SUPREME COURT OF INDIA

Union of India

Vs.

Dinesh Kumar

C.A.No.1208 of 2010

(V.S.Sirpurkar and Surinder Singh Nijjar JJ.)

16.02.2010

JUDGEMENT

V.S.Sirpurkar, J.

1. This judgment will dispose of 62 Civil Appeals mentioned above.

2. We had, by earlier orders, directed the remand of all these matters to the High Court and now we proceed to give reasons in support of our orders.

3. All these appeals have been filed by the Union of India. The main contesting respondents in all these appeals are the members of the Border Security Force. The respondents in all the matters succeeded before the High Court, which took the view that the orders passed against them by the Summary Security Force Court (hereinafter referred to as `SSFC' for short) and the appellate authority were bad and illegal, as there were no reasons given by any of these authorities.

4. On that count, the High Court directed remand in all the matters to the appellate authority under Section 117 (2) of The Border Security Force Act, 1968 (hereinafter referred to as `the Act' for short) for rewriting the order, giving reasons in support of the conclusions reached by the same.

> "The lead judgment was passed on 16.1.2006 in Writ Petition (Civil) No. 9427 of 2005 filed by one Constable Hans Raj. Relying on that judgment, all the other Writ Petitions in the above appeals before us were directed to be disposed of. The Union of India has now challenged the lead judgment, as well as other judgments, which were passed relying upon the same."

5. The common question that falls for consideration in all these appeals can be stated as under:- Whether the Summary Security Force Court (SSFC) is required to give reasons in support of its verdict? Similarly, Whether the appellate authority under Section 117 (2) is

required to give reasons while considering the correctness, legality or propriety of the order passed?

6. It is a common ground that in all these appeals, no reasons were given by either the SSFC or by the authority under Section 117 of the Act, which acts as an appellate authority.

7. Before we approach this question, it must be stated in all fairness that majority of the Learned Counsel appearing on behalf of the respondents, agreed to have the judgment in their favour set aside, provided the matter is remanded back to the High Court for deciding the Writ Petitions on merits. This was obviously because in all these matters, the merits of the Writ Petition were not considered and all the Writ Petitions were allowed for the sole reason that the appellate authority or the SSFC had not recorded any reason in support of the verdict given by them. In act, Shri P.P. Malhotra, Learned ASG also fairly conceded that the Writ Petitions were not decided on merits by the High Court and they were allowed on the preliminary ground that no reasons were given by the authorities under the Act. There were very little or almost no arguments led on behalf of the respondents supporting the order. However, in order to put the record straight and before acting on the request, we must consider the arguments led by the Learned ASG, who contended that there is no requirement of giving any reasons either by the SSFC or by the appellate authority under Section 117 of the Act.

8. Under the scheme of The Border Security Force Act, there are three kinds of Security Force Courts. Section 64 of the Act provides for those three kinds, they being (a) General Security Force Courts; (b) Petty Security Force Courts; and (c) Summary Security Force Courts. We are concerned here only with Summary Security Force Courts (SSFC). Section 70 provides that a SSFC may be held by the Commandant of any unit of the Force and he alone shall constitute the Court. Sub-Section (2) of Section 70 suggests that the proceedings shall be attended throughout by two other persons who shall be officers or subordinate officers or one of either, and who shall not as such, be sworn or affirmed. Section 74 speaks about the powers of a SSFC. Sub-Section (1) thereof provides that the SSFC may try any offence punishable under the Act, subject to the provisions of Sub-Section (2). Sub-Section (2) provides that when there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a Petty Security Force Court for the trial of the alleged offender, an officer holding a Summary Security Force Court shall not try without such reference any offence punishable under any of the Sections 14, 17 and 46 of this Act, or any offence against the officer holding the Court. Sub-Section (3) provides that the SSFC could try any person, subject to the Act and under the command of the officer holding the Court, except an officer or a subordinate officer. Sub-Section (4) controls the power of granting sentence and suggests that the SSFC may pass any sentence except the sentence of death or imprisonment for a term exceeding the limit specified in sub-Section (5). Sub-Section (5) provides the limit referred to under sub-Section (4) as under:- (a) one year, if the officer holding the Security Force Court has held either the post of Superintendent of Police or a post declared by the Central Government by

notification to be equivalent thereto, for a period of not less than three years or holds a post of higher rank than either of the said posts; and (b) three months, in any other case.

> "It is, therefore, clear that the SSFC can try all the offences, however, has limited powers in respect of the sentence which also depends upon the rank of the officer holding the SSFC. The offences under the Act are as mentioned in Chapter III while Chapter IV deals with the punishments.
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> Section 117 of the Act provides for remedy against order, finding or sentence of Security Force Court, which could include the SSFC also.
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> Under sub-Section (1) thereof, a petition could be filed by the aggrieved person before such person, officer or authority, who is empowered to confirm any finding or sentence of the SSFC and such officer or the authority has to specify himself/itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates. Sub-Section (2) thereof provides that any finding or sentence of the SSFC, which has been confirmed, could be challenged by the aggrieved person before the Central Government, the Director General or any prescribed officer, who is superior in command to one who confirms the finding and sentence, and such appellate authority like the Central Government, the Director General or the prescribed officer may pass such order thereon, as it/he thinks fit. Section 141 of the Act provides for the power to make rules, under which the Central Government may make rules for the purpose of carrying into effect the provisions of the Act.
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> Such rules have been framed, they being Border Security Force Rules, 1969. Chapter XI of the said Rules deals with the proceedings before SSFC. Rule 148 runs as under:- 148. Verdict: The Court shall after the evidence for prosecution and defence has been heard, give its opinion as to whether the accused is guilty or not guilty of the charge or charges.
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> Rule 149 is the most important Rule, on which Shri Malhotra, Learned ASG has heavily relied upon. The Rule is as under:- 149. Finding:
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> (1) The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of "Guilty" or of "Not Guilty".
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> (2) When 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 find the accused "Not Guilty" of that charge.

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

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

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

It is important to note at this juncture that in the same Rules, Chapter IX deals with the procedure for Security Force Courts. Rule 99, which is included in Chapter IX, is of importance for the decision in these appeals.

Before its amendment in the year 2003, the Rule was as under:-

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".

(2) Where the Court is of opinion as regards any charge that the facts proved do not disclose the offence, charge 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 has doubts as regards any charge whether the facts proved show the accused to be guilty of 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 stand in the charge, and that the difference is not so material as to have prejudiced the accused in his defence, 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 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 in the alternative, even if conviction upon one charge necessarily connotes guilty 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) Not relevant.

After the amendment of Rule 99(1), the same was in the following form:-

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". After recording the finding on each charge, the Court shall give brief reasons in support thereof. The Law Officer 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 law Officer, if any.

1 Therefore, under Rule 99(1), it became necessary for the SSFC to give brief reasons in support of the findings, where the procedure of SSFC was being followed."

9. It is needless to mention that Rule 99 will not apply to SSFC. The procedure for SSFC is provided in Chapter XI (Rules 133 to Rule 161), which alone is relevant here. It must be noted here that though Rule 99 was amended requiring authority of General Security Force Court or Petty Security Force Court to give reasons in support of their findings, no such amendment was made to Rule 149 which is applicable in case of SSFC.

"Shri Malhotra, Learned ASG, therefore, rightly argued that since Rule 149 was left intact in contradistinction to Rule 99, the authorities of SSFC were not required to give reasons in support of their findings in all these cases and the High Court has gravely erred in setting aside the orders of authorities on that count alone."

10. Shri Malhotra, Learned ASG further argued that if the SSFC was not required to give reasons under Rule 149, then the appellate/revisional authority under Section 117(2), also need not record its reasons while dealing with the appeal. Shri Malhotra further pointed out that in all the above matters, the SSFC only recorded findings in terms of Rule 149(1) by recording the verdict of guilty and the said verdict has been confirmed by the appellate authority under Section 117(2) of the Act in the similar 1 manner without giving any reasons.

Shri Malhotra pointed out that the High Court has allowed all the Writ Petitions only on the sole ground that the reasons have not been given by the appellate authority or the SSFC.

> "He pointed out that if the SSFC was not required to give any reasons, even the appellate authority under Section 117(2) of the Act was not required to record any reasons. For this, *Shri Malhotra relied on the decision in Som Union of India*[1]. There also, the question arose as to whether the court martial authorities in case of Army personnel, as also the appellate authorities, dealing with the proceedings, were required to give reasons and whether the absence of reasons would invalidate the verdict.
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> raised that the order of the Chief of the Army Staff confirming the proceedings of the court martial under Section 164 of the Army Act, 1950 was illegal since no reason had been given in support of the order by the Chief of the Army Staff and that the Central Government had also not given any reasons while dismissing the appeal of the petitioner in that case under Section 165 of the Army Act, 1950. The Court took the view that while Section 162 of the Army Act expressly provided that the Chief of Army Staff may for reasons based on the merits of the case, set aside the proceedings or reduce the sentence to any other sentence which the Court 1 might have passed, there was no express obligation imposed by Sections 164 and 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm India (cited supra), no other Section of the Army Act or any of the Rules made thereunder, had been brought to the Court's notice, from which necessary implication could be drawn that such a duty to give reasons was cast upon the Central Government or upon the confirming authority.
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> the less same question came before the Constitution Bench of this Court in respect of the provisions under Section 164 of the Army Act, as also the Army Rules. The Court held 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 must record the reasons for its decision. The Court was of the view that such reasons, if recorded, would enable the higher Courts like Supreme Court and the High Courts to effectively exercise the appellate or supervisory power. It also expressed that the requirement of recording reasons would necessarily (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimize chances of arbitrariness in decision making. This Court also further went on to hold that the reasons 1 need not be as elaborate, as in the decision of a Court of law and that the extent and nature of the reasons would depend on particular facts and circumstances. What was necessary was that the reasons were clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. However, the Court further went on to hold that the provisions of the Army Act and Rules suggested that at the stage of recording of findings and sentence, the court martial is not required to record its reasons. This Court also held that the judge-advocate plays an important role during the course of trial at a general court martial

and he is enjoined to maintain an impartial position. This Court further held that under the Army Rules, the court martial records its findings after the judge- advocate has summed up the evidence and has given his opinion upon the legal bearing of the case and that the members of the court have to express their opinion as to the findings by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It was held that it was only in case of Rule 66(1) of the Army Rules, where there was a recommendation for mercy, the reasons were required to be given. The Court further went on to hold in paragraph 48 that reasons are also not required to be recorded for an order passed by the confirming authority, confirming the findings and sentence recorded by the court martial. It further went on to hold that even the Central Government, dismissing the post-confirmation petition, is not 1 required to record the reasons. Ultimately in para 48, the Court observed:- "48. For the reasons aforesaid, it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial as well as for the order passed by the Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in Som Datt Datta Case the submission of Shri Ganguli that the said decision needs reconsideration cannot be accepted and is, therefore, rejected."

12. On this backdrop, it is clear that the provisions for the SSFC and the appellate authority are parameteria, more particularly in case of Rule 149 and Section 117(2) of the Act, with the provisions which were considered in both the above authorities. Therefore, there cannot be any escape from the conclusion that as held by the Constitution Bench, the reasons would not be required to be given by the SSFC under Rule 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the Legislature has chosen not to amend Rule 149, though it has specifically amended Rule 99 w.e.f. 9.7.2003. It was pointed out that inspite of this, some other view was *of India & Ors.*[2]. However, it need not detain us, since Rule 149 did not fall for consideration in that case. Even otherwise, we would be bound by law declared by the Constitution Bench in the

13. As has already been stated above, the contention of Shri Malhotra, Learned ASG was not traversed by most of the Learned Counsel appearing for the respondents and those who feebly controverted the same, could not show any decision excepting the decision in Nirmal Lakra Rule 149 and more particularly, the aspect of its non-amendment in contradistinction with the amendment of Rule 99.

14. It was, however, urged by all the Learned Counsel appearing on behalf of the respondents that since Delhi High Court has disposed of all the petitions only on the sole ground of the absence of reasons in support of the findings by SSFC and the appellate authority, the other contentions on merits of the Writ Petitions were not considered. They, therefore, urged that we should remand back all these matters. We had accordingly remanded the matters. Shri Malhotra, Learned ASG also very fairly conceded that the merits of the Writ Petitions were

not considered and, therefore, on that count, it would only be proper to remand the matters back to the Delhi High Court for reconsideration on merits. We have ordered accordingly. In the result, all these appeals filed by the Union of India succeed. All the matters are sent back to the Delhi High Court, which shall be now considered on the other contentions raised on merits. Since the matters have become very old, we would request the High Court to 1 dispose of these appeals as early as possible and not beyond six months from the date when the records reach Delhi High Court.

[1]*1990 (4) SCC 594*
[2]*2003 DLT(102) 415*