

(1976) 05 DEL CK 0009

In the Delhi High Court

Case No : Letter Patent Appeal No. 84 of 1975

Ram Murti Wadhwa

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-05-1976

Acts Referred:

Citation : (1976) ILR Delhi 691

Hon'ble Judges : T.V.R. Tatachari, J; A.B. Rohtagi, J

Bench : Division Bench

Advocate : B. Kirpal, A.B. Saharia, V.B. Saharya and K.B. Soni, for the Appellant;

Judgement

Avadh Behari Rohtagi, J.

(1) The Facts The appellant was a member of the armed forces. At very early stage he chose a military career for himself in life. He was recruited as a boy in the army on July 27, 1948. On May 13, 1963, he was commissioned in the army medical corps as a second lieutenant. In due course of time he rose to the rank of a captain. In that position he was confirmed on May 13, 1970.

(2) On November 11, 1968, the appellant was working in the post of an assistant administrative officer in the Armed Forces Medical College at Pune. The college has two divisions. One consists of the troops, that is. the defense personnel. The other is a civilian establishment. The appellant was working in the civilian establishment of the college which was under his charge. There were certain allegations of mismanagement against him. He was charged with having made payments to certain fictitious persons and making false entries in the monthly pay bills with an intent to defraud the Government. He was tried before a general court-martial. He was found guilty. The sentence of dismissal from service was passed against him which was finally upheld by Chief of Army Staff. As a result he was dismissed from service.

(3) On October 22, 1973, the appellant brought a writ petition under Article 226

of the Constitution. He prayed for a writ of certiorari claiming that the findings of the general court-martial dated July 20, 1972, be quashed. He further claimed a writ of mandamus directing the respondents. Union of India and the Chief of Army Staff, to reinstate him in service.

(4) A learned single judge (Prakash Narain, J.) of this court dismissed the writ petition on July 23, 1975. Now there is an appeal to this court.

(5) The appellant raised a number of contentions before the learned single judge in support of his plea that the findings and sentence of the court-martial were invalid. Most of those contentions were repealed before us. We shall deal with them in a moment. But before we do that it is necessary to have a synoptic view of the procedure of trials by the court-martial.

2. The outlines of procedure at court-martial

(6) The procedure at a court-martial is set out partly in the Army Act (XLVI of 1950) (The Act) itself and partly in the Army Rules 1954 (the rules) framed by the Government of India, Ministry of defense, in exercise of the powers conferred by section 191 of the Act. The procedure of trial by a general court-martial in broad outlines is this. The first step towards bringing an offender to justice under the military code is to order his arrest or confinement. (Section 101 of the Act). Military custody may mean open or close arrest at the discretion of the superior officer. A person under close arrest does not go out of his quarter or place of his confinement except to take an exercise. An officer placed under arrest is informed in writing of the nature of his arrest. In order to ensure expeditious disposal of disciplinary cases, the Act requires that whenever a person subject to military law is taken into military custody, the charge against him must be investigated with all convenient speed, (section 102).

(7) The first investigation is usually carried out by the company commander who formulates, in the light of investigation made by him, the charge or charges against the accused. With the list of charges so drawn up, the accused is produced before the commanding officer who holds a formal investigation into the case. At this investigation the nature of the offence or offences charged is made known to the accused and witnesses present depose to facts within their knowledge in support of the charge or charges. The accused is present throughout this investigation and is given full liberty to cross-examine the witnesses. He can also call any witnesses on his own behalf and make any statement in his defense. [rule 22(1)].

(8) After hearing the witnesses in support of the charge or charges and witnesses, if any, produced by the accused and any statement that he may make, the commanding officer, according to the view he has formed may either dismiss the charge if the evidence does not disclose any offence, or dispose of the case summarily under, section 80 of the Act, or refer the case to the proper superior military authority, or adjourn the case for the purpose of having the evidence reduced to writing, or order his trial by a summary court-martial. [rule

22(2) and (3)1.

(9) Suppose the commanding officer remands the case for trial by court-martial, then the case is adjourned for a "summary of evidence" to be taken. Its chief purpose is to give the accused, the commanding officer and the convening officer and to the presiding officer of a court-martial so convened particulars of the evidence in respect of the charge or charges. The commanding officer may himself prepare the summary of evidence or appoint some other officer to do so. The statements of witnesses who were present and gave evidence before the commanding officer whether against or for the accused and any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused. [rule 23(1)1.

(10) The accused may put in cross-examination such questions as he thinks fit to any witness and the questions together with the answers thereto are added to the evidence recorded [rule 23(2)1. The- accused is not, however, entitled to be legally represented at the taking of the summary of evidence. The accused is asked if he wishes to make any statement. Any statement thereupon made by the accused is taken down in writing and read over to him but he is not cross-examined upon it. The accused is then allowed to call his witnesses including, if he so desires, any witnesses as to character, [rule 23(3)1.

(11) When the summary of evidence is completed, it is considered again by the commanding officer, who, notwithstanding that he had previously remanded the case with the intention of applying for trial by court-martial, thereupon either remands the accused for trial by a court-martial, or refers the case to the proper superior military authority, or rehears the case and either dismisses the charge or disposes of it summarily [rule 24(1)1. If the accused is remanded for trial by a court-martial, the commanding officer, without unnecessary delay, applies to a proper military authority to convene a court-martial [rule 24(2)1. The convening officer then appoints or details the officers to form the court. The convening officer ensures that before the accused is arraigned, he is informed by an officer of every charge for which he is to be tried, and also that, on his giving the names of witnesses whom he desires to call in his defense, reasonable steps are taken for procuring their attendance. The officer at the time of so informing the accused gives him a copy of the charge-sheet and, if necessary, reads and explains to him the charge"s.

(12) The next stage is the arraignment of the accused. This is done by the charges being read. The accused is then questioned in respect of each charge separately whether he pleads "guilty" or "not guilty" thereto. If he does not plead guilty to the charge the prosecution examines the evidence. The accused is given full opportunity for making his defense and is afforded every facility for preparing it which is practicable having due regard to the military exigencies or necessities (rule 36). The military code is quite zealous of the rights of the accused. It provides that the court shall allow great latitude to the accused in making his defense, [rule 77(3)].

(13) After the addresses of the prosecutor and the accused have been made, the judge-advocate sums up the case in open court (rule 60). After the judge-advocate has delivered his summing up, the court is closed for the consideration of the finding in the presence of the judge-advocate (rule 61). The sentence is also considered in closed court. The sentence so arrived at is entered in the proceedings and authenticated by the presiding officer, and the judge advocate, if any, by affixing their signatures thereto. The proceedings are then forwarded to the convening authority for confirmation [rule 67(2)]. The confirming authority may confirm or refuse confirmation (rule 70). Thereafter the finding and sentence shall together with confirmation be promulgated. Until promulgation has been effected confirmation is not complete, [rule 71].

(14) This then is the skeletal sketch of the procedure which is followed at the general court-martial. In the present case in line with this procedure a preliminary investigation into the allegations of fraud and mismanagement was made between August 18, 1970 and September 14, 1970 by Lt. Colonel N. S. Rao. A court of inquiry was thereupon ordered by the commandant of the college on September 15, 1970, to give an opinion and pin-point responsibilities for acts of commission and omission. The court of inquiry assembled on September 23, 1970. It completed its inquiry on December 18, 1970. The appellant took part in the court of inquiry. A "summary of evidence" was then ordered on certain charges against the appellant. He was served with a charge-sheet dated May 9, 1972. A general court-martial was ordered for the trial of the appellant on June 1, 1972. The court-martial assembled on June 22, 1972. At the end of the trial the court-martial gave its verdict and pronounced sentence on July 20, 1972. The verdict and the sentence were, however, confirmed on November 27, 1973. The sentence of dismissal pronounced against the appellant was promulgated on December 1, 1972. The appellant appealed to the Chief of Army Staff. His appeal was dismissed on December 29, 1972. Thereafter he filed the writ petition challenging his dismissal from service, as we have said.

3.The contentions (i) Assembly of court of inquiry

(15) We now take up the several contentions raised on behalf of the appellant before us. The first contention is that the court of inquiry was not ordered by a proper authority. In the appellant's case it was ordered by the commandant of the college in place of the officer commanding troops. Air Vice Marshal Shri Nagesh was the commandant of the college at the relevant time. The colonel in charge of the administration at that time was one Colonel B. N. Narula. The appellant's case is that he being an army officer the officer commanding troops alone could have ordered the court of inquiry. In other words the court of inquiry ordered by the commandant Air Vice Marshal Shri Nagesh is said to be bad.

(16) The relevant provision in this regard is rule 177 :

"177.Courts of Inquiry (1)A court of inquiry is an assembly of officers or of officers and junior commissioned officers or warrant officers or non-

commissioned officers directed to collect evidence, and, if so required, to report, "with regard to any matter which may be referred to them.

(2)The court may consist of any number of officers of any rank, or of one or more officers together with one or more junior commissioned officers or warrant officers or non-commissioned officers. The members of the court may belong to any branch or department of the service, according to the nature of the investigation.

(3)A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps."

(17) The point for consideration is whether under sub-rule (3) of rule 177 the court of inquiry could have been ordered by the commandant or it could have been done only by the colonel in charge (administration), the officer commanding troops. It is true that the colonel in charge (administration) Colonel B. N. Narula was competent to order an inquiry by a court of inquiry. But there appears to be no bar to an officer senior to him in ordering the court of inquiry. Undoubtedly the commandant was a superior officer belonging to the armed forces. He was over all commandant of the Armed Forces Medical College. It is so recorded in the bulletin of information of the college which was produced before us for our perusal. We are not Therefore convinced that there was any jurisdictional infirmity in the commandant ordering the court of inquiry against the appellant. There is another answer to this objection to which we shall return a little later.

(II)Appointment of defending officer

(18) The second contention of the appellant was that he was seriously prejudiced in his defense in as much as "a friend of the accused" was not provided to him and he was not allowed to have the services of "a defending officer" during the court-martial. The relevant rule in this behalf is rule 95.

"95.Defending officer and friend of accused. (1) At any general or district court-martial, if any accused person is not represented by a counsel, he may be represented by any officer subject to the Act who shall be called "the defending officer" or assisted by any person whose services he may be able to procure and who shall be called "the friend of the accused."

(2)It shall be the duty of the convening officer to ascertain whether an accused person, not otherwise represented, desires to have a defending officer assigned to represent him at his trial and, if he does so desire, the convening officer shall use his best endeavors to ensure that the accused shall be so represented by a suitable officer. If owing to military exigencies, or for any other reason, there shall in the opinion of the convening officer, be no such officer available for the purpose, the convening officer shall give a written notice to the presiding officer of the court-martial, and such notice shall be attached to the proceedings.

(3)The defending officer shall have the same rights and duties as appertain to

counsel under these rules and shall be under the like obligations.

"(4)The friend of the accused may advise the accused on all points and suggest the questions to be put to the witnesses, but he shall not examine or cross-examine the witnesses or address the court."

(19) Now a friend of the accused is different from a defending officer. The friend of the accused may advise the accused and may suggest questions to be put to the witnesses but he cannot examine or cross-examine the witnesses or address the court. In this respect he suffers from a disability. But the defending officer can examine and cross-examine witnesses as well as address the court.

(20) On May 18, 1971, the appellant requested that Lt. Colonel Balakrishnan be made available as a defending officer. By communication dated March 16, 1972, he was informed that Lt. Colonel Balakrishnan could not be made available. On May 9, 1972, the appellant was asked to submit two names for the defending officer. The appellant by letter dated May 11, 1972, suggested the names of Lt. Colonel Umrao Singh and Major O. P. Choudhary. These two officers were not available and the appellant was told by a letter dated May 29, 1972 that their services could not be put at his disposal. He was asked to give two other names. On May 30, 1972, the appellant wrote that either Major M. J. Shallom or Lt. Colonel Vijay Shankar Singh may be deputed as defending officers. These officers were also not available. By a communication dated June 15, 1972, the appellant was asked to select a defending officer from a panel of three names-Major H. S. Sawhney, Major V. K. Sahney and Major D. S. Ghai. On June 17, 1972, the appellant wrote that as the prosecuting officer was a Lt. Colonel his defending officer should also be of the same rank. If that was not possible, he said, Captain Narinder Singh may be detailed as a defending officer. This request of the appellant was accepted. Captain Narinder Singh was detailed as the defending officer on June 17, 1972. Unfortunately Captain Narinder Singh's wife died and he refused to act as the defending officer on June 20, 1972. On June 19, 1972, Major R. N. Awasthi appeared as the defending officer for the appellant at the court-martial. He throughout defended him. The appellant paid tribute to Major Awasthi for the excellent manner in which he defended him.

(21) But this is not all. The appellant sought leave to engage a civilian counsel. Leave was given to him.

(22) In the record of the court-martial produced before us the following appears :

"the accused submitted on June 27, 1972, that Mr. A. J. D. Cunha, friend of the accused, will no longer appear before this court and that Mr. M. R. Ginwalla, advocate of Bombay High Court will represent the accused." HCD/76-2b2

(23) On June 30, 1972, another advocate of the Bombay High Court, Mr. Mohd. Hasan, appeared before the court-martial to assist the senior counsel Mr. Ginwalla. He was allowed to do so.

(24) Under rule 95(1) an accused before the court-martial is entitled to the

facility of having either "a friend of the accused" or "the defending officer". He cannot claim both as of right. In this case what we find is that the appellant was not only provided with a defending officer but he was also allowed the facility of having a civilian counsel of his choice to defend him at the trial. Mr. Ginwalla made the closing address on July 18, 1972. No complaint of prejudice was made at any time to the court-martial on the ground that the appellant was hampered in his defense for want of legal advice. This contention is, Therefore, without merit.

(III) Summoning of witnesses

(25) The third contention raised before us is that the military authorities did not summon all the witnesses which the appellant wanted to summon in his defense. On June 6, 1972, the accused gave a list of 22 defense witnesses. On June 27, 1972, the appellant made an inquiry from the colonel in charge (administration) to tell him whether all his witnesses had been summoned. On June 2-8, 1972, a reply was sent to him saying that confirmation had not been received till then from the authorities concerned regarding service of all the defense witnesses. On June 30, 1972, the appellant again addressed a letter inquiring whether steps had been taken for securing the attendance of defense witnesses. He again addressed another letter on July 1, 1972. On the same day, that is, July 1, 1972, the colonel in charge (administration) wrote to him that steps have been taken to procure the attendance of the witnesses as requested in his letter dated June 6, 1972, and information regarding non-availability of the defense witnesses as and when received will be communicated to him. This is all the relevant correspondence on this subject.

(26) The petitioner was put under close arrest on June 22, 1972. On that date the general court-martial assembled. But the court-martial was adjourned to June 27, 1972. On June 27, 1972, court-martial put the following question to the accused :

"Q: Do you wish to apply for adjournment ? A : No."

(27) The appellant examined eight witnesses at the trial in his defense. On July 15, 1972, the defense evidence was closed and an adjournment was sought for making an address. The case was adjourned to July 18, 1972. On that date the closing address of the defense was made.

(28) The main contention before us was that at the trial all the 22 witnesses were not present and it was for the military authorities to produce them for the appellant could not secure their presence as he was under a close arrest. The short answer to this contention is that though it is true that 22 witnesses were summoned and some of these witnesses could not be served in time so as to appear at the trial on June 27, 1972 yet the appellant made no complaint about it at any stage during the trial or even at the time of the closing address of the defense counsel. 8 witnesses were examined by the appellant. Some more witnesses were present but they were given up. For example Durga Dass was not

examined by him. He was later on examined as a court witness. Some witnesses could not be present at the trial as they were either not served in time or their whereabouts could not be known. For example, one Pushpangadan who was summoned as a witness could be served only in August 1972 after the trial had closed.

(29) The upshot of the discussion is that the proper stage for the objection on this score was before the court-martial when the trial opened. The procedure is this. After the plea of "not guilty" of the accused has been recorded the court asks the accused whether he wishes to apply for an adjournment on the ground that any of the rules relating to procedure before trial have not been complied with and that he has been prejudiced thereby or on the ground that he has not had sufficient opportunity for preparing his defense and his reply is recorded. If the accused makes any such application the court hears any statement or evidence which he may desire to adduce in support thereof, and any statement of the prosecutor or evidence in answer thereto; and if the court is satisfied that the accused has in fact been prejudiced by any non-compliance with any of such rules relating to procedure or that he has not had sufficient opportunity of preparing his defense, it may grant such adjournment as may appear to it in circumstances proper, [rule 56(1) and (2)].

(30) The appellant never made any complaint to the court-martial that his defense witnesses had not been summoned and that he wanted to examine each or all of them. On July 15, 1972, the defense was closed without any demur or complaint on his part. An adjournment was sought for making an address. The case was adjourned to July 18, 1972. Our conclusion, Therefore, on this contention is that the appellant was not prejudiced on the ground that all his witnesses were not present at the trial.

(IV) Loss of file

(31) The forth contention is that a certain file containing the pay bills was not produced at the trial in spite of the appellant's request for its production. According to the respondents this file was available till July or August 1972 but thereafter it was irretrievably lost. In fact a court of inquiry was ordered to investigate into the alleged loss of the file. The court of inquiry assembled on December 8, 1970. The court of inquiry recorded the finding that the file was lost and they were unable to pinpoint the responsibility for the loss of the file on any individual.

(32) The fact, Therefore, remains that a certain file summoned by the appellant was not produced. It was proved before the court-martial that it had been lost. What is the effect of the non-production or loss of the file on the case of the appellant was essentially a question for the court-martial to consider. It is not for this court to go into this question and say that the appellant was prejudiced because of the non-production of the file. Such a conclusion can be reached only after examining the merits of the controversy and on an appreciation of the

evidence adduced by the parties. We are afraid this we cannot do. The province of an inquiry under Article 226 of the Constitution of India is severely limited.

(V)Forensic examination

(33) The fifth contention is that the request of the appellant for forensic examination of certain pay bills was "turned down and this resulted in prejudice to him. This contention, we think, is without any foundation. The appellant made a request for examination of certain documents by a handwriting expert on January 5, 1971. On January 10, 1971, the request was rejected. That was at the stage of summary of evidence (and not at the stage of the court of inquiry as noted by the learned single judge in his judgment). The court of inquiry carried on its investigation from September 23, 1970 to December 18, 1970. The court-martial assembled on June 22, 1972. No request for forensic examination was ever made to the court- martial. Expert was not summoned as a witness by the appellant though he had a clear right to do so. Therefore this point did not arise at all at the trial before the court-martial. No grievance of it was made even in the closing address.

(34) When before the court of inquiry the request was made the appellant was told "this :

"THE Commandant has considered your request for getting the bills photographed or examined by experts. He has opined that you are free to ask any questions regarding the authenticity of these documents during the recording of Summary of Evidence or even at the Court-.Martial, if and when it is held."

(35) If the appellant had any grievance on the score of rejection of his request he should have taken it as a point before the court- martial and should have demanded that the documents be examined by a handwriting expert as a measure of his defense. He never did so. Now it is too late in the day to build an argument on it before us.

(VI)Objection to summary of evidence

(36) The sixth contention is that at the stage of summary of evidence the appellant's questions and answers were not correctly recorded. We have no hesitation in rejecting this contention out of hand. Colonel P. N. Anand who recorded the evidence made an affidavit dated November 11, 1974 before the learned single judge wherein he denied categorically that he ever "refused to record questions of the petitioner or recorded them in any form other than in which the petitioner had put the questions to witnesses during cross-examination."

(37) In the return of the respondents it is averred that the complaint against Lt. Colonel P. N. Anand was brought to the notice of the Commandant Air Vice Marshal Sri Nagesh who personally considered the application of the appellant dated January 15, 1971 (annexure I to the writ petition). Lt. Colonel P. N. Anand

was called as also the appellant to his office by the commandant. Apparently the complaint was groundless.

(VII)Objection regarding change

(38) The seventh contention raised before us is that the appellant was tried before the court-martial for an offence u/s 52(f) of the Act while at the stage of the court of inquiry he was charged with an offence u/s 57(e) of the Act. On this ground it was said that the trial was vitiated. At this stage we may here set out the two relevant sections :

"52.Offences in respect of property : Any person subject to this Act who commits any of the following offences that is to say :- (a)
(b) (c)
(d)
(e) (f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person; shall on conviction by court martial, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned."

"57.Falsifying official documents and false declaration :- Any person subject to this Act who commits any of the following offences, that is to say :-
(b)
(c)..... (d)
(e) obtains for himself, or for any other person any pension. allowance, or other advantage, or privilege by a statement which is false, or which he either knows or believes to be false or does not believe to be true, or by making or using a false entry in any book or record or by making any document containing a false statement, or by omitting to make a true entry or document containing a true statement; shall on conviction by a court martial, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this act mentioned."

(39) A charge-sheet as understood in military law, is a document which contains the whole issue or issues to be tried by court-martial at one time. A charge-sheet may thus contain one charge or several charges. A charge means an accusation contained in a charge-sheet that a person subject to the Act has been guilty of an offence (rule 28). Every charge-sheet commences with the name and description of the person charged and states his number, rank, name and the corps or department, if any, to which he belongs. Each charge states one offence only and in no case can an offence be described in the alternative. Each charge is divided into two :

(I)statement of the offence: and

(II)statement of the particulars of the act, neglect or omission Constituting the offence.

(40) The particulars state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission is intended to be proved against him (rule 30).

(41) The charge-sheet is signed by the commanding officer of the accused and contains the place and date of such signature (rule 31).

(42) It should, however, be clearly noted that the charges framed at the stage of proceedings under rule 23, that is, at the time of the Taking down of summary of evidence by the commanding officer are not final. Subject to the right of amendment under rule 50, it is only the charge-sheet on which the accused is arraigned before the court which is material as it is that charge-sheet alone which forms the basis of the trial and not any other charge-sheet which may have been prepared at the initial stage [see S. Sundarajan Vs. Union of India and Others,].

(43) Even the charge-sheet on which the accused is arraigned before the court can be amended under sub-rule (2) of rule 50 which reads:

"50.Amendment of charge. (2) If on the trial of any charge, it appears to the court at any time before it has begun to examine the witnesses, that in the interests of justice any addition to, omission from, or alteration in, the charge is required, it may report its opinion to the convening authority, and may adjourn, and the convening authority may either direct the new trial to be commenced, or amend the charge, and order the trial to proceed with such amended charge after due notice to the accused."

(44) The appellant's contention, it appears to us, is based on a confusion of thought. He is confusing the charges framed at the stage of proceedings under rule 23 with the charge-sheet framed under rule 50. It has also to be noticed that no objection to the charge was taken by the appellant. He was clearly entitled to raise objection under rule 49. In the court-martial record at page 214 the following appears in the proceedings :

"the accused has raised no objection to the charge-sheet or the charges."

(45) This contention is arid and we, Therefore, reject it.

4.Two general answers

(46) Before we close we would like to make two general observations on the whole case.

(47) Firstly, on a conjoint reading of rules 22, 23 and 24 it will be seen that by its very nature the hearing of the evidence by the commanding officer at the initial stage when the person charged with an offence is brought before him is for the purpose of ascertaining whether the charge should be dismissed or should be proceeded with. If the commanding officer is of the opinion that the charge ought not to be proceeded with, the person charged with the offence has to be released forthwith. On the other hand, if the commanding officer is of the opinion that the

charge ought to be proceeded with he may then follow one of the courses open to him under rule 22.

(48) The object of the rule is, Therefore, to hold a son of preliminary investigation by the commanding officer with a view to ascertain whether a prima facie case exists. The investigation contemplated by rule 22 docs not require that the evidence of the witnesses examined by the commanding officer should necessarily be reduced to writing. Its only requirement is that the charge should be heard in the presence of the accused and he should be given an opportunity not only to cross-examine any witness against him but also to call any witness and make any statement in his defense.

(49) Once the officer commanding comes to the conclusion that the charge ought to be" proceeded with then there must be a formal recording of statement of witnesses as required by rule 23. Rule 24 provides inter alias for the remand of the accused for trial by court- martial.

(50) Now rule 182 provides :

"182.Proceedings of court of inquiry not admissible in evidence. The proceedings of a court of inquiry, or any confession, statement, or answer to a question made or given at a court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for willfully giving false evidence before that court."

(51) Three principal contentions (contentions Nos. 1, 5 and 6 already discussed above) raised by the appellant before us relate to the stage of the court of inquiry and the summary of evidence. But under rule 182 proceedings before a court of inquiry are not to be taken into consideration in evidence before a court-martial. Any irregularity committed at the stage of court of inquiry cannot effect the jurisdiction of the court to proceed with trial [see *Sundarajan v. Union of India* (supra)]. The court-martial records its findings and sentence on the basis of independent evidence adduced before it. The appellant has not been able to show us any such illegality in the conduct of the trial by the court-martial or any infirmity in their jurisdiction to try him as would render the whole trial illegal.

(52) Secondly, if there is any defect of procedure or deviation from the Act or the rules at the stage of court-martial the proper stage would be to point it out then and there and register in the form of a protest. Later on an objection on the ground of error or defect of procedure cannot be entertained unless the irregularity or the illegality is such as goes to the jurisdiction of the court-martial or the confirming authority.

(53) Every irregularity or non-observance of the rules can by no means be regarded as affecting the jurisdiction of the court to proceed with the trial. It must be such as vitiates the trial and ultimate conviction of the accused. This is not to say that the proceedings of a court-martial are entirely immune from

scrutiny by this court. The court can enquire and ascertain whether the person held in custody was subject to military law or the court itself was properly convened and constituted. A writ of certiorari under Article 226 of the Constitution can be issued for the purpose of examining the record and proceedings of a court-martial if the complaint is that the court-martial was not duly constituted, that it had no jurisdiction over the person or over the subject-matter of the charge or that there is an error of law apparent on the face of the record or that the principles of natural justice were violated so as to result in miscarriage of justice. This is the view which a full bench (Dua C. J" S. K. Kapur & Hardy J. J.) of this court has propounded in *Sundarajan v. Union of India*, (supra). We respectfully follow that view. We are not prepared to hold that a writ or order under Article 226 can be issued for examining mere errors of procedure. To do so would be to convert the high prerogative writ jurisdiction into a jurisdiction of appellate review. Where a court- martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence can be reviewed by this court upon an application for certiorari. As was said by a division bench of this court :

"WE may repeat that we are not entitled to go into the regularity of steps taken by the court-martial in the course of trial or by the confirming authority in confirming the finding and the sentence which do not go to their jurisdiction."

(S.P.N. Sharma v. Union of India, Air 1968 Del 156 per I.D. Dua C.J. and S.N. Shankar J.)(2).

(54) The courts-martial are in fact a specialised form of administrative courts and the scope of review traditionally afforded by the civil courts over their judgments has been very limited. This is evident from the fact that Article 136 of the Constitution expressly excludes the power of judicial review in respect of any judgment, determination, sentence or order passed or made, by any court or tribunal constituted by or under any law relating to the armed forces though the jurisdiction of the Supreme Court and High Courts under Article 32 and Article 226 of the Constitution of India respectively to issue writs to any person or authority has been preserved.

5. Conclusions (i) Writ of certiorari

(55) To sum up : nothing has been shown which would induce us to hold that the finding and sentence as confirmed are tainted with such a serious jurisdictional infirmity that they should be described as nonest and ignored. From the record of the court-martial produced before us we are not prepared to say that there has been a denial of justice to the appellant of which he can justly complain to us. We are not persuaded to hold that a writ of certiorari should issue to quash the findings and sentence of the court-martial.

(II) Writ of mandamus

(56) One word more. That is with regard to writ of mandamus claimed by the

appellant directing the respondents to reinstate him in service and pay him the arrears of salary from the date of dismissal. Counsel for the respondents submitted that such a writ cannot be issued. He invited our attention to the following statutory provisions and cases. Article 310(1) of the Constitution provides :

"EXCEPT, as expressly provided by this Constitution, every person who is a member of a defense service or of a civil service of the Union or of an all-India service or holds any post connected with defense or any civil post under the Union, holds office during the pleasure of the President."

(57) Article 311 contains no reference to any person belonging to the defense service or holding post connected with defense.

(58) It is, therefore, evident that the protection enjoyed by the civil servant under Article 311 has not been extended to the members of the defense services. This constitutional principle is embodied in section 18 of the Act which provides :

"EVERY person subject to this Act shall hold office during the pleasure of the President."

(59) A member of the armed forces holds office during the pleasure of the President. That is the essential condition of his tenure of service. His services can be dispensed with at any time by the- President. Such is the term of engagement of those who take up the profession of arms. If any of them considers that he has been dismissed unjustly, his remedy is not by a law suit but by an appeal or remonstrance of official or political kind (*Shenton v. Smith* (1895) A. C. 229.

(60) In *Wing Commander O. P. Bhardwaj v. Union of India*, 1966 D.L.T. 531 the petitioner was dismissed from the Air Force. He brought a petition under Article 226 of the Constitution. Dismissing the petition Kapur J. said :

"IN case of civil servants, certain special safeguards have been provided by Article 311 of the Constitution. Those safeguards admittedly do not extend to the army personnel.

AS the law, however, stands at present it seems to recognise that employment in Army is not a right but only a privilege revocable by the Sovereign it will and efficient managements demands that power to appoint should necessarily include the power to dismiss. In Army matters the Legislature has conferred on the Government the same proprietary rights as provided to employers to ""hire and fire without restrictions." "

(61) Other courts, it was pointed out, have also taken the same view. (*Sec Union of India (UOI) Vs. Ram Chand Beli Ram*, and *Chhandra Bhan Varma Vs. Union of India*,). It was, Therefore, argued that a writ of mandamus cannot go for that would tantamount to directing specific performance of a contract of service. We need not decide this point as Mr. Kirpal on behalf of the appellant stated before

us that he did not press the claim so far as the writ of mandamus is concerned.

(62) For these reasons we would dismiss the appeal but make no order as to costs.