

Form No.J(2)

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

Present :

THE HON'BLE JUSTICE RAJA BASU CHOWDHURY

WPA 11842 of 2006

**M. John Kingsly
Versus
Union of India & Ors.**

For the petitioner : Mr. Dipanjan Datta
Ms. Sukanya Datta

For the respondents : Mr. Anirban Mitra

Heard on : 10.08.2023

Judgment on : 10.08.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging the charge sheet dated 27th April, 2005, as well as the Summary Security Force Court (in short, SSFC) proceeding dated 29th April, 2005, dismissing the petitioner from service, and the order dated 17th April, 2006, passed by the Appellate Authority.
2. The petitioner claims to have joined the post of a constable in the Border Security Force (in short, BSF) in the year 1989. At the relevant point of time, when he was posted at Border outpost of Soldighi under B-Company, 138 Battalion, BSF, he was served with

a charge sheet dated 7th April, 2005. Particulars of the charges leveled against the petitioner is extracted hereinbelow:

“FIRST CHARGE

BSF Act 1968, Section 40 : AN ACT
PREJUDICIAL TO GOOD ORDER AND
DISCIPLINE OF THE FORCE

in that he,

at BOP Soldighi on 06 April 2005 at about 0015 hrs improperly and without authority fired three rounds in Air from his Rifle 5.56mm bearing Butt No. 125, Registration No. 167385274 without regard to the safety of fellow BOP personnel.

SECOND CHARGE

BSF Act 1968, Section 26 : INTOXICATION

in that he,

at BOP Soldighi on 06 April 2005 at about 0025 hrs was found in a state of intoxication.”

3. Following the aforesaid, in terms of Rule 45 of the Border Security Force Rules, 1969 (hereinafter referred to as the “said Rules”), the Commandant while hearing out the charges, had examined witness, and the witness action was recorded. After the recording of evidence, by a communication dated 27th April, 2005, the Commandant instead of deciding on the charges himself, having thought it fit in terms of Rule 45(2)(iv) to remand the petitioner for trial by the SSFC, while informing him that trial shall be held by the SSFC under Rule 51 of the said Rules on 29th April, 2005, forwarded the record of evidence to him, including the exhibits along with a copy of the charge sheet for preparation of his defence. The petitioner was also

granted liberty to choose any BSF personnel available in the unit to act as a “friend of the accused” during the trial and that such choice was required to be made positively, by 1800 hrs. on 28th April, 2005.

4. The petitioner contends that along with the aforesaid communication, apart from the record of the evidence, the petitioner was also served with a charge sheet under Rule 53 of the said Rules, which included an additional charge, not forming part of the previous charge sheet. The petitioner contends that a new charge in the form of the second charge was incorporated in the charge sheet and the same surfaced for the first time in the communication dated 27th April, 2005. Following the aforesaid, the petitioner despite applying for postponement of hearing so as to enable him to prepare for the additional charge, the proceeding, however, continued as usual. The petitioner had participated in the SSFC trial and on the basis of his admission which, according to the petitioner, was obtained through and at the instance of Aniruddha Sen, who had been appointed as the friend of the accused, he was handed over a sentence of dismissal from service. Challenging the aforesaid order including the sentence dated 29th April, 2005, the petitioner had preferred a statutory appeal under Section 117 of the Border Security Force Act (hereinafter referred to as the “said Act”).
5. Mr. Datta, learned advocate for the petitioner, by placing reliance on the aforesaid appeal submits that the petitioner had duly brought to the notice of the Appellate Authority that Aniruddha Sen had forced

the petitioner to plead guilty at the time of trial. He had also brought to the notice of the Appellate Authority that he had not pleaded guilty before the recording officer in connection with the proceedings under Rule 48 of the said Rules and had also cross-examined the aforesaid witnesses. He also had raised the issue of the charge sheet being amended and a fresh charge being incorporated, which could not have been done and was contrary to the provisions of the said Act and Rules framed thereunder. According to the petitioner, the Appellate Authority, while overlooking the aforesaid contention of the petitioner had, by a cryptic order, rejected the said appeal.

6. Being aggrieved, the present writ application has been filed.
7. Mr. Datta, by placing reliance on the provisions of Rule 51(2) of the said Rules, submits that at the relevant point of time there was no power conferred on the Commandant, while convening a SSFC trial to reframe a charge. In any event, he submits that in the present case a new charge had been incorporated. No opportunity has been given to the petitioner to controvert the same. None had come forward to prove the said charge. Notwithstanding the aforesaid, on the basis of a purported admission of the petitioner, which was obtained at the instance of Aniruddha Sen, the petitioner has been held guilty. It is submitted that notwithstanding Aniruddha Sen being a named prosecution witness, such fact was held back from the petitioner and the respondents permitted the said Aniruddha Sen to act as a "friend of the accused" and it is at the

instance of the said Aniruddha Sen that the petitioner was compelled to plead guilty, although, he had not pleaded guilty before the Commandant, which led the petitioner being remanded for trial to the SSFC.

8. By placing reliance on a judgment of the Hon'ble Supreme Court rendered in the case of ***Sur Enamel and Stamping Works Ltd. v. Workmen***, reported in **AIR 1963 SC 1914**, it is submitted that a delinquent who is charged must be made aware of the charges and if such charges are not made aware to the delinquent, the entire enquiry stands vitiated. In this case, according to the petitioner, the 2nd charge was introduced 24 hours before the trial. No witnesses were examined to prove the charge. The petitioner did not have the opportunity to respond to the said charge and the admission of guilt was obtained from the petitioner through Aniruddha Sen, who while acting as a "friend of the accused" was in fact the prosecution witness. Mr. Datta, learned advocate appearing for the petitioner, by drawing attention of this Court to the affidavit filed by the respondents, submits the fact that Aniruddha Sen was a prosecution witness has been admitted by the respondents in the said affidavit. In the facts as stated hereinabove, it is submitted that the entire proceedings stand vitiated and the same should be set aside and quashed.
9. *Per contra*, Mr. Mitra, learned advocate appearing for the respondents submits that there is no dispute with regard to the

petitioner firing bullets or with regard to his consumption of alcohol. According to Mr. Mitra, on the basis of the evidence recorded in terms of Rule 48 of the said Rules, the aforesaid two charges which are charge nos. 1 and 3 stand proved. By referring to a letter dated 27th April, 2005, and the amended charge sheet which incorporated the new charge, it is submitted that there is no irregularity on the part of the respondents in framing such charge, as basis thereof is found from the record of evidence. By placing reliance on Rule 6 of the said Rules, it is submitted that the same gives an inherent power to the Commandant, and on the basis of such inherent power the said additional charge had been framed and had been incorporated in the charge sheet along with the other two charges.

10. By placing reliance on a letter dated 27th April, 2005, issued by the petitioner, he submits that the petitioner himself had chosen Aniruddha Sen as the “friend of the accused” and as such, the petitioner cannot complain that the said Aniruddha Sen had prevailed upon him to accept his guilt.
11. The petitioner had been given due opportunity to present the defence case and had also cross-examined the other witnesses, as such it cannot be said that there had been denial of the principles of natural justice. According to Mr. Mitra, this Court in exercise of its extra ordinary writ jurisdiction is not called upon to re-appreciate the evidence and as such no interference is called for.

12. Heard the learned advocates appearing for the respective parties and considered the materials on record. Admittedly, in this case, on 17th April, 2005, the first charge sheet was issued. Subsequently, the Commandant heard the charges, and after recording of the evidence did not decide the matter himself, instead, in terms of Rule 45(2)(iv), remanded the petitioner for trial by the SSFC and by a communication dated 27th April, 2005, while forwarding the record of evidence and an amended charge sheet to the petitioner, informed him about his right to elect a person of his choice from BSF personnel available in the unit to act as a “friend of the accused” during his trial.

13. At the stage of recording of evidence, the petitioner was not assisted by Aniruddha Sen, he had not pleaded guilty of all the charges. Records of the proceeding of the SSFC reveal that Aniruddha Sen, Deputy Commandant, 138Bn BSF, having IRLA No. 19566160, was appointed as the “friend of the accused”.

14. I have also considered the records of the proceedings, *inter alia*, including the record of evidence ordered in terms of Rule 45 of the said Rules. I find that in total 10 witnesses were examined and the petitioner had also cross-examined such witnesses. Particulars of such witnesses are set out hereinbelow:

1. SI Prem Singh Bohra
2. HC Shiv Dev Singh
3. HC Naresh Kumar
4. HC Prakash Chand
5. Const. Suresh Kumar
6. Const. Yogender Ram

7. HC R.K.Tiwari
8. Madhoo Tigga
9. Sabina Tigga
10. D.K.Yadav

15. From the original record of the proceeding produced before this Court, it appears that Aniruddha Sen, who was named as a “friend of the accused” was actually a named prosecution witness. Obviously this fact was within the notice of the prosecution, including the Commandant, despite the aforesaid Aniruddha Sen was appointed as the friend of the accused.
16. Although, the Commandant, having regard the nature of charges and the defence put forward by the petitioner, having not decided the matter himself and having referred the case to SSFC, it was only expected that the prosecution would attempt to prove the charges upon affording the petitioner reasonable opportunity to defend. Unfortunately, there appears to have been no contest before the SSFC, as according to the respondents, the very petitioner who had not pleaded guilty before the Commandant and had cross-examined the witness when not assisted by ‘friend of the accused’, namely Aniruddha Sen, all on a sudden appears to have admitted his guilt when produced before the SSFC along with an additional charge, which also did not find place in the original charge sheet.
17. In the light of the aforesaid, the involvement of Aniruddha Sen in the petitioner pleading guilty of all the charges cannot be ruled out. In the statutory appeal, the petitioner despite having specifically contended that he had not only not pleaded guilty in the hearing

before the Commandant or before the recording officer while recording evidence in terms of Rule 48 but had also cross examined the witnesses in support of his defence, and that he had been forced by Aniruddha Sen to plead guilty, this aspect was not at all considered by the Appellate Authority while disposing of the appeal.

18. I find that the provision for appeal is provided under Section 117 of the said Act. The Appellate Authority, however, appears to have rejected the aforesaid appeal without considering the issues raised by the petitioner. Although, Mr. Mitra had strenuously argued that the petitioner himself having appointed the said Aniruddha Sen cannot be permitted to contend otherwise, I am not impressed by the same. I must note that the petitioner had not pleading guilty, following which after recording of evidence he was referred to the SSFC. Incidentally, once Aniruddha Sen was appointed, the charge which earlier could not be proved, no longer required any proof as the petitioner appears to have admitted all the charges. As such, no witness was called for by the SSFC. The aforesaid admission, however, does not fit in the sequence of events and the defence case already setup by the petitioner, to say the least. I find that permitting the accused to be advised by a prosecution witness goes to the root of the matter and the same tantamount to violation of the principles of natural justice, to say the least. The aforesaid appointment coupled with the involvement of Aniruddha Sen in the plea of guilty, without a defence, speaks volumes of the manner and

mode in which the proceeding was held, to hold the petitioner guilty and to dismiss him in hot haste.

19. Thus once, the prosecution witness was appointed as the friend of the accused, the sanctity and credibility of the SSFC was lost, especially when the involvement of the said friend caused irreparable loss and damage to the petitioner, thereby rendering him defenceless, leading to his dismissal from service. Although, the Appellate Authority was obliged to consider the aforesaid issues raised by the petitioner, it appears that the same had been overlooked. The order dated 17th April, 2006, passed by the Appellate Authority, thus, appears to be perverse.

20. Having regard to the aforesaid, I am of the view that the proceeding before the SSFC and the final order passed thereon including the order passed by the Appellate Authority cannot be sustained, the same are accordingly set aside and quashed.

21. The respondents are directed to reinstate the petitioner with continuity in service, within a period of 8 weeks from the date. The petitioner shall be entitled to all notional benefits as applicable, however, he shall not be entitled to payment of actual salary for the period for which he had not discharged his duties. The said period shall be treated as an authorised long leave.

22. This order, however, shall not prevent the respondents from enquiring against the petitioner in respect of the aforesaid charges, if so advised, in accordance with law, without any manner of

involvement of the aforesaid Aniruddha Sen and the Commandant who had enquired against the petitioner. Since the proceeding including the order of dismissal has been set aside, *inter alia*, on the ground of impropriety as noted above, I have not gone into the validity and legality of the additional charge introduced by the communication dated 27th April, 2005.

23. Office is directed to return the original record of this case to the learned advocate representing the respondents against a proper receipt, to be retained in the file.
24. With the above observations and directions, the writ application being WPA 11842 of 2006 is ***disposed of***.
25. All parties shall act on the basis of the server copies of the order duly downloaded from this Court's official website.

(Raja Basu Chowdhury, J.)

Saswata
Assistant Registrar (Court)