

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

% *Judgment Reserved on: January 13, 2014*
Judgment Pronounced on: January 20, 2014

+ **W.P.(C) 3583/2001**

MAYA RAM SHARMA Petitioner
Represented by: Mr.Anil Gautam, Advocate

versus

UNION OF INDIA & ANR. Respondents
Represented by: Ms.Richa Kapoor, Advocate with
Ms.Saahila Lamba, Advocate
Mr.Bhupinder Sharma,
Dy.Commandant, BSF

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR.JUSTICE JAYANT NATH

PRADEEP NANDRAJOG, J.

1. The present writ petition challenges the order dated July 31, 1994 passed by the Summary Security Force Court (SSFC) holding petitioner guilty of the two charges framed against him and as a result ordering petitioner to be dismissed from service. The statutory petition filed by the petitioner against the said dismissal was rejected by the Competent Authority vide order dated December 07, 1999.
2. The petitioner was serving as an ASI/Pharmacist in BSF and was attached to the 19th Battalion.
3. A perusal of the original record would indicate that as required by Rule 45 of the BSF Rules, 1969, an offence report was placed before the Commandant of the battalion, in respect whereof he framed three

charges, being (i) petitioner assaulting his superior SI Gajender Singh, (ii) petitioner using abusive language against his superior officer 2-I/C Sh.P.K.Purkayastham, and (iii) found in a state of intoxication. Hearing the petitioner as to what he had to say and forming an opinion that a record of evidence required to be prepared, the Commandant directed record of evidence to be prepared and for which Sh.K.K.Sharma 2-I/C was deputed to do the needful. Sh.K.K.Sharma 2-I/C held proceedings on July 25 and 26 of the year 1994 pertaining to the recording of evidence during which he examined five witnesses.

4. At the recording of evidence Sh.P.K.Purkayastha, 2-I/C PW-1, deposed that on the date of the incident i.e. on June 21, 1994, he had lead the unit's advance party, in which petitioner was serving, from Sopore to Bhikhiwind. Prior thereto on July 19, 1994 ASI/PH Sube Singh of the 54th Bn. had complained to him that the petitioner was not dispensing medicine from the MI room and had even refused to hand over the key of the MI room to him. He summoned the petitioner to his office and counseled him not to create such problems but saw no improvement in the behaviour of the petitioner. Therefore accompanied by SI Gajendra Chand (PW-4) and D.C. Sh.A.A.Khan (PW-5) he went to the MI room and on finding petitioner not present there he proceeded to the SO Mess where petitioner was staying. When he reached the room of the petitioner he asked petitioner to attend to the patients and the petitioner got up and uttered '*Jaa Bhosri ke*'. He left the room telling SI Gajendra Chand to summon other officers and at that time he saw petitioner empty a bottle in the wash basin and at which smell of alcohol was detected by him and he realized that stench of alcohol was even emanating from the petitioner's mouth. Since he had asked SI Gajendra Chand to escort petitioner to MI room the petitioner was taken to the MI

room through the playground and he left for the MI room through the main road. He saw petitioner grabbing SI Gajendra Chand from the scuff of his neck and pushed him down but SI Gajendra Chand managed to loosen the grip and he heard the petitioner say '*Aap kaun hote hain mujhe MI Room le jaane wale.*' On being told that he was brought for medical examination, the petitioner yelled '*Main nahin jaata MI Room jo karna hai kar lo.*' He requested D.C.Sh.A.K.Khan to keep the petitioner in the quarter guard till he cools down and that the petitioner was released from the quarter guard the next morning and under his order was placed under open arrest.

5. On being cross-examined by the petitioner, 2-I/C P.K.Purkayastha stated that the time when the petitioner used foul language was 09:50 hours; and he ordered that the petitioner be put in quarter guard because the petitioner was behaving in a very aggressive manner and to avoid another incident like the one which happened with SI Gajendra Chand.

6. On being examined by the recording officer, 2-I/C P.K.Purkayastha stated that the petitioner's walk was normal while he was walking towards the MI room and that he was in full senses when he spoke but his speech was slightly unclear.

7. Ct.Dashrath Lakra PW-2 deposed that on June 21, 1994 he received a message from SI Gajendra Chand to reach SOs Mess. On reaching the mess, he along with SI Gajendra Chand (PW-4), Ct.Samar Razak and Ct.Ranbir Singh (PW-3) were asked to take the petitioner to the MI room. Enroute to the MI room, petitioner caught hold of the neck of SI Gajendra Chand from behind and all of them intervened to get SI Gajendra Chand released. 2-I/C P.K.Purkayastha was at that time walking towards the MI room through the main road and on seeing the

incident shouted that the petitioner be immediately taken to quarter guard instead of MI room.

8. On being cross-examined by the petitioner, Ct.Dasrath Lakara deposed that the petitioner caught the neck of SI Gajendra Chand without any cause and denied the suggestion that SI Gajendra Chand had caught the arm of the petitioner.

9. Ct.Ranbir Singh PW-3 deposed in sync with PW-2.

10. SI Gajendra Chand PW-4 deposed that on the morning of June 21, 1994, he was asked by 2-I/C P.K.Purkayastha to accompany him to the MI Room. Sh.A.A.Khan DC (PW-5) was also with them. On reaching the MI Room, they were told by Ct.Uttam Kumar that the petitioner was in the SOs mess. On reaching the petitioner's room they knocked and petitioner open the door. He entered the room and saw the petitioner sitting on the cot and was smoking a cigarette. He asked the petitioner why he was not present in the MI Room. Then, 2-I/C P.K.Purkayastha and D.C.A.A.Khan entered the room and asked the petitioner to go to the MI room. The petitioner replied to 2-I/C P.K.Purkayastha, using foul language saying, '*Jaa Bhosri Ke.*'. He was then asked to get a guard and escort the petitioner to the MI room. When he returned with a guard he saw an empty liquor bottle lying in the room and while he was escorting the petitioner to the MI room through the playground the petitioner suddenly held him from his neck and pressed him down wards. The guard released him from the petitioner's grip. On seeing this 2-I/C P.K.Purkayastha ordered them to take the petitioner to quarter guard.

11. Sh. A.A. Khan DC PW-5 deposed in sync with the testimony of 2-I/C P.K.Purkayastha.

12. As required by law, the record of evidence was placed before the Commandant and the petitioner was produced before him. The

Commandant proceeded under Rule 51 of the BSF Rules, 1969 by directing the petitioner to be tried at a SSFC Court but only with respect to two charges with respect where to hearing of the charge proceeding was conducted by him under Rule 45. Being of the opinion that there was insufficient evidence pertaining to the offence report that the petitioner had consumed alcohol, he did not draw up said charge. The two charges against the petitioner on which the trial took place are as under:-

“BSF Act
Sec.20(a)

ASSAULTING HIS SUPERIOR OFFICER

*In that he,
at Bhikhiwind on 21st June, 1994 at about
10:00 hrs. when being escorted to the Unit
M.I.Room by No.75001426 SI Gajendra
Chand caught the neck of the said SI with
his right hand and pushed and squeezed the
neck of the said SI.*

BSF Act
Sec.20(c)

USING INSUBORDINATE LANGUAGE TO HIS
SUPERIOR OFFICER

*In that he,
At Bhikhiwind on 21st June, 1994 at about
09:50 hrs when ordered by Shri
P.K.Purkayastha, 2I/C to report to
M.I.Room said “JAA BHOSRI KE”.*

13. Accordingly, a SSFC was convened and trial commenced on July 31, 1994.

14. The record would reveal that Assistant Commandant G.S.Sandhu acted as the friend of the accused and SI A.K.Pandey was the interpreter. The accused i.e. the petitioner was produced at 09:30 hrs. The witnesses were directed to be withdrawn from the Court. The two charges were read out to the petitioner and the petitioner entered the plea of ‘Guilt’ to the first charge and ‘Not Guilty’ to the second. Thereafter, since the

petitioner pleaded guilty to the first charge the Court explained to the petitioner the meaning of the charge to which he pleaded guilty and ascertained that the petitioner understood the nature of the charge to which he pleaded guilty. Thereafter, the Court informed the petitioner the general effect of the plea of guilt and the difference in the procedure which will follow consequent to said plea. Recording that the accused understood the charge and the effect of his plea of guilt, the Court recorded that the record of evidence was read out, translated and explained to the petitioner and was marked 'K'. The Court then recorded whether petitioner wished to make any statement in mitigation of the punishment for the first charge to which petitioner pleaded guilty, and he replied in the negative followed by a negative response to the question whether petitioner wished to summon any witness as to his character. Thereafter, as the record would reveal the Court proceeded to examine five prosecution witnesses, being the same who were examined during recording of evidence.

15. During arguments, learned counsel for the petitioner had conceded that though with use of different words and in different expressions, the pith and substance of the testimony of the five witnesses examined at the trial is the same as what they deposed during recording of evidence, and therefore we need not note the testimony of five witnesses for the reason it would be nothing but re-noting what we have noted hereinbefore.

16. The first contention urged by learned counsel for the petitioner was that the petitioner never pleaded guilty to charge No.1 and for which learned counsel pointed out that the signatures of the petitioner on the plea of guilt were not obtained.

17. Now, the BSF Rules, 1969, till the proviso was inserted to sub-Rule 2 of Rule 142 on November 25, 2011, did not require signatures of

the accused to be obtained on the plea of guilt. But prudence demands that signatures of an accused who plead guilty to a charge should be obtained on the plea of guilt lest an issue is raised later on. However, we hasten to add that a procedural default cannot be equated with a substantive default and merely because a plea of guilt does not bear the signatures of the accused it would be no ground by itself to conclude in favour of the accused. The correct approach would be to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment.

18. What would the surrounding circumstances be?

19. The record of evidence would be a good measure of the surrounding circumstances as also whether a friend of the accused was representing the accused at the trial. 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 on record material evidence, it would not stand to logic or reasoning that such an accused would plead guilty at a trial. But where evidence at the recording of evidence brings out a situation 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 nor makes a statement in defence, it would be an instance where the accused, having no defence, would be compelled to plead guilty hoping for mercy.

20. We note that various decisions of Division Benches of this Court have taken conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a SSFC trial. In the decision reported as 2008 (152) DLT 611 Subhas Chander vs. UOI the view taken was that a plea of guilt which has not been signed by the accused would

vitate the punishment. The decision reported as 2004 (110) DLT 268 Choka Ram vs. UOI holds to the converse. Neither decision has taken note of the jural principle that a default in procedure, unless hits the very root of the matter would not vitiate a decision making process.

21. In an unreported decision dated August 06, 2012 deciding WP(C)2681/2000 Anil Kumar vs. UOI & Ors., the view taken is that mere absence of signatures beneath the plea of guilt by itself is not fatal being a procedural default and that the Court should look at the surrounding circumstances.

22. In the instant case we note that an officer of the rank of Assistant Commandant had acted as the friend of the accused i.e. the petitioner. We note that charge No.1 was of assaulting SI Gajendra Chand on June 21, 1994 at 10:00 hrs. when SI Gajendra Chand was accompanying petitioner along with the escort to the MI room. As we have noted above all five witnesses deposed to said fact during recording of evidence. While noting the testimony of Ct.Dasrath Lakara PW-2 during recording of evidence, we have noted that the line of cross-examination adopted by the petitioner was to suggest that petitioner reacted when SI Gajendra Chand first caught petitioner by the arm. The suggestion to the witness during cross-examination is an admission by the petitioner that he did the offending act, albeit by way of a justification : a reaction when somebody grabs one's arm.

23. Thus, it is clear that the petitioner entered the plea of guilt pertaining to the first charge with a clear mind. The enwombing circumstances are such that in the facts of the instance case it has to be held that the plea of guilt was voluntarily entered upon.

24. The second point urged was that Rule 143(1) of the BSF Rules, was violated. Sub-Rule (1) of Rule 143, violation whereof is alleged thus needs to be noted; but we note the entire Rule. It reads as under:-

“143. Procedure after plea of ‘Guilty’.-

(1) Upon the record of the plea of ‘Guilty’, if there are other charges in the same charge-sheet to which the plea is ‘Not Guilty’, the trial shall first proceed with respect to those other charges, and, after the finding on those charges, shall proceed with the charges on which a plea of ‘Guilty’ has been entered, but if there are alternative charges, the Court may either proceed with respect to all the charges as if the accused had not pleaded ‘Guilty’ to any charge or may, instead of trying him, record a finding of ‘Guilty’ upon any one of the alternative charges to which he had pleaded ‘Guilty’ and finding of ‘Not Guilty’ upon all the other alternative charges which precede such charge.

(2)(a) After the record of the plea of ‘Guilty’ on a charge (if trial does not proceed on any other charges) the Court shall read the record or abstract of evidence and annex it to the proceedings, or if there is no such record, or abstract, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence.

(b) The evidence shall be taken in like manner as is directed by these rules in the case of a plea of ‘Not Guilty’.

(3) The accused may, after such evidence has been taken or, as the case may be, the record or abstract of evidence has been read, address the Court with reference to the charge and in mitigation of punishment and may call witnesses as to his character.

(4) (a) If from the statement of the accused, or from the record of evidence, or otherwise, it appears to the Court that the accused did not understand the effect of his plea of ‘Guilty’, the Court shall alter the record and enter a plea of ‘Not Guilty’ and proceed with the trial accordingly.

(b) Any alternative charges withdrawn under sub rule (1) shall be reinstated in the charge sheet and the trial shall take place as if they had never been withdrawn.

(5) If a plea of 'Guilty' is recorded on some charges and the trial proceeds with respect to other charges in the same charge-sheet, the proceedings under sub-rule (2) and (3) shall take place after the findings on the other charges in the same charge-sheet are recorded.

(6) When the accused states anything in mitigation of punishment which in the opinion of the Court requires to be proved, and would, if proved, affect the amount of punishment, the Court may permit the accused to call witness to prove the same."

25. A perusal of the Rule would reveal that upon recording a plea of guilt, if there are other charges in the same charge-sheet to which the plea is not guilty, the trial has to first proceed with respect to those other charges and only after the finding on those charges, the Court shall proceed with the charge on which a plea of guilt has been entered. Sub-Rule 2(a) requires that upon a plea of guilt being recorded on a charge the Court shall read the record of evidence or the abstract of the evidence and annex the same to the proceedings.

26. The reason why, if a plea of guilt is entered, the record of evidence or the abstract of evidence is read, is that sub-Rule (2) of Rule 142 mandates to the Court that if the accused pleads guilty the Court shall ascertain that the accused understands the nature of the charge and shall advise him to withdraw the plea if it appears from the record or abstract of evidence that the accused ought to plead not guilty.

27. Now, if a person is charged for two offences, the quantum of punishment would certainly be affected if the conviction is for only one or both offences. It is for this reason that Rule 143 would require

evidence to be led at the trial if an accused pleads guilty to one charge and not guilty to the other.

28. But, sub-Rule (1) of Rule 143 requires a trial on the charge to which the plea of not guilty is entered and thereafter considers the plea of guilty with reference to the record of evidence.

29. There is an apparent conflict with the procedure to be followed after the plea of guilty is entered and the requirement of sub-Rule (2) of Rule 142 for the reason sub-Rule (2) of Rule 142 casts a duty upon the Court to look into the record of evidence notwithstanding a plea of guilt being entered for the reason if from the evidence recorded during recording of evidence there appears to emerge something which ought compel the accused to plead not guilty, the Court is bound to advise the accused to withdraw the plea of guilt and plead not guilty.

30. Under the circumstances we hold that there is no violation of the law.

31. Even otherwise, it is settled law that a procedural violation which is not jurisdictional, unless shown to have caused prejudice would be a mere irregularity and not an illegality. The same has to be overlooked.

32. It was then urged that after the trial the petitioner was not supplied the copy of the recording of evidence and thus the penalty imposed is vitiated. The argument overlooks the fact that the right of the accused to receive entire record of the trial which would include the record of the recording of evidence is after the trial is over for the reason without the same no meaningful statutory representation can be made. Thus, the delay in supplying the recording of evidence to the petitioner after the trial cannot vitiate the trial.

33. But, we must caution BSF authorities to ensure that complete record of the trial should be supplied immediately after the trial to the

accused for the reason the right to make a statutory representation against a conviction and a sentence is a valuable right. Indeed, in the instant case the delay in furnishing the recording of evidence to the petitioner resulted in the petitioner being empowered to file the statutory representation against the conviction order dated July 31, 1994 only in the year 1999, and this explains as to why the statutory representation filed by the petitioner was rejected by the competent authority on December 07, 1999.

34. On the merits of the conviction, learned counsel for the petitioner urged no submissions and conceded that there was overwhelming evidence to sustain the indictment on both the charges. We have referred to the testimony of five witnesses recorded during recording of evidence and have also noted that at the trial the witnesses deposed in sync with their earlier statements. Indeed, the testimony of the five witnesses would bring out that the petitioner, employed as an ASI/Pharmacist in BSF was not performing his duties causing inconvenience to the injured and the sick BSF personnel who would go to the MI room for either receiving treatment or taking medicine. When asked to perform his duties, petitioner insultingly told his 2-I/C to get lost. When required to be produced formally before the 2-I/C, on being escorted *en route* the petitioner used force against his superior officer SI Gajendra Chand.

35. The last contention urged was that the penalty was disproportionate to the gravity of the offence.

36. We do not think so.

37. The evidence brings out that the petitioner would not perform his duties in the MI room causing inconvenience to his fellow BSF officers and personnel. When called upon to do his duties he abused his superior

officers. Required to be produced formally before the superior officer the petitioner assaulted another superior officer who was escorting him. He disobeyed lawful command by saying that he will not go to the MI room and taunted the superior officer to do what the superior officer could do. His words '*Main Nahin Jata MI Room. Jo Karna Hai Kar Lo*' must rebound on him. Such defiance must be responded, in the language of the petitioner : *Toh Le, Kar Diya. Ab Tu Apne Ghar Jaa*. Meaning thereby the response of the superior officer to permanently send the petitioner to his home cannot be called unjust or disproportionate.

38. The writ petition is dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(JAYANT NATH)
JUDGE

JANUARY 20, 2014
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