

CASE DETAILS

UNION OF INDIA & OTHERS

v.

JOGESHWAR SWAIN

(Civil Appeal Nos. 8629-8630 of 2014)

SEPTEMBER 05, 2023

[J. B. PARDIWALA AND MANOJ MISRA, JJ.]

HEADNOTES

Issue for consideration: Whether the High Court was justified in setting aside the dismissal order of the constable found guilty of misconduct, since it was vitiated by infraction of the prescribed procedure as also was based on no evidence.

Service Law – Border Security Force Act, 1968 – Border Security Force Rules, 1969 – rr. 49(3), 142(2) – Dismissal from service – Plea of guilty – Procedural safeguards u/r. 142(2) – Non-compliance of – Allegations against Border Security Force constable of clicking the photographs of lady doctor while she was taking bath – Proceedings initiated by the Summary Security Force Court wherein constable pleaded guilty – Order of dismissal from service against the constable – Set aside by the High Court on the ground of non-compliance of the prescribed procedure as also no evidence – Correctness:

Held: High Court was justified in finding the dismissal of the constable on the basis of the plea of guilty unwarranted and liable to be set aside in exercise of powers u/Art. 226 – Abstract of evidence recorded was not provided to the constable and twenty-four hours’ time was not given to him for reflection thus, a clear infraction of the proviso to sub rule (3) of r. 49 – Confession, if any, made during the course of preparation of the record of evidence, liable to be ignored – Minutes of the proceedings of the SSFC was nothing but a verbatim reproduction of the statutory rule, thus, non-compliance of r. 142(2) – Minutes of the proceedings recording the plea of guilty did not bear the signature of the constable – In absence of signature of the constable, pleading guilty appears to be an unnatural conduct

and further dents the credibility of the SSFC proceeding – Furthermore, there was no eye-witness of the incident; the camera was recovered from some other person’s house; the witness to the keeping of the camera by the constable, in her previous statement made no such disclosure; there was no cogent evidence with regard to ownership of that camera; and, even the reel was not developed to confirm the allegations – In these circumstances, heavy burden lay on the department to satisfy the conscience of the Court that the plea of guilty was recorded after due compliance of the procedure prescribed and the confession was made voluntarily – More so, when the record of evidence contained no worthwhile evidence regarding the guilt of the constable, the SSFC ought to have advised the petitioner to withdraw the plea of guilt – In view thereof, not a fit case for interference in exercise of the jurisdiction u/Art. 136 – Constitution of India. [Paras 27, 28 and 35-39]

Border Security Force Act, 1968 – s. 87 – General rules as to evidence – Proceedings before the Security Force Court – Applicability of the Evidence Act:

Held: By virtue of s. 87 of the BSF Act, the general rules of evidence as laid in the Evidence Act, subject to the provisions of the BSF Act, are applicable to all proceedings before Security Force Court – Thus, by virtue of s. 145 of the Evidence Act, witness may be cross examined as to previous statements made by him – Evidence Act, 1872 – s. 145. [Para 28]

Border Security Force Rules, 1969 – r. 142(2) – Plea of guilty – Procedural safeguards u/r. 142(2):

Held: Sub-rule (2) of r. 142 would indicate that on the accused pleading guilty, before a finding of “guilty” is recorded, the SSFC is required to ascertain whether the accused understands the nature and meaning of the charge to which he has pleaded guilty as also must be informed of the general effect of that plea and of the difference in procedure which will be made by the plea of guilty – Even if the accused pleads guilty, if it appears from the record or abstract of evidence or otherwise that the accused ought to plead not guilty, the SSFC is required to advise him to withdraw that plea – Strict adherence of the procedural safeguards laid down in sub-rule (2) of r. 142 is warranted before accepting a plea of guilty. [Paras 34 and 35]

**OTHER CASE DETAILS INCLUDING IMPUGNED
ORDER AND APPEARANCES**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 8629-8630 of 2014.

From the Judgment and Order dated 21.02.2013 of the High Court of Delhi at New Delhi in WPC No.17430 of 2006 and dated 22.11.2013 in RP No.394 of 2013.

Appearances:

R. Bala, Sr. Adv., Rajat Nair, Ms. Swati Ghildiyal, Sharath Nambiar, Vinayak Sharma, Vishnu Shankar Jain, Arvind Kumar Sharma, Advs. for the Appellants.

Yasobant Das, Sr. Adv., Kedar Nath Tripathy, Anubhav Mehrotra, Advs. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

MANOJ MISRA, J.

1. These appeals are directed against the judgment and order of the High Court of Delhi at New Delhi (in short, “the High Court”), dated 21.02.2013, by which W.P. (C) No. 17430 of 2006 filed by the respondent (the original petitioner) was allowed, the punishment of dismissal imposed upon the original petitioner was set aside and a direction was issued that the original petitioner would be entitled to full consequential benefits except salary to the extent of 50%. The appellants have also challenged the order of the High Court dated 22.11.2013, by which the review petition of the appellants seeking a review of the order dated 21.02.2013 was dismissed, though certain observations made in the earlier order were recalled.

FACTS

2. The original petitioner/accused (the respondent herein) was a Constable (General Duty) in the Border Security Force (in short “BSF”). The case against him was that while he was posted as a security aide to a lady doctor, on 17.06.2005, at about 7.45 pm, he clicked pictures of that lady doctor while she was taking her bath. The allegations against him were

that,-- on the fateful day, the lady doctor requested him to leave her quarter as she were to take a bath; while she was bathing, she noticed through the window of her bathroom two camera flashes; suspecting foul play, she raised an alarm; on her alarm, her mother went out but could find none; later, the matter was reported to the Chief Medical Officer; the BSF authorities investigated the matter and put the original petitioner under open arrest. During investigation a camera was recovered from the residential quarter of another person, who was a neighbour of that lady doctor. Thereafter, under orders of the Battalion Commandant, proceedings were initiated against the original petitioner in respect of commission of an offence under Section 40 of the Border Security Force Act, 1968 (in short, "BSF Act, 1968"), that is for committing an act prejudicial to the good order and discipline of the Force (BSF), and record of evidence was prepared. On completion of the record of evidence, the Commandant remanded the original petitioner for trial by a Summary Security Force Court (in short, "SSFC"). The SSFC held its proceedings on 23rd July, 2005 wherein the original petitioner is stated to have pleaded guilty. Based on that, the SSFC dismissed the original petitioner from service.

3. Aggrieved by his dismissal from service, the original petitioner filed an appeal under Section 117 of the BSF Act, 1968 before the Appellate Authority. In the appeal, the original petitioner refuted the allegations of clicking pictures of the lady doctor while she was taking her bath and claimed that,-- while recording the evidence, the prosecution witnesses were not offered for cross-examination; there was no evidence forthcoming against the original petitioner in the testimony of prosecution witnesses; the reel of the camera allegedly used in commission of the offence was not developed; the statement of PW-9 with regard to concealment of the camera in her house by the original petitioner was contradictory to her previous statement where no such allegation was levelled by her; nothing incriminating was recovered from the possession of the original petitioner; the statement of prosecution witnesses indicated that the original petitioner had denied the allegations levelled against him, therefore, there was no reason for making a confessional statement, hence, the same cannot be the sole basis for the punishment. In the alternative, the original petitioner pleaded that he was a young man, aged 31 years, who had diligently discharged his duties for over 11 years without a complaint, therefore, even if the original petitioner

is found guilty, a lenient view be taken by taking into account that he has old parents and a family dependent on him.

4. The aforesaid statutory appeal of the original petitioner was dismissed by the Director General, BSF, New Delhi. The letter communicating dismissal of the appeal recited that since the original petitioner had pleaded guilty to the charge, the SSFC justifiably held him guilty and dismissed him from service.

5. Aggrieved by dismissal of his appeal, the original petitioner filed writ petition before the High Court.

FINDINGS OF THE HIGH COURT

6. Before the High Court, the orders impugned in the writ petition were questioned on two grounds: (a) that there were procedural infirmities in conducting the proceedings and recording of evidence; and (b) that the evidence recorded did not inculcate him. With regard to the first ground, it was pointed out that Rule 60 of the Border Security Force Rules, 1969 (in short, BSF Rules, 1969”) disqualified an officer from serving as a Court if he was the officer who convened the Court; or is the Commandant of the accused. The High Court observed that the SSFC was not only convened but also presided over by the Commandant of the original petitioner which vitiated the proceedings of the SSFC. The High Court, however, also examined as to whether there was any worth-while evidence against the original petitioner. After considering the statement of the witnesses recorded while preparing the record of evidence, the High Court in paragraph 23 of its judgment observed:

“23. A close analysis of the evidence would highlight the following circumstances:

(1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone.

(2) The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu’s house, and borrowed boots. This was verified from the latter’s wife and sister-in-

law (PW 9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her.

(3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents.

(4) The petitioner was placed under open arrest the next day. He – according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence proceeding was over a week later, i.e. 25.06.2005.

(5) No written record of the confession said to have been made on 18th June, 2005 exists;

(6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability."

7. In addition to the above observations, the High Court found that while preparing the record of evidence, the last statement of the prosecution witnesses was recorded on 29.06.2005 and on the same day, without even giving twenty four hours' time to the original petitioner to reflect upon the evidence, as is the mandate of the proviso to sub rule (3) of Rule 49 of the BSF Rules, 1969, the statement of the original petitioner was recorded.

8. The High Court noticed that the minutes of the proceeding recording acceptance of guilt by the original petitioner before the SSFC was not signed by the original petitioner.

9. Taking all the aforesaid circumstances as well as the plea that no confession was made by the original petitioner into consideration, the High Court opined that there was no worthwhile evidence against the original petitioner as to weigh on him to admit his guilt. The High Court thus allowed the writ petition by the impugned order dated 21.02.2013.

10. After the writ petition was allowed by the High Court, the appellants herein filed a review petition claiming therein that the view taken by the High Court that there was infraction of Rules 60 and 61 of the BSF Rules, 1969 is erroneous because those provisions get attracted only if the trial is by a “General” or a “Petty” Security Force Court, whereas the original petitioner was tried by a “Summary” Security Force Court in terms of section 70 of the BSF Act, 1968.

11. On consideration of the plea taken in the review petition, the High Court recalled its observations regarding infraction of Rules 60 and 61 of the BSF Rules, 1969 in conduct of the proceedings, but rejected the review petition as the writ petition was allowed on consideration of the merits of the prosecution evidence.

12. Aggrieved by the orders of the High Court, the Union of India and BSF administration are in appeal before us.

13. We have heard Mr. R. Balasubramanian, learned senior counsel, for the appellants; and Mr. Yasobant Das, learned senior counsel, for the respondent (original petitioner).

SUBMISSIONS ON BEHALF OF THE APPELLANTS

14. The learned counsel for the appellants submitted:

- (a) The High Court exceeded its jurisdiction by appreciating the evidence led while preparing the record of evidence when the SSFC decided the matter on acceptance of guilt by the original petitioner.
- (b) There was no procedural defect in the trial or in the investigation, which preceded it.
- (c) The record of evidence indicated that though initially the original petitioner denied the allegations but, ultimately, he admitted his guilt. Otherwise also, from the statement of PW-9, recorded during preparation of the record of evidence, it was proved that the original petitioner had kept that camera in her house.
- (d) Adverse inference against the department could not have been drawn for not developing the reel of that camera because the original petitioner had admitted his guilt.

- (e) Absence of signature of the accused on the minutes of the proceedings recording acceptance of guilt by him does not violate any of the Rules contained in the then operating BSF Rules, 1969, as such requirement was inserted in the Rule with effect from 25.11.2011.

In a nutshell, the submissions on behalf of the appellants were that there was no infraction of the procedure prescribed; the principles of natural justice were duly observed; the decision was based on acceptance of guilt; and since the original petitioner is part of a disciplined force and was found guilty of clicking photographs of a lady doctor while she was taking a bath, and whom he was required to protect, the punishment of dismissal cannot be faulted. Consequently, the order of the High Court deserves to be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

15. Per Contra, on behalf of the respondent it was submitted that the order passed by the High Court is just and proper based on appreciation of the materials on record. Moreover, taking into account that there was no eyewitness of photographs being clicked by the original petitioner and no incriminating object or article was recovered from the original petitioner's possession, there was no reason for the original petitioner to accept his guilt. Further, as the whole case of the department is based on the confession, which is disputed by the original petitioner, and the minutes of the proceeding recording confession is not signed by the petitioner, the High Court rightly explored the evidence to find out whether in the circumstances making of such a confession was probable or not. Otherwise also, before the SSFC, no evidence was led and the record of evidence did not satisfactorily establish the charge against the original petitioner and, therefore, a decision was taken to remand the original petitioner for a trial by an SSFC. In these circumstances, there was no occasion for the original petitioner to admit his guilt. Consequently, once the High Court on overall assessment of the materials placed on record has taken a sound view of the matter, it would not be a fit case where the discretionary powers under Article 136 of the Constitution of India be invoked to set aside an order whereby substantial justice has been done.

16. In addition to the above, the learned counsel for the respondent pointed out certain procedural infirmities, which, according to him, vitiated the proceedings, namely,-

- (i) The first confessional statement was recorded in violation of Rule 49 (3) of the BSF Rules, 1969, inasmuch as copy of the abstract of evidence was not made available to the accused and the accused was not cautioned in the manner laid down in sub-rule (3) of Rule 48 before recording his statement. Moreover, it was recorded on the same day when the deposition of the last witness was recorded, that is, without giving 24 hours' time for reflection, as is the mandate of the proviso to sub-rule (3) of Rule 49 of the BSF Rules, 1969;
- (ii) When the confession was recorded, the original petitioner was under open arrest, therefore such a confession would be hit by Section 26 of the Indian Evidence Act, 1872 which becomes applicable by virtue of Section 87 of the BSF Act, 1968;
- (iii) The SSFC comprised of the Commandant of the accused as such he was disqualified from being a part of the Court by virtue of Rule 60 of the BSF Rules, 1969. That apart, the Commandant had ordered for preparation of the record of evidence as well as for open arrest of the original petitioner therefore, conduct of trial by him amounted to gross violation of the principles of natural justice.

In a nutshell, the submission of the learned counsel for the respondent is that the dismissal of the original petitioner (the respondent herein) is not only vitiated by infraction of prescribed procedure but is based on no evidence. Therefore, the order passed by the High Court is not liable to be interfered with in exercise of jurisdiction of this Court under Article 136 of the Constitution of India.

DISCUSSION

17. We have considered the submissions and have perused the record. As we notice that the order of dismissal from service was based on original petitioner's acceptance of his guilt before the SSFC, before proceeding further, it would be useful to have a glimpse of the relevant provisions of

the BSF Act, 1968 and the BSF Rules, 1969 concerning a “Security Force Court” and proceedings before it.

18. Section 2 (u) of the BSF Act, 1968 defines “Security Force Court” as, “means a court referred to in section 64”. Section 64 of the BSF Act provides:

“... there shall be three kinds of Security Force Courts: -

- (a) General Security Force Courts;
- (b) Petty Security Force Courts; and
- (c) Summary Security Force Courts.”

19. Section 87, which applies to all kinds of Security Force Courts, provides that the Indian Evidence Act, 1872 (Act No. 1 of 1872) shall, subject to the provisions of the BSF Act, 1968, apply to all proceedings before a Security Force Court.

20. In this case the dismissal order was passed by an SSFC. It would thus be appropriate to have a look at the relevant provisions concerning an SSFC. Section 70 provides: -

“S.70. Summary Security Force Court.—

- (1) A Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court.
- (2) The proceedings shall be attended throughout by two other persons who shall be officers or subordinate officers or one of either, and who shall not as such, be sworn or affirmed.”

21. Punishments awardable by a Security Force Court are specified in Section 48 of the BSF Act, 1968 which, inter-alia, includes the power to dismiss from service.

22. Section 141 (1) of the BSF Act, 1968 empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the BSF Act, 1968. Sub-section (2) of Section 141, inter alia, provides:

“(2) In particular, and without prejudice to the generality of the foregoing power to frame such rules as may provide for,—

- (a)
- (b)
- (c)
- (d)
- (e) the removal, retirement, release or discharge from the service of persons subject to this Act;
- (f)
- (g) the convening, constitution, adjournment, dissolution and sittings of Security Force Courts, the procedure to be observed in trials by such courts, the persons by whom an accused may be defended in such trials and the appearance of such persons thereat;
- (h).....
- (i) the forms of orders to be made under the provisions of this Act relating to Security Force Courts and the awards and the infliction of death, imprisonment, and detention
- (j).....
- (k) any matter necessary for the purpose of carrying this Act into execution, as far as it relates to the investigation, arrest, custody, trial, and punishment of offences triable or punishable under this Act
- (l).....
- (m) the convening of, the constitution, procedure and practice of, Courts of inquiry, the summoning of witnesses before them and the administration of oaths by such Courts
- (n). ...
- (o). ...”

23. In exercise of its powers conferred upon it by Section 141 of the BSF Act, 1968, the Central Government notified BSF Rules, 1969. Chapter VII of the BSF Rules, 1969 deals with investigation and summary disposal. Rule 43 provides that where it is alleged that a person subject to the Act other than an officer or a subordinate officer has committed an offence punishable

thereunder, the allegation shall be reduced to writing in the form set out in Appendix IV. Whereas, if the offence is allegedly committed by an officer or a subordinate officer then the allegation shall be reduced to writing in the form set out in Appendix VI. Rule 45, *inter alia*, provides: -

“45. Hearing of the charge against an enrolled person.—

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

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

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

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

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

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

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

(ii) dismiss the charge, or

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

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

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

24. In the instant case, it is not in dispute that the Commandant on 21.06.2005 ordered for preparing the record of evidence.

25. Rule 48 deals with preparation of the record of evidence. It provides that where the officer orders for the record of evidence, he may either prepare the record of evidence himself or detail another officer to do so. Sub-rule (2) of Rule 48 provides that the witnesses shall give their evidence in the presence of the accused and the accused shall have right to cross-examine all witnesses who give evidence against him. Sub rule (3) of Rule 48 provides that after all the witnesses against the accused have been examined, he shall be cautioned in the following terms: *“You may make a statement if you wish to do so, you are not bound to make one and whatever you state shall be taken down in writing and may be used in evidence.”* After having been cautioned in the aforesaid manner whatever the accused states is to be taken down in writing. Sub-rules (4) to (6) of Rule 48 provide as follows:

“(4) The accused may call witnesses in defence and the officer recording the evidence may ask any question that may be necessary to clarify the evidence given by such witnesses.

(5) All witnesses shall give evidence on oath or affirmation: provided that, no oath or affirmation shall be given to the accused nor shall be cross-examined.

(6)(a) The statements given by witnesses shall ordinarily be recorded in narrative form and the officer recording the evidence may, at the request of the accused, permit any portion of the evidence to be recorded in the form of question and answer;

(b) The witnesses shall sign their statements after the same have been read over and explained to them.”

Sub-rule (8) of Rule 48 provides that after the recording of evidence is completed the officer recording the evidence shall give a certificate in the following form: -

“Certified that the record of evidence ordered by ... Commandant ... was made in the presence and hearing of the accused and the provisions of rule 48 have been complied with.”

26. Rule 49 of the BSF Rules, 1969 provides for preparation of an abstract of evidence. Sub-rule (2)(a) of Rule 49 provides that the abstract of evidence, shall include,--- (i) signed statements of witnesses wherever

available or a precis thereof, or (ii) copies of all documents intended to be produced at the trial. Sub-rule 2(b) of Rule 49 provides that where signed statements of any witnesses are not available a precis of their evidence shall be included. Sub-rule (3) of Rule 49 provides:

“49 (3). A copy of the abstract of evidence shall be given by the officer making the same to the accused and the accused shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rule (3) of rule 48:

Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty-four hours after receiving the abstract of evidence to make his statement.”

27. In the instant case, from the materials brought on record we find that the original petitioner was placed under open arrest on 20.06.2005. On 21.06.2005, the Commandant of 128 Battalion BSF, wherein the original petitioner was posted, issued an order for recording of evidence. During the course of recording of evidence, the last witness statement, that is of PW-10, was recorded on 29.06.2005. On 29.06.2005 itself, the original petitioner was asked to give his statement. According to the original petitioner, the abstract of evidence was not provided to him and twenty-four hours' time was not given to him for reflection therefore, there was a clear infraction of the proviso to sub rule (3) of Rule 49 of the BSF Rules, 1969. Hence, according to the original petitioner, confession, if any, made during the course of preparation of the record of evidence, is liable to be ignored.

28. In our view, there appears substance in the aforesaid submission of the learned counsel for the original petitioner. Moreover, in the instant case after preparing the record of evidence, the Commandant in exercise of his power under Rule 45(2)(iv) of the BSF Rules, 1969, vide order dated 05.07.2005, remanded the original petitioner for trial by an SSFC. In these circumstances, the trial had to proceed as per Chapter XI of the BSF Rules, 1969 and, therefore, the statement, if any, recorded during investigation or preparation of the record of evidence could have been used as a previous statement of the witness for the purposes of cross-examining the witness as and when the witness was examined before the Security Force Court. This we say so, because by virtue of Section 87 of the BSF Act, 1968 the general

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rules of evidence as laid in the Evidence Act, 1872, subject to the provisions of the BSF Act, 1968, are applicable to all proceedings before a Security Force Court. Therefore, by virtue of Section 145 of the Evidence Act, 1872, a witness may be cross examined as to previous statements made by him.

29. Insofar as the proceedings against the original petitioner before the SSFC are concerned, a perusal of the record would reflect that they commenced on 23.07.2005 at the Headquarter of 128 Battalion, BSF. As per record of the proceedings dated 23.07.2005, the charge-sheet was read out and explained to the accused (original petitioner) and the accused was asked whether he is guilty or not of the charge. As per record of the proceedings, the answer of the accused is recorded in following terms:

“Ans: Guilty.”

After recording the answer as above, it proceeds to record:

“** The accused having pleaded guilty to the charge, the court explains to the accused the meaning of charge(s) to which he has pleaded guilty and ascertains that the accused understands the nature of the charge(s) to which he has pleaded guilty. The court also inform the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge(s) and the effect of his plea of guilty, accepts and records the same. The provisions of Rule 142(2) are complied with.”

30. Thereafter, the proceeding on the plea of guilty is recorded in following terms: -

“The accused No. 959220216; Rank: Constable; Name: Jogeshwar Swain of 128 BN BSF, is found guilty of the charge.

The record of evidence is read (translated), explained, marked “K” signed by the Court and attached to the proceedings.

Q.- Do you wish to make any statement in reference to the charge or in mitigation of punishment?

Ans. The accused says: I have committed an offence. Please pardon me. I will not repeat in future.

Q. Do you wish to call any witness as to character?

Ans. No.”

31. The minutes of the proceedings reflect that after the defence was closed, the Court’s verdict came in following terms: -

“Verdict of the Court

“I am of the opinion on the evidence before me that the accused No. 959220216 Rank Constable Name Jogeshwar Swain of 128 Bn BSF is guilty of the charge.”

Thereafter before pronouncing the sentence, original petitioner’s past record was considered as under:

“It is within my own knowledge from the records of the Battalion that the accused has not been previously convicted by Security Force Court or Criminal Court ...

That the following is a fair and true summary of entries in his defaulter sheet exclusive of convictions by a Security Force Court or a Criminal Court

Within last 12 months: Nil

Since Enrolment: Nil

That he is at present undergoing NIL sentence.

That, irrespective of this trial, his general character has been satisfactory.

That his age is 30 yrs, ...

His service is 10 years, 2 months, 15 days and his rank is Constable 8-5-95. That he has been in arrest/confinement for NIL days. That he is in possession of the following decorations and rewards: - NIL”

After considering the past record of the original petitioner, sentence was awarded in following terms:

“SENTENCE BY THE COURT

Taking all these matters into consideration. I now sentence the Accused No. 959220216 Rank Constable; Name: Jogeshwar Swain of 128 Bn BSF to be dismissed from the service.

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Signed at HQ 128 Bn BSF Patgaon, Ghty-17 on this 23rd day of July 2005.

Sd/- Commandant.

Dt/- 23.07.2005”

32. A perusal of the minutes of the proceedings of the SSFC dated 23.07.2005 would indicate that though the plea of guilty was recorded during the course of the proceedings dated 23.07.2005 but the minutes are not signed by the original petitioner. It is only signed by the Commandant 128 Battalion BSF, namely, Ghanshyam Purswani.

33. Rule 142 of the BSF Rules, 1969 which fall in Chapter XI of the BSF Rules, 1969 deals with the manner in which an SSFC is required to record the plea of guilty. Rule 143 provides for the procedure after the plea of guilty is recorded. The relevant portion of Rule 142 as it stood on the date of the proceeding in question is reproduced below:

“142. General plea of “Guilty” or “Not Guilty”.—

(1) The accused person’s plea of “Guilty” or “Not Guilty” or if he refuses to plead or does not plead intelligibly either one or the other), a plea of “Not Guilty” shall be recorded on each charge.

(2) If an accused person pleads “Guilty”, that plea shall be recorded as the finding of the Court; but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty **and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.”**

34. A plain reading of sub-rule (2) of Rule 142 would indicate that on the accused pleading guilty, before a finding of “Guilty” is recorded, the SSFC is not only required to ascertain whether the accused understands the nature and meaning of the charge to which he has pleaded guilty but it must also inform the accused of the general effect of that plea and of the difference in procedure which will be made by the plea of guilty. That apart,

even if the accused pleads guilty, if it appears from the record or abstract of evidence or otherwise that the accused ought to plead not guilty, the SSFC is required to advise him to withdraw that plea.

35. Before acting on the plea of guilty, compliance of the procedural safeguards laid down in sub-rule (2) of Rule 142 is important as it serves a dual purpose. First, it ensures that before pleading guilty the accused is aware of not only the nature and meaning of the charge which he has to face but also the broad consequences that he may have to suffer once he pleads guilty. This not only obviates the possibility of an uninformed confession but also such confessions that are made under a false hope that one could escape punishment by pleading guilty. The other purpose which it seeks to serve is that it ensures that confessions do not become an easy way out for deciding cases where marshalling of evidence to prove the charge becomes difficult. It is for this reason that sub-rule (2) of Rule 142 requires an SSFC to advise the accused to withdraw the plea of guilty if it appears from the examination of the record or abstract of evidence that the accused ought to plead not guilty. Since, the procedure laid in sub-rule (2) of Rule 142 serves an important purpose and is for the benefit of an accused, in our view, its strict adherence is warranted before accepting a plea of guilty.

36. Reverting to the facts of this case, we notice from the record that the minutes of the proceedings of the SSFC dated 23.07.2005 do not indicate as to what advice was rendered to the accused with regard to the general effect of the plea of guilty taken by him. The minutes dated 23.07.2005 are nothing but a verbatim reproduction of the statutory rule. There is no indication as to how the accused was explained of the broad consequences of him pleading guilty. Verbatim reproduction of the statutory rule and nothing further, in our view, is no compliance of the provisions of sub-rule (2) of Rule 142 of the BSF Rules, 1969. Therefore, we are of the view that the appellants cannot draw benefit from the minutes of the proceedings as to canvass that the plea of guilty was accepted after due compliance of the requirements of sub-rule (2) of Rule 142 of the BSF Rules, 1969.

37. Further, the record of the proceedings of SSFC dated 23.07.2005 does not bear the signature of the accused. No doubt, the requirement of

having the signature of the accused on the minutes recording plea of guilty was first introduced by insertion of the proviso to sub-rule (2) of Rule 142 with effect from 25.11.2011. But there existed no embargo in obtaining signature of the accused to lend credence to the making of the plea of guilty. Absence of signature of the accused in this case assumes importance because here the accused denies taking such a plea and looking at the available evidence, pleading guilty appears to be an unnatural conduct. At the cost of repetition, it be observed that the case against the petitioner was in respect of clicking photographs of a lady doctor while she was taking her bath. There was no eye-witness of the incident; the camera was recovered from some other person's house; PW-9, a witness to the keeping of the camera by the accused (i.e., the original petitioner), in her previous statement made no such disclosure; there was no cogent evidence with regard to ownership of that camera; and, above all, even the reel was not developed to confirm the allegations. In these circumstances, when there was a challenge to the making of such confession before the High Court, a very heavy burden lay on the non-petitioners (appellants herein) to satisfy the conscience of the Court that the plea of guilty was recorded after due compliance of the procedure prescribed by the BSF Rules, 1969. As we have already noticed that there was no proper compliance of the procedure prescribed by sub-rule (2) of Rule 142 of the BSF Rules, 1969, absence of signature of the accused in the minutes further dents the credibility of the SSFC proceeding. The High Court was therefore justified in looking at the evidence to find out whether punishment solely on the basis of confession (i.e., plea of guilty) was justified.

38. In this context, the High Court meticulously examined the record of evidence prepared under the direction of the Commander to come to the conclusion that except for the statement of PW-9 that the camera was hidden by the original petitioner, there was no worthwhile evidence in respect of his culpability. The High Court also noticed that even PW-9 was not consistent, as during investigation PW-9 had not made any such disclosure that the original petitioner had hidden the camera in the house from where it was recovered. What is important is that the house from where the camera was recovered was not the house of the original petitioner but of another constable who had his house adjoining the quarter where the lady doctor had taken her bath. Interestingly, there was no evidence

led to indicate that the said camera was of the original petitioner. In these circumstances, where was the occasion for the original petitioner to make confession of his guilt when there was hardly any evidence against him. Admittedly, none had seen him clicking photographs and the lady doctor also did not inculcate the original petitioner though she might have suspected the original petitioner. Further, we notice that while preparing the record of evidence also, plea of guilty of the original petitioner was recorded, which the original petitioner claims to have been obtained under duress and without giving him sufficient time to reflect upon the evidence as is the mandate of the proviso to sub-rule (3) of Rule 49 of the BSF Rules, 1969. At this stage, we may remind ourselves that while preparing the record of evidence the statement of last witness was recorded on 29.06.2005 and on that day itself, without giving twenty-four hours' time for reflection, as is required by the proviso to sub-rule (3) of Rule 49 of the BSF Rules, 1969, alleged confessional statement of the original petitioner was recorded. In these circumstances, when the original petitioner had raised a plea before the High Court that his confession was involuntary and that in fact no confession was made by him, there was a serious burden on the non-petitioners (i.e., the appellants herein), to satisfy the conscience of the High Court that there had been due compliance of the procedure and that the confession was made voluntarily. More so, when the record of evidence contained no worthwhile evidence regarding the guilt of the original petitioner. In the aforesaid backdrop, the SSFC ought to have advised the original petitioner to withdraw the plea of guilt as per provisions of sub-rule (2) of Rule 142 of the BSF Rules, 1969.

39. In light of the discussion above and also taking into account that the minutes of the proceedings recording the plea of guilty did not bear the signature of the original petitioner, in our considered view, the High Court was justified in finding the dismissal of the original petitioner on the basis of the plea of guilty unwarranted and liable to be set aside in exercise of powers under Article 226 of the Constitution of India. The High Court was also justified in not re-opening the proceeding from the stage where the error crept in by noticing that it would serve no useful purpose as there was hardly any evidence on record and nearly a decade had passed since the date of the incident.

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40. For all the reasons above, we do not find it a fit case for interference in exercise of our jurisdiction under Article 136 of the Constitution of India. The appeals are dismissed. Parties to bear their own costs.

Headnotes prepared by:
Nidhi Jain

Appeals dismissed.