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

+ **W.P.(C) 9853/2005**
EX HEAD CONSTABLE NAND RAM

+ **W.P.(C) 10085/2005**
EX CONSTABLE DHANANJAY KUMAR S

+ **W.P.(C) 10204/2005**
RAJESH KUMAR SHARMA Petitioners
Through: Mr. Anil Gautam, Advocate

versus

UOI & ORS. Respondents
Through: Ms. Barkha Babbar &
Ms. Dipanjali Tyagi, Advocates

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUNIL GAUR

ORDER
15.02.2016

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1. By this common judgment, we shall dispose of three petitions assailing a common verdict dated 28th November, 2013 passed by the respondent No.3- Commandant, BSF against the petitioners dismissing them from service and inflicting a punishment of one year on them. For the sake of convenience, the facts of W.P.(C) 9853/2005 are being referred to.

2. Cut to bone, facts of the case are that in the year 1987, the petitioner

was appointed to the post of a constable in the respondent-Border Security Force (BSF) and in due course, he was promoted to the rank of Head Constable. On the night of 5/6th November, 2003, when the petitioner was posted at the Border Out Post at *Nimtita* in *West Bengal*, he had headed an ambush party and along with the other petitioners in W.P.(C) 10085/2005 and W.P.(C) 10204/2005, was deputed in Char area of river Padma. At about 12:30 p.m. (mid night), the ambush party observed that two boats loaded with contraband goods were coming towards the ambush point. These boats were coming from *Maldapara Ghat* side and they were headed towards Bangladesh. The ambush party seized both the boats, which were full of contraband medicines and cattle.

3. It is the respondent's version that the owner of the contraband goods that were lying in the boats had entered into a deal with the members of the BSF ambush party, namely the three petitioners herein, and the ambush party had agreed to release the seized boats for a sum of Rs.1,40,000/-. However, the owner of the contraband goods i.e. the smuggler was able to arrange a sum of Rs.80,000/- and resultantly, the ambush party released one boat on the same night and confiscated the other boat. Later on, the ambush party had also seized another boat loaded with nine cattle. A third party informed the Commandant Head about the seizure of the two boats, one loaded with contraband medicines and the other loaded with cattle.

4. In the meantime, the Company Commandant received telephonic information from another civilian that the ambush party had allowed one boat to sail towards Bangladesh by accepting a bribe amount of Rs.80,000/-, which was still in their possession. The said information was received by Head Constable (G) Bhika Ram, who immediately apprised the Company

Commandant of the same. Both, the Company Commandant and Head Constable (G) Bhika Ram went to the ambush point and on checking the ambush party, recovered a sum of Rs.79,000/- from a *lungi* lying in the boat. Later on, a sum of Rs.2,000/- was recovered from *Sharif Hussain* (PW-4), who was the boatman of the ambush party and had stated in his testimony that he had sold one cattle from the herd of the seized cattle, which was handed over to him by the ambush party. The said amount was also deposited in the government treasury.

5. After the aforesaid incident, vide order dated 6th November, 2003, a Court of Inquiry was conducted and all the three petitioners were found blame worthy. Based on the Offence Report of 24th November, 2003, the petitioners were heard for the offences under Sections 40 & 46 of the BSF Act, 1968, in terms of Rule 45 of the BSF Rules. All the petitioners pleaded guilty to the charges levelled against them at the pre-trial stage. Subsequently, the respondent No.3- Commandant ordered for preparation of the Record of Evidence.

6. On 25th November, 2003, Record of Evidence was prepared and five witnesses were examined on oath in the presence of the petitioners. Out of the five witnesses, PW-1 was Commandant- H.S. Randhawa, who had stated that he had received a telephonic call from an unknown civilian about the ambush party accepting bribe of Rs.80,000/-. PW-2 was Head Constable (G) Bikha Ram, who had accompanied PW-1 to the spot and conducted a search on the boat of the ambush party and recovered the bundle of notes. PW-3 was Constable Achal Singh Shekhawat, who was performing the duty of GD Clerk on the date of the incident and had briefed the ambush party before they had left the camp. PW-4 Sharif Hussain, was engaged as a boat man by

the BSF and at the time of the incident and was in the boat with the ambush party. PW-5, Krishna Mandal was also working as a boat man with BSF and had taken PW-1 & PW-2 in his boat to the spot for confronting the ambush party.

7. The three petitioners were afforded an opportunity to cross-examine all the five prosecution witnesses. The statement of said witnesses were read over to the petitioners in the native language but none of them were cross-examined except for PW-4, who was cross-examined by the petitioner, Dhananjay Kumar in W.P.(C) 10085/2005. It is a different matter that the cross-examination of the said witness did not elicit anything in favour of the petitioners. The records produced by the respondents reveal that all the three petitioners did not affix their signatures on the ROE proceedings.

8. After completion of the ROE proceedings on 25th November, 2003, the petitioner and the other two co-accused were again heard by the respondent No.3-Commandant on 26th November, 2003, who informed them that the case would be taken up before the Summary Security Force Court (in short 'SSFC') on 29th November, 2003. On 27th November, 2003, the petitioners were handed over copies of the ROE proceedings and the charge-sheets against receipt and thereafter they were tried before the SSFC. All the three petitioners had pleaded guilty to the charges levelled against them and the procedure prescribed under Rule 142 (2) of the BSF Rules was followed. The petitioners also made statements under Rule 143 (3) for seeking mitigation of punishment. After considering the material on record, the petitioners were awarded a sentence of *dismissal from service* with one year in civil jail.

9. Aggrieved by the dismissal orders, the petitioners had filed statutory

petitions before the Director General, BSF, which were rejected vide order dated 7th December, 2004.

10. Mr. Anil Gautam, learned counsel for the petitioners submits that the respondents had falsely claimed that the petitioners had pleaded guilty, which can be verified from the fact that the documents recording the plea of the petitioners' admitting to their guilt, do not bear their signatures. He states that when the petitioners had allegedly pleaded guilty, the respondents ought not to have simply accepted it and instead, they should have proceeded with the trial in terms of Rule 142 & 143 (4) (a) of the BSF Rules. He argues that there was no evidence to indict the petitioners particularly when neither the smugglers from whom money was allegedly taken nor the civilians who had informed the respondents about the incident, were named or examined by the respondents. It is contended that no independent witness was associated at the time of seizure of the contraband goods and no seizure memo was prepared when an amount of Rs.80,000/- was allegedly recovered from the petitioners and mere recovery of money is not sufficient to sustain the charge levelled against them. In support of his submission that it is unbelievable that the petitioners had pleaded guilty before the SSFC, particularly when the documents recording their plea of guilt were not signed by the petitioners, learned counsel for the petitioners relies upon a judgment dated 4th May, 2012, pronounced by a Division Bench of this Court in W.P.(C) 2715/2000, entitled '*Rajinder Singh Vs. Union of India*'.

11. Per contra, learned counsel for the respondents refutes the arguments advanced by the other side and states that the proceedings before the SSFC commenced only after the plea of guilt by the petitioners and that too, after complying with the provisions of Rule 142 (2) of BSF Rules. She denies the

contention of the counsel for the petitioners that the petitioners had not been explained the meaning of the charge or that they had not understood the nature of the charge levelled against them. She submits that the provisions of the BSF Rules and Act were duly complied with, both in letter and spirit, which can be gauged from the fact that the petitioners were afforded an opportunity to choose a defending officer, whom they had selected on their own. Further, the petitioners had participated in the pre-trial proceedings, which included the Court of Inquiry proceedings, the offence report, hearing on charge and the recording of evidence. Lastly, learned counsel submits that the petitioners had all the opportunity to cross-examine the prosecution witnesses, but they had declined to do so and further, they did not comply with the provisions of Rule 48 (3) of the BSF Rules, which gives them an opportunity to offer their version and make a statement.

12. To fortify the said submission, learned counsel for the respondents relies upon the Record of Proceedings dated 24th November, 2003 conducted before the Commandant under Rule 45 of the Rules, wherein it was recorded that the petitioners had declined to cross-examine the witnesses or step forward as a witness. To fortify her argument that merely because the petitioners had not signed the plea of guilt, could not be a ground for interfering in the impugned order, she referred to a judgment dated 16th August, 2012 in W.P.(C) 4997/1998, entitled *Ex. Const. Kalu Ram Vs. UOI & ors.* and clarified that the said judgment was pronounced after passing of the judgment in the case of Rajinder Singh (supra), cited by the counsel for the petitioner.

13. We have heard the arguments advanced by the learned counsel for the parties and carefully examined the records produced by the counsel for the

respondents, in the light of the decisions cited by both sides.

14. A glance at the prosecution evidence recorded at the pre-trial stage is considered necessary, as it throws some light not only on the sequence of events that had taken place on the date of the incident i.e. on 5th November, 2003, but also on the complicity of the petitioners.

15. PW-2, HC(G) Bhika Ram, who had accompanied the Commandant to the ambush boat had deposed as below:-

“At about 0700 hrs I reached to the ambush site meanwhile after five minutes Sh. H.S. Randhawa, AC also reached there. Then Sh. H.S. Randhawa, AC reached there I took him to the side I took him to the side I again told him about the phone call. He also narrated same statement after this we call ambush party Comdr and other members. We told them about the telephone call and asked them whether you have allowed one loaded boat to go into Bangladesh after taking money and you have left some cattle also then ambush party denied they said they have seized only one boat loaded with good and one boat loaded with cattle.

After their denial we checked the boat in which ambush party laid ambush as informer as told if you check the boat in which ambush party laid ambush you will find the money. We checked the boat during the checking we found bundles of notes, which was wrapped in the lungi. After that I handed over the lungi to Coy Comdr in which bundle of notes were wrapped. After this Coy Comdr Sh. H.S. Randhawa, AC told them to report BOP Nimtita with seized goods. I along with Sh. H.S. Randhawa, AC came to BOP Nimtita. Where notes were counted in presence of Sh. H.S. Randhawa, AC, Insp. M.V. Balakrishnan was also present there. We reached BOP Nimtita at about 0930 hrs, after the counting Rs.79,900/- (seventy nine thousand nine hundred rupees) were found which wrapped in said lungi.

After counting of Rs. Sh. H.S. Randhawa, AC inquired from

HC Nand Ram that he has information that ambush party has sold some cattle also. Then HC Nand Ram gave Rs.2000/- (two thousand rupees) to Sh. H.S. Randhawa, AC and told that we sold one cattle to give money to the Majhi of the boat. About two thousand rupees were also included in the recovered rupees. By this total 81900 (eighty one thousand nine hundred rupees) were seized/ recovered from ambush party accordingly seizure memo of seized rupees was prepared.”

16. PW-3,CT Achal Singh Shekhawat, who had also accompanied the Commandant to the spot, had deposed as follows:-

“At about 0700 Hrs HC (G) Bhika Ram reached to the ambush point and told that you have made good seizure. After five minutes Sh. H.S. Randhawa, AC also reached on the place of seizure. Sh. H.S. Randhawa, AC inquired place and time of seizure from ambush party. Sh. H.S. Randhawa, AC and HC(G) had some conversation after that they called the ambush party members and had some discussion with them. After few minutes HC (G), Sh. H.S. Randhawa, AC and members of ambush party came back to the boat in which our ambush party laid ambush. After that Sh. H.S. Randhawa, AC direct to me to count seized goods. Then I started counting seized goods. After some time Sh. H.S. Randhawa, AC told that he is going to BOP and directed to ask to come with seized goods.

At about 0930 hrs we reached to BOP Nimitita with seized goods, which was unloaded and brought into the camp. At about 1030 hrs on 6 Nov 03 I heard that 80,000/- rupees was recovered from boat in which ambush party laid ambush. Later on inspector S N Ghos officiating coy Comdr C Coy and Sh Ashisa Behra, DC reached BOP Nimitita and counting the seized goods them. Accordingly seizure memo of seized goods was prepared and Msg was given to the BN HQ A GD entry regarding arrival of ambush party was made in GD register in page No.76 at Srl. No.08.”

17. Following is the testimony of PW-4, Sharif Hussain, the boatman who had accompanied the ambush party:-

“BSF party laid ambush in char area on boat at about in between 0000 hrs to 0030 hrs two boats loaded with goods came near to the ambush point (near to my boat) these boats came from Maldapara ghat side and they were heading towards Bangladesh side. When these boats came near to our boat then BSF party (ambush party) seized above boats during the time of seizure some civilians jumped into river and they ran towards char side leaving behinds the loaded boat then party seized two boats. After the seizure of the loaded boat ambush party discussed and they decided to leave the seized boat after taking some money. After this discussion I and CT Dhananjay went talk with smugglers who were standing in char area. We went there and called them, one of them came to our ambush point (boat) the above person was Bangladeshi. Then ambush party told him to go and call the main smuggler whose goods has been seized. Then above Bangladeshi went towards Maldapara side and after some time above Bangladeshi came with some civilian from Maldapara side. Among above civilian one civilian namely Badagudna R/o Vill Maldapara came to the ambush party. Then ambush party started negotiation with said civilian for leaving seized boats, which was loaded with cloths and medicine. Around 30 minutes negotiation was continue, however, on Rs.80,000/- (eighty thousand) agreement was made BSF ambush party agreed to leave 1 loaded boat with goods to go into Bangladesh in Rs.80,000/-. After this settlement above civilian namely Badagudna went to his home and brought Rs.80,000/- and handed over to CT. Dhananjay, which was further handed over to Ct. Dhananjay, which was further handed over to HC Nand Ram. During the negotiation all ambush party were present. At about 0230 hrs after receiving 80,000/- rupees ambush party allowed one loaded boat with medicine and cloth to go into Bangladesh and

seized one boat and above seized boat remain near to our boat. About boat was also loaded with cloths and medicines. When party was discussing to leave seized boat after taking money I told them not to do this act but they stopped me and told we are responsible for our act you need not to worry.

In morning at about 0330 hrs one boat loaded with cattle going towards Bangladesh from India was seized by ambush party with the help of my boat in which BSF party laid ambush that boat was without engine in said boat nine number cattle were loaded. After the seizure of above cattle and boat I asked ambush party to give me one cattle as I did hard work for making the seizure of boat loaded with goods and boat loaded with cattle. Then ambush party gave me one cattle I sold above cattle to fisherman in Rs.2000/- in night only.

In morning at about 0400 hrs ambush party gave O.K. report to Coy HQ and told operator that they have seized one boat loaded with goods and one boat with cattle, they asked boat for shifting goods. At about 0500 hrs one boat from BOP Bajitpur came to our ambush point. At about 0700 hrs HC(G) Bhika Ram came to ambush point (place of seizure) Bhika Ram was standing in our boat. After 5 minutes Sh. H.S. Randhawa, AC Coy Comdr also reached to the seizure site. After that HC (G) Bhika Ram and Sh H S Randhawa, AC called the ambush members and had some discussion. After approx 10 minutes, Sh. H S Randhawa, AC, HC (G) Bhika Ram and ambush party came to the boat in which ambush was laid. HC (G) Bhika Ram inquired about the money then HC Nand Ram gave money to HC (G) Bhika Ram, which was wrapped in the lungi of HC Nand Ram and was kept under the bedding and bedding was kept near to engine of said boat.

After taking above money which was wrapped in lungi Sh.H S Randhawa, AC and HC(G) Bhika Ram left that place and told us to bring the seized goods to BOP Nimtita. Then we brought the seized goods to BOP Nimtita with the help of boat.

At about 0930 hrs when we reached to BOP Nimita HC Nand Ram asked me to give Rs.2000/- which was received after _____ of one cattle among the seized nine cattle. I hand over the 2000/- rupees to HC Nand Ram then further detail what happen I do not know.”

18. The records reveal that an opportunity was granted to all the petitioners to cross-examine the prosecution witnesses, but they had declined to do so. Further, during the proceedings of plea of guilt, each of the petitioners were called upon to make a statement with reference to the charge levelled against them or offer circumstances for mitigation of punishment. Nand Ram, the petitioner in W.P.(C) 9853/2005 had stated as below:-

“I pray to the court that one chance may be given to me for this mistake. I may be pardoned on seeking my family and children (two).”

19. Dhananjay Kumar, the petitioner in W.P.(C) 10085/2005 had requested that he be given a minimum punishment, as his parents, brother, sister and family were dependent on him. Rajesh Kumar Sharma, the petitioner in W.P.(C) 10205/2005 had stated that such a mistake will not be repeated in the future.

20. After recording their statements, the proceedings before the SSFC were conducted on 28th November, 2003, wherein it was recorded that all the petitioners had pleaded guilty. It was also recorded that they were conveyed the effect of their plea of guilt, as prescribed under the provisions of Rule 142 of the Rules. Finally came the verdict of the Court whereunder all the three petitioners were inflicted a sentence of *dismissal from service with one*

year in civil jail.

21. The contention of the learned counsel for the petitioners that the record demonstrates that none of the petitioners had signed the plea of guilt, which should be understood to mean that they had in fact not pleaded guilty and in such circumstances, the respondents ought to have proceeded with the trial in terms of Rules 142 & 143 (4) (a) of the BSF Rules, is found to be absolutely untenable in the light of the extensive incriminating evidence recorded during the pre-trial stage, and reproduced above. Reliance placed on the decision in the case of Rajinder Singh (supra), would also not be of much assistance to the petitioners for the reason that in the said case, the court was of the opinion that there was fabrication of documents and no rationale explanation was furnished by the respondents therein as to how the proceedings of an earlier date were given on a subsequent page, when the record was maintained in an ascending order. Giving the facts of the said case, the Court had concluded that the petitioners therein had not pleaded guilty and resultantly, the entire SSFC proceedings were declared as vitiated.

22. In the present case, there is a clear distinction inasmuch as in the light of the evidence of the prosecution witnesses, who included amongst others, PW-4, the boat man, who was a civilian engaged by the respondents and had narrated the sequence of events that had unfolded on the night of the 5th/6th November, 2003, it cannot be contended by the petitioners that there was no evidence on record to indict them, particularly when recovery of a substantial amount of Rs.80,000/- was made on the spot. Though the petitioners had all the opportunity to explain how such a large amount had come in their possession, they had elected not to do so. Quite obviously, the petitioners had nothing at all to say in defence and that is why they pleaded

guilty.

23. In the case of Kalu Ram (supra), referred to by learned counsel for the respondents, the petitioner therein had pleaded guilty to the charges framed against him and was subsequently convicted by the SSFC, which sentence was assailed on the ground that the plea of guilt allegedly taken by him, stood vitiated for the reason that the documents containing the plea of guilt did not bear his signatures. After taking into consideration several decisions on the aspect of plea of guilt, including the judgment relied upon by the petitioners herein in the case of Rajinder Singh (supra), the Division Bench had held as follows:-

“20. The petitioner has assailed the finding and sentence of the Summary Security Force Court primarily on the ground that the plea of guilt allegedly taken by the petitioners is vitiated as the document containing the plea of guilt of the petitioner does not bear the signatures of the petitioner and as a result thereof the finding of the Summary Security Force Court also stands vitiated for the same is based upon the plea of guilt allegedly taken by the petitioner.

21. In the decisions reported as Lance Naik Vimal Kumar Singh v Union of India MANU/DE/1512/2010 and Subhash Chander v Union of India MANU/DE/1266/2008 the plea of guilt taken by the petitioners therein was held to be vitiated as the document containing the plea of guilt of the petitioners did not bear the signatures of the petitioners. On the other hand in the decisions reported as Chokha Ram v Union of India 110 (2004) DLT 268 and Diwan Bhai v Union of India MANU/DE/1823/2001 it was held that plea of guilt taken by the petitioner therein cannot be held to be vitiated on the ground that the document containing the plea of guilt of the petitioners does not bear the signatures of the

petitioners when there is no specific legal requirement to obtain signatures of a charged officer on the plea of guilt taken by him.

22. In view of the above legal position, it cannot be universally laid down that the plea of guilt taken by a charged officer would stand vitiated in every case where the document containing the plea of guilt of the charged officer does not bear the signatures of the charged officer. What would be the effect of non-bearing of signatures of the charged officer in document containing the plea of guilt by him on the veracity of the plea of guilt taken by him depends on facts and circumstances of each case.

23. In the instant case it could well be argued that the overwhelming evidence emerged against the petitioner in the Record of Evidence. Despite being given an opportunity the petitioner did not rebut the evidence appearing against him inasmuch as the petitioner did not cross-examine any of the witness of the prosecution. The petitioner did not make any statement before the Recording Officer in terms of the provisions of Rule 48(3) of the BSF Rules to explain the evidence appearing against him. The silence of the petitioner in the Record of Evidence proceedings is a very strong pointer to the fact that the petitioner had nothing to say in his defence. That being the position, it is a good possible argument that the petitioner had no alternative but to plead guilty at the trial.” (emphasis added)

24. Even in the instant case, it has clearly emerged that the petitioners were afforded an opportunity to cross-examine the prosecution witnesses but they did not cross-examine any of them, except for PW-4, from whom they were unable to elicit anything material, which would have gone in their favour. Further, the petitioners did not make any statement in defence, though an opportunity was granted to them. Having failed to rebut the

evidence produced against them and having failed to cross-examine the material witnesses and further, having declined to make any statement before the Recording Officer in terms of Rule 42 & 50 of the BSF Rules, it has to be concluded that the records maintained by the respondents are quite in order and the petitioners cannot be permitted to renege from the plea of guilt, recorded by the respondents in the course of the SSFC proceedings. Nor can the petitioners claim that the proceedings stood vitiated because their signatures were not obtained on the plea of guilt. The attending facts and circumstances noted above including the overwhelming evidence stacked by the prosecution are found to be sufficient to indict all the three petitioners.

25. In view of the aforesaid discussion, we are of the opinion that the petitioners have not been able to point out any illegality, perversity or arbitrariness in the proceedings held or the punishment inflicted against them for seeking judicial review. Accordingly, all the three petitions are dismissed as being devoid of merits and the parties are left to bear their own costs.

HIMA KOHLI, J

SUNIL GAUR, J

FEBRUARY 15, 2016

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