(32)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.No.729/2001

New Delhi, this the 24th day of July, 2003

Hon'ble Shri Govindan S. Tampi, Member (A)
Hon'ble Shri Shanker Raju, Member (J)

Shri Yatendra Singh Jafa ..Applicant
(By Advocates: Shri G.D.Gupta, Sr. Advocate with
Shri V.K.Rao for M/s. Sikri & Co.)

VERSUS

Union of India & Others
...Respondents
(By Advocates:Shri K.K.Sood, Additional Solicitor General
alongwith S/Shri A.K.Bhardwaj and Neeraj Jain
for Respondents 1 and 2 and Shri Nitin Tambwekar
for the State of Maharasthra)

Corum:-

Hon'ble Shri Govindan S. Tampi, Member (A)
Hon'ble Shri Shanker Raju, Member (J)

1. To be referred to the reporter or not? YES

2. Whether it needs to be circulated to
Benches of the Tribunal? NO

(Govindan S. Tampi)
Member (A)

(33)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A. NO. 729/2001

This the 29th day of July, 2003

Hon'ble Shri Govindan S. Tampi, Member (A)
Hon'ble Shri Shanker Raju, Member (J)

Shri Yatendra Singh Jafa,
S/o late Shri H C Jafa,
C/o 30, Ambar Apartment,
Malabar Hill, Mumbai - 400 006

At present

C/o Shri V S Jafa,
205, Gulmohar Park Enclave,
SFS, DDA Colony,
New Delhi - 110 049

..Applicant

(By Advocates: Shri G.D.Gupta, Sr. Advocate with
Shri V.K.Rao for M/s. Sikri & Co.)

VERSUS

1. Union of India,
through the Secretary,
Mionistry of Home Affairs,
North Block, New Delhi

2. The Director General,
Border Security Force,
10, CGO Complex,
New Delhi 110 003

3. State of Maharashtra,
through the Chief Secretary,
Mantralaya, Mumbai

...Respondents

(By Advocates:Shri K.K.Sood, Additional Solicitor General
alongwith S/Shri A.K.Bhardwaj and Neeraj Jain
for Respondents 1 and 2 and Shri Nitin Tambwekar
for the State of Maharasthra)

O R D E R

Shri Govindan S. Tampi:

Challenge by Shri V.S.Jafa, the applicant in this OA, is directed against Ministry of Home Affairs Order No. 16013/27/93-IPS-II dated 23/24.1.2001 where under he has been dismissed from service with immediate effect, in terms of Article 311(2) (c) of the Constitution of India, without holding any inquiry.

2. Shri G.D.Gupta Sr. Advocate along with Shri V. K. Rao for M/s Sikri & Co. represented the applicant while Shri K. K. Sood, Additional Solicitor General along with S/Shri A.K.Bhardwaj and Neeraj Jain appeared for respondent Nos. 1 & 2 - Union of India - Shri Nitin Tambwekar learned counsel was present on behalf of respondent No.3 - State of Maharashtra. Written submissions were also filed by both the applicant and the respondents.

3. The applicant, a directly recruited officer of Indian Police Service (IPS) of 1967 batch of Maharashtra cadre had successively held a number of important and sensitive assignments like, Superintendent of Police, Maharashtra; Joint Assistant Director, Intelligence Bureau (IB), New Delhi; Assistant Director, IB Srinagar and New Delhi, Deputy Commissioner of Police, Special Branch, Delhi Police; Deputy Inspector General, Border Security Force, Srinagar and Gurdaspur (Punjab); Deputy Director, BSF (Hqrs.) New Delhi; IG, BSF Kashmir Frontier, Srinagar and New Delhi; Director of Prosecution, Govt of Maharashtra, Bombay; Chief Security and Vigilance Officer, Maharashtra State Road Transport Corporation, Bombay (MSRTC); Inspector General, State Reserve Police, Maharashtra, Vice Chairman and Managing Director of Maharashtra State Police Housing and Welfare Corporation and Additional Director General of Police and Commandant General; Home Guards and Director, Civil Defence, Maharashtra.

4. He had been awarded Indian Police Medal for meritorious service in 1986. The applicant had throughout an outstanding career and had been entrusted with special tasks connected with anti-terrorists operations and internal security, wherein he had acquitted himself creditably at considerable risk to his personal security. His performance in the Organisation had also been duly appreciated by the Administration from time to time.

5. While the applicant was working as Inspector General of Police, BSF, Srinagar, a raid was planned and executed on 24.3.1992 by Shri M.L. Purohit, Commandant of 116th Bn. BSF at Bimna near Srinagar, leading to the capture of some notorious and hardened terrorists as well as the recovery of large cache of Arms & Ammunition. The applicant was neither the member of the raiding party nor had he planned or organised the same. Soon after he got to know of the incident, the applicant had informed Additional Director, IB, Srinagar about the capture of the terrorists. He was given the details of the operation by Shri Ashok Kumar, DIG, BSF. When the applicant took Shri Ashok Kumar to ADGP, J&K Police where he narrated the entire incident and also specified quantity of the arms and ammunition seized. It was only later that the applicant had come to know that information given by Shri Ashok Kumar both to himself and ADGP was not complete in that he had held back certain details about the seizure of gold and other articles. The apprehended persons were officially handed over to CRPF from which custody they had reportedly escaped. On 27th/28th, he was informed by the Asstt. Director, IB

that his junior Shri M. L. Purohit, Commandant had not given the full details of the goods seized. The applicant had directed Shri Ashok Kumar to obtain the necessary details, which he failed to do initially but he finally gave the information on 11.4.1992. The applicant thereafter ordered a Staff Court of Inquiry (SCOI). The subsequent report filed by Shri Ashok Kumar, DIG did refer to the recovery of gold ornaments, which had not been referred to earlier SCOI ordered by him was kept in abeyance by him on the advice given by the Director, J&K Police and also as he waited for the arrival of an officer senior to the DIG and the Commandant to conduct the inquiry. This had been brought to the notice of the DG, BSF. Shri Ananthachari, who intimated him that he would take a decision shortly. During his next visit, DG, BSF expressed unhappiness with the applicant and indicated that he would himself order an inquiry. The applicant, who was already in indifferent health, fell worse after the DG's visit. In April 1992, the applicant was transferred from Srinagar to Delhi the shock of which landed him in the hospital for nearly a month. Subsequently a fresh Court of Inquiry was ordered by IG, BSF, Kashmir, when the applicant's presence as a witness was desired, which he did on 27.7.92 and thereafter, the applicant was subjected to cross examination under Rule 173 (8) of BSF Rules, which was not applicable to him. It was learnt that DG, BSF had made adverse recommendations against him on the basis of which respondent No.1 was about to pass order dismissing the

applicant from service without holding any inquiry, as was required under law.

6. Apprehending the above, the applicant filed OA-1430/93 before the Principal Bench of the Tribunal which was disposed of on 9.9.1993 with the interim relief directing respondents "not to resort to any action under Article 311(2) of the Constitution without initiating regular disciplinary action in accordance with law". Thus it was clear that respondents could not have invoked Article 311(2) (b) nor BSF Act and Rules against the applicant but could have taken action only through a regular inquiry, in accordance with All India Service (Discipline & Appeal) Rules, 1969. The SLP filed by the respondents against the order of the Tribunal was dismissed by the Hon'ble Supreme Court on 10.11.1994 but with the observations that "the applicant is not precluded from taking such disciplinary proceedings against the respondent as are permissible under the law". However, no action was taken by the respondents for next 5(five) years. The Tribunal dismissed the OA as premature on 13.8.1999, on the averment of the Department that no decision had been taken in respect of the applicant and they were precluded from doing so on account of the interim order dated 9.9.1993 but this was wrong, as the Hon'ble High Court of J & K in their judgement dated 21.4.99 in LPA (SW 631/99) filed by Ashok Kumar, DIG, BSF had noted that it was being proposed to terminate the services of the applicant as well. CWP-5156/99 filed by the applicant against Tribunal's order dated 13.8.1999 was disposed of by the Hon'ble Delhi High Court on 6.9.2000 with the observations that "the respondents are not precluded from taking such disciplinary proceedings against the petitioner under the

law and as pointed out by the Tribunal vide its order of 9.9.1993". SLP filed by the applicant was also disposed of like-wise on 29.9.2000 by the Hon'ble Apex Court.

7. On 23.1.2001, the respondents, by their impugned order, dismissed the applicant from service with immediate effect by invoking proviso (c) to Article 311(2) of the Constitution, holding that it was not expedient to hold and inquiry in the interest of the security of the state. The order recorded the President's satisfaction that the "activities of Shri Y.S. Jafa are such as to warrant his dismissal from service, though there was no indication about the activities or the period of which they related to and to which capacity of the applicant they pertained". It gave an impression that it related to activities of the applicant in his capacity as an IPS Officer of Maharashtra. Such an order was irrational, arbitrary, unjust and mala fide. He could not have been dismissed without following the proper procedure of holding regular departmental inquiry in terms of All India Services (Discipline & Appeal) Rules, 1969. Further, he could not have been dealt with under BSF Act and Rules provisions of which made it clear that the regulations of BSF are not applicable to those in All India Services and others who are on deputation with BSF. In the SCOI proceedings conducted by the BSF, the applicant had been only referred as a witness and not as a Charged Officer and he could not have been dealt with on the basis of Enquiry held under BSF Act and Rules. Besides said SCOI had been conducted in clear violation of the principles of natural justice as:

a) the presence of the applicant in the Court of Inquiry was enforced despite his shattered physical health and the mental depression;

b) the inquiry was gone through in terms of the provisions of BSF Act and Rules which could not have been made applicable to the applicant;

c) during the inquiry, though some of the documents like statements were shown to the applicant, but the statements of Principal Staff Officer of IG (Kashmir) BSF, so far as these related to the applicant as well as the record of mutual cross-examination of the DIG and the Commandant where-under reference was made to applicant's role, were not supplied to him; and

d) he was also not explained the reasons for his being summoned for the inquiry, thereby denying him the opportunity to prepare his case and explain his position.

8. Conclusions drawn by the inquiry officer were that:

i) applicant was a silent spectator to the offence of non-declaration of certain weapons and other articles by his juniors - DIG and Commandant;

ii) he had avoided visiting the spot; and

iii) he had not initialled the letters received from his DIG to evade responsibility.

All the above were wrong, as the evidence recorded in this context did not support such findings, as there were contradictory averments and no independent and uninterested witnesses had been properly examined. Besides, as the raid had already been successfully completed, no specific purpose would have been achieved by the applicant's personal presence at the spot. The act of not initialling any letter, was not material when necessary action has been taken and as the relevant papers were handed over by the applicant himself to others for necessary action. Inquiry officer's conclusions were, therefore, clearly perverse and faulty. There was incorrect appreciation of evidence as well as of the positive steps taken by the applicant to ensure that the recovered goods were properly accounted for, physically checked and records taken over, as the documents would show. IG, BSF, Kashmir had wrongly accepted the inquiry officer's report, without objectively assessing the evidence brought on record and without any application of mind. There could not have been any apprehension that the departmental inquiry against the applicant was not possible, on account of the disturbed conditions in the valley and/or non-availability of the witnesses. In fact, the list of witnesses had 34 names, of whom 30 were BSF personnel. There were three Kashmiris witnesses, who did not depose anything against the applicant and the last was the

applicant himself. All the four witnesses, who deposed against him, were BSF officers, who were available for examination. Even, IG, BSF, did not, after perusal of the SCOI's findings, suggest recourse to proviso (c) to Article 311 (2) of the Constitution. Still, DG, BSF (as he then was) recommended for the dismissal of the applicant under Article 311 (2) (b) of the Constitution, which was a patently illegal act. The applicant, who had completed his extended tenure of seven years in BSF, was continued in the Organisation by the previous DG, which was not liked by his successor, who expressed his displeasure at the applicant in the event under reference without by specific reason. As the SCOI had begun after the applicant had been repatriated to Maharashtra, DG, BSF could have only forwarded its report of SCOI to the Ministry of Home Affairs or State of Maharashtra, instead of making any recommendations for his dismissal, which he did in clear violation of Rule 7 of the AIS (D&A) Rules, 1969. At the same time, the punishment recommended by DG to Shri Ashok Kumar, DIG, who was primarily concerned in the event and against whom adverse findings were recorded by the SCOI was only removal with pensionary benefits, DG, BSF's view that witnesses could not be made available in the proceedings against the applicant was incorrect because as many as 34 witnesses were examined in the SCOI out of 30 were from BSF itself. None of the three civilian witnesses had deposed against the applicant. DG, BSF, who had recommended the dismissal of the applicant for the alleged omissions of 1991-92 had not recorded any finding against him in his ACR for the period and if it was so recorded, it had never been communicated to him, thereby denying him any chance to

explain and represent his case. The applicant feels that he had been discriminated against in that while he has been recommended to be dealt with under Article 311 (2) (c), DIG, BSF had been dealt with under Section 20 of the Act, giving him an opportunity to explain his case, which has in fact enabled him to continue in service, in spite of the order of removal issued in 1993 by judicial intervention. The respondents have obtained wrong orders from the Tribunal and the Court by misrepresentation of the effect that the applicant's OA was premature and used it to issue the impugned order. DG, BSF's recommendations to Ministry of Home Affairs that holding an inquiry in the case of the applicant would adversely affect the case against S/Shri Ashok Kumar/Purohit went against him and thus he was discriminated by extraneous materials. In a still more serious case involving BSF officers, proceedings were held in the open, a facility which was denied to him. The applicant had been only charged with lack of supervision in the SCOI report. Still the penalty of dismissal had been imposed on him which was arbitrary and perverse. Nine years after the publication of the inquiry report, the applicant is being denied the chance to be heard on the alleged ground that the disclosure of the materials would be against the security of the interest of State. In the meanwhile, he had been repatriated to his parent cadre where he was promoted as ADGP keeping in mind his excellent track record. Still he had been dismissed from service only account of the mala fide action of the previous DG, BSF. Hence this OA.

9. Grounds raised in this OA are that:

a) the impugned order was illegal, based as it was on extraneous considerations and violative of Articles 14 & 16 of the Constitution;

b) the applicant had a distinguished and unblemished career and had handled over the years a number of sensitive and important assignments;

c) the raid at Bimna, which was the subject matter of inquiry was carried out by the Commandant 116 Bn BSF on his own;

d) the applicant being an officer of IPS, on deputation to BSF for a limited period, could not have been dealt with under BSF Act & Rules and even if the same were applicable the proceedings had been conducted wrongly;

e) the inquiry has brought out no material against the applicant, still the inquiry officer had recorded a perverse and illogical finding against him which had been wrongly accepted by the IG/DG, BSF, leading to his recommendations for action against the applicant without any departmental inquiry;

f) the applicant has never been put on notice before the inquiry officer's report was accepted;

g) no proceedings could have been taken against the applicant under the BSF Act and Rules and, therefore, no material existed against the applicant apart from the inquiry officer's report;

h) proceedings against the applicant have been initiated only under AIS (D&A) Rules, 1969 and, therefore, DG, BSF's recommendations against the applicant for involving of Article 311 (2) (b) was an exercise in futility;

i) satisfaction of the competent authority was not based on circumstances having any bearing on the security of the State more so as a detailed SCOI had been conducted and the report thereof was already public knowledge;

j) applicant has been singled out and discriminated, vis-a-vis, the DIG and the Commandant;

k) reasons shown for dispensing with regular inquiry were irrelevant and were hit by the findings of the Hon'ble Supreme Court in Union of India & Ors. Vs. Tulsi Ram Patel [AIR 1985 SC 1481];

l) the order was discriminatory in that the applicant was totally denied every opportunity to explain his case and the officers of BSF were given the freedom to explain their conduct;

m) placement of relevant material before the Court was necessary as held by the Hon'ble Supreme Court in the case of A.K.Kaul Vs. Union of India [1995 (3) SLR (SC) 1403;

n) the impugned order has been issued without any justification, as the applicant's record as an IPS Officer of Maharashtra has been totally unblemished and as far as his period of service with BSF is concerned, there was no ground to decide that holding the inquiry was impossible just because it would have affected the proceedings against the DIG;

o) what cannot be done directly cannot be done indirectly and merely because Article 311 (2) (b) could not be invoked, it did not follow that 311 (2)(c) could be invoked; and

p) invoking of proviso (c) to 311(2) was not at all called for in the circumstances of the case.

10. In view of the above the applicant seeks the following reliefs:-

"a) summon the entire original record pertaining to the case and also the record relating to the case of Shri Ashok Kumar, DIG, which was seen by the J&K High Court,

b) quash the order dated 23.1.2001 as illegal,

c) declare that the respondents cannot proceed against the Applicant under Art. 311(2)(b)& (c) of the Constitution of India,

d) direct the respondents to reinstate the Applicant immediately with all consequential benefits; and

e) pass such other and further orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

11. Respondent Nos. 1 & 2 hotly contest the pleas raised by the applicant. They point out that on the basis of the reports received that certain irregularities had occurred in a raid conducted by BSF at Srinagar in March, 1992, a SCOI was ordered under BSF Act, wherein the conduct of the applicant Shri V.S. Jafa, who was IG, BSF Kashmir Border, at that time also came up for scrutiny. Based on the findings recorded in the inquiry report, the services of the applicant were decided to be terminated invoking Article 311(2)(b) of the Constitution, which was stayed by the interim order dated 9.9.1993 passed by the Principal Bench of the Tribunal in OA-1493/93, SLP filed by the respondents was dismissed by the Hon'ble Supreme Court but with the directions that the Department was not precluded from taking action against the applicant as provided for in law. The Tribunal finally dismissed the OA on 13.8.1999 as pre-mature which decision was upheld by the Hon'ble Delhi High Court where it had left it open to the disciplinary proceedings against the applicant, as are permissible in law, including recourse to Article 311 (2) and that it

will be open to the party to impugn such proceedings before an appropriate forum at all appropriate stage in accordance with law. On the basis of the findings of SCOI and the report of DG, BSF, the competent authority, after evaluating the materials and records had come to an independent conclusion that the misconduct/failure of command on the part of Shri Jafa which was clearly proved to be deliberate and calculated and it could have posed serious threats to the security of the State and that the said incident was fraught with the dangerous implication of being exploited by forces inimical to the interest of the country and would have had adverse impact as the morale of the security forces fighting the militancy in the sensitive state of J&K. As the misconduct of Shri Jafa was a threat to the security of the state, he was dismissed under Article 311 (2) of the Constitution after observing due procedure as laid down for such case. According to the respondents, as the applicant had been correctly dismissed on 23.1.2001 after following the due process of law. The latter's contention that he had earned "Outstanding/Very Good" gradings during the period 1993-2000 was irrelevant and it did not dilute the gravity of his misconduct committed while he was working as IG, BSF, Srinagar and the action against him had been taken on the basis of the report of the SCOI while the applicant was not a participant in the raids conducted on 24.3.1992, he had been kept informed of the same by both S/Shri Ashok Kumar, DIG and M.L.Purohit, Commandant. He was also present in the meeting with Addl. DG Police, J&K (Shri Amar Kapoor) when the details of the raids and the recovery were disclosed and, therefore, the applicant's averment that he was not aware of the nature

and full quantity of the arms and ammunitions recovered was wrong. While Asstt. Director BSF had informed the applicant only on 27.3.1992, that the Commandant of 116 Bn. had not disclosed the full details of recovery, the applicant was already aware of it. Still he did not get the assistance to file the report in writing. Respondents admit that the applicant had on 31.3.1992 directed his DIG to file a report on the recovered articles, which had not been brought on record and also that the applicant had fallen ill and had to be hospitalised. The applicant was asked to appear before the SCOI as it was necessary and he did appear for the same. The applicant's plea that the proceedings could not be initiated against him under BSF Act and Rules was incorrect. He was correctly dealt with and SCOI's findings were properly taken into consideration for arriving at the decision to dismiss the applicant. It is true that the Tribunal had by means of an interim order stayed the proceedings, which was also upheld by the Hon'ble Supreme Court but with the clarification that the Department was not precluded from taking such disciplinary proceedings against the respondent as are permissible in law. Still the respondents did not take any action till the dismissal of the OA by the Tribunal on 13.8.1999, which was endorsed by the Hon'ble Delhi High Court. The action against the applicant was taken under Article 311 (2) (c) only after examining all the facts and circumstances of the case and following the due process of law. BSF Rules dealing with administrative termination of service of officers and others on account of unsuitability, medical unfitness, resignation, etc. are not applicable to the officers belonging to all India

Services and others who are on deputation with BSF. However, except the provisions of Chapter IV of BSF Rules, BSF Rules were applicable to IPS Officers by virtue of section 3 of BSF Act read with Rule 1 (3) of the BSF Rules. In terms of Section 1 (3) ibid, all those - officers, subordinate officers, under officers and others - who are enrolled under the Act, are subject to BSF Act. On joining BSF on deputation or otherwise, IPS Officers also become members of the Force in terms of Section 2 (0) of the Act and they would also be subject to the Act and, therefore, applicant's averments to the contrary are wrong. The SCOI was not directed against the applicant but was only ordered into the incident. It was not a departmental inquiry against the applicant and he had not been made a charged officer for which proceedings could be only under AIS (D&A) Rules, 1969. He was called as a witness in the SCOI on the basis of evidence collected thereunder, he was given an opportunity under Rule 173 (8) of BSF Rules, so that he can know what has been stated against him and to cross-examine the witnesses, who have deposed against him, if any, and give a statement and call witnesses, if need be. The above opportunity was given, as at the time of SCOI, he was subject to BSF Act and Rules. The respondents have thus complied with the principles of natural justice while dealing with the applicant. Punitive action could correctly have been taken against the applicant on the basis of the SCOI and, therefore, the Govt. had, after examining the contents of the report, taken action against the applicant under proviso to Article 311 (2) (c) and that too after duly recording the reasons for not holding the inquiry, in the

termination order itself. During the course of the SCOI, the statement of Shri Ashok Kumar, DIG, Shri M.L.Purohit, Commandant and of a few others were read over to him and he was also permitted to cross-examine a few others, but he declined to make any statement. In that scenario, he cannot state that principles of natural justice have been violated. While it was admitted that the applicant was ill, his sickness was not, as disclosed by the medical records, so severe to be an impediment to give evidence. In fact keeping in mind his illness, the inquiry Officer had even shifted the venue of the inquiry from Srinagar to Delhi to facilitate his attendance. Respondents have, therefore, been considerate and more than fair to the applicant, which also gave a lie to the applicant's version that he had been discriminated against. Record of cross-examination of Shri Ashok Kumar and Shri M.C. Purohit of each other was not shown to the applicant there was no specific request for the same. It is also not on record that he disagreed with the applicability of BSF Acts and Rules in his case. In that view of the matter, the applicant cannot allege any violation of the requirement of the statute or principles of natural justice. The SCOI, findings were in his favour only to a limited extent. The findings recorded are that:

a) though he was aware that a few of the seized ornaments were not declared still he did not rectify the same,

b) he did not visit the spot in Srinagar in spite of the importance of the operation and was avoiding the visit and chose to visit the spot only after confirming that the matter had come to the knowledge of the BSF Headquarters; and

c) he had not initialled the documents received by him showed his deliberate disdain for work and calculated effort to avoid responsibility. It also pointed to his failure as a supervisory officer.

The applicant is incorrect when he states that the mala fides of the previous DG towards the applicant was the moving spirit behind the entire proceedings against the applicant. The fact, however, is that the DG, BSF's action was only after examining all the facts and circumstances of the case. ACR for 1992 was not written by the DG, as he had not completed the requisite period of service under him. Further, in the proceedings before SCOI findings were recorded about Shri Ashok Kumar, DIG, who was thereafter proceeded under Rule 20 of BSF Rules by issuance of a show cause notice and examination of the concerned individual's reply, whereafter DG recommended his case for removal in terms of Rule 21. Present applicant's allegation is that his colleague was given the notice to provide him opportunity for filing writ petition was baseless. Respondents had not suppressed or failed to declare any material particulars at all. They had taken action in accordance with law but had to hold the proceedings in abeyance on account of the Tribunal's interim order in the OA. They moved on to start the

proceedings after the Tribunal dismissed the OA which was upheld by the Hon'ble Delhi High Court. This was correct.

12. Respondents agree that the order of termination dated 1.6.1993 served on Shri Ashok Kumar, DIG has not come into effect in view of Hon'ble Supreme Court's directions that the officers' services will not be terminated. Respondents further point out that the decision to deal with the applicant was based on the findings of the SCOI which went into the incident showing the applicant also to be blameworthy though IG, BSF Kashmir had held him to be guilty only for his failure in the supervisory role. The applicant had continued in the job after 1993 only on account of case filed and interim order obtained by him from the Tribunal. And, therefore, his performance appraisal between 1999-2000 was immaterial. He has been dismissed now on account of the misconduct and grave lapses committed by him in discharge of his duties, while being posted as IG, BSF Srinagar,

where he was expected to be alert and cautious, as the security of the nation was involved.

13. Respondents have replied to all the grounds in the OA in a general manner stating that they were either matters of record or that the impugned order has been issued after due process of law and, therefore, did not call for any intervention by the Tribunal.

14. Respondent No.3 - State of Maharashtra - have confined their arguments only to the vacation of the official quarter allotted to the applicant, as he had been dismissed from service (This is of not much relevance as the applicant has been protected against eviction of the official quarters by the interim order dated 22.3.2001, which has been extended till the final disposal of the OA).

15. In the rejoinder, the applicant has wondered as to how he could have been dealt with under proviso to Article 311 (2) (c) when neither security of State was threatened nor had the applicant's conduct come under any cloud. Recommendations for action under 311 (2) (b) was also faulty. Further, if the action of the applicant was indeed faulty, why was no action taken after the decision of the Hon'ble Supreme Court in 1994? Nothing had been brought out to show that applicant's conduct was in any way prejudicial to the security of the State. Respondents' view that due process in law has been meticulously gone through by the Tribunal, was wrong. The applicant was not subject to BSF discipline and, therefore, could not have been dealt with by the SCOI of BSF. DG, BSF's recommendations for terminating the services of the applicant invoking Article 311 (2) (b) was illegal. Besides, the applicant was discriminated against in every step. While the applicant's career and conduct have been totally above board and straight, the respondents have not given any consideration to the same, which was important. All the points raised in the rebuttal were baseless and motivated and, therefore, deserved to be rejected.

16. Shri G.D.Gupta, learned Senior Advocate, who appeared along with Shri V.K.Rao of M/s. Sikri & Co. for the applicant forcefully reiterated the pleadings both in the oral and written submissions. The applicant, an IPS Officer of 1967 batch, belonging to Maharashtra cadre and who had, by his unblemished record of service for 33 years, acquitted himself creditably both in the parent cadre and during central deputation in IB & BSF, as well as in difficult stations, like Punjab & Kashmir, has been dismissed on 23.1.2001, invoking the punitive powers under proviso to Article 311 (2) (c) that too without giving him any opportunity to explain his case and without following the requisite procedure which was the prerogative of even common criminals. According to Shri Gupta, the applicant belonged to the IPS and subject to the discipline in terms of AIS (D&A) Rules, 1969 and he could not have been dealt with under BSF Act and Rules as his tenure with BSF was only on deputation basis. Perusal of the BSF Act and Rules would clearly show that they were not applicable to deputationist like the applicant. Still on the basis of faulty findings recorded in the SCOI under BSF Act & Rules, respondents have dismissed the applicant from service in an illegal manner.

17. In terms of Article 311 (2) (c) of the Constitution, an inquiry against a Govt. servant can be dispensed with, if in the satisfaction of the President. Security of the State will be adversely affected by holding such an inquiry. In this connection, Hon'ble Supreme Court had observed that the said satisfaction should be based

on circumstances having a bearing on the security of the State (Union of India Vs. Balbir Singh), AIR 1998 SC 2043). The applicant was not a security risk at all but one who has been entrusted with the responsibility of protecting the security of a sensitive border State, on account of his excellent track record. Provisions of Article 311 (2) (c) could be invoked when prompt and immediate action was called for in the interest of the security of the State (Union of India Vs. Tulsiram Patel (1985) Supp.2 SCR 135). Here the action against the applicant was being taken after nine years. Obviously, there was neither urgency nor immediate requirement. Further, the above action could have been taken when disclosure of material on whose basis action is taken is of such a secret and sensitive nature that the revelation will itself affect the security of the State. But as the findings of the SCOI, on the basis of which dismissal has been ordered, have already become public knowledge and that too long ago, what remained on that count? Besides, the Hon'ble Apex Court has, in the case of Balbir Singh (supra), enumerated different kinds of subversive activities which alone would justify invoking of Article 311 (2) (c), none of which was found to have been committed by the applicant. The applicant's case also did not fall within the purview of the findings of the Hon'ble Apex Court in A.K.Kaul's case (supra), wherein action under Article 311 (2) (c) was permitted, if the matter relied upon for the decision to terminate the services was too sensitive to be declared, which definitely was not the case of the applicant.

18. Facts of the case, as brought out on records, would clearly show that the applicant was neither the organiser/leader of the raiding party. Nor did he plan or supervise the operation. The same was organised by the DIG and the Commandant on 24.3.2002, the results of which were thereafter reported to him and he brought the same to the senior persons and that too in the presence of the DIG. He had also directed that two of the persons apprehended be handed over to CPRF. Later on, as he came to know that the details of all the articles recovered were not fully furnished, he had directed the DIG to inquire into the same and file a report. This fact is admitted by the respondents themselves. He had also directed the retention of the recovered articles in the office itself. Besides, he had ordered on 1.4.1992, a SCOI which was kept in abeyance only on the direction of the DG, J&K and of DG, BSF, who visited the area two days later. This would show that he had acted promptly and had exercised his supervisory functions properly. Therefore, the allegation that he was guilty of inaction was baseless. The respondents' charge that he did not visit the sport of recovery of arms and other articles, has no relevance as he had been only informed about the raid only after its successful completion and his visit to the spot at such a late stage would only have been an exercise in futility. The charge that he had not initialled the communications/letters received also does not amount to much, as he had initiated action on all the points contained in those communications/letters.

19. The SCOI was ordered only to deal with the discrepancy in respect of recovered items and its terms of reference did not relate to any alleged breach of security, especially by the applicant. DIG, BSF had recommended that the inquiry be dispensed with in the case of the applicant only on account of the difficulty to get the witness and not on account of security of State. It is also pertinent that DG, BSF's recommendation was also for action under Article 311 (2) (b) and not 311 (2) (c). That being the case for the respondents to invoke 311 (2) (c) and that too after nine years without any additional surfacing during the intervening period was indeed strange.

20. Even while admitting, without accepting, that BSF Acts and Rules were to be the basis for the SCOI, it is seen that the same did not adhere to the principles of natural justice. The statement of DIG, BSF and Commandant 116 Bn and the record of their mutual cross-examination relating to him were not made available to him. This had seriously interfered with the applicant's case, as those two officers had made allegations against him to save their own skin, a matter duly noted by IG (Personnel) in BSF Headquarters as well. Besides, the applicant was discriminated against in that the DIG and the Commandant who were responsible for the planning and execution of the raid were issued show cause notices under Rule 20 of BSF Rules to explain their case while the applicant who was not a party but only the supervisor who was informed about the raid after its completion, has been dealt with under Article 311 (2) (c). Such type of an action has been frowned upon by the

Hon'ble Supreme Court in the case of M. Raghavelu Vs. Govt. of A.P. & Another, 1997 SCC (L&S) 1743. Further, the applicant was dealt with on the basis of extraneous consideration that holding inquiry against him would have adverse affect in the court cases initiated against the DIG and the Commandant. Besides, charges against the DIG were far more serious yet the penalty handed down in his case was removal, while in the case of the applicant it was dismissal. On the basis of the fact which emerged from the SCOI, the applicant was dismissed after nine years. Difficulty in getting the witness described by the respondents as an excuse was only a ruse as all the material witnesses were BSF personnel and procuring their attendance would not have presented any problem. And none of the three civilic witnesses witnesses had deposed anything against him. Further, the Hon'ble Supreme Court in the case of Union of India Vs. J. Ahmed., (1979) 2 SCC 286 had held that negligence in discharging of duty would not constitute misconduct unless consequences directly attributable to negligence would be such as to be irreparable or the resultant damages would be so heavy that the degree of culpability would be very high. Charges against the applicant are of much less gravity than those indicated above and they could not, therefore, have brought on him such a heavy punishment as dismissal. Respondents' plea and explanation that the reason for their delayed action arose on account of their deference to the judicial clemency granted by the Tribunal and the Court was of no significance as the Hon'ble Supreme Court had, while upholding on 10.11.1994 the Tribunal's interim order dated 9.9.1993, specifically permitted the respondents to continue with the disciplinary

proceedings, as permissible under law. Respondents need not have waited for nine years as they had done. Further, in view of the decision of the Hon'ble Supreme Court in Mohinder Singh Gill Vs. Union of India, (1978) 2 SCR 272, an order made in the exercise of statutory powers has to be tested only with reference to the reasons given therein. The applicant's record after 1992 has also been `Outstanding/Very Good' and he had in fact been promoted as Addl. DGP in October, 1997. The impugned order could not have been issued against the applicant in view of his distinguished record. In view of the above, the impugned action against the applicant was faulty, mala fide and irregular and should be set aside, pleads Shri Gupta, learned Senior Advocate. Before concluding, Shri Gupta also specifically stated that the entire proceedings have emanated from the mala fides of the DG, BSF, who was against the applicant from the very beginning and had struck against him at a point convenient to him. This was done by him in an illegal manner and it, therefore, deserved to be interfered with.

21. Case of the respondents have been canvassed with equal conviction by Shri K.K.Sood, learned Additional Solicitor General assisted by S/Shri A.K.Bhardwaj and Neeraj Jain. According to them, the applicant has been dismissed from service properly and correctly, in terms of Article 311 (2) (c) of the Constitution which authorised the President or the Governor to dispense with the inquiry if in the interest of the security of State, it is felt not expedient to hold the inquiry. In terms of this provision, security of the State gains priority

over the principles of natural justice and public interest is preferred to individual interest `Expedient' means `advantageous', `beneficial', `useful' and `practical'. In this context, expressions (i) interest of the security of the State, (ii) satisfaction of the President, (iii) expediency and (iv) scope of judicial review would have to be explained. Whenever the mere disclosure of a charge affects the security of State, President can withhold the inquiry. The gravity of any wrong committed would, depending upon the area where it was committed, who has committed it and again whom it was committed vary. While in a normal area and in normal times, a wrong would have limited application but in a sensitive border State, it would have an effect on the interest of the security of the State. A single issue, as pointed out by the Hon'ble Supreme Court in Kishan Mohan Behra Vs. State of West Bengal, AIR 1972 SC 1749 may affect law and order, public order and security of State. While in the first two cases, disclosure would be permitted and inquiry could be held, in the third case, when the larger interest of the security of State is affected, the same cannot be held. In such a case, the President would correctly withhold the inquiry and the same cannot be called in question. The above has been explained further in the case of Tulsi Ram Patel (supra) to the effect that the "Police Force stands very much on the same footing as a military or para-military force for it is charged with the duty of maintaining law and order and public order and breaches of discipline and the acts of disobedience and insubordination on the part of the

members of the Police Force cannot be viewed with less gravity than similar acts on the part of the members of the military or para-military forces".

22. Satisfaction of the President referred in proviso to Article 311 (2) (c) is not circumscribed by any condition. No inquiry is to be made by the President in this regard. It is not justifiable in the absence of mala fide. This would be only the subjective satisfaction which means the President's view or perception supported by some material on record and, therefore, recording of the reasons for satisfaction for reaching a particular conclusion is not necessary. As shown by the Hon'ble Apex Court in A.K.Kaul's case (supra) "satisfaction may be arrived at, as a result of secret information received by the Government about the brewing danger to the interest or the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction while holding whether an inquiry would be expedient or not. Reasons for satisfaction reached by the President or Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public". As already pointed out, expediency can be construed as practicability or propriety as the case may be.

23. Scope of judicial review of a decision taken by the President in terms of Article 311 (2) while dismissing an individual is very limited in that the Court has only to satisfy itself that there is some material on record

enough to dispense with the provisions of Article 311 (2) while removing/dismissing an employee. If the criteria laid down by the Hon'ble Apex Court in the case of Balbir Singh (supra) has been followed, nothing further remained to be seen. Respondents have acted accordingly and nothing was further was called for, states the learned A.S.G.

24. Court of Inquiry under BSF Act was only a fact finding exercise akin to an investigation and it is not circumscribed by limitation or adherence to principles of natural justice. A person summoned for the SCOI need not be told that he is under the cloud. Rule of testimonial compulsions is also not attracted. Only when a person examined in SCOI is ultimately tried in court martial, principles of natural justice get attracted. Non-supply of SCOI proceedings or findings cause no prejudice and even when a person is subject to BSF Act, he is not entitled to a copy (Shiv Prakash Pandey Vs. C.B.I. 2003 (1) SCC 492 (SC)). In view of the above, reliance placed by the learned counsel for the applicant, on a number of cases, is of no assistance to him. Besides, one wrong or mistake cannot give rise to a precedent. Two different persons can be dealt with differently. Principles of equality envisaged under Article 14 is a positive concept and cannot be enforced in a negative manner. One illegality cannot give rise to any right for anyone for being treated in the similarly illegal manner. Equality before law does not mean that the benefit of a wrong decision given to one person can form the basis for extending the same to some others (State of Bihar Vs. Kameshwar Prasad & Ors., SCSLJ 2000 (3) 1178, Gursharan

Singh & Ors. Vs. NDMC & Others, 1996 (2) SCC 459 and Secretary, Jaipur Development Authority, Jaipur Vs. Dault Jain & Others, 1997 (1) SCC 35). Further, Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced, without any rational basis or relationship in that behalf (State of Haryana & Ors. Vs. Ram Kumar Mann, 1997 (3) SCC 321). Besides, two authorities dealing with the case of two persons, subject to two disciplines, can come to different and even contradictory conclusions and yet parity may not be available to give relief to some one else. The decision to invoke Article 311 (2) (b) or (c) is ultimately the prerogative of the competent authority and any recommendations otherwise by a junior member of staff is immaterial. Therefore decision taken to invoke Article 311(2)(c) cannot in any way be treated as illegal. Shri Sood pointed out that the scope of judicial review is very limited in respect of orders under Article 311(2)(c) and none of the contingencies/grounds for interference engrafted, in the cases cited, did not exist in the present case and the decision in Balbir Singh' case (supra) squarely protected the respondents' action against the DIG and Commandant under Article 311 (2)(b). Further action initiated against them under Article 311 (2) (b) did not vitiate the action taken under article 311(2)(c) against the applicant.

25. The applicant had enjoyed a judicial clemency by the interim order dated 9.9.1993 passed by the Tribunal in OA 1430/1993. With the final dismissal of the OA on 13.8.1999, the interim order stood diluted and order

restraining the respondents from taking action under article 311 (2) (b) got revived. This was reinforced by the decision of the Hon'ble Delhi High Court dismissing WP-5156/1999, filed against dismissal of OA-1430/1993. Therefore, the respondents could have correctly taken action under Article 311 (2) (b) of the Constitution. There was no law, which provided that report of the fact finding inquiry conducted under BSF Rules cannot be used against the applicant. In fact, the ratio of the decision in Pushpa Devi Jatia Vs. M.L. Wadhawan (JT 1987 (2) SC 299) is just the opposite. Merely because the applicant initiated action against his subordinate he cannot claim that he was innocent. Shri Sood indicated that the applicant's plea that there was delay on the part of the respondents in taking action against the applicant and that as many as nine years have gone by in between, is of no avail to him, as the respondents had held their hand only on account of deference to the clemency granted to the applicant by the Tribunal while issuing the interim order dated 9.9.1993 in OA-1430/1993. After the dismissal of the OA and of the Writ Petition on 6.9.2000, only four months were taken by the respondents to issue the impugned order. Thus there was no delay whatsoever on the part of the respondents and the applicant cannot at all seek any benefit on the ground of alleged delay. OA deserved to be dismissed, being bereft of any merit argued Shri Sood, learned ASG. This was also reiterated in the respondents' written submissions.

26. In his reply to the written submissions, the applicant points out that there were cases in which BSF officers were charged for murder of a number of

Kashmiris, where the charged officers were dealt with under the normal disciplinary/criminal proceedings and not under Article 311 (2), which has been invoked to punish him. Proceedings of the SCOI, which formed the basis of the impugned order, having become already public knowledge, it could have been stated that disclosure thereof would be prejudicial to the security of the State or expedient. Decision of the Hon'ble Supreme Court in the case of Kishan Mohan Behra (supra) relied upon by the respondents was irrelevant, the circumstances being different. The applicant not having committed any act prejudicial to the security of the State, the impugned order was faulty. President's satisfaction was open to judicial review and the respondents attempt to interpret the decisions in A.K. Kaul. Balbir Singh's case in their favour cannot help them. Further, as shown in the decisions of Nirmal Kumar Das Barwan Vs. State of West Bengal (1977 LAB IC 628 and Tikaram Bhan More Vs. State of Maharashtra & Ors. (1982 (3) SLR 387) the act of a pubic authority, if it is unreasonable and not in good faith or based on irrelevant considerations can be interfered with. In the case of the applicant, it was expedient to hold the inquiry. While the sufficiency or otherwise of the material cannot be questioned, the inference drawn therefrom is certainly open to judicial review. It is wrong to submit that SCOI proceedings can totally overlook principles of natural justice. Applicant was definitely not taking the plea that an illegality committed benefiting somebody should be extended to him as well. His plea was only that he should also be treated fairly. In the case of DIG, BSF, detailed proceedings were gone through and it cannot be

the contention of the respondents that the punishment imposed on him was wrong or irregular. As such, the respondents' pleas have no basis. Besides, both in the case of the applicant and the DIG, the disciplinary authority was the same and, therefore, to state that two authorities can take two different lines, is an unacceptable ploy. Original decision of the respondents taken possible at the highest level was apparently to deal with the applicant in terms of Article 311 (2) (b), which has been subsequently changed to invoking of Article 311 (2) (c). Applicant, as has been pointed out early, was not subject to the procedure of BSF Act and Rules in disciplinary matters and even otherwise, when the SCOI, was set in motion, he had already been repatriated to his parent Organisation - Maharashtra Police and was liable to be dealt with only under AIS (D&A) Rules, 1969. Respondents attempted explanation on the aspect of delay was tenuous and unsatisfactory, in view of the fact that as far back as in November, 1994 itself, the Hon'ble Supreme Court had, while upholding the interim order issued by the Tribunal in OA-1493/93, permitted the respondents to go ahead with the proceedings against the applicant in accordance with law. It is reiterated by the applicant that the decisions relied upon by the respondents during their pleadings do not at all assist them. OA, in the circumstances, should be allowed with full reliefs as prayed by him, pleads the applicant.

27. Shri Nitin Tambwekar, learned counsel who appeared for respondent No.3, State of Maharashtra, stated that the applicant's case was directed only against

respondents 1 and 2 and that the Tribunal had already granted the applicant relief against his claim against wishes of the applicant from the official quarters till the disposal of the case. Learned counsel stated that he had, therefore, noting further to add.

28. We have very carefully deliberated upon the rival contentions and have gone through the oral submissions and the written pleadings by the contesting parties. We have also gone through File No.CAT/Alld/JA/9-A /2003/TR-94/20366 of the Ministry of Home Affairs made available for our perusal by the learned Additional Solicitor General.

29. Undisputed facts leading to the filing of this OA are that the applicant, an officer, who belonged to the Indian Police Service (IPS) of 1967 Batch of Maharashtra cadre, had worked on Central deputation to Border Security Force (BSF) wherein he was serving as Inspector General of Police (Kashmir) in 1992. Following a raid organised by one of the BSF Battalions, in the charge in March 1992, wherein a few terrorists were apprehended and a quantity of arms and ammunition were recovered, complaints about a few irregularities committed surfaced leading to the setting up of a SCOI under the BSF Act and rules. In the inquiry, the Inquiry Officer had made certain adverse references among others to the applicant. Proceedings proposed to be taken thereafter against the applicant were stalled by judicial interference of the Principal Bench and the Hon'ble Supreme Court, but with liberty being given to the respondents to go ahead with the proceedings, but strictly in accordance with law. The applicant had, in the meanwhile, been repatriated to

his parent cadre where by his good performance he earned promotion as Addl. DGP. However, on 23/24.01.2001, by the impugned order, he has been dismissed from service, by the President, invoking proviso to Article 311 (2) (c) of the Constitution.

30. The impugned order reads as below:

"No.16013/37/93-IPS.II
Government of India/Bharat Sarkar
Ministry of Home Affairs/Grih Mantralaya

New Delhi, dated 23 January, 2001.

O R D E R

To

Shri Y.S.Jafa, IPS (MH.67)
Addl. DGP,
Government of Maharashtra
Mumbai.

Whereas the President is satisfied under sub-clause (c) of the proviso to clause (2) of Article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry in the case of Shri Y.S. Jafa, IPS (MH:67).

2. And whereas the President is satisfied that, on the basis of the information available, the activities of Shri Y.S. Jafa are such as to warrant his dismissal from service.

3. Accordingly, the President hereby dismisses Shri Y.S. Jafa, IPS (MH:67) from service with immediate effect.

4. The President further orders that said Shri Y.S. Jafa will not be entitled to compassionate allowance consequent upon his dismissal.

(By Order and in the name of the President)

Sd/-

(R.K. MITRA)
Deputy Secretary to the Govt. of India

Dated 23 January, 2001.

No.16013/27/93-IPS.II

Copy to:

1. The Chief Secretary, Govt. of Maharasthra, Mumbai with a spare copy. It is requested that this order may be served upon Shri Y.S. Jafa, IPS (MH:67) under due acknowledgement and the same may be sent to this Ministry for record."

31. The applicant has challenged the impugned order as illegal, on as many grounds as possible, all of which have been totally contested by the respondents. Some of the grounds are also overlapping. Some of the more important of the grounds would merit detailed examination, individually, which we proceed to do in succeeding paragraphs.

a) Applicant has pleaded that he had an unblemished and distinguished record of service throughout his career, which enabled him to rise to the level of the Addl. Director General of Police and, therefore, on the basis of a single, alleged failure of supervision, which related to 1992, he could not have been dealt with and penalised and that too in a very harsh and crucial manner as if he was a common criminal. Respondents, on the other hand, hold that when the proceedings have been initiated on the allegation about the failure in performance of the duty by the applicant, while he was functioning as IG, BSF, Srinagar, he would only have to be accordingly dealt with and the distinguished and/or unblemished career of the applicant, prior to or subsequent to the said period, otherwise is immaterial. We hold that the respondents are correct in this aspect. Each act of omission or commission by a Govt. servant

involving a misconduct would have to be dealt with separately. The previous or subsequent record of service of the individual would be relevant only for the limited purpose of determining the quantum of punishment to be imposed on him for the alleged misconduct, if the same is proved. The applicant's plea in this context cannot succeed and it has to be repelled.

(b) The second major plea by the applicant is that being an officer belonging to IPS of Maharashtra Cadre, even if on deputation to BSF, for the purposes of disciplinary matters he could not at all have been dealt with under BSF Act and Rules but only in terms of All India Service (Discipline and Appeal) Rules, 1969 (AIR (D&A) Rules, for short). According to the respondents, however, all those who are on the rolls of BSF are subject to the discipline of BSF Act and Rules, which applied to deputationists including IPS officers like the applicant as well. Even otherwise, the Staff Court of Inquiry (SCOI), which the applicant apparently is peeved at was nothing more than a preliminary investigation, which could very well have been taken under BSF Act and Rules as it was aimed at ascertaining certain facts, connected with BSF's working. On examination of the issue, we hold that the applicant's plea is correct. It is not in doubt that the applicant is a member of IPS an All India Service, and is accordingly subject to the AIS (Discipline & Appeal) Rules. Disciplinary proceedings undertaken in respect of any alleged misconduct by him can only be dealt with under the above rules. The point to be determined is whether the operation of the above rules would stand suspended when the Officer is on deputation with some

other Organisation for a limited period and is liable to be repatriated to his parent cadre at the end of the tenure or extended tenure of deputation as the case may be. The applicant, a Police Officer of Maharashtra Cadre, was on deputation to BSF from May, 1984 to May, 1992, first as DIG and thereafter as IG. He was, thus, working with the BSF, but not as member on their regular rolls. Therefore, the provisions of BSF Act and the Rules would have only a limited application in his case, i.e., to the extent that the operational requirements warranted. This is clear from the provisions of the Section 3 (1) of the BSF Act which states that Officers and subordinate officers and under officers and other persons enrolled under the Act shall be subject to the Act whatever the maybe and shall remain so subject until they retire, discharged, released, removed or dismissed from the Force in accordance with the provisions of the Act or the Rules. It is further directed in Section 10 ibid that "the Central Govt. may dismiss or remove from the service any person subject to this Act.". It means, therefore, that a person has to be enrolled in BSF before he can be brought under its discipline. Rule 1 (3) of the BSF Rules makes this position clearer still. It reads:-

> "Rule 1(3):- These rules shall apply to all persons subject to the Act provided that the provisions of Chapter IV thereof shall not apply to persons belonging to All India Services and other Government servants who are on deputation with Border Security Office."
>
> (emphasis supplied)

The above overriding rule makes it obvious that the deputationists are not covered by the provisions of Chapter IV, dealing with disciplinary matters. Obviously, they would have to be dealt with under the relevant provisions of their own parent organisation. Respondents were at considerable pains to explain that except for Chapter IV dealing with administrative termination of servants, all the provisions of BSF Act and Rules apply to deputationists as well. Everyone who is on the rolls of the BSF is subject to its provisions and whether he is on deputation or otherwise or he is a member of the said Force under Section 2 (o) of the Act. This explanation, however, does not come to the rescue of the respondents. A person has to be one enrolled under BSF Act to be made liable for punishment and a deputationist is not so enrolled as an officer or a subordinate officer. He only performs the administrative functions during the course of the deputation in terms of BSF Act and Rules and he does not, for the purposes of disciplinary matters, come under the purview of BSF Act and Rules. Rule 1 (3), referred above, takes care of the above situation and any interpretation which is contrary to the said provision would render it nugatory cannot, therefore, be accepted. The applicant is, therefore, correct in law, when he states that the disciplinary provisions of BSF Act and Rules have been wrongly invoked in his case and that any alleged misconduct by him, which he denies had taken place could have been dealt with only under AIS (D&A) Rules, 1969.

(c) The third point at issue emanating from the second, is whether the respondents even while adopting the BSF procedure could have given a `go bye' to the requirement of adherence to the principles of natural justice. The applicant states that he has been treated like a common criminal and forced to attend the SCOI to the discipline of which he was not subject. In the SCOI, he was denied the facilities to explain his case and even material documents were held back from him. Respondents point out that SCOI was only an exercise of investigation to arrive at the truth. Therefore, it is not circumscribed by the requirements of the principles of natural justice. Even the report of SCOI, need not be supplied, as shown in Shiv Prakash Pandey's' case (supra). We do not agree. Here the circumstances are not normal. We have here an officer who was a deputationist from Maharashtra and subject to the discipline of a different set of procedures, who has been examined as a witness and that too after his repatriation, to the parent organisation but in effect as an accused, without being told that he was under a cloud. He was only barley told that others - a DIG and a Commandant who had worked under him - had made averments against each other and which were exacerbated during their mutual cross-examination. Still, he was not given the copy of the cross-examination details, which were against him. Further, the results of the inquiry have been kept in mind, while penalising him, on the grounds that principles of natural justice are irrelevant. As the name itself indicates, SCOI is a fact finding machinery, like the inquiry proceedings under AIR (D&A) Rules, 1969 or CCS (CCA) Rules, 1969 or similar provisions and in all those proceedings, the respondents

do exhibit an amount of fairness and transparency which are hallmarks of the rule of law. In this case, however, they are conspicuous by their absence. While his juniors were given the above facility, there was no reason why the applicant also could not have been treated in the same manner. According to the respondents, provisions of Article 14 would be applicable "only when invidious discrimination is meted out to equals and similarly circumstanced without any basis or relating in that behalf as pointed by the Hon'ble Supreme Court in State of Haryana & Others Versus Ravi Kumar Mann (supra). In the above scenario, the applicant has in fact been discriminated in an invidious manner, vis-a-vis, those similarly circumstanced. There has been a clear violation of the principles of natural justice and the SCOI proceedings as far as the applicant is concerned are clearly vitiated.

(d) Next the applicant has stated that the event which had led to the action being taken against him, i.e., the raid conducted at Bimna hide out of the alleged terrorists on 24.3.1992, which resulted in the apprehending of a few hardened terrorists and recovery of a substantial quality of arms and ammunitions, had not been either planned or ordered by the applicant but was undertaken by one Shri M.L.Purohit, Commandant of 116 Bn. BSF, on his own initiative and that the applicant was only informed about the same subsequently. As soon as he came to know of the same, he had informed ADG, IB Srinagar about the same and he had along with the concerned DIG visited the ADG, J&K Police when the DIG had narrated the entire developments. Only on a

subsequent date that the applicant came to know that the Commandant/DIG had not disclosed the correct quantity of arms and ammunitions recovered either to him or to ADG, J&K Police and had in fact concealed information about recovery of gold ornaments and other household goods. This had come to his knowledge by the verbal report of Assistant Director (G), BSF whereupon the applicant had also directed the DIG to furnish a detailed report. The necessary details were furnished by the latter only on 1.4.1992. The applicant himself had ordered a SCOI on the said date but was advised against going ahead with the same by the DG Police, J&K as well as DG, BSF as well. The latter thereafter ordered the inquiry. He cannot, therefore, be held responsible for failure, if any, of the action of his juniors, the applicant pleads. On the other hand, the respondents state that the applicant, as the Inspector General of Police of BSF in over all charge of the entire area of J&K, cannot claim that he was not at all responsible for the action undertaken by his Organisation. In this, we are with the respondents. The applicant was posted at the relevant time as the Inspector General of Police, BSF, J&K area in total control of as many as 70 Battalions and he was responsible for the actions of his juniors in the area where he was posted. He cannot, therefore, take the plea that the respondents were incorrect in dealing with him in this regard. At the same time, when it is on record that the applicant had not been consulted by either the Commandant or the DIG at any time before or during the operation and as he was not consulted either with the planning or the execution of the raid, and as had come to

know of the same only after the raid was completed successfully, the applicant's culpability, if any, is less than that of Commandant or the DIG.

(e) Applicant further points out that the findings of the SCOI dealing with him were only confined to only lapses of supervision. It is stated that:

i) the applicant had known that there has been non-declaration of the seized articles still he had remained a silent spectator to this irregularity;

ii) he did not visit the spot which was in Srinagar itself, despite the importance of the operation till 5.4.1992 and thus avoided visiting the place; and

iii) he had not put his initials on the letters received by him in the above connection to avoid possible involvement and responsibility.

These charges are strongly denied by the applicant. According to him, as soon as he came to know that there has not been full disclosure of recovered articles, he had directed DIG for a report and had also initialled a SCOI. Further, as the raid had been successfully completed by the time he was informed about the same, no useful purpose would have been served by his personal presence. The fact that letters had not been initialled also does not amount to much as necessary action had

already been taken by him, on the contents thereof. We find that the applicant is correct. It is brought on record that as soon as he came to know of the fact that the full details of the seized articles have not been disclosed, he had directed the DIG to file an immediate report and even had ordered an inquiry but the same was held back by him only on the advise of DG, J&K and DG, BSF, obviously as the latter wanted to widen the scope of the inquiry. That being the case, the applicant could not be considered as having been a silent spectator as shown in the SCOI. The applicant came to know of the incident only after the completion of the operations when the matter was reported to him by the Commandant/DIG, BSF, who were immediately concerned with the raid. As the apprehending of the alleged terrorists and the recovery of the articles were completed by the time the matter was reported to him, it is doubtful whether an extra visit by the applicant to the concerned area would have materially altered the situation. The fact that he had not put the initials of the letters received in his Office also cannot be held against him, as he has not, at any time, disclaimed their receipt. In fact, he had also initiated action on the communications received from him from time to time. <u>Therefore, to our mind, the applicant's culpability is of a considerably less extent than that of the Commandant and DIG and the report of SCOI was not fully correct</u>.

f) Further, the proceedings have been initiated after nearly nine years without any fresh cause arising in the interesting period. According to the applicant, the incident which has led to the entire chain of action had

taken place as far back as March, 1992, while the impugned order is of January, 2001. This delay was unreasonable. On the other hand, the respondents state that as the applicant was under the protective umbrella of judicial clearency, they had, in due deference to Tribunal's order, postponed the action till such time they were given the clear `go ahead' by the Delhi High Court. Their action could, therefore, not be challenged. The fact, however, is different. It is true that the applicant had, apprehending departmental action, moved this Tribunal in OA-1430/93, when an interim order was issued on 9.9.1993 directing the respondents "not to resort to any action under Article 311 (2) of the Constitution without initiating regular disciplinary action in accordance with law". The same was duly upheld by the Hon'ble Supreme Court on 10.11.1994 while dismissing the SLP but with the rider that the "the petitioners are not precluded from taking such disciplinary proceedings against the respondent as are permissible under the law". This was also duly noted by the Tribunal on 15.5.1995, while directing the OA to be taken up for disposal in its turn. It was thus clear that the respondents have been given full liberty to deal with the applicant in accordance with law, i.e., in terms of AIS (D&A) Rules, 1969. The OA was finally dismissed on 13.8.1999 holding it to be premature on the basis of the averment of the learned counsel for the respondents that Govt. had not taken any decision, as in terms of the interim order dated 9.9.1993, they were precluded from taking any action. This was upheld by the High Court on 6.9.2000, whereunder permission o invoke Article 311 (2) also was granted. Hon'ble Apex Court approved

this decision on 29.9.2000. The impugned order was issued on 23.1.2001. According to the respondents, nothing irregular has been committed by them and they were only waiting for the clearance from the Tribunal/ High Court. The fact, however, remains that the respondents did not at all take any action to deal with the applicant in accordance with law, which in terms of the Hon'ble Apex Court's order dated 10.11.1994. They could have taken, as provided under law. The delay caused by the respondents was of no basis as the ultimate action was not taken on any fresh material but on the same facts of 1992 and that too after the applicant has been long repatriated to his parent cadre where he had also earned promotion as Addl. DGP. Obviously, the respondents had taken a decision to deal with the applicant under Article 311 (2) from the very beginning though they had denied it before the Court while contesting OA-1430/99. Only when the Delhi High Court permitted that Article 311 (2) can also be invoked, the respondents acted. <u>The applicant's averment that this delay was unjustified and motivated, is correct</u>.

g) Applicant's next plea is that he has been discriminated, vis-a-vis, the DIG and the Commandant, though the latter were closely concerned with the event under issue while he was concerned with it only as a Supervisor. On the part of the respondents it is pleaded that each one has been dealt with keeping in view the gravity of the offence found to have been committed by him and even if one has been given a lenient treatment wrongly, the same did not give rise to a cause of action as the ground of discrimination in terms of Article 14.

Only an invidious discrimination practised by the respondents among those who are equals and similarly placed, without any rational basis Article 14 would apply. Respondents had relied upon the decision of the Supreme Court in the case of Kameshwar Prasad Gursharan Singh vs. NDMC, Secretary Jaipur Development Authority vs. Daulat Mal Jain and State of Haryana vs. Ram Kumar Mann (supra). Besides, they have also stated that two authorities dealing with the cases of two persons subject to his disciplines, can come to two different, even contradictory conclusions, yet parity may not be available. To our mind, the respondents' defence appears to be a bit too thin for comfort. They have conceded that the applicant has been treated on a different footing from the DIG and the Commandant, in that while in his case Article 311 (2) (c) was invoked and in the case of the others Article 311(2)(b). It is on record that the same event has led to the proceedings and that while the latter two were individuals immediately and directly concerned with the event as being responsible for the planning and execution of the raid the applicant was the Supervisory Officer brought into the picture, after the raid was completed. His culpability, if any, in the event could not have been higher than that of the DIG/Commandant as observed earlier and, therefore, he could have, at worst been dealt with only in the same manner as others. Respondents have taken the plea that only when the distinction made is invidious, among equals, Article 14 would come into play. Circumstances of the case shows that the distinction made is just that - invidious and unreasonable. Further, the respondents have neither averred that the action ordered by them

against the DIG/Commandant was wrong and, therefore, their plea that the applicant cannot seek any reliefs on the ground of discrimination, that the mistake committed in the case of others was not extended to him, is rejected as being not maintainable. The decisions relied upon by the respondents on this aspect, do not come to their assistance but only to the assistance of the applicant. Further, the plea by the respondents that two authorities dealing with two individuals can come to two different and even contradictory decisions deserves mention only to be rejected, as both the applicants and the others were dealt with in respect of the same event and by the same authority. DG, BSF - to start with and the proceedings ordered later had emanated from the findings/recommendations of the same authority.

h) The impugned order dated 23/24.1.2001 dismissing the applicant has been issued, invoking Article 311 (2) proviso (c) of the Constitution, stating that in the interest of the State, it was not expedient to hold the inquiry against the applicant. According to the applicant, he has been unjustifiably proceeded against under the above provision while the respondents hold that it was a fully correct step to have been adopted. In this scenario, it would be relevant to refer to the above Article, which reads as below:-

> "311 (1) No person who is a member of a civil service of the Union or All India Service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank, except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry to impose on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.

Provided further that this clause shall not apply.

a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, or

b) where the authority empowered to dismiss or remove a person or to reduce him is satisfied that for some reasons to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry, or

c) where the President or the Governor as the case may be is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

3) If in respect of any such person, as aforesaid, a question arises whether it is reasonable practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

(emphasis supplied)

32. Under normal circumstances, in terms of Article 311 (1) & (2), the dismissal or removal from service of any individual Govt. employee is preceded by a procedure established in law, whereunder the individual concerned is given a chance to explain his conduct which has been disapproved. However, the Article permits exceptions to the above in provisos (2) (a), (b) or (c). The inquiry can be dispensed with if the concerned individual has been convicted in a criminal charge, if the competent

authority is satisfied that it was not reasonably practicable to hold the inquiry and if the President/Governor is satisfied that in the interest of security of the State, it is not expedient to hold the inquiry. The applicant was a responsible police officer, who was entrusted with over-in-all charge of BSF's activity in the sensitive State of J&K and he could not at all have been considered a security risk unless proved otherwise. Besides, proviso to 311 (2) (c) could be invoked only when prompt and immediate action was called for as laid down in the case of Tulsi Ram Patel (supra). Shri K.K. Sood, Addl. Solicitor General, appearing for the respondents, points out that it was not expedient to hold the inquiry, as the security of the State was involved. He also pointed out that the satisfaction of the President is not circumscribed by any condition and that the matter is not justifiable. However, the plea of the applicant is that the respondents have acted illegally and, therefore, it called for examination. Proviso to Article 311 (2) (c) would be invoked, if it is decided to desist from the inquiry, as it would not be practicable to hold it. The fact, however, is that neither the expediency nor the security was relevant. The applicant has been punished in January, 2001, for the alleged failure of supervision which had occurred as many as nine years earlier. The matter has been gone into in extenso by the SCOI instituted by the DG, BSF and the inquiry officer had recorded his findings which have become public. Nothing thereafter having taken place and no fresh material having been brought on record, no threat to security at all existed to invoke the proviso to Article 311 (2). Both the applicant and the

respondents have relied upon the decisions of the Hon'ble Supreme Court in the cases of Balbir Singh, A.K. Kaul and Tulsi Ram Patel (supra) in support of the proposition they were canvassing. Examination of the relevant portions thereof is called for in this regard.

34. While referring to clause 'c' of Article 311 (2) of the Constitution of India, the Constitutional Bench of the Apex Court in Union of India & Another v. Tulsiram Patel, 1985 SCC (L&S) 672, defined the interest of the security of the State as follows:

> "142. The question under clause (c), however, is not whether the security of the State has been affected or not, for the expression used in clause (c) is "in the interest of security of the State". The interest of the security of the State may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Article 311(2). The satisfaction of the President or Governor must, therefore, be with respect to the expediency or inexpediency of holding an inquiry in the interest of security of the State. The Shorter Oxford English Dictionary, Third Edition, defines the word 'inexpedient' as meaning "not expedient; disadvantageous in the circumstances, unadvisable, impolitic". The same dictionary defines 'expedient' as meaning inter alia "advantageous; fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term 'expedient' as meaning inter alia "characterized" by suitability, practicality, and efficiency in achieving a particular end: fit, proper, or advantageous under the circumstances". It must be borne in mind that the satisfaction required under clause (c) is of the Constitutional Head of the whole country or of the State.

> Under Article 74(1) of the Constitution, the satisfaction of the President would be arrived at with the aid and advice of his Council of Ministers with the Prime Minister as the Head and in the case of State by reason of the provisions of Article 163 (1) by the Governor acting with the aid and advice of his Council of Ministers with the Chief Minister as the Head. Whenever, therefore, the President or the Governor in the Constitutional sense is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under clause (c). The satisfaction so reached by the President or the Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing of danger to the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the particular source from which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public."

35. In so far as judicial review in the matter of Article 311 (2) (c) is concerned, the Apex Court in Tulsi Ram Patel's case (supra) made the following observations:

> "146. It was then submitted that leaving aside the advice given by the Ministers to the President or the Governor, the Government is bound to disclose at least the materials upon which the advice of the Council of Ministers was based so that the Court can examine whether the satisfaction of the President or the Governor, as the case may be, was arrived

at mala fide or based on wholly extraneous and irrelevant grounds so that such satisfaction would in law amount to no satisfaction at all. It was further submitted that if the Government does not voluntarily disclose such materials it can be compelled by the Court to do so. Whether this should be done or not would depend upon whether the documents in question fall within the class of privileged documents and whether in respect of them privilege has been properly claimed or not. It is unnecessary to examine this question any further because in the cases under clause (c) before us though at first privilege claimed, at the hearing privilege was waived and the materials as also the advice given by the Ministers to the Governor of Madhya Pradesh who had passed the impugned orders in those cases were disclosed."

(Emphasis supplied)

36. The Apex Court in A.K. Kaul & Anr. v. Union of India & Anr., (1995) 4 SCC 73, while dealing with the aspect of judicial review referred to the satisfaction arrived at by the President/Governor observed as under:

"25. Under clause (c) of the second proviso to Article 311 (2) the President or the Governor has to satisfy himself about the expediency in the interests of the security of the State to hold an enquiry as prescribed under Article 311 (2). Are the considerations involving the interests of the security of the State of such a nature as to exclude the satisfaction arrived at by the President or the Governor in respect of the matters from the field of justiciability? We do not think so. Article 19 (2) of the Constitution permits the State to impose, by law, reasonable restrictions in the interests of the security of the State on the exercise of the right to freedom of speech and expression conferred by sub-clause (a) of clause (1) of Article 19. The validity of the law imposing such restrictions under Article 19 (2) is open to judicial review on the ground that the restrictions are not reasonable or they are not in the interests of the security of the State. The Court is required to adjudicate on the question whether a particular restriction on the right to freedom of speech and expression is reasonable in the interests of the

security of the State and for that purpose the Court takes into consideration the interests of the security of the State and the need of the restrictions for protecting those interests. If the courts are competent to adjudicate on matters relating to the security of the State in respect of restrictions on the right to freedom of speech and expression under Article 19 (2) there appears to be no reason why the courts should not be competent to go into the question whether the satisfaction of the President or the Governor for passing an order under Article 311 (2) (c) is based on considerations having a bearing on the interests of the security of the State. While examining the validity of a law imposing restrictions on the right to freedom of speech and expression this Court has emphasised the distinction between security of the State and maintenance of public order and has observed that only serious and aggravated forms of public order which are calculated to endanger the security of the State would fall within the ambit of clause (2) of Article 19. (See : Romesh Thappar v. State of Madras, 1950 SCR 594: AIR 1950 SC 124). So also in Tulsiram Patel the Court has pointed out the distinction between the expressions "security of the State", "public order" and "law and order" and has stated that situations which affect public order are graver than those which affect law and order and situations which affect security of the State are graver than those which affect public order. The President or the Governor while exercising the power under Article 311 (2) (c) has to bear in mind this distinction between situations which affect the security of the State and the situations which affect public order or law and order and for the purpose of arriving at his satisfaction for the purpose of passing an order under Article 311 (2) (c) the President or the Governor can take into consideration only those circumstances which have a bearing on the interests of the security of the State and not on situations having a bearing on law and order or public order. The satisfaction of the President or the Governor would be vitiated if it is based on circumstances having no bearing on the security of the State. If an order passed under Article 311 (2) is assailed before a court of law on the ground that the satisfaction of the President or the Governor is not based on circumstances which have a bearing on the security of the State the Court can examine the

> circumstances on which the satisfaction of the President or the Governor is based and if it finds that the said circumstances have no bearing on the security of the State the Court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations."
>
> (Emphasis supplied)

37. Insofar as jurisdiction of the Court or a Tribunal in a judicial review of an order passed under Article 311 (c) of the Constitution of India, the following observations have been made:

> "32. In our opinion, therefore, in a case where the validity of an order passed under clause (c) of the second proviso to Article 311 (2) is assailed before a court or a tribunal it is open to the court or the tribunal to examine whether the satisfaction of the President or the Governor is vitiated by mala fides or is based on wholly or extraneous or irrelevant grounds and for that purpose the Government is obliged to place before the court or tribunal the relevant material on the basis of which the satisfaction was arrived at subject to a claim of privilege under Sections 123 and 124 of the Evidence Act to withhold production of a particular document or record. Even in cases where such a privilege is claimed the Government concerned must disclose before the court or tribunal the nature of the activities in which the government employee is said to have indulged in."
>
> (Emphasis supplied)

38. In Union of India & Anr. v. Balbir Singh & Anr., JT 1998 (3) SC 695 the scope of judicial review in a case of dismissal under second proviso to clause (c) of Article 311 (2) of the Constitution of India has been explained as under:

"7. In the case of A.K. Kaul and Another Vs. U.O.I. & Anr.(supra) this Court had examined the extent of judicial review permissible in respect of an order of dismissal passed under second proviso Clause (c) of Article 311(2) of the Constitution. This Court had held that the satisfaction of the President can be examined within the limits laid down in S.R. Bommai & Ors. Vs. U.O.I. & Ors.=JT 1994(2)SC 215. The order of the President can be examined to ascertain whether it is vitiated either by mala fides or is based on wholly extraneous and/or irrelevant grounds. The Court, however, cannot sit in appeal over the order, or substitutes its own satisfaction for the satisfaction of the President. So long as there is material before the President which is relevant for arriving at his satisfaction as to action being taken under clause (c) to the second proviso to Article 311 (2), the Court would be bound by the order so passed. This Court has enumerated the scope of judicial review of the President's satisfaction for passing an order under Clause (c) of the second proviso to Article 311(2). The Court has said, (1) that the order would be open to challenge on the ground of mala fides or being based wholly on extraneous and/or irrelevant grounds; (2)even if some of the material on which the action is taken is found to be irrelevant the Court would still not interfere so long as there is some relevant material sustaining the action; (3) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute its opinion for that of the President; 94) the ground of mala fides takes in, inter alia, situations where the proclamation is found to be a clear case of abuse of power or what is sometimes called fraud or power; (5) the Court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Council of Ministers are the best judge of the situation and that they are also in possession of information and material and Constitution has trusted their judgment in the matter; (6) this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive. (cf. Also Union Territory, Chandigarh & Ors. V. Mohinder Singh=JT 1997 (2) 504".

39. If one has regard to the ratio decidendi of the above, security of the State has been defined as not only the security of the entire country or a whole State, but it also includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. The effect is through State secrets or information relating to the Defence Production being passed to other countries. The way in which security of the State is affected may be either open or calandestine. The next example where the security of the State is affected is disaffection in the Armed Forces or para-military Forces. Disaffection in any of these Forces is likely to spread, for disaffected or dissatisfied members of these Forces spread such dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination and disobedience to the orders of their superiors. It is this situation which not only affects law and order but is vital for the security of the State. Though the satisfaction to be arrived at by the President is subjective satisfaction not only danger to the security of the State but also other factors are required to be considered weighed and balanced to reach the requisite satisfaction whether holding of inquiry would be expedient or not. Leaving aside the advice given by the Minister to the President Government is bound to disclose at least the material upon which the advice of the Council of Ministers has been based to enable the Court to examine whether the satisfaction of the President has been arrived at mala

fidely or based on wholly extraneous or irrelevant grounds. In that event the satisfaction would be a nullity in law.

40. In S.R. Bommai v. Union of India, (1994) 3 SCC 1, majority view taken is reproduced:

(i) the satisfaction of the President while making a Proclamation under Article 356 (1) is justifiable;

(ii) it would be open to challenge on the ground of mala fides or being based wholly on extraneous and/or irrelevant grounds ;

(iii) even if some of the materials on which the action is taken is found to be irrelevant. the court would still not interfere so long as there is some relevant material sustaining the action ;

(iv) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute its opinion for that of the President ;

(v) the ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power or what is sometimes called fraud on power.

(vi) the court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgement in the matter; and

(vii) this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive."

41. In A.K. Kaul's case while dealing with the issue of privilege, the Hon'ble Court had held that the claim of privilege is to be considered by the Court or Tribunal on its own merits, but this claim would not stand in the way of the Government concerned being required to disclose the nature of activities of the employees on the basis of which satisfaction of the President has been arrived at leading to an order passed under Article 311 (2) (c). This would determine and facilitate the Court to examine whether the activities alleged could be regarded as having a reasonable nexus with the interest of the security of the State. These activities in which the employee is said to have indulged in must be distinguished from the material which support the indulgence in such activities. For non-disclosure of such material claim of privilege is upheld. However, this would not extend to the disclosure of nature of

activities because it would not involve disclosure of any information connecting with such activities or the source of such information.

42. Having regard to the aforesaid, we observe that initially the SCOI held by the BSF where applicant was on deputation, found the applicant to be guilty of lapses of supervision, command and control. This proceeding has been carried out as per the BSF Rules during the course of which of it several witnesses mostly BSF officers have been examined and explanations have been sought from the concerned. The applicant was one of the witnesses. On the basis of the findings of the SCOI, a proposal was drawn up to invoke against the applicant proviso to Article 311 (2) (c) of the Constitution in the interest of the security of the State. The move was stayed by the Tribunal and the Hon'ble Supreme Court but with the directions that the respondents are free to take action against the applicant in accordance with law. However, only on much later date, after the OA was dismissed as pre-mature and liberty was granted to the respondents by the Hon'ble High Court, it was felt needed to hold a meeting of the Committee of the Advisers.

43. OM No.34012/1(5)/79-Estt (B) dated 26.7.1980 lays down procedure for dealing with the cases of Government servant engaged in or associated with subversive activities in so far as applicability of proviso to Article 311 (2) is concerned. As per this OM on receipt of the information regarding subversive activities a Committee of Advisers is constituted and to first decide:

(i) whether the allegations made against the suspect or any of them should be disclosed to the suspect and he should be given an opportunity to furnish his information; or

(ii) whether on grounds of national security or the nature of allegations made against the suspect, it is not advisable or necessary to disclose the allegations against the suspect or to call upon his reply thereto. Thereupon, after consideration recommendations of Committee of Advisers is to be forwarded to the President.

44. As per the guidelines cases of government servant engaged in subversive activities are re-classified in clause (b) (3) with reference to the activities pre-judicial to the interest of sovereignty and integrity of India.

45. It is also not disputed that in pursuance of SCOI not only applicant but other officers including DIG Ashok Kumar has been indicted and course of action was suggested. Accordingly, Ashok Kumar who was terminated resorting to Section 20 of the B.S.F. Act. However, the orders been set aside by the Division Bench of Jammu & Kashmir High Court on 21.4.1999, against which SLP preferred before the Apex Court is still sub judice. In the meanwhile, directions have been issued by the Hon'ble Apex Court not to terminate the services of the concerned officer without further orders. He is thus continuing in service all these while.

46. As per the decision of the Apex Court, in cases where dismissal has been resorted to under Article 311 (2) (c) judicial review of this Tribunal is not barred. However, the same is limited to the examination as to whether the satisfaction of the President arrived at is not vitiated on extraneous or irrelevant considerations and whether it is mala fide or not. It is also to be examined whether the satisfaction is based on circumstances which have a bearing on the security of the State. In a judicial review even if the material found is irrelevant and the relevant material sustain the action cannot be challenged. Truth or correctness of the material or its adequacy by substituting opinion for the President is also precluded. This cannot be questioned in arriving at a conclusion. The Court is precluded from lightly presuming misuse of the power.

47. Having regard to the aforesaid we find that when the matter has been referred to the Advisory Committee on second time there has been total non-application of mind, to the relevant consideration as envisaged in OM of 1980 ibid. The earlier decision of the Committee which met on 16.7.1993 has only been re-iterated and adopted. As mandated upon, the Committee was to examine whether the nature of allegations be disclosed to the suspect. Grant of reasonable opportunity, which is a right of government servant before his services are dispensed with is in-built in a situation where protection to the employees granted in Article 311 (2) is sought to be curtailed. Constitution of India protects those rights subject to just exceptions out of which Article 311 (2) (c) is one.

A reasonable opportunity to defend could be dispensed with if the disclosure of material alleged against the suspect would not be in the interest of the security of the State. Enquiry cannot be avoided in a weak case or material not sufficient to prove the charges. The constitutional provisions cannot be by-passed and short-cuts cannot be permitted which would interfere with the rights of the individual on the alleged grounds of just exceptions. In our considered view and from the perusal of material in support of the satisfaction arrived at placed before us, we find that the relevant material on the basis of which applicant has been indicted in SCOI had already been made public. The witnesses have been examined to arrive at the findings about the lapses of supervision, command and control on the post of the applicant. The security of the State was not at all disturbed or affected from its disclosure, yet the same material has been avoided and not taken into consideration, which showed total lack of application of mind, while recommending course of action against applicant..

48. The relevant consideration as to gaps in the evidence also shows mala fides to avoid holding of inquiry against applicant.

49. A national interest can never be adversely affected in case of holding of a disciplinary proceeding but it is the security of the State which matters. From the perusal of the SCOI conducted by the BSF it transpires

that the outcome of the allegations, in the opinion of the inquiry officer then or now being treated as hazardous to the security of the State. It is after 9 years, at the remote point of time when disclosure of the material in SCIO has no effect at all over the security of the State, resort to Article 311 (2) (c) has been taken.

50. Any action of the Government has to pass through the cardinal test of fairness in action and deprivation of rights of the parties. The fact that a few officers have been punished is not a relevant consideration to deny the applicant permission to avail himself of his right to know the allegations against him and to effectively defend it. Arbitrariness in any action can never be upheld. The duty to act fairly is inbuilt. Though no personal mala fides are to be attributed, we feel that the satisfaction arrived at is based on the circumstances which do not even have an iota of an effect on the security of the State.

51. We also find that initially the proposed action was to await the outcome of the Apex Court decision in Ashok Kumar's case (supra). The same has been changed and the impugned action has been taken in haste, which conclusively points towards the desire of respondents to mete out to the applicant also the fate of other officers. It would appear that applicant who remained unpunished for long years has now been subjected to deprivation of his rights under Article 311 (2) (c) of the Constitution of India, which to our considered view cannot be countenanced. Not only the mala fides are to

be seen, the satisfaction arrived at is prone for an examination as to whether irrelevant considerations and circumstances having no bearing at all on the security of the State have gone into the decision. In such an examination, the inference is against the respondents. The grounds taken for non-disclosure of the reasons for the action, i.e., interest of security of State cease to have any relevance, as the allegations have already been disclosed to applicant in SCIO and no further indictment was on anvil. This is another factor which makes the satisfaction rests upon irrelevant considerations. Further, another reason for holding back the inquiry is that it might affect the progress of their proceedings initiated against others. This is totally irrelevant.

52. In the result, having regard to the above, the irresistible inference that emerges is that the present case is not a fit one for taking resort to proviso to Article 311 (2)(c) of the Constitution of India. The aforesaid provision has been resorted to more in breach than compliance, as the satisfaction arrived at is mechanical for want of independent application and arrived at mechanically keeping at bay all the relevant considerations the same cannot be sustained in the eyes of law.

53. The above inference/conclusion does not mean that we are against the idea of the respondents' taking any action against it. Far from it, what we feel is that invoking of Article 311 (2) (c) was clearly avoidable in this case and that the respondents should not have resorted to this short-cut for no compelling reasons, but

should have accepted the normal procedure in law, as enumerated in All India Service (Punishment & Appeal) Rules, 1969. That alone was possible in the present case.

54. According to the applicant, the competent authority's satisfaction calls for examination. According to the respondents, the above satisfaction was not justifiable and that the presidential exercise of the power was not circumscribed by judicial review. We are making it clear that we do not embark upon any course of action to substitute our wisdom/judgment for that of the competent authority. It falls outside the scope of judicial review. However, when it is brought out that the said satisfaction is based on wrong facts and unreasonable grounds, as had occurred in this OA, judicial review is called for. In the circumstances of the case, the result of the judicial review is not in favour of the respondents.

55. The plea of the applicant that he had been singled out for discriminatory treatment in that the result of the fact finding inquiry was not supplied, is answered by the respondents stating that the same was not at all called for. Besides, while the report of SCOI had been the basis of the action against the applicant could he have been denied the above? We hold the answer in the negative. On this score also, the applicant's case is strong. While the averment of DIG & Commandant after cross-examination of each other was against the applicant, he should have been put on notice. We also

had the opportunity to peruse the relevant file No.4/4/92-T of the Ministry of Home Affairs. It is seen therefrom that the decision to dispense with the services of the applicant had been taken as far back as in 1993 but the proceedings before the Tribunal/High Court and the Supreme Court had intervened. Govt. had, all the while, taken a stand that the culpability of the applicant was of the same magnitude as of those who were also concerned, i.e., DIG and the Commandant and had, therefore, decided to proceed against the applicant. The proposal from DG, BSF (as he then was) was that the services of the applicant be dispensed with invoking Article 311 (2) (b) while the decision taken by the Ministry of Home Affairs was to invoke Article 311 (2) (c). The earlier decision has been reiterated by the present administration. It is true that the Ministry of Home Affairs could deal with the applicant under Article 311 (2) but it is doubtful whether such an action was warranted in the circumstances of the case. As noted earlier, SCOI's findings about the applicant related to being a silent spectator to the irregularities committed by his juniors, his not visiting the spot and his not initialling the letters.

56. All the above three charges put together would show that this to be a <u>case at worst of failure of supervision</u>. But would it per se amount to a situation where the <u>applicant could</u> have been dealt with without observing any procedure to give him at least one chance to explain his case? We feel not. Facts and circumstances of the case show that neither the interest of security nor expediency would have suffered in any way

by following the requisite procedure for conducting the inquiry. When the applicant has been indicated on the basis of SCOI report, which has led to the impugned order, he should have been given an opportunity to explain his case, vis-a-vis, that report. It has not been done. It is also wrong to assume that witnesses would not be available, as most of them BSF officials themselves. Holding of the inquiry also could not have resulted in any breach of security, as feared by the respondents. By seeking the short-cut, the respondents have acted not as model employees. This was clearly avoidable. We do not at all suggest that the applicant should not be proceeded against. Respondents can always take action against any erring or defaulting employee for the error or omission or misconduct he is guilty of but the same should be done in accordance with law and after going through the due process. Our finding is that the respondents had not done so but had chosen a short-cut, which they should not have traversed. Their action, therefore, cannot at all be endorsed.

57. In the above view of the matter, the OA succeeds and is accordingly allowed. The impugned order dated 23/24.1.2001 is quashed and set aside. The applicant is ordered to be reinstated immediately. This does not come in the way of the applicant being proceeded against in a duly constituted inquiry in terms of AIS (D&A) Rules, 1969. If the respondents deem it necessary to do so, they may initiate the proceedings accordingly. We also direct that the period between the date of his dismissal and his reinstatement be regularised by the competent

authority in accordance with law and the outcome of the disciplinary proceedings, if the same are to be initiated. In view of the above directions, the interim relief granted against respondent No.3, on the aspect of eviction of the applicant from the official quarter, is made absolute and the applicant is permitted to continue in the quarter in the usual terms and conditions.

58. Before parting with this, we would also like to place on record our deep appreciation for the excellent assistance we received from the learned counsel on both sides. Shri G.D.Gupta, learned Senior Advocate along with Shri V.K.Rao appearing for the applicant and Shri K.K. Sood, learned Additional Solicitor General, who along with Shri A.K. Bhardwaj and Shri Neeraj Jain appeared for the Union of India and Shri Nitin Tambwekar, learned counsel for the State of Maharashtra, all tried sincerely to help the Tribunal in analysing the issues. We are thankful to them.

59. There shall be no order as to costs.

S. Raju

(SHANKER RAJU)
MEMBER (J)

(GOVINDAN S. TAMPI)
MEMBER (A)

/sunil/