

**(2013) 03 DEL CK 0152**

**In the Delhi High Court**

**Case No : Writ Petition (C) 1260 of 2000**

Dharambir Singh (Ex. Const.)

APPELLANT

Vs

UOI and Ors

RESPONDENT

**Date of Decision : 05-03-2013**

**Acts Referred:**

Border Security Force Act, 1968 — Section 55  
Constitution of India, 1950 — Article 226

**Citation : (2013) 03 DEL CK 0152**

**Hon'ble Judges :** Sudershan Kumar Misra, J;S. Ravindra Bhat, J

**Bench :** Division Bench

**Advocate :** Anil Gautam, for the Appellant; Mukesh Kumar Tiwari, Advocate with Sh. Bhupinder Sharma, DC/OIC (Legal), BSF., for the Respondent

**Final Decision :** Dismissed

## Judgement

S. Ravindra Bhat, J.—The petitioner has in the present writ proceeding challenged an order dated 14.12.1998, dismissing him from the services consequent upon the findings of "guilt", recorded in the Summary Security Force Court (SSFC). The findings and punishment were approved by the Competent Authority of the Border Security Force (BSF) on 05.03.1999; the petitioner's appeal was rejected on 22.11.1999. Briefly, the facts are that the petitioner - who joined the BSF on 30.09.1989 - was charged with culpability in respect of an incident which occurred on 31.08.1998. Two charges levelled against him were of, unauthorisedly removing and taking-away a jeep and secondly, the more serious allegation, of his having misbehaved and slapped a superior officer, namely Subedar A. Ghosh. The charge sheet initially issued against the petitioner were as follows:

CHARGE SHEET U/S. 55 OF BSF ACT

No. 89499341 CT/DVR DHARAMBIR SINGH OF 162 BN BSF IS CHARGED WITH:-

2. The petitioner's Commandant conducted a preliminary enquiry under Rule 45

of the BSF Rules, 1969 (hereafter referred to as "the Rules"). After hearing the nature of the incident from four witnesses, who were present at the time of the incident; the Commandant noted that the, "findings stand proved" and further directed that the petitioner be tried by the SSFC. On 02.09.1998, the Commandant directed the Recording of Evidence under the Rules. This was presided over by an Assistant Commandant, who conducted the proceedings in that regard - between 02.09.1998 and 11.09.1998. There is no dispute about the fact that during the course of these proceedings, the petitioner was provided the opportunity of cross-examining the witnesses who deposed against him. There is some controversy about the fact that the Commandant, who initiated the proceedings with a preliminary enquiry under Rule 45 of the BSF Rules, 1969, did not afford him similar opportunity to cross-examine the witnesses. Ultimately, upon being arraigned and charged for the incident, the petitioner pleaded "not guilty" in respect of the second and more serious charge. The BSF, on the basis of the preliminary enquiry proceedings formed the opinion that since the petitioner's plea of guilt had been entered in respect of the first charge, there is no need to adduce evidence on that score. Therefore, in the SSFC proceedings, the evidence was led by the BSF authorities solely on the question of petitioner's involvement in regard to the second charge, i.e. primarily of assaulting/slapping Subedar A. Ghosh. One of the witnesses, PW-5, in fact did depose about the other charge, i.e. the petitioner's alleged unauthorised removal of the official jeep.

3. The depositions of prosecution witnesses were relied upon by the BSF authorities to prove the charges made out against the petitioner. PWs-1 to 4 and 7 spoke about the second charge, i.e. assault. Apparently on 31.08.1998, at around 09.20 PM, the jeep in which the petitioner, and one Constable, Daya Chand, were travelling, was stationed near a culvert described as Naka No. 1 of BOP Binjour. A five-tonner truck with some BSF personnel reached that spot. Since the jeep was apparently blocking the way, it was alleged that Subedar A. Ghosh went to enquire from the petitioner and Constable Daya Chand as to why they were blocking the way. At that point, the prosecution alleged that the petitioner had an altercation with Subedar A. Ghosh; the BSF also alleged that Constable Daya Chand took position with his rifle and threatened to shoot anyone who approached him. The depositions of PWs 1 to 4 and 7 relied upon by the prosecution were considered by the SSFC, which, after recording the evidence, gave an opportunity to the petitioner, concededly to cross-examine them and subsequently to make his own statement. Thereafter, it held that the charges were proved. Sh. Anil Gautam, learned counsel for the petitioner argues that the BSF violated Rule 45 of the BSF Rules, 1969 in not affording opportunity to the petitioner to cross-examine the witnesses, whose statements were recorded by the Commandant during preliminary hearing. He stressed that significantly, the form which recorded the evidence contained a column, "Whether the charged employee had cross-examined the witnesses or declined to do so". Learned counsel argued that this column was blank which meant no

opportunity was granted. It was submitted that failure of the Commandant to follow this, on the one hand, and thereafter conclude straightaway that the offence had been proved, has resulted in irreparable prejudice in as much as the record now reflects that the petitioner's "guilt" was pre-judged and that an untenable plea of "guilt" in respect of one of the charges has been recorded. Learned counsel relied upon the decisions reported as *Union of India (UOI) and Others Vs. B.N. Jha*, by the Supreme Court. In that case, the Supreme Court considered the applicability of Rule 45B which is similar to Rule 45 of the BSF Rules, 1969, and stressed that the disciplinary authority or the Commandant has to apply his mind on the materials on record to enable him to arrive at a finding in favour of or against the officer. This Court is of the opinion that the facts of this case are entirely different. This is not as if the Commandant, who sent the petitioner for trial based his conclusions entirely on pre-judged matter. Use of the expression "guilt" has to be understood in the context, i.e. in the surrounding circumstances of the case. Immediately after the incident was recorded on 01.09.1998, when the preliminary enquiry was held, only 4 witnesses deposed or recorded their statements. At that stage, the Commandant had to take a decision whether to proceed further or not; his options were open. He, however, decided to proceed further and consequently directed Recording of Evidence under Rule 48 of the BSF Rules, 1969. There is no dispute that during the proceedings full opportunity of cross-examining all the witnesses was given to the petitioner. Having regard to the circumstances and the fact that even during the further proceedings before the SSFC, the petitioner was afforded the opportunity of cross-examining the witnesses, who deposed against him, this Court does not discern any prejudice much less substantial prejudice in regard to the conduct of proceedings or in regard to the recording of the plea of guilt as far as the first charge is concerned.

4. As far as the second charge is concerned, learned counsel urged that the overall reading of testimonies of 4 witnesses who deposed about the incident would reveal that there was no unanimity about the nature of the incident and the exact altercation which took place. Learned counsel for the petitioner relied upon the testimony of PW-1 and stated that this witness did not support the prosecution in the sense that he deposed about not having seen clearly who slapped whom. It was also submitted that the deposition of another witness, i.e. PW-3, who saw PW-1 intervening and trying to contain or control the situation which was contradictory to PW-1's statement, never mentioned about the slapping incident. On an overall reading and appreciation of the testimonies, it is apparent that only one witness who clearly mentioned about the slapping incident, i.e. PW-3 whereas the others did not mention it. Having regard to the quality of this evidence, the finding of guilt arrived at by the SSFC was untenable. Consequently, the dismissal order was illegal and the petitioner was entitled to be reinstated.

5. Even though the jurisdiction under Article 226 of the Constitution is extremely limited and circumscribed, nevertheless, the Court can examine the materials to

discern whether the findings of the decision maker are such that no reasonable person could have arrived at it, or that there are no materials at all to support the decision. Viewed from that angle, this Court is of the opinion that the petitioner's argument is unsustainable. PW-1 mentioned that a Constable/Driver was with the petitioner Dharambir Singh and Subedar A. Ghosh when they were quarrelling and that he separated the two. The witness also mentioned that the jeep in which the petitioner and the other Constable were travelling had blocked the road. He also mentioned that the other Constable Daya Chand had threatened to open fire. The witness no doubt, mentioned that he did not see who slapped whom but the perusal of his evidence clearly suggests that there was an altercation between the petitioner and Subedar A. Ghosh. As far as PW-2 is concerned, he too corroborated PW-1 about the quarrel and altercation; he mentioned that 5-6 personnel came out from the five-tonner vehicle and went near the petitioner. He also mentioned about an altercation, though due to the distance, he could not make-out what transpired between Subedar A. Ghosh and the petitioner. PW-3 too apparently witnessed the incident from a distance and could not hear it. He, however, stated that he could ".....clearly see Const./Driver raised his hand and hit to Sub. A. Ghosh..... Meanwhile Const. Laxman Singh, who was near both of came in between Const./Driver Dharambir Singh and Sub. A. Ghosh and due to this Const./Driver Dharambir Singh could not hit second time." PW-4 similarly stated that after Subedar A. Ghosh came down from the vehicle there was a quarrel and during the altercation, the petitioner "raised his hands" to hit Subedar A. Ghosh. "I am not sure Const./Driver slapped Sub. A. Ghosh or not but jawans were in my five ton vehicle were jumping down saying Const./Driver Dharambir Singh is beating to Sub. A. Ghosh." PW-7 also mentioned about an altercation and quarrel between Subedar A. Ghosh and the petitioner.

6. The above analysis of the evidence and the material witnesses, i.e. PWs-1 to 4 and 7, that even though there is no unanimity about exactly as to whether the petitioner had slapped Subedar A. Ghosh or not, all of them uniformly spoke about the fact that the Subedar - a superior officer - came down from the five-tonner truck to confront the petitioner, who was in the jeep which was blocking the road. A quarrel or altercation ensued. During the quarrel, the petitioner resisted Subedar's request or direction to move the jeep. It is quite likely that in the heat of the moment, the petitioner did raise his hand and slapped Subedar A. Ghosh. Although one of the witnesses - PW-3 categorically mentioned about this, significantly at least two other witnesses are not sure whether or not the incident of slapping did occur. One of them was at a distance, but he heard other personnel who were in the truck saying that Subedar had been slapped or assaulted by the petitioner. If one sees the surrounding circumstances, it is evident that the Subedar was travelling with a number of BSF personnel in the truck. The right of way was blocked by the jeep driven by the petitioner. He naturally asked the petitioner to move. At that point of time, the Constable deployed in the Naka or post, Constable Daya Chand apparently threatened to

shoot anyone who approached. The petitioner also objected to Subedar's requests and refused to budge. This led to an altercation during which the petitioner slapped the Subedar. Examined after this length of time, the incident may seem to be trivial and the reaction of the BSF disproportionate. However, this Court has to be conscious of the circumstance that the petitioner was an experienced BSF personnel. His insistence that the jeep which was parked at culvert would not budge and the five-tonner vehicle in which the BSF personnel were commanded by the Subedar would not be allowed to pass, was a serious matter. The Subedar who apparently tried to reason or argued with the petitioner about his approach was assaulted. Having regard to the nature of evidence in this case, this Court is unpersuaded by the submission that there were no material on the record to support the SSFC findings of guilt recorded against the petitioner. The Court, as mentioned earlier, does not exercise appellate review powers but has to be broadly satisfied that some materials exist on the record which are relatable to the allegations or support the allegations. It follows that the adequacy of materials is not subject matter of enquiry; as long as relevant material exist, pointing to or supporting the conclusion, the Court would stay its hands and not appreciate relative weight of evidence which falls within the domain of an appeal.

7. The petitioner's counsel had argued that having regard to the charges, the penalty of dismissal was harsh and oppressive and can be characterized as "shockingly disproportionate" to warrant the exercise of discretion under Article 226. This Court is of the opinion that in order to arrive at such finding, nature of the material or the nature of the charges should be such that the reaction of the Disciplinary Authority should be of an extreme kind. The authorities in the present case - especially the second charge - of slapping the superior officer, and the surrounding circumstances do not persuade the Court to hold that the penalty in this case imposed upon a personnel with almost one decade's experience in the force was disproportionate. In view of the above discussion, it is held that the petition has to fail. It is accordingly dismissed.