

**(2012) 10 DEL CK 0221**  
**In the Delhi High Court**  
**Case No : Writ Petition (C) 4503 of 1997**

Surendra Kumar

APPELLANT

Vs

UOI and Others

RESPONDENT

**Date of Decision :** 31-10-2012

**Acts Referred:**

Border Security Force Act, 1968 — Section 117(2), 14, 15, 17, 18  
Constitution of India, 1950 — Article 226, 227

**Citation :** (2012) 10 DEL CK 0221

**Hon'ble Judges :** Pradeep Nandrajog, J; Manmohan Singh, J

**Bench :** Division Bench

**Advocate :** Vinod Wadhwa, for the Appellant; Jyoti Singh instructed by Ms. Archana Gaur, for the Respondent

**Final Decision :** Allowed

## Judgement

Pradeep Nandrajog, J.—Briefly stated, the factual matrix leading to the filing of the present petition is that in the year 1980 the petitioner got enrolled as a Constable in the Border Security Force and earned promotion thereafter to the post of Lance Naik. On December 15, 1993, 4 officers namely : HC Har Vilash, SI Makhan Singh, Ct. Anand Singh and Ct. Virender Singh were deputed to perform guard duty at New Magazine room at BSF Academy, Tekanpur from 05:00 AM to 08:00 PM and thereafter the petitioner along with L/Nk. S.S. Patel, Ct. Baijnath Singh and Ct. R.P. Mishra were deputed to perform guard duty from 08:00 P.M. to 05:00 A.M.

2. Whereas HC Har Vilash, SI Makhan Singh, Ct. Anand Singh and Ct. Virender Singh performed the guard duty for the duration assigned, the petitioner did not reach the guard room for duty at the designated time i.e. 08:00 PM (he reached late) but the other three i.e. L/Nk. S.S. Patel, Ct. Baijnath Singh and Ct. R.P. Mishra reached the duty place on time and replaced the previous team.

3. On December 16, 1993 at about 04:25 PM it came to the light that the Self-Loaded Rifle issued to HC Har Vilash was lost by him when he was performing

guard duty on the previous day i.e. December 15, 1993. A Staff Court of Inquiry was convened by the Director, BSF Academy, Tekanpur to inquire into the circumstances under which the SLR issued to HC Har Vilash got lost. It was during the inquiry proceedings that it surfaced that the petitioner had reached late for duty; he took the stand that he had orally informed his superior officer that he would be reaching late.

4. On January 05, 1994 the Staff Court of Inquiry submitted its opinion; the relevant portion whereof reads as under:-

I. That rifle SLR ...issued to NK HARVILASH of Demo Coy, along with one magazine SLR, one bayonet with scabbard of SLR and 10 (10) live rounds of 7.62 mm BDR has been lost from the guard room tent of academy new magazine on the night intervening 15/16 December 1993 in between 2130 Hrs and 0500 Hrs.

II. That pinpoint responsibility could not fixed at this stage due to lack of direct evidence available in this case so far.

III. That though NK HARVILASH, to whom the said rifle was issued, remains responsible for the loss of his own rifle by neglect, the collusion and connivance of the guard people, directly or indirectly, cannot be ruled out.

IV. That disciplinary action should be initiated against the following on completion of final investigation:-

5. The opinion of the Staff Court of Inquiry was forwarded to the Director, BSF Academy, Tekanpur. After considering said opinion, the Director prepared a note dated 04.10.1994, the relevant portion whereof reads as under:-

?I generally agree with the findings, opinion as well as additional opinion of the Court.

...

In view of the above, I hereby direct action to be taken as under:-

...

b) Strict disciplinary action also be initiated against 800010447 NK Surinder Kumar of Demo Coy for remaining absent from Magazine Guard Duty from 2000 hrs to 2145 hrs and for consuming liquor while on duty on the night intervening 15/16 Dec 1993.

(Emphasis Supplied)

6. On July 27, 1995 the Director, BSF Academy, Tekanpur yet again prepared a note with regard to the opinion dated January 05, 1994 of the Staff Court of Inquiry, which note records that "Disciplinary action as per remarks of the Director given on the proceeding dated 4 Oct. 1994 be taken immediately."

7. On January 15, 1996 Commander, TAC Wing, BSF Academy held proceedings

under Rule 45 of the BSF Rules, 1969 and finding a case for preparing Record of Evidence, drew up a charge as under:-

8. Relevant would it be to note that the charge was simply of not reporting for duty at the designated time i.e. 20:00 hours. There was no charge that the petitioner had consumed liquor.

9. At the Record of Evidence proceedings, the department examined 12 witnesses. HC Ratan Singh PW-1, deposed that the petitioner was detailed to perform guard duty at New Magazine Room on December 15, 1993 from 08:00 P.M. to 05:00 A.M.; L/Nk. S.S. Patel PW-3, L/Nk. N.N. Rao PW-4, Ct. Baijnath Singh PW-5, Nk. Har Vilash PW-6 and Ct. Ravinder Prasad PW-7, deposed that on December 15, 1993 the petitioner had reported late for duty; Ct. Jai Narayan PW-8, Ct. Harun Khan PW-9 and Nk. Satpal Singh PW-10, deposed that on December 15, 1993 the petitioner had consumed liquor few hours before the commencement of his duty and Subedar Singh PW-11 and D.S. Sandhu PW-12, the superior officers of the petitioner, deposed that the petitioner had not taken any permission from them for reporting late for guard duty.

10. Be it noted here that the petitioner did not cross examine any witness of the department despite being provided with an opportunity in the said regard. The petitioner neither made a statement before the Recording Officer in terms of the provisions of Rule 48(3) of the BSF Rules nor led any evidence in his defence.

11. After the preparation of the Record of Evidence and consideration thereof, the Commandant, TAC Wing, BSF Academy directed that a Summary Security Force Court (hereinafter referred to as the "SSFC") be convened to conduct the trial in respect of the charge framed against the petitioner.

12. At the trial, the petitioner pleaded guilty to the charge framed against him. But would explain by stating that what he intended to convey was the admission of the fact that he reached late for duty and not that he intended to admit any negligence in that he had orally informed the superior officer that he would be reaching a little late.

13. In view of the plea of guilt taken by the petitioner, vide order dated May 02, 1996, the Summary Security Force Court convicted the petitioner and awarded a sentence of reduction of rank of the petitioner from Lance Naik to Constable.

14. Aggrieved by the finding and sentence of the Summary Security Force Court the petitioner filed an appeal u/s 117(2) of the BSF Act, 1968 before the Director General stating therein that he had stated before the Summary Security Force Court that in the night of December 15, 1993 he had sent information to the second-in-command of the guard duty that he would report little late for the guard duty due to an unexpected emergency and that he should manage guard duty during the period of his absence, but the Summary Security Force Court construed the said statement made by him as an admission of guilt by him i.e. the petitioner.

15. Vide order dated December 02, 1996 the Director General rejected the appeal filed by the petitioner, but regretfully without dealing with the stand projected by the petitioner in the appeal.

16. Aggrieved by the aforesaid, the petitioner has filed the present petition under Articles 226 and 227 of the Constitution of India reiterating the stand taken by him in his appeal.

17. Rule 45 of the BSF Rules, 1969 reads 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.?

18. Rule 45 of the BSF Rules, 1969 confers a discretionary power upon the Commandant to discharge an accused not only on the ground that there does not

exist any material on record which would establish his guilt but also on the ground that having regard to the previous character of the accused and the nature of charges against him no action is warranted against the accused. Thus, Rule 45 envisages that the Commandant should apply his mind to the materials on record, previous character of the accused and nature of charges against him and come to the conclusion that whether an accused should be discharged or not.

19. In the instant case, vide its opinion dated January 05, 1994 the Staff Court of Inquiry opined that a disciplinary action should be initiated against the petitioner for having remained absent from guard duty from 08:00 PM to 09:45 PM on December 15, 1993.

20. While considering the opinion of the Staff Court of Inquiry, the Director, BSF Academy, Tekanpur, directed the initiation of a disciplinary action against the petitioner for having remained absent from guard duty from 08:00 PM to 09:45 PM on December 15, 1993. Again on July 27, 1995 the Director, BSF Academy, Tekanpur directed initiation of a disciplinary action against the petitioner.

21. In the present case, Commander, TAC Wing, BSF Academy was delegated the functions of the Commandant. It is worth mentioning here that the Director, BSF Academy was senior to the Commander, TAC Wing. When his senior i.e. Director had already directed initiation of a disciplinary action against the petitioner, Commander TAC Wing had no option but to fall in line with the direction of his senior and frame the charge against the petitioner. Furthermore, there is nothing on the record to show that the Commander TAC Wing had applied his mind to the materials on record, previous character of the petitioner and nature of charge against the petitioner before framing the charge against the petitioner, which circumstance is a pointer to the fact that the Commander TAC Wing had framed the charge against the petitioner only on the command of his senior i.e. the Director.

22. Such being the position, it has to be held that Rule 45 of the BSF Rules, 1969 has not been complied with in the present case, in that the Commander, TAC Wing had not applied his mind to the materials on record, previous character of the petitioner and nature of charge against the petitioner before framing the charge against the petitioner.

23. A somewhat comparable situation had also arisen before the Supreme Court in the decision reported as Union of India (UOI) and Others Vs. B.N. Jha, The facts of the said case were that the respondent was working on the post of Deputy Commandant in the Border Security Force and posted at Training Centre and School, BSF in the year 1990. In or about July, 1990 allegations were leveled against the respondent of having received a gratification from 2 persons for procuring their recruitment as constables in the BSF. On September 04, 1990 Mr. Garcha, a superior officer wrote a letter to Mr. M.S. Arya, the Commandant of the respondent, the relevant portion whereof reads as under:-

Sub: Acceptance of Illegal Gratification by Shri B.N. Jha, Dy. Comdt., BTC for

Enrollment of R/CTs Bhabesh Kumar and Santosh Kumar Jha in the BSF.

Please find enclosed herewith Photostat copies of Commandant STC BSF HAZARIBAGH letter No. STC/Disc/90/2156 dated 17th July, 1990 and STC/Dis/90, dated 18th July, 1990 regarding the acceptance of illegal gratification by Shri B.N. Jha, Dy. Commdt. from R/CTs. Bhabhesh Kumar and Santosh Kumar Jha recruited from Madhubani (Bihar) for your information. The letters mentioned above are self-explanatory. The Cassettes containing the voluntary statements of the said reacts are available with Commandant STC, Hazaribagh with may be obtained from him if required.

2. You are, therefore, requested to kindly initiate disciplinary action against Shri B.N. Jha, Dy. Comdt. Working under your control immediately.

(Emphasis Supplied)

24. The respondent therein was tried by a General Security Force Court, which held the respondent guilty of the charges framed against him and awarded a sentence of dismissal from service to him. Aggrieved by the aforesaid, the respondent filed a petition under Article 226 of the Constitution of India which was allowed by a learned Single Judge of this Court on the ground that the department had grossly violated the provisions of Rules 45-B and 46 of the BSF Rules, 1946, which decision was upheld by a Division Bench of this Court. Union of India appealed against the decision of the Division Bench before the Supreme Court. After noting the contents of the letter dated September 04, 1990 written by Mr. Garcha and Rule 45-B of the BSF Rules, 1969 (Rule 45-B is identically worded as Rule 45, the only difference between the two being that Rule 45-B deals with officers and Rule 45 deals with enrolled persons) it was held by the Supreme Court that the contents of the letter dated September 04, 1990 written by Mr. Garcha brings out that the Mr. M.S. Arya, the Commander of the respondent, had framed the charge against the respondent only on the command of his senior i.e. Mr. Garcha and had not applied his mind to the material on record, previous character of the respondent and nature of charge against him before framing the charge against him. It was held by the Supreme Court that in such circumstances the decision of the courts below that the department had grossly violated the provisions of Rule 45-B of the BSF Rules, 1969 cannot be faulted with. The relevant discussion contained in the decision is being noted herein under:-

36. 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 charges against him it was not advisable to proceed further in the matter.

37. Rule 45B of the Rules, therefore, having regard to the extent and nature of the power of the disciplinary authority, 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. The manner in which the charge-sheet has been drawn leads to only one conclusion that Mr. Arya did so only on the command of Mr. Garcha. On a query made by us, Mr. Ranjit Kumar stated that no record is available with him to show that the respondent was supplied with any material as is mandatorily required under Rule 45B. There is nothing on record to show at least the materials which were referred to in Shri Garcha's letter dated 4th September 1990, were brought to the notice of the respondent and he has been given an opportunity to make a statement in his defence. There is also nothing on record to show that even the materials in possession of Mr. Bakshi were requisitioned by Mr. Arya and he applied his own independent mind thereupon for directing preparation of record of evidence. From the tenor of the charge-sheet dated 7-9-1990 it only appears that he merely heard the officer as to whether he pleads guilty thereto or not. The learned Single Judge of the High Court has considered materials on record and came to the conclusion that valuable rights of the respondent had been breached. The Division Bench went through the entire records and arrived at the same finding. The findings of the learned single Judge or the Division Bench cannot be said to perverse or contrary to law.

25. As already noted hereinabove, the petitioner had pleaded guilty before the Summary Security Force Court. In the appeal filed by him u/s 117(2) of the BSF Act, 1968 the petitioner had canvassed a stand that that he had stated before the SSFC that in the night of December 15, 1993 he had sent information to the second-in-command of the guard duty that he would report little late for the guard duty due to an unexpected emergency and that he should manage guard duty during the period of his absence, but the Summary Security Force Court construed the said statement made by him as an admission of guilt by him.

26. In the instant case, it is the case of the department that the petitioner was detailed to perform patrolling guard duty at the Magazine room in the BSF Academy, Tekanpur between 08.00 P.M. on December 15, 1993 to 05.00 A.M. on 16.12.1993 and that he reported for guard duty at about 09.45 A.M. on December 15, 1993 i.e. late by a period of 1 hour and 45 minutes. The conduct of the petitioner of reporting late by a period of 1 hour and 45 minutes for performing guard duty at New Magazine room at BSF Academy does not amount to grave misconduct. The nature of duty performed by the petitioner is the key here. Had the petitioner reported late for performing border patrolling duty the position would have been different for even few minutes delay in reporting for border patrolling duty is extremely serious. We further note that the petitioner who was enrolled in the BSF in the year 1980 has not been previously convicted for any offence.

27. In view of non-compliance with Rule 45 of the BSF Rules, 1969 by the department in the present case coupled with the facts that the conduct of the petitioner of reporting late by a period of 1 hour and 45 minutes for performing guard duty at New Magazine room at BSF Academy does not amount to grave

misconduct and the petitioner has not been previously convicted for any offence we set aside the order dated May 02, 1996 passed by the Summary Security Force Court convicting the petitioner and awarding sentence of reduction of rank of the petitioner from Lance Naik to Constable as also the order dated 02.12.1996 passed by the Director General rejecting the appeal filed by the petitioner.

28. The writ petition is accordingly allowed. The petitioner is restored to the rank of Lance Naik with effect from the date he was reverted to the post of Constable. The petitioner would be entitled to difference of wages. Seniority in the rank of Lance Naik would be restored and if entitled to be considered for promotion with effect from the date persons junior to the petitioner were promoted, Review Board would be constituted which shall decide petitioner's entitlement to be promoted as per rules applicable. Difference of wages shall be paid to the petitioner within 12 weeks from today. No costs.