

4. As per the record, two days later i.e. on January 11, 1999, the Commandant of the Battalion took cognizance of the Offence Report and after hearing the petitioner ordered Dy.Comdt.B.B.Gusain to prepare Record of Evidence (ROE) on the charge of the petitioner having committed an offence under Section 40 of the BSF Act, 1968 i.e. an act prejudicial to Good Order and Discipline of the Force inasmuch as he entered into a contract with smugglers for providing safe passage for smuggling of goods. The record reveals that Dy.Comdt.B.B.Gusain commenced recording evidence on January 17, 1999, and completed the same on January 23, 1999. During the course of the ROE, the statements of six persons, namely;

Insp.Mukund Singh, HC A.N.Godara, Ct.Ashok Kumar, SI R.D.Sarkar, HC Om Prakash and SI(G) R.B.Chaudhary were recorded; all of whom deposed against the petitioner and as per the version of the prosecution.

5. Relevant would it be to note that a translated copy of the alleged confessional letter bearing the signatures of the petitioner was proved at the ROE.

6. The record pertaining to ROE would reveal that the petitioner did not cross-examine any witness and that the signatures of the petitioner are not to be found in the Record of Evidence and in respect of which the case of the petitioner is that the Record of Evidence was prepared at his back and as per the respondents the petitioner had refused to co-operate during Record of Evidence proceedings.

7. The record would reveal that considering the Record of Evidence, the Commandant amended the charge with respect to which charge the Record of Evidence was prepared and on May 18, 1999 framed the charge as under:-

“The accused No.90002871 Constable Umesh Prasad of 79 Bn BSF is charged with:

BSF ACT
SEC 46

COMMITTING A CIVIL OFFENCE,
THAT IS TO SAY BEING PUBLIC
SERVANT, AGREES TO ACCEPT
FROM ANY PERSON, FOR
HIMSELF, ANY GRATIFICATION
WHATSOEVER, OTHER THAN
LEGAL REMUNERATION AS A
REWARD FOR SHOWING IN THE
EXERCISE OF HIS OFFICIAL
FUNCTIONS, FAVOUR TO ANY
PERSON, PUNISHABLE UNDER
SECTION 7 OF THE
PREVENTION OF CORRUPTION
ACT 1980

In that he,

while deployed at Chainagar, on 09.01.1999, during OP duties at Fencing Gate No. I agreed to accept a sum of Rs. 400/- (Rupees Four Hundred only) is a reward from an unknown smugglers for allowing him safe passage for smuggling of plastic net, iron plough an old bicycle from India to Bangladesh.”

and directed the petitioner to be tried at a Summary Security Force Court. He passed an order to said effect on June 04, 1999.

8. As per the record, the SSFC trial commenced on June 8, 1999. The charge was read, to which the petitioner pleaded ‘Guilty’ and thereafter the Commandant; ostensibly complying with BSF Rule 142(2), recorded a satisfaction that the accused understood the charge and the effect of his plea of guilt. The trial closed at 11:45 hours, followed by a verdict of guilt being returned and penalty of dismissal from service being inflicted.

9. The petitioner claims that even this is a hogwash. As per the petitioner he never pleaded guilty and he maintains that he was being targeted.

10. At the outset we may note that the record reveals that signatures of the petitioner have not been obtained by the Commandant beneath the plea of guilt recorded.

11. It was urged by learned counsel for the respondents that as per the existing rules when the trial was conducted, there was no necessity to obtain the signatures of an accused if the accused pleaded guilty.

12. In a recent judgment pronounced by us on August 06, 2012: WP(C) 2681/2000 Anil Kumar v. UOI & Ors. we had opined that as per the BSF Rules 1969 which were in force when the trial took place there is no requirement of obtaining the signatures of the accused upon the accused pleading guilty. But, prudence demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we had hastened to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment. Posing the question: What would the surrounding circumstances be? We had opined that the Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross-examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading guilty and simultaneously pleading for mercy at the trial. We had

noted various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial. In the decision reported as 2008 (152) DLT 611 Subhas Chander v. UOI the view taken was that a plea of guilt which is not signed by the accused would vitiate the punishment. The decision reported as 2004 (110) DLT 268 Choka Ram v. UOI holds to the converse. We had further noted that neither decision took note of the jural principle that a default in procedure, unless hits at the very root of the matter, would not vitiate a decision making process.

13. On the facts of the instant case, it assumes importance that all throughout it has been the case of the petitioner that he was being framed and that the Record of Evidence was prepared at his back. Under the circumstances, we see no reason why the petitioner would plead guilty at the trial.

14. The matter can be looked at from another angle.

15. Sub-Rule 2 of Rule 142 of the BSF Rules reads as under:-

“(2) If an accused person pleads “Guilty”, that plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or

otherwise that the accused ought to plead not guilty.”

16. As held by us in Anil Kumar’s decision (supra), an incisive reading of sub-rule 2 of Rule 142 would reveal that there are two distinct limbs thereof. As per the first limb, if the accused pleads guilty, it is the duty of the Court to ascertain whether the accused understands the nature of the charge and the general effect of the plea of guilt. The second limb is for the Court to read the Record of Evidence or the Abstract of Evidence, as the case may be, and if it appears from the record that the accused ought to plead not guilty, to record a plea of not guilty (despite the accused having pleaded guilty) and proceed with the trial.

17. The record of the instant case reveals that after recording the plea of Guilty, the Commandant has only recorded satisfaction of the first limb of sub-rule 2 of Rule 142 and not the second. It stands recorded as under:-

“The accused having pleaded guilty to the charge, the Court explains to the accused the meaning of charge(s) to which he has pleaded guilty and ascertains that accused understands the nature of the charge(s) to which he has pleaded guilty. The Court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charge(s) and the effect of this plea of guilty, accepts and records the same. The provisions of Rule 142(2) are complied with.”

18. It was vehemently urged before us by learned counsel for the respondents, as to what happens to the

confessional statement made by the petitioner before the 2-I/C Shri Sanjeev Bhanot.

19. As noted by us, the alleged confessional statement allegedly proved during Record of Evidence is a translated type script and not the original. During arguments we had queried the respondents whether the same i.e. the original could be produced for our perusal and the counsel informed that the record had been weeded out. But, there is something of relevance contained in the transcript forming part of the Record of Evidence. We note the writing in question. It reads:-

“Sir,

I No.90002811 Constable Umesh Prasad is rifle man of ‘C’ Coy, Platoon No.8. I was on duty at OP gate No.2 at BOP Chainagar. At 06:30 hours, I reached for OP duty and opened the gate. At 3 o'clock a man of Chainagar came and talked to me that he has some items which are to be crossed over. Items were plough and net. Then I settled the deal for ₹400/-. When that man was coming with the items the Coy. Commander called the items inside the gate and took them to BOP Chainagar and other OP Sarwan Kumar was with me, but he came to me at 8 o'clock and he did not talk anything.”

20. We had wanted to see the original for the reason it stands recorded: At 06:30 hours, I reached for OP duty and opened the gate. At 3 o'clock a man of Chainagar came and talked to me that he has some items which are to be crossed over. Items were plough and net. Then I settled the deal for ₹400/-. Now, if the petitioner reached for OP duty at 06:30 hours, where was the question of a man coming and speaking to him at 3'o clock. Was either time a typing mistake? Only the original could have resolved the same.

In the absence of the original being produced, we are handicapped. But would note the argument of the petitioner: When a person contrives or falsifies a document and the document is not prepared contemporaneously, these kinds of errors crop up.

21. Though of a very weak inferential nature, and not to be understood that we are resting our opinion and conclusions thereon, it does assume importance that the transcript contains an error of a kind which does occur when ante-timed documents are prepared.

22. On the facts of the instant case, signatures of the petitioner not being obtained beneath the plea of guilt and the petitioner taking a stand that he never pleaded guilty, in the backdrop facts of the case and in light of the law declared in Anil Kumar's case (supra) and for the additional reason the second limb of Rule 142(2) of the BSF Rules 1968 has not been complied with, compels us to allow the writ petition and quash the conviction and sentence imposed upon the petitioner and as a consequence we direct the petitioner to be reinstated in service with all consequential benefits. We are not directing a re-trial of the petitioner due to passage of time and would further highlight that appellate remedies are intended in the hope that the Appellate Authority would apply its mind and not act mechanically. We are left wondering as to why the Appellate Authority glossed over the fact that in the instant case the petitioner was alleging false entrapment; was alleging that the Record of Evidence was at his back and that he never pleaded guilty. Had the Appellate Authority applied its mind, the trial could have been set aside in the

year 1999 itself when the appeal was rejected. A re-trial could have been ordered. Today, with 13 years having passed by, it would be too late in the day to hold a trial.

23. Our directions be complied with in twelve weeks.

24. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

AUGUST 23, 2012
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