THE HIGH COURT OF MEGHALAYA

WA No. 32 of 2014

The Union of India
Represented by the Secretary to the
Government of India, Ministry of Home Affairs,
New Delhi – 110 001

:::: Appellant

-Vs-

Shri Dickson Ch. Marak,
Ex-Const. 930071202, 126 Bn, BSF
Haringhata, Mohanpur, West Bengal,
Son of (L) Edinburgh marak
Village: Balsanang, Tura
P.O. Araimile, Tura
P.S. Tura Sadar
District – West Garo Hills
Meghalaya.

:::: Respondent

BEFORE
THE HON'BLE MR JUSTICE UMA NATH SINGH
CHIEF JUSTICE (ACTING)
THE HON'BLE MR JUSTICE T NANDAKUMAR SINGH

For the Appellant	:	Mr . R.Deb Nath, Adv.
For the Respondent	:	Mr. AH Hazarika, Adv
Date of hearing	:	12-02-2015
Date of Judgment & Order	:	12-02-2015

JUDGMENT AND ORDER (ORAL)

Hon'ble Justice Uma Nath Singh, CJ (Acting)

This writ appeal by Union of India has been filed with prayer for quashing of judgment and order dated 14-03-2014 passed in WP(C) No. 224 of 2011 by learned Single Judge. Learned Single Judge having considered the rival submissions has noticed that the Commandant who filed the charge sheet against the respondent, a Border Security Force personnel for committing civil offence could not have presided over the Summary Trial under Section 64 of the Border Security Force Act, 1968 (for short, the BSF Act 1968). According to learned Single Judge, the alleged civil offence was cognizable under Section 13(i)(e) and 17 of the Prevention of Corruption Act, 1988, for the appellant had been found to be in possession of income disproportionate to the known sources of income.

2. Learned counsel for the appellant, Mr. R. Deb Nath, has one and only argument namely, that in terms of Section 17 of the BSF Act, 1968, the Summary Security Force Court has to be conducted only by the Commandant of any Unit of Force and thus he alone can constitute the Court. According to Mr. R. Deb Nath, the impugned judgment has been rendered contrary to the provisions of the Act. Learned counsel for the appellant referred to a judgment reported in (***1988) 2 SCC 459 (Vidya Prakash vrs Union of India and Ors***) to argue that in the case impugned therein, the Summary Court-Martial was held under the Army Act

and Rules by Commanding Officer alongwith two other Officers and the same was held to be valid. Therefore, the same principle should apply in the case of Summary trial proceeding of the Border Security Force.

3. On the other hand, Mr. AH Hazarika, learned counsel for the respondent tried to justify the impugned judgment interalia by relying upon the decisions of Hon'ble the Apex Court reported in ***(2000) 6 SCC 338 (State of MP vrs Mohanlal Soni)***. According to him vide para 8 of the judgment, the Court of competent jurisdiction should have considered the income tax returns which established that the property included in the assets of the accused constituting the offences of assets disproportionate to his known sources of income was his wife's property bought from her own sources. The same principle and ratio should also be made applicable in the facts of the instant case.

4. Mr. AH Hazarika, also cited another judgment namely ***(State of MP vrs Awadh Kishore Gupta and Ors) reported in (2004) 1 SCC 691***. According to him, para 6 of the judgment has defined the phrase "known sources of income". Para 6 is reproduced as under:

> "***6***. *The phrase "known sources of income" in Section 13 (1)(e) [old Section 5 (1)(e)] has clearly the emphasis on the word "income". It would be primary to observe that qua the public servant, the income would be what is attached to his office or post, commonly known as remuneration or salary. The term "income" by itself, is elastic and has a wide connotation. Whatever comes in or is received, is income. But, however wide the import and connotation of the term "income", it is incapable of being understood as meaning receipt having no nexus*

> *to one's labour, or expertise, or property, or investment, and having further a source which may or may not yield a regular revenue. These essential characteristics are vital in understanding the term "income". Therefore, it can be said that, though "income" is receipt in the hand of its recipient, every receipt would not partake the character of income. Qua the public servant, whatever return he gets from his service, will be the primary item of his income. Other incomes which conceivably are income qua the public servant, will be in the regular receipt from (a) his property, or (b) his investment. A receipt from windfall, or gains or graft, crime or immoral secretions by persons prima facie would not be receipt from the "known sources of income" of a public servant."*

5. The third case Mr. Hazarika has cited is reported in (***2006) 1 SCC 420 namely (DSP, Chennai vrs K. Inbasagaran)***. In the penultimate paragraph 17, Hon'ble the Apex Court has held that once the accused has satisfactorily accounted for the recovery of the unaccounted money, in the context of possession; that the premises from where the money was recovered was jointly shared by the wife and husband, and further that the wife accepted the entire recovery at her own hand, husband should not have been held guilty.

6. He also referred to the judgment of the Apex Court reported in (***2011) 4 SCC 402 (Ashok Tshering Bhutia vrs State of Sikkim).*** In the said judgment, the Court took a considerate view and allowed a small marginal excess amount found disproportionate to the known sources of income. The Court said that even if the said amount is spread over the period between 1987-1995, the alleged unexplained income remains merely a paltry sum which any government employee can save every year.

7. Mr. AH Hazarika, also took us to the judgment of 3 Judge Bench of Hon'ble the Apex Court reported in ***AIR 1981 SC 1186 (State of Maharashtra vrs Wasudeo Ramchandra Kaidalwar***). This judgment has been rendered in the premises of old Prevention of Corruption Act (2 of 1947), but that nevertheless it did relate to possession of assets disproportionate to known sources of income. The Court had discussed the parallel provision namely, Section 5 of 1947 Act in great detail in para 13. The same is reproduced as:

> *"**13.** That takes us to the difficult question as to the nature and extent of the burden of proof under Section 5 (1) (e) of the Act. The expression 'burden of proof' has two distinct meanings (1) the legal burden. i.e. the burden of establishing the guilt, and (2) the evidential burden, i.e. the burden of leading evidence. In a criminal trial, the burden of proving everything essential to establish the charge against the accused lies upon the prosecution, and that burden never shifts. Notwithstanding the general rule that the burden of proof lies exclusively upon the prosecution, in the case of certain offences, the burden of proving a particular fact in issue may be laid by law upon the accused. The burden resting on the accused in such cases is, however, not so onerous as that which lies on the prosecution and is discharged by proof of a balance of probabilities. The ingredients of the offence of criminal misconduct under s. 5(2) read with s.5(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can bring a case under s. 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution, and (4) it must prove quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the*

offence of criminal misconduct under s. 5(1)(e) is complete, unless the accused is able to account for such resources or property. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under Section 5(1)(e) cannot be higher than the test laid by the Court in Jahgan's case (supra), i.e. to establish his case by a preponderance of probability. That test was laid down by the court following the dictum of Viscount Sankey, L.C. in Woolmington v. Director of Public Prosecutions, (1935) AC 462. The High Court has placed an impossible burden on the prosecution to disprove all possible sources of income which were within the special knowledge of the accused. As laid down in Swamy's case (AIR 1960 SC 7) (supra), the prosecution cannot, in the very nature of things, be expected to know the affairs of a public servant found in possession of resources or property disproportionate to his known sources of income i.e. his salary. Those will be matters specially within the knowledge of the public servant within the meaning of s.106 of the Evidence Act, 1872. Section 106 reads:

Section. 106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In this connection, the phrase the burden of proof is clearly used in the secondary sense namely, the duty of introducing evidence. The nature and extent of the burden cast on the accused is well settled. The accused is not bound to prove his innocence beyond all reasonable doubt. All that he need do is to bring out a preponderance of probability."

8. Mr. AH Hazarika, again referred to a judgment of Hon'ble the Apex Court reported in ***AIR 1990 SC 287 (Sadashiv Mahadeo Yavaluje & Gajanan Shripatrao Salokhe vrs State of Maharashtra***). In that case, apart from charges framed under the provisions of Section 161 and 165 of the Indian Penal Code, there was also a charge under Section 5(1)(d) and (2) of the

Prevention of Corruption Act. Learned counsel, on the basis of above judgment, during the course of arguments, contended that the principle of reasonable doubt shall be made applicable also in the instant case. The evidence produced by the prosecution should establish the case beyond reasonable doubt.

9. In the aforesaid premises, as set out by the rival submissions of learned counsel for parties, we find that the point that has weighed with the learned Single Judge in deciding the case is the one that relates to free and fair proceedings as available under the principles of natural justice. Mr. R Deb Nath, learned counsel, has cited the judgment rendered in the context of Army Act and the provisions of the Army Act and that of BSF Act are not in pari materia. It is also noticeable from the discussions in the impugned judgment that the offence under Section 13(i)(e) read with 17 of the Prevention of Corruption Act, 1988, is a civil offence under the BSF Act, 1968. Vide Section 64 of this Act, 3 types of Security Force Courts are to be constituted, namely, (1) General Security Force Court (2) Petty Security Force Court and (3) Summary Security Force Court. The case of respondent was tried by Summary Security Force Court by the Commandant who had put up the charge-sheet. If we come to Section 70 of this Act that relates to Summary Security Force Court, it is obvious that the proceedings of this Court can be held by the Commandant of <u>any Unit of the Force</u> and thus he can constitute the Court. When we go to the BSF Rules the Summary Security Force Court shall be attended throughout by 2 other persons who shall be Officer and Subordinate Officer or either of them, and who shall not as such, be sworn or affirm. But, that

notwithstanding, the Court shall be constituted only by the Commandant. Here we need to put emphasis on Commandant of any unit of the force. When examining Rule 44 of the BSF Rules, 1968, relating to charge sheet, we find that it has to be drawn in the form as provided in Appendix VI of the Rules. As per Rule 43, the offence report has to be reduced to writing in the form set out in Appendix IV as given below :

"APPENDIX IV
(See rule 43)

FORM FOR USE AT SUMMARY PROCEEDINGS OF UNDER-OFFICERS AND OTHER ENROLLED PERSONS UNDER SECTION 53 OFTHE BORDER SECURITY FORCE ACT

Offence Report

……
Company……
Serial No. ……..
For week-ending……
Last report submitted on ……

Charges against No…… Rank ……
Name ……

Place and date of offence	*Offence*	*Plea*	*Names of witnesses*	*Punishment awarded*	*Signature, Rank and designation of officer by whom awarded and date of award*	*Date of entry in conduct sheet*	*Remarks*
1	*2*	*3*	*4*	*5*	*6*	*7*	*8*

Signature of Commandant
of the Battalion

Instructions:
Col. 1. In cases of absence without leave/desertion, the "date of offence" will be the first day of absence.

Col. 2. The section and sub-section of the BSF Act under which the charge is preferred will be inserted above the statement of offence.

Col. 3. An officer cannot deal summarily with a case in which he is the sole prosecution witness.

Col. 4. Must be completed strictly in accordance with the heading.
Note: This will be prepared in duplicate.

A copy alongwith a precise of evidence where made shall be sent to the Deputy Inspector-General."

"APPENDIX VI
[See rule 53(2)]
CHARGE-SHEET

The accused No…….. (if applicable) Rank ……
Name……. Battalion/Unit…….……., is charged with.

Disobeying The Lawful Command of His Superior Officer
BSF Act/sec. 21(2)

In that he, at…… on ……..……., disobeyed the lawful command of his superior officer Rank ……..……Name…….. of the same Battalion, to turn out for Commandant's parade, by not turning out.

Place……...
Date……

Commandant……Bn BSF.

** To be tried by a General/Petty Security Force Court*
Place ……..
Date……

Inspector-General/Dy. Inspector-General
(or Staff Officer to IG/DIG)
Frontier."

10. Thus, it is evident that the Commandant shall also sign the offence report and charge sheet which shall be countersigned by the Inspector General/Deputy Inspector General. Learned Single Judge has thus rightly held that the Officer who puts up the charge-sheet should not preside over the Summary Security Force Court. That finding of learned Single Judge though is not based on reference to any provision of law but such a provision is contained in Section 70 of the BSF Act. The provision envisages

like : the Commandant of any unit of the force. It does not necessarily imply that only the Commandant who puts up the charge-sheet shall has to sit as Presiding Officer of the Summary Security Force Court. On that count, we supplement the reasons given by learned Single Judge in support of his finding.

11. Another point that requires to be addressed here is the question relating to composite charges for commission of offences under IPC and Prevention of Corruption Act against a member of the BSF. In that case, the option can be given under Section 81 of the BSF Act, 1968, as well as Section 475 of the Code of Criminal Procedure, 1973. Both the Sections namely, BSF Act 1968 and Code of Criminal Procedure are reproduced hereunder for ready reference :

> *"**81. Procedure on plea of guilty. –** (1) When the Court has recorded the accused of guilty in respect of a charge to which an accused had pleaded guilty the prosecutor shall read the record or abstract of evidence to the Court or inform the Court of the facts contained therein:*
>
> *Provided that if an expurgated copy of the record or abstract of evidence was sent to the Presiding Officer, the prosecutor shall not read to the Court those parts of the record or abstract of evidence which have been expurgated or inform the Court of the facts contained on those parts, and shall not hand over the original record or abstract of evidence to the Court until the trial is concluded.*
>
> *[1][***]*
>
> *(3) After [2][sub-rule (1) had] been complied with, the accused may, -*
>
> *(a) adduce evidence of character and in mitigation of punishment;*
>
> *(b) address the Court in mitigation of punishment.*
>
> *(4) After sub-rule (3) has been complied with, the Court shall proceed as directed in rule 101."*

> *"**475** Delivery to commanding officers of persons liable to be tried by Court-martial – (1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950) and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case maybe, for the purposes of being tried by a court-martial.*
>
> *Explanation – In this Section –*
>
> *(a) "unit" includes a regiment, corps, ship, detachment, group battalion or company,*
>
> *(b) "Court-martial" includes any Tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.*
>
> *(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.*
>
> *(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-marital for trial or to be examined touching any matter pending before the Court-martial."*

12. Thus, when there was an option available for putting on trial before the Summary Security Force Court or before the Regular Criminal Court, there was no reason to violate the well established principles of fair trial by entrusting the proceedings of

trial to an Officer who has put up the charge-sheet. Secondly, the charge sheet is also countersigned by the Senior Officer of the organisation. The Commandant as well as the Senior Police Officers who have signed and countersigned the charge sheet can also be summoned as witness by the accused Security personnel. In that case, an embarrassing situation could be created if the superior officers are summoned by the Commandant who is presiding the Summary Security Force Court after having himself drawn and put up the charge-sheet. Secondly, the Officer who puts up the challan can also be a witness. In that view of the matter, it would be desirable in the interest of justice and free and fair trial to entrust the Summary Security Court proceedings only to such competent Officers who are not connected with the investigation or supervision of the proceedings.

13. Though Mr. AH Hazarika, has cited the aforesaid judgments of Hon'ble the Apex Court, but they have no bearing on the point that was considered by learned Single Judge for allowing the petition. They are generally related to joint accounts, joint assets and joint premises etc, a point that would relate to the merit of the case but that point has not been addressed and discussed in the impugned judgment elaborately, except in a few observations in para 4 thereof.

14. In view of all the aforesaid discussion, we do not find merit in this writ appeal. Hence, it is dismissed as such.

JUDGE **CHIEF JUSTICE (ACTING)**

S.Rynjah