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**(2014) 09 DEL CK 0219**  
**In the Delhi High Court**  
**Case No : WP (C) No. 13791 of 2004**

Bhanu Pratap Singh

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision :** 15-09-2014

**Acts Referred:**

Border Security Force Act, 1968 — Section 117, 14, 15, 16, 17  
Constitution of India, 1950 — Article 14, 16, 226, 227

**Citation :** (2014) 09 DEL CK 0219

**Hon'ble Judges :** Najmi Waziri, J; Kailash Gambhir, J

**Bench :** Division Bench

**Advocate :** L.R. Khatana and Kishan Nautiyal, Advocate for the Appellant; Sanjiv K. Saxena and Ramneek Mishra, Advocate for the Respondent

**Final Decision :** Allowed

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## Judgement

Najmi Waziri, J.—This writ petition under Articles 226 and 227 of the Constitution of India, seeks the setting aside of orders dated 10.8.1999 and 28.2.2000, whereby the petitioner was dismissed from service on the ground that they are violative of Articles 14 and 16 of the Constitution of India as well as of the provisions of the Border Security Force Act, 1968 (hereinafter referred to as "the BSF Act").

2. The petitioner's case is that he was enrolled as a Constable in the Border Security Force on 7.5.1988 and served the force for eleven (11) years with dedication, honesty and sincerity. On 5.8.1999, he was charged u/s 40 of the BSF Act for having connived with smugglers and while on duty having given them clear passage to throw goods over barbed wire fence near the Indo-Bangla Border Post No. 343/5-A on 4.8.1999 at 1100 hours at BOP Chainnagar; his Commandant had directed recording of evidence within 24 hours i.e., by 6.8.1999; that the evidence was recorded on 6.8.1999 in violation of BSF Act and Border Security Force Rules, 1969 (hereinafter, referred to as the "BSF Rules") and that there was denial of natural justice as the petitioner was not

given any opportunity to cross-examine the witnesses. Accordingly, it is submitted that the charge sheet, offence report and the order to prepare Record of Evidence were without any authority or jurisdiction. It is further submitted that the next day i.e., on 7.8.1999, the petitioner was informed by his Commandant/respondent No. 3 that he would be tried under the Summary Security Force Court (for short "SSFC") on 10.8.1999 at 1100 hours and he was asked to intimate the name of the officer/SO who would assist him during his trial. The petitioner contends that on 10.8.1999, the SSFC was held in a perfunctory manner, which was a mere formality, wherein the principles of natural justice were violated; that the official witnesses gave statements under undue pressure and influence of respondent No. 3, who held a grudge against the petitioner, besides the public witnesses were not allowed to depose; that neither the petitioner was given an opportunity to cross-examine the witnesses nor was he accorded an opportunity to prepare or lead his defence. The petitioner submits that the SSFC proceedings were completed in two hours and an order of conviction/sentence was passed against him imposing the penalty of dismissal from service from that day itself. The petitioner submits that the entire procedure, Recording of Evidence right from the issuance of Charge Sheet along with the Offence Report, and the SSFC proceeding itself were a farce, without authority of law, in violation of principles of natural justice and accordingly, unsustainable in law. The petitioner made his statutory petition u/s 117 of the BSF Act against the punishment meted out to him. The petition was rejected on 28.8.2000. The petitioner submits that the rejection was without merit as it is a non-speaking order. The petitioner further submits that later he challenged the impugned orders by way of a Suit (being No. 377/2000 before the Civil Judge, Delhi) on 21.7.2000. However, it was rejected on 2.6.2004 on the ground that the Civil Court had no jurisdiction to deal with it.

3. This Court notices that the charge against the petitioner was that "on 4.8.1999 at 1100 hours at BOP Chainnagar while on OP duty connived with smugglers and gave clear passage to throw goods over barbed wire fence to Indian smugglers near BP No. 343/5-A." The Offence Report of 4.8.1999 records the same allegation, as an offence u/s 40 of the BSF Act, recording that "an act prejudicial to good order and discipline of the Force". A report was sent to the Customs Office, Raiganj, North Dinagpur, West Bengal on 4.8.1999, which stated:

"1) Seized goods/items and value: 95 Nos. Goat Skin @ Rs. 200 per skin total approx. Value Rs. 19,000/-.

2) Brief History: On 4.8.1999 at about 1700 hours of Checking Party of BOP Chainnagar consisting of SI Bhanwar Singh along with two others gave some miscreants coming from Bangladesh to India side with hand load. Party challenged them to stop and surrender but they run away towards Bangladesh side after throwing head load. Party searched the area and recovered above items."

4. The learned counsel for the petitioner argued that proceedings for the

allegation of conspiracy as well as the act to smuggle across the Indo-Bangladesh Border with four (4) Indian civilians was not maintainable u/s 40 of the BSF Act as the same would be covered under the Indian Penal Code and the Customs Act. He submits that the proceedings could not have been initiated unless there were reasons for or permission sought in this regard from the Competent Authority. He relies upon Sections 70 and 70 of the BSF Act and Rule 42 of the BSF Rules in support of his argument.

5. The learned counsel for the respondents argues that Section 40 of the Act is wide enough to cover the act of the petitioner which, clearly, was prejudicial to the good order and discipline of the Force. Section 40, 70 and 80 of the BSF Act and Rule 42 of the BSF Rules read as under:

"40. Violation of good order and discipline." Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

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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.

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80. Choice between criminal court and Security Force Court." When a criminal court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector- General or the Deputy Inspector-General within whose command the accused person is serving or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted, and, if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody."

.... ....

BSF Rules, 1969

"42. Without prejudice to the provisions of sub-rule (1) of rule 41, an offender may not be claimed for trial by a Security Force Court:-

(a) where the offence is committed by him along with any other person not subject to the Act whose identity is known; or

(b) where the offence is committed by him while on leave or during absence

without leave."

6. From the aforesaid, it is clear that Section 40 of the BSF Act falls in Chapter III dealing with offences. It is a wide provision in its ambit and more in the nature of a residuary clause, because it covers guilt "of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force." The preceding Sections 14 to 39 deal with specific offences such as "offences in relation to enemy; mutiny; desertion; striking or threatening superior officers; insubordination; disgraceful conduct; escape from custody, etc. Sections 64 to 81 in Chapter IV of the Act spell out the details of the three kinds of the Security Force Courts to be set up for trying the various offences. The types of offences to be tried, the composition, prior sanction for and the manner of the proceedings are envisaged therein.

7. It would be seen from the scheme of the Act that the jurisdiction of general criminal law, the BSF Act mandates that a decision in this regard would have to be taken by the Competent Authority. Where the alleged act or offences comes in conflict or is alleged to have been committed by non-force persons, it would fall into the jurisdiction of the criminal courts and the proceedings under the BSF Act would not be maintainable. This Court notes that the reports to the Customs Office, North Dinajpur as well as to the Commandant of the petitioner dated 4.8.1999 and 6.8.1999 respectively, clearly mention the involvement of four Indian smugglers who were specifically named and identified through their village, and who were stated to have fled into India when challenged. Insofar, as the other persons were mentioned, the proceedings would have to be covered under Rule 42 of the BSF Rules read with Sections 70 and 80 of the BSF Act and not u/s 40 of the BSF Act. The allegation against the petitioner would have to be tried before a court of competent jurisdiction for having conspired with other Indian smugglers and having committed the offence of permitting them to carry out the act of smuggling. As the other alleged smugglers, identified and stated to be in the Indian territory had neither been prosecuted nor taken into consideration in the SSFC proceedings to establish their conspiracy with the petitioner, the evidence against the petitioner would be wanting to incriminate him or establish the charge against him. The permission of the Commandant for the SSFC proceedings as mandated in Section 70 of the Act is not found on the record. Even the choice between a criminal court and Security Force Court by the competent authority was not exercised. Otherwise also the SSFC proceedings could not have been undertaken because Rule 40 rules out the trial of an offender (member of the BSF) by Security Force Court "where the offence is committed by him along with any other person not subject to the BSF Act whose identity is known." The identity of the other persons, the alleged four Indian smugglers was claimed to be established in the reports. Therefore, the specific charge of conspiracy and the act of smuggling with other non-force persons could not be tried u/s 40 of the Act, as Rule 40 prohibits it.

8. In the circumstances, this Court finds that the charges, proceedings and

conviction against the petitioner were without the authority of law. Resultantly, the orders dated 10.8.1999 and 28.2.2000 are quashed. The petitioner is directed to be reinstated in service with all consequential benefits.

9. The writ petition is accordingly allowed.