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**(1994) 01 J&K CK 0003**  
**In the Jammu And Kashmir High Court**  
**Case No : L.P. Appeal (5WP) No. 91 of 92**

Union of India & Ors.

APPELLANT

Vs

K.S.Bhayee

RESPONDENT

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**Date of Decision :** 27-01-1994

**Acts Referred:**

Constitution of India, 1950 — Article 33

**Citation :** (1994) JKLR 95 : (1994) KashLJ 67

**Hon'ble Judges :** S.C.Mathur, J and S.M.Rizvi, J

**Bench :** Division Bench

**Advocate :** D.P.Gupta, C.M.Gupta, Advocates appearing for the Parties

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## Judgement

S C. Mathur, Chief Justice

This case was listed before us on January, 24.1994 for disposal of Civil Miscellaneous application moved on behalf of the appellants for

reimposition of the interim order which had been passed earlier and which had been vacated subsequently. The case was directed to be put up on

January 25,1994. The arguments which were to be advanced on behalf of the learned counsel for the parties indicated that the same arguments will

have to be repeated if the L.P.A. itself was taken up for hearing. The learned counsel for the parties were, therefore, asked whether they were

prepared to argue the whole appeal and they replied in the positive. Accordingly, we have heard Shri D. P. Gupta, learned counsel for the

appellants and Shri C.M. Gupta, learned counsel for the respondent, in the appeal itself.

The appeal is directed against the judgment of learned Single Judge who has quashed the verdict of 'guilty'" recorded by the General Security Force

Court, for short of the Court, in proceedings under the Border Security Force Act, 1968 (47 of 1968), for short the Act and the Border Security

Force Rules, 1969 framed under the Act, for short the Rules. The only ground on which the learned Single Judge has quashed the verdict is that it

does not contain reasons in support thereof.

The learned counsel for the appellants has submitted that in view of the statutory provisions contained in the Act and the Rules, there was no

obligation on the court to give reasons in support of the verdict.

The learned counsel for the respondent has countered the submissions of the learned counsel for the appellant and has submitted that in the facts

and circumstances of the present case, reasons were necessary to be recorded. He has further submitted that the order impugned in the writ

petition was the result of malafides and had been passed on the dictates of the confirming authority and was, therefore, illegal

Before dealing with the submissions of the learned counsel for the parties, a few facts necessary for the disposal of the appeal may be stated.

At the relevant time, the petitioner was holding the post of Commandant in the Border Security Force. A complaint of graft was made against him.

Pretrial inquiry was sought to be held and he was suspended from service. At this stage, the respondent approached this court seeking quashing of

the pretrial inquiry and the suspension order. He succeeded in obtaining an interim order. Subsequently, the order was modified and the inquiry

was allowed to be proceeded with. Not only the pretrial inquiry but the trial was also permitted to be held and only the confirmation proceedings

were stayed. Later, the embargo placed on the confirmation proceedings was also lifted. Thus decks were cleared for the finalisation of the

disciplinary proceedings

The trial of the respondent in respect of the aforesaid allegation of graft was held by the Court, mentioned hereinabove. The court examined

witnesses and gave opportunity of cross-examination to the respondent. After conclusion of the trial, the court recorded the finding of "act guilty

against the respondent. This finding did not contain reasons for the conclusion. In view of the provision contained in Sections 107 and 108 of the

Act, the finding recorded by the court did not acquire validity until it was confirmed by the confirming authority. Accordingly the papers appear to

have been forwarded to the confirming authority which by its order dated Sept. 2,1989 declined to confirm the verdict returned by the court and

directed reconsideration of the matter. This is a detailed order in which the confirming authority has given reasons for not confirming the verdict of

not guilty"" recorded by the court. While requiring the court to revise its verdict, the confirming authority specifically mentioned that the

reappraisal of the evidence by the court shall be uninfluenced by the observations contained in its order. Thereafter, without recording fresh

evidence, the same court recorded the finding of ""guilty"" against the respondent by order dated Sept. 25,1989 This order again did not contain

reason in support thereof. In view of the fact that the verdict required confirmation of the confirming authority, the papers were forwarded to the

Inspector General, Border Security Force, Kashmir, Srinagar. On July 15,1990, the said officer passed an order which reads:

I withhold the confirmation and transmit the confirmation to the superior authority

The papers were thereafter forwarded to the Director General, Border Security Force, who on July 18,1990 passed the order which reads:

I confirm the finding and sentence of the court"".

The respondent applied for amendment of the writ petition so as to challenge the orders dated Sept. 2,1989, July 15,1990 and July 18,1990 The

main ground of challenge was that the orders were nonspeaking.

The learned Single Judge was of the opinion that since on earlier occasion the court had recorded finding of ""not guilty"", it was obligatory on the

part of the court to give reasons in support of the contrary finding recorded subsequently. The learned Single Judge has not referred to any

statutory provision requiring recording of reasons in support of the orders. Obviously, the learned Single Judge has relied upon principles of natural

justice. The question for consideration is whether in the case of present nature. Rule of natural justice requiring recording of reasons was attracted.

Section 4 of the Act deals with the Constitution of Border Security Force. It states that the said Force shall be ""an Armed Force"". In respect of

Armed Forces, special provisions are contained in the Indian Constitution, Part III of the Indian Constitution contains fundamental rights. Article 33

falling within the same part provides that the parliament may, by law, determine

the extent to which rights conferred by Part III may be abrogated or respected in their application to members of Armed Forces. Article 136(1) deals with appeals to the Supreme Court. Clause (2) of this Article says :

Nothing in cl. (1) shall apply to any judgment determination, sentence or order passed on made by any court or Tribunal constituted by or under any law relating to the Armed Forces.

In view of this provision, the sentence recorded or order passed by the court constituted under the Border Security Force cannot be challenged before their Lordships of the Supreme Court under Article 136(1) of the Constitution. Regarding the supervisory powers of the High court, it is provided in Article 227 (4) as follows :

Nothing in this Article shall be deemed to confer on a High Court powers of superintendence over any court or Tribunal constituted by or under any law relating to the Armed Forces

In view of this provision, the order or sentence passed by the court constituted under the Act is not challengeable before the High court under Article 227 of the Constitution.

Obviously, in exercise of the power conferred under Article 33 of the Indian Constitution, special provisions have been made in the Act and the Rules in respect of the disciplinary proceeding taken under the Act and the Rules. For our purposes, Rule 99 is material. Sub Rule (1) of this Rule reads :

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"".

In view of this provision, there is no obligation on the part of the court to give reasons in support of its verdict.

We may now pass on to consider the obligation if any of the confirming authority to give reasons. The procedure for confirmation is provided for in

Rule 106. SubRule (1) provides that the order of confirmation may be passed in the form set out in Appendix8. Appendix8 does not require

recording of reasons in support of the order. Accordingly, in our opinion, the confirming authority is also not required to record reasons for its

order of confirmation.

The question raised in the writ petition and which has been reiterated before us in appeal is no longer resintegra as their Lordships of the Supreme

Court have already recorded verdict on parallel provisions contained in the Army Act and the Rules framed there under.

Som Dutt vs Union of India and another, AIR 1969 SC. 414, was a case where disciplinary proceedings were taken against an Army Officer in

respect of allegations of misconduct levelled against him. The trial was conducted by the courtmartial. The courtmartial recorded the finding of

guilty"" without recording reasons and the finding was confirmed by the confirming authority. The appellant before the Supreme court challenged

the punishment through writ petition filed before their Lordships. The relevant provisions of the Army Act and the Rules framed the under have

been referred to in the judgment of their Lordships. Rule 63 of the Army Rules which has been reproduced at page 421 of the report reads :

"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".

This rule is identical to Rule 99(1) of the Border Security Force Rules. Interpreting this Rule and the connected provisions of the Army Act and the

Rules, their Lordships of the Supreme Court rejected the contention of the appellant that the conviction recorded against him and the sentence

passed against him was invalid as it did not contain reasons in support thereof.

The aforesaid judgment was rendered by a Constitution Bench. The said judgment has been considered in detail by another constitution Bench in

S.N. Mukherji vs Union of India, AIR 1990 SC : 1984, This was also a case under the Army Act and the Rules framed there under. The

questions which arose for determination before the Bench have been formulated in paragraph 9 at page 1988 and they are as follows :

'(i) Is there any general principle or 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 courtmartial and postconfirmation proceedings under

the Act ?

Although question (ii) appears to be relevant in respect of the continuation

proceedings, but their Lordships proceeded to consider its applicability to the order passed by the trial authority also, as is apparent from the observation contained in paragraph 40. A perusal of this authority shows that their Lordships were of the opinion that recording of reasons is a rule of natural justice and rules of natural justice apply only in the absence of statutory provision to the contrary and since the Army Act and the Rules framed there under contained a specific provision dispensing with the requirement of giving reasons recording of reasons by the courtmartial and the confirming authority could not be insisted upon. In paragraph 39 of the report, dictum has been laid down thus :

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

The view expressed in the aforesaid two cases has been reiterated in Union of India and others vs J.S.Brar, 1993 SC : 773. This judgment was rendered by a Bench of three Hon'ble judges.

The judgment of their Lordships of the Supreme Court in S.N Mukherji's case has been referred to in the judgment under appeal the learned

Single Judge has distinguished this judgment on the basis that in Mukherji's case there were no contradictory findings by the trial authority at two

stages. The distinction drawn by the learned Single Judge, in our opinion, is without difference. The respondent has not Claimed recording of

reasons on any basis except the principle of natural justice. The Supreme court having held that principle of natural justice are not applicable in

view of the scheme of the constitution and the Act and the Rules, they cannot be invoked or applied by this court on the ground of the distinction

sought to be drawn by the learned Single Judge.

The learned counsel for the respondent in support of the submission that reasons are required to be stated has cited AIR 1966 SC 1827 State of

Madras vs Srinivason. This is not a case where the requirement of stating reasons had been dispensed with under a statutory provision.

Accordingly, this authority has no application to the facts of the present case.

The learned counsel for respondent further submitted that the sentence and punishment awarded to the respondent is the result of malafides. The

learned counsel did not invite our attention to any paragraph of the writ petition or the affidavits filed on behalf of the respondent in which the

allegations of malafides may have been made against any member of the Court or against the confirming authorities.

The plea of malafides was sought to be substantiated on the basis of general communication dated August 23, 1989 circulated to all Inspectors

General, Deputy Inspectors General and Commandants. A copy of this order was placed before us by the learned counsel for the appellants. A

perusal of this order shows that some study was made regarding the functioning of the court and the procedure of disciplinary proceedings

prescribed for members of the Border Security Force. The higher authorities noticed that the system was not working efficiently. It is in this context

that opinion was sought from those to whom the letter was addressed regarding continuance of the existing system or to incorporate changes

therein. This is apparent from the following paragraphs of the said letter :

4. The GSFC system of trials is based on a system where officers accused of wrong doing would be judged by their peers. It is the officers of the

Force who themselves sit on judgment on their colleagues. This implies that a high degree of trust has been given to officers and it is expected that

they would discharge this responsibility fairly that while justice is done to the accused colleagues yet at the same time, the interests of the

Organization are kept in view by ensuring that no one who is guilty, escapes punishment.

5. From a perusal of records and the study carried out, it appears that this ' trust and responsibility is not being exercised judiciously, fairly and

with restraint by officers so entrusted with this task.

6. I have, therefore, been desired to ask your opinion whether we should continue with the GSFC system by making suitable amendments to the

BSF Act or switch over to the civil system of departmental enquiries. Preliminary enquiries wherever necessary, would be entrusted to the CBI

and other central agencies instead of being carried out by the department itself as is the practice now prevalent. I am, therefore, desired to request

you to kindly send your considered opinion to this proposed change after due consultation with such of your officers you may think fit. A copy of

this letter is being sent to Sector DIsG also who should route their replies

through Frontiers Is G"".

The aforesaid letter does not contain any reference to the trial relating to the respondent. An administrative authority is always entitled to review the

working of institutions in the Organisation and to take note of the defects and amended the procedure. From the letter in question it appears that

such a review was made at the level of the Headquarters and it was found that some improvement was required. It is in this context that opinion

was sought. In para No. 5, it has been specifically stated that the exercise of power under the Act and the Rules should be judicious and fair.

There is no direction necessarily to convict a person even though he is innocent.

In paragraph 7 of the aforesaid letter, discipline required to be maintained in the force has been referred to. Border Security Force already

indicated; is an Armed Force of the Union of India. It 'has been constituted to guard the borders of the country. Discipline in Such a force is

intimately linked with the security of the country. It is on these considerations that a special procedure of trial has been prescribed in the Act and

the Rules with does not require even recording of reasons in support of the order passed by the trial authority or the confirming authority. No

exception can be taken to this letter.

The next submission of the learned counsel for respondent was that the verdict of ""quilty"" had been recorded on the dictates of the confirming

authority. We are unable to accept this submission of the learned counsel. The confirming authority is entitled to point out the flaws in the order or

proceedings of the trial authority. This is all that has been done by the confirming authority in its order dated Sept. 2, 1989 In paragraph 3 of its

order, the confirming authority has specifically stated that it did not in any way intend to interfere with the discretion of the court in arriving at a

decision. To make the position explicit, it is mentioned in the said paragraph :

3 While in no way intending to interfere with the discretion of the court in arriving at a decision, I as confirming authority direct the court to keep in

mind the following observations while reconsidering their findings

This cannot be treated as dictation by the confirming authority to the trial authority.

The learned counsel for the respondent has cited before us 1975 Criminal Law Journal: 577. This authority deals with the revisional powers of the

High Court under the Code of Criminal Procedure. It has no application to the facts of the present case.

In view of the above, the appeal deserves to be allowed and is hereby allowed and the judgment of the learned Single Judge dated July 10, 1992 is

hereby set aside. The writ petition of respondent shall stand dismissed but without any order as to costs. All C.M.Ps moved on behalf of the respondent shall stand rejected.