

S.A. Qadir Vs. the Union of India and ors.

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Court : Rajasthan

Decided On : Apr-26-2000

Reported in : 2000(2)WLN635

Judge : N.N. Mathur and; Amaresh Ku. Singh, JJ.

Appeal No. : D.B. Civil Special Appeal No. 563 of 1998

Appellant : S.A. Qadir

Respondent : The Union of India and ors.

Advocate for Def. : Mr. S.S.Lal

Advocate for Pet/Ap. : Mr. Mridul

Disposition : Appeal allowed

Judgement :

N.N. Mathur, J.

1. This appeal is directed against the judgment of the learned Single Judge dated April 17, 1998, dismissing the writ petition filed by the appellant-writ petitioner, hereinafter referred-to as the petitioner' seeking direction to quash the Communication dated 10.8.1987 confirming the punishment of dismissal from service under Section 40 of the Border Security Force Act, 1968, hereinafter

referred to as 'the Act'.

2. The petitioner, at the material time in the year 1987, was posted as Deputy Commandant (Joint Assistant Director) Headquarters, Dy. Inspector General, Border Security Force, Bikaner. He was charged for the offence under Section 40 of the Act alleging that he used contemptuous and disparaging remarks in his letter dated 18.3.1985 addressed to Shri W.G.J. Mudaliar, I.P.S. Inspector General of Police West Bengal and letter dated 4.9.1985 addressed to Shri M.C. Mishra. Director General, B.S.F., making slippery remarks on the entire I.P.S. Cadre saying that they were providing corrupt leadership to the B.S.F. as they were interested in their welfare alone and not the welfare of the officers and the men and also for describing the entire Boarder Security Force as 'Border Smugglers Force'. After trial, the General Security Force Court, hereinafter referred to as the Force Court', by order dated 25.4.1987 held the petitioner guilty of offence u/s 40 of the Act and awarded the punishment to 'take rank and precedence as if his promotion to the rank of Dy. Commandant bore the date 30 Nov. 1982' and to be 'severely, reprimanded'. However, In the opinion of Confirming Authority (Inspector General, B.S.F. (R&G;)), the punishment awarded was inadequate. The confirming Authority expressed that the discipline is the back bone of any Armed Forces: passing contemptuous and disparaging remarks against senior officers and B.S.F. as a whole, are acts of grave indiscipline. The confirming Authority, not impressed with one of the grounds weighed with the Force Court that one of the allegations contained in his letter against some of the officers was true, reminded that charges against the accused are not of making false allegations but of passing contemptuous and disparaging remarks. Thus, the question before the Force Court was not as to whether the allegations in the letter were true or not. The confirming Authority further observed that even the truth has to be expressed in a proper language. In view of this, the confirming Authority by order dated 19.4.1987 directed the Force Court to re-assemble on 25.4.1987 to re-consider the sentence awarded to the petitioner. The Force Court re-assembled on 25.4.1987 after notice to the petitioner. The revision order was read over to the petitioner and he was given opportunity to address the Court. The petitioner prayed for some time to make his submissions. He also asked for the supply of the copy of the order of the Inspector General remanding the matter. The Force Court rejected the prayer for

adjournment and proceeded-with the matter. On the same day, the Force Court after considering the material available on record enhanced the sentence to that of dismissal from service. As the Force Court awarded the sentence of dismissal from service, under the Rules, the Director General B.S.F. was the Confirming Authority, and not the Inspector General. Accordingly the sentence was confirmed by order dated 6.8.1987 of the Director General, B.S.F. The petitioner was informed of the said decision vide Communication dt. 10.8.1987 under the signatures of Shri Kan Singh, Commandant. By communication of the same date, petitioner was also informed that the Director General has rejected the statutory petitions dated 27.4.1987 and 1.7.1987 filed by him. The petitioner's statutory representation was rejected by the Central Government and the petitioner was informed under Communication dated 9th March, 1988. Petitioner approached this court challenging the order of dismissal by way of writ petition which has been dismissed by the judgment of the learned Judge dated 17.4.1998.

3. We have heard Mr. M.Mridul, Senior Advocate and Mr. S.S.Lal, learned Counsel for the respondent. Mr. Mridul raised the following contentions:

(i) that the petitioner's act of writing two confidential letters within the Organisation inviting attention of the higher authorities towards the corrupt activities of some of the officers, does not fall within any of the categories restricting or abrogating fundamental rights by Section 13 of the Act and, as such, an act exercising the fundamental rights guaranteed under Article 19(1)(a) of the Constitution, does not constitute an offence resulting into dismissal from service:

(ii) that the act of the petitioner inviting the attention of the higher authorities of the nefarious and corrupt activities of some of its officers, by writing two confidential letter does not constitute an offence u/s. 40 of the Act. Firstly because the offending act cannot be said prejudicial to good order of the Force and secondly because there was no mens-rea in writing such letters.

(iii) The trial leading to petitioner's conviction is vitiated being in violation of Rule 46 of the Border Security Force Rules, 1969, hereinafter referred-to as 'the Rules', in as much as hearing of a charge was intimated by Shri Kan Singh, Commandant, against whom the petitioner had made an allegation of indulging in smuggling

activities and, as such, he was a person, personally interested in the matter;

(iv) The petitioner was arbitrarily denied the opportunity to produce the witness in defence during the trial:

(v) While revising the sentence, petitioner was not given an adequate opportunity to collect the material and address the court;

(vi) The decision of the confirming Authority is illegal being non-speaking; the order does not indicate as to how and in what manner, the petition submitted by the petitioner was considered by the confirming Authority; and

(vii) The punishment awarded in the facts and circumstances of the case is shockingly disproportionate.

4. Mr. S.S.Lal, learned Counsel for the Union of India, before dealing-with each of the contentions raised by the petitioner, has invited our attention to the celebrated decision of the Apex Court in the case of Lt. Col. Prithi Pal Singh Bedi Vs Union of India, reported in AIR 1982 SC 1413 with a view to understand the true ambit and scope of judicial review in the matter's arising from the special courts constituted to deal with matters of personals of Armed forces. In the said case, the Supreme Court extensively considered the provisions of Army Act and the Rules made thereunder and the rights of the persons to whom the Army Act applies, and has laid down guidelines as to what extent, the courts should interfere with the matter of Armed Forces. Since the case in hand also pertains to Armed Force, may be of Boarder Security Force, it would be appropriate to refer to the relevant provisions of the Act and the Rules.

5. The B.S.F. Act, 1968 was enacted to provide for the constitution and regulation of an Armed Force of the Union for ensuring the security of the borders of India and for matters connected therewith. Chapter II of the Act provides constitution of the Force and conditions of service of the members of the Forces. Section 10 of the Act empowers the Central Government to remove or dismiss from service any person. There are two separate provisions for termination of service, one by administrative action and another by way of sentence as provided under Section

48, Section 13 abrogates certain fundamental rights of the members of the Force in respect of forming of an association, freedom of speech etc. Chapters III and IV set out various offences and punishment under the Act. Chapter V provides pre-trial proceedings including arrest. Chapter VI provides for Security Force Courts and its composition. Section 64 of the Act postulates three kinds of Security Force Courts namely: (a) General Security Force Courts; (b) Petty Security Force Courts: and (c) Summary Security Force Courts. Chapter VII provides procedure for Security Force Courts. Section 82 says that at every General Security Force Court or Petty Security Force Court, the senior member shall be the presiding officer. Section 83 provides that General Security Force Court or the Petty Security Force Court is to be attended by the Law Officer. A law Officer is attached to the Force Court. He is supposed to maintain an attitude of impartiality. Prosecution and defence both are entitled to his opinion. Section 84 provides opportunity to challenge participation of any Officer in the Court. On settling the controversy, if any, trial commence as provided under Sub-section (4) of Section 84. Sections 84 to 106 provide procedure to be adopted by the Security Force Courts, which includes summoning of witnesses, examination of witnesses by Commission, presumption as to certain documents, evidence of previous conviction etc. Chapter VIII provides confirmation and revision of sentence. Section 107 prohibits operation of the sentence of finding unless confirmed as provided under the Act. Section 111 empowers the confirming Authority to confirm the sentence awarded by the Force Court or remit the matter on the point of sentence for re-consideration to the Force Court or commute that punishment for any punishment lower in the scale laid down in Section 48. Section 113 provides a procedure to be followed when confirming Authority remits the matter for re-consideration on the point of sentence. The court may take additional evidence if the confirmed Authority so directs. In case, no such direction is given, the court is required to proceed with the revision. Section 117 provides remedy against the order, finding or sentence of Security Force Court. Chapter IX provides execution of sentence, pardons, remissions, etc. Section 141 empowers the Central Govt. to make rules for the purpose of carrying into effect the provisions of the B.S.F. Act.

6. The Central Govt. in exercise of powers conferred by Section 141 of the B.S.F. Act, framed the rules known as B.S.F. Rules, 1969, hereinafter referred-to as 'the

Rules of 1969'. Rule 2 provides the definition clause. Chapter III provides the constitution of the Force. The Force consists of (a) Border Security Force (Regular): and (b) Border Security Force (Auxiliary). Rule 14-A provides classification of the officer and other members of the Force in accordance with their ranks. The Force is divided in four categories. The category (a) consists of Officers of the rank of Assistant Commandant, Deputy Commandant, Commandant, Additional Deputy Inspector-General, Deputy Inspector-General, Inspector-General and Director-General. The Category (b) consists of Subordinate Officers. The category (c) consists of Under-Officers and lastly the category (d) consists of Enrolled persons other than Under-Officers. Chapter IV provides for Termination, Retirement, Resignation, Departmental Enquiry etc. Chapter V provides procedure of arrest and investigation. Chapter VI provides as to which are the cases to be tried by the Security Force Court and which are the cases to be tried by the Criminal Court. Chapter VII provides a detailed procedure of investigation and summary disposal. Rule 43 provides for report pertaining to an offence when it is found that there are allegations against a person subject to the Act that he has committed an offence punishable under the Act, such allegations are required to be reduced to writing. Rule 44 gives an opportunity of hearing to such person by the Company Commander or officer of the equivalent rank. A complete procedure of hearing has been given under the said rules. It is significant to notice that Rule 44 does not apply to the members of the Force of the officers category. Clause (a) of Sub-rule (1) of Rule 44, clearly prohibits the application of the rule to the person of officers cadre. It has been made applicable only to the persons subject to the Act other than an officer, which reads as follows:

44(1)(a). In the case of person, subject to the Act, other than a officer, the case may in the first instance, be heard by his Company Commander.

Rule 45 provides the procedure of hearing by the Commandant. The opening word of Rule 45 clearly excludes its application to the members of the Force of the category of officers as it speaks that a Commandant shall hear the charges against all ranks under Sub-rule (1) of Rule 44. It may be noticed that Sub-rule (1) of Rule 44 applies to all ranks other than the ranks in the officers category. Rule 45 reads as follows:

45. Hearing by the Commandant: The Commandant shall hear the charge against all ranks under Sub-rule (1) of Rule 44 and may:

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

(ii) dismiss the charge, or

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

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

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

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

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

Rule 46 provides that where the offence with which the accused is charged is against the Commandant himself, or where the Commandant is personally interested in the case, the Commandant shall not deal with such case and the accused shall be attached to another battalion or unit for disposal of the case under the order of the Dy. Inspector General. This provision and the subsequent provision under Chapter VII are not attracted in the case of members of the Force of the officers category. Rule 61 provides composition of General and Petty Security Force Courts. Rule 62 provides duties of convening officer when he convenes General Security Force Court. Rule 63 provides that an accused shall be given an opportunity for preparing his defence and he shall be allowed proper communication with his defending officer or counsel and with his witnesses. Rule 64 provides for summoning of defence witnesses. Chapter IX provides Procedure

for Security Force Courts. Rule 65 provides for Assembly and swearing of court. The rule casts a duty on the convening officer to satisfy before the trial commences (a) that the court has been convened in accordance with the Act and these Rules that the Court consists of not less than the minimum number of officers required by law: that the members are of the required rank: that the law officer has been duly appointed: that the charge has been framed in accordance with law and against the accused; and that the defending officer or counsel has been provided to the accused. Only after satisfying the necessary requirements, the Force Court shall proceed with the commencement of charge. Rule 66 provides for commencement of trial. Sub-rule (1) of Rule 66 provides that the order convening the court and the names of the officers appointed to try the accused shall be read in the hearing of the accused who shall be given an opportunity to object to any of those officers. Rules 69 and 70 provides for objection to Interpreter or Shorthand Writer, Law Officer and Prosecutor. Rule 72 permits the accused to raise a plea to jurisdiction. Rule 73 gives an accused an opportunity of objection to the charge before he pleads to a charge. It will be relevant to refer Rule 139 at this stage as the said rule also provides that accused, when required to plead to any charge, may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules. Rule 77 provides pleading to the charge. The detailed procedure has been given with respect to the pleading of charge. Rule 88 provides examination of witnesses. Rule 93 provides that after the close of the case for the prosecution, the presiding officer or the Law Officer shall explain to the accused that if he wishes to give evidence on oath, he shall be liable to cross-examination. Rule 94 permits the accused to apply for calling the witnesses. Rule 96 provides for closing addresses. Rule 97 provides that after closing addresses, the Law Officer shall sum up the evidence and advise the court on the law relating to the case in the open court. The subsequent provisions provide for the procedure on acquittal and on conviction. Rule 105 provides for revision. Rule 107 provides for confirmation and promulgation. Chapter X deals with the procedure of Security Force Courts and Incidental Matters. Rule 126 provides powers and duties of a law officer. Thus, it is evident that the B.S.F. Act and the Rules provide a complete Code of trial of the offences under the Act.

7. In Prithi Pal Singh Bedi's case (supra), while dealing with the provisions of the Army Act and the Rules, which are to larger extent identical to the provisions of the B.S.F. Act and the Rules, the court found that the provisions of trial by the Court Martial are analogous to the provisions of the trial in the ordinary criminal court. Dealing with the provisions prescribing the procedure prior to a stage anterior to the trial by the court martial, the court held that non-compliance of the provisions will not affect the decision of the court martial as even in normal trial under the Code of Criminal Procedure, it has nowhere been suggested that it is unfair to launch a criminal prosecution without first hearing the accused.

8. In another decision of the Apex Court in Major G.S. Sodhi Vs Union of India reported in AIR 1991 SC 1617, the court observed as follows:

37. We find that in the Court-martial which is important, the petitioners have duly participated. It must also be borne in mind that the army authorities are entrusted with certain powers and duties under the Act which also enjoined on them certain important responsibilities particularly in the matter of holding the enquiries and trials. The Parliament in its wisdom in exercise of its powers under Article 33 has enacted this law and the officers are to be guided by factors like exigencies of service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the person against whom the offence is committed. Normally having regard to the high office they hold there should not be any scope to apprehend deliberate lapse or intentional omission on their part.

It will thus, be seen that the court held, while construing the various procedural rules that some procedural infraction, unless fatal and substantial, does not affect the trial of a case for misconduct. Infraction of rule, a stage anterior to trial, does not vitiate the findings of the court martial.

9. Recently, the Apex Court in Union of India Vs Major A. Hussain, reported in 1998(1) SCC 537, in para 23 circumscribed the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India with respect to the court martial proceedings as follows:

23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court martial is not subject to superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of the law. It has been rightly said that court-martial remains to a significant degree, a specialised part of over all mechanism by which the military discipline preserved. It is for the special need for the Armed Forces that a person subject to Army Act is tried by court-martial for an act which is an offence under, the Act. Court-martial discharges judicial function and to a great extent is a court where provision of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charges before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or, not. Requirement of proper and adequate investigation is not jurisdiction and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject matter and has followed the prescribed procedure and is within its powers to award punishment.

10. Thus, it emerges that court martial proceedings under the respective provisions of Armed Forces being not subject to superintendence under Article 227 of the Constitution and the fact that court martial proceedings cannot be compared of proceedings under Code of Criminal Procedure, that court martial

proceedings are judicial proceedings specially tailored ensuring quick and reasonably fair trial to the accused (a defence personnel) without any compromise to discipline in the armed forces, the scope of judicial review is extremely narrow. While dealing with the court martial cases it must be borne in mind that the officers of the armed forces are entrusted with certain powers and duties, certain responsibilities are enjoined upon them including the duty to preserve discipline in the Force which is back bone of Armed Forces. Thus there is no scope to apprehend deliberate lapse or intentional lapse on their part. An infraction of rule at a stage prior to the stage of trial does not vitiate the findings recorded by the court martial. The High Court in exercise of its power under Article 226 should not minutely examine the proceedings of the court martial unless a serious prejudice is shown on the basis of material on record. Non-compliance of a provision simpliciter will not be a ground to interfere with the proceedings and findings of the court martial. The frequent interference by the courts of law in the matters to be dealt with under the law applicable to Armed Forces may adversely affect the discipline of the Armed Forces, ultimately affecting the security of the country. Unless there are compelling reasons on account of flagrant violation of statutory provisions causing serious prejudice or the punishment awarded is shockingly disproportionate, the High Court should not interfere with the court martial proceedings in exercise of the powers under Article 226 of the Constitution of India.

11. Now, we shall first examine the contention of malafide and bias attributed to the Commandant Shri Kan Singh, Assistant Director, Hqr. D.I.G.B.S.F. Bikaner. The submission of the petitioner is that he had made certain complaints against Shri Kan Singh relating to his illegal visits to Pakistan and indulgence in smuggling.

The learned Counsel has relied upon a decision of the Apex Court in *Rattan Lal Sharma v. Managing Committee* reported in : (1993)11LLJ549SC , wherein the court laid down the test for appreciating the case of personal bias. It is held therein the test is not whether infact a bias has affected the judgment: the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision

of the Tribunal. In the said case, the writ petitioner was Principal of a Higher Secondary School. In a Departmental Enquiry initiated against him, he raised an objection with respect to participation of one of the members of the Committee viz: Maru Ram on the ground that he was one of the witnesses in support of charge No. 12 on behalf of the administration in the said inquiry proceedings. It was also submitted that charge No. 12 pertained to allegation of use of money given to writ petitioner by Shri Maru Ram. The objection was overruled and on the finding of inquiry committee, the services of the writ petitioner were dismissed. He challenged the said order by way of filing a writ petition. The learned Single Judge was of the view that since Maru Ram conducted the enquiry with bias, the said bias continued and percolated in the entire proceedings and such bias, therefore, should not be restricted to charge No. 12 only. In view of the finding, the learned Single Judge set aside the order of dismissal. The Division Bench upset the judgment of the learned Single Judge on the ground that the plea of bias could be waived and if the writ petitioner felt that the enquiry proceedings were vitiated by reason of bias because of inclusion of Maru Ram, he could have raised a specific plea of bias before the Deputy Commissioner. In the opinion of the Division Bench, since such specific plea was not raised before Deputy Commissioner and Commissioner, the writ petitioner should not be allowed to raise such contention in the writ petition. The Division Bench accordingly set aside the judgment of the learned Single Judge and dismissed the writ petition. The Apex Court after referring number of its earlier decisions, reminded the cardinal principle of natural justice that no man should be a judge in his own cause. The decision making authority must be impartial and without bias. The Apex Court upheld the view of the learned Single Judge that the bias of Maru Ram, one of the members of the Enquiry Committee, had percolated throughout the enquiry thereby vitiating the enquiry as the findings made by the Enquiry Committee was a product of bias, and prejudiced mind. Thus, in the instant case, what is required to be seen is the role of Commandant Shri Kan Singh in the enquiry and trial. It is not in dispute that in one of the letters, the petitioner has made allegation against the Commandant Shri Kan Singh relating to his illegal visit to Pakistan and indulgence in smuggling activities. It is also not in dispute that the article of charges dt. 19.3.1987 was served on the petitioner under the signatures of Shri Kan Singh. It is also not in

dispute that Commandant Shri Kan Singh has appeared as one of the witness on behalf of the Force. However, Shri Kan Singh was neither a member of the Force Court nor the confirming Authority.

12. It is pointed out by Mr. Lal that Shri K.S. Rathore the Confirming Officer, is not the very Kan Singh but Shri Kishan Singh Rathore, who was the Inspector General, B.S.F. Raj. & Guj. at the relevant time. Shri Kan Singh against whom allegation of bias are made, had no decisive role to play. The only role played by Shri Kan Singh in his capacity as Commandant was to serve the article of charges dt. 19.3.1987 on the petitioner at a stage prior to trial.

13. It is submitted that Commandant plays a decisive role under Rule 45 as on hearing the charge he may award any of the punishments which he is empowered or he may dismiss the charges. Learned counsel has also invited our attention to Rule 46, which prohibits a Commandant to deal with a case in which he is personally interested or where the offence with which the accused is charged is against the Commandant himself. The contention is based on misreading of Rules 44 and 45. A bare reading of Rules 44 and 45 will show that the provisions have no application to the facts of the case in as much as the said Rules are applicable to persons belonging to cadre other than the officers. Rule 45 clearly provides that the Commandant shall hear the charge against all ranks under Clause (a) of sub-Rule (1) of Rule 44. Rule 44(i)(a) speaks that the case may in the first instance, be heard by his Company Commander, in the case of a person subject to the Act, other than an officer. It is not in dispute that the petitioner was an officer on account of holding the post of Dy. Commandant. Thus, Rules 44 to 46 have no application to the case of the petitioner. In the instant case, petitioner being of officers category, the trial commenced under Rule 66 and not under Rules 44 to 46. Though Shri Kan Singh has not played any decisive role in signing the article of charges still even if it is assumed that he played some role, it was at a stage prior to trial. Which will not vitiate the proceedings in view of the law laid down by the Apex Court in Prithvi Pal Singh. Thus, the contentions raised on the premises of the bias of Shri Kan Singh are not sustainable:

CONTENTION (i)

14. It is contended by Mr. Mridul, learned Counsel for the petitioner, that writing of two confidential letters within the Organisation inviting attention of the higher authorities towards the corrupt activities of some of the officers, does not fall in any of the category restricting or abrogating the fundamental rights by Section 13 of the Act and, as such, the petitioner in writing such letters has exercised the fundamental rights guaranteed under Article 19(1)(a) of the Constitution of India. It is stressed that by no stretch of imagination, the exercise of fundamental right can constitute an offence. It is of course true that Section 13 of the Act abrogates only certain fundamental rights i.e. with respect to formation of an Association, freedom of speech etc. but it is to be reminded that the right of freedom of speech guaranteed under Article 19(1)(a) of the Constitution is subject to reasonable restrictions under Article 19(2) of the Constitution. Such restrictions can be in the interest of Sovereignty and integrity of India, Security of the State. Friendly relations with foreign State, Public Order, Decency or morality, or in relation to Contempt of Court, defamation of Incitement to an offence. The offence under Section 40 of the Act, i.e. an act prejudicial to the good order and discipline of the Force, is not meant to curtail the freedom of speech or expression but it is meant to maintain discipline within the Force to ensure performance of duty by the members of the Force to protect the interest and prestige of the Boarder Security Force. In the present proceedings, the constitutional validity of Section 40 of the Act is not under challenge. What is under challenge is the order of dismissal having found guilty of act prejudicial of good order and discipline. For any action, which is prejudicial to the interest of the Organisation or which affects the prestige of the Organisation or undermines the discipline and affects the efficient functioning of the Organisation, a statutory provision prohibiting such act should be construed falling under the public order under Article 19(2) of the Constitution. The case relied upon by the learned Counsel in M.H. Deuendrappa v. Karnataka State Small Industries Development Corporation reported in : [1998]1SCR919 does not advance the case of the petitioner. In the said case, the writ petitioner addressed a letter to the Governor of Karnataka on behalf of the Karnataka State Small Industries Development Corporation Employees' Welfare Association in which he made serious allegation against the Chairman of the Corporation. He also issued a press statement, which was published in one of the daily local newspaper

containing allegations of corruption against the Chairman of the Corporation. An identical contention was raised in the said case that the petitioner had the fundamental right of speech and expression. The Corporation took the plea that such a conduct is misconduct under Rule 22 of the relevant service rules. The Apex Court held that writing letter to the Governor and making a public statement against the Head of the Organisation on a political issue amounts to lowering the prestige of the Organisation in which he worked. The Apex Court observed thus:

On a proper balancing, therefore, of individual freedom of the appellant and proper functioning of the government organisation which had employed him, this was a fit case where the employer was entitled to take disciplinary action under Rule 22.

In view of the aforesaid, we hold that a person has no fundamental right under Art.19(1)(a) to make statement in the form of letters prejudicially affecting the good order and discipline of the Force. The first contention is accordingly rejected.

CONTENTION (ii)

15. In order to appreciate the second contention, it will be appropriate to read Section 40, which is as follows:

40. Violation of good order and discipline: Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

The question falls for consideration is as to whether the contents of two offending letters can be said to be the act prejudicial to the good order of the Force? It may be stated at the outset that the words 'good order' used in Section 40 cannot be separated from the word 'discipline'. It is to be read as a complete phrase 'good order and discipline'. The offending contents of the letters, are extracted as follows:

First Charge

It is quite surprising for me that IPS officers who are providing the corrupt leadership to BSF looking after their own welfare and not the welfare of the officers and men.

Second Charge

(i) To be more clear I will explain that BSF which was raised as an Armed Force for the security of the national borders has now been converted to a 'Border Smugglers Force' to the extent of the least 50% and the whole organisation has become unfit for war because now the officers lot of the Force are of the opinion that IPS deputationists will get this Force butchered and get the Army Generals sacked at the time of read Ops against the enemy because these IPS officers will be behind the screen and out of the war theatre at the time of enemy attack.

(ii) If these honourable IPS officers have not made BSF a Border Smugglers Force then what it is? and

(iii) However, there is no dearth of corrupt officers in the BSF.

It is not possible for any Organisation to state every act and omission, which can be construed as prejudicial to the good order and discipline. There are certain traditions, norms and standard of behaviour, which every member of the disciplined Force is required to adhere strictly. An officer should not be guided by personal impulse. He is required to be patient and exercise restraint. The violation of traditions and the norms and the standards of behaviour in a given case does amount to an act prejudicial to the public order and discipline. Under Section 40 of the Act, the prejudicial act is not a misconduct simpliciter but an offence. It is not that every act violating the norms and standards of behaviour constitutes an offence u/s 40 of the Act but it is only such act which, on overall consideration, is considered to be prejudicial to good order and discipline. In the instant case, writing of two offending letters has been admitted by the writ petitioner. The plea of the writ petitioner is that in writing the offending letters his contention was only to bring to the notice of the superior officers the activities of those officers involved in smuggling, corruption and other offences and not to defame any officer or the Force as a whole. Learned counsel has also invited our attention to the statement

of the petitioner before the Force Court, wherein he stated that he had written personal letter to the Director General because he never wanted others to know about it and wanted the Director General to take action i.e. remedial action against the corruption and prevailing smuggling activities, which was affecting the discipline of the Force. He also stated that his purpose of writing the letters was not to bring bad name to the Force. His purpose Was also not to defame any I.P.S. Officer. Describing the Border Security Force as Border Smugglers Force, he meant to refer to only corrupt IPS Officers and not the good IPS Officers. He further stated that having experienced the smuggling activities on the Border, he was left with two options either to shut his eyes to anti national activities or to report the matter to the superior officers. He further stated that he could not shut his eyes as he could not compromise with his own integrity. It is submitted by Mr. Mridul, learned Counsel for the petitioner, that the mens rea is a essential ingredient of a criminal offence and in the instant case, a reading of the statement of petitioner clearly shows that in writing two offending letters, he had no intention to disrepute the organisation and, as such, it cannot be said that the act is prejudicial to the good order and discipline constituting an offence under Section 40 of the Act.

16. The submission that mens rea is an essential ingredient of the offence punishable under Section 40 of the Border Security Force Act, is based on the maxim 'Actus non facit reum nisi means sit rea'. The rule of common law, indicated by the maxim cannot be properly applied unless the reasons behind the rule are fully ascertained. The maxim 'Cessante Rationis legis cessat ipsa lex' (Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself), applies to the rule of common law as well as to the provisions of statutory law.

17. The law with regard to mens rea has its origin in the necessity of restricting the operation of penal laws, generally to the cases where the act or omission, charged an offence has been committed with a guilty intention. At common law, an honest and reasonable belief in the existence of the circumstances which, if true, would make the act for which a man is indicted, an innocent act, is a good defence. The maxim 'Actus non facit reum nisi mens sit rea' (the intent and the act must both

concur to constitute the crime), is the result of experience as well as prudence which have always been guiding principles in the enactment of law. Penal laws are made with a view to impose prohibition, violation whereof is charged as an offence. The basic object of the penal law is not to victimise innocent persons but to regulate the conduct of the citizens by imposition of duties, either expressly or by necessary implication. The penalty which is provided by the penal laws, at the lower plane, regulates the conduct by conditioning. When the offender committing offence is punished, he learn to avoid commission of such offences. At the higher plane of understanding, penal provisions, taboo acts of omission or commission, either totally or partly in specified circumstances. When there is a total prohibition of any act of omission or commission, no exception can be pleaded for avoiding the punishment because all exceptions, indicate the limits of law. Hence total prohibitions, do not admit of any exception. On the other hand, when the prohibition is not total, the prohibition imposed by penal law does not apply to such acts or omissions as are committed otherwise than in the specified circumstances. The punishment which is prescribed by the penal laws, triggers the desire to avoid the punishment because of its unpleasantness and the successful avoidance of punishment being dependent on avoidance of the act or omission which is charged as an offence for which punishment is prescribed, such act or omission is avoided. Penal provisions, thus necessarily, produce the desire, the inclination, the tendency and the habit of avoiding the act of omission or commission charged as offences.

18. Avoidance by the people of the act or omission charged an offence, may be total or it may be limited to specified circumstances. In case of total avoidance by the people, of the act or omission which is made punishment, people do not make a distinction between the circumstances in which the act or omission would be beneficial, and the circumstances in which the act or omission would be harmful. Total avoidance of the act or omission, no doubt protects the society from the evil consequences which may be caused by indulgence in the act or omission but the harm which results from total avoidance of any act or omission is that the individual and the society both are deprived of the benefits which may be caused by such act or omission in certain circumstances. When windows are totally closed, not only the entry of the insects is effectively stopped, fresh air and rays of

sun are also stopped. Experience and prudence, both require that as far as possible, total prohibition of any act or omission must not be imposed, because the imposition thereof is likely to deprive the individual and the society of the benefits of such act or omission in particular circumstances. Besides, when total prohibition, whether for enforcement of a positive duty or for enforcement of a taboo are imposed, the citizens do not have any excuse for committing the prohibited act of omission or commission and what they develop is total repulsion vis-a-vis prohibited act or omission and such repulsion, produces hatred which necessarily bears an essential ingredient of irrationality and thereby eclipses and paralyses intellect and takes away the power to distinguish circumstances when a certain act or omission would be desirable from those in which it would not be desirable. As a consequence, total prohibition of any act or omission, is most likely to produce irrational rejection, hatred and irrational avoidance of not only the prohibited acts and omissions but of all those persons, things, situations and circumstances in which the act or omission in question is likely to be caused unintentionally, inadvertently, due to coercion or due to mistake of fact.

19. When penal law, by imposition of a total prohibition of a breach of positive duty, enforces the performance of a positive act, the positive act so performed, is likely to become 'mechanical' because the law denies to the concerned person the right to decide when he should do and when he should not do the act in question. The performance of mechanical act, no doubt, causes benefit when it is necessary but it is wasteful when performance of the act is unnecessary and harmful when the performance of the act is, in all probability, likely to produce a harmful result. Similarly, when the penal law, forbids the doing of an act, totally and enforces the omission commanded by it in all cases, without making distinction between the circumstances in which the omission would be necessary from those in which it would not be necessary or may be harmful, the omission may be practised in mechanical manner and it leads to complete avoidance of not only the act, which is commanded to be omitted, but also all those persons, things and circumstances which may occasion the commission of the prohibited act by the concerned person, against his' will, or inadvertently or due to a mistake of fact.

20. The laws made by the sovereign, are intended to regulate the conduct of the human beings. The commands of law made by legislature are obeyed through the instrumentality of the faculties of cognition (perception) and will (intention) of the concerned persons. The presumption is that those who are commanded by law to do a thing or to refrain from doing anything, shall intend to do what is commanded by law and take appropriate steps to obey the command of law. The utmost duty which can be imposed on a human being by a law, is to develop the intention to do what is commanded and take all such steps as are necessary. The intention of the human beings, thus, plays a very important role in the obedience of laws.

21. The maxim '*lex not cogit ad impossibilia*' (the law does not compel a man to do that which he cannot possibly perform), is recognised by common law as necessary for administering justice and equity. Since the intention plays an important role in guiding the acts and omissions of human beings, when a positive duty is imposed by law on a person in absolute terms, the only way in which the direction of law may be complied with is to perform the act in question, in a mechanical manner, in all circumstances, irrespective of the question whether it is necessary or unnecessary; beneficial or harmful. When the law prohibits the performance of a positive act and enforces omissions, in absolute terms, the citizen has two alternatives; (1) in the case of acts, depending on his volition to avoid the intention and thereby avoid the act and (2) in the case of acts not depending on his volition, to avoid those persons, situations and circumstances which may cause prohibited act to be performed without his will or against his will. In the former case the intention to do the act is to be given up totally by the concerned person and in the latter case the person has to successfully avoid the company of all those persons or things as well as the circumstances which may occasion the occurrence of the prohibited act. Avoidance of the company of persons and things as well as the situation and circumstances, as aforesaid, for avoidance of punishment provided by law, seriously interferes with the lives and liberties of the people. The common law, therefore, lays down the rule that unless '*mens rea*' is established, no one should be punished for an offence.

22. In *Bread v. Wood* 1946 110 J.P. 317, the Lord Chief Justice of England observed:

It is in my opinion of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.

The observations made by Lord Chief Justice of England in *Brend v. Wood* (supra) were followed by their Lordship of the Judicial Committee in *Srinivas Mall Bairoliya and another v. Emperor* AIR (34) Privy Council 135. In that case their Lordships of the Judicial Committee observed:

The High Court took the view that even if appellant 1 had not been proved to have known of the unlawful acts of appellant he would still to liable, on the ground that 'where there is an absolute prohibition and no question of mens rea arises, the master is criminally liable for the acts of his servant.' With due respect to the High Court, their Lordships think it necessary to express their dissent from this view. They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of Wright J. in 1895 1 Q.B. 918 at p. 921. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held victoriously liable for a servant's crime and so punishable 'with imprisonment for a term which may extend to three years.' Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said:

it is in my opinion of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind;' 1946 111 J.P. 317 at p. 318.

23. The ratio of the above case was approved by the Supreme Court of India in *Bavula Hariprasada Rao v. The State* (: 1951 CriLJ768 and it was observed that the view of law as propounded by the Privy Council is the correct view.

24. In *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh* : 1964 CriLJ234 , the Supreme Court after referring to the decision of the Supreme Court in *Bavula Hariparasada Rao v. The State* (supra) observed:

There is no doubt that in *Bavula Hariprasada Rao v. The State* 1951 SCR 322, this Court speaking through Fatal All J., has accepted the observations made by the Lord Chief Justice of England in *Brend v. Wood* 1946 110 J.P. 317, 318 that 'it is of the utmost importance for the protection of the liberty of the subject that a Court should always bear subject that a Court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.' (vide also *Sherras v. De. Rutzen* 1895 1 Q.B. 918, 921)

It may also be conceded that offences in respect of which mens rea is not required to be established, are usually of a comparatively minor character and sentence imposed against the offenders are, therefore, not of severe type.

25. In *State of Maharashtra v. Mayer Hans George* : [1965]1SCR123 , Hon'ble Mr. Justice Subba Rao, summarised the law in the following words:

The law on the subject relevant to the present enquiry may briefly be stated as follows. It is a well settled principle of common law that mens rea is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. To put it differently, there is a presumption that mens rea is an essential ingredient of a statutory offence, but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law; can he do anything to promote the

observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

At page 736 of the report, after referring to the observations made by their Lordships of the Judicial Committee in AIR 1947 PC 135, Hon'ble Mr. Justice Ayyangar for himself and Hon'ble Mr. Madholkar, J. observed:

The learned Lord then quoted with approval the view expressed by the Lord Chief Justice in 1947 110 JP 317;

It is... of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute,

either clearly or by necessary implication rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Mr. Sorabjee is justified in referring as to these rules regarding presumption and construction and it may be pointed out that this Court has in : 1951 CriLJ768 approved of this passage in the judgment of Lord Du Pareq and the principle of construction underlying it. We, therefore, agree that absolute liability is not to be lightly presumed but has to be clearly established.

26. In Nathulal v. State of Madhya Pradesh : 1966 CriLJ71 . Hon'ble Mr. Justice Subba Rao for himself and for Hon'ble Mr. Bachawat, J. summed up the law in the following words:

The law on the subject is fairly well settled. It has come under judicial scrutiny of this court on many occasions. It does not call for a detailed discussion. It is enough to restate the principle. Mens rea is an essential ingredient of a criminal

offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof: see *Srinivas Mall v. King Emperor* ILR 26 Pat. 460 : AIR 1947 PC 135, *Hariprasada Rao v. State* : 1951 CriLJ768 ; and *Sarjoo Prasad v. State of Uttar Pradesh* : 1961 CriLJ747 . Most of the relevant English decisions on the subject were referred to in the judgment of this Court in *State of Maharashtra v. Mayer Hans George*, Cri. Appeal No. 218 of 1963, dated 24.8.1964; : [1965]1SCR123 . How to disprove mens rea has been succinctly stated in Halsbury's Laws of England, 3rd Edition, Col. 10 at p. 283, thus:

When the existence of a particular intent or state of mind is a necessary ingredient of the offence, and prima facie proof of the existence of the intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind, for example, by showing that he was justified in doing the act with which he is charged, or that he did it accidentally, or in ignorance, or that he had an honest belief in the existence of facts which, if they had really existed, would have made the act an innocent one. The existence of reasonable grounds for a belief is evidence of the honesty of that belief.

In the same judgment, Hon'ble Mr. Justice Shah made the following observations:

Definitions of diverse offences under the Indian Penal Code state with precision that a particular act or omission to be an offence must be done maliciously, dishonestly, fraudulently, intentionally, negligently or knowingly. Certain other

statutes prohibit acts and penalise contravention of the provisions without expressly stating that the contravention must be with a prescribed state of mind. But an intention to offend the penal provisions of a statute is normally implicit, however, comprehensive or unqualified the language of the statute may appear to be, unless an intention to the contrary is expressed or clearly implied, for the general rule is that a crime is not committed unless the contravener has mens rea. Normally full definition of every crime predicates a proposition expressly or by implication as to a state of mind; if the mental element of any conduct alleged to be a crime is absent in any given case, the crime so defined is not committed.

The Supreme Court held that the offence punishable under Section 7 of the Essential Commodities Act, 1945, by a dealer, requires mens rea as the dealer is a person who carries on business of purchase and sale foodgrains and for the contravention of a prohibition to be an offence, mens rea is, necessary condition.

27. Thus, it appears to be well established and for good reasons that mens rea is necessary ingredient of an offence, though, in a limited number of cases, and, in cases of minor offences, the common law rule may admit exceptions, if established either expressly or by necessary implication.

28. Ascertainment of general principle, is not the end of the exercise necessary for answering the question whether mens rea is a necessary ingredient of the offence under Section 40 of the Border Security Force Act. For the purpose of correctly ascertaining the intention of the legislature, the words used in the statute have to be construed. If the intention of the legislature is ascertained by this method, no further exercise would be necessary but if the intention of the legislature cannot be ascertained with precision and certainty, by construing the words used in the statute, it will be necessary to find out the intention of the legislature by 'necessary implication'. If the words used by the legislature, by putting a fair construction on them, indicate that mens rea is necessary for the offence, there would be no difficulty in coming to the conclusion that the common law rule is applicable and 'mens rea' is necessary for the offence. Even if the words used by the legislature, do not require mens rea for constituting offence, in view of the common law rule, a presumption may be drawn that mens rea is necessary for the offence. If this

presumption is to be rebutted, there must be either express words in the statute to exclude mens rea or it must be established that mens rea is excluded by necessary implication. The whole exercise necessary for ascertaining the intention of the legislature, in our humble opinion, consists of two steps which are separate and distinguishable. The first step is to find out whether the statute, expressly or by necessary implication, requires mens rea for the offence, if the answer be in the affirmative, no further exercise would be necessary. If the words used in the statute do not require mens rea for the offence, expressly or by necessary implication, the court may draw the presumption that mens rea is necessary for the offence, according to common law rule. Once the first step is taken and the presumption, as aforesaid, is drawn, the court may take the second step for finding out if the presumption drawn by it has been rebutted. The presumption may be rebutted either expressly or by necessary implication, but in either case, the rebuttal must be fully established and, if any doubt arises, the benefit of doubt must go to the accused because the observance of the common law rule, is necessary for the protection of personal liberty. A mere probability that the legislature might have intended to exclude mens rea, is not sufficient for establishing that mens rea is not necessary for the offence. Even if the object of the penal provisions is to promote social welfare or to eradicate a social evil of a serious nature, the presumption that mens rea is necessary for the offence cannot be held to have been rebutted unless rebuttal is fully established.

29. In view of the observations of the Lord Chief Justice of England in *Brend v. Wood* (supra), exclusion of mens rea and visiting a person with strict liability by imposition of a total prohibition, is likely to interfere with the liberty of the subject and, therefore, the exception to the common law rule must be fully established. Needless to say that it is as much necessary for the court to interpret/ascertain the law fairly as it is necessary for the legislature to make a law which is fair to the subject having regard to his right to life and personal liberty.

30. The drawback of the laws which do not require mens rea as an essential ingredient of the offence is that either, they impose an obligation to perform an act in a mechanical manner even when it is unnecessary or is harmful or they totally prohibit the commission of an act, which in some cases would be harmless and in

some other cases would be necessary to avoid a harm or to secure a benefit to the individual or to the society or to both. Besides, such laws, may induce, the tendency to avoid, the company as well as interaction with persons who may occasion the violation of law without the will and consent of the person or to shirk duties in discharge of which the offence may be committed, unintentionally, either due to inadvertence or due to mistake of fact or due to act of God or due to any factor over which the person has no control in the given set of circumstances in which the act or omission is committed. People may develop irrational fears and consequential dislike and hatred, for fear of being punished, as against persons or things or situations or one or more circumstances if any one or all of them have the potentiality to occasion violation of the prohibition even when it is unintended and due care and caution is taken to avoid it. The journey of mankind, through the corridors, of advancement in experience, knowledge and intellectual skills, in characterised by liberation from irrational fears and by acquisition of the ability to distinguish the circumstances, in which the act or omission, would be beneficial to the individual and to the society from those circumstances in which it would be harmful.

31. The task of finding out the differentia to distinguish the circumstances in which the same act or omission would produce good results and the circumstances in which it would produce bad results and to acquire ability to separate the former from the latter may be a difficult task put the confidence of man in his ability to regulate his activities by exercise of the faculty of will and to acquire necessary information as well as expertise in finding out the characteristic as well as the causes which produce similarities and differences and to be able to make proper choice and, conduct himself in the manner and to the extent expected of him, has resulted in his liberation from the irrational fears and enabled him to substitute the path of total rejection of any person, thing or action by adopting the path of partial rejection, which is necessarily relative to certain specified circumstances in which the particular act or omission causes evil consequences. The advantage of following this path is to be able to obtain the benefits of even those acts or omissions, which may be regarded as harmful and distribute this benefit to all the members of the society. This path may be described as the path of knowledge and of victory of man over his ignorance and irrational fears. It is characterised by the awareness

that evil does not lie in any person or human being or thing nor evil lies in any power, potential capability or the skill nor evil lies in any particular frame of circumstances but, in certain combination of circumstances in which a certain act may produce evil consequences and that if necessary changes are brought about in the frame of circumstances, it would be possible not only to avoid the evil consequences but to obtain benefits and mankind has assumed the responsibility of playing such a role, as may avoid the evil consequences and produce good results. Intention, knowledge, skills and proper action are necessary for avoiding the evil consequences and for securing good results and mankind has exercised the right to liberty in such a manner so as to develop the proper intention; acquire necessary information; obtain appropriate skills and perform the appropriate act (of commission or omission). The responsibility of man, thus, is restricted to developing the proper intention, to acquire necessary information, to obtain skills and efficiency and to take proper action, no matter what the circumstances are. The criterion for distinguishing an evil from the good may be the result or the consequence of an act or omission but the criterion for distinguishing good conduct from bad conduct is undoubtedly not the ultimate result of, the act or omission. The intention, the knowledge, the skills and capabilities as well as the particular act or omission of a mature human being are also relevant. So far as the intention is concerned, the presence of a proper intention which in the context of the offence means the intention not to violate the prohibitions imposed by law, has been recognised by the common law is a mitigating circumstance and, therefore, mens rea has been regarded as a necessary ingredient of the offence. Acquisition of necessary information, by taking necessary steps, leads to the inference that the person who committed the act neither deliberately avoided nor intended to avoid obtaining correct information, necessary for taking proper action. Acquisition of skills and efficiency necessary for taking proper action and the use thereof, leads to the conclusion that due care and caution was taken by the concerned person while performing the act in question and, lastly, the choice of act is guided by the consideration whether the object to be achieved is lawful and the act in question, intended to be used as means is lawful. According to common law rule if the object to be achieved as well the act in question are lawful, no further responsibility is to be imposed normally on the individual if the act done by him

produces any evil consequence. The very object of the substitution of limited prohibitions in place of total prohibitions is to make room for the exercise of discretion, by the human beings and to promote the exploration with a view to obtain the maximum advantage from all those things, situations and circumstances which a man is likely to encounter. It is not as if the adoption of this policy of imposing limited prohibitions, in place of total prohibitions, is absolutely successful in prevention of undesirable consequences. In fact, it is possible to conceive that in spite of the best intention and all possible efforts to acquire the necessary information, skills, efficiency, the act may result in unpleasant consequence, on account of anything which may not be foreseen or which may not be subject to full control of the concerned person but the optimism that perfection may be achieved, if not absolutely, at least to the near perfection degree, and the avoidance of the undesirable consequence would be possible by this method, appears to have been the cause for not resorting to the policy of imposing total prohibitions. So far as the faculty of will is concerned, perfection has been attempted by developing, devotion and dedication so as to rule out the possibility of an intention other than the intention to accomplish what is permitted by law. Perfection in the matter of acquisition of information necessary for taking a right action has been attempted by observations, experiments, discoveries, research and use of most reliable and valid methods of collecting information and drawing inferences. Perfection in development of skills and efficiency has been attempted by mankind by adoption of training, schooling and exercises in the right directions in the manner which has been found to be most suitable for the development of skills and efficiency under the guidance of the best instructors, and, if necessary, by use of most sophisticated instruments and appliances invented by man. The proper performance of the act which may have a direct nexus with the lawful object and which may not permit the unlawful consequences to occur is attempted to be perfected not only by mere sermonizing what is good but by developing in men and women, all those mental and bodily faculties which are necessary for a proper action and assistance is made available to men and women by the rest of the society, not only by providing them necessary guidance but also by providing them a complex set of circumstances, including ideals, values, norms of conduct so that proper action may be taken by them. The human fraternity, of which the man is a

member, by its, bonds of fraternity, produces mutuality and mutuality of interaction not only provides assistance, it also exercises control over the activities of man and woman. The path of perfection, though complex and tiresome, is necessary for the purpose of protecting the liberties of men and women and for enabling them to obtain maximum advantage and to avoid harm to them as well as to their fellow beings by taking appropriate action while encountering the large number of complex set of circumstances. The human society which has been evolved, because of above reasons, depends for its welfare and progress on the proper development, training and proper conduct by men and women, who are its members so that, by imposing the least possible restrictions on the liberties of the man, maximum advantage may be obtained. The object to avoid undesirable consequence has not been given up. The necessity of such means as may avoid the occurrence of an undesirable thing has also not been given up. Only the means have been changed. In place of imposition of total prohibitions, the policy of imposing limited prohibitions has been adopted and in order to make it predictable that the imposition of limited prohibitions will be equally effective in avoiding the evil consequences, emphasis is laid on development of the proper intention; acquisition of sufficient information, development of required degree of efficiency and skills and performance of right actions, in accordance with the test of judgment arrived at by the man in the given set of circumstances.

32. Perfection, as mentioned above, in the matter of intention, knowledge, skills, efficiency and the exercise of discretion is absolutely necessary for ensuring the high degree of predictability which is necessary for avoidance of evil consequences likely to arise from an act or omission. The price of liberties of men and women is, therefore, required to be paid in terms of the development necessary for effective implementation of the policy of limited control and perpetual vigilance; a constant desire to do the right action, is also indispensable. The faith in the mental and physical capabilities of men and women inspires confidence that they are capable of taking the right action and, their commitment, to such values, ideals and objects, as is necessary for a proper intention, inspires the confidence that they will not intend anything which is contrary to law and a perpetual desire on their part to guide every action by the faculty of their volition which, in turn, must be guided by that judgment of what is proper and what is

improper, inspires the confidence that they would not do anything which is impermissible or likely to produce an undesirable result and such confidence is further fortified by declaration of the objects which are lawful and distinguish them from those which are unlawful and also make a distinction between lawful means and unlawful means. It is this confidence in the capabilities of men and women which is at the root of mutual faith, unity and cooperation while interacting with one another, not only at a distance but at the closest quarters. The policy of imposing limited control has, therefore, been found to be preferable to the policy of imposition of total prohibitions.

33. Because of above reasons, though the standards for judging the desirability or undesirability of the consequences of an act have not changed, the standards for judging the responsibility of a man for his act or omission have been altered and, whereas in the case of total prohibitions of an act or omission, he is made responsible for the act even when, he did not intend it, nor acted with any negligence or rashness and is merely the victim of circumstances beyond his control. In the case of imposition of limited prohibitions, a person can be made responsible for the evil consequences arising from his act, when he is at fault in acting as a responsible human being and such fault may be found if he did not possess the proper intention or he neglected to collect proper information or he acted negligently or rashly or he guided his action by a judgment which no prudent man would take in the particular circumstances in which the act was done. If no fault can be found with the intention and the mental and physical action which he performed as a human being, the common law considers it undesirable for the preservation and growth of humanity that he should be punished because the fault does not lie with him, it lies with something else which was not in his control. This explains why the common law rule, that unless an act or omission is backed by an evil intention or the act has been committed rashly or negligently or it is the consequence of a perverse judgment which could have been avoided, no person should be convicted for an offence, is considered necessary for the protection of lives and liberties of the people and exception to the rule must be absolutely established, for, every exception to the rule, would have some undesirable consequences which may be injurious to the individual and the society and, as pointed out by their Lordships of the Judicial Committee and the Apex Court, the

cases in which the policy of total prohibitions and imposition of strict liability may be applied must be few and relating to the minor offences.

34. The prohibitions imposed by penal provisions, may be directed against (a) specified acts or omissions or (b) specified results of consequences arising from any act or omission or (c) specified object or against one or more objects. Where the penal law specifies the acts or omissions which are intended to be prohibited, the intention of the legislature to prohibit such specified acts or omissions may be easily ascertained and, in these cases, the question may arise whether mens rea has been excluded by the legislature, expressly or by necessary implication. But when the penal law does not specify any act or omission and imposes prohibition either on the result/consequence of any act or omission or on the objects which may be attempted by any act or omission, there does not arise any question of exclusion of mens rea. Because in such cases, no act or omission is specifically prohibited and, therefore, the citizens cannot be said to be at fault if they attempt to perform such act or omission as they think fit. In fact, total avoidance of all acts and omissions is impossible for a living man. To demand from the citizens that even when the law does not specifically prohibit any act or omission, they should avoid performing all acts and omissions, would be grossly unfair and unreasonably restrictive of their liberties. It would be, unfair to the legislature to hold that even when the legislature does not absolutely prohibit any act or omission, it should be deemed that the legislature has prohibited all the acts and omissions capable of being performed by the citizens. What the legislature in such cases does is to prohibit the causing of specified result/consequences of the act or certain objects and, therefore, it is for the citizen to consider and find out which acts or omissions would occasion the violation of the prohibition imposed by law. If specified objects are prohibited by law, the citizen would be guilty only when he performs any act of omission or commission for the purpose of obtaining prohibited object but not otherwise. In such cases, the intention behind the act would be absolutely necessary for distinguishing acts not amounting to offence and, acts amounting to offence. If the penal provisions prohibit the causing of a specified result or consequence, of any act or omission, the citizen would be fully justified in performing any act of commission or omission, in such a manner that prohibited result or consequence does not occur and, in these cases, the intention of the

citizen as well as the steps taken by him to avoid the occurrence of the prohibited result or consequence, would be relevant for making a distinction between the acts not amounting to offence and the acts amounting to offence.

35. To sum up. mens rea may be excluded only in those cases in which specified acts or omissions are prohibited by law. If the legislature has not specifically prohibited any act or omission and the prohibition imposed by it is directed against the specified results/consequences arising from an act or omission or against a specified object, mens rea cannot be excluded because no act or omission can be said to have been prohibited by law and in order to give effect to the prohibition imposed by law. the citizen has to make use of the faculty of his will as well as judgment based on knowledge and to make a distinction which acts or omissions would contravene the prohibition imposed by law and which acts of omissions would not contravene the prohibitions imposed by law. If the prohibition is directed against certain specified objects, no offence would be constituted unless it is proved that the intention behind any act or omission was to obtain the prohibited object and, thus, mens rea would be necessary. If the prohibition is directed against the results/consequences of an act or omission, no offence would be constituted unless it is proved that there was intention to cause the prohibited result or consequence to occur or that he was culpably negligent by not taking proper steps for successfully avoiding the prohibited result or consequence. Thus, there is an intelligible distinction between the penal provisions which prohibit performance of specified acts and omissions and the penal provisions which do not prohibit any specified act or omission and impose prohibition against specified results or consequences of the act or against specified objects and, whereas the laws of the former category, may exclude mens rea, expressly or by necessary implication, and a question may arise whether such laws exclude mens rea but, in the case of penal laws of second category, the question whether mens rea has been excluded does not arise because there is no prohibition against any specified act or omission and to obey the command of law, the citizen will necessarily have to employ his faculty of intention, knowledge and action for avoiding the violation of the prohibition. In other words, in the case of laws of second category, mens rea would be an essential ingredient of the offence, though the nature of mens rea may be guilty intention, or knowledge or negligence.

36. In *Nathulal v. State of Madhya Pradesh* : 1966 CriLJ71 , the Supreme Court considered the question whether mens rea is necessary ingredient for an offence punishable under Section 7 of the Essential Commodities Act and held that mens rea was necessary.

37. By Section 7 of the Essential Commodities Act, punishment is prescribed for (1) contravention of any order made under Section 3; (2) failure to comply with the direction given under Clause (b) of Sub-section (4) of Section 3. By necessary implication, Section 7 prohibits the contravention of an order passed under Section 3 and prohibits disobedience of a direction given under Clause (b) of Sub-section (4) of Section 3 of the Act. Section 7 does not by itself specify the acts or omissions which are prohibited by it. The contravention of the prohibition of Section 7 necessary depends on the issuance of an order under Section 7 or the issuance of a direction under Clause (b) of Sub-section (4) of Section 7 as the case may be and, contravention of an order passed under Section 7 or of a direction given under Clause (b) of Sub-section (4) of Section 7. It is obvious that in order to avoid the commission of offence punishable under Section 7 of the Essential Commodities Act, the citizen will have to apply mind to the order or the direction given to him and to find out, by what act or omission he can avoid committing the offence. This would necessarily require him to employ the faculties of intention, knowledge and action and, therefore, for the offence punishable under Section 7 of the Essential Commodities Act, mens rea cannot be excluded. The decision given by the Supreme Court in *Nathu Lal v. State of Madhya Pradesh* (supra) thus supports the view taken by us.

38. In *Ravula Hariprasada Rao v. The State* : 1951 CriLJ768 , the Supreme Court considered whether offence punishable under Rule 81 of the Defence of India Rules requires punishment. In that case the appellant was a licensee of two petrol filling stations at Guntur but he was a resident of Chirala which was 40 miles away. On the petrol filling stations employees had been appointed who were incharge of the petrol filling station. The appellant as well as his employees were tried on the following charges: (1) on 27.6.1945, petrol was supplied to three cars without taking coupons, in contravention of Clause 22 read with Clause 5 of the Motor Spirit Rationing Order, 1941 promulgated under Rule 81(2) of the Defence of India

Rules, (2) that on the same day and at the same place, they accepted coupons relating to two other cars in advance without supplying petrol, in contravention of Clause 27 of the Order. In another criminal case, the charges against the appellant and his employees were that in the second petrol filling pump, on 27.6.1945, petrol was supplied to four motor vehicles without taking coupons, in contravention of Clause 22 read with Clause 5 and they accepted coupons of three other vehicles in advance without issuing petrol in contravention of Clause 27 and that they supplied petrol to two other vehicles against coupons but without making necessary endorsements and particulars on the reverse of the coupons, infringing thereby Clause 27A of the said Order. The appellant and his employees were convicted and sentenced. The plea of the appellant was that his employees were incharge of the petrol filling station and the alleged offences were committed by his employees without his knowledge. Clause 22 read with Clause 5 of the Motor Spirit Rationing Order, 1941 impose prohibition against supply of petrol otherwise than in accordance with the provisions contained in the order. The Supreme Court held that only the person who furnishes motor spirit contrary to the provisions of the Order will be affected by the contravention. Mens rea was, therefore, held to be necessary for the first two charges, viz., the charge of supplying petrol without taking coupons and taking coupons in advance without supplying petrol. Regarding the third charge in second case, the Supreme Court upheld the conviction. The reasons were indicated in the following lines:

Clause 27A, as we have already seen throws the responsibility for making the necessary endorsement on the supplier. The definition of the word 'supplier' in the Act has already been quoted and there can be no doubt that if Clause 27 A is contravened, a person who comes without the definition of the word 'supplier' must be held guilty of the contravention. The object of this clause clearly is that the supplier of petrol should set up a complete machinery to ensure that the necessary endorsements are made on the coupons against which petrol is supplied. It is conceivable that in many cases the default will be committed by the servant of the supplier, who are incharge of the petrol pump, but that fact by itself will not exonerate the supplier from liability.

39. It is apparent from the above observations, that conviction on the third charge was upheld because in terms of the language used in Clause 27A, their Lordships of the Supreme Court held that the object of the statute was that the supply of the petrol should set up a complete machinery to ensure that the necessary endorsement were made on the coupons against which petrol was supplied. Since no such machinery had been set up and the machinery set up by the appellant was not adequate to comply with Clause 27A, the conviction was upheld. The negligence on the part of the supply of petrol, to set up an adequate machinery in accordance with Clause 27A was the reason for upholding the conviction. The view taken by the Supreme Court, in the above mentioned case, supports the view taken by us.

40. In *State of Maharashtra v. Mayer Hans George* : [1965]1SCR123 , their Lordships considered the question whether mens rea was necessary for an offence under Section 8(1) and Section 23(l-a) of the Foreign Exchange Regulation Act, 1947. In that case, the respondent, boarded the Swiss plane at Zurich on November 27, 1962, which touched Santa Cruz Airport at 6.05 a.m. on the next day. The Customs Officers, on the basis of previous information, searched for the respondent and found him sitting in the plane. On a search of the person of the respondent it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing approximately 34 kilos. It was also found that the respondent was a passenger bound for Manila. There was a general permission of a person to bring or send gold into India, if it was on through transit to a place outside the territory of India, after November 24, 1962. But from that date, it could not be done except on the condition that it was declared in the 'manifest' for transit as 'same bottom cargo' or 'transshipment cargo'. The respondent was prosecuted for importing gold into India under Section 8(1) of the Act read with Section 23 thereof and under Section 167(8)(i) of the Sea Customs Act. He was convicted and sentenced by the Magistrate. On appeal, the High Court of Bombay held that the relevant notification issued by the Central Government did not apply to a person carrying gold with on his body, that even if it applied, the mens rea being a necessary ingredient of the offence, the respondent who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and,

therefore, he did not commit any offence. The respondent was acquitted of the charges made against him. Against the order of acquittal, the State filed the appeal before the Supreme Court. The Supreme Court held that mens rea, in the sense of actual knowledge that the act which is contrary to law is not an essential ingredient under Section 8(1) read with Section 23(1-A) of the Foreign Exchange Regulation Act, 1947.

41. The crucial point to be decided in the case was whether the respondent could not be convicted because he did not know that bringing gold on his person amounts to an offence. It is well established that ignorance of law is no excuse. Ignorantia facti excusat-Ignorantia Juris non excusat (ignorance of fact excuses-ignorance of the law does not excuse) is a well established maxim and an order issued by the competent authority, in exercise of statutory power conferred on it, amounts to law. The ignorance on the part, of the respondent, who was coming to India from the foreign country, was not sufficient to save him from punishment on the ground that mens rea was necessary. In the above maxim, the terms 'fact' obviously does not include the existence of a law in force. Therefore, ignorance of law cannot be regarded as ignorance of fact for the purpose of protecting offenders from punishment.

42. To come to the case in hand, the submission of the learned Counsel for the appellant is that mens rea is a necessary ingredient of the offence under Section 40 of the Border Security Force Act, 1968. Section 40 reads:

40. Violation of good order and discipline-Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline of the Force shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

43. A bare reading of this section shows that this section does not refer to any specific act or omission and, therefore, it is proper to hold that this section, does not impose any prohibition against any act or omission. The prohibition imposed by this section is in respect of certain result arising from any act or omission. The prohibition imposed by this section is in respect of, certain result arising from any

act or omission. The result is 'prejudice' to 'good order and discipline of the Force. Since the section does not specifically prohibit any act or omission and prohibits only specified result of an act or omission, it is proper to hold that no question of excluding mens rea can exercise. This section cannot be interpreted so as to mean that a member of the force must avoid all acts of omission and commission, for fear of punishment under this section. A total prohibition of all acts and omissions cannot be inferred, because total prohibition of acts and omissions, would seriously interfere with the lives and liberties of the members of the Force and would also interfere with discipline as well as proper functioning by the members of the Force. Total prohibition of all acts and omissions, can neither be imposed nor it can be inferred that it would be impracticable and seriously interfere with the lives, liberties and functioning of the individual and of the groups.

44. The object of Section 40 of the BSF Act is to save the good order and discipline of the Force. 'Good order and discipline of the Force' which are intended to be protected by provisions of Section 40, themselves require a variety of acts and omissions on the part of the members of the Force. Where statute itself requires that the citizen should perform acts of commission or omission for due discharge of his responsibilities and proper performance of his duties, it cannot be inferred that the statute by necessary implication intends to impose total prohibition on any act or omission. Therefore, having regard to the object of Section 40, a total prohibition of all acts and omissions cannot be inferred. The language of Section 40, further makes it clear that in order an offence in this section may be committed, the concerned person of the Force must be 'guilty, of any act or omission'. The use of word 'guilty', in Section 40, clearly shows that an innocent act on the part of members of the Force cannot attract penalty provided by this Section. In other words, it is not sufficient for the purpose of proving an offence under Section 40, to prove that the member of the Force has committed an act or omission which has resulted in causing good order and discipline of the Force. It is further necessary to prove that a member of the Force committed the act or omission in question in such a manner as may be sufficient to call him guilty. The expression 'guilty' implies violation of a duty imposed on the person. Such violation may occur either when there is an intention not to do the duty or to do anything contrary to it or to do anything which a person knows is likely to result in

violation of duty or to avoid taking due care and caution so as to ensure that by his act or omission, he does not violate the duty imposed on him. Therefore, the use of the word 'guilty' in Section 40 suggests that mens rea is necessary for the offence under this section. This conclusion is further supported by the language used in Sections 14 to 39 and 41 to 46 of the BSF Act and mens rea has not been excluded. Legal provisions creating strict liability, by imposition of total restrictions, may make person liable to punishment under the law but they do not necessarily make a person 'guilty of such offences' because such laws, punish not only those who acted with a guilty mind, those persons are also punished who are innocent in the sense that they did not possess any guilty intention. We, therefore, hold that the words used in Section 40 of the BSF Act indicate that mens rea is necessary for the offence under this section and that there is no ground to infer that mens rea has been excluded expressly or by necessary implication. Thus question is decided accordingly.

45. The next question to be decided in this appeal is whether the charge under Section 40 of the BSF Act has been brought home to the appellant.

46. In *State of Maharashtra v. Mayer Hans George* : [1965]1SCR123 , at page 732, the Supreme Court has pointed out that the nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

47. The very object of the penal laws is to regulate the conduct of human beings by imposing prohibition, violation of which is charged as an offence and is made punishable. The presumption of law is that by imposition of prohibition and prescribing punishment for violation thereof, the conduct of the human beings can be regulated. The process of regulating the human conduct, requires some act or omission on the part of the person whose conduct is to be regulated by law and, therefore, it is the person whose conduct is sought to be regulated by law, who has to guide his acts and omissions in such a manner that the law may be complied with. The first thing necessary for such person is to possess an intention which has two facets, the first is to obey the command of law and the second is not to commit the breach of law. It is also necessary for such person to ensure that

by his act or omission he does not commit the breach of law and, therefore, it is necessary for him to acquire sufficient information, so as to be able to know the nature and consequences of his act in the given set of circumstances. If he knows that natural and inevitable act was consequence of his omission would be the violation of law, and yet he indulges in that act or omission and does not take any step to avoid the violation of law, he deserves to be held responsible for the consequences because of the knowledge of the nature and consequences of his act and omission to take necessary action for avoidance of the consequences of his act. If he does not avoid collecting necessary information and does not neglect collecting such information about the nature and consequences of his act and performs the act without the knowledge that the nature and consequences of act or omission would be the violation of law, he may not be responsible for the consequences. If he avoids or neglects collecting necessary information so as to be able to know the nature and consequences of his act or he neglects taking necessary steps for avoiding the evil consequences of his act or omission, he may be held guilty for acting negligently. If the fault is only this that he did not take proper action for avoiding undesirable consequences, he may be guilty of rashness.

48. For the reasons mentioned above it is necessary that proper skill and efficiency should be obtained in order to give effect to the intention to take the right action in the matter, in view of the given circumstances of the case. The very object of acquiring necessary skill and efficiency, is not only to succeed in doing what is intended. An other object behind acquiring of efficiency and skill is to successfully avoid all those harmful acts and omissions, which are prohibited by law. This explains why excessive use of power in matters requiring skill and efficiency, is impermissible because excessive use of power of any other kind of potential, is likely to produce undesirable results by causing harm or any kind of loss or by offending any person unnecessarily. Required degree of moderation in the use of power in any form is a basic characteristic of proper degree of skill and efficiency required for doing an act and, the skill and efficiency is necessary not only at the time of operating a machine, it is equally necessary, when interacting with other human beings. It is also necessary for communication of information, expression of views. Adherence to truth, is necessary because one who would

adhere to truth, would do his best to avoid exaggerations, false accusations, illicit generalisations and like vices, which occur on account of lack of moderation in exercise of the power of imagination and the power of speech. Improper use of power of imagination and the power of speech by indulging in acts of illicit generalisations, practice of falsehood by committing acts amounting to 'suppression veri' or 'suggestio falsi' or exaggerating any thing beyond the legitimate limits and: complete or partial omission to take into consideration the consequences which may arise from illicit generalisations; omissions of material facts, false suggestions. exaggerations etc. denote the improper use of skill and efficiency in the matter of expressing one's views and communicating information and, such acts are also index of a character which is irresponsible and immoderate and likely to offend and cause serious damage to all that humanity has created by constructing the bonds of fraternity on which the superstructure of human interaction is based.

49. Viewed in this light, consequences of an act or omission, as referred in Section 40 of the Border Security Act, will have to be considered in the totality of the circumstances, keeping in view the unwritten norms of conduct, which every member of the Border Security Force is bound to obey in order to maintain the unity, fraternity, mutual confidence as well as morale and the self-esteem dignity, good order and discipline of every member of the Force. The world in which human being has to live and act has innumerable dimensions of consequences and his acts and omissions, are manifested in more dimensions than one and though the frame of circumstances in which the human conduct takes place, is complex, the complexity is neither unintelligible nor beyond the power of understanding of man because every man who has to conduct himself has to necessarily take into consideration the whole of the frame, in which he has to act, in presence of a variety of circumstances and not only make observations but to further indulge in exercise of assessment and choice of proper act or omission if the choice is correct and proper, the particular act or omission may not be held culpable even if it does not produce the desired result or produces some undesirable results. If the process by which the choice of action which a man is required to perform in the given set of circumstances, is improper, and act in question is performed without due observance of all the norms of conduct which

are required to be observed, culpability will have to be assessed by enquiring into intention, knowledge, negligence or rashness as may be relevant. Every man and woman, in our society, is required to observe an unwritten code of conduct, the ultimate object of which is to be able to perform the proper action in every matter. It is not necessary for the legislature to give catalogues of norms of conduct. It is sufficient, in our opinion, to emphasise the importance of strictly following the norms of conduct and to enforce them either by prescribing punishment, as has been done under Section 40 of the Border Security Act or by offering reward. The view, that unless legislature gives a catalogue of norms of conduct, the citizen has no duty to observe the norms of conduct, is fallacious. The responsibility as well as the duty to observe any norm of conduct, may be imposed by the legislature by pointing out the objects or the consequences of acts/omissions without giving list of the norms of conduct and, in such cases, it is duty of every man and woman to find out what would be the proper act, no matter how difficult it may be to find out the acts which are required to be performed. What is expected from a person in such case is that he will possess the proper intention and avoid improper intention and that he will take all possible steps to collect necessary information regarding all relevant matters and that he will process such information, with a view to find out, accurately, what he is required to do and to take a proper decision in the matter before him and, before the decision is implemented, to acquire a satisfactory degree of skill and efficiency and, thereafter, to strive for a lawful object by employment of lawful means. If in spite of taking these necessary steps, an undesirable result occurs. His act/omission may not be held culpable but if he falters in the matter of taking above mentioned steps or any one of them, he will have to be held responsible for the undesirable result in accordance with law.

50. In the instant case, after reading carefully the communications addressed by the appellant to his senior authorities, we are convinced that by writing these letters, the appellant has imperilled good order and discipline of the Force and that he has done so with the required mens rea viz. such guilty intention, knowledge, negligence as well as rashness as is necessary to constitute an offence under Section 40 of the Border Security Force Act.

51. The first charge against the appellant is in respect of the following observations made by him in his letter:

If it is quite surprising for me that IPS Officers who are providing corrupt leadership to Border Security Force looking after their own welfare and not the welfare of the officers and the men.

52. A bare reading of these observations shows that the appellant, while making these observations, committed both, (a) omissions amounting to 'suppressio veri' and (b) false accusation by committing acts amounting to 'suggestio falsi' and he has deliberately omitted to give the names of those officers who are entitled to be regarded as good officers. Therefore, the omission to give the names of the good officers while making sweeping observations against all IPS Officers, amounts to suppression of material fact relating to the Border Security Force. The observations which are subject matter of charge No. 1 further show that the appellant indulged in illicit generalisations by making sweeping generalisations against all the IPS Officers of the Border Security. While making these observations he was not performing such exercises in statistics as could have authorised him to make generalisations against all the officers. He was a responsible officer of the Border Security Force and was making observations in respect of officers of the Force and the subject matter of his observations/allegations was equally important and, therefore, it was necessary for him not to indulge in any kind of illicit generalisation and to strictly adhere to truth and to take care that no false accusation is levelled by him while making observations in question. Illicit generalisation is impermissible, except while in dealing with any data statistically. We are convinced that by indulging in illicit generalisation, the appellant adopted the easy path of making sweeping generalisation against all the IPS Officers of the Force and thereby made false accusations against them. It is inconceivable that every officer of the Border Security Force is so degraded, as has been pointed out by the appellant and it is equally inconceivable that the officers of the Force are so degraded that all the acts and omissions committed by them are corrupt, illegal and bad. Even the worst person, commits several good deeds and to ignore them for the purpose of condemning him, does amount to 'suggestio falsi'. The language used by the

appellant is immoderate, full of sweeping generalisation, prima facie untrue and indicative of not only utter disregard for good order and discipline of the Force as well as to the dignity of other officers of the Force and it also suggests such amount of callousness and irresponsibility as may be generally regarded as base, depraved and liable to be branded as misconduct. It is well established that ends do not justify the means. Even if the ultimate object of the appellant was to point out some defects, whether real or imaginary in the conduct of the senior officers, the means which he adopted were impermissible and improper because of (a) omissions amounting to 'suppressio veri' and (b) false allegations amounting to 'suggestio falsi' (c) use of the technique of illicit generalisations, (d) immoderation and (e) no respect for truth.

53. The learned Counsel for the appellant has submitted that the act of writing letters to the senior authorities, is not prejudicial in any manner to good order or discipline of the Force. This submission has no force at all. The Border Security Force, is a Force, the members of which, must be united by such bonds of unity and human fraternity as are necessary for keeping all the members of the Force united, without any element of hostility as against one another and in such a way that they may share the desire to fulfill the object for which the Force has been created. The expression 'good order' used in Section 40 of the Border Security Force Act in our humble opinion, conveys the idea of such bonds of unity and fraternity among all members of the Force as are necessary for uniting them and producing the maximum possible coordination and cooperation by living and acting as members of the Force, without any element of hostility and reposing their faith, not only in the ideals and objects for which Border Security Force has been created but also in the objects and ideals of the humanity, of which Border Security Force is a small part. The expression 'good order' used in Section 40 of the Border Security Force Act, therefore, conveys the same idea which is conveyed by 'unity' amongst members of an unit united by bonds of human fraternity. One of the basic characteristics of such fraternity is total absence of the element of hostility, because hostility even of the slightest degree destroys unity, fraternity and the good order of every human unit. As soon as any person develops any element of hostility and assumes any role which if played, would amount to a hostile act, the conduct immediately becomes detrimental and

prejudicial to good order of the human unit. It would, therefore, be a prejudicial act if any hostile attitude is developed by any member of the Force against fellow members or against the officers. The hostility manifests itself by adoption of unjust ways of dealing with others. When the material information is suppressed and false accusations are made in such a manner as to cast reflection on the integrity and conduct of other members of the Force, in an unjust manner by use of untruth in any form, the whole conduct cannot be branded any thing else except a hostile act and such hostile act on the part of any member of the Force must be regarded as prejudicial to the good order of the Force. The term 'discipline' used in Section 40 of the Border Security Act includes good order as well as the conduct befitting the rank, status and responsibilities of the members of the Force. The necessity of creating and maintaining good order as well as the necessity of maintaining discipline, no doubt curtails the liberties of the members of the Force to a certain extent but the curtailment must be held to be a reasonable restriction of their liberties because reasonable curtailment of the personal liberties of the members of the Force is absolutely necessary for the purpose of creating the bonds of fraternity, trust and unity which are absolutely necessary for organising the Force as an unit of public servants dedicated to the cause allotted to the Force. Since no element of hostility is permissible in any unit of human society, which is created by forging bonds of unity and fraternity. The term 'discipline' signifies both, the extent to which a particular act or omission may be indulged in and the condition necessary for the purpose of indulging in any act or omission. Imposition of some restrictions is therefore, absolutely necessary and the observance of these restrictions, is known as 'discipline'. The submission that the object of the appellant was merely to object the mal-practice and corruptions prevailing in the Force, does not appeal to reason. If the appellant, in fact, was in possession of any true information about the involvement of any member or officer of the Force in any corrupt activity nothing prevented him from disclosing the source of his information and the particular information which he had received against one or more members of the officers of the Force. In the letters which he had written, the source of information is conspicuous by its absence. The appellant did not mention in the letter whether he had any personal knowledge about the involvement of any officer or member of the Force in any corrupt or unlawful act nor he disclosed the

names and addresses of the persons from whom he had collected any information. Non-disclosure on the part of the appellant of the source of his information, itself indicates, that the allegations were more, a product of his own imagination than the conclusion drawn from the information obtained from any reliable source. In any case the non-disclosure of the source of information clearly shows that the object of the appellant was not to enable the senior authorities to conduct enquiry in the matter but to tarnish the image, character and reputation of the members and officers of the Force. The appellant did not give the particulars of those acts or omissions which in his opinion, manifested the involvement of any officer or member of the Force in any corrupt or unlawful activity. Deliberate omission on the part of the appellant to give the particulars of the acts and omissions, of any officer or member of the Force, with date and time of commission of the alleged acts, further shows that he had no intention to enable the senior authorities to take any action in the matter as his object was merely to tarnish the image of the members and officers of the Force. In the letters, the appellant has not given the names of those officers and members of the Force who had indulged in corrupt or unlawful activities. If the appellant, in fact, intended that some concrete action should be taken against the offenders and if he knew who the offenders were, it was necessary for him to give the names of the offenders against whom the allegations were made. Any person who by such acts amounting to suppression of material facts, makes allegations against any person or persons, must be treated as indulging in a hostile act, because suppression of material fact, is the characteristic of the hostile action of those persons, who are not bound by any bond of unity and fraternity and are hostile to the persons against whom any action is taken by them. It is common knowledge that character assassination by suppressing of material fact and by making false allegation, is against the principle of natural justice and is a hostile act and such act is inevitably prejudicial to the good order and discipline of every human unit including the Border Security Force. We, therefore, find no force the submission that the act of writing the letters in question was not prejudicial to good order and discipline of the Force.

54. Having come to the conclusion that the act of writing the letters in questions, does amount to an act which was prejudicial to good order and discipline of the

Border Security Force, We deem it fit to deal with the evidence necessary to prove beyond reasonable doubt that mens rea, which in view of the reasons given above, is a necessary ingredient of the offence punishable under Section 40 of the Border Security Force Act. It is true that the burden to prove the ingredients of an offence lies on the prosecution and that this burden never shifts. The prosecution can discharge the burden by producing direct as well as circumstantial evidence or by both. The expression 'direct evidence', no doubt conveys the idea of documentary evidence or oral evidence Of those who have personal knowledge about the fact in question but the expression 'circumstantial evidence' is wide enough to include all those circumstances which may be relevant for the purpose of arriving at a conclusion regarding the fact in dispute. The conduct of an accused person, is a relevant fact and the circumstances in which the offence is committed are relevant. The act committed by a person is itself a very important circumstance and the maxim '*res ipsa loquitur*' (the thing speaks for itself) is applicable to all those acts and omissions, which by themselves are indicative of rashness, negligence, knowledge or intention. If the act committed by the accused, apparently shows that he acted in a rash or neglect manner, further question arises whether the appellant's rashness or negligence was accompanied by knowledge consequences. Every person is supposed to know the nature and consequences of his act or omission, if such nature and consequences of the act or omission occur in ordinary course of nature, knowledge about the nature as well as consequences of act may be presumed by the court or the Tribunal if such conclusion is warranted in the facts and circumstances of the case and in the case of an act or omission, which cannot occur unless the accused intended them, if it is shown that the act was neither accidental nor caused by anything on which the accused had no control, it may be inferred that the accused did such act intentionally.

55. Every member of the Force is required to conduct himself in a responsible manner which means that before he makes an allegations against others, he must take steps to collect information from reliable source and should take pains to arrive at the truth of the matter and, in case, he is permitted to inform the senior authorities about the matter which has come to his knowledge, he must submit the whole of the information, with a view to promote the cause of good order and

discipline and then leave it to the competent authorities to take such action as they deem fit. He cannot make any allegation, unless he has ground to believe that the allegations are true and such belief is based either on the personal knowledge or on information which has been collected from reliable sources and whatever is alleged must be absolutely true without committing an act of 'suppressio veri' or 'suggestio falsi' against any person.

56. In the instant case, the appellant, has not disclosed the source of his information nor he has disclosed the particulars acts or omissions which, according to him amount to corrupt and illegal act. He has also not given the names and designations of the members and officers of the Force, who indulge in any corrupt or illegal act and yet he has made sweeping allegations against the senior officers of the Force imputing to them lack of integrity and corruption as well as several vices. The conduct of the appellant is, therefore, sufficient evidence of negligence and rashness committed by him by not collecting necessary information about the allegations which he made and no investigation or enquiry could be conducted by any person in respect of the allegations made by him. In the facts and circumstances of the case, it must be inferred that the appellant knew the nature and consequences of his acts and omissions and, therefore it can be inferred that he wrote the letters in question with full knowledge that the allegations made in these letters will tarnish the reputation and image of all the officers and would seriously damage their self-esteem and dignity and would cause serious prejudice to the good order and discipline of the Force.

57. When any allegation is made against a member of any unit of human beings, without disclosing the name of the persons against whom the allegation is made, suspicions are aroused against all the members of that unit and these suspicions are prejudicial to the good order and discipline of the whole unit. It is, therefore, necessary that if allegations are intended to be made against one or more persons belonging to any human unit, the allegations should be restricted to the person or persons named by the complainant, if he knows the name of such persons. Withholding the information about the identity of the offenders, seriously damages the good order of the human unit. Similarly, one or more acts of commission or omission of any person are intended to be characterised as bad by making

allegations against him, sufficient particulars of such acts or omissions must be given so that the criticism may not suffer from the vice of extra venge. The act of making allegations, against a person without pointing out the particular act or omission in respect of which the allegations are made, does amount to condemning that person in place of condemning his act of omission and commission. Against such allegations no one can offer any defence even if he is completely innocent and such allegations cannot be proved in any court of law because unless the time, place and circumstances are disclosed no one can give any relevant evidence about the commission of any offence or misconduct. Making allegations against any person without giving the particular of his act or omission relating to such allegations, is highly unfair to such person and it destroys the good order of the human unit to which the victim of the allegations belongs.

58. The appellant had no right in law or otherwise to exercise his liberties in such a manner as to condemn each and every member of the Force by making allegations, which on the face of record are baseless and vague and possess sufficient potential to destroy the good order and discipline of the Force. We, therefore, have no hesitation in coming to the conclusion that knowledge of the nature and consequences of these acts must be attributed to the appellant and, in the circumstances of the case, it must be inferred that the appellant possessed the mens rea necessary for the offence under Section 40 of the Border Security Force Act. In the case of offences which are defined by the legislature by pointing out the consequences of act or omission but without specifying any act or omission, the mens rea necessary for constituting the offence, may be in the form of intention to cause the prohibited consequence to occur or it may be in the nature of knowledge that if a particular act or omission is performed, the prohibited consequences will occur according to the ordinary course of nature or the human conduct or the rules applicable to the case or it may be in the form of such negligence or rashness as is culpable, according to well established norms of conduct applicable to the accused, in the given set of circumstances in which he committed the offence. We, therefore, hold that, in the instant case, the presence of mens rea has been established and no fault can be found with the verdict of guilty pronounced by the court which tried him.

CONTENTION (III)

59. We have dealt with this contention while dealing with the contention of malafide against Shri Kan Singh. The petitioner being an officer, Rule 46 of the Rules is not attracted in view of Rule 44(1) of the Rules, which provides that the provision is not applicable to the officer's category. Accordingly, the contention is rejected.

CONTENTION (IV)

60. It is contended that the trial is vitiated as the same has been conducted in violation of principles of natural justice inasmuch as the petitioner was denied the opportunity to produce the witnesses in defence. The petitioner submitted an application on 15th April, 1987 and requested the Commandant to issue summons for the following witnesses:

1. Shri M.C. Misra, DG, BSF
2. Shri K. Ramamurti, Ex. DG, BSF
3. Shri J.L. Balani, Ex. IG, BSF (R & G), Jodhpur
4. Shri K.S. Rathore, IG, BSF (R & G), Jodhpur
5. Shri G.S. Mander, IG, HQ (I)
6. Shri T. Talwan Ex IG, NEF
7. Shri W.G. Mudaliar, Ex. IG, BSF, West Bengal
8. Shri I.S. Man, CLO, FHQ
9. Shri Net Ram Singh, DIG, BSF, FHQ
10. Shri Roop Ram, DIG, BSF, Bikaner
11. Shri A.S. Bedi, Addl. DIG (Now DIG)
12. Shri K.S. Vohra, Addl. DIG

13. Shri R.S. Mehta, DD (Pers)
14. Shri O.P. Rana, AD (Ops) Frontier HQ BSF (R & G)
15. Shri Gurdat Lal, AD (G) Frontier HQ BSF (R&G;)
16. Shri S.K. Sehgal, Comdt. 19 Bn BSF
17. Shri Kan Singh, AD, HQ DIG BSF Bikaner
18. Shri H.S.Sidhu, Commandant
19. Shri H.R Sharma, Commandant
20. Shri B.B. Aggarwal, Commandant.

The Commandant refused to summon these witnesses on the ground that their evidence was not likely to be of material assistance at the trial. Section 89 of the Act provides for summoning the witnesses. Rule 64 of the Rules provides for summoning of the defence witnesses, which reads as under:

64(1) Subject to the provisions of sub-rules (2) and (3) the Commandant shall, on a request made in this behalf by the accused, summon such witnesses as are specified by the accused.

(2) Where the Commandant is satisfied that the evidence to be given by any witness is not likely to be of material assistance at the trial he may refuse to summon such witness.

(3) The Commandant may before summoning any witness, require the accused to defray or undertake to defray the cost of attendance of such witness and if the accused refuses to defray or undertake to defray the cost aforesaid, the Commandant may refuse to procure the attendance of that witness.

(4) Where the Commandant has refused to summon the witness under Sub-rule (2) or Sub-rule (3) the accused may make an application to the Court for the summoning of such witness and the Court may, if it considers it to be expedient in the interests of justice, order the summoning of such witness and, if necessary,

adjourn the proceedings for the attendance of such witness.

A reading of the rule makes it clear that a Commandant may refused to summon such witness if he is satisfied that the evidence to be given by such witness is not likely to be of material assistance. The delinquent is given a second opportunity under Sub-rule (4) of Rule 64, which provides that where the Commandant has refused to summon the witness under Sub-rule (2) or Sub-rule (3), the accused may make an application to the Court for summoning of such witness and the court may, if it considers it to be expedient in the interest of justice, order the summoning of such witness.

61. The long list of witnesses consisting of the Senior Officers of B.S.F. serving and retired does not show how those witnesses could be of any assistance in answering the charge, i.e. whether the language used in the two admitted letters was an act prejudicial to the good order and discipline constituting an offence under Section 40 of the Act? To give such non-serious list of witnesses with a view to delay the trial and in event of adverse finding to raise a contention before the higher forum is a common practice. The burden is on the party raising the contention to show how the witness could be of material use and the non-calling the witness has caused prejudice. The learned Single Judge on elaborate discussion has arrived at the conclusion that there was nothing wrong in summoning the witnesses in defence. We find no infirmity in the said finding which may call for interference by us in special appeal, hence the contention is rejected.

CONTENTION (V)

62. It is contended by the learned Counsel that the order of the Force Court dt. 5.6.1987 to dismiss the petitioner from service subject to confirmation is ex facie illegal, as on revision, he was not given an adequate opportunity to collect the material and address the court. It is submitted that when the Force Court re-assembled on 25.6.1987 in pursuance of the directions dt. 19.6.1987 given by the confirming authority, the petitioner sought an adjournment on the ground that he wanted to consult the defence counsel and the same was arbitrarily denied.

63. Section 113 of the Act provides procedure on revision of finding or sentence, which reads as follows:

113. Revision of finding or sentence: (1) Any finding or sentence of a Security Force Court which requires confirmation may be once revised by order of the confirming authority and on such revision, the court, if so directed by the confirming authority, may take additional evidence.

(2) The court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers is unavoidably absent.

(3) In case of such unavoidable absence the case thereof shall be duly certified in the proceedings, and the court shall proceed with the revision, provided that, if a General Security Force Court, it still consists of five officers, or, if a Petty Security Force Court, of three officers.

It is clear from Sub-rule (1) that when a confirming authority directs the revision of sentence or finding, as additional evidence can be taken by the Force Court only when such a direction has been given by the confirming authority. Thus, it is for the confirming authority to consider whether in the facts of the case, it is essential to collect further material or take fresh decision on the material already on record. If the confirming authority considers that a decision can be taken on the basis of material available on record, in such circumstances, no opportunity is required to be given for production of the additional evidence. In this context, a reference may also be made to Rule 105 to the Rules, which reads as follows:

105. Revision:

(1)(a) Where the finding is sent back for revision under Section 113, the Court shall re-assemble in open court, the revision order shall be read and if the court, is directed to take fresh evidence such evidence shall be taken in open court.

(b) Where such fresh evidence is recorded otherwise than at the instance of the accused, the accused shall be given a further opportunity to lead evidence in respect of matters brought out in such fresh evidence.

(c) The Prosecutor and the accused shall be given a further opportunity to address the Court in respect of the fresh evidence led.

(d) The Law Officer may also give a further summing up.

(2) Where the revision of finding does not involve taking of fresh evidence, the accused shall be given an opportunity to address the court in respect of matter raised in the revision order.

(3)(a) The court shall then deliberate on its finding in closed Court and if the Court does not adhere to its former finding it shall revoke the finding and sentence and record a new finding and if such new finding involves a sentence pass sentence afresh.

(b) Where the original finding was one of 'Not Guilty' the Court shall, before passing sentence comply with Rules 101 and 102.

(4)(a) Where the sentence alone is sent back for revision, the revision order shall be read in open court and the accused given an opportunity to address the Court in regard to matters referred to in the revision order. (b) The court shall then reconsider its sentence in closed Court and if does not adhere to the sentence, revoke the sentence and pass sentence afresh.

(5) Where the sentence alone is sent for revision, the court shall not revise the finding.

64. It clearly appears from Clause (a) of Sub-rule (1) of Rule 105 that when a finding is sent back for revision under Section 113, the court re-assembles in open court, the order of revision is read and if the confirming authority has directed to take fresh evidence, the same is taken and in case, no such direction has been given and where the matter is sent back only for reconsideration of sentence part, the delinquent is to be given opportunity to address the court only on the point referred in the revision order i.e. the order of sentence.

65. In the instant case, the matter was referred by the confirming authority only on the point of sentence. On appreciation of material on record, the confirming

authority did not consider it appropriate to direct to take fresh evidence and as such the petitioner was to be given only an opportunity to address the court. The petitioner was given the said opportunity. He had submitted a written statement running in six or seven pages. The written submissions were considered by the court. The proceedings also show that the petitioner was aware of the proceedings even prior to 25.6.1987. Thus, it cannot be said that the Force was wrong in refusing the adjournment. Therefore, we find no substance in the fifth contention as well and the same is rejected.

CONTENTION (VI)

66. It is next contended that the decision of the confirming authority is illegal as the same is non-speaking. It is submitted that the confirming authority has simply confirmed the order of the Force Court without recording any reason. Under the provisions of the BSF Act, no finding of a Force Court is valid unless it has been confirmed in accordance with the provisions of the Act. Reference may be made to Sections 107 and 108 of the Act. Under Section 108 of the Act, the Central Government is the confirming authority. The Central Government may empower any officer to exercise the power of confirmation on its behalf. In this context, the reference may be made to the Notification dt. 11.11.1971 issued by the Ministry of Home, whereby the power of confirmation has been vested with the Inspector General of Border Security Force. However, the Inspector General cannot exercise such power where an accused has been sentenced to suffer death or an officer has been sentenced to be imprisoned or dismissed. In such cases, the Inspector General is required to transmit the proceedings to the higher authority. The aforesaid notification is reproduced as follows:

In pursuance of the provisions of the Border Security Force Act, 1968 (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 General Security Force Court held for the trial, in accordance with the said Act and the Rules made thereunder 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 the persons tried 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:

Provided always that if by the sentence of any General Security Force Court a person subject to the Border Security Force Act has been sentenced to suffer death or an officer has been sentenced to be imprisoned or dismissed, you shall in such case and also in the case of any other General Security Force Court in which you shall think fit so to do, withhold confirmation and transmit the proceedings to Superior Authority.

67. In the instant case, the court by order dated 25th April, 1987, awarded the sentence of 'take rank and precedence as if his promotion to the rank of Dy. Commandant bore the date 30 Nov. 1982' and to be 'severely reprimanded.' As it was not a punishment of dismissal or death or imprisonment for life, the proceedings were placed before the Inspector General of Border Security Force for confirmation. Shri Kishan Singh Rathore, I.G., B.S.F. (Raj. & Guj.) expressed the view that the sentence awarded was lenient and, as such, directed the Force Court to re-consider as to whether or not, the sentence awarded is commensurate with the offence committed by the accused in the light of the observations made by him in the order. The observations made by the Inspector General are extracted as follows.

The court should keep in view that charges against the accused are not of making false allegations but for passing contemptuous and disparaging remarks. Whether or not the allegations in the letter are true, is not the subject matter of the charge. Even the truth has to be expressed in a proper language. Needless to say that every punishment should commensurate with the offence committed. In the present case, the sentence awarded appears to be lenient.

68. The Force Court re-assembled and the aforesaid order in revision was read over to the petitioner. After hearing the petitioner and considering the written submissions made by him, the Force court by order dt 25.6.1987 awarded the punishment of dismissal subject to confirmation by the confirming authority. Since the punishment awarded was of dismissal, the confirming authority also changed

and instead of Inspector General of Border Security Force, the proceedings were placed before the Director General of Border Security Force. Accordingly, the Director General confirmed the order of punishment of dismissal awarded by the Force Court.

69. The question as to whether the confirming authority is required to record the reasons, has been considered by the Constitution Bench of the five Judges of the Apex Court in *S.N. Mukherjee v. Union of India* reported in : 1990 CriLJ2148a . The controversy in the said case pertained to the provisions of the Army Act. The question posed was, as to whether it was incumbent for the Chief of the Army Staff while confirming the finding and sentence of the General Court Martial and for the Central Government while rejecting the post confirmation petition of appellant to record the reasons for the orders passed by them? The Apex Court in its earlier case in *Som Datt Datta v. Union of India* reported in : 1969 CriLJ663 rejected such contention that apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, there is no general principle or rule of natural justice that statutory Tribunal should always and in every case give reasons in support of its decision. A contention was raised for re-consideration of *Som Datt Datta's* case (supra) to the extent it holds that there is no general principle or rule of natural justice that a statutory Tribunal should always and in every case give reasons in support of its decision. The Apex Court divided the question under consideration into two parts, firstly, (i) whether there is any general principle of law, which requires an administrative authority to record the reasons for its decision and (ii) if so, does the said principle apply to an order confirming the findings and sentence of a court martial and post-confirmation proceedings under the Act? The Court after examining the issue in depth and detail, concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi judicial function, is required to record the reasons for its decision. After examining the provisions of the Army Act, the court found that the provisions thus negative a requirement to give reasons for its finding and sentence by the court martial and reasons are required to be recorded only in cases where the court martial makes a recommendation for mercy. Thus, the court held that at the stage of recording the findings and sentence, the court martial is not required to record its reasons. With

respect to confirmation, the court held that the 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 in the order passed by the Central Government dismissing the post confirmation petition.

70. The Apex Court in Capt. Harish Uppal v. Union of India reported in AIR 1973 SC 258 has held that it is not necessary for the confirming authority to give a hearing to the charged officer before confirming the sentence passed after revision of the sentence originally passed.

71. Section 111 of the Act provides a power of confirming authority to mitigate, remit or commute sentences. Section 111 reads as follows:

111. Power of confirming authority to mitigate, remit or commute sentences: (1) Subject to such restrictions, reservations or conditions, as may be contained in any warrant issued under Section 108 or Section 109, a confirming authority may, when confirming the sentence of a Security Force Court, mitigate or remit the punishment thereby awarded, or commute that punishment for any punishment or punishments lower in the scale laid down in Section 48.

Thus, Section 111 gives a wide power to the confirming authority to mitigate, remit or commute the punishment awarded.

72. Rule 106 of the Rules provides for confirmation and promulgation, which reads as follows:

106. Confirmation and promulgation: (1) When a confirming authority receives the record of the proceedings of a Court, it shall record its decision thereon and on any sentence and any order which the Court may have made under Section 105 on the record of the proceedings in the appropriate form set out in Appendix VIII and such record of his decision shall form part of the record of the proceedings.

(2) When a Court has accepted a plea of guilty made under Rule 79 the confirming authority may confirm its finding notwithstanding that the Court has accepted the plea without the concurrence of the convening officer, if, in the opinion of the confirming authority it is in the interest of justice to do so.

(3)(a) When a Court has rejected a plea to the jurisdiction of the Court or a plea in bar of trial or has over-ruled an objection to a charge, it shall not be necessary for the confirming authority to approve specifically the decision of the court, but its approval shall be implied from its confirming the finding on the charge to which the plea or objection relates.

(b) Where it disapproves the decision of the Court to reject the plea or to over-rule the objection it shall withhold confirmation of the finding on the charge to which the plea or objection relates.

(4) A confirming authority may state its reasons for withholding confirmation in any case, but if it withholds confirmation where a Court has rejected a plea to the jurisdiction or plea in bar of trial or has over-ruled an objection to the charges because it disapproves this decision of the Court, it shall when recording its decision under Sub-rule (1) state that it has withheld confirmation for this reason.

(5) Where the sentence of a Court is improperly expressed, the confirming authority may in confirming the sentence vary the form thereof so that it shall be properly expressed.

(6) Whenever it appears that there is sufficient evidence or a plea of guilty under either Sub-rule (1) or Sub-rule (2) of Rule 77 to justify the finding of the Court, such finding and any lawful sentence consequent thereon may be confirmed, and if confirmed shall be valid, notwithstanding any deviation from these rules, if the accused has not been prejudiced by such deviation.

(7) While confirming the finding the confirming authority may either unconditionally or subject to conditions which the accused accepts, reduce or remit a portion of the sentence or commute the punishment to one given lower in the scale of punishment in Section 48.

(8)(a) When a confirming authority has confirmed a finding and a sentence of a Court or has withhold confirmation thereof, it shall send the record of the proceedings to the Commandant of the accused for promulgation to the accused of the finding and sentence or the fact that the confirmation has been withheld as

the case may be.

(b) The fact of promulgation shall be recorded on the record of the proceedings in the form set out in Appendix IX.

(c) Where confirmation has been withheld because the confirming authority disapproves the Court's decision to reject a plea to the jurisdiction or a plea in bar or trial or to over-rule an objection to the charge, the accused shall be so informed.

73. Thus there is no requirement of recording of reasons by the confirming authority in case of affirmation of the finding and sentence. Reasons are required to be recorded only in case where confirmation is withheld. Thus, we are of the opinion that the decision of the confirming authority is not vitiated for the reason that he has not passed a speaking order. Thus, the sixth contention also fails and same is accordingly rejected.

CONTENTION (VII)

74. It is lastly contended that in the facts of the case, the punishment awarded is shockingly disproportionate. It is submitted that the petitioner at the relevant time had served for twenty years. Learned counsel has also urged before us that in the letter of Shri W.G.J. Mudaliar, Inspector General of BSF addressed to the petitioner, the I.G. admitted the indulgence of some of the officers in corrupt and smuggling activities but he expressed his helplessness because of the political pressures. Learned counsel has also invited our attention to the statement made by the accused at page 114 of the paper book before the Force Court, which reads as follows:

The accused submits that when he became disheartened to note from the letter of IG Mr. WGJ Mudaliar that no action can be taken against the corrupt officers and the smugglers already specified by him (the accused) in his DO to the Director General and also when he joined the Anupgarh Border, he found that the Indo-Pakistan border was open to the Indo Pak smugglers. He intercepted such case where crores of smuggling was going under command of Shri Ghanshyam Singh, then Commandant of 42 Bn BSF. He reported the matter to his superiors which is

on record and has come in evidence also through (PW2). Since he became disheartened because no action was taken against the corrupt officers and smugglers due to political pressure, therefore, he found darkness around him and wrote to the Director General. Rest I leave on the Honourable Court.

75. It appears that the petitioner had written the offending letters under certain impulse. There are no allegations of corruption or slackness on his part while performing duties. The allegation of passing contemptuous and disparaging remarks against the force and its officers which constitutes an act prejudicial to the good order and discipline has been proved against petitioner. Thus, a question arises as to whether in the facts and circumstances of the case, the extreme punishment of dismissal which amounts to a civil death, can be said to be commensurate with the guilt of the petitioner?

76. It is well settled that it is not for the High Court in exercise of powers under Article 226 of the Constitution of India to interfere into the quantum of punishment unless the punishment awarded is shockingly disproportionate. The Apex Court has laid down the guidelines in this regard in *Ranjit Thakur v. Union of India* reported in : 1988 CriLJ158 . In the said case, the court considered the question of doctrine of proportionality in the matter of awarding the punishment under the Army Act and it was observed thus:

The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.

In the said case, the appellant before the Apex Court *Ranjit Thakur* was a Signal Man in '4 Corps'. While he was undergoing a sentence of 28 days' rigorous

imprisonment for violating the norms for presenting representations to higher officers, he sent a representation complaining of ill treatment at the hands of respondent No. 4 directly to the higher authorities. The appellant was punished for that by respondent No. 4. He was held in the Quarter guard Cell in handcuffs to serve that sentence of rigorous imprisonment. He was charged for disobeying a lawful command given by his superior. The disobedience was that he refused to eat food in protest. He was awarded the punishment of dismissal from service. The Court observed that a disregard of a direction to accept food might assume the complexion of disrespect to, and even defiance of authority. But an unduly harsh and cruel reaction to the expression of the injured feelings may be counter-productive and even by itself be subversive of discipline. The court further observed that appellant was perhaps expressing his anguish at, what he considered, an unjust and disproportionate punishment for airing his grievances before his superior officers. The Apex Court expressed that the punishment awarded was shockingly disproportionate.

77. In *Union of India v. Iqbal Singh Cheema* reported in 1995 Supp (4) SCC 84, considering the facts of the case, the Apex Court interfered with the punishment and substituted the punishment of removal by the punishment of forfeiture of promotion and pensionary benefits.

78. In *Ex Naik Subedar Singh v. Union of India* reported in AIR 1992 SC 417, having regard to the nature and degree of offence, the court found that the punishment awarded of three years' rigorous imprisonment and dismissal from service was severe. In the said case, the accused was found to have extra seven bottles of rum within an area under prohibition while going to home town. He was having a valid permit to carry five bottles. He pleaded that extra bottles were purchased from army canteen on chit given by the higher authority. In the opinion of the Apex Court, the punishment awarded was disproportionate to the guilt and, as such, it was considered to be a fit case for interference by the Court.

79. In the instant case, it appears that the petitioner had written the offending letters under certain impulse. He felt dejected when he found that even the higher officers in the Force were helpless for taking action against the corrupt officers. It

is true that it was improper on the part of the petitioner to write the offending letters in a most reckless manner forgetting that he was a member of the disciplined Force. Mr. Kishan Singh Rathore, IG. BSF, has rightly said in his order of revision that even the truth has to be expressed in a proper language. Still, such expression of anguish of a injured feeling, if stretched too far in the name of discipline completely ignoring the past unblemished service, the award of extreme punishment of dismissal from service which amounts to civil death will bring the case in the category of disproportionate punishment being unduly harsh. B.S.F. Rules caste a duty on the Force Court to take into consideration the past service of the delinquent while awarding the punishment. A statement of character and past service was prepared and placed before the Force Court. A copy of said statement finds place in the Paper Book at page 113. It shows that petitioner joined the service in the rank of Asst. Commandant in B.S.F. on 1.1.1969. He was confirmed on the said post on 1.1.1973. He was promoted as a Deputy Commandant on 30.11.1979. No previous conviction has been recorded against him. The general character of the accused has been certified to be satisfactory. At the relevant time, he was about 45 years of age. It is also stated that the accused had in his credit the service of seventeen years, ten months and twenty one days for the purpose of determining his pension. Applying the principle laid down in various cases of the Apex Court, referred to above, to the instant case, that the doctrine of proportionately, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of Court martial, if the decision of the Court even as to sentence is an outrageous, defiance of logic, the sentence would not be immune from correction, in our considered view the punishment is so strikingly disproportionate as to call for and justify interference.

80. Consequently, we allow the special appeal and set aside the judgment of the learned Single Judge dated 17.4.1998, the order Annexure P. 26 dated 9.3.1988, Annex. P. 23 and P. 23A dated 10.8.1987, Annex. P. 21 dated 25.6.1987 and restore the order of the Force Court Annexure P. 17 dated 26.4.1987 awarding the punishment (Take rank and precedence as if his promotion to the rank of Commandant bore the date 30.11.1982 and to be severely reprimanded). The said punishment shall stand confirmed by the Competent Authority. The appellant shall

be entitled to all consequential monetary and service benefits. Cost easy.

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