Union of India and Others Vs. Ex Constable Mohinder Singh (Deceased Now Represented Through Lrs. Smt. Kiran Devi and Two Others)

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SooperKanoon Citation : sooperkanoon.com/690441

Court : Delhi

Decided On : Mar-23-2001

Reported in : 91(2001)DLT291

Judge : Mr. Dalveer Bhandari and; Mr. Mahmood Ali Khan, JJ.

Acts : Border Security Force Act, 1968 - Sections 2(1), 5, 14, 17, 20, 28, 46, 48, 70, 74, 117; Border Security Force Rules - Rules 16, 43, 45, 48, 49, 51, 139, 149(3 & 4), 157, 158, 167; Indian Penal Code (IPC), 1860 - Sections 323, 350 and 351; Constitution of India - Articles 14, 21, 33, 137 and 323-A; Industrial Disputes Act, 1947

Appeal No. : L.P.A. 3/99

Appellant : Union of India and Others

Respondent : Ex Constable Mohinder Singh (Deceased Now Represented Through Lrs. Smt. Kiran Devi and Two Others)

Advocate for Def. : Mr. Bishram Singh, Adv.

Advocate for Pet/Ap. : Ms. Anjana Gosain, Adv

Judgement :
ORDER

Mahmood Ali Khan, J.

1. This Letters Patent appeal is directed against an order of the learned Single Judge dated 24.9.1998 whereby, he has quashed the Summary Security Court proceedings and the order of dismissal of Constable Mohinder Singh from service and has ordered his reinstatement in the service with all consequential benefits.

2. The relevant facts essential for deciding this appeal are set out as follows. Mr. Mohinder Singh, (who died and is now represented by his wife and two minor children and will be referred to hereinafter as respondent) was enrolled in the Border Security Force (BSF) as a Constable in April 1988 and became subject to the Border Security Force Act (hereinafter the Act). and Border Security Force Rules (hereinafter the Rules). In October 1993 he was posted in 'B' Coy of 92 Battalion BSF which was under the command of Shri Shiv Kumar Garg, Asstt. Commandant and was detailed for election duty. Some other companies of other battalions were also detailed for similar duty. All of them were under the command of one shri U.K.Chakraborty. On 25.11.1993 the respondent was punished to undergo 14 days rigourous imprisonment by Shri Chakraborty on the ground that he had been unauthorisedly absent from the campus. The imprisonment was to be carried out subsequently at the Battalion Headquarters, Kalyani which was the permanent location of 92 Battalion BSF to which the respondent belonged. He along with Constable Dinesh Saklani, Sanjeev Kumar Tyagi, Vijay Bahadur Singh and Narender Singh Dalal was accused of the commission of an offence of use of criminal force to CHM L.G. Singh of 'B' Coy in which they were posted. It was alleged that on 25.11.1993 at Krishna Nagar, Meerut where the company was then located, the respondent and his companion Constables had attacked and beaten up their immediate superior CHM L.G. Singh with fists and web belts causing him injuries on his head and other parts of the body. The respondent and other assailant Constables named above, were then tried by a Summary Force Court for committing offence under Section 20(a) of the Act. They were held guilty of the offence charged with and were convicted. While the co-accused Constables Dinesh Saklani, Sanjeev Kumar Tyagi, and Narender Singh Delal were sentenced to undergo rigourous imprisonment for 60 days each, the respondent Constable Mohinder Singh was dismissed from service. Fourth accused Constable Vijay

Bahadur Singh was, however, acquitted. Feeling aggrieved, the respondent preferred a writ petition for quashing the order of the Summary Security Force Court after his statutory appeal was turned down by the BSF authorities.

3. The respondent has challenged the order of his dismissal from service on various grounds. It was alleged by him that he was posted in 'B' Coy of 92 Battalion BSF which was duly constituted by the Central Government under Section 2(1) of the Act. The disciplinary powers upon him in terms of Rule 16(5) were to be exercised by the Commandant of the Battalion. An ad hoc arrangement was made for performing duties at elections by constituting one SB-1 'B' Battalion which was placed under charge of Shri U.K. Chakraborty, Second I/C, being the senior most officer. SB-1 Battalion was not constituted by the Central Government. thereforee, Shri Chakraborty also did not have disciplinary power over the personnel of the company as Commandant under the Act and the Rules. On his illegal punishment for 14 days rigourous imprisonment on 25.11.1993, for his alleged few hours absence from the campus, by Shri U.K. Chakraborty, he raised protest and intended to take legal proceeding under the Act against Shri Chakraborty and all others who were responsible for this punishment. On 14.12.1993 the respondent came to know that he along with three other Constables, namely, Sanjeev Kumar Tyagi, Vijay Bahadur Singh and Narender Singh Dalal was falsely involved in a case of assault on CHM L.G. Singh on 25.11.1993 at 18.30 hrs and causing him injury by fists and web belts. This allegation was absolutely false as the respondent was not at all present at the place of alleged incident since he had already disbursed after the roll call in the evening and had gone to the cook house with Constable Jaiprakash Dahiya for dinner. He was not questioned about this incident on 25.11.1993 or thereafter till the recording of evidence was ordered on 14.12.1993. The Commandant has ordered recording of the evidence without giving an opportunity of hearing to the respondent and applying the procedure prescribed by Rule 45. The charge against the respondent was that he had committed an offence under Section 20(a) of the Act with the allegation that the respondent along with his accomplices had voluntarily caused hurt to CHM L.G. Sing. It was a civil offence punishable under Section 323 I.P.C A reference to the officer empowered to convene Summary Security Force Court was required to be made which has not been done., The

explanatory memorandum which was essential under Rule 158 was also not attached and as such Section 74 and Rule 158 have been violated. In accordance with Section 70 of the Act Summary Security Force Court may be held by the Commandant of the Unit and he alone will constitute the court but the proceedings are attended to by two other officers though they shall not be sworn or affirmed. The proceedings held against the respondent were attended by two subordinate officers Subedar Balbir Singh and S.I. B.P. Balodi. Shri Balodi was examined as a prosecution witness No.4 against the respondent.. The respondent has also been denied assistance at the trial and his request for providing the services of Shri Man Singh, Dy. Commandant as his friends was dis-allowed and Rule 157 has been contravened. The respondent expressed his second choice of Inspector Ranbir Singh as friend in the trial proceeding but even he was not given for assistance to the respondent. Instead, S.I. J.C. Bhowmik was given as friend of the respondent who lacked knowledge in BSF laws and Civil law and was not of any assistance to the respondent. The common charge was framed against all the 5 accused persons for their joint trial and no charge was framed against the respondent separately. The respondent and other accused were also not asked to plead to the charge separately as mandated by Rule 138. Except the complainant L.G. Singh none other 9 witnesses have deposed against the respondent. The prosecution witnesses No. 2, 3, 4 & 10 were all supervisory staff and their statement was formal in nature. The medical report and the blood stained clothes of the complainant were admitted into evidence without their formal proof and examination of the expert witnesses. One of the accused Vijay Bahadur Singh was acquitted whereas other three accused were awarded 60 days rigourous imprisonment each in Force custody and were allowed to be continued in service. But the respondent was sacked. The Security Force Court had discretion to award punishment as provided under Section 48 but the respondent could have been given lesser punishment like other accused persons. The sentence was promulgated on 26.3.1994 with the stipulation that the sentence will take effect after clearance and dismissal from service will be intimated to all concerned. The Sector DIG BSF signed the proceeding on 8.6.1994. A petition under Section 117 of the Act read with Rule 167 was submitted in July 1994 challenging the proceedings and the sentence but the same was rejected by letter dated

10.6.1995. This Summary Security Force Court had no jurisdiction to try the offence. Shri Balodi, S.I. who attended the proceeding was disqualified being himself a witness to the prosecution. The joint charge framed did not disclose common intention of all the accused for the commission of the offence. Special finding on the basis of the sole evidence as per rule 149 (3&4) was not recorded. Since the date from which the dismissal of the respondent from service was to take effect has not been promulgated, thereforee, the order of dismissal has not come into effect.

4. The appellant in the counter reply controverter the allegations of the respondent made in the writ petition. On 24.11.1993 the respondent left the Battalion area after P.T. hours and came back on the next day at about 6.00 hrs. The matter was reported finally to the superior officers by the acting Coy Hawaldar Major CHM L.G. Singh and the respondent was awarded 14 days RI in Force custody by the Commandant. On 25.11.1993 at about 18.30 hrs CHM L.G. Singh, acting HC of 'B' Coy 92 Battalion conducted the roll call in front of company barrack located in campus of 6 PAC Line, Krishna Nagar, Meerut. At about 18.45 hrs after passing the orders CHM L.G. Singh announced restrictions on leave and out pass for personnel on behalf of the Commandant. He also directed that those who had grievance would wait and others could disburse. Most of the company personnel disbursed. The respondent along with three other Constables, namely, Narender Singh Dalal, Dinesh Kumar Saklani and Sanjeev Kumar Tyagi came forward and surrounded CHM L.G. Singh. The respondent enquired as to what were the orders for him. Shri L.G. Singh replied that there were no separate orders for him. Thereupon the respondent gave a fist blow to the chest of acting CHM L.G. Singh and his other friends and colleagues co-accused, named above, started beating CHM L.G. Singh with their belts and sticks in a pre-planned manner. Shri L.G. Singh suffered serious injuries on his head. The respondent was tried by Summary Security Force Court which found him guilty and he was dismissed from service w.e.f. 26.3.1994. The statutory petition filed against the order of dismissal has been rejected. As per the procedure in vogue by thinning out Trg companies from various units, ad hoc BSF Battalion was organized for IS duties purpose and due to the shortage of Command, a senior most Second IC was deputed to command the said ad hoc Battalion with proper approval of the superior authorities. The

acting Commandant Shri U.K. Chakraborty had all powers of Commandant to punish an offender in accordance with the provisions of Section 5 and Rule 16. He had awarded 14 days rigourous imprisonment in Force custody to the respondent for his remaining unauthorisedly absent from the campus and the sentence was to take effect at the Battalion Headquarters at Kalyani. It was done in order to enforce discipline. The procedure prescribed by Rule 45 was duly followed, as appeared from Annexure R-1, before order for recording evidence was passed by the Commandant. The offence committed by the respondent was statutory offence punishable under Section 20(a) of the Act. None of the Rules applicable were contravened or violated. The respondent and other accused were arraigned together and they were tried jointly and all of them had pleaded not guilty and no prejudice was caused to the respondent. The respondent took revenge by assaulting CHM L.G. Singh for his being punished with 14 days R.I. on account of his unauthorised absence from the unit lines on the complaint of CHM L.G. Singh. The Summary Security Force Court on the basis of the evidence and after due deliberation and consideration of all the material and evidence has rightly convicted and punished the respondent. Constable Vijay Bahadur was not found guilty of the charge and was acquitted. The dismissal order has been duly promulgated and the name of respondent has been struck off from the strength of the Battalion on 26.3.1994.

5. The learned Single Judge allowed the writ petition and quashed the order of dismissal of the respondent from service holding that proceedings under Rule 45 were not conducted since annexure R-1 to the counter reply was not filed and there was no other material placed on the record by the appellant to show that requirement of Rule was satisfied by the Commandant which vitiated the proceedings and the arraignment order passed by the Summary Security Force Court. He also held that Section 74 has also not been followed. In his view there was no Explanationn as to how the medical report could be admitted in evidence without the examination of the doctor or the wearing apparel could be admitted in evidence without the opinion of an expert witness. The learned Judge held that the entire proceedings were vitiated and the punishment awarded by the Summary Security Force Court was void and unsustainable. He accordingly set aside the Summary Security Force Court's proceedings and the punishment of dismissal of

service and directed reinstatement of the respondent with all the consequential benefits and further directed that on reinstatement all the consequential benefits would be given before 30.11.1998.

6. The appellant is aggrieved by the above order of the learned Single Judge. It is stated that the compliance of Rule 45 was duly made and the copy of the proceedings (annexure R-1_ was supplied to the respondent and another copy was given to the learned Single Judge since it could not be, inadvertently, filed along with the counter affidavit. The arguments were concluded in April 1998 and the judgment was pronounced in September 1998 and the appellant could not correct the impression of the learned Single Judge that copy of annexure R-1, i.e. the record of the proceedings under Rule 45, was not submitted. The learned Single Judge also held that the offence committed by the respondent was a civil offence and that Sections 46 and 74 of the Act and Rule 158 were not complied with. None of these provisions were attracted to the present case. The offence committed by the respondent was covered by Section 20(a) of the Act and was a statutory offence and not a civil offence as defined by Section 2(d) of the Act. Section 74 of the Act and Rule 158 do not apply to a statutory offence and the view of the learned Single Judge to the contrary is not sustainable in law. The jurisdiction of the court in the writ of Certiorari is of supervisory jurisdiction and not the appellate or revisional jurisdiction and the court has no jurisdiction to interfere with the finding of fact unless it is vitiated by a lack of jurisdiction or a complete lack of evidence or it was perverse or malafide or manifestly against the principles of natural justice or such error going to the root of the matter. Apart from the medical report and the wearing apparel there was other evidence which was sufficient to bring home the charge and prove the guilt of the respondent and the view of the learned Single Judge regarding the errors in the admission of some of the evidence was unsustainable. None of the two other officers who joined the proceedings in the court constituted under Section 70 of the Act took part in the trial and in the judgment. thereforee, there was no infirmity if one of the formal prosecution witnesses happened to be one of the two persons detailed for attending the proceedings. None of the two persons chosen by the respondent to act as his friend in the trial proceedings agreed to give assistance. The respondent was provided a friend of the accused and the respondent did not raise any

objection against him in the trial proceeding and raised it only before the learned Single Judge for the first time. The charge was read over and explained to all the accused persons and they were asked to plead to it individually and all of them pleaded not guilty. thereforee, there cannot be any violation of the Rule 138. The respondent was found guilty of the same charge for which he was tried. thereforee, Rule 166 did not come into play. It was requested that the impugned order of the learned Single Judge dated 24.9.1998 be set aside and the writ petition filed by the respondent be dismissed.

7. The first question that arises for adjudication is whether the offence which was committed by the respondent Const. Mohinder Singh was a statutory offence or a civil offence. The provisions of the Act are applicable to all the personnel of the BSF. The respondent was subject to the Act and the provisions were applicable in case he had committed the offence within the ambit of the Act. Civil offence is defined by clause (d) of Section 2 of the Act as to mean an offence which is triable by a criminal court. In other words it means an offence which is triable by a criminal court established under the Code of Criminal Procedure or any other special law other than the Security Force Court established under the Act. The case against the respondent was that on 24.11.1993 after the P.T. hours he left the battalion area and came back on the next date at about 6.00 hrs. His acting Commandant Shri U.K. Chakraborty punished him with 14 days of R.I. in custody on the complaint of acting Hawaldar Major CHM L.G. Singh. The sentence was to take effect after the company reached its Headquarters at Kalyani. On 25.11.1993 at about 18.30 hrs CHM L.G. Singh conducted the roll call and after the roll call was over at around 18.45 hrs he announced restrictions on leaved and out passes on behalf of the Commandant. He also asked those who had some grievance to wait and others to disburse from the place. Const. Mohinder Singh along with Const. Narender Singh Dalal, Dinesh Kumar Saklani and Sanjeev Kumar Tyagi stayed back. They came to CHM L.G. Singh. Const. Mohinder Singh enquired about further orders for him. When Shri L.G. Singh told him there were no further separate orders for him, he (Const. Mohinder Singh) gave a fist blow to the chest of L.G. Singh. Other constables, named above, joined him. They started giving beating to CHM L.G. Singh with their fists and web belts. It is alleged that all of them were friends and assaulted Shri Singh in a pre-planned manner. As a result,

Shri Singh suffered serious injuries on head and other parts of the body. Constable Mohinder Singh, three others, named above, and Constable Vijay Bahadur Singh, who did not come to the rescue of the complainant rather justified his beating, were then tried for committing offence under Section 20(a) of the Act by Summary Security Force Court. A joint charge was framed against all the four assailants accused and Constable Vijay Bahadur as under.

'USING CRIMINAL FORCE TO HIS SUPERIOR

OFFICER BSF ACT

Sec. 28(a)

in that they, at bn, HQ SB-I located with campus of 06 PAC line, Krishnanagar (Meerut) on 25.11.1993 at about 18.30 hrs pounced upon No.72922045 acting CHM LG Singh of B.Coy and also beaten him with their fists and web belts, thus caused multiple injuries on head and other portion of the body of the said NCO.'

8. The first question that arises here is whether the offence charged with is an offence provided in the Act, i.e. the statutory offence, or it is an offence under the Indian Penal Code which is ordinarily to be tried by a criminal court of a Magistrate in accordance with the Criminal Procedure Code. In case it is held that it is the civil offence, it can still be tried by the Security Force Court by virtue of Section 46 of the Act and awarded punishment prescribed by clauses (a) and (b) of Section 46 of the Act.

9. In both the events the provisions of the Act are applicable and the Security Force Court has jurisdiction to try them and award punishment. The only distinguishable feature is that the Security Force Court, in case it is a civil offence, is required to comply with certain procedure prescribed by Section 74 of the Rule 158 also.

10. Section 20 of the Act, which is relevant for consideration, is as under :

'Any person subject to this Act who commits any of the following offences, that is to say,-

(a) use criminal force to or assaults his superior officer; or

(b) uses threatening language to such officer; or

(c) uses insubordinate language to such officer; shall, on conviction by a Security Force Court,-

(A) if such officer is at the time in the execution of his officer or, if the offence is committed on active duty, be liable to suffer imprisonment for a tern which may extend to fourteen years or such less punishment as is in this Act mentioned; and

(B) in other cases, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned:

Provided that in the case of an offence specified in clause(c), the imprisonment shall not exceed five years.

11. In terms of clause (a) of the above Section, use of criminal force to or assaulting a superior officer by a person who is subject to this Act is an offence which carries a punishment in case the officer is at the time in the execution of his office or, if the offence is committed on active duty, imprisonment for a term which may extend to 14 years and in other cases imprisonment which may extend to 10 years or, any other punishment which is provided in the Act.

12. The words 'criminal force' and 'assault' have not been defined in the Act. With advantage we can read the definition of the offence of use of 'criminal force' and 'assault' as given in Sections 350 & 351 of the Indian Penal Code. Section 350 of the IPC defines the 'criminal force' as a force intentionally used to any person, without his consent, in order to commit an offence or with the intention of using the force to cause or knowing it or likely that by use of that force he would cause injury, fear or annoyance to the person to whom the force is used. Section 351 of the IPC says that whoever makes any gesture, or any preparation intending or knowing to be likely to be a preparation would cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Applying these definitions to the words of use of 'criminal force' and 'assault' on the case in hand there is no

escape from conclusion that beating a person with fists, belts, sticks etc. is definitely an offence covered by clause (a) of Section 20 of the Act. The argument of the respondent is that since Shri L.G. Singh is alleged to have suffered bodily injury on his person as a result of the beating given by respondent Const. Mohinder Singh and other co-accused the offence which the accused have committed is an offence of voluntarily causing hurt as defined by Section 323 IPC. The argument is not tenable. Use of Criminal force does not looses its gravity as soon as actual hurt is caused. It is the other way round. It invites more severe punishment provided under Section 20.

13. As noted above, Section 20 prescribe a heavy punishment to the person who has committed offence of using criminal force to or has assaulted his superior officers. Shri L.G. Singh was the superior officer of Const. Mohinder Singh and the co-accused. No dispute about it. The punishment was 14 years of imprisonment or 10 years of imprisonment if the case fell in clause (A) and clause (B) respectively. The offender could also be given such less punishment as it is prescribed under the Act. The scale of punishments awardable by Security Force Courts in respect of offences committed by a person subject to the Act has been prescribed in Section 48 of the Act. The first two punishments are death and a term of imprisonment for life or a term exceeding three months. The third is dismissal from service. The fourth is imprisonment for a term not exceeding three months in Force custody and so forth. The legislature has treated the offence defined in clause (a) to (c) of Section 20 very grave or serious and has prescribed heavy punishment for it. The reason is obvious. On the other hand the punishment provided for the offence of voluntarily causing hurt as per Section 323 of the IPC is only an imprisonment of either description i.e. simple or rigourous, for a term which may extend to one year, or with a fine which may extend to one thousand rupees, or with both. The legislature has prescribed heavy punishment for the offence covered by Section 20 clause (a) in order to give adequate powers to the Security Court Force in order to ensure maintenance of high order of discipline in a para military force like the B.S.F. The power of the legislature to modify the rights conferred by part third of the Constitution in their application to the armed forces has been enshrined in Article 33 of the Constitution. the Parliament by virtue of this Article may be law abrogate or restrict fundamental rights in their application to

armed forces. It is incongruous to hold that the legislature excluded an offence of use of criminal force or assault from the ambit of clause (a) of Section 20 of the Act if the hurt is caused and contemplated a lesser punishment of the hurt is caused and heavier punishment if the hurt is not caused. Clause (a) of Section 20 in our view is wide enough to include the offence where the use of criminal force or assault results in the causing of the hurt as well. In our considered view the respondent Constable Mohinder singh committed a statutory offence, when used criminal force to his superior officer CHM L.G. Singh and caused hurt to his body.

14. It has been strenuously argued that the offence which his alleged to have been committed by Const. Mohinder Singh and other co-accused was offence of voluntarily causing hurt within the meaning of Section 323 IPC and as such, was a civil offence and Const. Mohinder Singh and other accused could be tried by a Security Force Court by the enabling provision of Section 46 of the Act. Section 46 of the Act reads as under :

'Subject to the provisions of section 47, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Security Force Court and, on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall' be liable to suffer any punishment, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as in this Act mentioned.

15. A bare reading of this provision shows that this Section applies:

(a) to all the persons who are subject to the Act i.e. the personnel of the B.S.F.

(b) if a civil offence is committed by such person (i) in any place in India, or (ii) in any place outside India.

16. This Section enables the trial and punishment of Border Security Force personnel or officer by a Security Force Court. Where both Security Force Court and ordinary criminal court have jurisdiction to try a member of the BSF the option to decide the forum rested with the Force authorities and the criminal court would not have any jurisdiction to take cognizance in the matter without notice to the BSF authorities. But in the instant case it has already been held that the offence for which the respondent was tried and punished was an offence contained in clause (a) of Section 20 of the Act and was a statutory offence and was not a civil offence. The trial of Const. Mohinder Singh by Security Force Court cannot be faulted because of omission to comply with Section 74 and Rule 158.

17. Section 74 empowers the Summary Security Force Court, which had tried the respondent Const. Mohinder Singh, to try an offence punishable under the Act. It is as follows:-

Powers of a Summary Security Force Court.

(1) Subject to the provisions of sub-section(2), a Summary Security Force Court may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court fore the trial of the alleged offender, an officer holding a Summary Security Force Court shall not try without such reference any offence punishable under any of the sections 14, 17 and 46 of this Act, or any offence against the officer holding the court.

(3) A Summary Security Force Court may try any person subject to this Act and under the command of the officer holding the court, except an officer, or a subordinate officer.

(4) A Summary Security Force Court may pass any sentence which may be passed under this Act, except the sentence of death or of imprisonment for a term exceeding the limit specified in sub-section(5).

(5) The limit referred to in sub-section(4) shall be,

(a) one year, if the officer holding the Security Force Court has held either the post of Superintendent of Police or a post declared by the Central Government by notification to be equivalent thereto, for a period of not less than three years or holds a post of higher rank than either of the said posts; and

(b) three months, in any other case.'

18. The learned counsel appearing for the respondent Const. Mohinder Singh, has vehemently argued that in accordance with sub-Section (2) of this Section the Summary Security Force Court, in the absence of any grave reason for immediate action, was bound to make a reference to the officer who was empowered to convene a Petty Security Force Court. In case the offence was punishable under Sections 14, 17 & 46 of the Act and Summary Security Force Court was not competent to try it without such reference. It is submitted that in this case the respondent was awarded the sentence of dismissal and no reference has been made to the competent authority at all. The argument is unsubstantial, firstly because sub-Section (2) applies only to the offences which are punishable under Sections 14, 17 & 46 of the Act, i.e. the offences in relation to the enemy and punishable with death (Section 14), mutiny (Section 17) and civil offence (Section 46). It does not apply to an offence committed under Section 20 of the Act. No reference was necessary in this case. Clause (4) of Section 74 empowered a Summary Security Force to pass any sentence which may be passed under the Act, except the sentence of death or of imprisonment for a term exceeding the limit specified in sub-section (5). In the instant case Const. Mohinder Singh has not been sentenced to under go imprisonment. He was dismissed from service which punishment was within the power of Summary Security Force Court.

19. For the reasons stated above, compliance of Rule 158 will also not be necessary. Rule 158 is reproduced below:-

'Where a Summary Security Force Court tries an offence which shall not ordinarily be tried without reference to an authority mentioned in sub-section(2) of Section 74, an explanatory memorandum shall be attached to the proceedings'.

20. It is next urged by the learned counsel for the respondent that condition precedent to the trial by the Summary Security Force Court has not been satisfied. The order convening the Summary Security Force Court to try the respondent and the punishment awarded by it is vitiated. Reference is made by him to Rule 43, 45, 48, 49 and 51. As a matter of fact his submission is that there is a total non-compliance of Rule 45 and the proceedings allegedly recorded in regard to the proceedings of Rule 45 are absolutely false and fabricated. He submitted that the appellant in its rejoinder mentioned about the recording of the proceedings by the Commandant and also annexing it with the counter affidavit as annexure R-1. It is contended that annexure R-1 was not annexed with the counter affidavit and on the repeated reminders of the learned counsel for the respondent the appellant was directed to supply a copy of it to him and to place it on the record. The learned counsel stated that although the appellant had supplied a copy of annexure R-1 to him but it was not filed in the court and for obvious reason. He stated that no proceeding of Staff Court of Inquiry was in fact conducted which is mentioned in one of the columns of Annexure R-1 that requires 'description of documentary evidence produced (if any)'to be mentioned. The statement of the complainant Shri L.G. Singh was not taken orally or in writing and the refusal of the respondent to cross examine him does not bear the signature of the accused Const. Mohinder Singh. These facts are sufficient to lead to an inference that the document R-1 was forged and fabricated subsequently in order to fill in lacuna in the proceeding. Conversely the learned counsel for the appellant has submitted that though the annexure R-1 could not be attached with the counter affidavit when the counter affidavit was filed but the copy thereof was furnished to the learned opposite counsel and at the time of hearing a copy was also given to the learned court but somehow it was not attached with the file. The learned Single Judge probably could not remember it and missed it and, thereforee, had recorded the finding against the appellant observing that exhibit R-1 has not been intentionally placed on record and as such there was no material to hold that the proceedings under Rule 45 were conducted. Since the learned counsel for the respondent has conceded that a copy of the annexure R-1 to the counter affidavit was in fact supplied to him and that he had also annexed the copy thereof to his rejoinder affidavit, we need not dwell further into the controversy whether annexure R-1 was

or was not filed by the appellant before the learned Single Judge. Since exhibit R-1 was on the file, it could have been taken into consideration by the learned Single Judge.

21. An alternative argument of the learned counsel for the appellant is that the enquiry contemplated under Rule 45 was at the initial stage even before the evidence of the witnesses was recorded. According to him the convening of the Summary Security Force Court is decided upon after considering the evidence which is recorded in pursuance to an order passed by the Commandant and it is not the hearing of the charge by the Commandant at the very beginning in terms of Rule 45 that is the basis of trial by Summary Security Force Court. thereforee, he submitted, irregularities, if any, committed in compliance with Rule 45 will not vitiate the trial of the accused Const. Mohinder Singh by the Summary Security Force Court particularly when his conviction was based on the evidence recorded by the court and after full opportunity of hearing was given to him. He sought support to his argument from the judgment of a Division Bench of this court in Ex-Const. Ashok Kumar v. Union of India and others CWP No...3369/95 decided on 1st March, 2000 and Union of India and another v. O.P.Bishnoi, LPA No.79/94 decided on 11th May,2000.

22. In reply the learned counsel for the respondent contended that the proceedings under Rule 45 are not a mere formality. The Commandant had power to award punishment or even dismiss the charge at that initial stage if he did not find it desirable to proceed further in the matter. The witnesses are heard in the presence of the accused and he has even right to cross-examine them and non-compliance of Rule 45 vitiate the future proceedings and trial by summary Security Force Court. He submitted that even copy of offence report was not supplied to him or filed in the Court. He relied upon Ex.Major Harpal Singh Versus Union of India 1996 (37) DRJ 39, Lt.Col.Prithipal Singh Bedi Versus Union of India : 1983 CriLJ647 , Major G.S.Sodhi Versus Union of India : 1991 CriLJ1947 and an unreported case decided by a learned Single Judge of Jammu & Kashmir High Court on 8.12.1987 in Writ Petition No.148/81 Harbans Singh Versus Union of India.

23. Before dealing with the respective contentions of the parties it is necessary to set out the relevant Rules 43,45,48,49 and 51 as under:-

43. Offence report.--'Where it is alleged that a person subject to the Act (other than an officer or a Subordinate Officer) has committed an offence punishable there under the allegation shall be reduced to writing in the form set out in Appendix IV.

45. Hearing of the charge against an enrolled person.--

(1) The charge shall be heard by the Commandant of the accused-

(a) the charge and statement of witnesses if recorded shall be read over to the accused. If written statements of witnesses are not available, he shall hear as many witnesses as he may witnesses as the may consider essential to enable him to determine the issue;

(b) the accused shall be given an opportunity to cross-examine the witnesses and make a statement in his defense.

(2) After hearing the charge under sub-rule(1), the commandant may,-)

(i) Award any of the punishments which he is empowered to award, or.

(ii) dismiss the charge, or

(iii) remand the accused, for preparing a record of evidence or for preparation of an abstract of evidence against him, or

(iv) remand him for trial by a Summary Security Force Court:

Provided that, in cases where the Commandant awards more than 7 days' imprisonment or detention he shall record the substance of evidence and the defense of the accused:

Provided further that, he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him it is not advisable to proceed further with it:

Provided also that in case of all offences punishable with death a record of evidence shall be taken.'

48. Record of evidence.--

(1) (The officer ordering the record of evidence) may either prepare the record of evidence himself or detail another officer to do so.

(2) The witnesses shall give their evidence in the presence of the accused and the accused shall have right to cross-examine all witnesses who give evidence against him:

(Provided that where statement of any witness at a court of inquiry is available, examination of such a witness amy be dispensed with and the original copy of the said statement may be taken on record, A copy thereof shall be given to the accused and he shall have the right to cross-examine if he was not afforded an opportunity to cross examine the witness at the court of Inquiry.)

(3) After all the witnesses against the accused have been examined, he shall be cautioned in the following terms; 'You may make a statement if you wish to do so, you are not bound to make on and whatever you state shall be taken down in writing and may be used in evidence.' After having been cautioned in the aforesaid manner whatever the accused states shall be taken down in writing.

(4) The accused may call witnesses in defense and the officer recording the evidence may ask any question that may be necessary t o clarify the evidence given by such witnesses.

(5) All witnesses shall give evidence on oath or affirmation:

(6)(a) The statements given by witnesses shall ordinarily be recorded in narrative form and the officer recording the evidence may, at the request of the accused, permit any portion of the evidence to be recorded in the form of question and answer.

(b) The witness shall sign their statements after the same have been read over and explained to them.

(6A) The provisions of section 89 of the Act shall apply for procuring the attendance of witnesses before the officer preparing the Record of Evidence.)

(7) Where a witness cannot be compelled to attend or is not available or his attendance cannot be procured without an undue expenditure of time or money and after the officer recording the evidence has given a certificate in this behalf a written statement signed by such witness may be read to the accused and included in the record of evidence.

(8) After the recording of evidence is completed the officer recording the evidence shall give a certificate in the following from.

'Certified that the record of evidence by Commandant ..was made in the presence and hearing of the accused and the provisions of rule 48 have been complied with'.

49. Abstract of evidence--

(1) An abstract of evidence shall be prepared either by (the ordering it) or an officer detailed by him.

(2)(a) The abstract of evidence, shall include--

(i) signed statements of witnesses wherever available or a precise thereof,

(ii) copies of all documents intended to be produced at the trial;

(b) Where signed statement of any witnesses are not available a precise of their evidence shall be included.

(3) A copy of the abstract of evidence shall be given by the officer making the same to the accused and the accused shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rule(3) of rule 48:

Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty-four hours after receiving the

abstract of evidence to make his statement.

51. Disposal of case (against an enrolled person) by Commandant after record or abstract of evidence.--

(1) Where an officer has been detailed to prepare the record of evidence or to make an abstract thereof the shall forward the same to the Commandant.

(2) The Commandant may, after going through the record or abstract of evidence:

(i) dismiss the charge, or

(ii) rehear the charge and award one of the summary punishments, or

(iii) try the accused by a Summary Security Force Court where his is empowered so to do, or

(iv) apply do a competent officer or authority to convene a court for the trial of the accused.

24. Const. Mohinder singh, accused, was an enrolled person and subject to the provision of the Act and Rules extracted above applied in his case. Rule 43 required the allegations to be reduced in writing in the form set out in appendix-IV of the Rules. Rule 45 makes it obligatory for the Commandant to hear the charge made against the accused in his presence giving an opportunity to the accused to cross examine any witness against him and make a statement in his defense. At the conclusion of the hearing the Commandant can award any of the punishment which he is empowered to award or dismiss the charge as provided in clauses (1) & (ii) of sub-clause (2) of Rule 45. If at the conclusion of the hearing the Commandant is of the opinion that the charge ought to be proceeded, he had two options open to him. The fist option is to remand the accused for preparing a record of evidence or for preparation of an abstract of evidence against him and the second option is to remand him for trial by a Summary Security Force Court. Section 48 prescribed the manner in which the record of evidence is prepared and also cautions that are to be given to the accused and certificate which is appended to the record of evidence. It also required the supply of the copy of the abstract of

the evidence to the accused and giving of an opportunity to him to make a statement, if he so desires, after administrating a caution. The record of evidence or abstract thereof is then forwarded to the Commandant. The Commandant then after going through the record or abstract of evidence has four options. Firstly, he can dismiss the charge or, secondly, he can re-hear the charge and award on e of the summary punishments or , try the accused by the Summary Security Force Court if he is so empowered and lastly he may apply to the competent officer or the authority to convene a court for the trial of the accused. The Commandant, thus, has powers of far reaching consequences at two stages of preliminary investigation and enquiry under Rule 45 and Rule 51 before a personnel is actually put to trial before a Summary Security Force Court. He has power to punish or dismiss the charge at the very initial stage when the accused is first brought before him with a charge/complaint against him. He again got power to dismiss the charge or punish the accused after the record of evidence/abstract of evidence has been prepared in pursuance to his orders under sub-clause (2) of Rule 45. This power is given by Rule 55. These rules by no stretch or reasoning could be considered to be a mere procedural formality. The mandatory applicability of Rule 45 is clear from the opening words of the Rule the charge shall be heard by the Commandant of the accused'. A total non-compliance of the Rule would certainly be fatal to the subsequent proceedings under taken before the accused is actually tried by a convened Summary Security Force Court or conviction and punishment by the Summary Security Force Court after the trial. It will deny the accused an opportunity of hearing at an early stage in response to the charge. Further recording of evidence in accordance with Rule 48 can be done only after commandant exercises his power vested by Rule 45. If Rule 45 is not at all complied with, preparation of record of evidence cannot be recorded and if it was ordered it was violation of Rules and there will be no basis of holding Summary Security Force Court.Indeed an infraction of the Rule or an irregularity in complying with the rule 45, which does not cause any prejudice to the accused, will not vitiate the subsequent proceedings conducted at the stage f pre or post convening of the court and trial of the accused by Summary Security Force Court. The reason is that the procedure prescribe by Rule 45 or 48, 49 and 51 are at a stage anterior to the trial by the Summary Security Force Court. It is the order of

the Summary Security Force Court which results in the conviction and punishment of the accused which is material and not inconsequential, infraction and irregularity in the procedure prescribed in the Rules at pre-trial stage. Similar view has been taken by the two Division Benches of this court in the case of ex-Const. Ashok Kumar (supra) and Union of India v. O.P.Bishnoi (supra). This view is also fortified by the law laid down by the Hon'ble Supreme Court in Lt.Col.Prithipal Singh (supra) and Major G.S.Sodhi (supra). The Supreme Court was dealing with the Army Rules. Rule 22 which applies to the army men other than the officers and is more or less similar to Rule 45 of the Act was held to be mandator so far in regard to its application to all the persons subject to the Act other than an officer.

25. The appellant had mentioned about the compliance of rule 43 & 45 in the counter affidavit filed before the learned Single Judge. He also referred to annexure-R-1, copy of which is part of the record of this LPA which shows that the Commandant had heard orally the complainant CHM L.G. Singh on 14.12.1993 and the accused Const. Mohinder Sing is purported to have declined to cross examine the witness. The Commandant then ordered the recording of the evidence by an officer Shri S.S.Yadav 21/C. Thereafter the evidence was recorded by Shri Yadav. The contention of the respondent that Const. Mohinder Singh was not aware of the charge against him and was never taken to the Commandant for compliance of Rule 45 and he did not have knowledge of the case before the recording of evidence was ordered against him seems absolutely untenable. Had it been correct, he would not have slept over and allowed the evidence of the witnesses recorded against him by Shri Yadav without raising objections and bringing it to the notice of the Commandant. That the stage for recording of evidence had not reached yet. There does not seem any reason for the court to believe that the Commandant will forge and fabricate annexure R-1 document or offence report which has been shown to us in order to meet the objections of the petitioner in the writ petition when he has not to record the elaborate proceedings but was simply to fill in a proform a similar to the one which is at page 170 of the LPA record and he was not to record in writing the statement of the complainant or any of the witnesses called by him to determine the issue before him. No practice or procedure which requires obtaining of the signature of the accused person by the Commandant at that stage of initial hearing has been brought to our notice.

Non-filing of copy of offence report or supply copy thereof to the respondent does not bring infirmity in the proceeding as it is not the requirement of any Rule. It also does not lead to and inference that Annex. R-1 was a fabricated document. Nor does writing of reference to Staff Court of Inquiry in Annex. R-1, incorrectly , makes the document false and forged. The contention of the respondent that there is total non-compliance of Rule 45, for these reasons, is repelled.

26. With all deference to the learned Single Judge his view that there was contravention and violation of Rule 45 is not sustainable.

27. It is next urge don behalf of the respondent that Rule 157 gives right to the accused to take assistance of any person including the legal practitioner as the consider necessary during the trail by Summary Security Force Court and this assistance has been denied to him. None of the two officers who were requested to be provided as friend of the accused have ben allowed to give assistance to the accused. On the contrary another person who had no experience in criminal law and trial was thrust upon the accused. He was a mere spectator to the trial. Rule 157 is extracted below:-

'During a trial at a Summary Security Force Court an accused may take assistance of any person, including a legal practitioner as the may consider necessary:

Provided that such person shall not examine or cross-examine witnesses or address the Court.'

28. In terms of this Rule the accused has an option to call for person including a legal practitioner to give him assistance during the trial though such person had no power to examine or cross examine the witnesses or address the court. Const. Mohinder Singh initially requested for providing Shri Man Singh,Dy.Commandant as legal assistant and when he was told that Shri Man Singh had declined to act as friend of the accused in that case he wanted Shri Ranbir Singh, Inspector to act as his friend in the proceeding. It is the case of the appellant that Shri Ranbir Singh too refused to give legal assistance or act as friend of the accused and only thereafter S.I. J.C. Bhowmik was detailed by the Commandant as friend of the accused. The respondent accused did not refuse to take his assistance and

request for providing another person as his friend in the proceedings before the summary Security Force Court. He raised the objection against Shri Bhowmik only in the writ petition which is too late for him to be heard. Moreover, Rule 157 gives power to the accused to engage a legal practitioner of his choice. In case the respondent was not satisfied with the services of Shri Bhowmik, he could have arranged a legal practitioner of his own. This has not been done. The argument that the did not get proper legal assistance and friend of the accused at the trial, thereforee, is not tenable.

29. It is also urged by the learned counsel for the respondent that in accordance with Section 70 of the Act a Summary Security Force Court may be held by the Commandant and he alone shall constitute the court but the proceedings are to be attended throughout by two other persons who shall be officers or subordinate officers or one of either and who shall not be sworn or affirm. It is contended that the Summary Security Force court was held by the Commandant in this case indeed but he tow subordinate officers who attended the proceeding were Subedar Balbir Sing and S.I. B.P. Balodi but Shri Balodi has also been examined as a prosecution witness No.4 in this case. thereforee, the whole trial by the Summary Security Force Court is vitiated. Section 70 has provided as under:-

(1) A Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court.

(2) The proceedings shall be attended throughout by two other persons who shall officers or subordinate offices or one of either, an who shall not as such, be sworn or affirmed.

30. Two things are clear on reading this provision. Firstly, the Commandant alone is to constitute the court. No other person is part of decision making process.Secondly, two other persons who are officers or subordinate officers or none of either shall only watch the proceedings. They will neither be sworn nor affirm. They will not participate in the proceedings, the decision making process and the decision. They shall simply over see that the proceedings are conducted having due regard to the law and the principles of natural justice. thereforee, if one of these two officers also happens to be a witness, his testimony being of formal

nature and not a witness to the crime, will not prejudice the trial of the accused. The accused did not object to the presence in the Court or to the recording of the statement of Shri Balodi when he was called to give evidence as PW4. In fact, it is the case of the accused respondent that the statement of Shri Balodi was only of a formal nature. The trial of the accused, thereforee, cannot be held to be vitiated because one of the two persons who attended his trial also appeared as prosecution witness to give some formal evidence. This argument also does not carry any force.

31. It is also contended by the learned counsel for the respondent that a single charge has been framed against all the five accused and in the absence of common intention on the part of the respondent and other co-accused, joint charge did not lie and there is violations of Rule 138. The charge which was framed for the trial of the accused and the three other constables has already been extracted in the foregoing paragraphs. Rule 138, however, is reproduced below:-

(1) After the Court and interpreter (if any) are sworn o sworn or affirmed as above mentioned, the accused shall be arraigned on the charges against him.

(2) The charges on which the accused is arraigned shall be read and, if necessary, translated to him, and explained and he shall be required to plead separately to each charge.

32. Clause (2) of Rule 138 requires the charge to be read over and explained to the accrued and the accused is required to plead separately to each of the charge. It did not require that a common charge is to be put on separate sheets of paper for each accused to plead to the charge. Each of the accused has pleaded separately to the charge.

33. The allegations against the accused Mohinder Singh may be summarily stated as follows. After the roll call was over, he stepped forward and without any provocation from his superior officer Head Const. L.G. Singh gave a blow to his chest and three other constables, namely Sanjeev Kumar Tyagi, Narender Sing Dalal and Dinesh Kumar Saklani, also started beating Shri L.G.Singh with fists and

web belts. The fourth accuse Vijay Bahadur Sing remained standing at some distance but allegedly exhorted to give beating to Head Const. L.G.Singh.Though the charge as framed is not happily worded but it cannot be stated that it has not been understood by the accused persons and caused prejudice in their defense.The respondent accused and other co-accused pleaded separately to the charge and also raised no objection to the charge as framed. They did not claim separate framing of the charge or separate trial before the Summary Security Force Court. Above all it has not caused any prejudice to the respondent in trial.

34. The learned counsel for the appellant has assailed the observation of the learned Single Judge that the appellant has not explained as to how the medical evidence could be admitted without the examination of the doctor or how the wearing apparels of he complainant L.G. Singh could be admitted in evidence without the opinion of the serologist. Indeed the charge against the respondent accused and other constables was of using criminal force to their superior officer. Even if the use of criminal force had not resulted into a hurt caused to the complainant, the offence of use of criminal force and assault a superior officer would not fall. The proform of injury by a doctor who examined the victim or the serologist or any other expert to prove the blood stains on the clothes which the victim was wearing at the time of commission of the offence would only further increase the gravity of the offence. Even if both these expert witnesses are not examined, the offence of use of criminal force could be proved by other oral evidence. Though the learned Single Judge did make observation that the appellant has not explained as to how the medical report could be admitted without the examination of the doctor and how the clothes of the victim could be admitted in evidence without examining an expert but a reading of the impugned judgment showed that he had not based his finding on the basis of these observations. He has held that the proceedings conducted by the appellant was vitiated and the punishment imposed by the Summary Security Force Court was void and unsustainable because mandatory Rules are not complied with.

35. It was also an argument of the learned counsel for the respondent accused that the Summary Security Force Court had re-examined the two witnesses PW5 and PW9 without declaring them hostile and in the re-examination certain new

facts have been introduced and the questions were not confined to the clarification of the points which arose out of the cross-examination and even some witnesses who were not cross-examined had been re-examined. The power of the court in allowing re-examination of the witness has not been denied. It is not argued that the court had no power to allow a witness, who has not been cross examined, to be re-examined on certain points. Nothing has been pointed out to suggest the at re-examination of the witnesses particularly PW5 to PW9 had cause any prejudice to the accused.

36. It was further argued by the learned counsel for the respondent that the order of the Summary Security Force Court whereby Const. Mohinder Singh was convicted, is based on no evidence. thereforee,the order is illegal and is liable to be set aside. We are afraid that it will not be possible for this court in exercise of extraordinary jurisdiction under Article 226 of the Constitution to scrutinise and re-appraise the evidence and substitute its own views in place of judgment of the Summary Security Force Court. In order to judge and evaluate the validity of the administrative order or statutory discretion normally the Wednesbury test should be applied and it should be considered that the relevant considerations have been taken into account and or irrelevant considerations have been ignored. The court will also consider whether the decision was arbitrary, whimsical, absurd or perverse. Hon'ble Supreme Court laid down the following parameters on the court making judicial review of administrative orders and actions in Union of India and another Vs . C. Ganayutham : (2000)IILLJ648SC .

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker cold , on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was abused or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court the court substitute its decision to that of the

administrator. This is the Wednesbury test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational -in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU principles.

93)(a).....

(3)(b).....

(4)(a).....The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involve,d is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of 'proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.'

37. It is argued that besides the complainant Shri L.G.Singh none other prosecution witnesses has corroborated the prosecution case. The testimony of L.G.Singh was discrepant and not credible. The doctor and other expert have not been examined to prove that he had suffered injuries or bleeding injuries. Of the 10 witnesses, 4 witnesses PWs 2, 3, 4 & 10 belonged to supervisory staff and their testimony was formal in nature. On the other hand 4 DWs have supported the accused Const. Mohinder Singh that he was not present at the place of the occurrence. The learned counsel, however, does noted state that the complainant

has not supported the prosecution case so far as it related to the accused const. Mohinder Singh and other 3 constables who are alleged to have physically man-handled him. The charge was of use of criminal force to a superior officer. Even if the evidence that would prove the injuries is not there still, the uncorroborated testimony of the complainant could be believed by the court. Whether it has been rightly accepted as a truthful statement and has brought home the charge is a matter to be decided by the Summary Security Force Court and not by this court in this appeal.

38. It was also alleged that the accused. Const. Mohinder Singh was falsely implicated in the case because the superior officer were annoyed with the respondent since he wanted to approach the higher officers against the punishment of 14 days R.I. awarded by an acting Commandant to him for unauthorised absence from the campus. The argument has no force. the accused was punished on the complaint of Head Constable L.G.Singh and it is the accused who would bear a grudge against the action of Head Constable L.G.Singh and not vice-versa. Applying the principles of law laid down by the Hon'ble Supreme Court in the facts of the above cited case it goes without saying that the respondent has not been able to bring-forth anything to suggest that the order of Summary Security Force Court was based on no evidence or the material which should have been exclude from consideration had been taken into consideration or some relevant facts have not been taken into consideration for arriving at the conclusion. It cannot be held that the order of Summary Security Force Court is arbitrary or perverse. The order of the Summary Security Force Court, thereforee, is not vitiated for all these reasons.

39. It has then been contended by the respondent that Const. Mohinder Singh and 4 other co-accused constables were tried on a single charge and that out of them Const.Vijay Bahadur Singh was acquitted by Summary Security Force Court and this has brought infirmity in the finding of guilt of co-accused recorded by that court and the accused Const. Mohinder Singh was also entitle to be acquitted. It is note-worthy that the allegations against Const. Mohinder Singh and three other accused Sanjeev Kumar Tyagi, Narender Singh Dallal and Dinesh Kumar Saklani was that they together gave beating to Head Const. L.G.Singh.The complainant in

his statement to the Summary Security Force Court has stated that when he shouted for help Const. Vijay Bahadur Singh justified his beating by the Coy troops. That is the only role assigned to him in the whole episode by the complainant. His case was distinguishable from the case of const. Mohinder Singh and other co-accused. The Summary Security Force Court had found that the charge has not been proved against the constable. His acquittal, thereforee, does not entitle the other co-accused to be also acquitted.

40. The learned counsel for the respondent has argued that Constable Mohinder Singh was posted in 'B' Coy of 92 Battalion BSF which was duly constituted by the Central Government under Section 2(1) of the Act. The disciplinary power upon him in terms of Rule 16(5) were to be exercised by the Commandant of the Battalion. An ad hoc arrangement was made for performing duties at the elections by constituting one SB-1 Battalion which was place under the charge of Shri U.K. Chakraborty Second I/C being the senior most officer. It is argued that SB-1 Battalion was not constituted by the Central Government and Shri Chakraborty did not have disciplinary power over the personnel of the company as Commandant under the Act or Rules. thereforee, he could not exercise disciplinary control and power of a Commandant over force working under him.

41. The learned counsel for the appellant controverting the argument has submitted that Section 5 read with Rule 16 gave ample power to Shri Chakraborty II I/C who was duly appointed to command the ad hoc arrangement with due approval of superior officers. Section 5 and Rule 16 are as under:-

Sec. 5 Control, direction, etc.

(1) The general superintendence, direction and control of the Force shall vest in, and be exercised by, the Central Government and subject thereto and to the provisions of this Act and the rules, the command and supervision of the Force shall vest in an officer to be appointed by the Central Government as the Director-General of the Force.

(2) The Director-General shall, in the discharge of his duties under this Act, be assisted by such number of Inspectors-General, Deputy Inspectors-General,

Commandants and other officers as may be prescribed by the central Government'.

Rule 16. Command

(1) An officer appointed to command shall have the power of command, over all officers and men, irrespective of seniority placed under his command.

(2)(a) in the contingency of an officer being unable to exercise the command, to which he has been appointed, due to any reason , the command shall devolve on the second-in-command, if one has been so appointed.

(b) If no second-in-command has been appointed, it shall devolve on the officer who may be appointed to officiate by the immediate superior of the officer unable to exercise command.

(c) If no such officer has been so appointed, command shall devolve on the senior most officer present.

(d) The inability of an officer to exercise command and its assumption by any officer in accordance with this sub-rule shall be immediately reported to Force Headquarters by the officer who has assumed command.

(3) If persons belonging to different battalions and units are working together-

(i) regard to the specific task on which they are engaged, the officer appointed to command or in his absence to senior most officer present shall exercise command over all such persons,

(ii) in all other matters the senior officer belonging to each battalion shall exercise command over persons belonging to his battalion.

(4) When officers and other persons belonging to the Force are taken prison by an enemy the existing relations of superior and subordinate and the duty of obedience shall remain unaltered and any person guilty of indiscipline or insubordination in this behalf shall, after his release be liable for punishment.

(5) Disciplinary powers over a person subject to the Act shall be exercised by the Commandant of the battalion or unit to which such a person belongs or the officer on whom command has devolved in accordance with sub-rule (2).

(6)Where such a person is doing detachment duty, including attendance at a course of instruction the Commandant of the battalion, unit, centre or establishment with which he is doing such duty shall also have all the disciplinary power of a Commandant.

(7)The Director-General, the Inspector-General and the Deputy Inspector-General may specify one or more officers of the staff who shall exercise the disciplinary powers of a Commandant in respect of persons belonging to or doing detachment duty at their respective Headquarters'.

42. It is an admitted case that 'B' Copy (92 Bn) of Constable Mohinder Singh was detailed with other Coys of different Battalions for a special duty and Shri U.K. Chakarborty was II I/C. Rule 16(3) gave him powers of a Commandant over the persons working under him. Disciplinary action taken by Shri Chakarborty against the respondent was within his power. Argument to the contrary has no force and is repelled.

43. It is also argued that the sentence awarded to the accused by Summary Security Force Court was promulgated on 26.3.1996 with stipulation that the sentence will take effect after clearance, and dismissal from service of the respondent will be intimated to all concerned. The Sector D.I.G. signed the proceedings on 8.6.1994. It is submitted that the date from which sentence of dismissal of service was to take effect has not been specified yet, thereforee, the dismissal order has not come into effect. The appellant,m on the other hand, contended that the dismissal order has been duly promulgated and the na,e of the respondent has been struck off from the strength of the Battalion on 26.3.1996. The appellant has filed copy of the promulgation order. No infirmity has been found out in this order. This argument of respondent is also devoid of any force.

44. The argument of the respondent that special finding on the basis of sole evidence as required by Rule 149 (3 & 4) has also not been recorded. Rule 149

reads as under:-

(1) The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of 'Guilty' or of 'Not Guilty'.

(2) When the Court is of opinion as regards any charge that the facts proved do not disclose the offence charted or any offence of which he might under the Act legally be found guilty on the charge as laid, the Court shall find the accused 'Not Guilt' of that charge.

(3) When the Court is of opinion as regards any charge that the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defense, it may, instead of finding of 'Not Guilty' record a special finding.

(4) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.

(5) The Court shall not find the accused guilty on more than one of two or more charges laid in the alternative, even if conviction upon one charge necessarily connotes guilt upon the alternative charge or charges.

45. The above quoted rule is explicit. Special finding is required where the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge. But in this case the finding of guilt by the Summary Security Force Court is in consonance with the facts alleged in the charge. This argument is also rejected.

46. Lastly, it is submitted on behalf of the respondent that the punishment awarded by the Summary Security Force Court is highly discriminatory and disproportionate to the offence said to have been committed by Const. Mohinder Singh. It is submitted that while Const. Mohinder Singh has been punished with dismissal from service the co-accused Constables, named above, have bene let off with

lesser punishment of 60 days rigourous imprisonment in Force custody. All of them were tries on a single charge; if they had pre-planned the attack on their superior Head Const. L.G. Singh and in furtherance of their common intention, they had used the criminal force and assaulted him, they should suffer a similar punishment for sharing common intention whatever may be their actual role in the incident. He relied upon the observation of Hon'ble Supreme Court in Bhagat Ram Vs . State of Himachal Pradesh and others : (1983)IILLJ1SC wherein it was held:-

'It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be vocative of Article 14 of the Constitution.'

He also relied upon Ranjit Thakur Vs . Union of India and others : 1988 CriLJ158 . The Hon'ble Supreme Court has observed:-

'.....the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias.'

47. The learned counsel for the appellant has stated that Const. Mohinder Singh is the main culprit who had instigated the other co-accused to take revenge upon Head Const. L.G. Singh by man-handling him. It is stated that it was the punch given by Const. Mohinder Singh which has encouraged the other 3 accused also to join in the attack. Since it was the accused Const.Mohinder Singh who was responsible for committing the offence, thereforee, other 3 accused were given lenient treatment in awarding punishment.

48. The scope of the judicial review of the administrative order is extremely limited. The court will be justified in disturbing the administrative order only when the punishment awarded is outrageous, defiance of logic and was shocking and it was perverse or irrational. The appellant has not been able to point out to any evidence or material to shoe that the role of accused Const. Manhinder Singh was materially different from that of other 3 convicted accused. There is no evidence at all to suggest that it was Const. Mohinder Singh who had instigated or exhorted his co-accused to commit the offence charged with. His punch to the chest of HC L.G.

Singh may have embolden other to take revenge from L.G. Singh. Even if the attack was not pre-planned but the manner in which they assaulted HC L.G. Singh by chasing him would certainly show that they had formed common intention at the time of commission of offence. Any how even if individual role of each accused is considered separately the complainant HC L.G. Singh as PW-1 stated that the respondent Mohinder Singh gave a severe punch to his chest and other constables, co-accused, also started beating with belts and cricket wicket. As such Mohinder Singh respondent gave beating with hands while his co-accused used web belt and cricket wicket and caused bleeding injury. Their role if not more reprehensible than Constable Mohinder Singh is at least not less serious. Above all, all of them jointly attacked HC L.G. Singh and used criminal force.

49. It is also pertinent to note here that the conduct report of accused Constable Mohinder Singh and Constable Dinesh Kumar Saklani put up by the department for determining the quantum of punishment is exactly identical. Even it has bene noted therein that the work and conduct of Constable Mohinder Singh had been good. Still Const. Mohinder Singh was awarded punishment with dismissal while others were treated very leniently and got lighter punishment and were retained in service. Though the punishment of dismissal from service in the para military forces where a high degree of discipline and obedience of the superiors is required, may be justified but all similarly situated accused persons tried together on one charge were required to be treated equally in the matter of punishment. The punishment awarded is arbitrary and irrational in respect of Constable Mohinder Singh when viewed in the light of punishment given to his co-accused. The judgments cited by the learned Counsel for the respondent are on the point of quantum of punishment which should be in consonance of gravity of offence. In our considered view the dismissal of Constable Mohinder Singh is not disproportionate to his offence. So, judgments cited by him do not advance his argument. But punishment given to the respondent is certainly discriminatory, whimsical, arbitrary and it is vocative of Article 14 of the Constitution and cannot be upheld.

50. With utmost respect to the views of the learned Single Judge we are constrained to hold that there is no legal infirmity in the trial procedure and the

conviction of Const. Mohinder Singh by Summary Security Force Court is not vitiates. The findings of the learned Single Judge to the contrary are not sustainable.

51. Since we have held that the punishment awarded to Const. Mohinder Singh was discriminatory, arbitrary and whimsical, the necessary corollary is that the matter should be remitted back to the appellate authority which decided the petition filed by the petitioner Const. Mohinder Singh under Section 117(2) of the Act for a fresh decision. We are told that Const. Mohinder Singh has died in 1998 leaving a widow and two minor children who are presently representing him in this appeal. Const. Mohinder Singh is no more available for suffering the punishment on the scale provided under Section 20 read with Section 48 of the Act. In the changed facts and circumstances, we feel that in order to do complete justice, in the case some monetary compensation to the widow and children of Const. Mohinder Singh would be just and proper. Such an order could be passed by the court in its inherent powers. The supreme Court in B.C. Chaturvedi Vs . Union of India and Others : (1996)ILLJ 1231 SC case has elaborately observed about the power and jurisdiction of the High Court which can be exercised for doing complete justice in the peculiar facts and circumstances of a particular case. It is as follows:-

'The first of these relates to the power of the High Court to do 'complete justice', which power has bene invoked in some cases by this Court to alter the punishment/penalty where the one awarded has been regarded as disproportionate, but denied to the High Courts. No doubt, Article 142 of the Constitution has specifically conferred the power of doing complete justice on this Court, to achieve which result it may pass such decree or order as deemed necessary; it would be wrong to think that other courts are not to do complete justice between the parties. If the power of modification of punishment/penalty were to be available to this Court only under Article 142, a very large percentage of litigants would be denied this small relief merely because they are not in a position to approach this Court, which may, inter alia, be because of the poverty of the person concerned. It may be remembered that the framers of the Constitution permitted the High Courts to even strike down a parliamentary enactment, on such

a case being made out, and we have hesitated to concede the power of even substituting a punishment/penalty, on such a case being made out. What a difference! May it be pointed out that Service Tribunals too,set up with the aid of Article 323-A have the power of striking down a legislative act.

The aforesaid has, thereforee, 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.

It deserves to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh case that the High Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. Of course, this power is not as wide as which this Court has under Article 142. That, however, is a different matter.

What has been stated above may be buttressed by putting the matter a little differently. The same is that in a case of a dismissal, Article 21 gets attracted, and, in view of the interdependence of fundamental rights, which concept was first accepted in the case commonly known as Bank Nationalisation case, which thinking was extended to cases attracting Article 21 in Maneka Gandhi v. Union of India, the punishment/penalty awarded has to be reasonable; and if it be unreasonable, Article 14 would be violated. That Article 14 gets attracted in a case of disproportionate punishment was the view of this Court in Bhagat Ram V. State

of H.P. also. Now if Article 14 were to be violated, it cannot be doubted that a High Court can take care of the same by substituting, in appropriate cases, a punishment deemed reasonable by it.

No doubt, while exercising power under Article 226 of the Constitution, the High Courts have to bear in mind the restraints inherent in exercising power of judicial review. It is because of this that substitution of the High Court's view regarding appropriate punishment is not permissible. But for this constraint, I would have thought that the law-makers do desire application of judicial mind to the question of even proportionality of punishment/penalty. I have said so because the Industrial Disputes Act, 1947 was amended to insert Section 11-A in it to confer this power even on a labour court/industrial tribunal. It may be that this power was conferred on these adjudicating authorities because of the prevalence of unfair labour practice or victimisation by the management. Even so, the power under Section 11-A is available to be exercised, even if there be no victimisation or taking recourse to unfair labour practice. In this background, I do not think if we would be justified in giving much weight to the decision of the employer on the question of appropriate punishment in service matters relating to government employees or employees of public corporations. I have said so because if need for maintenance of office discipline be the reason of our adopting a strict attitude qua the public servants, discipline has to be maintained in the industrial sector also. The availability of appeal etc. To public servants does not make a real difference, as the appellate/revisional authority is known to have taken a different view on the question of sentence only rarely. I would, thereforee, think that but for the self-imposed limitation while exercising power under Article 226 of the Constitution, there is no inherent reason to disallow application of judicial mind to the question of proportionality of punishment/penalty. But then, while seized with this question as a writ court interference is permissible only when the punishment/penalty is shockingly disproportionate.

I had expressed my unhappiness qua the first facet of the case, as Chief Justice of the Orissa High Court in paras 20 and 21 of Krishna Chandra Pallai v. Union of India, by asking why the power of doing complete justice has been denied to the High Courts. I feel happy that I have been able to state, as a Judge of the Apex

Court, that the High Courts too are to do complete justice. This is also the result of what has been held in the leading judgment.'

52. In the peculiar facts and circumstances of the case in order to do complete justice, monetary compensation to the legal heirs of the deceased Const. Mohinder Singh would meet the needs of justice. We find it appropriate t direct the appellant to pay a sum of Rupees Seventy Five thousand to the legal heirs of deceased Const. Mohinder Singh within three months from today. Appeal is disposed of accordingly. In the circumstances, the parties shall bear all their costs.