

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10377 of 2009

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MUKESH KUMAR, SON OF SRI DINESH SINGH, RESIDENT OF VILLAGE BANA PO AND
POLICE STATION KHIZARSARAI, DISTRICT GAYA Petitioner

Versus

1. THE UNION OF INDIA THROUGH THE DIRECTOR GENERAL, BORDER SECURITY
FORCE, 2ND FLOOR, BLOCK NO. 10, CGO COMPLEX, LODHI ROAD, NEW DELHI
 2. THE COMMANDANT, 105 BATTALION, BORDER SECURITY FORCE, ROSHAN
BAGH, MURSHIDABAD, WEST BENGAL
 3. THE CHIEF LAW OFFICER (D AND L), DIG FOR DIRECTOR GENERAL, BORDER
SECURITY FORCE, 2ND FLOOR, BLOCK NO. 10, CGO COMPLEX, LODHI ROAD, NEW
DELHI Respondents
- =====

Appearance :

For the Petitioner : Mr. Pushkar Narain Shahi, Senior advocate
Mr. Manish Kumar 2, Advocate
For the Union of India : Mr. Anjani Kr.Saran, Assstt. Solicitor General
Mr. Ravindra Kr.Sharma, CGC

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CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

Date: 21-06-2018

Heard learned senior counsel for the petitioner and learned
counsel for the Union of India.

2. By filing counter affidavit, learned counsel for the
Union of India has questioned the maintainability of the writ
proceedings in the instant case for want of jurisdiction since he
submits that the orders which are impugned in the writ petition
have been issued pursuant to a proceeding conducted against the
petitioner under the BSF Act & Rules, beyond the territorial
jurisdiction of this Court.

3. The writ petition was filed pursuant to disposal of the
appeal filed by the petitioner by order dated 23.6.2009 which was



communicated to him at his village in Bihar within the territorial jurisdiction of this Court. Upon filing of the writ petition in the year 2009, the matter was admitted under order dated 26.8.2009. In May, 2011 this Court, upon consideration of the petitioner's case that there is no detailed finding by the Summary Security Force Court (herein after referred to as 'the SSFC') with respect to each of the charges, and in order to verify such submission of the petitioner, directed learned counsel for the Union of India to produce the finding dated 9.2.2009 of the SSFC for consideration of this Court.

4. Nine years have lapsed since the instant case was admitted by this Court. In the meantime, developments as noticed above, have taken place in the proceedings. Counsel for the Union of India raises an objection regarding lack of territorial jurisdiction of this Court before consideration of the writ petition on the grounds noticed herein above. Reliance has been placed on a full bench decision of the Allahabad High Court, rendered in case of **Rajendra Kumar Mishra Vs. Union of India and others, reported in (2005) 1 UPLBEC 108**. Learned counsel for the petitioner, on the other hand, submits that this Court may take different view of the matter inasmuch as the Hon'ble Apex court in case of **Dinesh Chandra Gahtori Vs. Chief of Army Staff &**



Anr, reported in (2001) 9 SCC 525, paragraph 4 in similar circumstance as in the instant case, has held as follows:-

“4. The writ petition was filed in 1992. The impugned order was passed in 1999. This is a fact that the High Court should have taken into consideration. More importantly, it should have taken into consideration the fact that the Chief of Arm Staff may be sued anywhere in the country. Placing reliance only on the cause of action, as the High Court did, was not justified.”

5. This Court is persuaded to agree with the submissions of learned senior counsel for the petitioner inasmuch as in the instant case, the matter has been pending before his Court since 2009. The matter was admitted, interim order was issued so as to facilitate proper consideration of the instance case. In the instant case also as in the case of **Dinesh Chandra Gahtori (supra)**, order passed on the petitioner's appeal has been communicated to the petitioner at his village in Bihar within the territorial jurisdiction of this Court. This Court would also take a notice of the fact that the Director General of BSF who is respondent no.1 in the writ proceedings, may be sued anywhere in the country. The facts and circumstances of the case are therefore within the four corners of the judgment of the Hon'ble Apex court in the case of **Dinesh Chandra Gahtori (supra)**. Having considered the issue of territorial jurisdiction, this Court would overrule the objection raised by the Union of India regarding territorial jurisdiction and



would proceed to consider the case of the petitioner.

6. In the charge memo dated 4.2.2009 (Annexure 1) the petitioner is sought to be proceeded against under the provisions of the BSF Act, 1968. Allegation in respect of first charge is under section 40 of the BSF Act that on intervening night 03/04 February, 2009 while performing Naka duty at Naka No.03 of BOP DMC of 'D' Coy 105 Bn BSF along with Constable No.901724429 Babu Lal and Constable No. 001011234 C. Chandran provided safe passage to smugglers that resulted in crossing over of approx 10/12 numbers cattle heads in his Area of Operational Responsibility (AOR in short) from India to Bangladesh. Other allegation against the petitioner is under section 20(a) of the BSF Act, 1968 that on the same intervening night 03/04 February, 2009 he assaulted senior member of the Force, namely, Constable Babu Lal with his Rifle butt and torchlight.

7. On the said allegations, the charge memo was issued to the petitioner on 4.2.2009. The petitioner has submitted his response to the same on 9.2.2009. He has totally denied the allegation. Specific case of the petitioner is that he has been victimized and falsely been implicated in this case at the hands of the constable Babu Lal who has primarily made allegation against the petitioner on both counts. SSFC proceedings were initiated



against the petitioner. Both the constables, namely, Babu Lal and C. Chandran have been examined as witnesses by the SSFC.

8. It is submitted by learned Senior counsel for the petitioner that the records reveal that other than the self serving statement of Constable Babu Lal, none of the other five witnesses have supported the charges levelled against the petitioner as an eye witness. They have heard about the allegations from the constable Babu Lal when they came subsequently at the place where the alleged occurrence has taken place. It is also pointed out with reference to the communication of the witnesses that there is consistent allegation that a Mat had been used so as to cover up the hoof marks of cattle and to facilitate the cattle crossing over the border. The Mat however has not been produced in the proceedings. It is also pointed out that the petitioner has not been afforded opportunity to cross examine all the witnesses. Verdict of the SSFC Force shows non consideration of even his statement (exhibit K) in response to the charge memo. The verdict of the SSFC after recording the deposition of the witnesses, their cross examination and examining exhibit K is as follows:-

“I am of the opinion, after analyzing the evidence before me, that the accused no. 034012657 Constable Mukesh Kumar of 105 Bn BSF is guilty of both the charges.”



9. The appellate authority, who is the Director General of the BSF has passed the appellate order which is dated 23.6.2009 (Annexure 5), taking note of the grievance of the petitioner regarding the proceedings having been conducted in total violation of the procedure prescribed without assigning any reason as is mandated under the BSF Act & Rules and without considering the evidence/lack of evidence, merely on the basis of self serving statement of the Constable Babu Lal and on alleged suspicious circumstances.

10. The appellate authority has considered the issue to some extent. He has exercised the appellate jurisdiction in respect of one of the glaring deficiencies in the order of the punishment dated 9.2.2009. Taking note of the fact that the 2nd charge did not constitute misconduct under section 20(a) of the BSF Act, 1968 inasmuch as the Constable Babu Lal was not a superior officer of the petitioner, the 2nd charge has been interfered with and conviction on that score has been set aside.

11. There was a composite punishment order in respect of both the charges, to the extent that the petitioner was directed to suffer imprisonment for one year in civil jail and to be dismissed from service. Part of the punishment has thus been reduced. The appellate authority has set aside conviction of the petitioner on the



second charge and reduced the sentence of one year imprisonment to the extent/period already undergone by him as a result of partial consideration of the order of the Commandant dated 9.2.2009, since the 2nd charge could not have been sustained in the proceedings. The first charge has not been interfered with even by the Appellate authority. Accordingly, the punishment of dismissal from service of the petitioner on the ground of the 1st charge of allegedly facilitating the crossing over of 10/12 cattle has been maintained.

12. Learned senior counsel for the petitioner submits that the manner in which the order has been passed by the SSFC is in violation of the provisions contained in Rule 99 of the BSF Rules, 1969. Learned senior counsel has relied upon the said rule, which reads as follows:-

“99. Record and announcement of finding -

(1) The finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded simply as a finding of “Guilty” or of “Not Guilty”. After recording the finding on each charge, the Court shall give brief reasons in support thereof. The Law Officer or, if there is none, the Presiding Officer shall record or cause to be recorded such brief reasons in the proceedings. The above record shall be signed and dated by the Presiding Officer and the Law Officer, if any....”.

13. He rightly submits that it was incumbent upon the SSFC to record findings in respect of the charges and to give



reasons in support thereof. As noticed above, order of the SSFC dated 9.2.2009 (Annexure 3) is a few lines order. The same does not record findings on each charge and does not give any reason whatsoever in respect of the conclusion of the guilt.

14. Submission of the senior counsel for the petitioner is that had the authority conducting the SSFC applied his mind, considered the issue and assigned the reasons; than such conclusion could not have been arrived at inasmuch as there was no evidence whatsoever to sustain the charges against the petitioner. If any consideration had been given to the depositions recorded, no such finding of guilt could have been recorded against the petitioner. As such, violation of Rule 99 of the BSF Rules, 1969 has occasioned grave prejudice to the petitioner. Such order, without assigning reasons is not only unfair and arbitrary, but also in violation of the principles of Natural Justice. Verdict of the SSFC dated 9.2.2009 shows non consideration of the facts which have emerged in the proceedings. In view of such non consideration of the petitioner's case this Court would find that the conclusion of guilt and the punishment of dismissal of the petitioner from the Force, cannot be sustained as the same is primarily and *ex facie* violative of Rule 99 of the BSF Rules, 1969.

15. This Court would therefore direct that the respondent



authorities, namely, the Commandant (respondent no.2) shall reconsider the case of the petitioner and pass fresh order in accordance with Rule 99 of the BSF Rules, 1969. Order dated 9.2.2009 recording conclusion of guilt imposing the penalty of dismissal from service is unsustainable and is quashed.

16. Respondent 2 would be obliged to take a final decision on the SSFC reconsidering the matter in light of all the submissions and issues raised by the petitioner which have been noted herein above. He would be obliged to give brief reason in support of his findings in keeping with the requirement of Rule 99 of the BSF Rules, 1969 within a period of three months from the date of receipt/production of a copy of this order. The appellate order as consequence of such verdict of the SSFC dated 9.2.2009 is also unsustainable and is quashed.

17. The consequential benefits of the petitioner shall abide by the final order passed by respondent no.2.

18. The writ petition is allowed to the extent indicated above.

Shashi.

(Madhuresh Prasad, J)

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	24.07.2018
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