(2012) 05 DEL CK 0457

Delhi High Court

Case No: Writ Petition (C) No. 7312 of 2011

Constable Vipin Kumar		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: May 17, 2012

Acts Referred:

- Border Security Force Act, 1968 - Section 117, 19, 20, 34, 35
- Border Security Force Rules, 1969 - Rule 143(4), 147, 160, 161(1), 85
- Constitution of India, 1950 - Article 14, 20, 226

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

Bench: Division Bench

Advocate: M.G. Kapoor, for the Appellant; Jatan Singh and Mr. Tushar Singh, for the Respondent

Final Decision: Allowed

Judgement

Anil Kumar, J.

The petitioner has sought the quashing of the SSFC proceedings, findings and sentence dated 25th September, 2010 and order dated 11th August, 2011 rejecting the statutory petition dated 21st March, 2011 filed by the petitioner. The petitioner has also sought his reinstatement with full back wages. Relevant facts for comprehending the controversies are that the petitioner was appointed as Constable (GD) on 15th January, 2003 after which he had undergone training at STC BSF, Kharkan Camp (Punjab). After the completion of his training, the petitioner was posted to 193 Bn., BSF w.e.f. 11th December, 2003. The petitioner was thereafter sent to SHQ BSF CI (Ops) Manipur for his permanent posting. The petitioner again joined 193 Bn on 24th March, 2009 and served at various locations.

2. During his posting, the petitioner was granted 23 days Earned Leave from 7th May, 2009 to 29th May, 2009 with permission to avail three days JP w.e.f. 30th May, 2009 to 1st June, 2009 from Tac Headquarter (HQ), 193 Bn BSF, Komkeirap

(Manipur), when the petitioner''s unit was deployed on CI Role duty in Manipur State. The petitioner had availed the 23 days leave on account of his sister''s marriage.

3. The petitioner was required to join the duty on 1st June, 2009, but he did not resume the duty on the said date and, therefore, a registered Letter No.11641-42 dated 07.06.2009 was issued to the petitioner directing him to join the duty forthwith.

4. The petitioner, by letter dated 4th June, 2009 intimated the authorities, that on account of his medical condition, he should be granted one month''s earned leave. The said letter was received by the Unit on 12th June, 2009. However, along with his application dated 4th June, 2009, the petitioner did not send any medical certificate stipulating the ailment which he had been suffering at that time.

5. The leave for one month sought by the petitioner was not granted and he was intimated by letter no.12411-12 dated 16.06.2009 about it. Another registered Letter No.13044-45 dated 28.06.2009 was sent at petitioner''s home address, intimating him that his leave has not been sanctioned and that he should join the duty.

6. The petitioner, however, did not rejoin the duty. The petitioner contends that towards the expiry of his leave, he had fallen sick, and that he was having fever and suffering from nausea and loss of appetite. Since his conditions had not improved, he went to Diwan Shatrughan Singh United District (Male) Hospital, Hamirpur (UP) as an OPD patient on 3rd June, 2009. There the petitioner was diagnosed with having contracted Gastritis and Hepatitis and he was advised ''bed rest'' for 2 1/2 weeks. The petitioner thereafter, visited the Hospital on 20th June, 2009, 15th July, 2009, 7th August, 2009 and 24th August, 2009. On 20th June, 2009, the petitioner was further advised ''bed rest'' for 3 1/2 weeks; on 15th July, 2009 he was again advised ''bed rest'' for a further period of 31/2 weeks and on 7th August, 2009 he was advised ''bed rest'' for a further period of 2 1/2 weeks. Thereafter, the petitioner was declared fit to resume duty. The petitioner also disclosed that the validity of the OPD Card was only for 15 days, therefore, on each visit a fresh OPD Card was made. The petitioner further contended that as per the prevalent practice in the Hospital, the petitioner had to sign on the OPD Card in the presence of the doctor and the doctor attending the patient also used to counter sign the OPD card for the verification of the patient''s signature.

7. The request of the petitioner for extension of one month''s leave by his letter dated 4th June, 2009 was not accepted without disclosing any reason, rather a Court of Inquiry (COI) was ordered by order dated 5th July, 2009 to investigate the matter of over staying the leave by the petitioner. Pursuant to the COI, it was decided that the petitioner be dealt with as per the provisions of the BSF Act and Rules. On the basis of the final remarks of the Commandant on the COI, an apprehension roll under the provisions of Sections 60 & 61 of the BSF Act, 1968 was issued to the

Superintendent of Police, District Hamirpur (UP) by letter dated 13th July, 2009 to apprehend the petitioner. However, the petitioner was not apprehended and therefore, a show cause notice dated 6th August, 2009 was issued to the petitioner.

8. Thereafter, the petitioner visited the Hospital on 25th August, 2009 for obtaining the certificate regarding his treatment. According to him, he had signed two copies of the certificate. One copy was to be given to the petitioner and the second copy was to be retained in the Hospital record. The petitioner disclosed that since the medical officer was not available, the dealing clerk told him that he could collect the certificate on a later date. However, the petitioner had signed the copies of the certificate. When he had signed the certificates, they were undated as the Chief Medical Officer was not available. The petitioner, thereafter reported and rejoined the duty on 27th August, 2009 at the RTO BSF, Dimapur. On the arrival of the petitioner, he was allegedly produced before the Commandant, who demanded an explanation and ordered the preparation of the "Record of Evidence" ROE. The ROE submitted its proceedings on 15th September, 2009.

9. According to the petitioner, when he had voluntarily reported for duty on 27th August, 2009, he was marched up before Sh. Jameel Ahmad, the Commandant and he had tried to explain to the Commandant that he had contracted jaundice and that he was undergoing treatment for the same in a Govt. Hospital. The petitioner had also produced the OPD Card bearing his signature and the signature of the concerned doctor who had attended to him at that time. As per the practice of the concerned Hospital, the OPD Card was valid for 15 days and was to be signed by the patient and counter signed by the doctor. The petitioner also contended that he had informed his Commandant that the medical certificate had been left behind in the Hospital, as the day he had gone to procure the medical certificate, he could not procure the same as the Chief Medical Officer was not present to sign it.

10. The petitioner further disclosed that since an ROE was ordered against him, therefore, he obtained the certificate through his relative, a maternal uncle, Sh. Dhani Ram Pal who visited the Hospital on 5th September, 2009. The uncle of the petitioner deposited Rs. 68 towards the fees for obtaining the certificate by receipt No.26855 dated 5th September, 2009 and a copy of the said certificate was duly faxed to the petitioner by his uncle.

11. The petitioner contended that the Commandant had doubt regarding the date of the certificate, and therefore, he asked the petitioner to obtain the certificate with the correct date. Consequent to this, the petitioner requested his uncle to go to the hospital again and apprise the dealing clerk of the anomaly. The dealing clerk, therefore, corrected the date by overwriting on the date of 5th September, 2009 and putting the date as 25th August, 2009, as well as stipulating the same date at two additional places. The petitioner, thereafter received the corrected certificate from his uncle by speed post on 28th October, 2009. According to the petitioner, with the certificate dated 25th August, 2009, the Commandant was satisfied and the charges

were dropped against the petitioner and no follow up action was taken by the then Commandant, Sh. Jameel Ahmad.

12. However, thereafter, there was a change of guard and Sh. Neeraj Dube took over as Commandant of 193 Bn in December, 2009 i.e. three months after recording of the ROE and his Unit moved from Nagaland to Ranbir Sing Pura in Jammu in May, 2010.

13. The plea of the petitioner is that the Jawans had been given a raise in the Ration Money pursuant to the 6th Central Pay Commission from Rs.1100/- to Rs,1300/-. The new Commandant, however, decided to increase the contribution for the mess from the Jawans by Rs.200/- retrospectively. The petitioner contended at that time that he had raised this point in the Sainik Sammelan on 5th September, 2010 that the increase should not be effected at all or at least not retrospectively and in case the increase is effected then extra money so received should be spent on the welfare of the Jawans by providing more amenities.

14. The petitioner disclosed that this was not liked by the Commandant Sh. Neeraj Dube who therefore, reopened his case and directed the trial of the petitioner by the SSFC for over staying his leave in 2009 from 30th May, 2009 to 26th August, 2009. Subsequently, the petitioner was tried by the SSFC held on 25th September, 2010. The petitioner had pleaded not guilty. Even though the doctor at Diwan Shatrughan Singh Sanyukt Zila (Male) Hospital, Hamirpur (UP) was not examined during the Record of Evidence, however, during the SSFC he was summoned without notice to the petitioner and without disclosing to the petitioner that he was entitled to get the hearing adjourned so as to cross-examine him properly. The SSFC ultimately held that the petitioner was guilty and, therefore, sentenced him to be dismissed from service on 25th September, 2010. The petitioner applied for the SSFC proceedings and thereafter, filed a petition dated 21st March, 2011 u/s 117 of the BSF Act. The Director General, BSF, however, rejected the statutory petition by order dated 11th August, 2011.

15. Aggrieved by the order of rejection of his statutory petition, the petitioner has filed the above noted writ petition, inter-alia, on the grounds that though the Commandant, Sh.Jameel Ahmad was satisfied with the certificate produced by him, however, the Commandant Sh. Neeraj Dube reopened the proceedings against him as he had raised the issue of not changing the mess amount by another Rs. 200/- retrospectively, in the Sainik Sammelan. The petitioner contended that no satisfactory explanation has been given by the respondents for ordering a SSFC after a lapse of more than one year of the alleged offence and of recording of the ROE. The petitioner further contended that the punishment of dismissal from the service is disproportionate to the alleged offence. It was also contended that since the doctor was not examined in the ROE, during the trial by the SSFC, the petitioner at least ought to have been given the notice for the examination of the said doctor and should also have been communicated to exercise his right to get the recording

of the cross-examination adjourned so that the petitioner could cross-examine the said doctor properly. The petitioner also challenged the SSFC proceedings on the ground that the OPD Cards have not been considered, which bear the signatures of the petitioner and the attending doctors. The plea has also been raised by the petitioner that if there was any doubt regarding the signature of the petitioner, the same could have been verified by getting an Expert to verify the same on the various OPD Cards. It is asserted that the certificate would not have had the petitioner''s signature, if the petitioner had not been treated in the said Hospital. The petitioner also contended that since a doctor in the Govt. Hospital treats a large number of patients who come in the OPD daily, therefore, if the petitioner was not recognized by the doctor who had visited him after 13 months, no adverse inference in these circumstances could be taken against the petitioner.

16. The petitioner contended that the examination of the doctor P.K. Gupta, PW-4 in the SSFC was in clear violation of Rule 85 of the BSF Rules, 1969, which is as under:-

85. Additional witness. - Where the prosecutor intends to adduce evidence which is not contained in any record or abstract of evidence given to the accused notice of such intention together with the particulars of the evidence shall, when practicable, be given to the accused a reasonable time before the evidence is adduced. If such evidence is adduced without such notice or particulars having been given, the Court may, if the accused so desires adjourn after receiving the evidence or allow cross-examination arising out of that evidence to be postponed, and the Court shall inform the accused of his right to apply for such an adjournment or postponement.

17. The petitioner contended that neither any notice as contemplated under the said rule was given, nor were the proceedings adjourned, nor was the petitioner allowed to cross-examine the said doctor. It is asserted that the testimony of such a witness could not be considered in the facts and circumstances and if the testimony of said witness is ignored, there is no evidence to establish the charge against him and the entire SSFC proceedings will be vitiated.

18. The writ petition is contested by the respondents contending, inter-alia, that the ROE proceedings were concluded on 15th September, 2009, however, the SSFC was held after a long gap of time on 25th September, 2010 at the Headquarter 193 Bn, BSF, R.S.Pura (Jammu) on account of the want of the original medical documents from Constable Vipin Kumar and the verification of the photocopies of the medical documents from the treating Hospital and also for the reasons of summoning the civil witnesses for their presence. The reason for the delay was also attributed to the movement of 193 Bn from Komkeirap (Manipur) to Jiribam (Manipur) and the further changeover of 193 Bn BSF from M&C Frontier to Jammu Frontier and on account of the various other administrative, as well as operational commitments. It was further contended that another SSFC trial of the petitioner was also held on 6th October, 2009 for the offences committed by him under Sections 20(c), 20(b), 34(a) & 35(a) of the BSF Act, 1968 for which he was awarded the punishment of 32 days of Rigorous

Imprisonment in Force custody and forfeiture of one year''s service for the purpose of promotion.

19. The respondents further disclosed that the petitioner had proceeded on 15 days CL w.e.f. 9th February, 2010 to 2nd March, 2010 and had reported only on 26th May, 2010 after over staying for 85 days, for which he was summarily tried u/s 19(b) of the BSF Act, 1968 on 30th June, 2010 and was awarded 28 days Rigorous Imprisonment in Force Custody, which RI was completed on 27th July, 2010. Thereafter, the validity of the treating doctor was confirmed and on receipt of the confirmation, the SSFC trial for the offence committed in June, 2009 was fixed.

20. The respondents also gave details of the good and bad entries against the petitioner, including OSL, AWL which were recognized during the service of the petitioner. According to the respondents, the petitioner''s net qualifying service is as under:-

(a) Good Entry - 02 Nos. (IG-01 during 2007, C0-01 during 2007-08)

(b) Bad Entry - 02 Nos

(i) Major- 01(SSFC) -(i) To suffer 32 days RI in Force Custody By SSFC on 6.10.2009 U/s 35(a), 20(c), 20(b) & 34(a). (ii) (To forfeit one year of service for the Purpose of promotion (by SSFC under the charge of Sec-35(a), 20(c), 20(b) 34(a) on 06-10-2009)

(ii) Minor-01 - 28 days RI in Force Custody U/S-19 b on 30-06-2010 for 85 days OSL.

(c) Overstaying of Leave - 06 Times:

(i) 45 days OSL (15 days CL + 24 days OSL) period w.e.f. 30.08.2005 to 13.10.2005 regularized by granting him 30 days EL w.e.f. 30-08-05 to 28-9-05 and 15 days HPL w.e.f. 299-05 to 13-10-05.

(ii) 46 days OSL period w.e.f. 26.3.2006 to 10.5.2006 regularized by Granting him 46 days HPL.

(iii) 34 days OSL (10 days CL + 23 days OSL) period w.e.f. 13.11.2006 to 16.12.2006 regularized by granting him 07 days EL w.e.f. 13-11-06 to 19-11-06, 18 days HPL w.e.f. 20-1106 to 07-12-06 and 09 days EOL w.e.f. 08-12-06 to 16-12-06.

(iv) 14 days OSL period w.e.f. 20.9.2007 to 03.10.2007 regularized by granting him 14 days EOL..

(v) 61 days OSL period w.e.f. 07.4.2007 to 07.6.2007 regularized by granting him 20 days HPL w.e.f. 07-04-07 to 26-04-07 and 41 days EOL w.e.f. 27-04-07 to 07-06-07.

(vi) 59 days OSL period w.e.f. 05.6.2008 to 02.8.2008 regularized by granting him 59 days EOL.

(d) Absent Without Leave - 01 Time.

(i) 89 days AWL w.e.f 12.12.2008 to 10.03.2009 regularized by granting him 89 days EOL

(e) EXTENSION - 01 Time.

10 days HPL w.e.f. 18.4.2008 to 27.4.2008. 20 days EOL w.e.f. 28-04-2008 to 17-05-2008 extended in continuation of 30 days EL w.e.f. 19-03-2008 to 17-04-2008 earlier sanctioned.

(f) Net qualifying service- Total 07 years 08 months 11 days (-) Dies Non period of 438 days i.e. 14 months &13 days '' 01 year, 02 months and 13 days.

21. The respondents also produced the extract of the Sainik Sammelan for the month of September, 2010 to contend that the plea as alleged by the petitioner was not raised in the said Sainik Sammelan.

22. Since the allegations were made against the Commandant, Sh. Neeraj Dube, he was also impleaded as respondent No.3 by the petitioner. Respondent No.3, however, did not file any reply to the show cause notice and did not refute the categorical allegations made against him.

23. The petitioner refuted the allegations made in the reply to the show cause notice/counter affidavit dated 28th January, 2012 filed on behalf of the respondents and contended that the respondents have detailed his over stay of leave and absence without leave, with a view to cause prejudice against the petitioner because even as per SSFC record, since the petitioner''s enrolment he had only received two punishments which were also regularized for absence and over stay, which are as under:-

02 Nos:-

02 Nos:-	-32 days RI and forfeit
(i) U/s-35(a), 20(c), 20(b) & 34 (a) (SSFC)	01 yrs service for the purpose of promotion
	on 06.10.09
(ii) U/S- 19(b)-	28 days RI- on 30.06.10

24. The petitioner contended that since his over stay had been regularized on account of sufficient cause, the respondents have detailed the same with a view to create a bias against the petitioner. According to the petitioner, the SSFC on 6th October, 2009 had only awarded 32 days RI in Force custody and forfeiture of one year''s service for the purpose of promotion. The summary of the entries in the default sheet of the petitioner were as under:-

WITHIN LAST 12 MONTHS	SINCE ENROLEMENT APPOINTMENT 02 Nos:-
(i) U/s-35(a), 20(c), 20(b) & 34	(i) U/s-35(a), 20(c), 20(b) & 34 (a)
(a)(SSFC)- 32 days RI and forfeit 01 yrs service for the purpose of promotion • on 06.10.09 (ii) U/S-19(b)- 28 days RI on 30.06.10	(SSFC) -32 days RI and forfeit 01 yrs service for the purpose of promotion • on 06.10.09 (ii) U/S- 19(b)- 28 days RI- on 30.06.10

The petitioner contended that he is at presently undergoing no sentence. That irrespective of this trial his character has been satisfactory.

That his age is 28 years 08 month as on 25.09.2010.

That his service is 07 years 08 months and 11 days as on 25.09.2010.

That he has been put in arrest from 24-09-2010 till completion of the trial. That he is in possession of following decorations and rewards:-

Decoration	Nil
Rewards	01
IG	
Reward	Nil
DIG	
Rewards	01
CO	

25. The petitioner also challenged the verdict of ''guilty'' and sentence of dismissal from service of the SSFC, inter-alia, on the grounds that the petitioner was held guilty due to the ill will and vengeance and mala fides on the part of the Commandant, respondent No.3 on account of the fact that the petitioner had raised the point of extra ration money not to be taken retrospectively from the jawan at the Sainik Sammelan and he had also sought the expenditure of the extra ration money on the welfare of the Jawans. The case of absence without leave in June, 2009 was therefore, re-opened and the SSFC was ordered after a lapse of more than one year after recording of ROE, though for absence on another occasion another SSFC was held on 30.6.2010. The punishment awarded to the petitioner and entire SSFC proceedings are also challenged on the ground that the doctor''s evidence was not taken in "ROE", however, he was examined in violation of Rule 85 of the BSF Rules, 1969 and the punishment imposed on the petitioner is disproportionate to his offence of over staying on account of suffering from infective hepatitis.

26. The petitioner emphasized that the oral testimony of the doctor does not negate the fact that he was suffering from infective hepatitis in view of the documentary evidence produced before the SSFC which has been practically ignored. It is also alleged that the respondents have not considered the OPD cards which were issued to the petitioner on 3rd June, 2009, 20th June, 2009, 15th July, 2009, 7th August, 2009 and 24th August, 2009. All the OPD cards bear the signature of the petitioner and are also counter signed by the concerned doctor. These OPD cards have not been denied by the doctor, who was produced by the respondents. In order to ascertain whether the petitioner was sick or not and had suffered from infective hepatitis, it is urged that the respondents ought to have verified these OPD cards which were produced by the petitioner and the same ought not to have been negated merely, on account of the oral statement of the doctor, stating that he does not recognize the petitioner. According to the petitioner, the reason why the doctor might not have recognized him might be since he had seen him after considerable time had passed since he last met the doctor, and the fact that a doctor has to be deal with several patients in the OPD and it may not be possible for the doctor to remember all of them. The petitioner contended that the documents are genuine i.e. the OPD cards and therefore, the fact that the petitioner had suffered infective hepatitis is established. In order to ascertain the genuiness of the OPD cards of the various dates which were counter signed by the concerned doctor, the petitioner contended that the respondents ought to have ascertained the genuiness of the signature of the petitioner by taking his specimen signatures and getting them compared. It is also urged that the doctor who appeared as witness did not deny that the signatures of doctors on various OPD cards were not genuine or that the cards were not issued by the concerned hospital.

27. The petitioner has also challenged his dismissal on the ground that the respondents failed to appreciate that the OPD cards bear signature of the attending doctor at two places, i.e. one at the end of each OPD cards also besides the petitioner''s signature in token of endorsing his presence. These facts have not been considered by the respondents and in case the commandant had any doubt about the signature of the petitioner, he should have got them verified. The petitioner contended that the OPD card would not have had his signature had he not been treated in the hospital. In the circumstances, the petitioner has asserted that there was sufficient cause for him to overstay leave and the charge u/s 19 (b) is not made out at all so as to hold him guilty and dismiss him from the service.

28. The petitioner also emphasized that the SSFC is meant for fast disposal of minor offences and a period of 13 months cannot be called as fast disposal. In the circumstances, it is asserted that the SSFC was constituted by respondent No.3 with a view to settle scores with him as he had objected to the mess charges recovered from the BSF personnel retrospectively. It is also urged that the plea by the respondents that the SSFC could not be conducted earlier on account of administrative and operational commitments is vague and is attempt to skirt the

whole issue. If the respondents could hold the SSFC for another period of absence on 30.6.2010 there was no reason not to hold the SSFC for his absence in June, 2009 earlier. The petitioner also contended that neither the relevant facts pertaining to administrative reasons had been disclosed, nor any such facts had been established during SSFC proceeding. On account of specific plea of the petitioner regarding mala fides of the respondent no.3, the respondents ought to have disclosed the alleged facts regarding alleged administrative and operational reasons which had led to the delay.

29. Learned counsel for the petitioner has relied on Shri Ravinder Singh Vs. The Union of India (UOI) and Others, to contend that this Court should exercise its jurisdiction under Article 226 of the Constitution of India as the decision of the respondents suffer from unreasonableness. The counsel contended that the punishment imposed upon the petitioner is also disproportionate. He contended that it has been established on record that the petitioner overstayed leave on account of having contacted infective hepatitis. Therefore, considering the fact that he was about 27 years of age, the quantum of punishment is too harsh and disproportionate. Reliance has also been placed on Ex. LN Vishav Priya Singh Vs. Union of India (UOI) and Others, in the facts and circumstances should not have been convened. Reliance has also been placed on Ranjit Thakur v. Union of India & Ors., AIR 1987 SCC 2386 to contend that procedural safeguard should commensurate with the gravity of the misconduct and that any penalty in disproportion to the gravity of the misconduct, would be violative of Article 14 of the Constitution and that with wider powers, there is great need for restraint in the exercise of such powers by the respondents. The learned counsel for the petitioner has also contended that in case the punishment by the SSFC is set aside by this Court, the respondents shall not be entitled to try the petitioner afresh. Learned counsel in support of this contentions has relied on Section 75 of the BSF Act, which stipulates that the petitioner cannot be tried again and has also placed reliance on a decision of the Division Bench of this Court in Mr. Banwari Lal Yadav Vs. Union of India (UOI) and Another, .

30. The Learned counsel for the respondents have relied on Major G.S.Sodhi v. Union of India, ; Ajit Jain v. National Insurance Company Limited, (2003) 3 LLJ 558 SC & Subhash Chander (Ex.Naik) v. Union of India & Ors., 152 (2008) DLT 611 in order to contend that in case this Court sets aside the verdict of guilty and sentence of dismissal awarded to the petitioner, then this Court should permit the respondents to try the petitioner, from the stage that the proceedings have vitiated.

31. This Court has heard both the parties and has also perused the documents filed with the writ petition, as well as the counter affidavit and the rejoinder. The Court has also perused record of the SSFC trial proceedings produced by the respondents. The learned counsel for the petitioner has primarily contended that the only evidence that goes against the petitioner in the record is the statement of the

Doctor, PW-4, who did not recognize the petitioner as the patient he had treated. However, the said deposition is not to be considered as PW-4 was not examined during the ROE and that he was called to be examined during the SSFC Trial proceedings as additional evidence without giving notice to the petitioner so that the petitioner could cross examine him later, or even an opportunity to adjourn the proceedings, therefore, being in complete violation of Section 85 of the BSF Act and gravely prejudiced the petitioner.

32. Perusal of the statement of the Doctor, P.K. Gupta, PW-4, reveals that he had stated that he had treated a patient, named, Vipin Kumar, but he did not recognize the petitioner. The basis for the statement given by the said witness is that none of the OPD slips had any endorsements of a Constable Vipin Kumar but instead it was only signed as Vipin Kumar while the petitioner was a constable. The explanation given by the said witness is illogical and not acceptable. If a person has to sign an OPD card he will not sign a prefix before his signatures, specifying his designation. If the name of the petitioner is Vipin Kumar, then he would sign as Vipin Kumar. It cannot be expected that in his signatures which were in Hindi, he would have written Constable Vipin Kumar. The OPD cards had been produced before the SSFC by PW3 and exhibited as RW 6 to 11. The original certificates were stated to be received on 28.10.2009 and were entered into dak register at Sr. No. 2773 which were

i. OPD slip no. 43289 dated 3.6.2009

ii. OPD slip no. 67081 dated 7.8.2009

iii. OPD slip no. 74052 dated 24.8.2009

iv. OPD slip no. 57881 dated 15.7.2009

v. OPD slip no. 49460 dated 20.6.2009

33. The other documents which were entered at said dak register were New Sachan Medical Store Cash Memo No. 396 and Medical Certificate issued by CMO District Hosp Hamirpur (UP) dated 25.8.2009. All these certificates bear the signatures of ''Vipin Kumar''. The said witness as PW-4 did not depose that the said OPD slips are forged and not issued by Diwan Shatrughan Singh Combined Distt. Hospital (Male) Hamirpur (UP). The least which was expected from the said witness was to depose regarding the authority of the OPD slips and whether the OPD cards were counter signed by him or not. From the statement of the said witness, it is apparent that he has not denied that the OPD cards were not issued by the Diwan Shatrughan Singh Combined District (Male) Hospital, Hamirpur (UP). The statement of the PW4, is as under:-

PW NO. 4 (Fourth witness for prosecution)

I Dr. P K Gupta, Consultant and Physician at Diwan Shatrughan Singh Combined District Hospital (Male) Hamirpur (U P) having been duly affirmed States that:-

I, Dr. P K Gupta is performing the duties of Consultant and Physician at Diwan Shatrughan Singh Combined Distt Hospital (Male)Hamirpur (U P). As per your office letter a clarification was asked whether I have treated Constable Vipin Kumar or not. I would like to clarify that although I have treated one namely Vipin Kumar but he was not from your Department / organization i.e. BSF. None of the OPD slip has any endorsement as Constable Vipin Kumar, but Vipin Kumar only.

The person to whom I have treated has told that he was appointed in Police Department, Lucknow.

As per procedure, when fitness certificate is issued to a person he has to deposit a Govt. fee of Rs.68/- in hospital and obtain fitness certificate. In this context, it is clarified that your Constable Vipin Kumar on 5/9/09 (date of issue of certificate) was physically present in your Battalion and was serving at Manipur, as such he cannot be the person to be issued with the certificate.

The original certificate produced by Constable Vipin Kumar in the office of 19 Bn BSF on being. compared with the Photostat copy being produced by me, it is evident that the original certificate deposited with 193 Bn BSF by Constable Vipin Kumar has been forged and tempered by changing its date whereas correct date of issue was 5/9200. I hereby produce a photo copy of fitness certificate and official fee receipt to the Court. (Courts encloses the documents and marked as Annexure - R-12 & 13 respectively).

If the certificate of fitness would have been issued on 25/8/2009 then there would have not been cutting and if the certificate have been issued on 5/9/2009 there was no question of issuing a certificate with striking records as a fresh certificate is always issued without any cutting on the testimony. If Constable Vipin Kumar has been issued with a certificate of fitness on 25/8/09 then individual should be able to produce a money receipt as per procedure before obtaining the certificate, of Rs.68/- of the same date. While on the contrary, the certificate and the fee deposited receipt are of 5/9/09, a date on which he was present in his Battalion.

I also produce an attested copy of the revenue register of the hospital which clearly indicates that on 5/9/09 Shri Vipin Kumar of Police Department Lucknow has deposited a fee of Rs.68/- wide receipt No.26855 and subsequently he was issued with fitness certificate. I do not understand under what circumstances a person with the same name serving in your Battalion can obtain fitness certificate at Hamirpur Hospital. (The Court encloses the same and marked as Annexure - R- 14).

34. Perusal of the original record produced by the respondents also reveals that the Commandant Jameel Ahmed had sent a detailed communication dated 24.9.2009 to the Chief Medical Officer about the difference in age between the OPD slip no.

43289 dated 3.6.2009 and other OPDs slips; how the medical certificate was issued to the petitioner in contravention of Medical rules and ethics without constituting a Board of Doctors and why was he not referred to higher level of Medical care/Hospital, how the petitioner was given IV fluid of 02 bottle and in the circumstances, he should have been admitted to the Hospital and whether he had been issued any medicine from the hospital and whether he was kept under the treatment of only one doctor and he was also directed either to appear as witness on 24.10.2009 or to send the reply so as to reach before 13.10.2009 when the Court had to re-assemble.

35. The Chief Medical Officer had sent a reply dated 7th October, 2009 to Commandant Jameel Ahmed stating that the petitioner was treated by Dr. P.K.Gupta and medical rest was recommended to him from 3.6.2009 to 24.8.2009. He also stated that the medical certificate was issued which was also signed by him but he could not certify whether the said person was Vipin Kumar (petitioner) or someone else but he had disclosed his name as `Vipin Kumar son of Shri Devi Ram Resident of village Kunheta, District Hamirpur. Another letter dated 7.10.2009 was also sent which was by Dr. P.K.Gupta addressed to Chief Medical Officer. In the said letter Dr. P.K.Gupta had disclosed that the difference in age between one OPD slip and other OPD slips was because the age was entered as disclosed by the person getting treatment at the registration counter. He had stated that his treatment period was less than three months therefore, the case was not referred to Medical Board, nor he felt the need for it. In the letter dated 7.10.2009 Dr. P.K.Gupta had rather stated that he cannot say with certainty that the person who had come to him for treatment was ''Vipin Kumar'' or not but he had taken his signatures on all the OPD slips. He had been provided all the medicines and as he had the senior most physician therefore, there was no need to refer him to any other Doctor.

36. Thus in order to ascertain whether the petitioner had got himself treated at the medical centre or someone else, the only thing required was to get the signatures of the petitioner compared with the signatures which were on OPD slips. In the circumstances, if Dr. Gupta did not recognize the petitioner, it could not be inferred that the person who had signed the OPD slips was not the petitioner. The Chief Medical Officer had also sent photocopies of the register in which the OPD slips were entered counter signed by the person in whose name the OPD slips were issued. Had the petitioner been impersonated by someone else before the District Hospital, the signatures of the petitioner could be compared with the signatures which had appeared in the registers of the District Hospital. In the circumstances, on the basis of the evidence which had been produced before the SSFC without getting the signatures of the petitioner with the signatures which had been on the OPD slips and even on the medical certificate, it could not be held that the OPD slips and the medical certificate do not bear the signatures of the petitioner. The reasoning and the findings of the SSFC are apparently perverse and cannot be sustained in the facts and circumstances.

37. The petitioner has also contended that Rule 85 of the BSF rules was not complied with regard to PW-4 and therefore, the SSFC proceedings and the punishment awarded to the petitioner has been vitiated. The respondents have repelled the plea of the petitioner on the ground that Rule 85 does not apply to the SSFC proceedings. This has not been denied by the respondents, that the doctor P.K.Gupta, PW-4 was not examined by the respondents during the ROE. This is also not disputed and cannot be disputed that the statement of doctor P.K.Gupta could not have been given to the petitioner earlier as he was not examined. It is also not denied that the copies of letter dated 7.10.2009 from the Chief Medical Officer and the copy of letter dated 7.10.2009 by Dr. Gupta addressed to the Chief Medical Officer were not given to the petitioner. If that be so, then in compliance with Rule 85, if the statement of Dr. Gupta which was not adduced during ROE, then before recording the statement of such a witness, the notice of the same ought to have been given to the accused. The object of the said rule is salutary so that compliance of the principles of natural justice is ensured and to make certain that any person may not be taken unaware and may be given the opportunity to put his version to impeach the testimony of such witness whose evidence has not been adduced earlier. Rule 85 further contemplates that if the accused so desires, the statement of such a witness whose evidence is not recorded earlier, may be adjourned for the cross examination after receiving the evidence of such an additional witness. The rule, therefore, not only puts an obligation on the respondents to give a notice of adducing evidence of such a witness, but also mandates that in case such additional evidence is recorded, the cross-examination by the accused or on his behalf be deferred at the instance of the accused, and the accused should be made aware of his right to apply for such an adjournment or postponement. The intent behind the said provision is clearly to provide a reasonable opportunity to the charged officer to be aware of the evidence against him, so as to enable him to substantially defend himself. The action of the respondents completely fails on all these counts. As is evident from the record, the notice was not given to the petitioner regarding the examination of PW-4, and the evidence was adduced almost after 13 months after the ROE was completed, in which the doctor P.K.Gupta was not examined. Also the petitioner was not even informed that he has the right to get the cross-examination deferred, nor was the cross-examination deferred. Perusal of the SSFC proceedings reveals that in these circumstances, the petitioner had declined to cross-examine the witnesses and thus, it was incumbent upon the respondents to have explained to the petitioner that he had the right to have the cross-examination deferred instead of stipulating that the statement has been read over to the accused in the language he understands i.e. Hindi and that the provision of BSF Rule 90 has been complied with. In these circumstances, how Rule 85 has been complied with, has not even been explained. Recording of the statement of doctor P.K.Gupta is thus, in violation of the statutory Rule 85 and if a right to cross-examination has been denied to the petitioner, the necessary consequence is that the statement of such a witness cannot be considered by the respondents to arrive at the verdict of guilty. If the statement of

PW4 is to be ignored then there is no evidence to inculpate the guilt of the petitioner, in respect of the charge framed against him that he had overstayed his leave without any sufficient cause. The remaining evidence, especially the statement of PW3 rather establishes that the OPD slips and a medical certificate regarding the petitioner had been produced pursuant to the clarification from the District Hospital, Diwan Shatrughan Singh Combined District (Male) Hospital, Hamirpur (UP).

38. The plea of the respondents that the Rule 85 does not apply to the SSFC proceedings, also cannot be accepted. If Rule 85 does not apply to the SSFC than under which rule the SSFC could adduce the additional evidence. There is no other rule which deals with adducing of additional evidence. If the said rule does not apply and they are being no other rule for adducing additional evidence, the SSFC could not adduce the additional evidence. In that case also the evidence of PW4 cannot be considered. Careful consideration of the rules pertaining to the SSFC proceedings under Chapter XI reveal that the only provision dealing with the evidence of witnesses is Rule 147 which provides that rules 88, 89 and 90 shall apply to the evidence of witnesses at Summary Security Force Court as it applies to the evidence of witnesses at a General or Petty Security Force Court. However, there is no specific provision under Chapter XI for adducing the evidence of additional witnesses. The evidence of additional witnesses is provided for only under Rule 85 and there is nothing in the rules that bar the applicability of Rule 85 which is provided under Chapter IX titled as "Procedure for Security Force Courts". Since the intent behind Rule 85 is clearly to provide a reasonable opportunity for the Charged Officer to be aware of the evidence procured against him, from a witnesses who has not been examined in the earlier proceedings, so as to enable him to properly defend himself, this Court does not find any reason for not applying this safeguard in the proceedings of the SSFC as well, as it is in consonance with the principles of natural justice. In any case, Section 64 of the BSF Act, 1968 specifies the Summary Security Force Court as a type of Security Force Court, therefore if the provisions of Chapter IX can be relied on for the other aspect of the evidence of witnesses, then the same too can be relied on, for the purposes of examination of additional witnesses. If the additional evidence can be taken by the SSFC, then the only provision is Rule 85. In the circumstances, the respondents cannot contend that the said Rule is not applicable to the SSFC.

39. The other reason which appears to have weighed with the SSFC to hold the petitioner ''guilty'' is that the date on the original certificate had been changed and thus, allegedly forged from the 5th September, 2009 to 25th August, 2009. The respondents also have relied on the deposition of PW-4 whereby he had deposed that as per the record the fee for the medical certificate alleged to be tampered was deposited on 5th September, 2009. It is evident that the petitioner on the said date was present at his post in Manipur. PW-4 had also stated that if the certificate of fitness would have been issued on 25/8/2009 then there would have not been any cutting and if the certificate had been issued on 5/9/2009 there was no question of

issuing a certificate with changed date, as a fresh certificate is always issued without any cutting. It was also asserted by PW-4 that if the petitioner had been issued with a certificate of fitness on 25.8.2009 then he should be able to produce a money receipt as per procedure before obtaining the certificate, of Rs.68/- of the same date. On the contrary, the certificate and the fee deposit receipt are of 5.9.2009, a date on which he was present in his Battalion.

40. This has been sufficiently explained by the petitioner in his statutory petition, as well as in the present writ petition. According to the petitioner, before leaving his home town for joining the unit, the petitioner had visited the hospital on 25th August, 2009 for obtaining the Certificate of his treatment at the hospital. At that time he had signed on two copies of the ''Certificate'', one copy was to be given to the petitioner and the second copy for the hospital''s record. But since the Chief Medical Officer was not available at that time, therefore, the dealing clerk had told the petitioner that he would have to get the Certificate collected at a later date through someone else. It was also submitted that at that time, the said certificates were kept undated, since the Chief Medical Officer was not available for signatures. Thereafter, when the petitioner had reported for duty on 27th August, 2009 he was asked to explain the reason for overstaying his leave and to also submit the medical documents validating his treatment. Since the Commandant required the certificate, though the OPD slips had been produced, the petitioner had asked his relative to collect the same, which he did by depositing Rs. 68/- on 5th September, 2009, which was thereafter faxed to the petitioner. Thus this clearly explains how even though the petitioner was present in his battalion, he still got the medical certificate from the concerned hospital. This explanation given by the petitioner has remained un-rebutted. The Doctor did not depose that on 25th August, 2009, whether the concerned doctor was available or not. The respondents should have also examined the concerned clerk who got two certificates signed by the petitioner and also told him to get the certificate collected from someone else. In any case, whether the certificates are signed by the petitioner or not has not been established and PW4 has not denied that the certificate are not signed by the concerned person on behalf of the District Hospital. Perusal of the record shows that the said certificate bears the signatures of the petitioner. How the petitioner could have signed the certificate, as he had already reported to the unit on 27th August, 2009. Another relevant reason is that the petitioner does not gain anything by changing the date of the certificate. What is relevant is that prior to 25th August, 2009, whether the petitioner was suffering from Hepatitis or not. The evidence of PW4 could not be construed against the petitioner in the facts and circumstances and does not establish the charge against the petitioner.

41. The petitioner has further submitted that the Commandant, Sh. Jameel Ahmad too was not satisfied with the genuiness of the certificate at that time, since it was dated 5th September, 2009 which is why the petitioner again asked his maternal uncle to obtain the certificate with the correct date. Therefore, the uncle again went

to the dealing clerk for pointing out the said anomaly, after which the dealing clerk had corrected the date on the certificate from 5th September, 2009 to 25th August, 2009 and stipulated the same at two additional places. The said corrected certificate was then showed to the Commandant who was satisfied with the same and had therefore, dropped the charges against the petitioner. Thereafter, the case was reopened against the petitioner after 13 months by the new Commandant, Neeraj Dube. This explanation on the part of the petitioner is also believable in the facts and circumstances, since on examining the certificate it is clear that the tampering alleged by the respondents instead seems to be a clear correction of the date specified on the certificate, since there is an evident cutting and an attestation of the same by the dealing authority. Instead of wholly rejecting the pleas of the petitioner it was incumbent on the respondents to have examined the dealing clerk and the Commandant Sh. Jameel Ahmad, who would have provided the relevant facts.

42. The SSFC ought to have ascertained whether the contents of the said certificate except for the date were correct or not. If the dates on two certificates are different then in order to ascertain whether there has been a forgery or not, it has to be shown as to how the petitioner would have benefited by changing of the date from 5th September, 2009 to 25th August, 2009. The certificate is pertaining to the petitioner suffering from infective hepatitis from 3rd June, 2009 to 24th August, 2009 and he became fit for duty from 25th August, 2009. So as long as it can be certified that the petitioner had suffered from infective hepatitis from 3rd June, 2009 to 24th August, 2009, the change of date of the certificate from 5th September, 2009 to 25th August, 2009 does not benefit the petitioner in any manner. It is evident that the respondents have not considered the version of the petitioner and disposed off his petition by order dated 11th August, 2011 in a mechanical manner without considering the relevant pleas and contentions of the petitioner.

43. Regardless, in light of the reasonable explanation given by the petitioner, which has not been rebutted, the certificate ought to have been accepted by the respondents. The medical certificate on which the date was changed was based on the OPD cards/prescriptions which were issued to the petitioner. The OPD cards/prescription have remain un-rebutted and in the circumstances, there is ample evidence about the illness of the petitioner which could not be ignored by the SSFC. Thus the medical documents submitted by the petitioner had to be considered and the same amply justify the reason for his overstaying the leave from 30th May, 2009 to 25th August, 2009 as he was suffering from Infective Hepatitis. Therefore, the punishment of dismissal in light of the sufficient cause for overstaying the leave on the part of the petitioner is not justifiable and misconduct on the part of the petitioner has not been established and the petitioner could not be dismissed and he is entitled to be reinstated.

44. The respondents have also failed to give any satisfactory reason for holding the SSFC after 13 months. The petitioner categorically asserted that the SSFC was

ordered by the respondents No.3 with a view to teach him a lesson, as he had objected to the increase in the contribution to the mess charges from the force personnel retrospectively, as it was only after the 6th Pay Commission had increased the mess charges and not before that. Mere denial and production of the minutes of the Sainik Sammelan would not absolve the respondents of the averments made against them in order to counter the plea of mala fide. In these facts and circumstances, the affidavit of Mr. Neeraj Dube, Commandant ought to have been filed by the respondents. Instead of an affidavit of respondent No.3, a counter affidavit has been filed on behalf of the respondents by Sh. Hardeep Singh, Dy. Inspector General. There are no averments made even in the counter affidavit that Sh. Neeraj Dube, Commandant has been apprised of the fact that specific allegations have been made against him. The respondents, however, have skirted the whole issue by simply denying that the facts which have been alleged by the petitioner in support of his plea of mala fides against respondent No.3 and by stating that he had, in fact, not raised any objection as alleged by him as per the extracts of the Sainik Sammelan. Even if it is established that such a fact was not raised in the Sainik Sammelan, still the fact that the mess charges were claimed from the force personnel retrospectively or not, would still remain. The respondents in the counter affidavit has not denied that the mess charges were recovered from the force personnel retrospectively and no justification has been given as to how, the mess charges could be recovered retrospectively prior to the date the enhanced amounts were granted to the personnel by the 6th Pay Commission. Also the plea of the respondents that the delay in convening the SSFC proceedings was on account of want of original medical documents and verification of the photocopies of the documents is to be rejected since it is evident from the record that all the documents and the clarifications for the same were received by 7th October, 2009 which is when the letter from The Chief Medical Office and letter by Dr. P.K. Gupta to the Chief Medical Officer was received by the Commandant Jameel Ahmad regarding the genuineness of the OPD slips and medical certificate submitted by the petitioner. In these circumstances, why the SSFC proceedings were initiated only on 25th September, 2010 i.e. after the lapse of almost one year has not been explained.

45. While dealing with the power of judicial review, the power of the High Court or Tribunals in judicial review relating to the punishment imposed by the disciplinary authority, the Supreme Court after considering the case law on the subject had held as under. In B.C. Chaturvedi Vs. Union of India and others, in para 18 it was held as under:

18. ..... If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

The Supreme Court in para 22 also held as under:

22..... The aforesaid has, therefore, to be avoided and I have no doubt that a High Court would be within its jurisdiction to modify the punishment/penalty by moulding the relief, which power it undoubtedly has, in view of a long line of decisions of this Court, to which reference is not deemed necessary, as the position is well settled in law. It may, however, be stated that this power of moulding relief in cases of the present nature can be invoked by a High Court only when the punishment/penalty awarded shocks the judicial conscience.

46. The Supreme Court in U.P. State Road Transport Corporation and Ors. v. Mahesh Kumar Mishra and Ors., (2000) ILLJ SC 1113 had held as under:

8. This will show that not only this Court but also the High Court can interfere with the punishment inflicted upon the delinquent employee if, that penalty, shocks the conscience of the Court. The law, therefore, is not, as contended by the learned Counsel for the appellants, that the High Court can, in no circumstance, interfere with the quantum of punishment imposed upon a delinquent employee after disciplinary proceedings.

47. Therefore, in the present facts and circumstances, though the petitioner had overstayed the leave granted to him, however, there was sufficient cause for doing the same, as the petitioner was suffering from Infective Hepatitis and pursuant to medical advice he did not join duty. As there was sufficient cause for overstaying the leave the same ought to have been regularized by the respondents, instead of imposing an extreme punishment of dismissal.

48. For the forgoing reasons the charge imputed against the petitioner has not been established by the respondents, and thus the punishment of dismissal dated 25th September, 2010 is liable to be quashed and the order dated 11th August, 2011 is also liable to be set aside.

49. Since the punishment awarded to the petitioner is liable to be set aside also on account of non compliance of Rule 85 of BSF Rules, whether the respondents would be entitled to try the petitioner again or not and whether the matter is to be remanded to the respondents. This cannot be disputed by the respondents that the SSFC which tried the petitioner and punished him with dismissal from service was competent to try the petitioner and the Security Force Court did not lack the jurisdiction to try him. In the circumstances, the trial of the petitioner will not be non est being null and void from its very inception as the SSFC had the jurisdiction to try the petition. Since the petitioner withstood trial which has been vitiated on account of there being not sufficient evidence establishing the charge against him and for violation of BSF Rules, the petitioner cannot be tried again.

50. Section 75 of BSF Act categorically prohibits a second trial. Section 75 of the BSF Act is as under:-

75. Prohibition of second trial: (1) When any person subject to this Act has been acquitted or convicted of any offence by a Security Force Court or by a criminal court or has been dealt with u/s 53 or u/s 55 he shall not be liable to be tried again for the same offence by a Security Force Court or dealt with under the said sections.

(2) When any person, subject to this Act, has been acquitted or convicted of an offence by a Security Force Court or has been dealt with u/s 53 or Section 55, he shall not be liable to be tried again by a criminal court for the same offence or on the same facts.

51. In Mr. Banwari Lal Yadav Vs. Union of India (UOI) and Another, , a Division Bench of this Court relied and considered the ratio of the cases in Civil Rule No.3236 (Writ Petition)/73, AIR 1945 16 (Federal Court) AIR 1949 264 (Privy Council); Baij Nath Prasad Tripathi Vs. The State of Bhopal, Mohd. Safi v. State of West Bengal, (1965) 3 SCC 467 State of Karnataka through CBI Vs. C. Nagarajaswamy, and State of Goa Vs. Babu Thomas, and had held that there is distinction between the cases where the Court has no jurisdiction to try the offence and where the trial ipso facto is unsatisfactory. It was held that where the Court has no jurisdiction, an accused can be tried again. However, if the trial is vitiated on account of it being unsatisfactory, the delinquent or the accused cannot be tried again. In para 13 of the said judgment the Court had held as under:-

13. In our considered view, there is a clear distinction, albeit a fine one, between cases where a court has no jurisdiction to try the offence, as for example, if the court is not competent to try the offence for want of sanction for prosecuting the accused or if the composition of the court is not proper as required for that type of court or if the court is illegally constituted of unqualified officers, and cases where the trial ipso facto is unsatisfactory as for example if during the course of the trial, inadmissible evidence is admitted or admissible evidence is shut out or proper procedure is not followed and the trial is consequently marred by grave irregularities which operate to the prejudice of the accused. In the former category of cases the trial would be no nest, being null and void from its very inception. In other words, there would be no trial in the eyes of law. In the latter category of cases, however, in our view, it would be deemed that the accused has withstood the trial and as such he cannot be tried again.

52. Considering the object and intent of Section 75 of BSF Act which clearly prohibits the second trial of the accused, it was held that the second trial was not permitted. The Court in para 21, 22, 23 and 24 of the said judgment had held as under:-

21. Keeping in view the aforesaid position of law, we are of the considered view that the question as to whether a fresh trial or de-novo trial can be initiated against the accused would depend upon the reason for the setting aside of the earlier trial. There are clearly two kinds of cases (1) where the earlier trial was void ab initio in the eyes of law having been initiated by a court inherently lacking in jurisdiction to

conduct the trial to which reference has been made hereinabove and (2) where the trial was initiated before a competent court vested with jurisdiction to conduct the trial, but Subsequently the trial was vitiated on account of procedural or other grave irregularity committed in the conduct of the trial. The present case is clearly a case of the second type where the conviction is quashed not for want of inherent jurisdiction in the court, but because the trial was unsatisfactorily conducted. The petitioner who had earlier pleaded guilty to the charge, in his statement for mitigation of sentence stated that his mental condition was not proper and, therefore, the offence committed by him had been intentionally committed. Keeping in view the said statement of the petitioner and the provisions of Rule 143(4) read with Rule 161(1) of the BSF Rules, the court would have been well advised to alter the plea of Guilty of the petitioner to Not Guilty. The court not having done so, the proceedings were hit by the provisions of Rule 143(4) of the BSF Rules and the Appellate Authority, being the Dy. Inspector General, rightly concluded that the injustice had been done to the petitioner by reason of the grave irregularity in the proceedings. The petitioner accordingly was allowed to join back his duties and the sentence of his dismissal from service was set aside. So far, the order of Dy. Inspector General possibly cannot be faulted. What, however, followed was the second trial of the petitioner and this, to our mind, keeping in view the embargo imposed by Section 75 of the BSF Act and Article 20 of the Constitution of India was clearly impermissible.

22. The object and intent of Section 75 which has been incorporated in the BSF Act is clearly to prohibit a second trial of the accused, whether by the Security Force Court or by a criminal court, in all cases where the accused has been convicted or acquitted of an offence by a Security Force Court or by a criminal court or has been dealt with u/s 53 or Section 55. Section 75 consequently imposes a bar on second trial where the first trial was by a court of competent jurisdiction, though not where the first trial was void ab initio.

23. We are fortified in coming to above conclusion from Section 161 of the BSF Act which provides as under:

161. Action by the Deputy Inspector General- (1) Where the Deputy Inspector General to whom the proceedings of a Summary Security Force Court have been forwarded under Rule 160, is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise, he may, (a) set aside the proceedings of the court; or (b) reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in Section 48 and return it to the unit of the accused for promulgation.

24. A bare glance at the provisions of the aforesaid section shows that what is envisaged is the setting aside of proceedings by the Deputy Inspector General where grave irregularity has been committed by a Summary Security Force Court, thereby causing injustice to the accused. The provisions of the said section do not

envisage the setting aside of the proceedings in a case where the court had no jurisdiction in the first place to deal with the matter, as for example where the court was illegally constituted or incompetent to deal with the matter on account of want of sanction by the competent authority or otherwise. The trial initiated by such a court against the accused would be no nest in the eyes of law, and quite obviously cannot stand in the way of initiation of de-novo trial.

53. Therefore, de novo trial cannot be initiated in cases where the trial was initiated before a competent Court vested with jurisdiction to conduct the trial, however, where subsequently, the trial was vitiated on account of procedural or other irregularity the accused is acquitted of the charges against him. Therefore, in the facts and circumstances and for the foregoing reasons, the petitioner cannot be tried de-novo and the matter cannot be remanded to the respondents to try the petitioner again. For the foregoing reason, the writ petition is, therefore, allowed and the orders of the respondents dismissing the petitioner are set aside and the petitioner is directed to be reinstated with all consequential benefits, arrears of pay and other benefits from the date of dismissal till the date of reinstatement forthwith. The petitioner is also awarded a cost of Rs.10000/- to be paid by the respondents. Costs be paid within four weeks. With these directions the writ petition is allowed.