

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : July 14,2016*
Judgment Delivered on : July 29,2016

+ **W.P.(C) 6896/2015**

RAMESH CHANDER Petitioner

Represented by: Mr.Surender Singh Hooda,
Advocate.

versus

UNION OF INDIA & ANR. Respondents

Represented by: Ms.Shubhra Parashar, Adv.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. After serving BSF for about a quarter of century with unblemished service records and 17 rewards to his credit, dismissal from service was something which was least expected by the petitioner.

2. The petitioner has challenged the verdict returned at the SSFC trial conducted against him and the consequent dismissal from service vide order dated June 05, 2012. The petitioner has further sought quashing of the order in appeal whereby while maintaining the dismissal order, in view of his unblemished service record for more than 24 years, he was granted 50% pension with gratuity which would have been admissible to him under the provisions of Rule 41 CCS (Pension) Rules, 1972.

3. The petitioner had been charged as under:-

“BSF ACT 1968 U/S 40
AN ACT PREJUDICIAL TO GOOD ORDER AND
DISCIPLINE OF THE FORCE

*in that he
at about 0320 hours on 12 December 2011, when he was
performing 2nd shift ACP duty in area between BP No.312/2-S
and 314/MP in AOR of BOP Domutha from 0001 hours to 0600
hours improperly omitted to exercise ACP duty as per SOP/laid
down instructions and deliberately delayed in reaching out for
help of No.04005236 Const. Kamal Singh of the same until who
shouted for his help when he saw IBB Fence Gate No.30 open
on the both sides and 2 smugglers standing near the gate with a
result that the smugglers could not be apprehended and
managed to escape.*

*Sd/-
(Raj Kumar Basatta)
Commandant
120 Bn BSF*

*Place: Govindpur, Raiganj (WB)
Dated, the 31 May, 2012”*

4. SCOI was ordered to investigate the said incident vide SHQ BSF Raiganj O/No. OPS/995/SCOI/Conv/120 Bn/SHQ-RGJ/2011 dated 28th Dec 2011. In compliance to the remarks of IG BSF Ftr HQ BSF Malda on the SCOI, for deliberate dereliction of duty by the petitioner, disciplinary action was initiated against him. After affording an opportunity of being heard as required under Rule 45 of BSF Rules, the Commandant directed ROE to be prepared. After perusing the record of evidence and finding a prima facie case to send the petition for trial before SSFC, the chargesheet was prepared and furnished to the petitioner alongwith its annexures. Sh.Satpal, Deputy Commandant was appointed as friend of the petitioner.

5. Thereafter, the petitioner was tried by Summary Security Force Court (SSFC) from June 02, 2012 to June 05, 2012 on a charge u/s 40 of BSF Act and on being found guilty of the charge, sentenced to be “dismissed from

service” on June 05, 2012.

6. The petitioner challenged his dismissal from service by filing statutory appeal. Considering the unblemished service record and 17 rewards, vide order dated January 15, 2013, the Director General Border Security Force limited relief to the extent of granting 50% of the pension with gratuity (which would have been admissible to him under the provisions of Rule 41 CCS (Pension) Rules, 1972) was allowed .

7. The petitioner filed a W.P.(C) No.2441/2013 impugning the said order but same was directed to be withdrawn with liberty to file a fresh petition.

8. Thereafter, this writ petition has been filed by the petitioner.

9. We have heard learned counsel for the parties and perused the departmental file containing all the proceedings conducted against the petitioner.

10. The contention of the petitioner is that in respect of the incident that had taken place on the night intervening December 11/12, 2011 at Gate No.30 Indo Bangladesh Border, detailed special situation report was sent by the Company Commander soon after the incident (Annexure P-1). Thereafter, on the basis of vigilance cell letter dated December 14, 2011 received by the office of DIG, BSF Raiganj suggesting connivance of BSF personnel through Bangladesh Border fence Gate No.30 in the area of BOP Domutha of Ambush cum Patrolling Party (in short ‘ACP’) of 120 Bn. BSF, a Staff Court of Inquiry was ordered to inquire into the connivance of the force personnel. However, SCOI in the said report did not find any connivance.

11. Learned counsel for the petitioner has submitted that for initiating

disciplinary proceedings against the petitioner, grounds were created i.e. breaching SOP/instructions and deliberately not reaching out for help of constable Kamal Singh when he saw two smugglers standing near fence Gate No.30 due to which both the smugglers managed to escape. Learned counsel for the petitioner has submitted that at the stage of ROE, statement of witnesses recorded during SCOI were taken on record. None of the witnesses examined during the trial before SSFC had stated about any breach of SOP or laid down instructions and in the absence of any evidence about the instructions being given during briefing to the Ambush cum Patrolling Party while going for patrolling, the petitioner alone could not have been charged and held guilty for the same.

12. Learned counsel for the respondent has submitted that the statements of witnesses were produced at the stage of ROE in accordance with provisions of Rule 48 of BSF Rules, 1969. The petitioner was provided opportunity to cross examine the witnesses. It has been further submitted that the statement of Constable Kamal Singh clearly implicate the petitioner who deliberately delayed in reaching gate No.30 despite Constable Kamal Singh shouting for help to nab the smugglers.

13. At the stage of SCOI total eight number of witnesses (including the petitioner) namely Sh.Rajesh Kumar Pandey – Assistant Commandant (PW-1), Constable Kamal Singh (PW-3), HC Y.K.Joshi (PW-4), HC Lal Kumar (PW-5), Constable S.J.Sikia (PW-6), Constable Ranjit Kumar Roy (PW-7) and Constable Bhag Chand (PW-8) were examined. At the stage of ROE, written statement of these witnesses recorded at the time of SCOI were produced. These witnesses were also examined at the stage of SSFC.

14. Article of Charge contains following two acts of misconduct by the

petitioner:

- (i) Violation of SOP while patrolling by ACP
- (ii) Deliberate delay by five minutes in reaching Constable Kamal Singh when he was approaching towards Gate No.30 on hearing sound from there as a result of which the two smugglers managed to escape.

15. For violation of SOP/instructions laid down, the statement of PW-3 Ct.Kamal Singh and PW-4 HC Y.K.Joshi - the Party Commander can be referred to.

16. PW-3 Constable Kamal Singh who was on patrolling duty along with Head Constable Ramesh Chander near the fencing gate No.30 has stated that:-

“On the intervening night of 11-12 Dec 2011, I was detailed in ACP no.1 for second shift duty in ACP w.e.f. 120001 hrs to 120600 hrs from BP No.313/s-2 to 313/s-8 alongwith HC Y K Joshi, HC Lal Kumar, HC Ramesh Chand, Ct Ranjit Kumar Rai, Ct. Ranjit Kumar Rai, Ct S J Saikia and CT Bhag Chand. At about 112350 hrs, we left from BOP Domutgha on our respective bicycles for ACP duty. HC Ramesh Chand was leading, myself and Ct Ranjit Kumar Rai were following him, HC Lal Kumar and Ct Bhag Chand were following us and HC Y K Joshi and Ct S J Saikia were in the last. When we reached near fencing gate No.31, I and Ct Ranjit Kumar Rai stopped to wait for HC Y K Joshi, ACP party Commander. HC Lal Kumar came there to us and asked me to go further towards gate no.30 and also directed Ct Ranjit Kr Rai to go to abandoned OP tower. He himself occupied the position in front of gate No.31. I proceeded to gate no.30 where I met HC Ramesh Chand who was standing near gate no.30. In the meantime HC Y K Joshi, ACP party cdr, also reached there on his bicycle and after giving direction about duty he returned back and went towards gate no.32/31. Once HC Y K Joshi left from there, HC Ramesh Chand asked me to go further towards BOP Elandery up to the last point or start point of AOR of our ACP and to check the area. I went up to the last point or start point or start point of AOR of our ACP and checked for correctness of border

fencing. As per direction of HC Ramesh Chand I remained in that area for turning point (near BFL pole No.37) towards right side every time whenever I used to take round of my given AOR and reached upto BFL pole No.37 HC Ramesh Chand used to come there for contact. He always persisted about sensitivity towards right side and asked me to be careful of the area right of BFL pole No.37.

17. In respect of SOP on ACPs duty, the questions asked by the Court (SSFC) from PW-4 HC Y.K.Joshi and answers given are relevant. The same are as under:

Q1. How much was the AOR of the ACP?

Ans. Appx more than 02 KMs.

Q2. Being ACP Comdr, why didn't you ensure the performance of ACP duty as per SOP and why did you split the ACP party?

Ans. Since taking over the charge in this area, we used to perform ACP duty in buddy pair only. We were never ticked off by any one in the post also. Therefore, I did not disturb the ongoing practice. Moreover, there are more chance of smuggling from other area wherever troops are not present if we happen to stay together and not split over given AOR.

Q3. Did you know the SOP on ACP duty?

Ans. No, I don't know about SOP on ACP duty.

Q4. Did you ever try to know or go through the SOP on ACP duty more so, when you are CHM of the Coy?

Ans. I never tried to know about the SOP on ACP duty. Moreover our main concern was to stop the smuggling from the given AOR which could effectively achieved by physical present throughout the area.'

18. Thus, statement of the party commander HC Y.K.Joshi established that even the party commander did not know about the SOP/instructions laid down for ACP duty.

19. If it was so, then violation of SOP/instructions laid down was by the entire patrolling party and not by the petitioner only. If the petitioner was also following the practice, a violation that was done even by the Party Commander HC Y.K.Joshi, the petitioner alone could not have been held guilty for following the practice prevalent by the Ambush cum Patrolling Party.

20. The second misconduct attributed to the petitioner is deliberate delay by five minutes in reaching Constable Kamal Singh when on hearing sound he was approaching towards Gate No.30 and in the meantime the smugglers escaped.

21. We find no such complaint/version in the special situation report immediately sent by the Company Commander or in the statement made by PW-1 Assistant Commandant Rajesh Kumar Pandey – the Company Commander.

22. Special situation report (Annexure-P1) sent by the Company Commander reads as under:-

*'OP DTO 12930
12.12.2011
From 'F' Coy
To 120 Bn BSF
No. 0/7201*

Spl. Sitrep. Sitrep upt 120600 HRS. F Coy Comdr Sh. Rajesh Kumar Pandey AC. BOP Domutha. ACP IInd sheet section No.01 party Comdr No.05005477 HC Y.K.Joshi A/W 06 Ors performing ACP Duty from 12001 Hrs to 120600 Hrs. AOR from BP 313/2-s to BP No.313/7S. Picket No.1 to Picket No.695. At about 120315 HRS ACP party while patrolling in AOR heard some noise and metallic sound of the shutter of IBBF gate. ACP party rushed towards the direction and observed 5/6 NOS miscreants on India side and same

NOS Bangladesh side ACP party challenged them to stop but the miscreants flee from base of Indian side shutter IBBF gate No.30 ACP party chased them towards the nearby village Tartikuri but miscreants manage to escape by taking advantage of dense fog. Party return to Gate and found that the lock of Indian side shutter was missing and gate was open and the lock of Bangladesh side shutter was also unlocked with the help of duplicate key but the lock was hanging with the gate only. ACP Party immediately intimate Coy Comdr about the incident with was already patrolling in Coy AOR. Coy Comdr immediately rushed to the spot and searched the area towards village Tartikuri in the direction of retreat of the miscreants and recovered the missing lock of Indian side shutter at a distance of about 70 meter from the IBBF. Also the party detected the spot where the cattles were consantrated for smuggling purpose. HOOF marks of returning cattle to the Tatikuri village was also observed. Reference BP No.313/3S. Distance from IB approx 140 mtr. Own BOP Domutha approx distance 2.5 km. Own village Tatikuri approx distance 300 mtr. BD BOP Dainur approx 3 km BD village Attur distance approx 1 km. crossing nil seizure nil rest NTR.

*Sd/-
Coy Comdr.
'F' Coy 120 Bn BSF'*

The statement made by PW-1 Assistant Commandant Rajesh Kumar Pandey – the Company Commander is extracted as under:

'On the intervening night of 11-12 Dec 2011, at about 0255 hrs, I got up for natures call. When I was to retire again to my bed I heard some suspicious sound from border side, from window of my room which opens in the direction of border road. The distance of border road from my room is appx-125 Mtrs. Since, it was foggy outside, it was very difficult to make out from BOP about the reason/source of suspicious sound or any movement of miscreants. I tried to identify/locate the reason/source behind the suspicious noise and started walking in that direction along connecting road after coming out of my room. I hit the IBB road and checked the border fencing in that area which was found to be intact. As soon as I reached the IBB

road, the noise also stopped for a while. I returned back towards BOP. While I was returning and reached appx-50 Mtrs from BOP, that suspicious sound again started from border side. I sat down there near a security light pole on the road connecting BOP with IBBR. I observed the sound for about 10 minutes then I called for sentry of the BOP who was at a distance of about 75 mtrs from my location. Within no time sentry reached there. I tried to enquire from him about the suspicious sound on which he told me that farmers across IB, on BD side, might be harvesting their paddy crop. I directed him to call for HC(G) and driver alongwith vehicle. By the time, they could come, I also came back to BOP to change my dress as I had gone out in my night dress.

.....

.....

While I was talking to ACP No.2 guard Cdr, I received a call over set from radio operator at Coy HQ who informed me that I'm being called at gate No.30 as the fencing gate has been opened and some smuggling is suspected to have taken place. Immediately rushed towards gate no.30 after directing ACP no.2 party Cdr to be alert in their AOR. When I reached near gate No.32 opposite BP no. 314/4-R I saw the first sentry ACP no.1, Ct. S J Saikia. But since, I was in hurry to reach at the place of occurrence, I did not stop or ask anything from him. As I moved further, I saw HC Y.K.Joshi at a distance of about 250 mtrs from first sentry. I stopped there for a while to know/ask him about the matter and how come the ACP is split for he being the ACP party Cdr. On being asked, HC Y.K. Joshi informed me that gate no.30 has been opened on both sides, i.e. home sides gate as well as counterpart side gate also. On being asked about how it all happened, he could not give me any satisfactory reply and said that "I don't know". I directed driver of my vehicle to move further towards gate no.30. When I was heading towards gate no.30, I saw HC Lal Kumar, CT Bhag Chand and then Ct.Ranjit Kumar Rai each standing at a distance of about 250-300 mtrs from each other. I stopped the vehicle near Ct.Ranjit Kumar Rai, who was standing at a distance of about 150 mtrs from IBB gate No.30. I tried to enquire about the matter from Ct. Ranjit Kumar Rai who also did not give me any satisfactory reply and said, "Sir, I don't know that any thing has happened regarding opening of

gate". Without wasting much of time there I moved further towards gate No.30. When I reached in front of gate No.30, I found SI Daya Ram along with bullet motor cycle driver who had come on patrolling there and HC Ramesh Chand along with Ct.Kamal Singh of ACP No.1. I asked HC Ramesh Chand that how come the gate has opened and by whom on which he did not say anything and kept mum. Then I asked Ct.Kamal Singh who told me that he was asked to perform duty towards BOP Elandery and HC Ramesh Chand was there in front of gate no.30. Ct.Kamal Singh also said that when he heard some noise towards gate no.30 he came there to enquire about the matter and found the fencing gate open on home side. '

23. PW-3 Constable Kamal Singh has stated about hearing of the sound much after 0300 hrs. His version of occurrence is as under:-

"At about 0300 hrs, it was very foggy and I was coming towards gate no.30 saw HC Ramesh Chand approaching towards me, I stopped near BGL pole No.37. When HC Ramesh Chand reached near me, I asked him about further course of action in the wake of dense foggy weather. Once again he reiterated upon the sensitivity about right side and asked me to dominate the area. Once again I went to take the round of given AOR. I met Ct Subhash Chand Meena of BOP Elandery near the start point of AOR of our ACP. After talking to him about correctness of fencing I returned back towards gate No.30. On my way back to the other end of my given AOR i.e. temporary OP point, when I reached near BGL pole no.38, I saw HC Ramesh Chand roaming in my AOR. I asked him the reason for being there in my AOR on which he said that since he had taken round of his AOR so he came in my AOR to be with me. When we were talking to each other, suddenly I heard some noise of gate opening or as if somewhere has tried to open the bolt of fencing gate from the direction of gate no.30. I immediately informed HC Ramesh Chand that some noise is coming from gate No.30 I repeated the saying and started walking in the direction of gate No.30. I did not notice his reaction as he was standing facing in opposite direction (towards BOP Elandery). When I was approaching towards gate no.30, I was obstructed by one miscreant hiding in the field on left hand side of IBBR near BFL pole No.37,

near the turning point. He, the miscreants, used threatening language and asked me to stop. He said "YE RUK KAHAN JA RAHA HAI, YE RUK BEHAN CHOD" (He stop, where are you going, stop sister fucker or words to that effect). I also used stern language to deter that miscreant and I moved further towards gate No.30. After going few paces, when I looked back for HC Ramesh Chand I did not find him but I kept on moving ahead. After going few more paces (5-7 paces) ahead when I looked for HC Ramesh Chand again, I did not find him. I parked my bicycle on the IBBR and started beating the wooden stick, which I was carrying on my bicycle, on the road to deter away the miscreants who were standing between home side gate and counterpart side gate of gate no.30. I started shouting simultaneously and called for help for Ct. Ranjit Kuimar Rai and HC Ramesh Chand as I kept on moving closer to gate no.30. I found/noticed two miscreants standing on hard platform between home side gate and counterpart side gate no.30, 4-5 persons were standing on counterpart side of the gate on counterpart side and holding the gate, right hand side door/shutter of home side gate was open and two nos. oxen were standing there on IBBR in front of gate no.30. When I reached about 20-25 yds. away from gate no.30, both the miscreants standing in between both the gates came out towards IBBR from home side gate and ran away towards Indian side after taking both the oxen standing on the IBBR. When I reached closer to gate no.30, I saw HC Ramesh Chand, coming towards this side, near BFL pole No.37 gathered some courage and approached closer to home side gate to close the opened door/shutter. I was continuously beating the stick on the road and asking miscreants standing on the other side of the gate to go away but they did not go away. In the meantime, I got hold of opened door/shutter of home side gate and closed that. By that time, HC Ramesh Chand also reached there. When miscreants on opposite side of fence noticed both of us they started running towards BD side. I asked HC Ramesh Chand that where were you for so long when I was all along facing the miscreants. He said that he slipped from the pedal of his bicycle and took him some time in talking reverse. I asked HC Ramesh Chand to report the matter to Coycomdr over telephone. In the meantime CT Ranjit Kumar Rai also reached there. HC Ramesh Chand informed operator in Coy

HQ over telephone and by that time SI Daya Ram, post Cdr of BOP Elandery, also reached at the spot with motor cycle driver.

After some time HC Lal Kumar and others also gathered there. After 15-20 minutes Sh.Rajesh Kumar, AC also reached there. I told him the whole story on being asked by him.”

24. In respect of the incident, PW-4 HC Y.K.Joshi – the Party Commander has stated that while patrolling between gate No.32 and nearby turning point he heard banging/thumping sound of fencing gate. He asked Constable S.J.Saikia to remain there and sent Constable Bhag Singh to him so that they remain in pair. He (PW-1) along with Head Constable Lal Kumar moved towards gate No.30 and on the way met Constable Ranjit Kumar and enquired from him about sound of gate. He was informed that ‘Gate ka taala khul gaya hai’.

25. PW-4 HC Y.K.Joshi has further stated that when he reached near Gate No.30, he found HC Ramesh Chander and Constable Kamal Singh there. SI Daya Ram Post Comdr. BOP Elandery also reached the spot. Both the doors of the gate No.30 (home side) were found closed but without lock. When he questioned Constable Kamal Singh about the matter he also said ‘Gate ka taala khul gaya hai’ and that miscreants have taken away the locks with them. Then SI Daya Ram directed him (PW-4) to go back to the gate No.32 and after 10-15 minutes the Assistant Commandant Company Commander Rajesh Kumar Pandey crossed them while proceeding towards gate No.30.

26. In his statement Constable Kamal Singh has attributed the following deliberate acts to the petitioner:-

(i) The petitioner deliberately asked him to go further towards BOP Elandery upto the last point or start point of AOR of their ACP and to check

the area.

(ii) During patrolling as and when they came into contact, HC Ramesh Chander – the petitioner continued reiterating the sensitivity about the right side and asked to dominate that area.

(iii) When he heard about some noise coming from the side of Gate No.30 he drew attention of petitioner towards the sound and asked him to accompany him.

(iv) HC Ramesh Chander reached there with a delay of five minutes.

(v) Gate No.30 was found open on Indian side as well as Bangladesh side.

27. The question arises as to whether there was incontrovertible evidence before the Inquiry Officer and Disciplinary Authority to reach the conclusion that the above acts of misconduct have been committed by the petitioner.

28. After carefully perusing the record and the statement of the witnesses recorded at the stage of SCOI, ROE as well before SSFC, we find it to be a case of no evidence against the petitioner. Reasons are not difficult to be found.

29. Special situation report in respect of the incident was sent by Assistant Commandant Rakesh Kumar Pandey – the Company Commander who visited spot on hearing the sound and questioned the members of ACP.

30. The said report does not contain any of the facts stated by Constable Kamal Singh.

31. On December 14, 2011 FIR was got registered by ACP Party Commander HC Y.K. Joshi almost on similar lines as reflected in the situation report sent by Assistant Commandant Rajesh Kumar Pandey - the

Company Commander. In the complaint to police names of four persons suspected to be engaged in smuggling were also mentioned with the request to register an FIR and take action against miscreants as per law.

32. Thereafter one man SCOI to investigate about the gravity of complaint regarding connivance through IBB Fence gate No. 30 in AOR of BOP Domutha on December 11, 2011 during ACP duty was constituted on receiving Vigilance Cell letter No. Vigilance/Compt./raiganj/2011/57 dated December 14, 2011.

33. Before the SCOI Assistant Commandant Rajesh Kumar Pandey - the Company Commander was examined as witness No. 1 on December 30, 2011 wherein he stated that he got up at about 0255 hrs. on the night intervening December 11/12, 2011 for nature's call. Before retiring to bed he heard some suspicious noise from the border side through window of his room open in the direction of border road which is at a distance of approximately 125 mtr. from his room. There being dense fog outside it was very difficult to ascertain the reason/source of suspicious sound. He went out to check the border fencing area which was found intact and the noise also stopped for a while but when he was returning and had already covered about 50 mtrs. sound again started hearing. He sat down near a security light pole on the road connecting BOP with IBBR and observed the sound for about ten minutes and then called for the Sentry of BOP who was at a distance of 75 mtrs. from his location. When he questioned about the sound, he was informed that farmers must be harvesting their paddy crop across the border. He asked the Sentry to call the driver along the vehicle and in the meantime changed his dress. At about 0320 hrs. he left for BOP. On the way he had also received the call on the set of their radio operator at

Company Headquarter about he be called at gate No. 30 as the fencing gate has been open by someone. He immediately rushed to gate No. 30 directing ACP No. 2 party Commander to be alert in the AOR. He also met the Party Commander HC Y.K. Joshi on the way and asked why ACP was split. He was also informed by the Party Commander about the gate being open on home side as well on counter-part side but could not tell the reason. When he reached gate No. 30 he found HC Ramesh Chander and Constable Kamal Singh of ACP No. 1 present there. Constable Kamal Singh told him that he was asked to perform duty towards BOP Elandery and HC Ramesh Chander was there in front of gate No. 30.

34. After the stage of ROE the Company Commander was again examined on June 02, 2012 before the SSFC. In that statement also the Company Commander Rajesh Kumar Pandey stated about hearing of some noise at about 0255 hrs. and tried to ascertain the source. He has also stated about proceeding to that area in a Gypsy to ascertain he source of noise but he was unable to make out anything about the sound as it was foggy all around. He has also stated about the call being received on the set of radio operator about gate No. 30 being opened by someone and he proceeding towards gate No. 30. At gate No. 30 he met HC Ramesh Chander and Constable Kamal Singh. The gate was closed with no lock on Indian side. The gate on Bangladesh side was also bolted but lock was hanging outside. He inquired from HC Ramesh Chander and informed that someone had opened the door. He also questioned Constable Kamal Singh who informed that he was asked by HC Ramesh Chander to move towards BOP Elandery and HC Ramesh Chander had remained on the gate.

35. Thus from the above statement of the Company Commander it is clear

that Constable Kamal Singh had not informed him about the deliberate delay by the petitioner in reaching near gate No. 30 when some noise was heard from that side.

36. Constable Kamal Singh was examined as witness No. 3 by the Summary Court of Inquiry. In his statement before SCOI he had stated that at about 0300 hrs. it was very foggy and when he met the petitioner near BFL pole No. 38 roaming in his AOR he asked him about the reason to be there and was informed that since the petitioner had taken round of his AOR he had come to him to be with him in his AOR. When they were talking to each other he heard about some noise from the direction of gate No. 30. He informed HC Ramesh Chander but could not notice his reaction as he was facing the opposite direction. When Constable Kamal Singh was approaching towards gate No. 30 he was obstructed and abused by some civilians to whom he replied in the same tone. After going a few paces (5-7 paces) when he looked back he found HC Ramesh Chander not there. Then he parked his bicycle and started moving on foot beating the wooden stick which he was carrying on his bicycle, to deter the miscreants who were standing between home side gate and counter-part side gate of gate No. 30. He was also shouting simultaneously for help from Constable Ranjit Kumar Rai and HC Ramesh Chander. When he was moving towards gate No. 30 he also noticed two miscreants standing on hard platform between home side gate and the counter-part side gate of gate No. 30. 4-5 persons were standing on the counter-part side gate and two numbers of oxen were also there on IBBR in front of gate No. 30. When he was 20-25 yds. away from gate No. 30 the two miscreants standing in between ran away towards Indian side along with the two oxen. **When he reached closer to gate No. 30 he**

saw HC Ramesh Chander coming towards that side.

37. In his statement before SSFC he has though made statement on the similar lines, added one line to the following effect:

“After that I saw HC Ramesh Chander reaching the spot, some 5 minutes after the incident”

38. During his cross-examination question No. 5 put to him was as to how much time it takes to cover 150 mtrs. on cycle and answer given by him was that it may take hardly one to one and a half minute at the most.

39. What is emerging on record is that sound was heard by the Company Commander Rajesh Kumar Pandey at 0255 hrs. when he got up to answer the call of the nature. Thereafter he had checked the fencing and found it intact. He sat near the security light pole, called the Sentry who was at a distance of 75 mtrs. from him to get the necessary information. Thereafter he had also called the vehicles along with the driver, changed the clothes as he was in night clothes and left for finding out the source of noise. HC Ramesh Chander and Constable Kamal Singh had been seen at gate No. 30 by Party Commander HC Y.K. Joshi at the time of briefing. Constable Kamal Singh was present with HC Ramesh Chander when the Party Commander and Company Commander reached the spot. All the witnesses including the Company Commander had stated that on the night intervening December 11/12, 2011 density of fog was so much that it was difficult to ascertain the source of sound.

40. The distance of gate from the point Constable Kamal Singh who was present with the petitioner, heard the noise was 150 mtrs. The petitioner as well Constable Kamal Singh both were on bicycles. Constable Kamal Singh had stated that it takes only one or one and a half minute to cover the

distance on cycle which he covered partly on cycle and partly on foot while beating the wooden stick. Constable Kamal Singh admits that before he could reach the gate he had already noticed Constable Ramesh Chander coming towards him. If the distance of 150 mtrs.to be covered by cycle takes one or one and a half minutes, part of the distance covered by him on cycle and remaining on foot, he might have taken 2-3 minutes extra. Then where is the question of petitioner reaching gate No. 30 with deliberate delay of 5 minutes when petitioner was seen by Constable Kamal Singh much before he could reach Gate No.30. Constable Kamal Singh has nowhere stated that he had noticed the delay of five minutes by watch. It is clear that it was by approximation. Head Constable Ramesh Chander who also followed him though with a gap had explained that he tried to hurry up towards the gate his foot slipped on the pedal and due to jerk the handle also got turned at an angle. He brought it in right direction and then followed Constable Kamal Singh shouting 'Pakro', 'Pakro'. Thus, it was the first conversation between the Constable Kamal Singh and Head Constable Ramesh Chander about a slight difference in their time of arrival at the gate No.30 which was immediately explained.

41. If there was a deliberate attempt by the petitioner to delay in reaching Constable Kamal Singh to gate No. 30 when the Company Commander was inquiring the matter, this fact could have been reported to him but there is no such version in the situation report sent immediately after the occurrence. If for some reason Constable Kamal Singh could not muster the courage to inform immediately at least at the stage of SCOI delay by five minutes could have been narrated.

42. Though it is not clear that due to dense fog visibility was to what

extent and whether the persons standing near the gate could be seen by Constable Kamal Singh from a place which was partly covered by him on cycle and partly on foot and covered by Head Constable Ramesh Chander by cycle. The time of occurrence is about 0300 hours on a foggy night in the mid of December and the sketch plan placed on record during Court of inquiry shows that this area is open area and even slightest noise can be heard at a distance. Even PW-1, the Assistant Commandant Rajesh Kumar Pandey heard the noise while he was in his room when he got up to answer the call of nature and on the sound of being repeatedly heard, came out in his night dress and questioned the sentry about the cause. He was informed that the farmers on the other side were harvesting and noise is due to them. When the noise persisted he called for the jeep to reach the spot and in the meantime had also received the information from the petitioner about gate No.30 being open/unlocked by someone. PW-4, the party Commander Y.K.Joshi has also testified before the SSFC that by the time he reached gate No.30 he found both Head Constable Ramesh Chander and Constable Kamal Singh at the gate and the incident being already reported by Head Constable Ramesh Chander.

43. Although initially the SCOI was with a purpose to ascertain the connivance of ACP but the same was not established. Otherwise also it belies logic/common sense that after conniving with the smuggler, the petitioner would remain close to gate No.30 by keeping Constable Kamal Singh away from there, knowing fully well that sound of opening of gate No.30 can be heard even two kilometres away.

44. The petitioner in this case had put in more than 24 years of service in BSF and he would not have committed the suicidal act of remaining on ACP

duty close to gate No.30 allowing the same to be opened during his duty time.

45. This Court in exercise of writ jurisdiction can differ with a finding of fact only on the ground of illegality, irrationality and procedural impropriety.

46. We find it to be a case where there was no evidence before the SSFC to prove deliberate attempt by the petitioner in reaching Constable Kamal Singh while he was proceeding towards gate No.30. It may be noted that on that night there being dense fog visibility might be restricted to a few meters. It might not have been possible for Constable Kamal Singh or any other member of ACP to see what was happening at a distance of 150 mtrs. The version of Constable Kamal Singh about being obstructed and abused by one person on way to gate No.30 was never reported to the Company Commander when he was taking stock of the situation at the spot itself.

47. In the decision reported as AIR 2002 SC 3030 Sher Bahadur vs. Union of India (UOI) & Ors. the expression 'sufficiency of evidence' has been dealt with by the Supreme Court as under:-

'It may be observed that the expression "sufficiency of evidence" postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence, however, voluminous it may be, which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law. The mere fact that the enquiry officer has noted in his report, "in view of oral, documentary and circumstantial evidence as adduced in the enquiry", would not in principle satisfy the rule of sufficiency of evidence.....'

48. In the facts and circumstances, we set aside the penalty of dismissal

from service and order reinstatement of the petitioner with all consequential benefits.

49. No costs.

**PRATIBHA RANI
(JUDGE)**

**PRADEEP NANDRAJOG
(JUDGE)**

JULY 29, 2016
'pg'