

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

Judgement Reserved on : July 13, 2016
% *Judgment Delivered on : July 18, 2016*

+ **W.P.(C) 3640/2006**

RAKESH KUMAR Petitioner
Represented by: Dr.Ashwani Bhardwaj, Advocate
versus

UOI & ORS. Respondents
Represented by: Ms.Abha Malhotra, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The petitioner was enrolled as a Constable with the Border Security Force on April 19, 1989. His service is governed by the BSF Act, 1968 read with BSF Rules, 1969.
2. Attached to the 86th Bn. BSF, in March, 2000 the petitioner was deployed with the 'B' Coy at the BoP Uppan Chowki. The company commander received information on March 07, 2000 that around 22:45 hours, the petitioner had trespassed into the house of one Sh.Vishamber Roy in village Kuchli Bari in a drunken condition and created nuisance. He was overpowered by the villagers. He was beaten. He was handed over by the inhabitants of the locality to the police authorities at PS Kuchli Bari. Information from deployment register was obtained which showed that the petitioner was not on duty at that time and that the place he had visited was declared out of bounds for the force personnel.

3. As per the requirement of Rule 43 read with Rule 44 of the BSF Rules, 1969 an offence report was drawn up listing two charges against the petitioner as under:-

<u>Place and date of offence</u> <u>Charge No.1</u>	<u>Offence</u> <u>BSF ACT 1968: UNDER SECTION 22(e)</u> <u>NEGLECTING TO OBEY LOCAL ORDER</u>
BOP UPPAN CHOWKY 07/03/2000	In that he, on 07 March 2000 at 2230 hrs. While deployed at BOP Uppan Chowky contrary to Bn standing order and he was found in village Kulchilbari which has been placed "Out of Bounds".
<u>Charge No.2</u> BOP UPPAN CHOWKY 07/03/2000	<u>BSF ACT 1968: UNDER SECTION 26</u> <u>INTOXICATION</u> In that he, at BOP Uppan Chowky on 07 th March 2000 at about 2230 hrs. Was found in a state of intoxication.

4. Produced before the Commandant of the Battalion along with the offence report, the Commandant complied with Rule 45 of the Rules and called upon the petitioner to respond to the two charges. The petitioner pleaded guilty to both charges. The plea of guilt has been recorded by the Commandant. No punishment has been awarded. The Commandant took a decision that the petitioner should be remanded for preparing record of evidence. The Rule 45 in question reads as under:-

"45 Hearing of the charge against an enrolled person.-

(1) The charge shall be heard by the Commandant of the Accused in the following manner :-

(i) The charge and statements of witnesses, if recorded, shall be read over to the accused.

(ii) *If written statements of witnesses are not available, or where the Commandant considers it necessary to call any witness, he shall hear as many witnesses as he may consider essential to enable him to determine the issue;*

(iii) *Wherever witnesses are called by the Commandant, the accused shall be given an opportunity to cross-examine them.*

(iv) *Thereafter, the accused shall be given an opportunity to make a statement in his defence.*

(2) *After hearing the charge under sub-rule (1), the Commandant may:-*

(i) *award any of the punishments which he is empowered to award; or*

(ii) *dismiss the charge; or*

(iii) *remand the accused, for preparing a record of evidence or for preparation of an abstract of evidence against him; or*

(iv) *remand him for trial by a Summary Security Force Court:*

Provided that, in cases where the Commandant awards more than 7 days imprisonment or detention he shall record the substance of evidence and the defence of the accused:

Provided further that he shall dismiss the charge, if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him it is not advisable to proceed further with it:

Provided also that, in case of all offences punishable with death a record of evidence shall be taken.

Provided further that in case of offences under Sections 14, 15, 17, 18 and offence of 'murder' punishable under Section 46 of

the Act, if the accused has absconded or deserted, the Commandant shall hear the charge in his absence and remand the case for preparation of the record of evidence.

5. Suffice it to state that sub-Rule 2 of Rule 45 vests four discretions in the Commandant after he concludes the hearing of the charge contemplated under sub-Rule 1 of the Rule and he can exercise any one of them. The first, as per Rule 45(2)(i), is to award any punishment which the Commandant is empowered to award. The second, as per Rule 45(2)(ii) is to dismiss the charge. The third, as per Rule 45(2)(iii) is to remand the accused for preparing a record of evidence. The fourth, as per Rule 45(2)(iv) is to remand the accused for trial by a Summary Security Force Court.

6. The Deputy Commandant of the Battalion was directed to record the evidence and thus he commenced proceedings to record the evidence and examined HC Mohindra Singh PW-1, AC Mahendra Singh PW-2, Ct.Ramesh Pal PW-3, Ct.Jaipal Singh PW-4, Ct.K.Nazir Ahmad PW-5, AC M.L.Verma PW-6, SI Rabin Muramu PW-7, Vishamber Roy PW-8, Ct.Gippen Thapa PW-9 and Insp.Dayanand PW-10.

7. The record shows that given an opportunity to cross-examine the witnesses the petitioner declined to do so.

8. Succinctly stated the witnesses deposed in sync that they received information of a hue and cry in the village and on checking the barracks found petitioner absent. He had not been detailed for duty. They reached the village and therefrom PS Kulchi Bari where they saw petitioner intoxicated. His clothes were stripped. He was in his underwear. Since petitioner was injured he was given medical treatment at the MI Room Dhapraht by Nursing Assistant HC P.N.Deka. Sufficient to highlight at this stage that the person in whose house petitioner allegedly trespassed was examined as PW-8.

9. Given an opportunity to make a statement in defence and lead evidence in defence if he desired, the petitioner declined both. In terms of the Rules the record of evidence was placed before the Commandant who, on perusing the evidence recorded decided that the petitioner should be tried before a Summary Security Force Court. As per the requirement of Rule 53 of the Rules a charge-sheet was drawn up on July 31, 2000 by the Commandant, containing the same two charges in respect of which the Commandant had directed recording of evidence.

10. Serving the same upon the petitioner, arraignment took place on August 03, 2000. Deputy Commandant B.D.Chetri was the friend of the accused i.e. the petitioner, to defend him. The charges were read out to the petitioner. He pleaded guilty. As per the requirement of Rule 142, the Commandant, presiding over the Court, ascertained whether the petitioner understood the nature of the charge to which he pleaded guilty. It is so recorded in the proceedings. It was informed to the petitioner as to what would be the effect of the plea of guilt and the difference in procedure to be followed as a consequence thereof. It is so recorded in the proceedings. It is also recorded that the petitioner understood the charge and the effect of the plea of guilt and the difference in the procedure to be followed further upon plea of guilt being taken. The record of evidence was read out in the presence of the petitioner and was made part of the record of the trial. The petitioner was called upon to make a statement if he desired. He said that he had committed a mistake and sought a pardon. Called upon whether he was to examine any person as a witness, the petitioner answered in the negative.

11. Thereafter a summary of the service record from the personal file of the petitioner was summarized at the trial. It was noted that petitioner's general character was satisfactory. His age was 31 years, 2 months and 29

days as of August 03, 2000 and he had served for 11 years, 3 months and 29 days. He had never been arrested. He had earned three cash records and instant misdemeanour was the first of the kind.

12. Verdict of : '*To be dismissed from service*' was pronounced. The trial was closed. The verdict was confirmed by the superior authority.

13. The petitioner has filed the present petition and at the hearing held on July 13, 2016, faced with the fact that firstly at the hearing of the charge and then at the trial the petitioner had pleaded guilty and keeping in view the evidence recorded at the record of evidence learned counsel for the petitioner conceded that on the merits of the indictment he has nothing to argue. Learned Counsel made a technical argument, which we note and deal with.

14. The argument was that once the petitioner pleaded guilty when proceedings under Rule 45 of the BSF Rules, 1969 were conducted, the Commandant recorded that the petitioner had pleaded guilty as also his finding that with respect to the charges the petitioner was held guilty. Learned counsel argued that the penalties which the Commandant could inflict and ought to have inflicted are the once contemplated by Rule 53 of the Rules and once having exercise one of the four options available to him under Rule 45 i.e. hold the petitioner guilty, could not have exercise the option to direct record of evidence to be prepared. Thus, the argument was that the petitioner could not be tried at a Security Force Court and the penalty of dismissal from service levied is illegal.

15. The argument is not legally tenable for the reason while conducting the proceedings under Rule 45 notwithstanding the Commandant writing that the petitioner pleaded guilty to the charge and hence was guilty of the wrong committed, he did not levy any penalty for the obvious reason the

wrong was serious. The petitioner had disobeyed lawful commands prohibiting force personnel not to enter the residential areas of the village and additionally not to leave the BoP without permission. Further, the petitioner entered the house of an inhabitant of the village in a drunken condition. It was a fit case where a record of evidence ought to have been prepared and if evidence surfaced at the record of evidence to try the petitioner at a Security Force Court, it ought to have been done. Meaning thereby the discipline of the force had to be maintained and at the same time the petitioner had to be granted a full opportunity to defend himself.

16. We further find that when the arraignment took place, the petitioner did not protest that he could not be tried. Infirmity, if any had taken place, was thus condoned by the petitioner.

17. We need to speak a word upon the requirement of the force personnel not to leave the BoP without prior sanction. The personnel of the Border Security Force are generally stationed at the Line of Control on the Indo-Pak Line of Control and along the border with Bangladesh. The border at Bangladesh is highly porous. Lot of infiltration takes place. Cattle smuggling into Bangladesh from India is rampant. The traffickers have their sympathisers in the villages along the border. The BoPs are on the border. There is hostility of a few local residents against the members of the force and thus the members of the force have to be isolated from the civilians. Further, illicit liquor is freely available in these villages and women selectively. If a force personnel is enticed into drinking or caught in a honey trap information regarding movement of the various companies of the battalion as also the location of the BoPs can be extracted. The jawans of BSF are instructed not to go out of the BoPs without permission and generally nobody is granted permission to go alone outside. The purpose of

this restriction is explained. It is not only for the security of the jawans but even of the country. The petitioner who had served for more than a decade was aware of the importance of the instructions and yet he chose to disobey the same at his peril.

18. We have satisfied ourselves of the requirement of the law being complied with. We find no infirmity in the procedure adopted. As noted above, on the sufficiency of the evidence to sustain the two charges learned counsel for the petitioner did not even attempt to urge anything.

19. The argument that the penalty was disproportionate is noted and rejected for the reasons recorded in paragraph 17 hereinabove.

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

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JULY 18, 2016
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