

(2013) 04 DEL CK 0456

In the Delhi High Court

Case No : Writ Petition (C) No. 2380 of 1999

Ex. Const. Tejbir Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 233, 234, 235, 236, 306

Citation : (2013) 04 DEL CK 0456

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

Bench : Division Bench

Advocate : M.G. Kapoor, for the Appellant; Saquib, Advocate with Mr. Bhupinder Sharma, Dy. Commandant, BSF, for the Respondent

Judgement

Sudershan Kumar Misra, J.—This petition, which has been filed by a former constable of Border Security Force (BSF), impugns the finding and sentence of a Summary Security Force Court (SSFC) held by the Commandant, 173rd Battalion, Border Security Force on 3rd March, 1998, whereby he was dismissed from service. The petitioner was recruited as a Constable in the BSF in the year 1990. It is alleged that on 14th December, 1996, during his posting at Taratala (Calcutta), when the petitioner, who was a part of a working party, was relaxing after working hours, an incident occurred. A Head Constable, M.A. Khan, found a mess boy in an inebriated condition. He apparently thought that someone from the working party, which also included the petitioner, was responsible, and got enraged. He, therefore, began abusing the members of the working party, including the petitioner. When the said Head Constable refused to calm down despite polite requests by the petitioner and members of the working party, and because he then began hurling abuses at the petitioner; the petitioner, admittedly, retaliated, "in the same tone and language". The situation was, ultimately, defused by intervention of another Head Constable, Shiv Nath Singh. The petitioner further alleges that the Head Constable, Mushtaq Ahmed, took the matter further and, ultimately, the AC/JSO (Prov) advised the petitioner to apologize to the Head Constable, which he did. Despite this, Head Constable

Mushtaq Ahmed pressed his complaint, where he had stated that the petitioner also assaulted him; and an offence report was duly lodged on 11th January, 1997. The petitioner pleaded, "not guilty", and the Commanding Officer directed Recording of Evidence (ROE).

2. It is alleged that on 2nd April, 1997, when the ROE or, the Recording of Evidence, commenced; the petitioner noticed that this exercise was being carried out with regard to another co-accused, namely, Constable Prempal Singh, as well. According to the petitioner, this was not permissible. However, be that as it may, admittedly, midway through the Recording of Evidence, the petitioner applied for annual leave, which was refused. He, thereafter, absented himself without leave, allegedly because he had heard his mother was seriously ill. On his return, for the offence of absenting himself without leave, the petitioner was punished with 28 days rigorous imprisonment.

3. Since the petitioner had remained absent without leave as aforesaid, the Recording of Evidence was completed in his absence. Obviously, the other co-accused, Constable Prempal Singh, remained present throughout the Recording of Evidence. It is in these circumstances that the petitioner claims that he was denied the opportunity of cross examining the remaining prosecution witnesses, who had deposed in the aforesaid Recording of Evidence.

4. Later, in December, 1997, whilst the petitioner was posted at Azad Basti, he was granted 10 days leave. He states that, on 14th December, 1997, when he went to return some clothing to Head Constable Attar Chand before proceeding on leave, another incident took place. The petitioner's version of what happened is described thus in the list of dates and events appended to the petition:-

....Head Constable Attar Chand, who had just returned from his duty, got annoyed by the petitioner and started insulting the petitioner. The petitioner was in a happy mood as he was to proceed on leave the next morning. He told the Head Constable that he would return later. Later when the petitioner returned, the said Head Constable had consumed some alcoholic drinks and, therefore, was in no mood to entertain the petitioner. This time the said head Constable started hurling abuses on the petitioner. At that very moment the Acting Company Commander of "B" Company came. Head Constable Attar Chand, to save himself, falsely alleged that the petitioner had hit him the said Head Constable started calling other colleagues of his. Sensing trouble, the petitioner tried to make escape and in the process brushed past the Acting Company Commander. Thereupon every one pounced on the petitioner and started beating him. The petitioner was thereafter taken into custody.

With regard to this second incident also, on 22nd December, 1997, an offence report was put up and Recording of Evidence (ROE) was directed by the Commanding Officer. On 12th February, 1998, the recording of prosecution evidence was closed; however, according to the petitioner, although the mandatory caution in terms of Rule 48 of the BSF Rules was administered to him,

his statement was not recorded. Thereafter, on 18th February, 1998, evidence of some additional prosecution witnesses was also recorded. According to the petitioner, recording of such evidence of additional witnesses on behalf of the prosecution, after the ROE was completed, was impermissible.

5. It is the petitioner's case that a charge sheet was handed over to him on 28th February, 1998, containing four charges. The first charge pertained to the earlier incident of 4th December, 1996. Remaining three charges were with respect to the second incident of 14th December, 1997. On 2nd March, 1998, the Record of Evidence, prepared by the respondents, as well the Abstract of Evidence (AOE), is stated to have been handed over to the petitioner. Thereafter, on the very next day, i.e., 3rd March, 1998 itself, on 1100 hours, Summary Security Force Court was convened to try the petitioner. According to the petitioner, by holding the Summary Security Force Court (SSFC), as aforesaid, in less than 4 days, after supply of the Record of Evidence, or after Abstract of Evidence was given to the petitioner, the respondents have violated the provisions of sub rule (4) of Rule 63 of the Border Security Force Rules, 1969.

6. It is also the case of the petitioner that the grant of the power to a Commanding Officer to preside over a Summary Security Force Court (SSFC) and to render a decision, irrespective of the fact that he may also be Investigator or Prosecutor in the matter, is similar to the power vested in Commanding Officer in a Summary Court Martial under the Army Act, 1950. He submits that this is a peculiar power given to the Armed Forces keeping in mind the unique nature of the duties and functioning of such Forces with a view to maintaining discipline. It is contended that such resort to summary proceedings is envisaged only when it is not practicable to keep the case pending till an appropriate proceeding, where the roles of judge and investigator etc. are kept distinct, can be constituted, and not otherwise. According to him, the delay in instituting the trial shows that there was no urgency to warrant the invocation of the procedure of SCM. In support of this proposition, counsel for the petitioner relies on a decision of the Division Bench of this Court in Ex. LN Vishav Priya Singh v. Union of India & Ors., whereby a batch of writ petitions were disposed off by this Court and where, in paragraph 20, this Court had concluded, inter alia, that, ".....holding of SCM is the exception and not the rule", and that, "what is of pre-eminence in convening an SCM is that it should be found imperative that immediate action is manifestly necessary"; and other similar conclusions. On a query put by this Court, counsel for the respondents informed the Court that this decision has been set aside by the Supreme Court. He further states that as far as the aspect of delayed disposal of the matter and, in particular, the proceedings relating to the first charge are concerned, the delay occurred for the sole reason that the petitioner had willfully, and without obtaining leave, absented himself from the Unit. Looking to the fact that a clear and succinctly articulated view by the Division Bench of this Court on the lines of the plea put forward by counsel for the petitioner before us on this aspect of the matter has been set aside by the Supreme Court, we see no ground to entertain the same plea over again.

7. It is next argued by counsel for the petitioner that all the four charges mentioned in the charge sheet, on which the petitioner was tried, could not have been combined; and the petitioner could not have been subjected to a common trial since the nature of the charges do not conform to the requirements of Rule 53 (1) of Chapter VIII of the Border Security Force Rules, 1969 relating to charges and matters antecedent to trial. The relevant portion of the said Rule reads as follows:

53(1) A charge sheet shall contain the whole of the issue or issues to be tried at one time and may contain more than one charges, if the charges are founded on the same facts or form part of a series of offences of same or similar character.

...

8. According to counsel, the charges mentioned in the impugned charge sheet of 28.02.1998, cannot be said to be either founded on the same facts, or form part of a series of offences of same or similar character, as envisaged in the aforesaid Rule 53 (1). For this proposition, counsel for the petitioner relies on the decision of Bombay High Court in D.K. Chandra Vs. The State, . That decision related to four charges framed under the Criminal Procedure Code, 1898, in respect of which the accused was tried at one trial. There, the Court had occasion to consider the three exceptions laid down in Section 233 of the Criminal Procedure Code, 1898, as well as Sections 234, 235 and 236 thereof. In the case at hand, the offences complained of have arisen under the Border Security Force Act, 1968, to which, admittedly, the petitioner/accused was subject, and which forms a complete Code as regards the offences, as well as the procedure, for investigating and trying the offences prescribed under that Act. In this context, a reference to Sections 4(2) and 5 of the Code of Criminal Procedure, 1973 is apposite. They state as follows:-

4. Trial of Offences under the Indian Penal Code and other laws -

...

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

A perusal of the aforesaid provisions makes it clear that the provisions of the Code of Criminal Procedure, 1973 have no application with respect to jurisdiction, powers or procedures prescribed by any special or other law in force. It follows therefore that the Border Security Force Act and Rules, being a special law in force, would not be controlled or affected by any of the provisions of the Criminal

Procedure Code, which, in essence, is a more general enactment. Furthermore, the Border Security Force Act, 1968, to which the petitioner is, admittedly, subject, and in terms of which, the offences alleged against him were investigated, charges framed and the trial held, has been enacted with a specific, clear and distinct object, which is to provide, "for the constitution and regulation of Armed Forces of the Union for ensuring security of the borders of India and for matters connected therewith". Further, the Statement of Objects and Reasons lays down that;

...However, considering the nature and purpose of the Force and the experience gained during the last two years, it has been felt that the Force should be regulated by a separate self-contained statute which will provide for its special needs, especially the needs of efficiency and discipline...

And further that;

As the Border Security Force is charged with the policing of the borders the Bill seeks to ensure that the standards of efficiency and discipline of the Force are of a very high order.

Therefore, it is imperative for the Court to ensure that in securing for a person subject to this enactment, a just, fair and reasonable procedure for trying him, the vision of the legislature as to the unique procedure prescribed, whereby the objects of the enactment are best served, is not obscured by importing procedures from other statutes, so long as sufficient safeguards are found to exist in the governing statute and rules, which in this case happens to be the BSF Act and Rules.

9. We might note that despite specifically putting it to counsel for the petitioner, he failed to cite any precedent at the Bar setting down parameters similar to the ratio in D.K. Chandra's case (supra), in the context of a case arising out of the Border Security Force Act and Rules, in circumstances akin to that of the petitioner. While on the subject, we might also add that Section 464 of the Cr.P.C., 1973 postulates that any error, omission or irregularity in the charge, "including any misjoinder of charges", shall not result in overturning the proceedings unless, in the opinion of the court, "a failure of justice has in fact been occasioned thereby". It follows therefore, that under the Criminal Procedure Code, 1973, a misjoinder of charges would not ipso facto render a trial bad, without a further finding of a failure of justice having been occasioned thereby. When we drew the attention of learned counsel for the petitioner to this provision while examining D.K. Chandra's case (supra), his only response was that, "the Bombay High Court judgment does not say so", without any further elucidation or attempt to go into that aspect of the matter.

In fact, the decision in D.K. Chandra's case (supra) has been rendered in the light of the 1898 Code. The essential distinction between 1898 Code and the current, 1973 Code, for the purposes of this case; is the insertion of the words, "including any misjoinder of charges", which did not find mention in the saving

provisions of 1898 Code, which were otherwise *pari materia* to Section 464 of the current, 1973 Code. Obviously, therefore, there could have been no occasion for the Bombay High Court in D.K. Chandra's case (*supra*), which was decided in the year 1951, to address itself to the question whether a misjoinder of charges has occasioned any failure of justice, thereby vitiating the trial.

10. Furthermore, the question of applicability of the provisions of Code of Criminal Procedure to persons subject to the BSF Act, was up for consideration before Supreme Court in *Union of India and others Vs. Anand Singh Bisht*, where its earlier decision in *Ajmer Singh and Others Vs. Union of India (UOI) and Others*, was reiterated to the effect that the Army, Navy and Air Force Acts are special laws in force conferring special jurisdiction and powers on Courts Martial; and Section 5 of the Code of Criminal Procedure renders the Code inapplicable in respect of matters covered by such special laws. Further, it has been concluded in the said judgment that:

2.the distinction made in Section 475 of the code between trial by a court to which this Code applies and by a Court Martial conclusively indicates that Parliament intended to treat the Court Martial as a forum to the proceedings before which the provisions of the code will have no application.

In the context of the matter at hand, it must be noted that Section 475 of the Code of Criminal Procedure, 1973 examined in the cases of *Anand Singh Bisht* and *Ajmer Singh* (*supra*) by the Supreme Court, also contains the words, "and any other law relating to the Armed Forces of the Union for the time being in force.....". The Border Security Force Act and Rules, with which we are concerned, is one such special law relating to the Armed Forces of the Union; it, therefore, follows that the provisions of the Cr.P.C. could have no application to the petitioner's case. We are, therefore, not inclined to accept the submission of counsel for the petitioner on this aspect of the matter. We might mention that both counsel for the petitioner, as well as the respondent, had failed to draw our attention to the aforesaid decisions in the cases of *Anand Singh Bisht* and *Ajmer Singh* at the bar.

11. As regards the availability of safeguards to ensure that there is no miscarriage of justice, the Border Security Force Act and Rules are also a self-contained and comprehensive Code, *inter alia*, specifying offences as well as prescribing the procedure of the trial of offenders etc. One of the methods of trial contemplated by the said Act and Rules is by, "Summary Security Force Courts". This is the type of court that tried the petitioner. Whilst there may be no specific provision in the nature of Sections 464 and 465 of the Code of Criminal Procedure, 1973; its own safeguards in the case of a trial by Summary Security Force Court (SSFC) are prescribed under Rule 139 and 161 of the BSF Rules applicable to such proceedings.

Rule 139 states as follows:

139. Objection by accused to charge - The accused, when required to plead to

any charge, may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules.

It is at this stage that liberty is granted to the accused to take any objection to the effect that the charge sheet, as framed against him, is in violation of the provisions of Rule 53 (1), because it, in effect, amounts to a, "misjoinder of charges". Thereafter, Rule 161, which is also applicable to SSFC, provides as follows:

161. Action by the Deputy Inspector-General -

(1) Where the Deputy Inspector-General to whom the proceedings of a Summary Security Force Court have been forwarded under rule 160, is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise, he may, -

(a) set aside the proceedings of the Court; or

(b) reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in [section 48 and return it to the unit of the accused for promulgation]

(2) Where no action under sub-rule (1) has been taken he shall counter-sign the proceedings.

(3) The proceedings shall, after its promulgation, [under sub-rule (1) or counter-signature under sub-rule (2)], be forwarded to the Chief Law Officer for custody.

Here again, a power akin to Section 464 of the Code of Criminal Procedure has been granted to the Deputy Inspector General, to whom the proceedings of an SSFC have to be forwarded; and who is obliged to either counter sign the proceedings and have them promulgated; or, to either set aside the proceedings of the court or reduce or commute sentence if he is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise. In other words, in the case of the BSF Act; which is a special enactment; in case a misjoinder of charges contrary to the requirements of Rule 53(1) has, in fact, occasioned any failure of justice, sufficient safeguards, unique in their scope and amplitude, and commensurate with the objects of the BSF Act, have been duly provided by the Legislature. Admittedly, the petitioner failed to raise any such objection at the relevant time. Before this Court also, despite our inviting him to do so, counsel for the petitioner did not even venture to demonstrate that any failure of justice, whatsoever, has been occasioned in this instance. For this reason also, we are not inclined to accept the submission of the counsel for the petitioner on this aspect of the matter.

12. Similarly, even the allegation that the Record of Evidence and the Abstract of Evidence has been given to the petitioner on 2nd March, 1998 whilst the Summary Security Force Court was convened on 3rd March, 1998 to try the petitioner, which violated the provisions of Rule 63(4) of the BSF Rules, which

enjoined the respondents to supply the same to him at least four days before his trial, is without substance, firstly, for the reason that as provided by Rule 63 (6), the period of 4 days referred to in Rule 63 (4) is to be construed as 24 hours in the case of a trial before a Summary Security Force Court as in this case. Furthermore, no failure of justice on this account has been demonstrated at the Bar. We, therefore, see no infirmity in this aspect of the matter.

13. The next ground urged by counsel for the petitioner is that at the hearing of the charges against the petitioner under Rule 45B of the BSF Rules, 1969, one constable Prem Pal Singh was produced as a witness against the petitioner even though he was also a co-accused in relation to the first charge framed against the petitioner. For this, he relies on a decision of the Division Bench of this Court in Malkiat Singh v. UOI & Others, WP(C) No. 3900/1998, decided on 24th July, 2008. That matter pertained to a Sepoy who was governed by the Army Act, 1950 and the Army Rules, 1954. The procedure mentioned in the manual of military law was also considered. There, after examining the relevant provisions of the Army Act & Rules, the procedures laid down in the manual of military law and memoranda issued in terms of the Army Act & Rules, the action of the army authorities in setting up co-accused as witnesses against each other, without disposing of the case of any one of them till the court martial was concluded, was held to be sufficient to vitiate the proceedings. Consequently, the entire proceedings, including the plea of guilt, stated to have been entered by the petitioner in that case, were set aside. The respondents were granted liberty to hold fresh court martial, if they were so inclined. According to counsel for the petitioner, notwithstanding the fact that the decision in the Malkiat Singh's case (supra) has been rendered in the light of the Army Act and Rules, as applicable to a Sepoy in the Indian Army, he, "may stretch it to Rule 45 of the BSF Rules". In response to query by this Court as to whether, in his opinion, Rule 45 of the BSF Rules applicable here was *pari materia* to any of the provisions of the Army Act or Rules examined in the Malkiat Singh's case (supra), counsel for the petitioner replied in the negative, and then tried to contend that the provisions of the Army Act and Rules as well as the procedures laid down in the Manual of Military Law for trial under that Act, are similar to Sections 306, 307 and 321 of the Code of Criminal Procedure, 1973; therefore, they should all be taken as applicable to a trial, such as the one before us, under the BSF Act and Rules also. As we have already concluded above, the provisions of the Code of Criminal Procedure are not applicable to a trial under the BSF Act and Rules, therefore, counsel's contention in this behalf has no merit. At best, the proposition of the petitioner's counsel can be taken to mean that the evidence of a witness who is himself either facing prosecution or is under the threat of being prosecuted, is unworthy of consideration because there is every likelihood that it has been tendered with a view to ingratiating himself with the prosecution to secure a better deal for himself. We do not, however, find any infirmity in this behalf since we have already concluded that firstly, the provisions of the Code of Criminal Procedure are not applicable under the BSF Act and Rules. Further, counsel for

the petitioner has failed to draw our attention to any of the provision of the BSF Act or Rules prohibiting the production of a co-accused as a witness against an accused. It is also not clear as to whether any proceedings were ever brought against the so-called accused, Constable Prem Pal Singh, till the time his evidence was recorded before the court, or even thereafter. Also, reading the entire evidence in a holistic manner, we do not find that the petitioner has been irretrievably prejudiced. Indeed, no attempt has been made to demonstrate any such prejudice.

14. The last submission on behalf of the petitioner, and in which there may be some force, is that evidence of four additional witnesses was recorded after the Recording of Evidence was completed on 12th February, 1998. In this context, counsel for the petitioner has drawn our attention to a Certificate dated 12th February, 1998, which states as follows:

...Certified that the record of evidence ordered by Shri P.K. Purkayastha, Commandant 173 Bn BSF was made in the presence and hearing of accused and the provision of BSF Rule-48 have been complied with.

Place: Chhanpora (J&K)

Dated: 12/02/98

Sd/ - 12/02/98

(P.C. Kumar)

DC Recording Officer

He submits that this Certificate has been given in terms of Rule 48 (8) which enjoins the giving of such a Certificate after the Recording of Evidence is completed. On the same date, it was also recorded that, "recording of prosecution evidence is hereby closed". After this was recorded, the petitioner was given the opportunity to make any statement he wished. He was also asked if he wished to call any witness, to which he replied in the negative. Counsel submits that after a gap of six days, four more witnesses, who are referred to as, "Addl PW5; Addl PW6; Addl PW7; Addl PW8", were examined, and ultimately, the same certifications, that were appended earlier on 12th February, 1998, were once again appended to the record by the Recording Officer on 19th February, 1998. It is the case of the petitioner that once the Recording of Evidence was completed and duly certified in terms of Rule 48 (8), it was not open to the Recording Officer to suo moto proceed with the recording of further evidence of witnesses in the matter.

15. Counsel for the respondents has tried to defend this action in two ways. He has first tried to take recourse to Rule 6 of the BSF Rules, which provides that, with regard to any matters not specifically provided for in these rules, the competent authority is empowered to take such action as it considers just and proper in the circumstances of the case. He also tried to call to his aid Rule 51

(2), which empowers the Commandant to remand a case for recording additional evidence if he considers evidence recorded is insufficient but considers further evidence may be available.

16. The entire procedure for investigation and Recording of Evidence is elaborately set down in the BSF Act and Rules including Rule 48 thereof. However, Rule 51(2), which empowers the Commandant to remand a case for recording additional evidence, was brought into existence by an amendment only in the year 2011, whereas the trial in question took place in the year 1998. Obviously, therefore, the respondents cannot gain any support from a provision which was not in existence at the relevant time.

17. As far as application of Rule 6 is concerned, the said Rule states as follows:

6. Case unprovided for - In regard to any matter not specifically provided for in these rules it shall be lawful for the competent authority to do such thing or take such action as may be just and proper in the circumstances of the case.

The above provision provides certain residuary powers with regard to matters not specifically provided for under these Rules. However, that does not mean it would be open for the respondents to record further evidence at their whim, even after the recording of evidence has already been completed and the appropriate certification stating so has been duly provided by the concerned officer in terms of Rule 48(8). To permit this to be done by taking recourse to Rule 6 would amount to making a mockery of Rule 48 (8) and rendering it superfluous. After the decision is taken under Rule 45 (2) (iii) to prepare a Summary of Evidence under Rule 48(1), the Commanding Officer could have decided to record the ROE either himself, or he could have directed one of his subordinates to do so. Thereafter, in both situations, once the stage of Rule 48(8) is reached, and the necessary certifications appended, the mandate in the decision to prepare the ROE is over. After this, evidence could have been recorded once again only under the limited circumstances set down in this judgment, and not otherwise.

18. The Border Security Force Rules, as they stand today, envisage the power of the Commandant to remand a case for recording additional evidence at the stage of operation of Rule 51 itself, under which the officer detailed to prepare record of evidence is obliged to forward the same to the Commandant. The Commandant can remand it for this purpose, if he is satisfied that the evidence recorded is insufficient and believes that further evidence may be available; however, this power was not available under Rule 51 at the relevant time in 1998. At the same time, it is also obvious that in the instant case, the statements of the additional witnesses which were recorded later, after the recording of evidence was initially completed, were part of the record of evidence that was forwarded to the Commandant in terms of Rule 51(1). And after going through the same, the Commandant had decided to try the accused by a Summary Security Force Court in terms of the extant Rule 51 (2)(iii). In our view, the lack of power available to the Commandant at that time, to remand a

case for recording additional evidence at the stage of Rule 51, was obviously a lacuna in the Rules which was duly rectified by the 2011 amendment with the insertion of Rule 51 (2) providing the said power. We are persuaded to this view, inter alia, also because even Rule 59(1)(iii), which is also a part of the same Chapter VIII, titled, "ON CHARGES AND MATTERS ANTECEDENT TO TRIAL", under the sub Heading, "Convening Of [General and Petty] Security Force Court", postulates that the, "superior authority", on receiving an application for convening a court in terms of Rule 52 or 51 (iv) may return a case for recording further evidence if he considers it necessary. However, under the extant rules, i.e. prior to the aforesaid 2011 amendment, in a case such as the one at hand, where, after receiving the record of evidence under rule 51(1), the Commandant only had the option of either trying the matter himself, or of applying to a superior authority to convene a court for trying the accused; if he were to exercise the option of trying the accused by Summary Security Force Court, as postulated under Rule 51 (2) (iii), the question of any further application to any superior authority for convening a court would not arise and therefore, to that extent, the possibility of the superior then authority applying its mind under Rule 59(1) (iii), and deciding to return the case for recording further evidence, would also not arise. In other words, while there is a power with superior authority to remand the case for recording additional evidence under rule 59 (1) (iii) if the Commandant exercises the option of applying to a superior authority for convening a court, there is no such power available if the Commandant decides to try the accused himself by a Summary Security Force Court. Thus the lacuna. To our mind, in such a case, where there is an obvious lacuna, it indubitably falls within the scope of the phrase, "any matter not specifically provided for", and recourse may be had to Rule 6 of the Border Security Force Rules. Of course, this lacuna has since been rectified by the 2011 amendment. It follows therefore that in the instant case, and keeping in mind the state of the Rules and, in particular Rule 51, as it existed in 1998, additional evidence could only have been recorded pursuant to an appropriate order being passed in that behalf by the, "competent authority", as envisaged in Rule 6. To our mind, the, expression, "competent authority", would be the same authority which had ordered the recording of evidence under Rule 45(2)(iii) and had thereafter proceeded under Rule 48(1). In this case, it was the Commandant who had ordered a subordinate officer to do so. Of course, if the officer who prepared the record of evidence was himself the officer who had remanded the accused for preparing a record of evidence in terms of Rule 45(2)(iii), then it was open to him to decide to record further evidence after first duly recording his reasons. However, if the officer actually recording evidence was someone else, then it would have required the application of mind of the officer who had initially ordered recording of evidence under Rule 45(2)(iii) to once again direct recording of additional evidence after noting his satisfaction of the need for so doing. This was clearly not done.

19. In view of the above discussion, all that emerges is that at the preliminary stage of preparing a record of evidence, the officer empowered in this behalf

issued a certificate on 12.02.1998 in terms of Rule 48 (8) to the effect that the same had been done, and that the recording of prosecution evidence was closed. However, about a week later, he suo motu proceeded to record further evidence of four more witnesses, styled as additional prosecution witnesses, and then appended the same certification once again. Admittedly, the petitioner too was granted full opportunity to cross-examine these witnesses. Be that as it may, the fact remains that there has been a violation of the procedure mandated by the BSF Rules; even the requirements of Rule 6 have not been satisfied; and this court would be loath to set down a precedent which could, in effect, lead to a complete dilution of the requirements of Rule 48(8) of the BSF Rules in the sense that the certification required by that Rule would then really mean nothing because, any recording officer could keep on closing and reopening the record of evidence with a view to finding further evidence at will.

20. We notice that the petitioner was a member of an Armed Force of the Union and that he is, inter alia, alleged to have assaulted a superior officer. Therefore, this Court is of the view that the interest of justice would be served if, as a consequence of the said infringement, the findings and order of the Summary Security Force Court on 3.3.1998 dismissing the petitioner from service, are set aside, and the respondents are permitted to proceed with the matter from the stage when the aforesaid certificate was issued by the recording officer for the first time on 12.02.1998. In other words, it would be open to the Commandant under Rule 6 to properly remand the case for recording of additional evidence, after which, the matter shall proceed in terms of the BSF Act and Rules to its logical conclusion as per law. It is ordered accordingly. It is made clear that, as is necessary, the petitioner shall be reinstated in service for facing trial, he shall, however, not be entitled to any pay, allowances or other benefits for the intervening period from the date of the impugned order. The petition is disposed off on the above terms. No costs.