
(2012) 07 DEL CK 0408

In the Delhi High Court

Case No : Writ Petition (C) No. 1798 of 2000

Pankaj Negi

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 09-07-2012

Acts Referred:

Border Security Force Act, 1968 — Section 14, 15, 17, 18, 40
Constitution of India, 1950 — Article 14, 16, 21

Citation : (2012) 07 DEL CK 0408

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : R.P. Sharma, for the Appellant; Ankur Chhibber Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—The petitioner has challenged the Summary Security Force Court trial conducted against him and his consequent dismissal from service by order dated 28th April, 1999 and he has also sought the quashing of the same on the ground of being unconstitutional and violative of Articles 14 & 16 of the Constitution. The petitioner has further sought the quashing the order in appeal passed by the respondents, dismissing his appeal. He has in addition sought his reinstatement with full back wages and all consequential reliefs. Brief relevant facts to comprehend the dispute are that the petitioner was enrolled with the Border Security Force at BSF STC Bangalore and after his enrollment he completed his basic training. Thereafter, he was posted to the unit on 18th February, 1994. The petitioner was thereafter, posted in 'A' Coy which was deployed at Border Out Post (BOP) Govindpur.

2. On 7th September, 1998, the petitioner was on operation duty at Gate No.16 of IBB fencing, which was the responsibility of 'A' Coy. The duty schedule of 'A' Coy was from 0600 hours to 1200 hours.

3. At about 0945 hours on the same day, Inspector Murari Singh came to the O.P

and asked the petitioner whether six men had tried to push through six heads of cattle towards Bangladesh from gate No.16. According to the petitioner, he replied that the said cattle were grazing at about 150 feet inside the Indian territory. Thereafter, the Inspector ordered the petitioner and the Sentry at O.P duty to catch both the men and their cattle. They were chased by the petitioner, however, they still managed to enter the village and therefore could not be caught.

4. According to the respondents, Inspector Murari Singh had rather observed that few heads of cattle were going from the side of the village Govindpur and heading towards the international border and were about to reach Bangladesh through gate No.16. On seeing through his binoculars, he saw that six heads of cattle with six persons were rushing towards gate No.16. On realizing the seriousness of the situation, he rushed on a motorcycle to gate No.16 and noticed that 10 cattle with 10 persons were to cross the international border (IB). Inspector Murari Singh had asked the petitioner and Ex.Lnk Durug Singh as to how 10 cattle had crossed through Gate No.16 and were about to cross the international border with men. However, neither the petitioner nor the other person could give any satisfactory reply. Inspector Murari Singh then had ordered the petitioner to catch the six persons running away with their cattle, however, all the six persons took their cattle to village Govindpur and thereby could not be caught. Inspector Murari Singh thus observed that the petitioner deliberately showed no interest in catching the escaping cattle with smugglers and on checking the gate register, it was also realized that no entry was made in the register of the cattle crossing the IB through gate No.16 which is a mandatory requirement as per SOP.

5. The Company Commander also made enquiries, however, no satisfactory replies were given. Therefore, a detailed report of the case was forwarded to Bn.HQ. The petitioner was, thereafter, called to Bn.HQ and an ROE vide order No.14421-24 dated 15th September, 1998 was ordered. On completion of the ROE, the SSFC trial was held on 28th April, 1999 which ultimately passed the sentence of dismissal of the petitioner from service which was thereafter also confirmed by the DIG, BSF, Calcutta on 26th July, 1999.

6. According to the petitioner, after the incident of 7th September, 1998 an order was issued on 15th September, 1998 suspending the petitioner and his companion and after 4 days an ROE was ordered in terms of Rule 45 of the BSF Rules on the charge u/s 40 of the BSF Act for failing to detect 16 cattle crossing over to Bangladesh.

7. The petitioner asserted that the SSFC was ordered only after 7 months on 19th April, 1999 since the incident took place. It is contended that rule 63 of the BSF Rules was not complied with, as neither the charges were explained to him nor was he informed of his legal and constitutional rights as an accused person in terms of Rule 157 of the BSF Rules and Article 21 of the Indian Constitution. The petitioner also raised the grievance that as he was in captivity and was located

thousands of miles away from his family he could not arrange a professional legal advisor, which gravely prejudiced him and thus he could not properly defend himself.

8. According to the petitioner, the trial was held on 22nd April, 1999 and he had pleaded not guilty. It is also contended that the evidence adduced before the Summary Security Force Court was not sufficient, as there was no material evidence adduced from the record which showed the culpability of the petitioner, however, inspite of this he was dismissed from the service. The petitioner contended that he made an attempt to catch the cattle and it is not that no effort was made by him and in the circumstances the penalty of dismissal from service is too harsh and disproportionate to the lapse attributed to him. The petitioner further contended that he had filed a statutory appeal dated 11th October, 1999 which was also dismissed by the respondents by order dated 2nd February, 2000. The petitioner challenged his dismissal from service, inter-alia, on the grounds that the petitioner was charge sheeted without any application of mind; that the petitioner and his senior colleague ought to have been jointly charged; that the Commander did not give adequate time and opportunity to the petitioner to prepare his defense and that he was given charge sheet and ROE at only about 70 hours before the commencement of the trial, which did not leave much time to the petitioner to seek legal advice in preparing his defense and thus the proceedings were conducted in violation of Rule 63(4) and Rule 157 of the BSF Rules; that the mandatory provision of Rule 45(A) of the BSF Rules was not complied with and that the findings of the Summary Security Force are based on no evidence as there was no mention of whether or not the cattle in question were accompanied by any persons, which is clearly reflective of the fact that the cattle may have just strayed into Bangladesh and also because there is evidence that the land between gate No.16 and Bangladesh border belongs to the Indian nationals and that at that time the paddy crop was also in full bloom. In the circumstances, it is urged that the cattle would not have left the green paddy fields in preference to an unknown tract of land in Bangladesh. The petitioner contended that he could not have been held blameworthy for failing to detect the six cattle entering Bangladesh. The petitioner further asserted that he could not have seen from such a far distance whether the cattle were bulls or cows as in the charge the word used is "bulls". The petitioner also asserted that there is no evidence to show that any order was passed directing the BSF men not to allow Indian nationals to graze their cattle in the said fields. The petitioner also alleged the violation of Rule 151, as according to the petitioner his past conduct was not taken into consideration while awarding the punishment of dismissal from service. The petitioner has also alleged that the sentence awarded to the petitioner, in view of the charges imputed against him, is disproportionate to the evidence against him.

9. The writ petition is contested by the respondents by contending, inter-alia, that the petitioner performed the duties negligently and failed to detect 16 bulls which crossed over to Bangladesh from gate No.16 of the IBB fencing through his

area of responsibility at about 0945 hours where he was deployed on OP Duty along with L/nk Durug Singh. The respondent contended that the petitioner was tried by the Summary Security Force Court and thereafter three prosecution witnesses were examined and after considering the deposition of the prosecution witnesses and considering the defense of the petitioner, it was found that the petitioner was guilty of the charge and therefore, he was dismissed from service.

10. The respondents contended that Rule 45 of the BSF Rules was complied with and the order for record of evidence (ROE) was issued against the petitioner only thereafter. On the basis of the record of evidence, the decision was taken to convene the Summary Security Force Court. The charge was properly explained to the petitioner during the course of SSFC trial and the petitioner himself had nominated Sh. Anil Thakur, Deputy Commandant, as "friend of the accused" and consequently he was appointed so. The friend of the accused, Sh. Anil Thakur, Deputy Commandant, was present during the trial of the petitioner by the SSFC. In the circumstances, it is contended that the plea of the petitioner that he was not rendered legal assistance is not sustainable. The plea that the petitioner was in captivity was also denied as he was removed from suspension with effect from 15th December, 1998.

11. Regarding the negligence of the petitioner, it is contended that he was posted to prevent smuggling and crime, however, he did not even detect the presence of six cattle in the area of his responsibility which were meant for smuggling them over to Bangladesh through gate No.16 of the IBB fencing. During the trial of the petitioner by the SSFC, the petitioner was given an opportunity to cross examine the witnesses and the petitioner had cross examined them. Against the order of dismissal, the petitioner had also filed a statutory appeal which was dismissed by the Director General after carefully considering all the pleas raised by the petitioner.

12. Regarding the compliance of the provisions of the BSF Act and the relevant rules, it is contended by the respondents that the trial was in accordance with the rules and that no prejudice was caused to the petitioner. It was further contended that the petitioner was given sufficient time to defend himself. The respondents also categorically denied the violation of Rule 45. According to the respondents mandatory hearing under Rule 45 was conducted by the officiating Commander and that there was no fatal infraction of law vitiating the subsequent proceedings. In any case it is contended that before the SSFC and during the SSFC proceedings no infraction was pointed out by the petitioner of Rule 45 and, therefore, even if there was violation of any of the rules, the SSFC proceedings will not be vitiated on account of it. According to the respondents the deposition of Inspector Murari Singh is sufficient to inculcate the petitioner.

13. Regarding the punishment awarded to the petitioner, the respondents contended that the punishment is commensurate with the gravity of the offence and the allegations leveled against him. Being a willful associate to the smugglers while on International border duty to prevent the smuggling, the

petitioner did a shameful act against the duty of BSF and had therefore been negligent.

14. The pleas and contentions raised by the respondents in their counter affidavit were refuted by the petitioner who filed a rejoinder dated 17th November, 2003 reiterating the pleas and contentions raised in the writ petition. The petitioner also relied on Union of India & Ors. v. B.N.Jha, 2001(58) DRJ 765; Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, Union of India & Anr. v. Ram Paul 2005 (83) DRJ 718, and LPA No.409/2004, Raj Kumar v. Union of India decided on 21st November, 2008. The learned counsel for the respondents, however, relied on B.N. Jha Deputy Commandant Vs. Union of India and Others, , & Union of India v. Dev Singh, (2007) 15 SCC 709 in support of the pleas and contentions raised on behalf of the respondents.

15. This Court has heard the learned counsel for the parties in detail and has also perused the original record of the SSFC and the ROE produced by the respondents before this Court. Perusal of the record reveals that in the proceedings, the defense report indicates that the respondents had ordered ROE to be prepared by the appropriate officers. The proceedings dated 15th September, 1998 reveals that hearing of the charge commenced on that date at 1325 hours and in the cyclostyled Performa in which the various columns regarding the date on which the witnesses were heard orally by the Commandant, the particulars of the prosecution witnesses, description of the documentary evidence produced, and whether the accused had cross examined the witnesses, etc. have been left blank. The said proceedings only records that the ROE be prepared and is signed by the Commandant. According to the learned counsel for the petitioner Rule 45 of the Border Security Force Rules, 1969 contemplates that the charge will be heard by the Commandant and thereafter, the charge and statements of the witnesses should be read over to the accused and the accused should also be given an opportunity to cross examine the witnesses and make a statement in his defense. Rule 45 of the Border Security Force Rules, 1969 is as under:-

45. Hearing of the charge against an enrolled person.-

(1) The charge shall be heard by the Commandant of the Accused:-

(a) The charge and statements of witnesses if recorded shall be read over to the accused. If written statements of witnesses are not available, he shall hear as many witnesses as he may consider essential to enable him to determine the issue;

(b) the accused shall be given an opportunity to cross examine the witnesses and 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 cases where the Commandant awards more than 7 days imprisonment or detention he shall record the substance of evidence and the defence of the accused: Provided further that he shall dismiss the charge, if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him it is not advisable to proceed further with it: Provided also that, in case of all offences punishable with death a record of evidence shall be taken. Provided further that in case of offences under Sections 14, 15, 17, 18 and offence of "murder" punishable u/s 46 of the Act, if the accused has absconded or deserted, the Commandant shall hear the charge in his absence and remand the case for preparation of the record of evidence.

45 A. Hearing of charge by an officer specified u/s 53 of the Act.-

(1) A specified officer may proceed against an enrolled person if,-

(a) the charge can be summarily dealt with; or

(b) the case has not been reserved by the Commandant for disposal by himself; or

(c) the accused is not under arrest.

(2) After hearing the charge under sub-rule (1) of the Rule 45 the specified officer may,-

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

(ii) dismiss the charge, or

(iii) refer the case to Commandant.

45 B. Hearing of charge against an officer and a subordinate officer.-

(1) (a) The charge against an officer or a subordinate officer shall be heard by his Commandant: Provided that charge against a commandant, a Deputy Inspector-General or an Inspector General may be heard either by an officer commanding a Unit or Headquarters to which the accused may be posted or attached or by his Deputy Inspector-General, or his Inspector-General or, as the case may be, the Director-General.

(b) The charge sheet and statement of witnesses, if recorded and relevant documents, if any, shall be read over to the accused if he has not absconded or deserted.

Provided that where written statements of witnesses are not available, the officer, hearing the charge shall hear as many witnesses as he may consider essential to enable him to know about the case.

(c) The accused if he has not absconded or deserted shall be given an opportunity to make a statement in his defence.

(2) After hearing the charge under sub-rule (1), the officer who heard the charge may :-

(i) dismiss the charge; or

(ii) remand the accused, for preparation of a record of evidence or preparation of abstract of evidence against the accused: Provided that he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him, it is not advisable to proceed further with it: Provided further that in case of all offences punishable with death, a record of evidence shall be prepared. Provided also that in case of offence u/s 14, 15, 17, 18 and offence of "murder" punishable u/s 46 of the Act, if the accused has absconded or deserted, the Commandant shall hear the charge in his absence and remand the case for preparation of record of evidence.

16. The learned counsel has laid great emphasis on B.N. Jha's case (supra) rendered by a Division Bench of this Court which considered the mandate of Rule 45B, 46, 48 and 51A of the Border Security Force Rules, 1969. This Court had laid down that under Rule 45B the Commandant ought to have heard the charge himself, as in the said case he instead had directed another person who was directly working under him to initiate disciplinary action against the accused. It was held that the direction of the Commandant, Mr.Garcha, was contrary to the mandate of Rule 45B and it was held that Rule 45B had been violated and in the process the accused's valuable right was infringed. This Court had further held that according to Rule 45 the Commandant has to hear the charge and if he is not convinced, then at that very stage he can dismiss the charge and since the Commandant did not hear the charge, the accused was denied a valuable right which was lost by him. In para 44 of the judgment it was held that according to Rule 45B the Commandant can direct recording of the evidence only after hearing the accused under Rule 45B. Para 44 of the said judgment is as under:-

44. We have considered the rival contentions of the parties. It is not necessary to reproduce the entire evidence in this case. The learned Single Judge has correctly observed that Rule 45B has been violated. According to the said Rule the Commandant can direct recording of the evidence only after hearing the accused under Rule 45B. The entire record has been placed before us. There is nothing on record by which it can be established that Rule 45B was followed. The learned Single Judge was correct when he mentioned that a very valuable right of the respondent has been denied. Therefore, the subsequent proceedings taken under Rule 45B are also unsustainable in law.

17. The appeal filed against the judgment of the High Court was also dismissed by the Supreme Court which is reported as Union of India vs. B.N.Jha, JT 2003 (3) SC 201, holding that Rule 45B confers a discretionary power upon the

Commandant of the accused to discharge not only on the ground that there does not exist any material on record to proceed against him but also on the ground that having regard to the previous character of the accused and the nature of charge against him it was not advisable to proceed further in the matter. The said rule therefore, leaves no manner of doubt that the Commandant of the accused is required to apply his mind on the materials on record so as to enable him to arrive at a finding in favor or against the officer. In the said case there was no record establishing that the accused was supplied with any material, which is the mandatory requirement under Rule 45B. There was nothing on the record also to show that at least the materials which were referred to by the Commandant were brought to the notice of the accused and that he had been given an opportunity to make a statement in his defense. There was also nothing on record to show that even the materials in possession of the officer who had conducted the proceedings under Rule 45B in place of Commandant were considered independently before directing preparation of record of evidence (ROE). Since the Single Judge and the Division Bench had considered the material pertaining to Rule 45B of BSF Rules and came to the conclusion that the valuable rights of the accused had been breached, it was held that their findings could not be termed to be perverse or contrary to law and, therefore the Supreme Court had dismissed the appeal filed by the Union of India.

18. In *Raj Kumar (supra)* the allegation against a constable of the BSF was that he had allowed the cattle to cross from India to Bangladesh for which the charge sheet was issued to the accused alleging that while on duty at Kanchantar BOP the constable had shown negligence in discharge of his duties by improperly and without authority allowing approximately 25 to 30 cattle to cross the International Border which were headed towards Bangladesh. On the next date the Commandant had found the constable guilty of the charge and had sentenced him to be dismissed from service. The appeal filed by the constable was dismissed and a writ petition filed before a Single Judge was also dismissed. In this case the evidence was thereafter examined by the Division Bench and the Court came to the conclusion that though the specific charge was that the constable had allowed 25 to 30 cattle heads to cross from India to Bangladesh, but no charge of smuggling was framed against the constable. On perusal of the evidence, the Division Bench was of the view that the statement of adjutant Mange Ram about cattle smugglers appeared to have been made for the first time during the examination which clearly did not constitute the charge against the constable and in any case the evidence of the adjutant was held to be based on mere hearsay, as none of the other depositions had supported his version. In the circumstances it was held that even on preponderance of probability, the charge could not be established against the constable and it was a case of no evidence and consequently the punishment awarded was set aside.

19. In *Lt.Col.Prithi Pal Singh Bedi (Supra)* the Supreme Court, while dealing with Rule 22, 23 and 24 of the Army Rules, had held that the said rules are mandatory in respect of every person subjected to the Army Act other than an

officer. The Supreme Court had held that non compliance of mandatory Rule 22, 23 and 24 in respect of such persons would invalidate the enquiry.

20. In Ram Paul (supra) while dealing with the Summary Court Martial it was held by a Division Bench that the charge was not supported by any evidence, therefore, there should have been no conviction and that the trial of the person imputed with such charge was without jurisdiction and thus illegal. In the said case the accused was posted at BOP (Border Outpost) and an allegation was made against him that while performing the duty he not only did not exercise his authority, but he also did not prevent the smugglers from crossing the border and go into Bangladesh and instead allowed the smugglers to cross the border. The charged officer had pleaded not guilty and thereafter, the record of evidence was ordered to be prepared to the two charges which were framed against him. On the basis of record of evidence, the competent authority had passed an order for trial of the accused constable by Summary Security Force Court on a charge u/s 40 of the BSF Act. Before the Summary Security Force Court the charge against the accused constable was amended and during the proceedings thereafter, after the chargesheet was read and explained to the accused constable, he pleaded guilty. As the accused constable had pleaded guilty the Commandant passed the order of conviction. The appeal filed by the accused constable was also dismissed with a cryptic order and against the said order in the legal proceedings it was contended that there was non compliance of Rule 45 and that the charge on the basis of which the petitioner was convicted and sentenced, was passed on no evidence at all and, therefore, no sentence could have been awarded to the petitioner. On perusal of the ROE it had transpired that there was no reference at all, of the accused constable accepting any illegal gratification. As there was neither any reference nor any statement made by any of the witnesses that the accused constable had accepted illegal gratification, in return for which he allowed the smugglers to cross the international border, the Court held that there was no evidence on record for substantiating the charge of acceptance of illegal gratification and, therefore, there could not be any such charge made out against the accused constable nor could there be any conviction even on assuming that the petitioner had pleaded guilty and consequently the Division Bench had set aside the order of conviction. The order of the Division Bench was challenged in SLP (Civil) No.26064/2004 titled as "Union of India & Anr v. Ram Paul" which was dismissed by the Supreme Court on 4th January, 2005.

21. However, perusal of the ROE in the case of the petitioner reveals that there is sufficient evidence against the petitioner for framing of the charge. PW-1 Inspector Murari Singh had deposed that on reaching gate No.16, 6 heads of cattle along with six persons were coming from Govindpur Village, which were approximately 150 ft away from the said gate. He categorically stated that the petitioner with Lance Naik Durug Singh was standing at O.P Point. He asked the petitioner and the other Lance Naik as to how the head of the cattle had crossed the gate, however, the petitioner showed his ignorance. He also asked the

petitioner and the other personnel to rush behind the cattle and apprehend them but they could not be apprehended by the petitioner. He deposed that he had not found entry of any cattle in the register. He also deposed that he had confronted the petitioner that if there was no entry in the register how was there fresh footprints of the cattle, however, the petitioner again showed his ignorance. The petitioner had been given an opportunity to cross examine the said witness and he put questions against him in the cross examination as well. The other witness who was examined as PW-2 in ROE was Lance Naik Arun Ghosh. He had also deposed about the petitioner. Similarly PW-3 Head Constable Tej Singh had also deposed about the petitioner. Perusal of the proceedings also reveals that the petitioner was cautioned under Rule 48(3) of the BSF Rules and the petitioner did make a statement in his defense. The petitioner rather stated that there were no footprints but the company commander had told the petitioner that he was telling a lie. The petitioner was also given an opportunity to call any other witness in his defense, however, he did not examine any other witness. In the circumstances, it cannot be held that there was no evidence against the petitioner in the ROE.

22. Regarding the compliance of Rule 45, it is only revealed from the record that the hearing of the charge commenced on 15th September, 1998 at 1325 hours. The proceeding sheet thereafter has blanks and at the bottom it is ordered that an ROE be prepared. The offence report shows that the petitioner pleaded not guilty and the findings of the Commandant shows 'guilty Rs. and thereafter it contains the order that the ROE be prepared. Perusal of Rule 45B contemplates that the charge sheet and the statements of the witnesses, if recorded, and relevant documents, if any, shall be read over to the accused, however, where the written statement of the witnesses are not available to the officer hearing the charge, then he shall hear as many witnesses as may be considered essential to enable him to know about the case and the accused is also given an opportunity to make a statement in his defense. From the proceeding sheet and the offence report dated 15th September, 1998, it does not appear that the charge sheet and statements of witnesses were read over to the accused nor is it disclosed if the statements of witnesses in writing were available at that time. In the facts and circumstances, it is not clear as to on what basis the ROE was ordered by the Commandant from the proceedings sheet and the offence report dated 15th September, 1998.

23. Perusal of the original proceedings of the Summary Security Force Court, however, reveals that witness PW-1 Murari Singh was examined and he was also cross examined by the petitioner extensively. Head constable Tej Singh, PW-2 was also examined before the Summary Security Force Court. The petitioner was thereafter given the opportunity to cross-examine him, however, he had declined. Instead the Summary Security Force Court had put certain questions to the said witness. To a question put by the Court whether the farmers were ploughing the fields, the witness had replied that since the crop was ripe the fields were not ploughed. Another witness which was examined before the

Summary Security Force Court was Lance Naik Arun Ghosh as PW-3. The petitioner was given the opportunity to cross examine the said witness but he had declined, however, the Court had put certain questions to the said witness who, however, corroborated the statement of PW-1 and PW-2. Another witness examined before the Summary Security Force Court was PW-4 Constable Devinder Kumar. The petitioner was given an opportunity to cross examine him as well but he again had declined.

24. Before the Summary Security Force Court the petitioner had declined to examine any of the witness in support of his defense. The petitioner was also asked to make a statement but he had declined to do so. On perusal of the evidence recorded before the Summary Security Force Court it cannot be held that the petitioner was not guilty of the charges framed against him.

25. From the perusal of the proceedings it appears that the charge sheet and the statement of witnesses and the relevant documents were not read over to the petitioner in violation of Rule 45B (2) as is apparent from the proceeding sheet and the offence report as they did not mention anything regarding the same. Along with the offence report nothing is annexed which would show that no written statement of witnesses was available at the time nor do the proceedings of the offence report disclose that the Commandant had heard any witnesses to know about the case as no such mention is made in the proceedings of the offence report.

26. If there is a violation of Rule 45B, whether the Summary Security Force Court proceedings shall be vitiated or not is the next question for consideration. The learned counsel for the respondents has contended that during the recording of the ROE the petitioner did not raise the objection about non compliance of Rule 45B and in the Summary Security Force Court also the petitioner did not raise the objection about non compliance of Rule 45B and in any case before the Summary Security Force Court he had ample opportunity to cross examine the witnesses on the basis of whose testimony he has been held liable for the charges framed against him. Rather, before the Summary Security Force Court the petitioner had declined to make any statement and also declined to produce any witnesses in support of his pleas and contentions. The learned counsel has relied on *Union of India v. Dev Singh*, (2007) 15 SCC 709, wherein the Supreme Court had held relying on Rule 149 that if there was irregularity before the stage of initiation of Court Martial the same will not vitiate the Court martial proceedings as the officer had cross examined the witnesses during the Court martial proceedings and had not raised any objection regarding non compliance or violation of the mandatory Rule 22. It was held that if subsequent to the proceeding under Rule 22 of the Army Rules, a regular Court martial is held, during which proceedings the officer concerned is given full opportunity to cross examine the witnesses who deposed against him, then the defect of non compliance with Rule 22 would not vitiate the Court martial proceedings and the delinquent could not complain of any violation of statutory rules. According to the

learned counsel, Rule 45B is para materia to Army Rule 22 & 23 and even if a strict compliance of Rule 45B was not made, the petitioner ought to have objected about it in the ROE or at least before the Summary Security Force Court. According to the learned counsel for the respondents, during the Summary Security Force Court the petitioner had the full opportunity to cross examine the witnesses and in fact had cross examined one of them while on the other hand he did not give any statement in his own defense or examine any other witnesses in support of his plea. Therefore, he cannot be allowed to take the plea of Rule 45B not being strictly complied with in his case.

27. Perusal of the original proceedings under Rule 45B and thereafter the ROE of the Summary Security Force Court has been indicated hereinabove. It is apparent that the petitioner did not object or raise objections regarding non compliance of the mandatory requirement of Rule 45B. The petitioner rather cross examined the witnesses during ROE and also deposed in support of his contentions but did not raise any objection about non compliance of Rule 45B. The plea of the learned counsel for the petitioner that the petitioner is not literate and did not know the intricacies of the rules cannot be accepted in the facts and circumstances. The plea regarding non compliance of Rule 45B was also not categorically raised by the petitioner before the Summary Security Force Court and, therefore, the plea of the petitioner that since Rule 45B of the BSF Rules was not strictly complied with, therefore, the findings of the Summary Security Force Court will be vitiated cannot be accepted.

28. The case is also distinguishable from the case of Lt.Col.Prith Pal Singh Bedi (Supra) relied on by the petitioner as subsequent to the proceedings under Rule 45B, the Summary Security Force Court was held during which the petitioner had full opportunity to cross examine the witness who had deposed against him and, therefore, the defect, if any, of compliance with Rule 45B would not vitiate the Summary Security Force Court proceedings. The Supreme Court in the case of Dev Singh (Supra) had distinguished the case of Col.Prith Pal Singh Bedi. In *Union of India v. Major A.Hussain*, (1998) 1 SCC 537 wherein also no objection was taken as to the violation of mandatory rule 22 at the time when the Court martial proceedings were initiated, relying on Rule 149 it was held by the Supreme Court that the irregularity, if any, in the preliminary proceedings would not prejudice the delinquent officer. Similarly, in the case of the petitioner irregularity, if any, in compliance with Rule 45B will not vitiate the Summary Security Force Court in the facts and circumstances.

29. As far as the sufficiency of the evidence before the Summary Security Force Court is concerned, this Court in judicial review of the decision of SSFC Court will not take over the function of SSFC Court as the writ petition is not an appeal against the findings of SSFC nor can this Court exercise or assume the role of the appellate authority. It cannot differ with the findings of the fact arrived at by the SSFC except in the cases of malafides or perversity i.e. where there is no evidence at all to support the finding or where the finding is such that anyone

acting reasonably or with objectivity could not have arrived at the same or where a reasonable opportunity has not been given to the accused to defend himself or it is a case where there has been non application of mind on the part of Summary Security Force Court. In the present case, there was evidence before the Summary Security Force Court, however, the sufficiency of evidence is not to be assessed by this Court. The grounds on which the decision of the SSFC can be interfered by judicial review are "illegality", "irrationality" and "procedural impropriety". As far as procedural impropriety is concerned, it has already been held that on the grounds raised by the petitioner, this Court cannot interfere. As far as illegality or irregularity is concerned, the learned counsel for the petitioner has failed to make out any such illegality or irregularity which shall entail any interference by this Court. The learned counsel for the petitioner has rather tried to emphasize that the evidence of the witnesses cannot be relied on as from a distance it could not be asserted whether the cattle were bulls or cows. Such pleas as has been raised by the learned counsel for the petitioner are not sufficient to conclude that the SSFC had left out relevant factors or had taken into account irrelevant factors. In any case, it was for the petitioner to have put such questions, as has been raised by the counsel for the petitioner now, that from a distance it could not even be ascertained whether the cattle which had crossed the gate were bulls or cows, to the witnesses who had appeared in the ROE and thereafter in the Summary Security Force Court. This Court as has already held that it will not re-appreciate the evidence on the basis of the assumptions raised by the learned counsel for the petitioner.

30. With regard to the petitioner's plea of disproportionate punishment imposed on him, on carefully examining the record it is clear that the charge framed against the petitioner is only of not detecting 16 bulls crossing over to Bangladesh from India. Also it is evident that even though the superior authority, Inspector Murari Singh, who has deposed against the petitioner had detected the cattle crossing the border over to Bangladesh, however, he too was unsuccessful in retrieving the cattle. Moreover, there is nothing on the record to establish that the petitioner was involved with any smugglers or that he had accepted any illegal gratification for allowing the cattle to cross over the international border or that he deliberately allowed the cattle to cross over the border, nor is this the charge framed against him. In the circumstances, the allegations proved against the petitioner does not warrant such an extreme punishment of dismissal from service which has been imposed on him. Even if there was failure on his part to detect the cattle cross over the International Border, this will not reflect extreme negligence or dereliction of duty by him. It can hardly be disputed that the punishment of dismissal from service is the severest punishment that could be imposed upon an employee. For imposition of such punishment, it should be necessary that the charge is proved and the conduct of the employee is such that it would invite imposition of such a harsh punishment. It is not possible to evolve a straight-jacket formula to determine the excessiveness or otherwise of the punishment awarded, however, in the present case it is clear that the

punishment is so strikingly disproportionate, that it demands judicial interference. The Apex Court has, however, repeatedly held that the imposition of punishment is primarily the job of the Disciplinary Authority and in normal circumstances even if the Tribunal or the Court comes to a finding that the punishment imposed on a delinquent in a given case is excessively harsh, disproportionate to the proved misconduct or is one which shocks the conscience of the Court, it may after setting aside the said punishment, remand back the matter to the Tribunal or to the Disciplinary Authority for the imposition of punishment afresh. Thus, the appropriate course of action would be to remand the matter to the respondent authorities, in order to reconsider the quantum of punishment imposed on the petitioner. The writ petition is accordingly allowed and the order of dismissal dated 28th April, 1999 and the order dated 2nd February, 2000 dismissing the petitioners statutory appeal are set aside. The matter is remanded back to the respondent authorities, to impose a suitable punishment by the competent authority, which needless to state would be less than the penalty of dismissal already imposed or removal, and which should commensurate with the charge framed against the petitioner. The petitioner is permitted to appear in person before the competent authority who would hear him on the issue of penalty and thereafter, would pass a reasoned order justifying the quantum of penalty imposed. The needful would be done by the respondent authorities within a period of two month from the date of the order and the decision will be conveyed to the petitioner. While awarding punishment, the respondents shall take into consideration the past record of the petitioner. The writ petition is, therefore, allowed to this extent. The parties are however left to bear their own costs.