

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 7572 of 2009

Hoshiyar Singh
v.
Union of India & Ors.

For the petitioner : Mr. Debdutta Basu

For the respondents : Mr. Sauvik Nandy

Heard on : 4th August, 2023.

Judgment on : **4th August, 2023.**

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging the order dated 25th June, 2008 passed by the Summary Security Force Court (hereinafter referred to as the "SSFC") including the sentence of dismissal of the petitioner from service, and the order passed by the Appellate Authority dated 15th January, 2009.
2. The petitioner claims to have joined the Border Security Force on 28th February, 2002 in the "D" Company of 108 of the Border Security Force (hereinafter referred to as the "BSF") and was

posted at BSF, Chapghoti, Malda, when a charge-sheet dated 8th May, 2008 was issued by the Commandant in terms of Appendix VI, Rule 53(2) of the Border Security Force Rules, 1969 (hereinafter referred to as the “said Rules”) and served on the petitioner.

3. The charge-sheet, *inter alia*, was not only served on the petitioner but also against one Gyani Ram who was a co-accused. Both the said Gyani Ram and the petitioner were tried by the SSFC, in a summary trial. After conclusion of the trial by an order dated 25th June, 2008, both Gyani Ram as also the petitioner were held guilty in respect of second charge, however, in respect of the first charge both were held not guilty.
4. Notwithstanding, both the accused being held guilty only in respect of the second charge, in case of the said Gyani Ram, he was sentenced to the following punishment;
 - a) To be reduced to Constable rank
 - b) to forfeit five years of seniority and service for the purpose of promotion.
 - c) and also forfeited pay and allowances for a period of one month;while in case of the petitioner he was sentenced to dismissal from service.

5. Being aggrieved, the petitioner preferred a statutory appeal within the meaning of Section 117(2) of the Border Security Force Act, 1968 (hereinafter referred to as the “said Act”), before the Director General, BSF. By an order dated 15th January, 2009, the Director General, BSF, as an Appellate Authority taking into consideration all aspects of the matter was, *inter alia*, pleased to reject the said appeal.
6. Challenging the aforesaid orders, the present writ application has been filed.
7. Mr. Basu, learned advocate representing the petitioner, submits that notwithstanding both Gyani Ram and the petitioner being charged with the same offence and notwithstanding both being held guilty, only in respect of second charge, two different sentences have been awarded, to the two different accused. This, according to the petitioner is a discrimination meted out to him and is violative of Article 14 of the Constitution of India.
8. Mr. Basu then contends that the order of the SSFC holding the petitioner guilty is perverse and based on no evidence. By drawing attention of this Court to the records of the proceeding, *inter alia*, including the evidence of the petitioner, he submits that the petitioner’s evidence was taken by compelling him to accept the guilt. According to Mr. Basu, the SSFC could not have acted on the basis of the confession of the petitioner, since, the

said confession was not free or voluntary and did not constitute a confession within the meaning of Section 24 of the Indian Evidence Act, 1872.

9. The informant was not examined and finding reached by the SSFC was based on hearsay. There was no eyewitness of the incident complained of and that the petitioner has been made a victim of circumstances. Reliance has been placed on the provisions of Section 14 to Section 18 of the Indian Contract Act, 1872, to, *inter alia*, demonstrate what would constitute 'free consent' and 'undue influence'.
10. By placing reliance on a judgment delivered by this Court in the case of **Robert Xess v. Union of India & Ors.**, reported in **2011 (4) CHN (Cal.) 176**, he submits that unless the informant is examined, the delinquent would lose the valuable right of cross-examining him and would thereby be prejudiced. The Division Bench of this Hon'ble Court in an identical case, while taking note of the failure on the part of the prosecution to examine the informant, had held that the informant was a vital witness to the incident and depriving the opportunity to cross-examine such a vital witness, would tantamount to violation of natural justice.
11. By placing reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **Roop Singh Negi v. Punjab**

National Bank and Others., reported in **(2009) 2 SCC 570**, he submits that SSFC Court ought to have proceeded on the basis of materials on record. The evidence collected during the investigation by the Investigating Officer against the accused by itself could not be treated to be evidence in the proceeding. Unless, the witness is examined to prove the charge, the enquiry would stand vitiated. In any event, no sentence could have been pronounced on the basis of a mere confession. The Appellate Authority also did not examine the questions put forward by the petitioner and had merely brushed aside the same. The aforesaid order dated 25th June, 2008, passed by the SSFC and the sentence, dismissing the petitioner from service cannot be sustained, the same should be set aside and the petitioner should be reinstated in service.

12. *Per contra*, Mr. Nandy, learned advocate representing the respondents, had placed before this Court the provisions of said BSF Act and Rules framed thereunder. He submits that although, in this case the second charge was proved, both in respect of Gyani Ram as also in respect of the petitioner, two different sentences were awarded to the two different accused, on the basis of proceeding held before issuing such sentences.
13. By placing reliance on Rule 101 and Rule 151 of the said Rules he submits that before the sentence is pronounced, it is

obligatory for the authority to ascertain either on its own or on the basis of the evidence, the following facts:-

General character of the accused, age, service, rank and any recognized acts of gallantry, or distinguished conduct of the accused and previous convictions of the accused either by a Security Force Court or a Criminal Court, any previous punishment awarded to him by any officer exercising authority under Section 53; the length of time he has been in arrest or in confinement on any previous sentence, and any decoration, or reward, or to which he may be in possession or to which he may be entitled.

14. Mr. Nandy, thereafter, by placing reliance on the proceeding before the sentence submits, while in the case of Gyani Ram, he was found not to have been previously convicted since his enrolment, however, in the case of the petitioner, he was found to be convicted on four several occasions, during his entire tenure which included one occasion during the past twelve months. The aforesaid proceeding before sentence clearly records that on three occasions the petitioner was found to have absented without leave and on one occasion, he was punished for violation of good order and discipline. The aforesaid factors were taken into consideration by the SSFC and the same weighed in favour of the

accused Gyani Ram and against the petitioner, while awarding the sentence.

15. By placing the order passed by the Appellate Authority in detail, it is submitted that the Appellate Authority had taken into consideration all aspect of the matter while rejecting the Appeal. The petitioner chose not to cross-examine any of the prosecution witnesses. Having chosen not to cross-examine the prosecution witnesses, it does not lie in the mouth of the petitioner to complain that the informant was not produced. In any event, from the evidence on record, the involvement of the petitioner would be clear. There is no irregularity on the part of the authorities either in holding the petitioner guilty or in inflicting the punishment of dismissal. In support of his contention that when the two opinions are possible, the Court should not substitute its views with that of the Disciplinary Authority reliance has been placed on the judgments of the Hon'ble Supreme Court in the case of ***State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya***, reported in (2011) 4 SCC 584, as also the judgment delivered in the case of ***Om Prakash v. Union of India and Others***, reported in (2015) 8 SCC 705. In the facts as stated above, he submits that the writ application deserves to be dismissed.

16. Heard the learned advocates appearing for the respective parties and considered the materials on record. As would appear from the charge-sheet the petitioner was a co-accused along with Gyani Ram in respect of the following charges: -

<u>"1st CHARGE</u> <u>BSF ACT</u> <u>SECTION 46</u>	<u>COMMITTING A CIVIL OFFENCE THAT IS TO SAY</u> <u>CRIMINAL MISCONDUCT FOR HAVING BEEN A</u> <u>PUBLIC SERVANT BY ABUSING THEIR POSITION</u> <u>AGREES THEMSELVES FOR ANY PECUNIARY</u> <u>ADVANTAGE FOR AN OFFENCE SPECIFIED IN</u> <u>SECTION 13(1)(E) OF THE PREVENTION OF</u> <u>CORRUPTION ACT, 1988 PUNISHABLE UNDER</u> <u>SECTION 13(2) OF THE SAID ACT.</u>
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In that they,

on the intervening night of 09/10 Nov'07, when No. 882101295 HC Gyani Ram and No02145545 CT Hoshiyar Singh of 'D' Coy 108 Bn BSF who were deployed at addl ambush point No.4 of BOP Chapghati, connived with an un-identified civilian boy and agreed to accept Rs 7000/- per pair for crossing of cattle heads for themselves by abusing their position as a public servant for pecuniary advantage while performing border ambush duty of said ambush point and allowed to cross over 12 to 15 pairs of cattle heads from India to Bangladesh side between 1930 hrs to 2000 hrs through their AOR.

<u>2nd Charge</u> <u>BSF Act</u> <u>Section 40</u>	<u>AN ACT PREJUDICIAL TO GOOD ORDER AND</u> <u>DISCIPLINE OF THE FORCE.</u>
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In that they,

on the light intervening of 09/10th Nov'07, while performing ambush duty at Addl. Ambush Point No.4 Ex – BOP Chapghati has allowed to cross 12 to 15 pairs of cattle heads from India to Bangladesh side between 1930 to 2000 hrs through their AOR with connivance of smugglers.”

17. Both the co-accused were tried before the SSFC. That a total of 9 prosecution witnesses were examined before the SSFC and 6 witnesses were examined on the order of the Commandant and their evidence were recorded as per Rule 45 of the said Rules. Although, it has been strenuously argued by the learned advocate for the petitioner that in the absence of Ram Kumar being examined as witness, the petitioner has suffered prejudice, I am afraid and am unable to accept the same. I find that the petitioner had not bothered and had declined to cross-examine the 9 witnesses examined before the SSFC. Having regard to the aforesaid, it cannot be said that the petitioner had suffered any prejudice by reasons of Ram Kumar not being examined.
18. Admittedly, both the petitioner as also the other accused Gyani Ram were on duty on the intervening night of 9th and 10th November, 2007. Factum of cattle crossing over to Bangladesh from India from the additional ambush point no.4 was established. Since, the petitioner has chosen not to cross-

examine any of the witnesses, it is clear that the petitioner has not put forward his defense case. The aforesaid 9 witnesses had also corroborated the prosecution case. I find that the SSFC on the basis of the evidence on record, *inter alia*, the evidence of the prosecution witness, has arrived at a conclusion that both the petitioner as also the co-accused are guilty of the second charge. I do not find any reason to interfere with the same, especially when this Court is not called upon to re-appreciate evidence. In this context, I must note that the aforesaid matter does not appear to be a case, which is based on no evidence or where the finding reached by the SSFC can be said to be perverse. It is well settled that a judgment is an authority for what it decides and not what can be logically deduced therefrom. A slight variation in the facts may alter the final outcome. In the case of **Roop Singh Negi**. (supra), no witnesses were examined to prove the documents, such is not the case here. In the case of **Robert Xess**. (supra), since, the informant was not examined, the Division Bench of this Hon'ble Court based on the facts of the said case had concluded that the delinquent had been denied the opportunity of cross-examination. In this case, nine several witnesses were examined by the SSFC, the petitioner did not bother to examine even one witness. As such, the petitioner

cannot complain of any prejudice. None of the aforesaid judgments relied on by the petitioner comes in his aid.

19. The only other point canvassed by the petitioner is with regard to discrimination in awarding of the punishment between the petitioner and the co-accused. I find that the petitioner claims to have been discriminated, inasmuch as the co-accused despite being levelled with the same charges and despite both being held guilty of the second charge, the co-accused had been given a lesser punishment, while in the case of the petitioner, sentence in the form of dismissal has been awarded. I, however, find that before the sentences were awarded, a proceeding before the sentence took place wherein the SSFC had taken note of all particulars as are required in terms of Rule 101 and Rule 151 of the said Rules, for the purpose of considering any mitigating circumstances, for mitigating the punishment. I find that in the case of the petitioner, he had been convicted on four several occasions during his service tenure, while in the case of the Gyani Ram, the co-accused, there had been no previous conviction, at all.

20. Having regard to the aforesaid, it cannot be said that the respondents had discriminated against the petitioner. I am further of the view that the SSFC is the best judge to decide in the facts of the case what punishment was to be awarded, having

regard to the gravity of the charge, the past conduct, past convictions and other factors as statutorily provided to be taken note of.

21. From the order passed by the Appellate Authority it would appear that the Appellate Authority had duly considered the matter in detail and has passed a reasoned order.
22. In the facts and circumstances as stated above, I am of the view that no interference is called for. The petitioner has also not been able to demonstrate violation of principles of natural justice or any jurisdictional error committed by the SSFC, either in holding the petitioner guilty or in awarding the punishment of dismissal from service or in the Appellate Authority, dismissing the appeal.
23. In such circumstances, the writ application fails and is accordingly dismissed.
24. There shall, however, be no order as to costs.
25. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)