

(1978) 11 RAJ CK 0030

In the Rajasthan High Court

Case No : Miscellaneous Writ Petition No. 41 of 1978

P.C. Pande

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-11-1978

Acts Referred:

Border Security Force Act, 1968 — Section 107, 108, 141, 30, 40
Constitution of India, 1950 — Article 166, 226, 311, 32, 367
General Clauses Act, 1897 — Section 3, 5
Government of India Act, 1935 — Section 312, 313, 317, 40

Citation : (1979) RLW 9 : (1978) 11 WLN 435

Hon'ble Judges : M.L. Joshi, Acting C.J.; M.C. Jain, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.C. Jain, J.—This is a petition under Article 226 of the Constitution of India for issue of writ of Habeas Corpus and for issue of writ in the nature of Certiorari for quashing or setting aside the order of conviction and sentence dated 13-9-1977 passed by the General Security Force Court (hereinafter referred to as "the Court). At present the petitioner is undergoing sentence in the Central Jail, Jodhpur.

2. The material facts may briefly be stated as follows : The petitioner was a Sub-Inspector (Clerk) in 13 BN, BSF No. 671870641 attached with of S.T.O. Jodhpur in the year 1975 and was working as Accountant-cum-Cashier in that year The petitioner was prosecuted for misappropriating property u/s 30 of the Border Security Force Act, 1968 (47 of 1968)(hereinafter referred to as the Act"), during the year 1975-76. He was convicted by the General Security Force Court and sentenced to suffer rigorous imprisonment for two years. It was farther ordered that the petitioner was to be dismissed from the service and to forfeit all arrears of pay and allowances and other public money due to him, vide the Court's order dated 13-9-1977 The Inspector-General, Border Security Force (R & G), Jodhpur, vide his order date d 18-10-1977 confirmed the finding and sentence of the

Court The Court was convened by an order of the Inspector General, Border Security Force (R & G), Jodhpur, dated 4-8-1977 and according to this order the Court was to assemble at Jodhpur for trying the petitioner on 17-8-1977 and the Court assembled at Jodhpur on 17-8-1977. The Court after trial convicted and sentenced the petitioner as stated above and the said sentence was ultimately confirmed. The petitioner further averred that on 10-9-1977, he filed a written statement in his defence marked as Ex. MMM at the trial In the last but one para of this statement, he made submissions to the effect that for the last about 17 months he is in close arrest and all his efforts to meet the Director-General) and represent his case have been nullified by the Head quarters, I.G. BSF (R & G), Jodhpur. Time and again he requested that a court of inquiry may be convened so that thorough enquiries are made into all bung lings going on in the office, but his requests had always been denied and time and again the oral representations to constitute a court of inquiry, which is a condition precedent to the holding of a trial, made by him were also ignored. The Law officer in summing up the case on 13-8-1977 did not even advert to the representations of the petitioner that a court of inquiry must precede the trial of the petitioner The petitioner submitted a pre-confirmation appeal for the revision of the sentence awarded by the Court, but the same was rejected and information thereof was conveyed to the petitioner through letter dated 29 10 1977. This letter was annexed with the copy of letter No. D. IX 110/77 (R & G)/24343-44 dated 24-10-1977 from the Head quarters Inspector General, Border Security Force (R & G), Jodhpur, addressed for the Deputy Inspector General, Border Security Force, Jodhpur purported to be signed on behalf of the Inspector General, Border Security Force, Jodhpur. Thereafter the petitioner was dismissed from service with effect from 13-9-1977 by the Deputy Commandant. Border Security Force STC. Jodhpur, vide his order No. DV-2/STC/16193 dated 8-11-1977. The petitioner thereafter made representation to the Director General, Border Security Force. New Delhi, dated 25-10-1977, but the petitioner was informed vide letter No. 3/408/76.CLO/BSF dated 23-11-1977 of the Government of India, Ministry of Home Affairs, Director-General, Border Security Force, New Delhi that his petition dated 25-10-1977 was rejected by the Director-General being devoid of merits. The petitioner has challenged his conviction and sentence inter alia on the grounds stated in para 14 of the writ petition, but during the arguments of the writ petition, the challenge to conviction and sentence was confined to the following two grounds only:

(1) that the findings and sentence of the Court were not confirmed according to Section 107 and 108 of the Act and there being violation of these provisions, the findings and sentence of the Court are invalid. The findings and the sentence could either be confirmed by the Central Government or by an officer empowered in this behalf by a warrant of the Central Government. The respondent's stand that IG, BSF (R & G) holds the warrant to confirm the findings and sentence of the Court Ex. R/2, which purports to be a warrant issued by the order of the Central Government and purports to be signed by the Secretary in the Ministry of

Home Affairs is not tenable in law as the authority under the document Ex. R/2 was neither expressed to be given by the President nor the power to confirm the findings of the Court was properly authenticated and even the Secretary had no power to authenticate Ex. R/2. The said order, therefore, does not comply with the requirements of Article 77 of the Constitution and so it cannot be said that the power of confirmation of the findings and sentence of the Court had been legally and properly delegated to the Inspector General, Border Security Force (R & G).

2. That the provision of Sub-rule (2) of Rule 174 of the Border Security Force Rules, 1969 (hereinafter referred to as "the Rules") is mandatory and under Sub-rule (2) with regard to all financial irregularities, losses, theft and misappropriation of public or force property the holding of a court of inquiry was necessary and indispensable preliminary and a condition precedent to the convening of the General Security Force Court. The trial of the petitioner without complying with this mandatory provision was absolutely illegal, void, ultra vires and without jurisdiction.

3. On these two grounds the validity of the order of the Court and the confirmation thereof by the Inspector General, Border Security Force, have been challenged and it was prayed that the order of sentence of imprisonment be set aside or quashed and the petitioner be set at liberty forthwith.

4. The respondent submitted their return to the amended writ petition in which it was stated that the petitioner was charged for misappropriating Government money u/s 30(b) of the Act Besides this there was a seventh charge against the petitioner u/s 40 of the Act in respect of unauthorised possession of the keys of the Treasury Chest of the Headquarters Inspector General, Border Security Force, Rajasthan and Gujarat. The Court after trial found the petitioner guilty of all the charges except fourth and sixth and it was stated that under the provisions of the Act and the Rules made there under, it was not essential to assemble a Court of Inquiry before the trial of an accused. A record of evidence was ordered against the petitioner under Rule 45 of the Rules. The record of evidence was prepared in accordance with Rule 48 of the Rules and the charge was heard under Rule 51. The respondents refuted the contention of the petitioner that Court of inquiry is a condition precedent for the holding of a trial. The petitioner is subject to the Act and action could be taken against him under the Act and the Rules. The Law Officer did not comment upon the request of the petitioner about holding of a court of inquiry as it was not a condition precedent to the trial of an accused as holding of a court of inquiry for administrative purposes in certain cases had been made essential under the provisions of Rule 174(2) of the Rules. In Clause (c) of the said Rules a Court of inquiry is required to be held in all cases of financial irregularities etc. Such an inquiry is held only to establish the nature and the extent of irregularity and the identity of persons responsible therefor. In this case there was hardly any doubt with respect to either of the ground and it would have been a sheer waste of time and would have resulted in

unnecessarily delay in the trial of the petitioner.

5. As regards the other ground on which the findings & the sentence have been challenged, it was stated that the findings and sentence were duly confirmed by the Inspector General, BSF (R & G) as he was empowered by the Central Govt. under the warrant issued by it, and thus, the competent authority has confirmed the findings and sentence of the Court in accordance with the provisions contained in Section 107 and 108 of the Act, The findings and sentences of the General Security Force Courts, u/s 108 of the Act, can be confirmed by the Central Government or by any officer empowered in this behalf by warrant of the Central Government. The Central Government has empowered by warrant the Inspector Central, BSF to confirm the findings & the sentence of the Court. It was also stated that the warrant was duly authenticated, and the said warrant cannot be called in question, as it is in conformity with the Article 77 of the Constitution and in no way invalid.

6. It was further stated in the reply that there is no contravention of any of the provisions of law. The detention of the petitioner as a result of the conviction and sentence, is legal and in such circumstances the petitioner is not entitled to invoke the extraordinary original jurisdiction and so the petition is not maintainable. In the alternative it was pleaded that even if there are and irregularities and illegalities in the trial of the petitioner they cannot be looked into in the proceedings relating of Habeas Corpus and the writ of Habeas Corpus does not lie for questioning the validity of such conviction as the petitioner has been convicted and sentenced under the provisions of the Act and the Rules and the conviction and sentence have been confirmed by the competent authority and the proceedings of the court are not open to scrutiny in the petition under Article 226 of the Constitution.

7. We have heard the learned Counsel for the petitioner & the learned Counsel for the Union of India at length. We now proceed to consider the arguments advanced before us.

8. On behalf of the petitioner first of all it was vehemently contended that the findings and sentence of the court have not been validly confirmed in as much as the Inspector Central, BSF (B & G) was not empowered in conformity with the provision contained in Article 77 of the Constitution. The power of confirmation ought to have been expressed in the name of the President and further the order made and executed in the name of the President ought to have been authenticated in such manner as may be specified in the Rules made by the President The learned Counsel submitted that document Ex. R/2 does not satisfy the requirements of Article 77, as it is not expressed in the name of the President nor it has been signed by the Secretary by order of the President. According to the learned Counsel such a document is not immune from challenge as it does not satisfy the requirements of Article 77. His submission is that some sort of evidence could have been led to satisfy the court that compliance of Article 77 had been made. Mere production of the copy of the document Ex. R/2

without being supported by any evidence in the form of affidavit or otherwise is insufficient to satisfy the requirements of Article 77. The learned Counsel submitted that it was all the more necessary to adduce some evidence in any form when strict compliance of Article 77 was not made and where strict compliance has not been made, some evidence adduced was a must, without which it should be held that Article 77 has been violated and the delegation of power of confirmation to the Inspector General, BSF(R&G) through document Ex. R/2 is not valid. The learned Counsel referred to some decisions to show that where strict compliance of Article 77 was not made and evidence has been led in some form or the other to prove that compliance of Article 77 has been made, though he concedes that the provisions of Article 77 are only directory and not mandatory, and where the order itself does not satisfy the requirements of Article 77, the deficiency can be made good by production of some evidence.

9. The learned Counsel for the respondents on the other hand submitted that the order is expressed to be made or, the name of the Central Government and it has been issued by the order of the Central Government signed and authenticated by the Secretary, Ministry of Home Affairs under the Authentication (Orders and Instruments) Rules, 1958. By virtue of Article 367 of the Constitution, the General Clauses Act shall apply for the interpretation of the Constitution and u/s 3(8) of the General Clauses Act (10 of 1897) the expression "Central Government", to anything done or to be done after commencement of the Constitution, shall mean the President. Thus, it would be deemed that the warrant dated 11-11-1971 Ex. R/2 is expressed to be made in the name of the President and was issued by the order of the President and is duly authenticated by the Secretary, Ministry of Home Affairs and so the order is immune from challenge and cannot be called in question on the ground that it is not an order made or executed by the President. Further, Section 108 of the Act only requires that the findings and sentences of the General Security Force Court may be confirmed by any officer empowered in this behalf by a warrant of the Central Government. Thus, the order Ex. R/2 satisfies the requirements of Section 108 of the Act, as the power of confirmation has been conferred on the Inspector General, Border Security Force (R & G), Jodhpur, by the warrant issued by the Central Government. According to the learned Counsel for the respondents there is not only substantial compliance of Article 77 of the Constitution and Section 108 of the Act, but there is rather strict compliance of law placing the order in question beyond challenge and is irrefutable. Therefore, there was no need to produce any evidence to prove that the requirements of Article 77 were satisfied. The learned Counsel for the respondents also referred to some case law.

10. We have given our anxious consideration to the rival contentions advanced before us by both the sides. From the rival contentions, it would appear that the controversy lies in a very narrow compass what is to be seen is, as to whether the order dated 11-11-1971 satisfies the requirements of Article 77 and it does not require any evidence to support its validity. If it satisfies the requirements of Article 77 no evidence is needed, but in case it is found that it does not satisfy

the requirements of Article 77 then it can be said that in order to hold that the order was made after complying with the requirements of Article 77, some evidence may be needed. Let us see the order itself. It is reproduced below:

Warrant for confirming findings and sentences of the General Security Force under the Border Security Force Act.

To

The Inspector General,

Border Security Force,

JODHPUR (RAJASTHAN).

In pursuance of the provisions of the Border Security Force Act, 1958 (47 of 1968), the Central Government is pleased to hereby empower you, or the officer on whom your Command may devolve during your absence, not under the rank of a Deputy Inspector General, to receive the proceedings of the General Security Force Court held for the trial, in accordance with the said Act and the Rules made there under, of any person under your command who is subject to the Border Security Force Act, and confirm the findings and sentences thereof, and to exercise as respects these Courts and persons filed by them, the powers created by the said Act in the confirming officer in such manner as may be best for the good of the Force.

And for so doing, this shall be, as well to you as to all others whom it may concern, a sufficient warrant.

Given at New Delhi this Eleventh day of November, 1971.

By order of the Central Government,

Sd/-xxx

Secretary,

Ministry of Home Affairs.

11. It would be evident from the above communication by the Secretary to the Inspector General that it is a warrant for confirming findings and sentences of the Court under the Act and this warrant has been issued in pursuance of the provisions of the Act. It would further appear that this warrant confers power of confirmation of the findings and sentences of the Court by the Central Government, that is, the Central Government has delegated the power of confirmation to the Inspector General under the provisions of the Act and such confirmation shall be considered a sufficient warrant. This has been issued by the Secretary, Ministry of Home Affairs by order of the Central Government, as would appear from the words "By order of the Central Government" appearing above the signatures of the Secretary.

12. Section 107 of the Act lays down that no finding or sentence of a General Security Force Court or a Petty Security Force Court shall be valid except so far as it may be confirmed as provided by the Act. Section 108 of the Act provides that findings and sentences of General Security Force Courts may be confirmed by the Central Government or by any official empowered in this behalf by warrant of the Central Government. If the aforesaid order is examined in the light of the provisions contained in Section 108 of the Act it is quite clear that it satisfies the requirements of Section 108 of the Act. It is the Central Government which has delegated the power of confirmation to the Inspector General and the order has been issued by the Secretary under order of the Central Government.

13. The question that arises is whether the aforesaid order satisfies the requirements of Article 77 or not, may be examined. For this purpose it will be useful to notice the cases cited at the Bar and the relevant provisions of Article 77. Article 77 may be reproduced, as under:

77. (1) All executive actions of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in Rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on ground that it is not an order or instrument made or executed by the President

14. The first case on the subject, which has been approved and subsequently followed in later decisions is *J.K. Gas Plant Manufacturing Co. (Rampur) Ltd. and others v. Emperor* AIR 1947 FC 38. In this case the question arose as to the validity of the Iron and Steel (Control of Distribution) Order 1941. The validity of the Distribution Order was challenged on the ground that it does not comply with the requirements of Section 40(1) of the old Government of India Act, as this provision was in force as one of the constitutional provisions of the Government of India Act, 1935. By virtue of Sections 312 313 and 317 of the Government of India Act, 1935, Section 40(1) of the Old Government of India Act, set out in Schedule 9 to the 1935 Act, was in force. The Distribution Order was purported to be under powers conferred by Sub-rule (2) of Rule 81, Defence of India Rules, which authorized "the Central Government" to provide by order for certain matters including, without doubt, control of the use and disposal of iron and steel. Rule 81 was itself made under the rule-making powers conferred by Section 2, of the Defence of India Act, 1939 upon "the Central Government". By virtue of Rule 3(1) of the Defence of India Rules, it was provided that the General Clauses Act, 1897, shall apply to the interpretation of the Defence of India Rules as it applies to the interpretation of a Central Act. The contention advanced was that u/s 40(1) it is imperative that all orders and proceedings made by the Governor-General in Council should fulfil three requirements : - (1) that they should be made by the Governor General in Council; (2) that they should be expressed to be so made, and (3) that they should be signed by the

proper person therein mentioned. The Distribution Order on the face of it purported to be made by "the Central Government" and it was signed by a Secretary to the Government of India. It was therefore, argued that while condition as to signature may have been fulfilled, the condition about the order being expressed to be made by the Governor-General in Council has not been complied with. The contentions were examined and it was held that the provision cannot be held to be mandatory and the construction and effect cannot be given as claimed by the appellants. It was further held as under:

In any event we are prepared to hold that Section 40(1) has in substance been complied with. It is the Distribution Order that has in this case to be construed, to determine whether it adequately complies with the provisions of Section 40(1). By virtue of the provisions of Section 2, Defence of India Act, 1939, & of Rule 81 & of the application thereof to the General Clauses Act (X) of 1897, the expression Central Government in the Distribution Order has to be construed as the equivalent of the Governor-General in Council. In the circumstances there is no substantial difference in such an order, which has to be construed in the Courts of British India, in accordance with the General Clauses Act (X (10) of 1897), whether the phrase Governor-General in Council is used or the phrase the General Government. The latter phrase has to be construed as meaning the former.

15. It would appear from the above observation that the expression "Central Government" was construed as equivalent to the Governor-General in Council by application of the provisions of the General Clauses Act and it was found that Section 40(1) has in substance been complied with.

16. In *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, the question arose in an application under Article 32 of the Constitution for the issue of a writ in the nature of "habeas corpus". The detenu's case was placed before the Advisory Board and in the opinion of the Advisory Board there was sufficient cause for the detention of the petitioner and this report of the Advisory Board was placed before the Government and the Government decided to confirm the order of detention. This decision was communicated to the District Magistrate, Surat, in a confidential letter signed by G.K. Kharkar for Secretary to the Government of Bombay, Home Department and it was stated that u/s 9 of the Preventive Detention Act, 1945, the case of detenu was placed before the Advisory Board which has reported that there is sufficient cause for his detention. The Government is accordingly pleased to confirm the detention order issued against the detenu. G.K. Kharkar was an Assistant Secretary at that time, who signed the letter. An affidavit of Venilal Tribhovandas Dehejia, Secretary to the Government of Bombay, Home Department, was filed stating that the report of the Advisory Board was placed before the Govt. & the Govt. decided to confirm the order of detention, & the signatory to the letter was an Assistant Secretary and under Rule 12 of the Rules of Business made by the Government of Bombay under Article 166 of the Constitution, was authorised to sign orders and

instruments of the Government of Bombay. The validity of this confidential letter came up for consideration before their Lordships of the Supreme Court and after consideration it was observed by his Lordship S.R. Das, J. as he then was, that strict compliance with the requirements of Article 166 give an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that Article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself. In this case on the basis of the affidavit it was held that the appropriate Government has in fact taken a decision and, therefore, in the circumstances of the case there was no breach of the procedure established by law and the petitioner's detention cannot be called in question. It may be stated that the letter did not speak as to who Shri G.K. Kharkar was. His designation as Assistant Secretary was not mentioned and he signed for Secretary to the Government of Bombay, Home Department, so an affidavit was filed stating the capacity in which Shri G.K. Kharkar, signed the letter and along with that it was also stated in the affidavit that the report of the Advisory Board was placed before the Government and the Government decided to confirm the order. His Lordship B.K. Mukherjea observed that Article 166(1) of the Constitution does not undoubtedly lay down how an executive action of the Government is to be performed. It only prescribes the mode in which such an act is to be expressed. The manner of expression is ordinarily a matter of form, but whether a rigid compliance with a form is essential to the validity of an act or not depends upon the intention of the legislature and after scrutiny of the provisions of Clauses (1) and (2) of Article 166, it was observed that Clauses (1) and (2) are directory and not of imperative character. It was also observed that noncompliance with the provisions of either of the Clauses would lead to this result that the order in question would lose the protection which it would otherwise enjoy, had the proper mode for expression and authentication been adopted. It could be challenged in any court of law even on the ground that it was not made by the Governor of the State and in case of such challenge the onus would be upon the State authorities to show affirmatively that the order was in fact made by the Governor in accordance with the rules framed under Article 166 of the Constitution. It was stated that this view receives support from the aforesaid Federal Court decision. In this case no such question arose that by application of the provisions of the General Clauses Act the expression "Central Government" can be construed to mean the President after coming into force of the Constitution.

17. In *The State of Bombay Vs. Purushottam Jog Naik*, the order of detention was expressed in the name of the Government of Bombay and it was signed by the Secretary to the Government of Bombay, Home Department by order of the Governor of Bombay. It was held that the order was "expressed" to be made in the name of the Governor as required by Article 166(1) because it said "by order of the Governor." The validity of the detention order was challenged first before the Bombay High Court and the Bombay High Court held that the order was not

expressed to be made in the name of the Governor and so was not protected by Clause (2) of Article 166. The judges of the Bombay High Court conceded that the State could prove by other means that a valid order had been passed by proper authority, but they held that the writing, which purports to embody the order, cannot be used to prove that a valid order was made because the formula set up in Article 166(1) was not employed. Their Lordships of the Supreme Court did not approve of this view. Bose, J., speaking for the Court expressed as under:

Now we do not wish to encourage laxity of expression, nor do we mean to suggest that ingenious experiments regarding the permissible limits departure from the language of a Statute or of the Constitution will be worth while, but when all is said and done we must look to the substance of Article 166 and of the Order.

The short answer in this case is that the order under consideration "is" "expressed" to be made in the name of the Governor because it says "By order of the Governor". One of meanings of "expressed" is to make known the opinion or the feelings of a particular person & when a Secretary to Government apprehends a man and tells him in the order that this is being done under the orders of the Governor, he is in substance saying that he is acting in the name of the Governor &, on his behalf, is making known to the detenu the opinion and feelings and orders of the Governor. In our opinion, the Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there.

It has to be remembered that this order was made under the Preventive Detention Act, 1950 and therefore had to conform to its terms Section 3 of the Act provides that the "State Government" may, if satisfied,

make an order directing that such person be detained.

It is true that u/s 3(43-a)(a) of the General Clauses Act the words "the State Government" mean the Governor, but if that be so, then the expression must be given the same meaning in the order which merely reproduces the language of Section 3, not indeed because the General Clauses Act applies to the order (it does not) but because the order is reproducing the language of the Act and must therefore be taken to have the same meaning as in the Act itself, particularly as the order concludes with the words:

By Order of the Governor of Bombay.

18 From the above observations of their Lordships it would be evident that requirements in substance, if, are satisfied, still the order would not be open to challenge and the General Clauses Act would apply to the order as the order employs the language of the Act, though there was an additional factor, in the case of *State of Bombay v. Purshottam* (supra) that the order concluded with the words. "By Order of the Governor of Bombay". That would not in any way effect

that validity of the order even when these concluding words would not have been there.

19. In *P. Joseph John Vs. The State of Travancore-Cochin*, the question was as to whether the show cause notice was in accordance with the provisions of Article 166 of the Constitution as it was not expressed to have been made in the name of the Raj Pramukh. The show cause notice under Article 311 of the Constitution was issued and was signed by the Chief Secretary of the United State of Travancor-Cochin, who had, under the Rules of Business framed by 1 he Raj Pramukh, the charge of the portfolio of "service and appointments" at the Secretarial level in this State. Their Lordships of the Supreme Court held that this was in their opinion substantial compliance with the directory Provisions of Article 166 of the Constitution. *Dattatreya Moreshwar v. State of Bombay* referred to supra was referred it & was observed that:

Clauses (1) and (2) of Article 166 are directory only and non-compliance with them does not result in the order being invalid, and that in order to determine whether there is compliance with these provisions all that is necessary to be seen is whether there has been substantial compliance with those requirements. In the present case there can be no manner of doubt that the notice signed by the Chief Secretary of the State and expressed to be on behalf of the Government and giving opportunity to the petitioner to show cause against the action proposed to be taken against him was in substantial compliance with the provisions of the article.

20. In *Major E.G. Barsay Vs. The State of Bombay*, sanction for prosecution was accorded by the Central Government u/s 197 of the Code of Criminal Procedure and Section 6(1)(a) of the Prevention of Corruption Act and this sanction was conveyed in the name of the Central Government by the Deputy Secretary to the Government of India, The validity of this sanction was challenged with the touch stone of Article 77 At the trial there was a statement of Dharmbir (PW 36), an Assistant in the Ministry of Home Affairs, who stated that the papers relating to the present case, were submitted to the Home Ministry by the Inspector General of Police for obtaining the necessary sanction and the papers were put up before the Deputy Secretary, who was competent to accord sanction on behalf of the President and that he gave the said sanction under his signature. He also stated in the cross examination that he cannot say whether the Deputy Secretary's signature was in his own right or by way of authentication of the President's order. O a the basis of his uncontradicted evidence it was found that the Deputy Secretary was competent to accord sanction of behalf of the President and he gave the sanction in exercise of the power conferred on him, presumably, under the rules framed by the President in this behalf Reference was made to the observation of Bose, J., quoted above in *State of Bombay v. Purshottam Jog Naik*'s case (supra) and it was observed that the judgment of *Jog Naik*'s case (supra) lays down that we must look at the substance of the order.

21. In *State of Rajasthan and Another Vs. Sripal Jain*, Sripal was compulsorily

retired. Rule 244(2) of the Service Rules contemplated an order of compulsory retirement by the Government, but in this case the order was not used by the Government but by the Inspector General of Police and a contention was advanced that if it is an order of the Government, it should be in the form required by Article 166 of the Constitution and as it is not in that form there is, in law, no order of the Government ordering compulsory retirement. It was observed that there is no doubt that the order is not in the form required under Article 166 of the Constitution, but it is well settled that any defect of form in the order would not necessarily make it illegal and the only consequence of the order not being in proper form as required by Act 1966 is that the burden is thrown on the Government to show that the order was in fact passed by it. In this case the burden was discharged by the production of papers from the relevant file by the appellant and it was held that the order was of the Government though it was communicated by the Inspector General of Police and its form was defective.

22. Reference may also be made to the case *Rahmat Ullah Vs. State*, . The citizenship of the applicant was determined by the Central Government under Rule 30 of the Citizenship Rules 1956 and the validity of the Government order was challenged on the ground of non-compliance of Article 77. In this connection it was observed that in view of what "Central Government" is defined to mean u/s 5(8) of the General Clauses Act, viz., "the President," the order in question will be deemed to have been made in the name of the President.

23. In the Full Bench decision of *Delhi High Court Zalam Singh and Others Vs. Union of India and Others*, the validity of the notification regarding appointment of Controllers under Delhi Rent Control Act, 1958, signed by the Under Secretary was under challenge, as it was not expressed to be made in the name of the President. The notification was in the name of the Central Government. It was observed that what has to be seen is the substance of the order or the instrument with all its attending circumstances and not merely its form. Provisions of Article 77 are not mandatory. They are directory and keeping this in view any hair splitting in construing these provisions would not be justified. The appointment of Controller and Additional Controllers by the Central Government u/s 35 of the Delhi Rent Control Act is an administrative function and what has to be seen is whether in effect there has been a substantial compliance with Article 77 or not. It was held as under:

The notification having been made u/s 35 of the Act had to conform to its forms & the order in the present case expressly did so in so far as it mentioned that the appointments had been made by the Central Government. According to Sub-clause (b) of Clause (8) of Section 3 of the General Clauses Act, the Central Government in relation to anything done after the commencement of the Constitution means the President. If the word "President" was read in place of "Central Government" in this notification, it was difficult to see how the order could be said not to have been expressed to be made in the name of the President. As Section 35 of the Act in terms conferred the power to appoint on the

Central Government, as the authority competent to make this appointment, it was necessary and proper that the appointments in the notification should have been described to have been made not by the President, but by the Central Government.

Further no precise word or manner except the signatures of the officials named in Clause (a) of Rule 2 of "the Authentication (Orders and other Instruments) Rules, 1958 had been prescribed for purposes of authentication. That being so there was no reason why the signature with the designation "Under Secretary" added to it should not be taken in this Gazette notification to be a sufficient authentication within the meaning of Sub-clause (2) of Article 77 of the Constitution. The impugned notification fell within the ambit of Article 77 of the Constitution and could not be called in question on the ground that the appointment made thereby was not made by the Central Government.

24. From the consideration of the various decisions, the position of law appears to be well settled that the provisions of Article 77 of the Constitution are only directory and not mandatory and if sufficient or substantial compliance of this provision has been made, the order or instrument is not open to challenge and it will enjoy immunity from being called in question. In the above well settled position of law, if we look to the warrant in question in the present case, it is quite obvious that this warrant is in conformity with the provisions of Section 108 of the Act and further by adapting the interpretative methodology as provided in Article 367 of the Constitution and Section 3(8) of the General Clauses Act, under this provision of the General Clauses Act, it will be taken that the expression "Central Government"s in the impugned order would mean the President. Thus, the impugned order can be said to be expressed in the name of the President and further so far as Article (2) is concerned, there is full compliance as the order has been authenticated by the Secretary as he was competent to so authenticate under Rule 2 of the Authentication (Orders and other Instruments) Rules, 1958, which clearly lays down that the orders and other Instruments made and executed in the name of the President would be authenticated by the Secretary, Additional Secretary, Joint Secretary Deputy secretary, Under Secretary or Assistant Secretary to the Government of India, and was, therefore, immune from being challenged. It may be stated that in the nature of the order, it is obvious that it does not require any sort of proof and no evidence is needed to sustain its validity. On behalf of the petitioner no such objection has been raised that the order is not signed by the Secretary or that the order did not exist at the time when the Inspector General, Border Security Force (R & G), Jodhpur, confirmed the findings and sentence of the petitioner. Had any such objection been taken the question of proof would have arisen. The validity of the order has only been challenged simply on the ground that it does not satisfy the requirements of Article 77 of the Constitution. In our opinion, this ground has no substance, as considered above.

25. We now proceed to take up the second contention of the learned Counsel for

the petitioner. In order to correctly comprehending and dealing with the second contention, it is necessary to examine the scheme of the Act and the Rules framed there under, as it will assist in examining the validity of the contentions of the learned Counsel as to whether holding of the court of inquiry was a condition precedent for the trial of the petitioner. The Act is a self contained Code Chapter III deals with the offences and Chapter IV deals with the punishments. Chapter V deals with the provisions of arrest and proceedings before trial. Chapter VI deals with the Security Force Courts & Chapter VII deals with the provisions relating to the procedure of the Security Force Courts. Under Chapter VI three kinds of the Security Force Courts are provided, - (1) General Security Force Courts, (2) Petty Security Force Courts, and (3) Summary Security Force Courts. Section 65 lays down that a General Security Force Court may be convened by the Central Government or the Director General or by any officer empowered in this behalf by warrant of the Director General. Section 141 of the Act embodies rule making power vested in the Central Government. In Sub-section (2) thereof it is provided that the rules made by the Central Government may provide for the convening, constitution, adjournment, dissolution and sittings of the Security Force Courts, the procedure to be observed in trials by such Courts, the persons by whom an accused may be defended in such trials and the appearance of such persons thereat. The forms or orders to be made under the provisions of this Act relating to the Security Force Courts & the awards and infliction of death, imprisonment and detention; the convening of, the constitution, procedure and practice of, Courts of Inquiry, the summoning of witnesses before them and the administration of oaths by such courts; and any other matter which is to be, or may be prescribed of in respect of which this Act makes no provision or makes insufficient provision and; provision is, in the opinion of the Central Government, necessary for the proper implementation of this Act.

26. The Central Government in exercise of the powers conferred by Sub-sections (1) and (2) of Section 141 of the Act framed the Border Security Force Rules, 1969. Chapter V of the Rules makes provisions for arrest & investigation and Chapter VII makes provisions relating to procedure for investigation and summary disposal and Chapter VIII relates to charge and matters antecedent to trial and Chapters IX and X lay down the procedure for the Security Force Courts and incidental matters. The Chapter on Courts of Inquiry is Chapter XIV. Rule 43 in Chapter VII provides that where it is alleged that a person subject to the Act, has committed an offence shall be reduced to writing in the form set at in Appendix IV, and Rule 44 provides that in the first instance the case shall be heard by his Company Commander. The witnesses shall give evidence in presence of the accused who shall have the right to cross-examine them and the accused shall have the right to call witnesses in defence and to make a statement. After hearing the charge under Sub-rule (1), the Company Commander may either award any punishment if he is empowered to award, or dismiss the charge if not proved, or refer the case to the Commandant. Rule 45 makes a provision for hearing by the Commandant. The record of evidence may be prepared by the

Commandant under Rule 48 or abstract of evidence under Rule 49 and Rule 51 further provides for disposal of case by the Commandant after record of evidence or abstract of evidence as received by the Commandant. Rule 51(2)(iv) provides that the Commandant may apply to a competent officer or authority to convene a Court for the trial of the accused and under Rule 52 an application is required to be made by the Commandant in the form set out in Appendix V. It would appear from the provisions of Chapter VII that before convening of the Court in case the Company Commander refers the case to the Commandant, the Commandant is required to investigate into the matter and there are detailed provisions for investigation almost akin to trial and the Commandant is competent to dismiss the charge or try an accused by a Summary Security Force Court or apply for convening the Court to a competent officer. Rules 53 to 58 deal with charge-sheet, Charges, joint Charges, validity of charge-sheet, amendment of the charge by the Security Force Court and amendment of charges by the convening officer Rule 59 further provides for action by a superior authority on receiving an application for convening a court and Sub-rule (2)(a) thereof makes a provision that the superior authority may either himself convene a court or if he considers that a higher type of Court should be convened and he is not empowered to convene such a Court, forward the case to a higher authority with a recommendation that such Court may be convened. The higher authority on receiving the case may exercise any of the powers given in Sub-rule (1) of Rule 59 As already mentioned above that u/s 65 of the Act, the power to convene the General Security Force Court is vested in the Central Government or the Director General or any officer empowered by warrant of the Director-General.

27. The provisions relating to courts of Inquiry contained in Chapter XIV begin from Rule 170 and prior to Chapter XIV, the proceedings for investigation, trial, confirmation of sentence and execution of sentence and petitions after confirmation of sentence have been provided in previous chapter. Rule 173 deals with the procedure of courts of Inquiry It lays down how the inquiry will be conducted, how the evidence will be recorded and Sub-rule (8) of this rule further provides that before giving an opinion against any person subject to the Act, the court will afford that person the opportunity to know all that has been stated against him, cross-examine any witnesses who have given evidence against him and make statement and call witnesses in his defence. Then Rule 174 provides for courts of inquiry when to be held. It would be proper that this rule may be reproduced, as the arguments are based on this rule, which is as under:

174. Courts of Inquiry when to be held:

(1) A Court of inquiry may be held to investigate into any disciplinary matter or any other matter of importance.

(2) In addition to a court of inquiry required to be held u/s 62, a court of inquiry shall be held in the following cases:

(a)(i) All unnatural deaths of persons subject to the Act or of other persons within the Force lines, an immediate report shall be sent through the messenger to the officer in-charge of the Police Station within whose jurisdiction the place of such unnatural death is.

(ii) In case when such report cannot, for any reason be delivered within a reasonable time, a court of inquiry shall be held into such unnatural death.

(iii) Immediately on receipt of information of an unnatural death the Commandant or the senior most officer of the Battalion present shall prepare a report in the proforma set out in Appendix XIII.

(b) All injuries sustained by persons subject to the Act which are likely to cause full or partial disability. The court shall in such case determine whether such injuries were attributable to service or not.

(c) All financial irregularities, losses, theft and misappropriation of public or Force property, where it is necessary to obtain the order of a superior officer on such irregularities, loss, theft or misappropriation.

(d) All losses of secret document and any other material of secret or above security classification Such a court of inquiry shall be ordered by an officer or authority superior to the unit Commandant having the lost document or material on its charge.

(e) All damage to private persons or property in respect of which there is likely to be a claim against the Government or the Force.

28. The cc mentions of the learned Counsel is that holding of a court of inquiry into any disciplinary matter or any other matter of importance under Sub-rule (1) of Rule 174 is only directory, where as under Sub-rule (2) holding of the court of inquiry is mandatory for those matters enumerated in Clauses (a) to (e) thereof. Under Sub-rule (2) Clause (c) holding of a court of inquiry is a must in all financial irregularities, losses, theft & misappropriation of public or Force property, where it is necessary to obtain the order of a superior officer on such irregularities, loss, theft or misappropriation. It was urged that in view of this mandatory provision without holding of court of Inquiry trial could not be initiated and if any trial is conducted it will stand vitiated. This inquiry is akin to committal inquiry in criminal proceedings. He emphasised that only after the conduct of court of inquiry the Commandant has to apply to the competent officer or authority to convene a court for the trial of the accused under Rule 51. Without holding of court of inquiry the trial was bad in the eye of law.

29. We have given our thoughtful consideration to the contention of the learned counsel. However we are unable to agree with this contention of the learned Counsel and the reasons are not far to seek The examination of the scheme of the Act and the Rules reveals that there is no provision which makes it obligatory for holding of the court of inquiry prior to the commencement of the trial of the person subject to the Act. Had this been the intention of the legislature or of the

rule making authority, such a provision would have found mention in the Act or in the Rules made there under, but there is no such provision. On the contrary in the scheme of the Rules, we find that the Chapter of courts of inquiry finds in place when all matters connected with arrest, investigation, summary disposal, charges, procedure for Security Courts and incidental matters thereto, execution of sentence and petitions have been provided from Chapters V to XIII. It may also be stated that for the purpose of trial as well, provisions relating to a kind of preliminary inquiry are already provided in Rules, 44, 45, 48 and 49 as is the case of the non-petitioners that a preliminary inquiry as envisaged in Chapter VII was conducted and thereafter on an application by the Commandant, the court was convened. It appears that preliminary inquiry prior to trial by the Court is different from the court of inquiry contemplated in Chapter XIV. It is also noteworthy that in Appendix V relating to the application for convening of the Court under Rule 52 in Clause (b) of the proforma under-death the application form it is mentioned that in column (b) it is to be inserted whether any court of inquiry respecting any matters connected with the charges has been held. If not, this column has to be struck out. Thus, this column with its note indicates that for convening of a General Security Force Court, Court of inquiry is not a must. It is true that detailed procedure is provided under Rule 173 for the conduct of the court of inquiry giving full opportunity to the person subject to the Act against whom any opinion is being expressed, but the contents of Rule 174 give a clear intent and purpose of it. From it, it can be deduced that this provision does not make it obligatory to hold a court of inquiry prior to the trial of any person subject to the Act, who has committed any offence provided in the Act. If we read Clause (a)(b)(d) and (e) of Sub-rule (2) of Rule 174, it would be manifest that the object of holding of court of inquiry is to ascertain the truth about the matters mentioned in these clauses. Clause (a) deals with the matters relating to unnatural deaths of persons. Clause (b) deals with injuries sustained by persons which are likely to cause full or partial disability and whether such injuries were attributable to service or not, Clause (d) deals with losses of secret documents and any other material of secret or above security classification; and Clause (e) deals with all damage to private persons or property in respect of which there is likely to be a claim against the Government or the Force. Thus the perusal of Sub-rule (2) of Rule 174 makes it abundantly clear that the object of Sub-rule (2) is to ascertain the facts and determine the liability in the matters which are of importance and so it has been provided that court of inquiry must be held in these cases. Such is the position in matters relating to all financial irregularities, losses, theft and mis-appropriation of public or Force property. It cannot be taken to mean that holding of a court of inquiry is a condition precedent to trial. The court of inquiry envisaged in such matters appears to be of administrative nature and not akin to committal inquiry in criminal proceedings in the ordinary criminal courts. Thus, in the light of the examination of the scheme and the foregoing discussion we do not find any force in the second contention of the learned Counsel for the petitioner.

30. In view of our discussion on both the contentions this petition is liable to be dismissed, but we would also like to advert to the objection raised on behalf of the non-petitioners regarding the maintainability of the writ petition. It was urged by Shri Mathur, appearing on behalf of the Union of India that the writ petition against the finding and sentence of the General Security Force Court confirmed by the competent authority is not open to challenge in the petition for habeas corpus or in the writ in the nature of certiorari. The jurisdiction of this Court is only limited in the sense that this Court can only see as to whether there was want of jurisdiction in the Court-Martial or the confirming authority in respect to the person against whom action has been taken. Even when there is any irregularity or illegality not affecting the jurisdiction of the Court Martial or the confirming authority, the finding and sentence passed by the Court Martial or the confirming authority are not open to challenge. Reliance was placed by the learned Counsel on *Janardhan Reddy and Ors. v. The State of Hyderabad and Ors.* AIR 1951 S.C. 317, *S.P.N. Sharma v. Union of India and Anr.* AIR 1968 Delhi 156 and *S. Sundarajan Vs. Union of India and Others*,

31. In *Janardhan Reddy's* case (*supra*) their lordships of the Supreme Court were examining a case of detention in execution of a sentence of indictment on a criminal charge by a Special Tribunal. Several objections challenging the validity of the conviction and sentence were taken. One of the objection was regarding misjoinder of charges. Their Lordships observed that misjoinder of charges is a defect in the procedure followed at the trial & it does not mean that the trial court acted without jurisdiction. There is a basic difference between want of jurisdiction & an illegal or irregular exercise of jurisdiction. The defect, if any, can according to the procedure established by law be corrected only by court of appeal or revision. When the appellate court, which was competent to deal with the matter pronounced its judgment against the petitioners, the matter having been finally decided is not one to be reopened in a proceeding under Article 32 of the Constitution. It was further observed that:

If it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an applicant for a writ of habeas corpus. Assuming, however, that it is open even in such cases to investigate the question of jurisdiction, where the conviction and sentence had been upheld on appeal by a Court of competent jurisdiction, the mere fact that the trial Court had acted without jurisdiction would not justify interference, treating the appellate order also as a nullity. Evidently, the appellate Court in a case which properly comes before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction, & it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the conviction & thereby decides wrongly that the trial Court had the jurisdiction to try & convict it cannot be said to have acted without jurisdiction, & its order cannot be treated as nullity.

It is well settled that if a Court acts without jurisdiction, its decision can be

challenged in the same was as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the Court to which it would lie if its order was with jurisdiction.

32. It may be stated that this is a case which is directed against the proceedings before the regular court and the present case is not a case conducted by a regular court, but it is a case arising from the decision by a Tribunal. Court-Martial is undoubtedly a Tribunal. However the two other cases cited by the learned Counsel for the Union of India relate to the proceedings before the Court Martial.

33. In S.P.N. Sharma's case (supra) it was observed that unless the order detention could be shown nonest, the High Court cannot interfere with the detention. The High Court in habeas corpus proceedings, is not entitled to go into the alleged irregularities in procedure adopted by a Court Martial when trying a person brought before it in accordance with law to stand trial on charges within its competence and jurisdiction. Broadly speaking, the remedy of habeas corpus is not available to one who is properly detained under military arrest or is serving out a legal sentence of a Court-Martial except that the jurisdiction of the Court-Martial concerned may be enquired into and the prisoner set at liberty if he was not amenable to such jurisdiction. If the person concerned is a prisoner in detention in execution of a sentence implied by a properly constituted Court-Martial, which sentence is prima facie legal, he will not be entitled to a writ of habeas corpus. The principle that a writ of habeas corpus is not grantable in general when the party, is convicted in due course of law is attracted with greater strictness to a person convicted by a duly constituted Court-Martial, the finding and the sentence of which have, in the course, been confirmed by a competent authority. A habeas corpus proceeding is not admissible so as to enable a Civil Court to exercise a supervisory control over or review procedural errors generally in the proceedings of the Court-Martial. The single enquiry open in habeas corpus proceedings to secure release from imprisonment ordered by a Court-Martial is as to its jurisdiction in regard to the person, the offence and sentence.

34. Nothing has been shown which would induce us to hold that the finding & the sentence as confirmed are tainted with such a serious jurisdictional infirmity that they should be described as nonest and ignored. We are afraid we are not entitled to go into the regularity of steps taken by the Court-Martial in the course of trial or by the Confirming Authority in confirming the finding and the sentence which do not go to their jurisdiction.

35. We may in this connection refer to the case of Flying Officer Section Sundarajan (supra). In that case, the petitioner was convicted by a General Court Martial & a writ of habeas corpus was moved by him through his wife under Article 226 and Section 491, Criminal Procedure Code, 1898. On behalf of the petitioner it was contended that there was a violation of Rule 15 of the Air Force Rules, 1950, which provided for a sort of preliminary investigation by the

Commanding Officer with a view to ascertain whether prima facie case exist to justify detention of the accused in custody. It was contended that the denial of opportunity to the delinquent under Rule 15 vitiated the proceedings before the Court-Martial. Hence writ of habeas corpus be issued to set him at liberty. In this connection their Lordships observed that the enquiry was however, directed to ascertain whether the person held in custody was subject to military law or the court itself was properly convened and constituted. That jurisdiction continues to exist in the High Court even today. Article 226 of the Constitution cannot be said to have enlarged the ambit of that jurisdiction in any way. The remedy of a writ of habeas corpus is not available to test the propriety or legality of the verdict of a competent court. The court is not entitled to go into the regularity of steps taken by the court-martial in the course of trial or by the confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming authority. Interference is possible only where the irregularity or illegality affects the jurisdiction of the court-martial or the confirming authority. As regards the alleged irregularity it was observed that any irregularity at that initial stage might have a bearing on the veracity of witnesses examined at the trial or on the bonafides of of the Commanding Officer or on the defence that might be set up by the accused at the trial; but the irregularity could by no means be regarded as affecting the jurisdiction of the court to proceed with the trial. Hence even if violation of Rule 15 were to be assumed, the non-observance of the Rule was not such as to vitiate the trial and ultimate conviction of the petitioner.

36. In the result, on the basis of the principles which emerge from the cases cited by the learned Counsel for the Union of India, it can be said that the writ of habeas corpus can be said to be maintainable on the first ground, as the objection related to the jurisdiction of the confirming authority, whether authority was properly delegated to the Inspector General, Border Security Force, in accordance with the provisions of the Constitution and the provisions of the Act. But so far as the second contention is concerned, it may be stated that even assuming that a court of inquiry was essential as a preliminary to the holding of the trial, in our opinion, the proceedings before the General Security Force Court and of the confirming authority are not in any way affected and the order of confirming the findings and sentence is final and is not open to challenge in these proceedings.

37. No other point has been pressed before us.

38. In the result, we do not find any substance in this writ petition so it is hereby dismissed.