

(2001) 03 DEL CK 0048
In the Delhi High Court
Case No : L.P.A. No. 202/99

Union of India and Others

APPELLANT

Vs

B.N. Jha

RESPONDENT

Date of Decision : 23-03-2001

Acts Referred:

Border Security Force Rules, 1969 — Rule 45B, 46, 48, 51A

Citation : (2001) 91 DLT 581 : (2001) 58 DRJ 765

Hon'ble Judges : Mahmood Ali Khan, J; Dalveer Bhandari, J

Bench : Division Bench

Advocate : Mr. Keshav Dayal and Mr. Jyoti Singh, for the Appellant; Mr. R.P. Sharma and Mr. S.B. Dwidevi, for the Respondent

Judgement

Dalveer Bhandari, J.—This Letters Patent Appeal has been preferred by the Union of India against the judgment of the learned Single Judge dated 12.1.1999 delivered in Civil Writ Petition No. 999 of 1992.

2. Brief facts which are necessary to dispo(SIC) of this appeal are recapitulated as under:-

3. respondent B.N. Jha, on 19.7.1990 was posted as Dy. Commandant in the Basis Training Centre of the Border Security Force, Training Centre and School (for short hereinafter referred as TC&S) at Hazaribagh. The TC&S had three wings which were located in the same campus at Hazaribagh headed by Mr.B.S. Garcha, DIG and Commandant. He was overall in charge of all the three wings mentioned hereinafter. The details of which are set out as under:-

TC&S	(Commanded	by	DIG)	-----
-----	(1)	(2)	(3)	Basic Trg
Centre Specialist Trg Centre	Administrative Wing	(Commanded by	& School	
(Commanded by	Commandant)	(Commanded by	Commandant)	Commandant)

4. On 17.7.1990 a theft of Rs.1,700/- belonging to one recruit B.K. Jha (P.W-9) had taken place. On questioning the related personnel, it came to light that

respondent B.N.Jha accepted Rs.5,000/- from the recruit B.K. Jha to get him enrolled;/recruited in the BSF during June/July 1990.

5. On 16.7.1990 Mr.Raj Singh, D.C. reported to Mr.J.S. Bakshi, Commandant that Ct Bhavesh Kumar Jha had told him in the presence of Mr. G.S. Rana that he had brought Rs.8500/- from his house and out of that amount he was told by his father to pay Rs. 7000/- to B.N. Jha, the respondent herein as he had helped him in getting enrolled/recruited in the BSF. Mr.Raj Singh, D.C. also told Commandant Bakshi that he was informed by Ct.Bhavesh Kumar Jha that he had paid Rs.5000/- to the respondent a week prior to that day. He further told Mr. Raj Singh that after about two days of the said payment to the respondent one constable of the Administrative Wing had come to Ct Bhavesh Kumar Jha to collect money for the respondent and he had paid him Rs.1000/-.

6. On 17.7.1990 at about 0930 hours Mr. J.S. Bakshi called up the DIG and Commandant Mr. B.S. Garcha to inform him that the respondent had come to his office and apologised for having received money. the respondent told Mr. Garcha that while he was on leave, one boy contacted him for his recruitment and accordingly the respondent spoke to the presiding officer of the recruitment board. The respondent further told the DIG Mr. Garcha that he had received Rs. 6000/- from Constable Bhavesh Kumar Jha after his arrival at Hazaribagh for training. The respondent also admitted that he had also received Rs. 4000/- before the recruitment. Thereafter, the DIG asked Mr. Bakshi to further inquire into the matter.

7. Mr. J.S. Bakshi, Commandant had sent a letter to Mr. B.S. Garcha, DIG & Commandant mentioning in detail about the entire episode, he in turn on 4.9.1990 asked Mr. M.S. Arya, Commandant, BTC to initiate disciplinary action against the respondent B.N. Jha. It may be pertinent to mention that Mr. M.S.Arya was working directly under Mr. B.S. Garcha, DIG & Commandant.

8. During the course of hearing the learned counsel appearing for the Union of India has handed over two letters. One letter dated 4.9.1990 was sent from the DIG & Commandant Mr. B.S. Garcha to Mr. M.S. Arya, Commandant, BTC and another letter dated 17.7.1990 sent by Mr. J.S. Bakshi, Commandant to the DIG Mr. Garcha. The letter dated 4.9.1990 reads as under:-

CONFIDENTIAL

DIG/Disc/90/BSF No. 07/SECR/90/sub-47 Border Security Force, Trg Centre & School, HAZARIBAGH (BIHAR)

4 Sep 90

To

Shri M. S. ARYA, Commandant BTC TC&S HAZARIBAGH

Sub: ACCEPTANCE OF ILLEGAL GRATIFICATION BY SHRI B.N. JHA, DY COMDT BTC FOR ENROLMENT OF R/CTs BHABESH KUMAR AND SANTOSH KUMAR JHA IN

THE BSF

Please find enclosed herewith photo-state copies of Commandant STC BSF HAZARIBAGH letter No. STC/Disc/90/2156 dated 17 Jul 90 acceptance of illegal gratification by Shri B.N. Jha, Dy Comdt from R/Cts BHABESH 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 said react are available with Commandant STC Hazaribagh which 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.

Sd/- (B.S. GARCHA) DIG & COMMANDANT

Copy to:-

Shri J.S. BAKSHI - for information Commandant STC BSF please. HAZARIBAGH He is requested to produce the witnesses and the Cassettes containing tape recorded statements of the react in question, as and when required by Shri M. S. ARYA, Comdt.

Sd/- (B.S. GARCHA) DIG & COMMANDANT

9. The learned counsel for the appellant-Union of India urged that the appellant had acted in accordance with the provisions of the Border Security Force Act, 1968 and the Border Security Force Rules, 1969. The appellant also submitted that the respondent was given full opportunity to defend himself in this case including a counsel to defend him in the trial. The court had come to the right conclusion on the basis of the material on record. It cannot be said that the finding is not based on any evidence. The learned counsel for the appellant submitted that under Article 226 of the Constitution, this Court cannot go into the sufficiency of evidence. Reliance has been placed the judgment of the Supreme Court in Union of India and Others Vs. Himmat Singh Chahar, He also contended that the respondent approached this court without availing the statutory remedy. The learned counsel for the appellant placed reliance on the D.B. judgments of this Court of Ex-Constable Ashok Kumar vs. Union of India delivered in Civil Writ Petition No. 3369/95 on 1.3.2000 and on another judgment in Union of India vs. O.P. Bishnoi (LPA No. 79 of 1994) delivered on May 11, 2000 for the proposition that pre-trial irregularity or illegality in procedure may not vitiate the trial if no prejudice has been caused to the accused.

10. The learned counsel for the respondent submitted that this is the case of no evidence. In the instant case there is no evidence of either demand or acceptance of bribe. The learned Court for the respondent also submitted that the most important person, that is, the father of ct. Bhavesh Kumar Jha, on whose instruction money was allegedly given to the respondent was not examined. According to the respondent statutory rules have been flouted and his dismissal is against the principles of natural justice.

11. The learned counsel for the respondent to strengthen his submission placed reliance on the Constitution Bench judgment of the Supreme Court Union of India (UOI) Vs. H.C. Goel, . In this judgment their Lordships of the Supreme Court observed that in dealing with a writ petition filed by public servants who have been dismissed, or otherwise dealt with so as to attract Article 311, the High Court under Article 226 has jurisdiction to enquire whether the conclusion of the Government on which the impugned order of dismissal rests is not supported by any evidence at all.

12. Reliance has also been placed on the Supreme Court judgment in Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, . Their Lordships of the Supreme Court in this judgment observed that it is well settled that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man would come, the court would be perfectly justified in exercising its jurisdiction.

13. In Bhagat Ram Vs State of Himachal 454, the Supreme Court observed that in a petition under Article 226, the High Court does not function as a court of appeal over the findings of disciplinary authority. But where the finding is utterly perverse the High Court can always interfere with the same.

14. Reliance has also been placed on the judgment of the supreme Court in Ranjit Thakur Vs. Union of India (UOI) and Others, . The Court observed that at least the minimal requirements of natural justice is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trail "corm non judice".

15. According to Rule 45B when information of this kind is received, then the Commandant of the accused hears the charge against him and after hearing, he may even dismiss the charge against the accused. The Commandant may after being satisfied about the prima facie case against the accused, remand him for preparation of Record of Evidence or Abstract of Evidence. This rule has been flouted. The direction of Mr. Garcha is contrary to the mandate of Rule 45B. Rule 45-B reads as under:

45B. Hearing of charge against an officer and a subordinate officer. -(1)(a) The charge against an officer or 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.

(2). The charge sheet and statements of witnesses if recorded and relevant documents, if any, shall be read over to the accused:

Provided that where written statement 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 shall be given an opportunity to make a statement in his defense.

(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]

16. In the instant case, Mr. B.S. Garcha was the DIG and Commandant and according to the mandate of Rule 45-B he ought to have heard the charge himself but instead he directed Mr. M.S. Arya who was directly working under him to initiate disciplinary action against the accused by the aforementioned letter dated 4.9.1990. The direction of Mr. Garcha is contrary to the mandate of Rule 45-B. Rule 45-B has also been violated again in the manner in which Mr. M.S. Arya was directed to handle the case of the respondent. Mr. Garcha, DIG and Commandant did not ask Mr. M.S. Arya to deal with the case of the respondent according to the mandate of Rule 45-B but directed him to initiate the disciplinary inquiry against the respondent. In the process the accused's (respondent) valuable right was infringed. According to Rule 45 the Commandant has to hear the charge and if he is convinced at that very stage he can dismiss the charge. In the instant case the respondent was denied this stage and consequently his valuable right was lost.

17. The respondent submitted that even Rule 46 has been flouted. According to rule 46 the Commandant shall not deal with any case where the Commandant himself is a witness in the case where the Commandant himself is a witness in the case against the accused. Rule 46 read as under:

46. Attachment to another unit.- The commandant shall not deal with any case-

(i) where the offence with which the accused is charged is against the Commandant himself or

(ii) where the Commandant is himself a witness in the case against the accused; or

(iii) where the Commandant is otherwise personally interested in the case and the accused shall be attached to another battalion or unit for disposal of the case

under the order of the Deputy Inspector General:

Provided that a Commandant shall not be disqualified from hearing a charge merely because the offence was committed against the property of a Force Mess, band or institution of which the Commandant is a member or trustee of because of offence is one of disobedience or such Commandant's orders.

18. In the instant case Mr. B.S. Garcha, DIG and Commandant had known that he is going to be a witness in this case. Therefore, he ought to have requested the concerned officials to attach this case with another unit but instead Mr. Garcha asked Mr. M.S.Arya, Commandant (BTC) to initiate disciplinary action against the respondent. Mr. Arya was directly working under Mr. Garcha. When Mr. B.S. Garcha, DIC and Commandant himself could not deal with this case according to rules, obviously he should not have asked his own subordinate to do so. According to the rules, he ought to have requested the concerned officials to attach this case with another unit so that the respondent could have got fair and impartial trial.

19. Under Rule 48 the Record of Evidence or Abstract of Evidence is prepared. In the Record of Evidence witnesses give their statements on oath in the presence of the accused who can cross-examine them. Once the statements of prosecution witnesses are over, the accused may make a statement, if he so wishes. He can also call witnesses in his defense.

20. According to Rule 51A after the Record of Evidence is complete, the Commandant of the accused applies his mind on the evidence adduced on record. After going through the evidence on record, the Commandant has four options which are enumerated as under:

- i) dismiss the charge;
- ii) dispose of the case summarily if he is so empowered;
- iii) Refer the case to a Competent Superior Officer for disposal;
- iv) Apply to a competent officer or authority to convene a GSFS for trial of the accused;

21. The superior authority after taking advice of the Chief Law Officer or Law Officer can convene the General Security Force Court. In the instant case Shri M.S.Arya Commandant BTC under the provisions of sub rule (2)(ii) of Rule 45B remanded the respondent for preparation of Record of Evidence as per Rule 48 of the B.S.F. rules. Record of Evidence was prepared in the presence of the respondent by Shri M.S. Arya, Commandant.

22. Shri B.S. Garcha, DIG & Commandant retired on 31.10.1990. On 18.12.1990 the Law Officer advised trial of the respondent by the General Security Force Court under Rule 59. ON 22.2.1991 the accused was attached to TC&S, Hazaribagh from 127 Battalion for disciplinary purpose. Shri V.S. Sirohi, DIG joined TC&S Hazaribagh as DIC/Commandant. The charge sheet dated 21.1.1992

was served on the respondent on 31.1.1992. The charge sheet was duly signed by the DIG TC&S Hazaribagh, Shri V.S. Sirohi, as by that time Shri B.S.Garcha, had already retired on 31.10.1990 and Shri V.S. Sirohi joined in May, 1991 as DIG and Commandant of TC&S, Hazaribagh. As the charge sheet dated 21.1.1992 was not having endorsement of the convening authority, so, on the reference of the CSFC, a fresh charge sheet containing the same charges was prepared on 3.2.1992 and fresh convening order dated 3.2.1992 was issued.

23. The trial of the respondent held by the General Security Force Court consisted of the following members:

- 1) Shri H.S. Gill, Addl DIG (STC Hazaribagh)
- 2) Shri B.S. Tehlan, DC/21/C (133 Bn BSF)
- 3) Shri H.S. Indolia, DC (BTC Hazaribagh)
- 4) Shri R.P. Singh, DC (163 Bn BSF)
- 5) Shri P.N. Das, DC (SHQ Krishananagar).

It may be pertinent to mention that Shri H.S. Gill and Shri H.S. Indolia were from STC and BTC Hazaribagh. PW 13 Shri B.S. Garcha, DIG & Commandant was over all in charge of the Training Centre and School at Hazaribagh.

The learned counsel for the respondent submitted that in the beginning of trial a clear objection was taken to transfer the case of the respondent to another unit because DIG and Commandant Mr. Garcha, who had initially got the matter investigated, himself was scheduled to appear as a prosecution witness in this case but the objection was unfortunately overruled.

24. The respondent was found guilty of both the charges and the court dismissed him from service subject to confirmation. On 18.3.1992 the sentence was confirmed by the Director General, Border Security Force. The respondent without availing the statutory remedy approached this Court by filing a petition under Article 226 of the Constitution. The learned Single Judge after hearing the learned counsel for the parties at length allowed the writ petition. The sentence imposed on the respondent by the General Security Force Court was quashed. The learned Single Judge directed that the respondent herein shall be entitled to all the consequential benefits.

25. According to the learned Single Judge because of the extraordinary facts and circumstances of this case, in order to reach at the truth of the matter he had to scrutinize the evidence and the findings of the General Security Force Court. The learned Single Judge has mentioned in the impugned judgment that he was conscious of the limitation of his jurisdiction under Article 226, but because of apparent breach and violation of the provisions of law and the principles of natural justice, he had to closely scrutinize the evidence and findings of the court.

26. According to the learned Single Judge both the provisions of law and the

principles of natural justice have been grossly violated and consequently he was compelled to set aside the order of the General Security Force Court. According to the learned Single Judge this is a case of no evidence and the findings rendered by the Court are based on no evidence.

27. The learned Single Judge placed reliance on various judgment of the Supreme Court, Privy Council and other Courts to justify quashing of the order by which the respondent was dismissed from service. The learned Single Judge was primarily moved by the well known principles of equity, justice and fair play in deciding this case.

28. The learned Single Judge has marshalled the entire evidence of the General Security Force Court and came to the definite conclusion that the evidence led by the prosecution is not reliable and the findings of the Court are based on no evidence.

29. The learned Single Judge was aware of the court's limitation under Article 226 of the Constitution in re-appreciating the evidence in a case of this nature but he observed that it is well settled that the Court can scrutinize the evidence to find out the basis for the findings arrived at by the Court. In this view, the learned Single Judge scrutinized the evidence adduced before the Court. He had extracted the relevant portions of the statements of PW-9 (B.K. Jha), PW-3 (H.C. Waryam Singh), PW-2 (Sher Bahadur Bhujel), PW-1 (G.A. Rana), PW-4 (J.S. Bakshi), PW-5 (Raj Singh), PW-8 (Dr. Nirmal Kumar), PW-11 (Santosh Kumar Jha), PW-12 (S.I. D. Chidambaram), PW-13 (Mr. B.S. Garcha, former DIG of the BSF) and came to the conclusion that the witnesses are not reliable because they did not state truthfully and this is a case of no evidence. It is not necessary to reproduce the analysis of the evidence carried out by the learned Single Judge in this case.

30. The learned Single Judge also arrived at the conclusion that the Rules 45B and 46 of the B.S.F. Rules, 1969 have been flouted. The gist of the judgment of the learned Single Judge is that the respondent was denied fair trial and justice and in fact he has been victimized in this case.

31. The learned Single Judge mentioned that the commanding unit and other three units were under the direct control of the Commandant and DIG Mr. B.S. Garcha. It is not disputed that the DIG and Commandant - TC&S is the controlling head of all the units but what is stated by the respondent is that the Commandant of each of the units would have power to take action against the delinquent officer under his control.

32. The respondent herein is alleged to have committed offence in June, July, 1990. The learned Single Judge observed that Mr. Garcha, DIG was informed about the alleged offence on 19.7.1990. He knew that he was going to retire w.e.f. 31.10.1990 and Therefore, he did not want to initiate the action himself. In case the factum of confession is true then the DIG had no powers to authorise the officer working directly under him to proceed against the respondent. The

object of Rule 46 is that once the Commandant of the accused is likely to be a witness against the delinquent and in accordance with the principles of fair play and justice, the independent authority equivalent to the rank of Commandant who is not under the control of the Commandant has to take action so that the officer concerned could be dealt with impartially.

33. The learned Single Judge observed that according to Rule 45(B) of the B.S.F. Act, the DIG Mr. B.S. Garcha, who was also Commandant, was duty bound and under an obligation to hear the charge and he had no power to authorise an officer working directly under him to initiate disciplinary action against the respondent B.N. Jha.

34. The learned Single Judge has observed that there is a clear violation of Rule 45B of the BSF Rules. He further observed that according to the mandate of Rule 45B, the Commandant after hearing the officer can even dismiss the charge. There is nothing on record to show that Rule 45B was followed. A very valuable right was denied to the respondent. He, Therefore, observed that the subsequent proceedings taken by the Commandant under Rule 46 are also void.

35. The learned Single Judge also observed that there has been a clear violation of Rule 46. According to the mandate of this rule the Commandant shall not deal with any case where the Commandant himself is a witness against the accused. Because of the extra judicial confessional statement before the DIG and Commandant, he very well knew that he is going to be a witness in that case. Therefore, his directing Mr. M.S. Arya, who was working directly under him to initiate disciplinary action against the accused was absolutely improper, illegal and against the mandate of the Rule 46 of the BSF Rules. Mr. Garcha ought to have got this case attached to an independent unit so that the respondent could expect a fair trial where there is no inherent prejudice or bias against the respondent in the minds of those responsible for conducting the trial.

36. In reply to the preliminary objections regarding maintainability of the writ petition, the learned counsel for the respondent submitted that because of the extra-ordinary facts and circumstances of this case where the respondent had no hope of getting any justice from the BSF authorities, he approached this Court without wasting time before the statutory authority. According to the respondent approaching the statutory authority would have been a futile exercise.

37. The learned counsel for the respondent has placed reliance on the judgment of the Supreme court Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, . In this case their lordships have held that alternative remedy does not take away court's jurisdiction to issue a writ of certiorari. The Court observed as under :

"When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court

to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefore. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may Therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted".

38. In Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, their Lordships relied on the Constitution Bench judgment of the Supreme Court in Rashid Ahmed Vs. The Municipal Board, Kairana, , and their Lordships observed as under:

"the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefore. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may Therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted".

39. State of U.P. vs. Mohammad Nooh reported in AIR 1958 SC 86, S.R. Das, C.J., speaking for the Court, observed:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Law of England, 3rd Ed., Vol.II, p.130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the Superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the King Vs Postmaster-General Ex parte Carmichael 1928 (1) KB 291 a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The

case of *Rex Vs Wandsworth Justices Ex parte Read* 1942 (1) KB 281 is an authority in point. In that case a man had been convicted in a Court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction."

40. Similar question came for consideration before Hon"ble the Supreme Court in the case of *Carl Still G.M.B.H. and Another Vs. The State of Bihar and Others*, and *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, . In these cases, the Court observed that there are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra virus it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice.

41. The Division Bench of this Court in *Major Taj Mohamad Sheikh Vs Union of India & Others* 1996 I AD (Delhi) 162, while following the judgment of the Supreme Court observed that the jurisdiction of the Court to entertain writ petition in appropriate case without insisting on the filing and disposal of pre-confirmation and post-confirmation petitions is not taken away in appropriate cases, such as (i) where there is a patent lack of jurisdiction in constitution of court-martial or any proceeding thereof, (ii) where rights of natural justice are violated and where case of bias on the part of the authority hearing or likely to hear the pre-confirmation or post-confirmation petition is made out.

42. Similar view has been taken by the Division Bench of Gujarat High Court in *Major Parvesh Chander Suri Vs. Union of India (UOI) and Others*,

43. The Full Bench of Madhya Pradesh High Court in *Subhash Chandra Sarkar Vs. Union of India (UOI) and Others*, has held that the existence of an alternative and its non-exercise by a petitioner cannot be a bar to the granting of a Writ of Certiorari for quashing the decision of the Special Tribunal in exercise of prerogative powers under Article 226 of the Constitution, although as per Article 227 of the Constitution, that Tribunal may not be considered to be subordinate to the High Court".

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 48 are also unsustainable in law.

45. The learned Single Judge also observed that there is clear violation of Rule 46 in this case. When the DIG/Commandant Mr. B.S.Garcha had known that he is going to be a witness in this case then according to the mandate of Rule 46, he ought to have transferred the case to an independent battalion or unit so that the respondent could get a fair trial. Mr. M.S.Arya Commandant BTC who was asked to initiate disciplinary action against the respondent was working directly under Mr. B.S.Garcha, DIG and Commandant TC&S. During the relevant period the confidential reports of Mr.M.S.Arya used to be written by Mr.Garcha. What Mr.Garcha could not do himself who could he ask Mr.M.S.Arya who was working, under him to do by initiating the disciplinary action against the respondent. It is clearly violative of the mandate of Rule 46 and the principle of natural justice.

46. In the instant case, after recording of the findings under Rule 45-B, Mr. M.S. Arya directed the competent authorities to convene a general security Force Court for the trial of the accused. Record of the evidence was prepared by Mr.M.S.Arya, Commandant who was working directly under DIG B.S.Garcha. After the retirement of Mr. B.S.Garcha on 31.10.1990 the respondent was again attached to TC&S, Hazaribagh from 127 Battalion for disciplinary purpose. In May 1991, Mr. V.S. Sirohi joined TC&S as DIG in place of Mr. B.S.Garcha and chargesheeted the respondent and conducted the trial. The trial of the respondent held by the General Security Force Court. In the trial Mr.B.S.Garcha had appeared as a witness (PW-13).

47. In a disciplined force like the B.S.F., the respondent rightly had the apprehension of not getting any justice particularly when the DIG and Commandant who got the disciplinary action initiated against the respondent himself appeared as a witness against him. It is extremely rare that a person of the stature of the DIG himself appears as a witness. In practice it becomes rather difficult for the other members to decide the matter differently. All the members of the General Security Force Court were far junior to Mr. Garcha, Mr. H.S. Gill, Additional DIG and H.S. Indolia, D.C. were working in S.T.C. and B.T.C. Hazaribagh of which Mr. B.S. Garcha was the DIG and the Commandant. These facts have to be appreciated in the back drop of the disciplined organization like the Border Security Force.

48. We have carefully examined the judgment of the learned Single Judge. He has correctly arrived at the conclusion that there is clear violation of rule 45B and Rule 46 of the B.S.F.Rules, 1969. The learned Single Judge was also correct that even the basic principles of natural justice have not been followed. Looking to the extra ordinary facts and circumstances of this case, the learned Single Judge was justified in scrutinizing the evidence recorded by the General Security Force Court. No interference is called for. This appeal is accordingly rejected.