

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

WPA 15518 of 2022

With

WPA 31234 of 2017

Ex. CT. Vijay Prakash, No 941062422 OF 140 BN

Versus

Union of India and Ors.

For the Petitioner : Ms. Ashima Mandla, Adv.
Mr. Surya Prakash Singh, Adv.
Ms. Ritu Das, Adv.
Mr. Sangkrito Ray Chowdhuri, Adv.

For the Union of India : Mr. Dayashankar Mishra, Sr. Adv.
Mr. Sushil Kr. Mishra, Adv.
Mr. Shailendra Kr. Mishra, Adv.
Ms. Sabnam Laskar, Adv.

Heard on : 11.12.2023

Judgment on : 12.02.2024

Ajay Kumar Gupta, J:

1. Both writ petitions are taken up together for disposal by a common judgment since similar issues are involved in both the writ petitions filed by the petitioner, Ex. CT. Vijay Prakash.

FACTS LEADING TO FILING OF TWO WRIT PETITIONS:

2. In the first writ petition being WPA No. 31234 of 2017, the writ petitioner has assailed the order dated 04.04.2013 passed by the Director General, Boarder Security Force (herein referred to as The D.G, BSF), Block-10, CGO Complex, New Delhi -110003 in appeals/representations filed by the Jail Authority as well as through his counsel under Section 117 of Boarder Security Force Act, 1968 (BSF Act) thereby declared the petitioner as guilty and further confirmed the judgment and order of conviction dated 17.04.2012 passed by Learned General Security Force Court (hereinafter referred to as 'GSF Court') in a Trial, No. 941062422 Constable Vijay Prakash of 140 BN BSF, whereby convicted him for an offence committed under Section 46 of the Boarder Security Force Act, 1968 that is say for murder and attempt to murder punishable under Sections 302

and 307 of the Indian Penal Code, 1860 and sentenced him “To Suffer Life imprisonment and to be dismissed from service”.

The contention of the Petitioner is that appeal was considered by the Respondent No. 3 only on the basis of aforesaid written representations/ appeals. No proper appreciation or marshalling of evidences either oral or documentary adduced by the Prosecution have been taken into consideration by the Respondent No. 3. Surprisingly, no opportunity was afforded to the Petitioner to place the case through his learned counsel and thereby violated the principles of natural justice. The Respondent No.3 decided the case without applying his judicious mind and finally confirmed the judgment and order dated 17.04.2012 passed by the GSF Court illegally and erroneously contending therein simply that the appeal is devoid of merit.

Feeling aggrieved by and dissatisfied with the order dated 04.04.2013 passed by the Respondent No. 3/the D.G, BSF, the writ petitioner had earlier preferred a Writ Petition being WP(C) No. 4462 of 2013 before the Hon'ble High Court of Delhi at New Delhi through his earlier counsel on the impression that the territorial jurisdiction lies before the Delhi High Court as the head office of the Appellate Authority is situated in New Delhi. In the said writ petition, the

Hon'ble High Court of Delhi on several occasions, directed to file reply and rejoinder to the parties but at the time of hearing, a preliminary question of territorial jurisdiction was raised by the respondents since the alleged incident took place within the State of West Bengal and Trial held in West Bengal on the basis of case originated in the West Bengal. Accordingly, the writ petitioner had to seek before the Hon'ble High Court of Delhi for withdrawal of the writ petition and the said prayer for withdrawal of the said writ petition was simply allowed on 11.12.2014 by the Hon'ble High Court of Delhi.

3. Thereafter, the writ petitioner filed first writ petition being WPA No. 31234 of 2017 before this court seeking for setting aside and/or quashing of the purported order dated 04.04.2013 passed by the D.G, BSF and impugned judgment and order dated 17.04.2012 passed by the General Security Force Court with other consequential relief.

4. The said first writ petition was heard by Hon'ble Justice Arindam Mukherjee of this Court on 05.10.2021 and after hearing and considering the provision laid down in Border Security Force Act

and Rules framed thereunder, His Lordship was pleased to pass an order, inter alia, as follows:

“A sentence can be suspended under the provisions of Section 130 read with section 117(2) of the BSF Act.

On a reading of the various provisions of the BSF Act and the Rules framed thereunder, it appears to me that the same is a complete Code in itself. In fact, in cases where an employee of the BSF is charged of criminal offence and is ordinarily to be tried by the jurisdictional Magistrate and/or the Sessions Court as the case may be, the GSFC has the power to hold trial even in such a case by themselves. The petitioner in the instant case was charged amongst other with an offence under section 302 of the Indian Penal Code 1860 (in short, IPC). This offence is ordinarily triable by the Criminal Court in terms of the provisions of the Code of Criminal Procedure 1973 (in short, Cr.P.C), but by dint of powers conferred under the BSF Act, the GSFC tried the petitioner. This emboldens the view that BSF Act is a complete code in itself. The suspension of the sentence therefore, has been prayed as per the provisions of the BSF Act.

On a harmonious reading of the provisions of section 117(2) and 130 of the BSF Act, I am of the view, that primarily an application has to be made to the concerned authority following the provisions of section 130, even in a case where the sentence has been

confirmed and the propriety of the order is under challenge before a High Court in writ jurisdiction.

Taking a lenient view of the petitioner's prayer for suspension of sentence as made in the application, being CAN 2 of 2021, despite a previous application on the self-same cause is pending, I think justice will be subserved if I direct the petitioner to make a fresh application/representation before the Director General, Border Security Force, being the respondent no. 3 in the instant writ petition for suspension of sentence in terms of the provisions of Section 130 read with Section 117(2) of the BSF Act, by 25th October, 2021.

In the event, such application is made, the Director General, Border Security Force shall decide the same irrespective of the fact whether the previous application said to have been forwarded by the Jail Authorities on 1st February, 2019, has been disposed of or not.

The entire exercise shall be concluded within a period of three months from the date of the petitioner making such application and/or representation.

In the event, the respondent no. 3, to whom the application and/or representation is directed to be made is of the view that he is not the Competent Authority to suspend the sentence then he shall forward such application and/or representation of the petitioner to the authority concerned who according to him is competent to take cognizance of the petitioner's application and consider the prayer for suspension of sentence.

This order is passed considering the prayer for suspension of sentence made by the petitioner is a consequential relief sought for during the pendency of the writ petition though the same has not been directly prayed for in the writ petition.”

5. In pursuant to the aforesaid order passed by the Co-ordinate Bench of this court on 05.10.2021, petitioner made a fresh application/representation dated 18.10.2021 before the Respondent No. 3 on 19.10.2021 which was received by the Office of Respondent No. 3 on 21.10.2021 but unfortunately, the order of the Hon'ble Court was not complied and concluded within a period of three months. As such, the petitioner issued a contempt notice upon the Respondent No. 3 and upon receipt of the contempt notice, the Respondent No. 3 passed an order immediately on 29.04.2022 thereby disallowed the prayer for suspension of sentence rather again confirmed the judgment and order passed by the GSF Court on 29.04.2022 holding therein that the case is not fit for suspension of sentence and affirmed the judgment of conviction and sentence passed as aforesaid.

6. Thereafter, Petitioner having no other efficacious alternative remedy against the impugned order dated 29.04.2022 passed by the D.G, BSF , filed a second writ petition being WPA 15518 of 2022 on 13.07.2022 with more or less similar payers seeking to quash and set aside the purported order dated 29.04.2022 passed by Respondent No. 3 and also direction for release of the Petitioner (now in jail) on suspension of the sentence dated 17.04.2012 passed by the GSF Court with consequential reliefs on several grounds as under : -

- i) The Respondent No. 3 neither considered the points as raised by the Petitioner nor properly appreciated the oral and documentary evidences brought on record by the prosecution;
- ii) The Respondent No. 3 has not afforded an opportunity of hearing to the petitioner as such he grossly violated the principles of natural justice;
- iii) The judgment and order passed by the learned GSF Court is based on surmises and conjectures and same is liable to be set aside;
- iv) The GSF Court ignored the oral evidence of the eye witnesses i.e. P.Ws. 3, 9, 14, 15 and 18. They did not

support the prosecution case though they were present at the place of occurrence;

v) The learned GSF Court did not consider specially the independent vital public eye witnesses i.e. P.Ws. 9 and 18, who did not support the prosecution version in any manner and blot out the entire prosecution case;

vi) The learned GSF Court also did not consider the evidence of eye witnesses who state that originally a scuffle took place in between BSF 'G' and petitioner and thereby an incident of firing occurred;

vii) The learned GSF Court did not consider that the prosecution has failed to prove the motive or intention or pre-meditation of the BSF Jawan/Petitioner thereby illegally convicted and sentenced the petitioner under Sections 302/307 of the IPC read with Section 46 of the BSF Act, 1968 is liable to be set aside;

viii) The learned GSF Court did not consider the material contradictions and inconsistency in the statements of the officials and public witnesses and thereby grossly ignored the entire material evidences adduced by the Prosecution

and convicted and sentenced the petitioner though he is entitled to get benefit of doubts;

ix) The Respondent No. 3 did not consider that the petitioner has already suffered more than 11 years' imprisonment without any fault;

x) The learned GSF Court as well as Respondent No. 3 have infringed the fundamental rights of the petitioner and imposed incorrect conviction and sentence calls for immediate judicial intervention by this Court under its writ jurisdiction;

xi) The learned GSF Court did not consider the alleged incident/ offences come within the purview of Section 304 II of the Indian Penal code;

xii) The learned GSF Court or the Respondent No. 3 further erred in holding that the prosecution proved the case under Section 307 of the IPC though it does not attract in the instant case.

7. Both writ petitions were assigned before this Bench by the Hon'ble Chief Justice for disposal. Hence, both writ petitions are taken up for disposal.

FACTS OF THE CASE:

8. The factual matrix of the case is relevant for the purpose of disposal of the instant case as under:

On 01.12.2010 at about 17.00 hrs Constable No. 94106242 Vijay Prakash, petitioner herein and Constable No. 02145820 Sanjeev Kumar Rai while returning from OP duty stopped at the shop of a Civilian, Shri Jogai Sarkar to purchase gutka and cigarette etc. which is about 300 yards away from BOP Satimari. Ct. Sanjeev Kumar Rai who was his buddy pair waited for some time but Ct. Vijay Prakash told Ct. Sanjeev Kumar Rai to go to BOP Satimari, he will come soon. When Ct. Sanjeev Kumar Rai reached at BOP Satimari, Offg Coy Commander No. 77287006 Inspr Md. Yaqub inquired about his buddy pair, and then Ct. Sanjeev Kumar Rai informed that the petitioner has consumed liquor. He is standing at the shop of Jogai Sarkar in the village in intoxicated condition. Immediately, Inspector Md. Yaqub, Offg Coy Commander along with No. 86005119 HC (G) Tarsem Lal and No. 94403510 CT/DVr Gulam Mohammad left to bring Ct. Vijay Prakash back to BOP. On reaching at the shop of Shri Jogai Sarkar, Inspr Md. Yaqub saw Ct. Vijay Prakash arguing with

the shop keeper, upon enquiring, Shri Jogai Sarkar said that he was telling Ct. Vijay Prakash to go to BOP as he is in intoxicated condition but he was not ready to go from the shop. Inspr. Md. Yaqub, Offg Coy Commander also told the petitioner to proceed towards the BOP but he did not move. Offg Coy Comdr reported the entire matter to the Adjutant of the unit on mobile. On this, the petitioner became furious and went towards the other side of the road where his bicycle was standing and suddenly cocked his personal weapon 5.56 mm INSAS Rifle Butt No. 584, body no. 16610357 and started firing indiscriminately towards the shop where Inspr. Md. Yaqub, Offg Coy Commander, HC (G) Tarsem Lal and some other civilians were standing. Tarsem Lal saw Ct. Vijay Prakash cocking his personal weapon, rushed towards him to prevent him from firing, but in the process of preventing such firing, he was hit by bullet in his right hand. The petitioner started firing, Inspr. Md. Yaqub, Offg Coy Commander, HC (G) Tarsem Lal and other civilians, who were standing near the shop, ran away from the site towards the village Chandipur to save them from the firing. Ct. Vijay Prakash also escaped from the spot by taking advantage of darkness after firing. On hearing the sound of fire, CQMH of the Coy No. 87009666 HC Satheesan N K took out a party of 10-12 personnel available in the

coy for rescue towards the place of occurrence. When the rescue party reached about 100 yards from the BOP, No. 02145874 Ct. Addya Prasad saw bicycle of Ct. Vijay Prakash lying on the ground along with his personal weapon and a carry bag containing a pouch which contained one filled magazine with 20 Rds of 5.56 mm INSAS and one empty Mag and one Mag containing 20 Rds of 5.56 mm INSAS was fitted on weapon. Later the rescue party saw that Insp. Md. Yaqub, Offg Coy Commander was being beaten by civilian as such the party immediately rescued him. During the firing, one civilian namely, Gopal Tudu, S/o John Tudu aged about 21 years of Vill- Chandipur (Satimari) was hit by a bullet in his abdomen. Immediately, the civilians removed the injured civilian to PHC Kushmandi, who after the first aid was further referred to Dist. Hospital Raiganj. Thereafter, Gopal Tudu was further referred by the treating doctor at Dist. Hospital Raiganj to North Bengal Medical College and Hospital, Siliguri, where he succumbed to his injuries on 02.12.2010 at about 06.30 hrs. HC (G) Tarsem Lal also sustained bullet injury in his right hand was also removed to SHQ BDF Hospital Raiganj, where after the first aid, he was further referred to Dist. Hospital, Raiganj. Wherefrom he was further referred to BSF Composite Hospital, Kadamtala on 02.12.2010 and, thereafter, on 3rd

Dec, 2010 sent to Anandlok Hospital, Siliguri where he remains admitted till 13th Dec, 2010. After the incident, a civilian, father of deceased lodged an FIR against the petitioner under Section 302 IPC resulting in registration of Kushmandi P.S. GDE No. 85 dated 02.12.2010, corresponding to Kushmandi P.S. Case No. 106/10 dated 02.12.2010 under Section 302 IPC. On the same line, BSF also lodged another FIR on issue of firing and murder of one civilian etc. Subsequently, the case was transferred on 29th September, 2011 for trial to the learned General Security Force Court from the Ld. Court of ACJM, Gangarampur at Buniadpur as per the provision of BSF Act, 1968.

CHARGES FRAMED BY THE LEARNED GSF COURT:

9. Charges were framed against the accused no. 941062422 Constable Vijay Prakash of 140 Bn BSF as follows:

First charge BSF Act- 1968 Section 46	<u>Committing a civil offence that is to say murder, punishable under Section 302, IPC:</u> In that he, on 01.12.2010 at about 18.45 hrs., at village
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	Chandipur, P.S. Kushmandi, District- Dakshin Dinajpur (West Bengal) by firing with his service rifle INSAS Butt No. 584, Body No. 16610357, at Sri Gopal Tudu, a civilian, aged about 21 years son of Sri John Tudu, R/o Chandipur, P.S. Kushmandi, District- Dakshin Dinajpur (West Bengal), caused the death of said Gopal Tudu and thereby committed murder.
Second Charge BSF Act- 1968 Section 46	<u>Committing a civil offence that is to say attempt to murder, punishable under Section 307, IPC:</u> In that he, on 01.12.2010 at about 18.45 hrs, at village Chandipur, P.S. Kushmandi, District- Dakshin Dinajpur (West

	Bengal) fired with his service rifle INSAS Butt No. 584, Body No. 16610357, at No. 77287006, inspector Md. Yaqub of 140 Bn BSF, with intent to kill him.
Third Charge BSF Act- 1968 Section 46	<u>Committing a civil offence that is to say attempt to murder, punishable under Section 307, IPC:</u> In that he, on 01.12.2010 at about 18.45 hrs., at village Chandipur, P.S. Kushmandi, District- Dakshin Dinajpur (West Bengal) fired with his service rifle INSAS Butt No. 584, Body No. 16610357 at No. 86005119 HC (G) Tarsem Lal of 140 Bn BSF, with intent to kill him.

10. The trial was conducted before the Learned General Security Force Court and in order to prove the case of the prosecution, the prosecution has produced and examined 22 witnesses. However, no Defence witness adduced from the side of petitioner. Thereafter, the statement under Rule 93(2) of BSF Rules read with Section 313 of the Cr.PC of the petitioner was recorded.

CONVICTION AND SENTENCES

11. Thereafter, the arguments were advanced by the parties before the learned GSF Court. After hearing the arguments of the both sides and after marshalling and appreciation of oral and documentary evidence adduced by the prosecution, learned GSF Court came to a final conclusion that the petitioner is the person, who started firing indiscriminately resulted in murder of one civilian boy and injured one BSF personnel on his hand and found him guilty of the alleged offences and convicted him for an offence committed under Section 46 of the Boarder Security Force Act, 1968 that is to say for murder and attempt to murder punishable under Sections 302 and 307 of the Indian Penal Code, 1860 and sentenced him "To Suffer Life imprisonment and to be dismissed from service" on

17.04.2012. Under the above circumstances, the present writ petitions have come up before this Bench for adjudication.

SUBMISSION ON BEHALF OF THE PETITIONER:

12. Ms. Ashima Mandla with Mr. Surya Prakash Singh, Ms. Ritu Das and Mr. Sangkrito Ray Chowdhuri, learned advocates appearing on behalf of the petitioner vehemently argued that in spite of making a fresh application dated 18.10.2021 in pursuant to the order dated 05.10.2021 passed by this Hon'ble High Court, the Respondent No. 3 unfortunately did not consider or dispose of the application even after expiry of time bound direction of three months. Petitioner has issued a contempt notice upon the Respondent No. 3 through his Learned Advocate. After receiving the said contempt notice, the Respondent No. 3 hurriedly passed an order on 29.04.2022 thereby rejected the prayer for suspension of sentence without affording an opportunity of hearing to the petitioner. The impugned order also bears no reasons and a cryptic one which is liable to be set aside.

13. It is further submitted that the Respondent No. 3 overlooked the grounds set forth and evidences, both oral and documentary as adduced by the prosecution and finally dismissed the application

only on the basis of surmises and conjectures avoiding the true facts and material evidences available on the record. No personal hearing was given to the petitioner as such grossly violated the principles of natural justice. It is the basic principle of natural justice that a reasonable opportunity of being heard to be given to the petitioner but the Respondent No. 3 avoided and surreptitiously jumped and passed only to comply the direction of the Hon'ble High Court without going into the merits of the case or applying judicious mind. The learned GSF Court failed to appreciate the oral evidences adduced by the prosecution particularly the eye witnesses i.e. P.Ws. 9 and 18. The learned GSF Court also failed to consider under which situation and circumstances, the incident was occurred and directly convicted the petitioner under Sections 302/307 though there was no intention or motive or pre-meditation on the part of petitioner for such incident. There was no prior enmity with the private individuals or officials of the BSF. The said incident was taken place owing to scuffle and sudden provocative statement uttered by P.W. 14. It can be easily ascertained the actual truth from the evidence of eye witness (P.W. 9), who is the shop owner of provisional shop situated at Village Chandipur, P.S. Kushmandi, where the incident occurred.

14. It is further submitted that allegation of altercation/argument took place between petitioner and shop owner was never happened at all. Prosecution miserably failed to prove the allegation that the petitioner was under influence of liquor and picked up an altercation with the shop owner. All these facts have not been considered by the learned GSF Court or Appellate Authority and finally dismissed his application whimsically and capriciously without affording an opportunity of being heard to the petitioner. Therefore, this writ petitions are maintainable because there is no other alternative efficacious remedy for his grievances as prayed for as such it can be allowed after setting aside the order dated 29.04.2022 passed by the Appellate Authority and judgment and order dated 17.04.2012 passed by the Learned GSF Court in exercising power under Article 226 of the Constitution of India. Ld. Advocate placed reliance of a judgment reported in **Ram Prasad Saini Vs UOI and Anr.**¹ in support of her contention.

15. It is further submitted that the person, who sustained bullet injury died due to delay in removing to the hospital and insufficient medical facilities. It is specifically stated by the prosecution witnesses

¹ **2012 SCC Online Del 5160**

that no BSF personnel help to remove the deceased for his treatment. He was travelled from one place to another and finally succumbed. If he would have been given proper medical treatment in time, he would have been alive. The allegation of suffering bullet injury by P.W. 14 is also not proved. He suffered simple injury in his hand during scuffle but prosecution has given impression that he suffered bullet injury on his hand as such the Petitioner has not committed an offence under Section 307 IPC. At best, it would be Section 308 Part II of the IPC. The Learned GSF Court erroneously convicted the petitioner under Sections 302/307 IPC though it would be at best Sections 300 Part II/308 of the IPC because sudden quarrel or altercation took place between the P.W. 14 and the petitioner at the place of occurrence and same has been corroborated by the eye witness P.W. 9, shop owner and P.W. 18, who was present at the spot. The altercation and scuffle actually taken place between the petitioner and P.W. 14 at the place of occurrence as per the statement of P.W. 18, who is one of the vital eye witnesses and he was present at the place of occurrence, where the petitioner went to purchase Gutka, Cigarette etc.

16. Finally, in alternatively, learned advocate submitted that as the incident occurred in the course of sudden quarrel or altercation and in a fit of passion when the BSF personnel informed the higher officer about the false allegation against the petitioner that he engaged in altercation with shop keeper under influence of liquor and further provoked by saying “Oye Vijay Prakash Kya Marega Kisi Ko”. There was no intention to kill or assault anyone as it transpires from the evidence of eye witnesses P.W. 9 and P.W 18. They did not support the prosecution case. Secondly, other eye witnesses also not supported the case of the prosecution. There was no prior intention or motive or pre-meditation on the part of the petitioner for such incident. There was no prior enmity with the private individuals or officials of the BSF. She prayed that his sentence may be scaled down to culpable homicide not amounting to murder after considering Exception 1 and Exception 4 of Section 300 of the Indian Penal Code. Petitioner has already suffered imprisonment for more than 11 years as such he should be released from the case as he had suffered maximum punishment. To bolster her submission and contention, she places reliance of judgments as under:

i) Sukhdev Singh V. Delhi State (Govt. of NCT of Delhi)²

ii) Bhagwan Singh vs. State of Uttarakhand³

iii) Anbazhagan Vs. State⁴

iv) Tholan V. State of Tamilnadu⁵

SUBMISSION ON BEHALF OF THE RESPONDENTS:

17. Per contra, Mr. Dayashankar Mishra, with Ms. Sabnam Laskar, learned advocates for the respondents, on the other hand, vociferously argued and raised preliminary issue with regard to maintainability of Writ Petitions on the self-same issues and grounds after withdrawal of earlier writ petition filed before the Hon'ble High Court of Delhi. No liberty was granted by the Hon'ble Delhi High Court for filing a fresh writ petition as such both writ petitions are liable to be dismissed at the threshold. There is no provision to entertain writ petition under Article 226 of the Constitution of India when the case has been finally dismissed by the Appellate Authority in an appeal filed under Section 117 of the BSF Act, 1968. The said Act is itself a complete code.

² **(2003) 7 SCC 441;**

³ **(2020) 14 SCC 184;**

⁴ **(2023) SCC online SC 857;**

⁵ **(1984)2 SCC 133.**

18. It is further submitted that the petitioner was habitual offender. He was enrolled in BSF with effect from September 7, 1994 and from the very beginning of his service he was awarded seven punishments for his indiscipline acts. He never adhered to any rules and regulations of the BSF so no leniency can be shown to him.

19. It is further submitted that the D.G, BSF has examined all the points raised by the petitioner in his petition seeking suspension of sentence, the evidences brought by the prosecution in the proceeding before the learned GSF Court and all attending facts and circumstances of the case, the Respondent No. 3 finally came to the conclusion that in view of the nature of offences, where the petitioner had indulged in indiscriminate firing in civil area on his superiors and civilians resulting in killing one civilian boy and bullet injuries suffered by P.W. 14, rightly confirmed the sentence and disallowed the prayer for suspension of sentence under section 117 of the BSF Act earlier on 04.04. 2013. Furthermore, in the second time also in the same line, Director General further passed an order on 29.04.2022 being a discretionary power under Section 130 of the said Act taking into consideration of Petitioner's past conduct and

penalties imposed during his period of service. The BSF Act is itself a self-contained statute, which deals with the cases of BSF personnel for their commission of offences in civil areas. Petitioner has availed all his grievances under the said Act as such he cannot avail any further relief by filing fresh writ petitions as such those petitions are not at all maintainable and liable to be dismissed. To bolster his contention, he placed reliance of judgments as under:

i) Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior and other⁶

ii) M/S Rajasthan Art Emporium V. Rajashtan State Industrial and Investment Corpn and another⁷

20. It is further submitted that the prosecution has established the charges against the petitioner beyond any reasonable doubt before the learned GSF Court through oral and documentary evidence. P.W.s 3, 9, 10, 11, 14 and 15 have established that the petitioner was under the influence of liquor and he had cocked his riffle and started firing indiscriminately with an intention to kill

⁶ **AIR 1987 Supreme Court 88;**

⁷ **AIR 1998 Rajasthan 277.**

officials and civilian who were present at the spot. Due to such indiscriminate firing, one civilian boy and employee of BSF, P.W. 14 suffered bullet injuries in his right hand. Subsequently, civilian boy expired as such the Learned GSF Court rightly convicted and sentenced the petitioner with life imprisonment and dismissed from service. Later the conviction and sentence were confirmed by the Appellate Authority. There is no question of sudden provocation and scuffle between the officials of the BSF and Petitioner. Actually, the officials of BSF moved to the place of occurrence to bring the Petitioner as his buddy partner informed, he was arguing with the shop owner under the influence of liquor. They were requesting and asking him to go to BPO Satimari from the spot as he was under influence of liquor and he was disturbing the civilians. He had not paid amount of gutkha and cigarettes to the shop owner (P.W. 9). P.W. 9 specifically stated in his evidence that petitioner had not paid any amount to him. At the same time, his previous antecedent is also not good. So, question of interference of such conviction and sentence by this Court does not arise at all rather the writ petitions are devoid of merits and liable to be dismissed.

21. It is further submitted that the Learned GSF Court has not violated any of the procedures as laid down in the said Act during whole trial. Court has given ample opportunity to the petitioner for cross-examination and to adduce defence witness on his behalf as such learned Court had in no way violated the procedure as prescribed in the said Act as such allegation of not affording opportunity being heard is false, baseless, unfounded and devoid of merits. Both writ petitions are totally based on suppression of facts, vexatious and frivolous as such not sustainable in the eye of law. Hence, Petitioner is not entitled to any relief sought for under Article 226 of the Constitution of India.

22. Finally, learned counsel appearing on behalf of the Respondents, vehemently opposed the prayer for scaling down to culpable homicide not amounting to murder after considering Exception 1 and Exception 4 of Section 300 of the Indian Penal Code and its sentences and further submitted that it is the clear case of murder because the Petitioner/convict started firing indiscriminately towards the officials of BSF Jawan and civilians. Petitioner's act of indiscriminate firing cannot be said to come under the purview of Exception 1 or Exception 4 of Section 300 of IPC because petitioner

being the BSF jawan was working for more than 17 years of service and he was fully aware about the consequences of his indiscriminately firing in civil areas by INSAS rifle. He fired on several rounds as such he is not entitled to get any benefits. Prosecution has established its case of murder and attempt to murder under Sections 302/307 IPC beyond reasonable doubt. Consequently, instant writ petitioners are devoid of merit and deserve to be dismissed.

DISCUSSION AND FINDINGS

23. Heard the rival submissions of the parties and on meticulously perusal of record, it is not disputed that one civilian, Gopal Tudu died due to bullet injury and one official of BSF suffered injury on his right hand. The whole case is based on eye witnesses, who were present at the spot, where the incident took place on the fateful date i.e., on 01.12.2010. Eye witnesses i.e., P.Ws. 3, 9, 14, 15 and 18 are the vital witnesses. So, let me scan their evidences one by one. But before entering into the merits of the case, it would be appropriate to decide the preliminary issue raised by the Respondents as under:

(a) Whether the writ petitions are not maintainable, when it was withdrawn by the petitioner without seeking liberty to file afresh?

24. With regard to the maintainability of the writ petitions, it is true that the petitioner had withdrawn the Writ Petition from the Hon'ble High Court of Delhi at New Delhi and the said prayer was pleased to allow vide order dated 11.12.2014 by the Hon'ble High Court. It is correct that no liberty sought for filing writ petition afresh or liberty granted by the Hon'ble High Court but it is contended by the Writ Petitioner that previously appointed Ld. counsel appearing on behalf of the petitioner wrongly filed the Writ Petition before the Hon'ble High Court of Delhi at New Delhi on the impression that the office/ head office of the Appellate Authority, who rejected the prayer of the petitioner in appeal filed under Section 130 read with Section 117 of the BSF Act is situated in New Delhi. The Hon'ble High Court of Delhi at New Delhi initially admitted the writ petition and, thereafter, on several occasions, directed to file reply and rejoinder to the parties but at the time of final hearing, a preliminary question of territorial jurisdiction was raised by the Respondents as the alleged incident took place and Trial held within the State of West Bengal on the basis of incident originated within the District of Dakshin Dinajpur, West Bengal. Accordingly, the writ petitioner had to seek before the Hon'ble High Court of Delhi for withdrawal of the writ

petition and file the same in Calcutta High Court at Calcutta and the said prayer for withdrawal of the said writ petition was simply allowed on 11.12.2014. There is no reflection in the order regarding liberty to file afresh writ petition within the actual territorial jurisdiction. It is admitted facts that the incident occurred and entire trial held within the territorial jurisdiction of the West Bengal, which comes within the territorial jurisdiction of the Hon'ble High Court at Calcutta. Accordingly, the writ petitioner has filed a writ petition being WPA No. 31234 of 2017 and after hearing both sides, the Hon'ble High Court entertained the Writ Petition and vide order dated 05.10.2021 directed the petitioner to make a fresh application/representation before the Director General, Border Security Force, being the Respondent No. 3 in the first writ petition for suspension of sentence in terms of the provisions of Section 130 read with Section 117(2) of the BSF Act by 25th October, 2021.

In the event, such application is made, the Director General, Border Security Force shall decide the same irrespective of the fact whether the previous application said to have been forwarded by the Jail Authorities on 1st February, 2019, has been disposed of or not.

The entire exercise shall be concluded within a period of three months from the date of the petitioner making such application

and/or representation. The application made by the Petitioner was finally decided and rejected the prayer of the petitioner by the DG, BSF on 29.04.2022, which has now been challenged in another writ petition. Petitioner has not suppressed any facts rather he disclosed complete facts and further justified the reasons for filing of the writ petitions before this court.

The Judgment relied on behalf of the petitioner is also justified. Because in the referred judgment, the Hon'ble Supreme Court in **Daryao V. State of U.P.**⁸ held that if the petition filed in the High Court under Article 226 is dismissed not on the merits because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to a subsequent petition. If a writ petition is dismissed in limini and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature or the order. If the order is on the merits, it would be a bar. If the petition is dismissed in limini without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata.

The judgments referred as aforesaid on behalf of the Respondents are not applicable in the instant case because facts and

⁸ **1961 SCC Online SC 21**

circumstances of the instant case are different. The petitioner has not suppressed any facts rather he disclosed complete facts and further justified reasons for filing of the writ petitions. The Hon'ble High Court of Delhi simply allowed his prayer vide order dated 11.12.2014. The said order of dismissal as withdrawn was not on merits. Furthermore, it is admitted fact that the incident occurred in Dakshin Dinajpur, West Bengal and whole trial held at HQ 140 BN BSF, Maheshpur (Raiganj) within the State of West Bengal i.e. within the territorial jurisdiction of the Hon'ble High Court at Calcutta.

In addition to that, this Court would also like to place the decisions referred by the Respondents reported in:

- 1) Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior and others and**
- 2) M/S Rajasthan Art Emporium V. Rajasthan State Industrial and Investment Corpn. and another.**

In the first case, the Hon'ble Supreme Court held in paragraph 9 of the said judgment as follows:

“9. the point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Art. 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no

assistance. But we are of the view that the principle underlying R. 1 of O. XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Art. 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Art. 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Art. 21 of the Constitution since such a case stands on a different footing altogether. We however, leave this question open.”

In the second case, the Hon’ble Supreme Court held in paragraphs 10 and 20 as follows:

“10. In the instant case, as the petitioner has approached this Court earlier, the submission made by Mr. Mathur that the petition is not maintainable is full of substance. Mr. Kothari, learned counsel for the petitioner has submitted that the earlier writ petition had been filed against the judgment and order of the Tax Tribunal and this petition is filed against the order dated 26-7-97, which was subsequent to the judgment of the Tax Tribunal and by the said order dated 26-7-97, the RIICO has rejected his application to delete the said condition, therefore, being a separate cause of action, it cannot be said that the writ petition is barred by the principle enshrined in Order XXIII, Rule 1, I.P.C. In the facts and circumstances of the case, as the same Condition had been challenged before the Rajasthan Taxation Tribunal and the contention raised by the petitioner had been negative and the judgment and order of the Tax Tribunal had been challenged before this Court by filing the earlier writ petition, and as the petitioner was not likely to get any relief from the Court, he had chosen to withdraw the said writ petition without getting the liberty to file another writ petition, the submissions made by Mr. Kothari are not tenable.

20. The contractual obligations are generally not disputed in writ jurisdiction. Petitioner has entered into the agreement with the respondents and he was under no compulsion to purchase the said property if the condition was not suitable to him. Entering into the contract was by no means compulsion for him, thus it cannot be described as Hobson’s choice. Petitioner is an industrialist and it was not a case of a weaker person who was not in a position to bargain with a company and even if the condition imposed is arbitrary and liable to be quashed, it cannot be done so as the petitioner had already filed the writ petition and got it dismissed as withdrawn without any

further liberty to file the petition and it made the petition not maintainable.”

However, in the instant case, withdrawal of writ petition by the petitioner from the Hon'ble High Court of Delhi at New Delhi is not tantamount to abandon his grievances or decided on merits. Furthermore, question of personal liberty is involved herein as he has been convicted and sentence “To Suffer Life imprisonment and to be dismissed from service”. Appellate Authority dismissed his application/appeal under Section 117 of the BSF Act, 1968 without applying his judicious mind and affording opportunity of being heard to the petitioner is a clear violation of principle of natural justice. Petitioner has withdrawn the said writ petition from the Hon'ble High Court of Delhi only on the ground of lack of territorial jurisdiction and same was filed by the previous conducting Ld. Advocate on the impression that the Office/Head Quarter of the Respondents is situated under the territorial jurisdiction of the Hon'ble High Court of Delhi and said question of territorial jurisdiction was raised by the Respondents while hearing the case. The said prayer for withdrawal was simply allowed by the Hon'ble High Court of Delhi but the said writ petition was not decided on merits. It is not the contention of the

Respondents that writ petitioner has abandoned his prayer in respect of the cause of action arose in the said writ petition when he withdraws it and furthermore, there is no allegation that the writ petitioner is indulging in bench-hunting tactics. The writ petitioner has filed these writ petitions before this Court and not in the same High Court as such question of bench- hunting tactics also does not arise. Hence, there are justifiable reasons to entertain the writ petitions invoking an extraordinary jurisdiction of the High Court under Article 226 of the Constitution as this Court has territorial jurisdiction to entertain the same as the alleged incident occurred in Dakshin Dinajpur, West Bengal and whole trial held within the State of West Bengal i.e., within the territorial jurisdiction of the Hon'ble High Court at Calcutta. Therefore, these writ petitions are well maintainable.

Now, this Court would like to proceed with the case on merits after scanning and appreciation of the evidence, oral and documentary brought on record by the prosecution and considering the contentions of both parties. Entire case is based on eye witnesses i.e. P.W. Nos. 3, 9, 14, 15 and 18. They are the vital eye witnesses.

25. P.W. 9, Shop keeper, specifically narrated in his evidence that one BSF Jawan (petitioner herein) came to his shop for purchasing Gutka and cigarette on the fateful day. After purchasing, he remains standing outside the shop. At that time, one lady and 4-5 civilian customers were also present there. In the meantime, he saw one vehicle of the Coy Commander reached there. He got down and enquired about the jawan from him. Then he replied nothing has happened. In the meantime, he was busy in attending other customers and went inside his shop, at that point of time, Coy Commander started talking with that BSF Jawan (petitioner). What all transpired between them, he is not aware about that. At that point of time, some arguments were taken place between the Coy Commander (P.W. 3) and that Jawan (Petitioner herein). He also noticed that BSF 'G' person standing near by the Gypsy, which was parked on the other side of the road side. He also noticed that a scuffle took place between the BSF 'G' person and that BSF Jawan. After a while firing took place. It is further stated that when the firing took place, Gopal Tudu was standing in his shop. P.W. 9 ran away towards his house and his shop was closed by his brother. Next day he came to know that one bullet hit the BSF 'G' personnel and one civilian Gopal Tudu. Later on, he came to know that Gopal Tudu died

in the hospital. During re-examination, he stated when the BSF personnel came to purchase Gutka and Cigarette from his shop at that time he was not having any weapon. He replied to the questions asked by the Court that he is not aware who fired the weapon as he immediately ran away from the place of occurrence. The Jawan who purchased Cigarette and Gutka did not pay any amount. Generally, BSF Jawans made payment immediately after they purchased any goods from his shop.

During cross-examination, he stated no hot argument took place between him and the Jawan. He purchased cigarette and Gutka from his shop as such prosecution failed to prove the allegation that he was arguing and hot altercation taking place with the shop owner.

26. P.W. 14, No. 86005119 Head Constable Tarsem Lal, 'A' Coy, 140 Bn BSF is injured witness. He deposed that on 1st December, 2010 at about 18.20 hours he was present at BOP Satimari at that time Coy Comdr. told him that Ct. Sanjib Kr. Roy reported that petitioner had taken liquor and was standing at civilian's shop in the village Chandipur. After that, Coy Comdr. asked him to get ready with the vehicle to move towards the civilian's shop at Chandipur to bring the petitioner. Within 5 to 10 minutes, he along with Coy

Comdr. and Ct./DVr. Gulam Mohammad left for the civilian's shop in Maruti Gypsy. They reached at the civilian's shop within 3 to 4 minutes. He saw petitioner standing in front of the shop of civilian. On reaching near the petitioner, Coy Comdr. enquired about the shop keeper as to what was the matter. Shop keeper replied that petitioner purchased some items today and earlier also and he had made all the payments and still he is not leaving the shop. Since it was his business hours so petitioner should leave the shop immediately. He further deposed that on the date of accident the Coy Commander asked the petitioner to move away from the shop and went to BOP but petitioner did not move from that place as such immediately Coy Commander informed the Unit Adjutant, who asked to Coy Commander to pursue the petitioner. After that, petitioner went towards the place where Gypsy was parked i.e. towards other side of the road at that time he was having his weapon on his shoulder and suddenly shouted "Madarchodo, tumne meri report to de hi di hai, mai tum logo ko nahi chorta" and petitioner cooked his Rifle. On seeing this, he told Petitioner, "Oye Vijay Prakash Kya Marega Kisi ko." Immediately, soon thereafter that petitioner started firing. When firing started, he tried to take cover in nearby small ditch. At that time, one bullet hit him on his right hand by which he was holding a

torch. He led down in ditch to save his life. Bullet hit him on his right hand and his torch fell down. He did not know as to where the Coy Commander and other civilians ran away. But petitioner continued to fire for 02-03 minutes. When he was lying down in the ditch, he heard accused was saying, "Maine jo karna tha kar diya abhi tum log dekh lena." After sometimes fire stopped and Petitioner kept on roaming there for about 05 minutes and after that moved towards the BOP side with his cycle. When he saw the petitioner moving towards BOP, he asked Ct/Dvr Gulam Mohammad opened the door of Maruti Gypsy. He told him to stop and took him in Gypsy since he was hit by the bullet in the firing. Ct/Dvr Gulam Mohammad took him towards the border in Maruti Gypsy i.e. towards opposite direction of the BOP Satimari because they were apprehending danger since petitioner went towards BOP side with his weapon. After leaving the place of occurrence, they stopped at OP point for a while and he informed the Commandant, 140 Bn BSF on the mobile of Ct/DVr Gulam Mohammad about the incident and he also told him that he got injured by the bullet. He ordered him to move towards the nearby hospital or to any nearby BSF camp. Then he told him that he cannot move towards BOP Satimari because petitioner may again attack on him.

During cross-examination, he narrated that he cannot say that it was aimed fired but as soon as he cocked his rifle, he told the word **“Oye Vijay Prakash Kya Marega Kisi ko.”** He could not say how bullet hit him in the right hand because at that time he was running to save his life.

It transpires from his evidence that the petitioner started firing but he cannot say whether it was aimed fired or not. He sustained injury while he was saving himself. It is admitted fact that he told the petitioner by saying **“Oye Vijay Prakash Kya Marega Kisi ko.”**

27. P.W. 18, Shri Abdul Sadiq, another civilian eye witness, who stated that on 1st December, 2010 at about 18.30 hours he went to the provisional shop of Jogai Sarkar in his village. There he saw one BSF Jawan already standing there and asked for Gutka from shop keeper. In the meantime, one BSF vehicle came there and Coy Comdr, G Wala and driver got down from the vehicle and came towards the shop. He saw one civilian and two BSF persons engaged themselves in hot argument. Suddenly he heard sound of firing of one round. At the same time, he turned towards them and saw that they were scuffling. After scuffling, again firing took place. After the firing,

Coy Comdr asked all of us to go away from the place of occurrence. Approx 10 to 12 rounds were fired and he ran away from the place of occurrence. During night, he came to know that one boy, namely, Gopal Tudu from village Chandipur and one BSF person sustained bullet injuries in that firing. On the next morning, he came to know from the civilians that injured Gopal Tudu died in Hospital at Siliguri.

During cross-examination, he stated that no argument was going on between the shopkeeper and BSF person when he reached there and the BSF person who was present before the civilian shop was without weapon. Weapon was kept in cycle which was parked in front of the shop across the road. BSF person who was standing in front of the shop purchased something from the shop was behaving normally and talking in normal way. He further stated three persons got down from Gypsy. Out of them one was wearing civil dress and two were in uniform. The civilian who was scuffling with the petitioner was G Wala (P.W. 14). When BSF persons were scuffling at that time the Coy Comdr. was standing in the shop. He further stated the firing was not done in aimed position but it was fired downward. He did not see anybody firing aiming towards any person. Thereafter, he ran away from the place after firing of three rounds. When the firing was going on he ran away from the place of occurrence towards

the direction i.e. behind the shop along with two other civilians namely, Hidaitulla and Anarul.

Upon careful consideration of his evidence, he specifically stated no argument was going on between the shopkeeper and BSF person (petitioner herein) when he reached there and the BSF person who was present before the civilian shop was without weapon. Weapon was kept in cycle which was parked in front of the shop across the road. BSF person who was standing in front of the shop purchased something from the shop was behaving normally and talking in normal way. He further narrated that there was scuffling between the Petitioner and G Wala (P.W. 14) and the firing was not aimed towards anyone. All the aforesaid oral evidence of eye witnesses clearly proves no altercation/argument was held between the Petitioner and shop owner. At the same time, his behaviour was normal and talking in normal way. This behaviour would not be said the petitioner was under influence of liquor. The allegation of the prosecution is that petitioner was under influence of liquor and was engaged in altercation with shop owner is absolutely false and washed out by the independent eye witnesses i.e. P.Ws. 9 and 18. No sufficient or reliable evidence or corroboration brought on the record with regard to the allegation that he was in drunken condition or he

was in intoxicated condition and was mis-behaving anyone on the date of accident. What transpires from the evidence that some sudden scuffle took place between G Wala (P.W. 14) and the petitioner but actual reason cannot be revealed but it reveals during scuffle P.W. 14 insisted him by saying "Oye Vijay Prakash Kya Marega Kisi ko." It tantamount to some extent provocation from the side of P.W. 14 resulted in firing by the petitioner. It is admitted facts that one civilian boy died and HC (G) sustained injury in his right hand. The Petitioner was a BSF jawan. He was in service for more than 17 years, he should have known the consequence of firing. Due to his firing, one civilian boy died and P.W. 14 also sustained bullet injury in his right hand. It cannot be denied more casualties might have been occurred due to such firing but other persons, who were present near the place of occurrence any how they escaped narrowly. But it cannot also deny that there was no previous enmity with BSF personnel's or any civilian. Firing took place suddenly due to sudden argument and scuffle took place between the petitioner and P.W. 14 and the firing was not aimed fired but it was fired downward. So, there was no intention to kill anyone.

28. P.W. 15, No. 94403510 Constable/DVr Gulam Mohammad. MT Pl. 140 Bn BSF stated on 1st December, 2010 at about 18.30 hours Coy Comdr along with HC (G) Tarsem Lal came and asked him to move towards boarder side. While they were going towards boarder, Coy Comdr asked him to stop vehicle near civilian shop in front of school. When they reached there, Coy Comdr and HC (G) got down from the vehicle. At that time, he saw the petitioner was engaged in arguing with the shop keeper and 2 to 3 civilians were also present in the shop. Coy Comdr and HC (G) moved towards him and he got down from Gypsy and moved towards opposite direction of the shop for nature's call. While he was answering nature's call at that time, he found petitioner started indiscriminately firing. He laid down the said place and after sometimes he heard HC (G) screaming saying "Mai Mar Gaya, Mai mar gaya, Mujhe goli lagi hai". He noticed one bullet hit entry mark on the bonnet of co-driver seat side of the Gypsy and further exit point of the same in the front side of the bonnet. Immediately after the firing, he did not see the Coy Comdr at the place of occurrence. In the next morning, he came to know that a civilian was also injured in the firing.

However, during cross-examination he stated he saw hot argument going on between shop keeper and the petitioner but he did

not find mentioned in the COI, he seems his statement was not recorded properly. He saw petitioner firing when he was standing under the Banyan tree. At that time, HC (G) was standing in front of the shop. At that time, 2 to 3 civilians were also present at the shop but no female was present there. He saw only petitioner firing towards the shop continuously. He further stated that the distance between the shop and the Maruti Gypsy was about 10 to 15 yards as such he able to hear the argument going on between petitioner and the shop keeper.

From his entire evidence, it transpires that he heard argument between shop keeper and the petitioner. However, shop keeper (P.W.9) denied about any argument or hot altercation with the petitioner. P.W. 15 narrated about the indiscriminately firing by the petitioner and HC (G) suffered bullet injury on his person and heard HC (G) screaming saying “Mai Mar Gaya, Mai mar gaya, Mujhe goli lagi hai”.

29. P.W. 3 Inspr. Md Yakub stated Constable Sanjeev Kumar Rai reported him that after returning from Op duty the Petitioner has taken liquor and arguing with the Civilian shopkeeper, Jogai Sarkar. On hearing, he went towards the shop along with HC Tarsem Lal and

Constable Gulam Mohd in Maruti Gypsy. When they reached at the shop of Civilian, he saw the Petitioner was making arguments with the shopkeeper. He immediately reported the matter to the Unit Adjutant on mobile phone. He told him to take the Petitioner to the camp by anyhow as such he told the Petitioner to accompany him to camp. At that time civilian shop keeper also told the Petitioner to go away from the shop. He further stated that the shopkeeper said that the petitioner had already made the payment but still he did not move. The civilian shopkeeper told him that he did not care for the order of Coy Comdr as well as HC (G). The petitioner move towards his bicycle parked on the other side of the road near tree. From there he said "Madarchodo, tumne meri report to de hi di hai, mai tum logo ko nahi chorta" Immediately he cocked his rifle and started firing on them.

During cross he stated he had lodge an FIR on 02.12.2010. In the Police station he came to know that one FIR had already been lodged in this case by the civilians. He got minor injuries due to manhandling by the civilians but no medical examination was conducted.

30. P.Ws. 16 and 17 are the mother and father of deceased Gopal Tudu. They stated they heard from a villager that her son had got bullet injury and he was lying in front of provisional shop of Jogai Sarkar near school. Immediately, they rushed to the place of occurrence. On reaching there, saw one BSF vehicle was standing and two personnel were present there. Upon enquiry, they both started the vehicle and left the place of occurrence without answering their query. Their son received two bullet injuries on the right side of the stomach. P.W. 16 kept on sitting near her injured son for about one and half hour. In between number of civilians came there but nobody attended her son. Two Police vehicles came there and they removed their son to the Hospital. He was removed to Raiganj and from there to Siliguri. On the next day, it was informed Gopal Tudu died in Hospital. Same day in the evening they received dead body and last rites were performed.

P.W. 17, de facto-complainant also stated no BSF personnel reached there and when he went to the police station at that time Coy Comdr, BOP Satimari was also present there. Coy Comdr wrote something on paper and asked him to sign it since he was an illiterate. He lodged the FIR which was written in Bengali after putting signature in Bengali before the Kushmandi P.S. same was registered

as Kushmandi P.S. GDE No. 85 dated 02.12.2010, corresponding to Kushmandi P.S. Case No. 106/10 dated 02.12.2010 under Section 302 IPC.

31. P.W. 19 Shri Munsa Tudu is another co-villager. At the time of occurrence, he was in his house. Suddenly, he heard the sound of continuous firing. A villager came to his house and told him that Gopal Tudu had sustained bullet injuries in the firing incident which took place near the shop. When he reached at the shop of Jogai Sarkar, he saw Gopal Tudu was lying there in injured condition. Then he told one villager to call a taxi from nearby village Mahipalpur. After about 40-45 minutes, a taxi came there and he took injured Gopal Tudu to PHC Kushmandi. From there one ambulance was provided to them and referred the injured to Distt. Hospital Raiganj and from there Gopal Tudu was further referred to Sadar Hospital, Siliguri. They reached there in the emergency ward at 4.30 hrs and Doctor attended the injured Gopal Tudu and told them that it is too late. Later on, in the morning at about 5.00 hrs Gopal Tudu expired in the Hospital. The matter was reported to P.S. Matigara and then Post-Mortem was conducted on the dead body of Gopal Tudu. At about 17.00 hrs, dead body was handed over to them. At about 22.00 hrs,

dead body was brought to the village and last rite was performed on the same day.

32. P.W. 20 No. 02145874 Constable Addya Prasad, 'F' Coy, 140 Bn BSF stated on 1st December, 2010, in the evening he was taking rest in the BOP as he was further detained for the IInd ACP duty from 22.00 hrs to 02.00 hrs at about 19.20 hrs. Coy Operator informed him regarding some firing incident. On fall-in they were divided in small groups of four personnel each and asked to go towards border to know about the firing. His party left towards border through pacca road which was leading to border. When they reached just 150 mtrs away from BOP, he saw on the left side of the road one Rifle with two filled and one empty magazine and one cycle. They bring the Rifle and cycle to BOP and handed over the same to Kote NCO HC Praveen Kumar. At that time, he did not know whose Rifle was that but HC Praveen Kumar told him that Rifle belonged to Ct. Vijay Prakash.

33. P.W. 21 Dr. Mrs. Neela Bhattacharya, M.S., MCH (Plastic Surgeon) of Anandlok Hospital, Siliguri stated on 3rd December, 2010 one patient from BSF namely, HC Tarsem Lal S/o Shri Buta Ram aged about 45 years was referred to Anandlok Hospital, Siliguri from

Composite Hospital, BSF, Kadamtala for blow-out injury of dorsum of the right hand. There were skin and soft tissues loss of the first and the second interosseus spaces with complete shattering of the metacarpal bone of the index finger and fracture of the metacarpal bone of mid finger. The extensor tenders of the index and mid finger were avulsed and there is sensory loss over the index and mid fingers of the dorsum. The patient was immediately attended and admitted on the same day. On 4th December, 2010 the wound debridement was done along with fixation of fractures on mid finger and index finger. She also repaired the extensor tendons. Resurfacing has been done with superiorly based abdominal flap on 7th December, 2010. The patient remains admitted till 13th December, 2010. She further stated when patient came to her on 3rd December, 2010 the case history shows that he got bullet injury on 1st December, 2010 but before patient was referred; his wound was treated by the BSF doctors. Discharge summary of Tarsem Lal marked as Exhibit W-1.

34. P.W. 22 IRLA No. 49874860 Kulwant Singh Rawat, DC, 140 Bn BSF stated on 1st December, 2010, a BSF raiding party was going on in the Officers' mess and at about 19.15 hrs, he was told by Shri Satish Chandra, DC that a firing incident had taken place in BOP

Satimari in which Ct. Vijay Prakash of 'F' Coy had fired and he had to move to BOP Satimari immediately and unit Commandant had already left for the place of occurrence. He identified Ct. Vijay Prakash of 'F' Coy who is sitting in the Court. At about 21.00 hrs, he reached at BOP Satimari and there he met Offg Coy Comdr Inspector Md. Yaqub. At that time, he observed that some blood was coming out from his lips and nose. Then Offg Coy Comdr narrated him the incident and also told him that petitioner did not report back in the BOP after completion of his duty and later on when he went there to bring him from the shop at that time some hot argument took place between them and petitioner fired on him. Till then petitioner did not report back in the camp after the incident and search parties were already out to search him. The weapon of the petitioner was recovered and deposited in the Coy Kote. In the mean time, at about 23.00 hrs, it struck in his mind that petitioner can be contacted on his mobile. Then he asked about the mobile number of the petitioner. One constable namely, Somraj was having his mobile number and through his mobile he tried to contact the petitioner and he succeeded in contacting the petitioner at about 23.45 hrs. After his great persuasion, petitioner got ready to disclose his location where he was hiding himself. Then he took his vehicle along with guards

and reached the place where petitioner was hiding himself, which was just 200 yards away from the place of occurrence. When vehicle reached there, he himself came near the vehicle and sit down in the vehicle. At that time, he was bare handed. Then he informed the Commandant and he ordered him not to bring the petitioner to BOP Satimari and took him directly to Bn HQ and put him in Quarter Guard. A Special SITREP in respect to this incident was originated from Bn HQ vide Signal Number O/7201 dated 2nd December, 2010. Later on, it came to know that injured civilian expired at NBMC, Siliguri, same was also informed to SHQ BSF Raiganj, vide Bn HQ Signal Number O/7207 dated 2nd Dec, 2010. On 1st and 2nd Dec 2010 spot verification was carried out by the Commandant 140 Bn BSF and report sent to SHQ BSF Raiganj vides Bn HQ Signal Number O/7208 dated 2nd Dec 2010. On 3rd Dec 2010, a detail report was also prepared by the Commandant and sent to SHQ BSF, Raiganj. He hereby produced both the SITREPs, spot verification report and detail report before the Court. Same are read over, received by the Court and marked as Exhibits- 'X', 'Y', 'Z' and 'AA' respectively and signed by the Law Officer. This case was transferred to BSF on 29th Sept, 2011 by the Ld. ACJM Court, Gangarampur at Buniadpur. On 01st Oct, 2011 the case property in respect to this case was handed over

to 140 Bn BSF by the Court, which was collected by HC Gautam Basu of 140 Bn BSF, Court handed over one 5.56 mm INSAS Rifle butt no. 584, body no. 16610357, three magazines, 08 EFCs (In sealed wooden box) 40 live rounds of 5.56 mm INSAS Rifle (sealed) and case diary. As per the orders of the Commandant, he deposited all these items in Quarter guard.

35. P.W. 1 No. 94455340 Ct Kuldeep Raj, 140 Bn BSF stated at about 11.30 hrs, petitioner along with Ct. Sanjeev Kumar Rai went for OP no. 2 between BP no. 324 to 325/1-s w.e.f. 1200 to 1800 hrs, after duty only Ct. Sanjeev Kumar Rai reported the BOP about 1815 hrs and he reported that to Coy Comdr that the petitioner consumed liquor at OP point and stopped appx 300 mtrs away from camp at shop of one Jogai Sarkar and arguing with him as such Coy Comdr along with HC Tarsem Lal and Ct/Dvr Gulam Mohd left the BOP at 1825 hrs to get him back.

36. P.W. 2, Constable Sanjeev Kumar Rai stated he was on OP duty along with petitioner Constable Vijay Prakash at OP No. 2 from 011200 hrs to 011800 hrs at about 011700 hrs petitioner consumed country liquor in the duty hours and while returning to BOP on his

own stopped at shop of Jogai Sarkar at Vill Chandipur and started argument/picked up quarrel with shop owner. At that time, petitioner was having his weapon with him over his shoulder and stayed on his own and directed him to go to BOP. He subsequently on reaching BOP reported the fact to Coy Commander on which Coy Commander along with HC (G) Tarsem Lal and Constable Gulam Mohd left BOP to bring petitioner back since the petitioner was in the habit of picking up quarrel once he is drunk.

37. P. W. 4 HC Praveen Kumar stated he was the Guard Commander and also Kote Commander of BOP Satimari. The petitioner deputed for duty at OP 2 was issued with INSAS Butt No. 584, Body No. 16610357 along with 3 magazines and 60 rounds live amns of 5.56 mm and the petitioner did not return to BOP and deposited same along with his colleague. At about 011900 hrs, on being reported about firing incident at village Chandipur and troops left BOP to search the area to ascertain fact as Constable Vijay Prakash has not returned and Inspr Md. Yakub, HC (G) Tarsem Lal and CT/DVr Gulam Md had left to bring him back.

After some time, Constable Addya Prasad found weapon along with 40 Rds and 3 magazines (2 filled comma one empty)

thrown at the distance of 100 mtrs away from BOP by the side of the road by the petitioner, was brought to the BOP, on checking found it to be butt No. 584 issued to Constable Vijay Prakash (petitioner) which Kote NCO subsequently deposited after reported Offg Coy Commander Md. Yakub which subsequently checked by the Police and endorsed entry in the Kote register and was seized on 2nd Dec 2010 further given into the custody of BSF which he deposited at Bn HQ.

38. P.W. 5 stated the weapon deposited at Bn HQ butt no. 584 along with two filled magazine containing 40 live rounds and 01 empty mag along with 01 selling used by petitioner on 01 Dec 2010 firing at village Chandipur, Satimari was deposited to P.S. Kushmandi for further production at the Court and necessary action by police at their end.

39. P.W. 6 Dr. Dibyakar Chhetri, MBBS of Murshidabad Medical College, Behrampur stated that on 2nd December, 2010 he was posted as Demonstrator in Department of forensic medicine, North Bengal Medical College, Siliguri. On the said date, he performed the PM Examination over the dead body of one Gopal Tudu, male, aged

18-year S/o Jahan Tudu in connection with Matigara PS U/D Case No. 820/10 dated 02.12.2010. The body was brought and identified before him by Ct 1302 K K Roy of Matigara PS.

On examination, he found adhesive tape and bandage applied over enterer abdominal wall, leucoplast applied over anterior aspect of left elbow with IV punctured wound, rigor mortis present all over body. Length 5 feet 01-inch weight 62 kgs.

On PM examination, following injuries were found:

(i) Oval shaped penetrating firearm wound of entry over right side of anterior abdominal wall, 4 inch right and 2 ½ inch above the umbilicus, ¼" X 1/6" area, margins inverted with omentum coming out of the wound.

(ii) Circular shaped penetrating firearm wound of entry over right anterior abdominal wall, 5 inch right and 1/2" above the umbilicus, 1/6" in diameter, margins inverted with omentum tissues coming out of the wound.

After completing the PM examination, he opined that the death was caused due to the effect of firearm injuries as noted above and ante-mortem in nature.

During cross-examination he stated that one foreign metallic body was recovered from the dead body of Gopal Tudu. As per his opinion, firing was not contact shot means from close and finally he stated the injuries caused to the victim were fatal in nature but it cannot cause instant death.

40. P.W. 7 Inspector Anirban Home Roy S/o Late Atindra Roy, of WB Police, SAP 08 Bn Barrackpur stated that he is an expert of Arms, WBP and deposed Butt No. 584 INSAS issued to petitioner on 01 Dec 2010 for duty and with this weapon the petitioner has committed the heinous crime, was in working condition, magazine can be fitted into the weapon and the EFCs recovered can fit into the chamber of this weapon.

41. P.W. 8, Dr. Sanjib Kumar Maity, MO (Surgeon), Dist. Hospital Raiganj stated on 1st December, 2010 at about 10.50 pm one patient namely, Gopal Tudu resident of village Chandipur, PS Kushmandi was admitted in the hospital with history of firearm injury. He was referred from Kushmandi Block Primary Health Centre. He attended him and found he was in moribund condition. On examination, he found perforating wound on the right

hypochondria with expulsion of blood. Patient was conscious. Pulse, Blood Pressure not recordable and severe pallor and abdomen was distended. He treated him with blood transfusion, fluid transfusion and also gave him necessary medicines. After stabilization of the patient, he referred him to North Bengal Medical College, Siliguri for further treatment.

42. P.W. 10 SI Santanu Mukherjee (1st IO) of West Bengal Police was first to reach the PO at Vill- Chandipur on 01 Dec 2010 evening where petitioner has resorted to the fire indiscriminately and later absconded. He carried out the investigation and specified the civilian who came there as the area was tensed due to firing resorted by the petitioner and absconded and due to which civilian namely, Gopal Tudu sustained injuries at his abdomen and he was removed to PHC Kushmandi. He also stated about the argument/quarrel of petitioner with the shop owner Jogai Sarkar and petitioner's intoxication condition before crime as learnt on 1st December, 2010. The IO visited the BOP Satimari same day after the incident and endorsed his entry in the Arms issue register where Butt No. 584 issued to the petitioner for the duty and he has not deposited the same after his duty timing and he resorted to fire one full magazine i.e. 20 rds.

Weapon butt no. 584 along with 3 magazine and 40 rds recovered by Constable Addya Prasad was also seized and handed over to Kote NCO in the presence of Coy Commander and later he shield it on 2nd December, 2010 and further handed over to BSF. He lodged the FIR U/S 302 on written complaint lodged by Shri John Tudu whose adopted son Gopal Tudu sustained injuries due to petitioner's firing. On subsequent inquiry as well as written application given by Inspr Md Yakub charges U/S 307 IPC were also framed on this additional FIR since HC (G) Tarsem Lal was also injured and fire was also delivered on Inspr Md Yakub on 1st Dec 2010 at about 1845 hrs and later he posted out from P.S. and could not complete the case.

43. P.W. 11, 2nd IO stated he carried out the left-out inquiry and file the charge sheet in Court, in which the petitioner No. 94106242 Constable Vijay Prakash of 140 Bn BSF was found prima facie case U/S 302 established and Section 307 IPC and throughout petitioner was on custody of BSF and as requisition case was transferred to BSF for its trial.

44. P.W. 12 Ct Somraj stated he found petitioner No. 94106242 Constable Vijay Prakash normal at changeover of duty and petitioner was carrying his weapon at the time of leaving spot in his cycle.

45. P.W. 13, HC Pradeep Kumar Mishra deposed petitioner No. 94106242 Constable Vijay Prakash was found normal at the time of closing of fence gate. He despatched troops to ascertain cause of firing at about 011900 hrs and let to recovery of weapon INSAS Butt No. 584 along with 40 Rds with two filled magazine and one empty magazine dumped by petitioner who has absconded after committing the heinous crime with deliberate intention to kill Inspr. Mohd. Yakub, HC (G) Tarsem Lal and others. It is learnt on arrival of Offg Coy Commander at his BOP. The petitioner was absconding and not returns to BOP. He was traced at about 23.45 hrs after committing the crime. He subsequently learnt injuries sustained to Gopal Tudu S/O John Tudu Village Chandipur who was removed by civilians of village and also injuries to HC Tarsem Lal who has escaped this heavy volume of fire by the petitioner and further removed from the spot by Constable/DVr Gulam Mohd. Police as well as Officers from nearby Coy and Bn HQ also reached the spot and started search of

the area to trace petitioner Constable Vijay Prakash who was absconding.

46. Upon perusal of entire evidence and case of the Prosecution, it reveals the allegation of the prosecution that the petitioner created a scene in the spot under influence of liquor. He had engaged an altercation with the shop owner (P.W. 9) in intoxication condition but no such facts proved by the prosecution witnesses by cogent and/or reliable evidence. Prosecution miserably failed to prove that there was hot argument or an altercation between the shop owner and the BSF Jawan i.e. Petitioner herein. Public witness i.e. P.W. 18 specifically deposed that there was no altercation with the shop owner. Even P.W. 9, shop owner himself flatly refused that any disturbance or altercation took place between them. P.W. 18 further stated the BSF person who was present before the civilian shop was without weapon. Weapon was kept in cycle which was parked in front of the shop across the road. Petitioner, who was standing in front of the shop purchased something from the shop was behaving normally and talking in normal way. Rather he narrated that there was scuffling between the Petitioner and G Wala (P.W. 14) and the firing was not aimed towards anyone but it was fired downward. All the aforesaid

oral evidence of eye witnesses clearly proves no altercation was held between the Petitioner and shop owner. At the same time, his behaviour was normal and talking in normal way. This behaviour could not be said under influence of liquor. The allegation of the prosecution is that petitioner was under influence of liquor and was engaged in altercation with shop owner is absolutely obliterated by the vital eye witnesses i.e. P.Ws. 9 and 18. All these vital facts and evidence have not been considered by the Learned GSF Court while marshalling and appreciation of evidence. It is also not considered why such incident of firing took place at the place of occurrence. The Learned GSF Court finally came to conclusion that he is found guilty under Section 46 of the Boarder Security Force Act, 1968 that is to say for murder and attempt to murder punishable under Sections 302 and 307 of the Indian Penal Code, 1860 and sentenced him "To Suffer Life imprisonment and to be dismissed from service". At the same time, Appellate Authority dismissed his application without affording opportunity of being heard to the petitioner on earlier occasion as well as second time by the DG, BSF despite of giving opportunity by this High Court vide order dated 05.10.2021 to dispose of application for suspension of sentence or set aside the judgment and order dated 17.04.2012 on merits. The DG, BSF

surreptitiously jumped and decided the case without sufficient reasoning and without affording opportunity of hearing to the Petitioner. He grossly violated the principle of natural justice and infringed rights of hearing to the Petitioner. It is apparent from the face of record that there is insufficient evidence to support the allegation of the prosecution and thereby findings of the learned GSF Court ought to have been considered by the Appellate Authority under Section 117 of the BSF Act, 1968 but miserably failed. It further reveals there is patent defect and error of law while considering application of the petitioner filed under Section 117 of the BSF Act, 1968 on the part of Appellate Authority. There is no other alternative efficacious remedy for his grievances as prayed for under the BSF Act, 1968 after rejection by the DG, BSF as such this Court can exercise power under Article 226 of the Constitution of India to secure the end of justice. Therefore, these writ petitions are maintainable.

Judgment relied on behalf of the petitioner is well acceptable. The Hon'ble Delhi High Court held in paragraph 10 of the said judgment reported in **Ram Prasad Saini Vs UOI and Anr**⁹ as under: -

⁹ **2012 SCC Online Del 5160**

“10. It is trite that a challenge to proceedings of the Boarder Security Force Court would lie if there was no evidence at all to support the findings; or if the GSFC failed to comply with the prescribed procedure or on account of violation with the principles of natural justice in the conduct of the proceedings”

47. The prosecution has been able to prove that P.W. 14 sustained injuries in his right hand. P.W. 14 and P.W. 15 specifically deposed injury suffered by P.W.14 is due to bullet injury. P.W. 21, Dr. Mrs. Neela Bhattacharya, M.S., MCH (Plastic Surgeon) of Anandlok Hospital, Siliguri has corroborated that she attended him and stated he was referred to Anandlok Hospital, Siliguri from Composite Hospital, BSF, Kadamtala for blow-out injury of dorsum of the right hand. On 4th December, 2010 the wound debridement was done along with fixation of fractures on mid finger and index finger. She also repaired the extensor tendons. Resurfacing has been done with superiorly based abdominal flap on 7th December, 2010. The patient remains admitted till 13th December, 2010. She further stated when patient came to her on 3rd December, 2010 the case history shows that he got bullet injury on 1st December, 2010. Discharge summary of Tarsem Lal marked as Exhibit W-1.

There is no dispute about the death of a civilian person, namely, Gopal Tudu due to bullet injury suffered by him as most of the witnesses proved that the Petitioner started firing and during such firing Gopal Tudu sustained bullet injury on his person. P.M. report and information of cause of death from the hospital marked Exhibit Nos. 'F' and 'F1' also supported the same.

48. From meticulously perusal of entire evidence, this Court does not repose confidence about the version of prosecution that the petitioner engaged in argument or altercation with the shop owner under the influence of liquor on the following reasons:

Firstly, story of argument or altercation with the shop owner under the influence of liquor is not proved by the prosecution with cogent or reliable evidence. There was no reflection either in the FIR lodged by John Tudu on 02.12.2010 marked as 'V' and 'V1' or evidence of the witnesses. P.W. 18 clearly denied the version of prosecution by saying that there was no altercation with the shop owner. Even P.W. 9, shop owner himself flatly refused that any disturbance or altercation took place between them. P.W. 18 blots out the case of prosecution by saying BSF person who was standing in front of the shop purchased

something from the shop was behaving normally and talking in normal way.

Secondly, no justified or reliable evidence transpires from the version of the prosecution witnesses that petitioner was under the influence of liquor or petitioner had consumed liquor at the place of occurrence or in between the way of BOP Satimari to shop situated at village Chandipur, P.S. Kushmandi, District- Dakshin Dinajpur or OP point because P.W. 12, Ct. Somraj and P.W. 13, H.C. Pradeep Kr. Mishra deposed petitioner was normal at changeover of duty and/or at the time of closing of fencing gate.

49. In view of entire evidence adduced by the prosecution witnesses, on the other side, it reveals there was quarrel or scuffle actually taken place between the petitioner and BSF personnel particularly P.W. 14 at the place of occurrence just prior to the incident but reason is unknown to anyone. Prosecution or defence also fails to prove the same. Consequently, contentions of prosecution itself proved beyond reasonable doubt that the petitioner had no intention or pre-meditation to murder or assault anybody else.

50. Undoubtedly, prosecution has established beyond reasonable doubt that one BSF personnel, P.W. 14 suffered bullet injury on his right hand and civilian boy namely, Gopal Tudu died due to suffering from bullet injury on 02.12.2010. Autopsy Doctor opined that deceased died due to shock and haemorrhage which were ante mortem and homicidal in nature.

Petitioner, Ex ct. Vijay Praksh also stated categorically in his examination under Section 313 of the Cr.P.C. read with BSF Rule 93 (2) that he did not fire on any civilian namely, Gopal Tudu and tried to kill any person in fact HC (G) Tarsem Lal and Ct/Driver Gulam Mohammad tried to snatch his rifle from him and he did not know how the firing took place during scuffle. However, one civilian boy died due to injury suffered by the bullets.

51. In the light of above discussions and analysis of evidence, it cannot be ruled out that sudden quarrel/scuffle took place between the Petitioner and HC (G) Tarsem Lal. BSF personnel went towards the shop of Jogai Sarkar and invited or picked up quarrel with him but actual reason is not known. Thus, it can be safely accepted it was sudden quarrel or scuffle took place at the place of occurrence and in

a fit of passion and without any pre-planned/pre-meditation, Petitioner started firing on the instigation of P.W. 14 by saying **“Oye Vijay Prakash Kya Marega Kisi ko.”**

It is definitely a challenge offer or provocation to petitioner, which may prompt him to fire but, in my opinion, Exception I of Section 300 IPC is not applicable in this case. The Exception 1 of Section 300 IPC deals with homicide committed in the heat of passion or way of sudden provocation. The test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the petitioner, placed in the situation in which the petitioner was placed would be so provoked as to lose self-control.

In determining the question of provocation, the objective test as was applied by the Privy Council in *Philips vs. R* [(1969) 2 AC 130: (1969) 2 WLR 581] must be applied. The two questions which require affirmative answers are as follows:

- (1) Would a reasonable man have lost his self-control?
- (2) Would he then have retaliated as the offender did?

In the present case, the firing cannot be said to be the result of grave and sudden provocation because petitioner was in BSF for more than 17 years at the time of incident and he knows the consequence of firing by INSAS Rifle.

On the contrary, this appears to be a case as noted above, covered by Exception 4 to Section 300 IPC. Four requirements are to be satisfied to bring in application of Exception 4. Those are as under:

- (1) It was a sudden fight;
- (2) There was no premeditation;
- (3) The Act was in a heat of passion; and
- (4) The assailant had not taken any undue advantage or acted in a cruel manner.

The cause of quarrel is not relevant nor is it relevant that offered the provocation or started the fight.

The factual scenario as appears from entire evidence goes to show that in course of sudden quarrel/altercation, the petitioner fired the shots without target. It reveals from the evidence of P.W. 14 injured person, who deposed that he cannot say whether it was aimed fire or not though he was a BSF personnel.

P.W. 18 public witness also stated he did not see anybody firing aiming towards any person.

During cross-examination, he specifically stated the firing was not in aimed position but it was fired downward.

Therefore, in fact, Exception 4 to Section 300 applied in the instant case. I, therefore, alter the conviction to Section 304 Part II of Indian Penal Code read with Section 46 of BSF Act, 1968 instead of Section 302 IPC and under Section 308 part II from the Section 307 of the IPC read with Section 46 of BSF Act, 1968.

In this regard, we should not forget several judgments passed by the Hon'ble Apex Court, on the similar circumstances, which can be relied upon. Those judgments are indicated herein below:

In Surinder Kumar v. Union Territory, Chandigarh¹⁰

Hon'ble Supreme Court held:

"To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, offender must not have taken any undue advantage or acted in a cruel manner. Where,

¹⁰ (1989) 2 SCC 217

on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly....." (Emphasis supplied)

In **Dhirajbhai Gorakhbhai Nayak v. State of Gujarat**¹¹ the Hon'ble Supreme Court while discussing the ingredients of Exception 4 of Section 300 IPC, held:

"The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not

¹¹ (2003) 9 SCC 322

traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would-be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

The Hon'ble Supreme Court in the case of **K. Ravi Kumar vs. State of Karnataka**¹² held:

"9. Before we turn to the facts of this case, it is apposite to take note of the principle of law laid down by this Court as to in which circumstances, the accused is held entitled to claim the benefit of Exception 4 to Section 300 IPC thereby is entitled to seek conversion of the offence committed by him from murder to culpable homicide not amounting to murder. Indeed, the principle of law on this issue remains no longer res integra and settled by a series of decisions of this Court. What has varied is its application to every case.

10. Exception 4 to Section 300 reads as under:

"300. Murder - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation - It is immaterial in such cases which party offers the provocation or commits the first assault."

¹² (2015) 2 SCC 638

The judgement relied by the petitioner passed in **Sukhdev Singh V. Delhi State (Govt. of NCT of Delhi)**¹³ is also applicable. In the said case the accused/appellant had an altercation with the deceased and during the course of scuffle the accused fired shot from his pistol but the bullet missed the target and hit the thigh of another person, who was standing nearby, sustained injury. The accused/appellant fired again aiming at deceased and eventually deceased collapsed. The Hon'ble Supreme Court altered the conviction to 304 II and Section 308 IPC from Section 302 and 307 of the IPC after observing therein that:

“14. In the present the gunshots cannot be said to the result of grave and sudden provocation

15. on the contrary, this appears to be a case as noted above, covered by Exception 4 to Section 300. Four requirements are to be satisfied to bring in application of Exception 4. They are as follows:

- (1) It was a sudden fight;*
- (2) There was no premeditation;*
- (3) The Act was in a heat of passion; and*
- (4) The assailant had not taken any undue advantage or acted in a cruel manner.*

¹³ (2003) 7 SCC 441

16. The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the fight. "

(Emphasis supplied)

52. Keeping in view of the decisions of the Apex Court, this Court also inclined to give benefit of Exception 4 to Section 300 IPC to the petitioner by altering his Conviction and Sentence awarded by the Learned GSF Court under Section 304 Part II IPC and Section 308 part II instead of Section 302 and 307 of IPC read with 46 of BSF Act, 1968 on the following reasons: -

1. There was no pre-meditation or intention for commission of offence causing murder or attempt to murder by the petitioner.
2. Incident was occurred on 01.12.2010, when BSF personnel came to the shop of Jogai Sarkar and started inquiry about the petitioner and ensued sudden quarrel/scuffle between the petitioner and H.C (G) P.W. 14 resulting firing took place.
3. It is well-established by P.Ws. 9 and 18 that there was no argument/hot altercation taken place between the petitioner and the shop owner, Jogai

Sarkar under the influence of liquor. He was behaving normally and talking in normal way.

4. No conclusive evidence was adduced by the prosecution to prove any kind of enmity amongst the shop owner, civilian boy or BSF personnel with the Petitioner prior to the incident. The Act was in a heat of passion.

5. Due to sudden quarrel and altercation between the Petitioner and P.W. 14 and in addition, P.W. 14 uttered by saying "Oye Vijay Prakash Kya Marega Kisi ko." resulted in firing took place and finally caused death of a civilian boy, who was standing near the shop and P.W.14 sustained injury though the target of firing was not in aimed position but it was fired downward. The Petitioner being BSF Jawan, experience in firing had not taken any undue advantage or acted in a cruel manner.

53. Therefore, I am of the considered view that aforesaid reasons are sufficient to give benefit of Exception 4 to Section 300 IPC to the petitioner and enables this Court to hold that the offence in question

was not murder but it was an offence of culpable homicide not amounting to murder as specified in Exception 4 to Section 300 and hence, petitioner is punishable under Section 304 Part II IPC and Section 308 part II instead of Sections 302/307 of the Indian Penal Code read with Section 46 of BSF Act, 1968.

FINAL RESULT:

54. In the result, writ petitions being **WPA 31234 of 2017** and **WPA 15518 of 2022** are allowed in part. Accordingly, the conviction and sentenced is alter by directing to undergo sentence of 10 years for an offence punishable under Section 304 Part II and Sentence to imprisonment for 7 years for an offence punishable under Section 308 part II of the Indian Penal Code read with Section 46 of the BSF Act, 1968. Both sentences run concurrently. Sentence towards dismissal from service shall remain unaltered.

55. Consequently, both writ petitions are, thus, disposed of with above observations and pending applications, if any, are also disposed of.

56. As the petitioner already suffered more than 11 years' imprisonment would suffice the sentenced imposed by this Court. Accordingly, Petitioner shall be set at liberty forthwith if he is not wanted in any other case, upon execution of a bond to the satisfaction of the Learned GSF Court which shall remain in force to appear before the Appellate Court or Higher Court as and when such Court issues notice in respect of appeal or petition filed against the judgment and order of this Court. Fine amount, if any, not paid, be recovered in accordance with law.

57. Lower Court Records along with copies of this judgment are to be sent down at once to the learned GSF Court for information and necessary compliance.

58. All parties shall act on a server copy of the judgment and order uploaded from the official website of High Court at Calcutta.

59. Photostat certified copy of this judgment, if applied for, is to be given to the parties on priority basis on compliance of all formalities.

(Ajay Kumar Gupta, J)

Later

When the above judgment is passed, the learned counsel for the Respondents seeks a stay of operation of this judgment and order. Since there is no any sufficient reason placed by the learned counsel, prayer for stay of operation of judgment and order, passed today, is hereby rejected.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)