

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

Reserved on: March 02, 2016
Pronounced on: March 29, 2016

+ **W.P.(C) 23111/2005**

EX-CT. OM PRAKASH Appellant
Through: Mr. Anil Gautam, Advocate

versus

UNION OF INDIA & ANOTHER Respondents
Through: Ms. Barkha Babbar, Advocate

CORAM:

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

SUNIL GAUR, J.

1. On 28th July, 2001, the petitioner, who was a constable in the Border Security Force (*hereinafter referred to as BSF*) and was performing observation duty at the border outpost in Ram Nagar from 1200 Hrs. to 1800 Hrs. on the International Border between India and Bangladesh, was tried by Summary Security Force Court (*hereinafter referred to as SSFC*) on the charge of giving free pass to smugglers to smuggle approximately 100 cattle from India to Bangladesh. Vide order dated 11th August, 2001, the petitioner was found guilty of the aforesaid misconduct and awarded a sentence of dismissal from service. It is a

matter of record that the petitioner's co-delinquent-Constable Shiv Shankar Singh, who was also performing duty at the same border outpost, was also awarded a similar penalty. The penalty imposed upon the petitioner was approved by the Reviewing Officer on 25th January, 2002, and the statutory petition against the afore-referred conviction preferred by the petitioner stood dismissed by the Directorate General, BSF and the said dismissal of the statutory petition was conveyed to the petitioner vide impugned communication dated 17th February, 2003 (*Annexure P-6*).

2. The relevant facts, which led to the trial and conviction of the petitioner, as noticed in the counter affidavit filed by the respondents, are highlighted, as under: -

“On 28.7.2001, the petitioner was detailed to perform OP duty at OP No.1 under Ramnagar BOP, jointly with Ex.Ct. Shiv Shanker Singh of 62 Bn BSF at B.P. No.34/2-S from 0600 hrs. to 1800 hrs. While performing the O.P. duty, both the constables allowed free pass to smugglers to smuggle the cattle approximately 100 in number to Bangladesh.

Both constables were heard by the Commandant and thereafter a joint Record of Evidence was ordered vide order dated 30.7.2001 after completion of record of evidence a decision was taken to try them jointly by a Summary Security Force Court. The petitioner and Ex.Const. Shiv Shanker Singh were tried jointly by a Summary Security Force Court by the Commandant for an offence under Section 40 of BSF Act, 1968 “An omission prejudicial to good order and discipline of the Force”. The petitioner pleaded not guilty to the charges. However, after going through the material and evidence on record, the court found the petitioner guilty of the charge and awarded sentence to be dismissed from service with effect from 11.8.2001. Summary Security Force Court proceedings were

forwarded to Law Officer Grade-I Ftr. HQ. SB Vide letter dated 14.8.2001 and were received after counter signature by DIG SHQ BSF KNR vide their letter dated 28.1.2002 and were sent to Chief Law Officer, FHQ BSF, New Delhi for record. The petitioner joined the BN HQ at Roshanbagh (WB) on 29.6.01, after which he underwent pre-induction training about the modus operandi of smugglers and about taking the counter measures. He was deployed on the border after area familiarization, and before assigning the duty the petitioner was briefed by officiating Coy Commander Subedar Jaswant Kumar.”

3. The trial against the petitioner and his co-delinquent proceeded on the basis of a written complaint dated 29th July, 2001, by the Offg. Coy Comdr. 62 Bn. BSF, which unfolds the precise case set up against them. It is pertinent to advert to this complaint, which in verbatim reads as under: -

“To

*The Commandant
62 BN BSF
Roshanbagh Murshidabad.*

Sub.: Connect with smugglers and crossing of cattle to Bangladesh

It is submitted that No.90254297 Ct Om Prakash Choti and No.98002550 Ct Shiv Shankar Singh of D Coy, 62 BN BSF were on OP duty. At OP point No.1 from 2811300 hrs. to 281900. I was given some Spl. Task by the worthy Comdt to carry out joint Ops with B Coy towards BOP Khandua side during night Intervening 28/29 July 2001 and accordingly I had left my Coy HQ Ramnagar at about

--- on a motor cycle Driver No. ---- Ct/Dvr T.S. Prakash.

On reaching at OP Point No.1 I had found that No.90254297 Ct Om Prakash on OP duty along with No.98002550 Ct Shiv Shankar Singh had consumed liquor and was fully in the stock of intoxication. I had tried to enquire about the focus. But Const. Om Prakash was not in a position to give response of my queries. I had told and Shiv Shankar to remain vigilant on duty and since I had to accomplish this special task assigned to me, I proceeded further with the view that I will deal with this Ops later on.

Secondly, I hardly about 500 yards ahead towards BOP Khandua I had seen that there was a small way crossing border road and going towards IB and a large no. of foot marks of cattle on the way were noticed. On seeing this, I again returned back towards this OP Point 01 and asked the both this above persons as to how large number of cattle have crossed by the smugglers just a 500 yards distance from the OP Point. Ct. Om Prakash was not in a position to give a reply being in the state of intoxication and Ct. Shiv Shankar Singh had replied that I do not know in this regard.

Keeping in view the above facts, I am of this view that crossing of cattle from just such short distance from OP Point in broad day light between 1600 hrs to 1700 hrs. cannot be possible without connivance of these persons on naka duty. Therefore, it is requested that a strong disciplinary action against the above persons may be initiated so that reoccurrence of such lapses in furtherance be avoided.

It is further submitted that Sh. Chhindu Ram DC has also reported of this location today at about 1200 hrs. from BN HQ and has seen the way/spot from where the cattle have been crossed by the smugglers.

Sd/-
Insp. Jaswant Kumar
(Offg Coy Comdr)
D Coy 62 BN BSF
Dated 29.07.2001”

4. A perusal of the proceedings of the SSFC held at Headquarter 62 Bn. BSF, on 11th August, 2001 (*Annexure P-1*) reveals that apart from an interpreter, a friend was also provided to the petitioner during the course of the trial to assist him to effectively contest the case set up against him. The precise charge framed against the petitioner reads as under: -

“Ram Nagar BOP 28.7.2001 BSF Act 1968 U/s 40 An Omission Prejudicial To good order and Discipline of Force/
in that the petitioner at Ram Nagar BOP on 28.7.2001 at about 1730 hrs while performing OP duty jointly with No.902542974 Constable Om Prakash of 62 BN BSF at between B.P. No.34 / 2-S to 34 / 3-S allowed free pass to smugglers to pass the cattle approx 100 nos. to Bangladesh.

Sd/- 11.8.2001
(Dr. INDRAJIT)
21/C
Offg. Commandant

5. To prove the afore-noted complaint, Inspector Jaswant Kumar had stepped into the witness box as PW-2 and his driver constable Prakash T.S. as PW-3. Constable Madan Mohan (PW-4) was on duty at the border outpost prior to the petitioner taking over on the day of the incident. Deputy Commandant Chhindu Ram (PW-1) had inspected the spot after the incident in the presence of Inspector Jaswant Kumar and had found footprints of cattle on the small tract indicating that many cattle had crossed IB Road towards Bangladesh.

6. On the strength of the deposition of afore-referred four witnesses, the petitioner was tried by the SSFC. During the trial, the petitioner had also stepped into the witness box to depose that the track from where the cattle went was bunch type and the cattle had come there for grazing. However, the petitioner had maintained that no smuggling had taken place during his duty hours. In his defence, the petitioner had got examined Constable Rafiq Ahmed, who had deposed that on the day of the incident, he was the ground duty clerk and had replaced one man due to shortage of manpower. Although the impugned penalty of dismissal from service has been assailed by the petitioner in this petition on numerous grounds, but at the hearing, learned counsel for the petitioner had assailed the impugned penalty solely on the ground that the evidence led is wholly unjustified to prove the charge against him. In this endeavour, learned counsel for the petitioner had taken us through the evidence of the witnesses, who had deposed against the petitioner to highlight that from the evidence on record, it does not stand proved that

the petitioner had in any way connived in the smuggling of cattle from India to Bangladesh from the border outpost where he was on duty.

7. It was pointed out by learned counsel for the petitioner that the Deputy Commandant, Chhindu Ram (PW-1) has admitted that Inspector Jaswant Kumar had taken him on the *Kaccha* track upto a little distance to show the foot marks of the cattle and this by itself does not prove that the petitioner had in any way facilitated the passage of cattle to cross the border outpost to Bangladesh. This submission is noted only to be rejected for the reason that on a bare perusal of the deposition of Deputy Commandant Chhindu Ram (PW-1), we find that he had clearly stated in the cross-examination that he had seen foot marks on both the sides of border road on the track, which goes to Bangladesh.

8. It was next contended that the observation post was on the ground and as there was no observation tower at the International Border, which is at a distance from the observation post, it was not feasible to keep a watch at such a distance as jute crop of 6 feet was growing between both the border outposts and the border and the track leading to it was in a zigzag form. This contention does not in any way demolish the case set up against the petitioner for the reason that there is nothing on record to suggest that the observation post was on the ground or that the visibility from the border post upto the International Border, was poor. In any case, it is not even disputed by the petitioner that during his duty hours, villagers had brought cattle for grazing and drinking water and there was a lot of movement of cattle. This assumes importance in view of the deposition of Constable Madan Mohan (PW-4), who has clearly deposed that when he was on duty prior to the petitioner at the border

outpost, one civilian had approached him and had asked that “*Maal Paar Karana Hai*” and this witness (PW-4) had told him to run away or he will be shot dead. In this background, it cannot be said that the charge levelled against the petitioner does not stand proved as there is evidence of the complainant-Inspector Jaswant Kumar (PW-2).

9. To assail the evidence of the complainant, learned counsel for the petitioner had drawn our attention to the deposition of driver constable Prakash T.S. (PW-3), who had stated in his evidence that he did not know whether footmarks of cattle were fresh or old as it was drizzling. To say the least, the story of drizzling has been put by the petitioner and this witness belatedly and there is no cross-examination of this witness regarding the version put forth by the petitioner.

10. During the course of the hearing, learned counsel for the petitioner had placed reliance upon a decision of the Division Bench in 102 (2003) DLT 415, titled Nirmal Lakra v. Union of India & Ors. to submit that the standard of proof required in the case, like the instant one, is of establishing the guilt beyond reasonable doubt. Reliance was also placed upon another decision of the Division Bench in LPA No.409 of 2004 titled Ex.Ct. Raj Kumar v. Union of India rendered on 21st November, 2008 to submit that when the evidence is not sufficient to prove the charge in such like cases, then the penalty cannot be imposed.

11. On the contrary, learned counsel for the respondents had placed reliance upon the Supreme Court’s decision in JT 1997 (9) S.C. 676, titled Union of India and Others v. Major A. Hussain to submit that if a court martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure

prescribed, the High Court or for that matter any court must stay its hands.

12. In the light of the afore-noted precedents, we have scrutinized the evidence of the star witnesses i.e. the Complainant-Inspector Jaswant Kumar (PW-2) and we find that he has categorically deposed that when the petitioner and his co-delinquent were questioned by this witness (PW-2) as to why they had allowed the cattle to crossover to Bangladesh, the petitioner had no answer and he had remained silent. Pertinently, there is no cross-examination on the afore-noted material aspect. It is relevant to note that this witness (PW-2) had categorically deposed that there was no field for grazing near the border outpost as it was submerged under water. It has come in the evidence of this witness (PW-2) that footmarks were seen upto the bank of Marghati Nala and approximately 50 persons were seen at the junction of Padma River and Marghati Nala and that there was no field for grazing as it was all surrounded by water. This witness had gone to the extent of deposing that he has not considered it fit to check the boats for the cattle because 50 persons were there and they were only two persons and this witness did not have any confidence in the petitioner and his co-delinquent for him to take them along for checking of the boats. Relevantly, on this crucial aspect also, there is no cross-examination of this witness.

13. After having scrutinized the evidence of the witnesses, who have deposed against the petitioner, and the evidence of the petitioner and Constable Rafiq Ahmed (DW-1), we find that the evidence of the complainant (PW-2) stands materially corroborated by the deposition of a senior officer i.e. Deputy Commandant Chhindu Ram (PW-1) and that of

Constable Madan Mohan (PW-4) and that the evidence of the driver-Constable Prakash T.S. (PW-3) does not in any way demolish the version of the complainant. In our considered opinion, the evidence led against the petitioner on the preponderance of probabilities proves the charge against him and so, reliance placed by learned counsel for the petitioner upon decision in the cases of Ex. Ct.Raj Kumar (supra) and Nirmal Lakra (supra) is of no avail. While exercising the power of judicial review, only in a complicated criminal case, a charge is required to be proved beyond reasonable doubt and not in every case. The instant case cannot be said to be a complicated one. The Supreme Court in the case of Major A. Hussain (supra) has reiterated that proceedings of a court martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure and the courts should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, and that court martial has jurisdiction over the subject matter and if it has followed the prescribed procedure, then it is within its powers to award a punishment.

14. The position of law is fairly settled. That is to say, this Court while exercising its power of judicial review is not required to sit in appeal over the evidence led in such trials and what is required to be seen is as to whether evidence on record is fairly sufficient to establish the charge. We have no hesitation in holding that from the evidence on record, the charge levelled against the petitioner stands proved when judged on the yardstick of preponderance of probabilities and there is no violation of the prescribed procedure in holding of the SSFC trial. Consequently, finding no irregularity or illegality in the impugned penalty awarded to the

petitioner, this petition is dismissed while leaving the parties to bear their own costs.

HIMA KOHLI, J

SUNIL GAUR, J

MARCH 29, 2016

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