

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

Reserved on: 22.01.2013

Decided on: 21.02.2013

+ **W.P.(C) 17430/2006**

SHRI JOGESWAR SWAIN Petitioner
Through: Ms. Saahila Lamba, Advocate.

Versus

UNION OF INDIA AND ORS. Respondents
Through: Sh. Amrit Pal Singh, CGSC with
Sh. Bhupinder Sharma, Law Officer, for
Resp. Nos. 1 to 4.

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner joined the Border Security Force (BSF) as a Constable (92 BN BSF Kalyani Nadia) on 10.05.1995. Subsequently, he was posted as Constable in Kashmir and discharged his duties at different times, in Punjab, Manipur and Assam. He states that he was rewarded for his duties in tackling terrorists at Manipur and that he had never earned any adverse remarks or entry during his entire career. When he was working as Constable in 128 BN, BSF, Patgaon, Kamrup in Assam, he was deployed for security aid duty to Dr. (Mrs.) Somy Dey Sarkar, who used to reside in the BSF Campus at Guwahati since 26.01.2004. It is stated that while on such duty, on 17.06.2005,

Dr. (Mrs.) Somy Dey Sarkar instructed him at 07.45 PM to leave her quarters as she was about to bathe. He, therefore, left the quarters. Dr. Sarkar thereafter alleged that she found/noticed two camera flashes within a span of few seconds from the window of the bathroom where she was bathing. She immediately shouted for help; her mother, Smt. Dipali Dey Sarkar went outside and found nobody. It was alleged that the matter was immediately reported to the Chief Medical Officer, Dr. A.C. Karmakar over telephone; acting on his advice, she instructed the Gate Commander to stop the petitioner from leaving the BSF Campus. The BSF authorities thereafter investigated the matter and ultimately recorded the petitioner's admission; a written report was prepared and a proceeding was drawn-up against the petitioner under Rule 49 of the BSF Rules, 1969. In the course of the proceedings, it was alleged that the BSF authorities seized one Kodak Camera make EC-300 with a photo reel from the house of Constable Kunnu Thamaria, adjacent to the quarters of Dr. Sarkar. The seizure memo stated that the camera was used to take pictures of Dr. Sarkar. The petitioner was placed under open arrest on 20.06.2005 and taken into custody by the BSF the same day. By order dated 21.06.2005, the Commandant of 128 BN BSF issued an order for recording of evidence, directing that the proceeding in that regard should be completed by 29.06.2005. The petitioner claims that he apprehended that his wife might be sexually harassed by another Constable by taking advantage of his arrest, which he expressed to the concerned authorities, leading to allotment of a quarter inside the Campus, on 22.06.2005.

2. Pursuant to the directions of the Commanding Officer, the Deputy Commandant recorded the evidence of the prosecution witnesses whilst the petitioner was in custody. In all, 10 witnesses were examined and the statement of the accused was recorded at the end of the proceedings. The concerned official, i.e. the Deputy Commandant certified that the Record of Evidence (RoE) directed by the Commandant was completed on 29.06.2005. On the basis of the Record of Evidence, the Commandant of the petitioner's Battalion was of the opinion that the case be presented before the Security Force Court, and intimated accordingly, on 05.07.2005. The petitioner was also asked to intimate names of 3-4 officers of his choice, to defend him at the trial.

3. The charge framed on 19.07.2005 is as follows:

*“AN ACT PREJUDICIAL TO GOOD ORDER AND
DISCIPLINE OF THE FORCE*

In that he,

*At BSF Campus, Patgaon, Guwahati, on
17.06.2005 at 2000 hours, improperly and without
authority took photograph of Dr. (Mrs.) Somi Dey
Sarkar, L.M.O., SHQ, BSF, Guwahati from the outside
window of bath room of her quarter No.1, Type-III at
BSF Campus, Patgaon, Guwahati, when she was taking
bath there.”*

4. The petitioner nominated one Sh. Anil Kumar, Assistant Commandant as friend of the accused; this was also approved by the appropriate authority on 22.07.2005. It is stated that even though an

Assistant was nominated to the petitioner to defend his case, the Security Court which held the proceedings on 23.07.2005, did not permit him to ask any questions during the trial, investigated under Section 157 of the BSF Act, 1968. It is alleged that the Court on 23.07.2005 recorded the guilt, allegedly admitted by the petitioner, without complying with the mandatory provisions of the Act and Rules and proceeded to pronounce him “guilty” and sentenced him to dismissal from service. This order was questioned by the petitioner in an appeal preferred to the concerned authority, i.e. the Deputy Inspector General (DIG), on 29.08.2005. This appeal was apparently rejected subsequently.

5. Learned counsel argues that the petitioner was denied a fair trial on account of various infirmities which vitiated the proceedings of the Security Force Court (hereafter “the Court”). It is stated that Rule 63(1) of the Rules was violated because the complainant, i.e. the Commandant was himself a member of the Court which enquired into the matter thus infringing one of the most cardinal principles of natural justice. It was highlighted that the alleged confessional statement said to have been made by the accused whilst in custody could not be the basis of his guilt nor was it admissible in evidence against him. It was contended that the petitioner had little or no knowledge of the English language and that the abstract of the evidence was not made available or known to him in the manner intended by Rule 46(3). The last witness, i.e. PW-10 was examined on 29.06.2005 and the petitioner was straightaway asked to give his statement although no copies of abstract of evidence were supplied to

him, nor was he afforded the opportunity of taking stock of the situation. Learned counsel also highlighted that Rules 142(2) and 143(4)(a) were given a go-by, in that the Court did not follow the procedures prescribed and also did not satisfy itself that the petitioner fairly understood the entire purport of the evidence before it (the Court) to record his guilt. Having regard to all these circumstances, submitted counsel, the finding of guilt recorded against the petitioner was unsustainable in law.

6. Learned counsel submitted that on an overall reading of the entire evidence, what clearly emerged was that none of the witnesses had actually seen him using the camera or its flash, nor even witnessed him fleeing the spot. The prosecution's allegations were completely undermined by the testimony of PW-9, Ms. Binita Sah who stated that when at around 08.30 two officers visited her house and enquired if the petitioner had visited immediately prior to that, she confirmed that he did visit but did not state anything about photo camera and that on the next day, she told them about the camera and handed it over to them. It was submitted that this deposition entirely undermined the prosecution case and furthermore, neither was the camera or its contents sent for examination nor was it proved in any manner known to the law that it belonged to the petitioner or was connected with him. In these circumstances, the material on the record clearly did not amount to evidence even pointing to, much less proving, his guilt on an application of the lower threshold of preponderance of probabilities. In these circumstances, neither could the Court have assumed his guilt nor could the appellate authority

have blindly turned down his request for reinstatement. Learned counsel lastly argued that the decisions of this Court have now ruled that even though at the relevant time, the BSF rules did not mandate the signatures of accused in the GSC proceedings after the recording of statement, necessarily the evidence on record would have to be viewed in order to determine whether the findings entered by the Court on the basis of a confessional statement or a guilt recorded, in the probabilities of the case, could be sustained as valid. On a fair application of that principle, submitted counsel, the finding of guilt in the present case is unsustainable.

Respondent's contentions:

7. The respondent argues that when the petitioner was working as a security aide to Dr. (Mrs) Sarkar, (LMO of 18 Bn BSF) and attached with Sector Hospital BSF, Guwahati, he indulged in misconduct amounting to betraying the trust reposed in him, by indulging in the unethical act of stealthily photographing of the medical officer when she was bathing. It was urged that soon after this was reported, the petitioner was put up on offence report before the Commandant, who after hearing the petitioner, ordered preparation of Record of Evidence (ROE) against him for committing an offence Under Section 40 of BSF Act for an act prejudicial to good order and discipline of the Force. In view of the above charge, the Record of Evidence was prepared under Rule 48 of BSF Rule 1969; on completion of Record of Evidence, the Commandant decided to try the petitioner by Summary Security Force Court as under Rule 51 of BSF Rules 1969. The petitioner was given notice along with the copy of charge sheet

and Record of Evidence proceedings as mandated under Rule 63 of the BSF Rule 1969. The Summary Security Force Court trial of the petitioner was held at Bn HQr. on 23.07.2005. On being arraigned by the Court, the petitioner pleaded 'Guilty' to the charge. The Court duly complied with the provisions of BSF Rule 142(2) before recording its findings of 'guilty' on the charge. Thereafter, the Record of Evidence proceedings was read over, explained to the accused and attached to the proceedings. On being given an opportunity to make statement in mitigation of punishment, the accused while admitting his guilt stated that he had committed an offence and requested for pardon and stated that he would not repeat the mistake in future. In view of above, the Court sentenced him "to be dismissed from service." The petitioner's statutory petition against the dismissal order was duly considered and dismissed by the respondent by order dated 24.01.2006.

8. It is contended that the procedure prescribed by law was duly followed before imposing the punishment of dismissal upon the petitioner. The respondents argue that the Record of Evidence (ROE) was prepared under BSF Rules. All the evidence was recorded in presence of the petitioner. After recording of each and every statement of PWs, the petitioner was given opportunity to cross-examine the witnesses under the provision of Rule 48(2) of BSF Rules, 1969, thereafter same was read over to the witnesses and the petitioner in the language they understand well, i.e. in Hindi and then only the witnesses, as well as the petitioner signed the same. It is further submitted that Rule 49(3) of BSF Rules, 1969 is not applicable in this

case.

9. It was argued that during the trial, Sh. Ghanshyam Purswani, Commandant, i.e. the Court was affirmed as interpreter as per Rule 136 of BSF Rules, 1969. On being arraigned by the Court, the accused pleaded 'Guilty' to the charge. The Court complied with the provisions of BSF Rule 142(2) before recording its findings of 'guilty' on the charge. Thereafter, the Record of Evidence proceedings was read over, translated and explained to the accused in the language he understands well, i.e. in Hindi and attached to the proceedings. It is, therefore, clear that the punishment was imposed after following due procedure of law.

10. It was further argued that the proper procedure mandated by law was strictly followed. On commencement of disciplinary proceedings, the petitioner was placed under open arrest as provided under BSF Rule 38 and simultaneously he was afforded opportunity to defend his case without any pressure and harassment. The petitioner was placed under open arrest subject to the condition of his keeping within the limit of BSF Campus, Patgaon. He was also intimated by order that in case his move outside the Campus is required, prior written permission of the Commandant had to be taken. After hearing the petitioner as per Rule 45 of BSF Rules, Commandant directed the preparation of Record of Evidence by Sh. A.K. Jha, Dy. Commandant as provided under Rule 45(2)(iii) of BSF Rules, 1969. Sh. A.K. Jha, Dy. Commandant completed the ROE on 29.06.2005. After recording each statement of witnesses, the petitioner was given opportunity to cross-examine under Rule 48(2). The depositions were read over to

the witnesses and the petitioner in the language they understand well, i.e. in Hindi and then the witnesses, as well as the petitioner signed the statements.

11. The respondents submit that the Record of Evidence in respect of witnesses was recorded in accordance with the Act and Rules and in presence of the accused/petitioner. During this process, he admitted his guilt voluntarily without any threat, inducement or promise and his said admission was recorded in accordance with rules. The Recording officer took down the statement of the petitioner (accused) as provided under BSF Rule 48(3) in English, thereafter same was read over to the petitioner in the language he understood well, i.e. Hindi and then only did he appended his signature in the presence of independent witness, namely ASI (RM) R.P. Tripathi.

12. The respondents deny that the petitioner was not permitted to engage a next friend, or defence assistant. It was submitted that having regard to the fact that the petitioner admitted to his guilt on more than one occasion and having regard to the fact that the misconduct really amounted to sexual harassment, this court should not interfere with the disciplinary order.

Relevant provisions under the BSF Rules

13. Before a discussion on the merits, it would be necessary to extract the relevant Rules, i.e. the Border Security Force Rules, 1969. The same are as follows:

“48. Record of evidence.- (1) 1[The officer ordering the

record of evidence may either prepare the record of evidence himself or detail another officer to do so.

(2) The witnesses shall give their evidence in the presence of the accused and the accused shall have right to cross-examine all witnesses who give evidence against him.

2[Provided that where statement of any witness at a court of inquiry is available, examination of such a witness may be dispensed with and the original copy of the said statement may be taken on record. A copy thereof shall be given to the accused and he shall have the right to cross-examine if he was not afforded an opportunity to cross-examine the witness at the Court of Inquiry.]

(3) After all the witnesses against the accused have been examined, he shall be cautioned in the following terms; "You may make a statement if you wish to do so, you are not bound to make one and whatever you state shall be taken down in writing and may be used in evidence." After having been cautioned in the aforesaid manner what ever the accused states shall be taken down in writing.

(4) The accused may call witnesses in defence and the officer recording the evidence may ask any question that may be necessary to clarify the evidence given by such witnesses....."

49 Abstract of evidence.- *(1) An abstract of evidence shall be prepared either by 1[the officer ordering it] or an officer detailed by him.*

(2)(a) The abstract of evidence, shall include-

(i) signed statements of witnesses wherever available or a precis thereof,

(ii) copies of all documents intended to be produced at the trial.

(b) Where signed statements of any witnesses are not available a precis of their evidence shall be included.

(3) A copy of the abstract of evidence shall be given by the officer making the same to the accused and the accused shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rule (3) of Rule 48:

Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty four hours after receiving the abstract of evidence to make his statement.

60. Disqualification of officers for serving on General and Petty Security Courts.]- *An officer shall be disqualified from serving on a Court if he:-*

- (i) is an officer who convened the Court; or*
- (ii) is the prosecutor or a witness for the prosecution; or*
- (iii) has taken any part in the investigation of the case, which would have necessitated his applying his mind to any part of the evidence, or to the facts of the case; or*
- (iv) is the Commandant of the accused; or*
- (v) has a personal interest in the case.*

61. Composition of General and Petty Security Force Courts.- *(1) A court shall consist, as far as practicable, of officers of different battalions 3[or units].*

(2) The members of a court for the trial of an officer shall be of a rank not lower than the rank of that officer, unless in the opinion of the convening officer, officers of such rank are not, having due regard to the exigencies of public service, available. Such opinion shall be recorded in the convening order.

142. General plea of “Guilty” or “Not Guilty”.- *(1) The accused person’s plea of ‘Guilty’ or ‘Not Guilty’ or if he refuses to plead or does not plead intelligibly either one or the other, a plea of ‘Not Guilty’ shall be recorded on each charge.*

(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.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after sub-rule (2) has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which the accused has pleaded guilty without requiring the accused to plead thereto, and a record to that effect shall be made in the proceedings of the Court.”

Analysis and Findings

14. The petitioner's arguments are two fold, i.e procedural infirmities in regard to recording of evidence, and that the evidence on record did not implicate him. This court proposes to take up first the question of procedural irregularity. On a plain reading of Rule 61, it is apparent that a certain diversity is expected (apparent from the mandate that "*as far as practicable, of officers of different battalions or units*" should compose the General Security Court). However, in this case, the personnel who manned the Court were entirely drawn from the petitioner's battalion, i.e 128 Bn BSF. Such irregularity, however *ipso facto* would not invalidate the court. The next infraction, nevertheless, is more serious. Rule 60 lists out the officers who should

not be part of the Court. These include “(i) ..an officer who convened the Court..” and “(iv)...the Commandant of the accused.” The records – produced during the hearing reveal that in this case, the Court was both convened and presided over by, the petitioner/accused’s Commanding Officer, i.e. Commandant Ghanshyam Puruswami. This serious infirmity would, in the opinion of this court, invalidate the GSC proceeding. The absolute bar in regard to the participation of the Commandant of the accused, who also convened the Court, was prescribed apparently with a purpose, i.e. to eliminate all semblance of bias. The entire structure of Rules 60 and 61 is to ensure a degree of impartiality, by requiring officials of different battalions to man the Courts. If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the court, the *rationale* obviously is to ensure that bias – real or perceived- is eliminated altogether. The violation of this rule, in the opinion of the Court, invalidates the proceedings.

15. This Court does not rest its decision on the above reasoning. There appears to be a more fundamental flaw in the proceeding. Counsel had argued that the petitioner did not make the confession attributed to him during the Record of Evidence and that the matter has to be considered from the overall conspectus of evidence and deposition of witnesses. She had argued that none of the witnesses had seen the petitioner actually clicking the photograph or noticed the flash of the camera; even the camera roll was not admittedly developed. The entire finding of guilt was based on the confessional statement extracted under duress, and not given with due knowledge

of the petitioner's rights. On the evidence led, there was no occasion for the petitioner to have reasonably given a confessional statement. She relied on the decision in *Ex Const. Umesh Prasad vs Union Of India & Ors* (decided on 23-08-2012, in WP(C) 4099/2000 to say that confessions recorded by the Security Force Court or during the Record of Evidence cannot be taken at face value. It would therefore, be essential to briefly analyse the Record of Evidence, taken down between 22-6-2005 and 29-6-2005.

Evidence before the Security Court

16. PW-1, Dr Somi Dey Sarkar (the complainant) deposed that the petitioner, was her security aide from approximately one year before the date of the incident till the date of the incident; on 17.6.2005, at about 7:45 PM, she had told him that he could leave as she was going for her bath. He left her quarter. While bathing, she twice observed camera flashes of light through the bathroom window focusing inside the bathroom; she even heard the auto rotation of a camera reel. She then screamed, calling for help, telling her mother to go out and stop the person who was doing this. Her mother checked the back of the quarter, but did not find anybody/anything except that the flower-tub. She informed Dr. A.C. Karmakar CME (SG) on telephone; he advised her to tell the gate cadre at Gate no-1 to not allow the petitioner leave the campus. She made further enquiries about the petitioner from the other GDs that if they sighted the petitioner, he should be told to report to her quarters. At about 8:20 PM, Dr Karmakar visited the scene of incident; one Keshav Kumar (DC Adjutant 128 Bn) also visited the spot, and they both examined it; soon thereafter the

petitioner arrived. He was asked what he had in his protruding pocket, to which he answered that he had a water bottle. This deposition was corroborated by her mother, PW-2, Deepali Dey Sarkar in material particulars.

17. PW-3 Keshav Kumar, was in his office when he was called and asked to go PW-1's residence. When he reached there, Dr Karmakar was present. The witness was told by PW-1 that the petitioner, who was well-versed with layout of the quarter and the in-house routine, might have clicked the pictures. He further deposed that they (he and Dr Karmakar) questioned the petitioner about his involvement in the incident, which he (the petitioner) denied stating that after leaving the quarters, he went to Const. Kunu Thamaria's house to collect ankle shoes which he needed for Zero Parade for leave purpose. He further stated that he along with Dr Karmakar went to Kunu Thamaria's house. Const. Kunu repeated the petitioner's version, as was narrated to them. They were further told by Const. Kunu that the petitioner visited his house in his absence, when only his sister-in-law and his wife were present. He also testified that Const. Kunu's wife and sister-in-law too narrated the same story. He also stated that next day (18th June), when further enquiries were made as to who had a photo camera, the petitioner's name came up; that when the petitioner was asked about this, at first he denied, but when he was further questioned by Const. Sushant Behra in the presence of Sub. S.K. Sharma, Hukum Singh Narula and Ram Lakhan Sharma he accepted that he had clicked the photos of PW-1 the previous evening. The petitioner even agreed to hand over the camera with the reel, which he

said he had kept at Const. Kunu's house. Thereafter, they visited Const. Kunu's house again, where at the instance of the petitioner, the camera and reel were recovered. PW-3 further stated that both the items had been hidden by Kunu's sister-in-law on the petitioner's request the previous night. The items were seized and seizure memo was prepared.

18. PW-4 Dr. A.C. Karmarkar corroborated the version of PW-1 about her narrating the incident, his reaching the spot, finding nothing etc. He further stated that when the petitioner came back, his slippers were wet and his pocket was bulging outwards; that upon being asked, the petitioner showed the items he was carrying viz. liquor bottle and bundle of keys; that the petitioner told them (Dr. Karmakar and PW-3 Keshav Kumar) that he had taken the liquor from his box kept at Const. Kunu's house; then they went to Const. Kunu's house and asked him (Const. Kunu) to show the petitioner's box, which he did. The witness further stated that they enquired about that too, but none including Kunu's sister-in-law and wife stated anything.

19. PW-5 Const. Kunu Kamaria, stated that on the evening of the incident, he was informed by his wife, when he reached home, that the petitioner visited and had taken his (Kunu's) ankle boots; that at about 9:15 PM, PW-3 and PW-4 came along-with the petitioner and enquired whether the latter had visited his house, more particularly about whether the petitioner left any camera at his house. The witness enquired the same from his wife and sister-in-law, who denied; these were conveyed to the officers present. He further stated that the next day (18th June), the petitioner along with Sub. S.K. Sharma, SI (Adj)

Hukum Singh Naruka and HC Ram Lakhan again visited his house and asked his (Kunu's) sister-in-law to bring the camera which he had kept in her box; she did so. The camera was seized. PW-5 further deposed that he then asked his sister-in-law as to why she did not reveal her knowledge about the hidden camera the previous night, to which she stated that she had been asked by the petitioner not to do so. PW-6 SI Hukum Singh Naruka corroborated Kunnu's version about the circumstances under which the camera was seized from his sister-in-law. He also stated that he was present when the petitioner was questioned about the incident, on 18-6-2005.

20. PW-7 Sub. S.K. Sharma testified about his presence at *sammelan kakshya* at the time when the petitioner was questioned about the incident; PW-3 Keshav Kumar was also present then. He further revealed that the petitioner also took him aside and confessed that he had clicked the photos in question and that he did so because he had been requesting leave which the LMO (Lady Medical Officer – PW-1 Somi Dey Sarkar) kept on denying. The petitioner also stated that the camera had been kept at Const. Kunu's house. The witness also stated that after the confession, he along with SI (Adj. H.) Hukum Singh HC, Ram Lakhan and the petitioner visited Kunu's house, from where the camera was recovered, after Kunu's sister-in-law handed it over to him (Kunu). Lastly, he stated that the camera was taken in possession and seized. A similar version was given by PW-8 in his deposition.

21. PW-9 Ms Binita, sister in law of Const. Kunu stated that at about 8 PM on 17th June, the petitioner came and handed over to her a

camera with the instruction of remaining silent about the same, which she carried out; that at that time, Const. Kunu was not present. She recognized the petitioner during her testimony. She stated that the petitioner used to come to their house as he also hailed from Orissa. She further stated that at about 8:30 PM, two officers visited the house, and enquired about the petitioner, and his having kept any camera at the house. The witness deposed that upon such enquiry she admitted that the petitioner had been to the house that evening, but did not say anything about the camera. She further deposed that the next morning, at about 9 AM, the petitioner again visited the house with other persons, asking her to bring the camera. She stated that she had kept the camera in the box which she handed over to the petitioner, in the presence of Kunu and other persons.

22. PW-10 Deepak Chaturvedi (Second in Command 128 Bn BSF) deposed in the same light as PW-7 and PW-8 about the Petitioner's confession at the *sammelan kakshya*, where the petitioner touched his feet saying "*mujhse galti ho gayi, mujhe bacha lo*". He further stated that the petitioner admitted to having clicked two photos of Dr Somi Dey Sarkar the previous night. The reason for this misbehaviour was rejection of his leave request by Dr. Sarkar. He also stated that the petitioner confessed that he had been asked by his wife to whom he confided about the matter; she suggested him to apologize. The witness further stated that the petitioner had then demonstrated how he had climbed and got access for clicking the photo. The witness stated that the petitioner confessed that he climbed a small portion of a wall which was jutting out, then climbed on to the window using the

iron pipe. He reached the window, whereupon he clicked the photos with his left, free hand. The witness stated that after this he went back to his office. The witness identified the petitioner.

23. A close analysis of the evidence would highlight the following circumstances:

(1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone.

(2) The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu's house, and borrowed boots. This was verified from the latter's wife and sister in law (PW-9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her.

(3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents.

(4) The petitioner was placed under open arrest the next day. He – according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence

proceeding was over a week later, i.e 25-6-2005.

(5) No written record of the confession said to have been made on 18th June, 2005 exists;

(6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability.

24. The above circumstances have to be seen in the light of the further fact that the Record of Evidence in this case – i.e the statement of prosecution witnesses, was completed on 29th June, 2005. The petitioner/ accused was not, however given the necessary reasonable time to reflect about the overall effect of these statements, and directly asked to make his statement, the same day. This is starkly contrary to Rule 49 (3), which mandates that the accused is furnished with copies of the evidence and *“shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rule (3) of Rule 48”*. Proviso to Rule 49 (3) prescribes that:

“Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty four hours after receiving the abstract of evidence to make his statement.”

In the present case, the original records reveal that the last witness, PW-10 deposed on 29th June, 2005; the Official recording the evidence administered the caution to the petitioner immediately thereafter and proceeded to straightaway record his statement, contrary to Proviso to Rule 49 (3). This amounted to violation of the

rule, and resulted in denial of fair-play.

25. On the question of whether a charged official's plea of guilt in the GSC proceeding can be accepted in the absence of his signatures, there is considerable authority. A Division Bench of the Jammu and Kashmir High Court in *Union of India and Ors. v. Ex Havaladar Prithpal Singh and Ors.*, 1991 KLJ 513 held that-

"At the time of recording the 'plea of guilt' of the accused in a Summary Trial as well the accused should be necessarily informed of the nature of the charges levelled against him and the Court should ascertain that the accused has understood the nature of the charge to which he pleads guilty and shall inform him of the general effect of the plea and in particular of the meaning of the charge to which he pleads guilty. The Court should further require to advise the accused to withdraw that plea if it appears from summary of evidence or otherwise that the accused ought to plead not guilty- Non fulfillment of such a procedure violates and said rule and vitiates the trial as the rule is mandatory in nature.

Signature of the accused in token of the plea of guilt should be obtained which will show that the accused has willingly 'pleaded guilty'. The Court should also certify this compliance of the rule in the minutes of the proceedings of the trial."

This view was followed in *Chanchal Singh vs Union of India & Ors* 2003 (3) JKJ 381 by the same court. In *Ex Const. Umesh Prasad vs Union Of India & Ors* (decided on 23-08-2012, in WP(C) 4099/2000 by a Division Bench of this Court), a divergence of judicial opinion was noticed, which was sought to be reconciled in the following terms:

“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:-

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.....

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."

26. This Court concurs with the above observations. On an overall conspectus of circumstances, previously outlined in detail, it is apparent that the Record of Enquiry proceedings, and the proceedings before the Court were held in violation of mandatory conditions. Though this resulted in the punishment imposed upon the petitioner being fatal, this court has analysed how the evidence relied on by the respondents could not have resulted a conclusion of guilt, on an application of the lowered threshold of preponderance of probabilities (as opposed to proof beyond reasonable doubt). Such being the case,

the lack of his signatures in the Court proceedings, are such that the plea guilt before the Court cannot be accepted.

27. In the result, the punishment of dismissal imposed upon the petitioner is hereby set aside. However, having regard to the overall circumstances, the petitioner shall not be entitled to the entire arrears of salary but would be entitled to 50%, with full consequential benefits. The writ petition is allowed in the above terms without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**SUDERSHAN KUMAR MISRA
(JUDGE)**

FEBRUARY 21, 2013