

(2006) 01 DEL CK 0011
In the Delhi High Court
Case No : WP (C) No. 9427 of 2005

Const. Hans Raj

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-01-2006

Acts Referred:

Citation : (2006) 87 DRJ 108

Hon'ble Judges : Mukul Mudgal, J;H.R. Malhotra, J

Bench : Division Bench

Advocate : D.C. Yadav, for the Appellant; P.P. Malhotra, Addl. Solicitor General, Manoj Ohri and Rohit Nagpal, for the Respondent

Judgement

Mukul Mudgal, J.—With the consent of the learned counsel for the parties, the leading writ petitions No. 9427/05 and 4753/02 are taken up for final hearing as all these writ petitions raise a common question of law.

2. The issue involved in these group of petitions is whether in an order passed u/s 117 of the Border Security Force Act(hereinafter referred to as the `BSF Act") in dealing with appeals against the orders of Security Force Court and the Summary Security Force Court and its confirmation, reasons are required to be given. Section 117 of the BSF Act reads as follows:-

117. Remedy against order, finding or sentence of Security Force Court.--(1) Any person subject to this Act who considers himself aggrieved by any order passed by any Security Force Court may present a petition to the officer or authority empowered to confirm any finding or sentence of such Security Force Court, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity or any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any Security Force Court which has been confirmed, may present a petition to the Central Government, the Director-General, or any prescribed

officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Director-General, or the prescribed officer, as the case may be, may pass such order thereon as it or he thinks fit.

3. The Summary Court Martial is held u/s 116 read with the Rules 103-133 of the Army Act, 1958. The Summary Security Force Court is held u/s 74 read with Rules 133-161 of the Border Security Force Act. General Court Martials under the Army Act are akin to Security Force Courts and Summary Court Martials are akin to Summary Security Force Courts under the BSF Act.

4. The brief facts of the representative case, WP.No.9427/05 are that the petitioner joined the respondent No. 2, i.e., the Border Security Force (hereinafter referred to as the 'BSF') in the year 1987. In April 1997 while on duty the petitioner met with a serious accident as a result of which four fingers of the petitioners' left hand were amputated. Thereafter in October 1999 the petitioner on grounds of disability was posted as a Generator Operator at BSF Academy, Tekampur. On 24th February, 2003 a chargesheet was served on the petitioner

5. On 24th February, 2003 the petitioner was tried by the Summary Security Force Court and was convicted by an impugned order dated 3rd March, 2003 according to which inter alias a rigorous imprisonment of 89 days was imposed on the petitioner. The petitioner filed an appeal against the order of the Summary Security Force Court before the respondent Deputy Inspector General. The petitioner's appeal was rejected by the respondent No. 2 by an unreasoned order dated 2nd September, 2004. The petitioner has filed this petition under Article 226/227 of the Constitution to set aside the order dated 3rd March, 2003 of the respondent No. 3 and order dated 2nd September, 2004 of the respondent No. 2.

6. The contention of the petitioners is that while disposing of statutory petitions of appeal u/s 117(2) of the BSF Act, the disposal should be supported by reasons. While opposing the above plea, the Union of India and the BSF have contended that as per the Constitution Bench judgment of the Hon'ble Supreme Court in S.N. Mukherjee Vs. Union of India, , reasons are not required to be recorded for an order passed by the confirming authority while confirming the finding and sentences of general Court Martials under the Army Act as well as that the orders passed by the Central Government dismissing the post-confirmation petitions in respect of an Army Personnel challenging such court Martial verdicts and the same analogy of the Army Act applies to the Border Security Force Act as the provisions of the Army Act and the Border Security Force Act are *pari materia*.

7. The pleas of the learned counsel for the petitioners, Mr. R.P. Sharma, Mr. Bishram Singh and Ms. Jyoti Singh on behalf of the petitioners are as follows:-

(a) The issue whether the appellate authority under the Army Act was required to record reasons was first decided by the Hon'ble Supreme Court in Som Datt

Datta Vs. Union of India (UOI) and Others, wherein it was held that neither the court martial nor the confirmation by the appellate authority was required to record reasons in support of their decision. A subsequent Constitution Bench of the Hon''ble Supreme Court in S.N. Mukherjee's case (supra) by following the reasons in Som Datt Datta's case (supra) held that no reasons were required to be given in an order of confirmation u/s 164(2) of the Army Act.

(b) That the Som Datt Datta's case (supra) and S.N. Mukharjee's case (supra) related to General Court Martials which required the presence of a Judge Advocate who is present throughout the trial to aid and advise the Court on all questions of law and other procedural matters. The accused in such a General Court Martial had a right to be represented by a civil lawyer and the Judge Advocate summed up the evidence at the end of the trial and advised the Court on all issues of law involved in the case. In a closed court thereafter findings were discussed in the presence of the Judge Advocate who was thus an integral part of the court martial proceedings ensuring fairness and legal inputs.

(c) That on the other hand and contrastingly a Summary Court Martial is held by the Commanding Officer of the accused who before taking on the role of the Judge chargesheets the accused, conducts a mandatory hearing of the charges, and then arrives at its decision as to the mode and disposal of the case. At such a summary court martial there is no Judge Advocate to aid and advise the Commanding Officer in law who is really functioning in a dual role of the Court as well as the prosecutor. Further in a Summary Court Martial the accused does not have the right to be represented by a lawyer thus placing such an accused in a disadvantageous position.

(d) That the judgments in Som Datt Datta's case (supra) and S.N. Mukherjee's case (supra) are not applicable to the present cases on the ground that the said cases related to a General Court Martial and in view of the differences pointed out in respect of General Court Martial and the Summary Court Martial, the principles laid down in the above judgments in Som Datt Datta's case (supra) and S.N. Mukherjee's case (supra) would not apply to the cases of the Summary Court Martial.

(e) That in the year 1969 when the BSF Rules were framed, Rule 148 clearly stipulated that the Court subsequent to the recording of the evidence was required to record its opinion before recording its findings in terms of Rule 149.

(f) That certain observations have been made by the Hon''ble Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, wherein military law was termed as 'archaic' and the absence of the single judicial review was adversely commented upon. The Supreme Court had suggested the change of the existing military law to bring it in tune with the changing times.

(g) Further distinction is sought to be drawn by reliance on the amendment in Army Rule 62 in the year 1992 which provided that the Court Martial (General/

District) was required to record brief reasons in support of their findings and sentences.

(h) That the Rule 99 of the BSF Rules was amended subsequently on the lines of Army Rule 62.

8. The said existing and amended Rule 99 of the BSF Rules and the existing and amended Army Rule 62 read as follows:-

Unamended BSF Rule 99

Amended BSF Rule 99

99. Record and announcement of Finding. (1) The finding on every charge upon which the accused is arraigned shall be recorded and except as provided in these rules, shall be recorded simply as a finding of "Guilty" or of "Not Guilty".

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Unamended Army Rule 62

Amended Army Rule 62

"Form, record and announcement of finding----(1) The finding of every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded simply as a finding of "Guilty" or of "Not guilty".

(2) Where the court is of opinion as regards any charge that the facts proved do not disclose the offence charged or any offence of which he might under the Act legally be found guilty on the charge as laid, the court shall acquit the accused of that charge.

(3) If the court doubts as regards any charge whether the facts proved show the accused to be guilty or not of the offence charged or of any offence of which he might under the Act legally be found guilty on the charge as laid, it may, before recording a finding on that charge, refer to the confirming authority for an opinion, setting out the facts which it finds to be proved, and may, if necessary, adjourn for that purpose.

(4) Where the court is of opinion as regards any charge that the facts which it finds 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 a finding of "Not guilty" , record a special finding.

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

(6) Where there are alternative charges, and the facts proved appear to the court not to constitute the offence mentioned in any of those alternative

"Form, record and announcement of finding. (1) The finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded as finding of "Guilty" or of "Not Guilty" . After recording the finding on each charge, the court shall give brief reasons in support thereof. The judge advocate or, if there is none, the presiding officer shall record or cause to be recorded such brief reasons in the proceedings. The above record shall be signed and dated by the presiding officer and the judge advocate, if any.

(2) Where the court is of opinion as regards any charge that the facts proved do not disclose the offence charged or any offence of which he might under the Act legally be found guilty on the charge as laid, the court shall acquit the accused of that charge.

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(4) Where the court is of opinion as regards any charge that the facts which it finds 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 a finding of "Not guilty" , record a special

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(6) Where there are alternative charges, and the facts proved appear to the court not to constitute the offence mentioned in any of those alternative charges, the court shall record a finding of "Not Guilty" on that charge.

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

(8) If the court thinks that the facts proved constitute one of the offences stated in two or more of the alternative charges, but doubts which of those offences the facts do at law constitute, it may, before recording a finding on those charges, refer to the confirming authority for an opinion, setting out the facts which it finds to be proved and stating that it doubts whether those facts constitute in law

the offence stated in such one or other of the charges and may, if necessary, adjourn for that purpose.

(9) In any case where the court is empowered by Section 139 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment, or where it could, after hearing the evidence, have made a special finding of guilty subject to exceptions or variations in accordance with sub-rules (4) and (5) it may, if it is satisfied of the justice of such course, and if the concurrence of the convening officer is signified by the prosecutor, accept and record a plea of guilty of such other offences or of the offence as having been committed in circumstances involving such less degree of punishment or of the offence charged subject to such exceptions or variations:

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

(6) Where there are alternative charges, and the facts proved appear to the court not to constitute the offence mentioned in any of those alternative charges, the court shall record a finding of "Not Guilty" on that charge.

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(9) In any case where the court is empowered by Section 139 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment, or where it could, after hearing the evidence, have made a special finding of guilty subject to exceptions or variations in accordance with sub-rules (4) and (5) it may, if it is satisfied of the justice of such

prosecutor, accept and record a plea of guilty of such other offences or of the offence as having been committed in circumstances involving such less degree of punishment or of the offence charged subject to such exceptions or variations:

Provided that failure to obtain the concurrence of the convening officer as aforesaid shall not invalidate the proceedings when confirmed notwithstanding such failure.

(10) The finding on each charge shall be announced forthwith in open court as subject to confirmation.

course, and if the concurrence of the convening officer is signified by the prosecutor, accept and record a plea of guilty of such other offences or of the offence as having been committed in circumstances involving such less degree of punishment or of the offence charged subject to such exceptions or variations:

Provided that failure to obtain the concurrence of the convening officer as aforesaid shall not invalidate the proceedings when confirmed notwithstanding such failure.

(10) The finding on each charge shall be announced forthwith in open court as subject to confirmation."

(i) The Constitution Bench judgment of the Hon''ble Supreme Court in S.N. Mukharjee's case (supra) was based on the then applicable Army Act and Rules and in particular Rule 62 which did not require recording of reasons in support of the findings of the court martial and hence the aforesaid judgment held that reasons were not required to be given in appellate proceedings. However since the Army Rules were amended in 1993 and in particular amended Rule 62 now requires reasons to be given in support of the findings of the court martial, the position of law laid down in S.N. Mukharjee's case (supra) which pertained only to the unamended Army Rule 62 and that too in respect of a General Court Martial, could no longer hold the field.

(j) That the Supreme Court laid down in Union of India (UOI) and Others Vs. B.N. Jha, that the BSF Act had filled up the gaps of Army, Navy and other Acts. The following position of law was laid down by the Hon''ble Supreme Court in the above judgment :

The scheme of the Act and the Rules leading to holding of a trial by the General Security Force Court leaves no manner of doubt that the basic principles of natural justice have been codified therein. The provisions of the Act and the Rules in no uncertain terms envisage protection from bias against an officer. We may notice that the Act which was enacted in the year 1968 even sought to fill up the gaps occurring in other Acts like Army Act, Navy Act or Armed Forces Act in this behalf so as to protect a person from personal bias or a real likelihood of bias.

(k) That the Division Bench of this Court had delivered a judgment dated 26th July, 2004 in WP(Civil) No. 2287/2001 entitled "Ram Paul v. Union of India and Ors." wherein the following position of law in respect of a disposal of an appeal by the BSF's Director General was laid down:-

However, we would like to comment upon another aspect, which is brought to our notice. It is pointed out that the appeal filed by the petitioner was statutory appeal. The petitioner was intimated by communication dated 3.1.2001 that his appeal was disposed of by the Director General as the same is devoid of merit. It

is unfortunate that even the order of the appellate authority was not communicated to the petitioner so that the petitioner could understand the matter in which the appellate authority had exercised its mind to the plea raised by the petitioner in appeal petition. As we gather from the communication issued, the appellate authority rejected the appeal on the ground that it is devoid of merit. If the disposal of the appeal was in the manner as stated in the said communication, one cannot but hold that the said order of the appellate authority is cryptic and is devoid of reasons. While disposing of an appeal, the appellate authority discharges a statutory function and acts as a quasi judicial authority. Therefore, the appellate authority is required to give due weightage and apply its mind take a conscious and considered decision and dispose of the appeal giving reasons for its decision. The order disposing the appeal must indicate that there has been proper application of mind by the authority to all the pleas raised and the reasons for the decision are also to be explicit in the order itself. On that count also the order of the appellate authority is found to be invalid and Therefore, the said order is also required to be set aside.

(I) That a SLP No. 26064/2004 filed by the Union of India against the aforesaid judgment of the Division Bench in Ram Paul's case (supra) has been dismissed by the Hon''ble Supreme Court on 4th January, 2005 and thus the aforesaid decision has become final and binding in so far as this Court is concerned.

9. Ms. Jyoti Singh, the learned counsel, appearing for the petitioner has placed strong reliance upon the judgment of the Division Bench of this Court in Delhi Agricultural Marketing B. Vs. Satya Pal Singh Dabas and Another, Reliance has been in particular placed on the following passages from the above judgment of Hon''ble Chief Justice S.B. Sinha (as he then was):-

13. In a larger interest of national security as also the military discipline, although such a right has been conferred upon the Parliament, the question arises is as to whether the benefits of the liberal spirits of the Constitution would be totally deprived to a class of citizens, namely, those who are engaged in defending the country against external aggression and those who serve the country in peace as much as in war. A person may not have a Fundamental Right, yet he is entitled to the benefits of the Charter of Human Rights. Despite denial of some of the provisions contained in Part III of the Constitution, he is entitled to compliance of the principles of natural justice.

10. The questions which arose in S.N. Mukharjee's case (supra) were summarized in the above judgment in Nirmal Lakra's case (supra) as under:-

(i) Is there any general principle of law which requires an administrative authority to record the reasons for its decision; and

(ii) If so, does the said principle apply to an order confirming the findings and sentence of a Court Martial and post-confirmation proceedings under the Act.

11. The following extracts of S.N. Mukharjee's judgment (supra) were also relied

upon in the judgment of Nirmal Lakra's case (supra):-

Therein, the Apex Court observed that the underlined object of the rules of natural justice is to prevent miscarriage of justice and secure fair play and action. It was held that the requirement to record reasons can be regarded as one of the principles of natural justice, which covered exercise of powers by administrative authorities. It was observed:

39. For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision."

However, it was observed that such a provision has been expressly and/or by necessary implication excluded in a proceeding under the said Act and the rules made there under.

Thus, the Apex Court, in S.N. Mukherji's case (supra), whereupon reliance has been placed by the learned Counsel appearing on behalf of the respondents, was primarily concerned with the question to whether reasons are required to be assigned while disposing of post-confirmation petition u/s 164(2) of the Act.

12. In paragraph 29, the Division Bench of this Court in Nirmal Lakra's judgment (supra) held as follows:-

29. If reasons are not assigned having regard to the parameters of judicial review, the Court may not be able to find out as to whether any illegality, irrationality or procedural impropriety has been committed. While considering the question of irrationality, if a High Court, or the Supreme Court is required to undergo the stressful exercise of going through the entire records and arriving at a decision that there was sufficient evidence to uphold the order or conviction and sentence as was done by the Apex Court in S.N. Mukherji's case (supra), the very purpose of having a limited power of judicial review may in a large number of cases be lost.

30. Judicial Review, it is trite, is a basic feature of the Constitution of India. All statutes must, thus, be construed in such a manner so that right of judicial review of a citizen may be effectively safeguarded.

13. The following passages in De Smith, Woolf and Jowell, Judicial Review of Administrative Action, Fifth Edition, Sweet and Maxwell, London, 1995 have also been noticed by the Division Bench in Nirmal Lakra's case (supra):-

The advantages of a duty to give reasons

The absence of a general duty to give reasons has long been condemned as a major defect of our system of administrative law. As the Justice-All Souls Committee concluded, "no single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions.

The beneficial effects of a duty to give reasons are many. To have to provide an Explanation of the basis for their decision is a salutary discipline for those who have to decide anything that adversely affects others. The giving of reasons is widely regarded as one of the principles of good administration in that it encourages a careful examination of the relevant issues, the limitation of extraneous considerations, and consistency in decision-making. Moreover, if published, reasons can provide guidance to others on the body's likely future decisions, and so deter applications, which would be unsuccessful. Further, the giving of reasons may protect the body from unjustified challenges, because those adversely affected are more likely to accept a decision if they know why it has been taken. In addition, basic fairness and respect for the individual often requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit.

The learned author specifies various circumstances where failure to provide reasons would amount to procedural impropriety. It was observed:

Since the duty to give reasons may now be seen simply as yet another aspect of the requirement of procedural fairness, it would be wrong to imagine that the duty may be artificially confined to situations in which the decision maker is acting in a "judicial" or "quasi-judicial" capacity. Although in *Cunningham*, some reliance was placed upon the fact that the Civil Service Appeal Board is a fully "judicialised" Tribunal, and one that is almost unique among Tribunals in not falling under a statutory duty to give reasons, subsequent decisions have made it clear that reasons may be required of a body exercising "quasi-judicial" functions, such as that of the Home Secretary in relation to the tariff period to be served by life sentence prisoners and "administrative" functions, such as a local authority making decisions, regarding an individual's housing application. The distinction between judicial, quasi-judicial and administrative functions may be consigned to history in this context, as well as more generally. As Sedley, J., has put it, rejecting such a submission in the context of the duty to give reasons. In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of Courts, and public law has since *Ridge v. Baldwin*, been alive to that fact.

14. Thereafter the Division Bench in *Nirmal Lakra's* case (*supra*) arrived at the following finding in paragraph 40:-

40. However, having regard to the provisions contained in the Army Act and the Army Rules vis-a-vis Article 33 of the Constitution of India, duty to assign reasons at all levels is desirable.

15. Ms. Jyoti Singh has further contended that since it is well settled position of law as per the following decisions cited in the footnote¹ that while dismissing a writ petition under Article 226 of the Constitution of India a High Court is required to record reasons, yet in proceedings u/s 117 of the BSF Act the Director General of BSF is not required to record reasons and as per the plea of

the respondent the judgment of S.N. Mukherjee's case (supra) indicates that this Court under Article 226 is required to go through the record and record reasons for its decision. It is thus contended that if the respondents' plea is accepted an incongruous situation will arise where the appellate authority u/s 117(2) of the BSF Act whose order is under challenge in this Court in its writ jurisdiction is not required to record reasons, whereas this Court in its exercise of extraordinary writ jurisdiction under Article 226 is nevertheless required to peruse the entire record and record reasons. She has further submitted that consequently this Court should adopt an interpretation which avoids such an anomalous situation.

16. The relevant para 46 which sums up the reasoning of the Hon'ble Supreme Court in S.N. Mukherjee's case (supra) is as under:-

46. With regard to post confirmation proceedings we find that sub-section (2) of Section 164 of the Act provides that any person subject to the Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such orders thereon as it or he thinks fit. In so far as the findings and sentence of a court-martial and the proceedings for confirmation of such findings and sentence are concerned, it has been found that the scheme of the Act and the Rules are such that reasons are not required to be recorded for the same. Has the Legislature made a departure from the said Scheme in respect of post-confirmation proceedings? There is nothing in the language of sub-section(2) of Section 164, which may lend support to such an intention. Nor is there anything in the nature of post confirmation proceedings, which may require recording of reasons for an order passed on the confirmation petition even though reasons are not required to be recorded at the stage of recording of findings and sentence by a court martial and at the stage of confirmation of the findings and sentence of the court martial by the confirming authority. With regard to recording of reasons, the considerations which apply at the stage of recording of findings and sentence by the court martial and at the stage of confirmation of findings and sentence of the court martial by the confirming authority are equally applicable at the stage of consideration of the post confirmation petition. Since reasons are not required to be recorded at the first two stages referred to above, the said requirement cannot, in our opinion be insisted upon at the stage of consideration of post confirmation petition and u/s 164(2) of the Act.

17. Since Rule 62 has since been amended and a court martial verdict is required to record reasons, the statutory basis for the above judgment in S.N. Mukharjee's case based on the unamended Rule 62 (supra) no longer exists. She has further submitted that since an analogy is being placed by the respondents on a judgment under the Army Act in S.N. Mukharjee's case (supra)

by the respondents by seeking to adopt the principle laid down in the said judgment in respect of the Army being applicable to another para military force such as BSF in the present case, if the basis for that principle on which S.N. Mukharjee's case (supra) is founded has changed, by the same analogy reasons are required to be recorded in the case of a Summary Security Court (the BSF equivalent to a Court Martial).

18. The pleas of the learned ASG, Shri Malhotra are as follows:-

(a) Mukherjee's case (supra) clearly laid down that statutory petitions u/s 164(2) do not require any reasons to be recorded by the confirmation authority while disposing of the confirmation petition.

(b) In this context, reliance has been placed by the learned ASG Shri Malhotra upon the judgment of the Hon"ble Supreme Court in Union of India and another Vs. Ex Constable Amrik Singh, . That in cases of special enactments all the principles of natural justice cannot apply and this analogy has been made applicable to the statutory petitions u/s 117(2) of the BSF Act. The Hon"ble Supreme Court in the paragraphs 7 & 8 of the Amrik Singh's case (supra) held as follows:-

7. From the above discussion it emerges that in cases of special enactments like Army Act, all the principles of natural justice cannot be imported. The same ratio applies to a petition u/s 117(2) of the Act also. We may also point out here that Chapter XIII consisting of Rules 167 to 169 of the BSF Rules deals with petitions filed u/s 117 of the Act. Even in them there is nothing to indicate that the hearing has to be given before disposal of a petition.

8. As noted above, u/s 117(2) the respondent is only entitled to file a petition but the disposal of such a petition does not attract principle of natural justice. The respondents has been tried by observing the due process of the Law and the verdict of the Security Force Court was confirmed and it only a post confirmation petition that was filed u/s 117(2) of the Act and the authority which disposed of the same is not a court and every order passed administratively cannot be subjected to the rigours of principles of natural justice.

(c) It has also been contended by the respondents that while there was an amendment to the Army Act and Rules in respect reasons required to be recorded in support of a court martial, in so far as BSF Act is concerned there was no such corresponding amendment in Rule 149 which related to Special Security Force Court under Chapter XI.

19. In our view Amrik Singh's decision (supra) only related to the plea of natural justice in respect of a hearing to be given u/s 117(2) of the Act while disposing of an appeal. Such reasoning is not ipso facto applicable when it comes to recording of reasons.

20. We are of the view that S.N. Mukherjee's case (supra) was postulated on the premise discernible from paragraph 46 of the judgment which was to the effect

that the reasons were not required to be given to the post confirmation petition u/s 164(2) as there was no statutory requirement of giving reasons in support of the findings of the court martial or at the stage of pre-confirmation based upon an analysis inter alias of existing Rule 62. Since the amendment of the Rule 62 in the year 1993 has already put in the requirement of giving reasons in support of the findings of court martial, the position of law laid down in S.N. Mukherjee's case in so far as it held that reasons in support of orders u/s 164(2) of the Army Act were not required to be given no longer holds the field. The other position of law laid down in S.N. Mukherjee's case (supra) was discernible from the paragraph 39 which clearly held that except to the extent where the requirement to record reasons was dispensed with expressly or by necessary implication, the administrative authority exercising quasi or non-quasi judicial function was required to record reasons. In our view even S.N. Mukherjee's case (supra) required the recording of reasons by administrative authority exercising quasi or non-quasi judicial function except when the requirement to record reasons was dispensed with expressly or by necessary implication. In the aforesaid Mukherjee's case (supra) the Constitution Bench of the Hon''ble Supreme Court held that the said requirement was necessarily excluded by implication by virtue inter alias of the then existing Rule 62 of the Army Rules. Since Rule 62 has been since amended and recording of reasons have been expressly included therein, the reasoning contained in paragraph 39 of the S.N. Mukherjee's case (supra) to the following effect comes into play:-

39. For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision.

Since in the amended Army Rule 62 the requirement of recording reasons in support of a Court Martial verdict has now been statutorily incorporated, the principles laid down in S.N. Mukherjee's judgment far from supporting the plea of the learned Addl. Solicitor General Shri P.P. Malhotra, in fact supports the plea of the petitioners about the requirement of recording reasons in support of a decision u/s 117(2) of the BSF Act.

21. The Hon''ble Supreme Court noted while observing about the general Court Martial that the findings and sentence of a Court Martial under the then existing Army Act did not require the recording of reasons as evident from the Act and the Rules. Keeping the above position of law which permitted the Court Martial Finding to be without recording of reasons in view of the pre-amendment Rule 62, the Hon''ble Supreme Court observed that the consideration of reasons which applied while awarding the sentence of Court Martial are equally applicable in the case of proceedings of confirmation u/s 164(2) of the Army Act. It was thus observed that since reasons were not required to be recorded at the stage of recording of findings and the confirmation of the finding, they were not required to be recorded at the state of post confirmation petition u/s 164(2) of the Act. In

our view since Rule 62 has since been amended in 1992 after the judgment in S.N. Mukherjee's case (supra) the entire foundation of the aforesaid judgment in S.N. Mukherjee's case based on unamended Rule 62 in our view cannot now be held applicable in Court Martial proceedings which arose from the amended Rule 62 which requires the recording of reasons. Since Court Martials after the amendment of Army Rule 62 are required to record reasons, the rationale or the reasons of S.N. Mukherjee's case can no longer be said to apply to the situation emerging pursuant to the amended Rule 62 requiring recording reasons. Accordingly, in our view in confirmation petitions pursuant to court martials which subsequent to the amendment in Rule 62 are required to record reasons for their decision, the post confirmation petition disposal is required to be with reasons. Indeed we find that the observations in paragraph 39 of S.N. Mukherjee's case clearly indicate that except where the requirement of recording the reasons has been dispensed with by necessary implications, an administrative authority exercising judicial or quasi-judicial evidence is required to record the reasons for its decision. We are also respectfully bound by the view taken by the Division Bench of this Court in Nirmal Lakra's case (supra) in paragraph 29 of the judgment wherein it was clearly stated that unless reasons are assigned, the High Court under Article 226 or the Supreme Court under Article 32 would not be able to find out as to whether any illegality, irrationality or procedural impropriety has been committed. In Lakra's case (supra) it was thus held that this Court would thus be required to undergo a stressful exercise of going through the entire records and arriving at a decision that there were sufficient evidence to uphold the decision of conviction and sentence and in such a situation, the very purpose of having a limited power of judicial review may in a large number of cases be lost. We are not only in respectful agreement with the aforesaid view of the Division Bench but we are indeed bound by it. Even De smith, Woolf and Jowell in *Judicial Review of Administrative Action*, Fifth Edition, Sweet and Maxwell, Landon 1995, has clearly held that giving of reasons is widely regarded as the principle of good administration and leads to consistence in decision making as well as exclusion of extraneous considerations. It has also been observed that giving of reasons may protect the body from unjustified challenges because those adversely affected are more likely to accept the decision if the reasons for the decision were known. De Smith has also noted that requirement of recording the reasons is particularly important where decisions are subject to right of appeal on a question of law.

22. We follow the position of law as stated in Nirmal Lakra's case (supra) that while examining the challenge to conviction recorded in the Court Martial and its conformation, the reasons recorded therein would furnish valuable aid and save time of the High Court in its exercise of writ jurisdiction under Article 226 of the Constitution of India.

23. In Nirmal Lakra's case, it has been concluded while referring to the proceedings u/s 87, the Court constituted under the BSF Act is to assign reasons, correctness whereof can be judged by the Court exercising the power of judicial

review. Consequently, since the Court Martial proceedings are required to record reasons and a post confirmation order is amenable to challenge under Article 226 of the Constitution of India, an effective and meaningful exercise of power of judicial review would only be available where reasons for disposal of the post confirmation petition are recorded.

24. Mr. Malhotra, relied on the judgment of Hon''ble Supreme Court in Amrik Singh's case (supra) to contend that in case of special enactments, principles of natural justice cannot apply and this analogy has been made applicable to the statutory petitions u/s 117(2) of the BSF Act. In our view, the aforesaid observations were made in respect of Section 117(2) of the BSF Act in the context of a hearing required to be given before disposal of a petition for confirmation of a Court Martial and the non-application of principles of natural justice was indicated in a context of hearing sought by the petitioner in Amrik Singh's case before the disposal of his petition u/s 117(2) of the BSF Act. In our view, the aforesaid observations regarding principles of natural justice in the context of hearing in respect of post confirmation cannot ipso facto be made applicable to the requirement of recording reasons. Even though the interpretation of Amrik Singh's case (supra) as suggested by the learned ASG in a possible one, we are bound by the decision of the larger Constitution Bench of the Hon''ble Supreme Court in Mukherjee's case (supra) as extracted in paragraph 39 above.

25. It was then submitted by the learned Solicitor General that while there was an amendment to the Rules under the Army Act in respect of which reasons are required to be recorded in support of Court Martial, in so far as BSF Rules there was no amendment to Rule 149 which resulted to a constitution of a Special Security Force Court similar to Court Martial under Chapter XI. In our view, the aforesaid plea cannot be sustained because it was the respondent themselves who relied upon the principles enshrined in S.N. Mukherjee's judgment (supra) and the analogy of the Army act with the BSF Act. The respondents have themselves contended that reasons are not required to be recorded for an order passed by the confirming authority as well as in the order in the post-confirmation petition in respect of an Army Personnel challenging such court Martial verdicts and the same analogy of the Army Act applies to the Border Security Force as the provisions are *pari materia*. The respondent Therefore cannot be now permitted to urge that there is difference between the principles applicable to the Army Act and the principles applicable BSF Act. If the Army which is premier military force of the country is required to record reasons for disposal of the appeal u/s 164(2) of the Army act, it would be extremely incongruous that a paramilitary force like BSF could be heard to say that they are not required to record reasons. The principles laid down in S.N. Mukherjee's case were general in nature applicable both to the Army Act and the BSF Act and the mere fact that an amendment in the Rule 149 has not been effected cannot rule out the applicability of the principles laid down in paragraph 39 of S.N. Mukherjee's case which stated the desirability of recording of reasons but for its

exclusion statutorily or by necessary implication. Besides Nirmal Lakra's case (supra) rendered by a Division Bench of this Court dealt with BSF Act and clearly concluded the desirability of recording the reasons. In so far as judgment in Som Dutt Dutta's case (supra) is concerned which also arose from the unamended provisions of the Army Act and Rules made there under and cannot be made applicable to the present case.

26. In an appeal arising from an order passed u/s 378(3) Code of Criminal Procedure, Hon'ble Mr. Justice Arijit Pasayat speaking for the Supreme Court in State of Punjab v. Bhag Singh reported as AIR 2004 SC 1203 held as under:-

Even in respect of administrative order Lord Denning M.R. In Breen v. Amalgamated Engineering Union 1971 (1) All ER 1148 observed "The giving of reasons is one of the fundamentals of good administration" . In Alexander Machinery [Dudley] Ltd. v. Crabtree 1974 LCR 120, it was observed : "Failure to give reasons amounts to denial of justice" . Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at" . Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx" , it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

Though the above mentioned case is with respect to an appeal arising from an order u/s 378(3) of the Cr.PC but the position of law laid down therein by the Hon'ble Supreme Court is general and hence applicable in the present case.

27. The Hon'ble Supreme Court in (a) Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI), has laid down the following position of law:

...The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory court to keep the tribunal within bounds. A reasoned order is a desirable condition of judicial disposal." Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI), .

If Tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are to be given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one.

The public should not be deprived of this only safeguard....

(b) In *Travancore Rayon Ltd. Vs. Union of India (UOI)*, the Hon"ble Supreme Court has laid down the following position of law:

The Court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceedings before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

(c) In *Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others*, it was held as follows:

Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just.

(d) In *Woolcombers of India Ltd. Vs. Woolcombers Workers Union and Another*, the Hon"ble Supreme Court held as follows:

The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious, unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third, it should be remembered that an appeal generally lies from the decision of judicial and quasi-judicial authorities to this Court by special leave granted under Article 136. A judgment which does not disclose the reasons will be of little assistance to the Court.

(e) In *The Siemens Engineering and Manufacturing Co. of India Ltd. Vs. The Union of India (UOI) and Another*, the Hon"ble Supreme Court held as follows:

It is now settled law that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes.

Every quasi-judicial order must be supported by reasons.

(f) The Hon"ble Supreme Court in S.N. Mukherjee's case observed as follows:-

the giving of reasons is one of the fundamentals of good administration. (p. 191)

(g) The Hon"ble Supreme Court in S.N. Mukherjee's case (supra) noticed the 14th Report of the Law Commission of India relating to reform in judicial administration which reads as follows:-

In the case of administrative decisions provisions should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs." (Vol. II p. 694)

28. We are also bound by the law laid down by the Division Bench judgment dated 26th July, 2004 of this Court in Ram Paul's case in CWP 2287/2001 which clearly laid down the position of law in respect of the disposal of an appeal by the Director General of the BSF. It was held that since the statutory appellate authority acts as a quasi judicial authority, it is required to apply its mind and give reasons. This judgment was challenged in the Hon"ble Supreme Court and the SLP No. 26064/2000 filed by the Union of India was dismissed on 4th January, 2005. Thus the above judgment has become final and binding on this Court.

29. In view of the above position of law found by this Court which indicates the necessity of recording reasons, the pleas of the petitioner's succeed to the above extent. Accordingly all these writ petitions will be remanded to the appellate authority u/s 117(2) of the BSF Act for the disposal of the appeal by a reasoned speaking order. There are certain other cases which were clubbed along with the present judgment which dealt with the orders passed by the CRPF in respect of a departmental enquiry leading to an appeal to an appellate authority. The following matters will be dealt with separately and are listed for directions on 2nd February, 2006:-

- 1) WP(C) No. 3320/1997
- 2) WP(C) No. 2569/1999
- 3) WP(C) No. 1647/1999
- 4) WP(C) No. 4560/1993
- 5) WP(C) No. 5213/2000
- 6) WP(C) No. 1763/1979
- 7) WP(C) No. 2599/1999
- 8) WP(C) No. 3995/1998
- 9) WP(C) No. 41/2002

- 10) WP(C) No. 2803/1999
- 11) WP(C) No. 2768/1999
- 12) WP(C) No. 1420/1999
- 13) WP(C) No. 2731/1998
- 14) WP(C) No. 2352/1994
- 15) WP(C) No. 672/1999
- 16) WP(C) No. 7097/2002
- 17) WP(C) No. 1543/1999
- 18) WP(C) No. 2002/1999
- 19) WP(C) No. 3225/2003
- 20) WP(C) No. 646/1999
- 21) WP(C) No. 1085/1995

The following other cases, i.e., where show cause notice was issued but there was no trial by court martial, shall be dealt with separately and are listed for directions on 10th February, 2006:-

- 1) WP(C) No. 14627/2004
- 2) WP(C) No. 1723/2004
- 3) WP(C) No. 2019/1999
- 4) WP(C) No. 1386/1996
- 5) WP(C) No. 4822/1995
- 6) WP(C) No. 2709/1996
- 7) WP(C) No. 1569/1999
- 8) WP(C) No. 578/98
- 9) WP(C) No. 3415/99

The writ petition No. 1682 of 1997 entitled "Hari Om Sharma v. UOI" and the writ petition No. 4081/1997 entitled "Ex.Constable Vinod Kumar Singh v. UOI" have been wrongly clubbed with the present batch of matters and shall be listed for directions on 25th January, 2006.

30. The writ petitions thus stand disposed of in terms of the position of law laid down in this judgment.