

(2002) 05 DEL CK 0126
In the Delhi High Court
Case No : C.W.P. No. 2937 of 1995

Ranjit Singh, Ex. Sepoy

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-05-2002

Acts Referred:

Army Act, 1950 — Section 109, 113, 125, 126, 127
Army Rules, 1954 — Rule 102, 18, 39, 39(2), 40
Constitution of India, 1950 — Article 20, 21, 33, 39A
Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 — Rule 7(1)
Criminal Procedure Code, 1973 (CrPC) — Section 304
Legal Services Authorities Act, 1987 — Section 12
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2002) 05 DEL CK 0126

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : R.S. Randhawa, for the Appellant; T.V. George, for U. Hazarika, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—The scope and limitation of Court Martial proceedings envisaged under the provisions of the Army Act, 1950 (hereinafter referred to as "the Act") and the Army Rules, 1954 (hereinafter referred to as "the Rules") framed there under is in question in this writ petition, which arises out of a judgment and order of conviction and sentence passed against the petitioner on 23.03.1993.

2. The petitioner was accused of a serious charge. A complaint was made against him by a few ladies that on 15.05.1992 he committed an offence of rape on one lady. He was put under arrest on the same day. He was released on 18.05.1992 as no F.I.R. was lodged. The petitioner allegedly shot at Major Gaikawad on 20.05.1992, who had arrested the petitioner. A charge-sheet u/s 302 of the Indian Penal Code (hereinafter referred to as "the IPC") was filed against him on

30.01.1993 and a Court Martial for the purpose of his trial was convened on 17.02.1993.

3. A sentence of imprisonment of life coupled with dismissal from service was passed on 23.03.1993. A pre-confirmation application filed before the competent authority by him was rejected. Even a post-confirmation petition was rejected by the Government of India vide an Order dated 22.04.1994.

4. The petitioner thereafter filed a writ petition before the Punjab and Haryana High Court, which was withdrawn with a liberty to file writ petition before this Court.

5. Mr. R.S. Randhawa, the learned counsel appearing on behalf of the petitioner keeping in view the limited jurisdiction of this Court has raised three contentions in support of the present writ petition.

6. The learned counsel would firstly contend that the Judge Advocate, who has a vital role to play in Court Martial proceedings, being not competent, the entire proceedings were vitiated in law.

It was argued that the qualification of a Judge Advocate having regard to Rules 39 and 40 of the Rules and Section 113 of the Act must be taken into consideration in terms whereof 3 years of Commission is a pre-requisite for participating in Court Martial proceedings. Strong reliance in this connection has been placed on *Union of India and Another Vs. Charanjit S. Gill and Others*, .

7. The learned counsel would next contend that the State had an obligation to provide a counsel at its expenses. Such counsel, keeping in view the gravity of the offence must not only be a competent counsel, but also a counsel who would be in a position to communicate with and take instructions from the accused. The learned counsel would urge that the petitioner did not know Hindi, English or Assamees and as he was conversant with the Punjabi language only, he could not communicate with his counsel and thus, he was seriously prejudiced in the matter of conduct of trial. The learned counsel would submit that as the petitioner was not provided with a counsel of his own choice, his fundamental right under Article 21 was violated. He filed an application as regards engagement of his counsel that the decision be awaited till his family members come, but without passing any order thereon the trial proceeded. It was pointed out that whereas at one point of time, the petitioner was asked to engage his counsel and the State declined to bear expenses, but only at a later stage, by an Order dated 30.01.1993, he was informed that a counsel shall be provided to him, where for payment of fees shall be restricted to the maximum of Rs. 250/- per day for the days, the counsel appeared in the General Court Martial Proceeding. It was, Therefore, submitted that even a defense counsel of proven ability was not engaged to appear on his behalf. Reliance in this connection has been placed on *Ranchod Mathur Wasawa Vs. State of Gujarat*, ; *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, ; and *Suk Das Vs. Union Territory of Arunachal Pradesh*, .

8. The learned counsel would next contend that an offence of murder is a civil offence within a meaning of Section 69 of the Act; having regard to Section 70 of the Act, the jurisdiction of the Court Martial as also the criminal courts being concurrent, the competent authority was bound to follow the mandatory procedure laid down in terms of Section 125 thereof. It was pointed out that not only no order was passed in that regard, but also no clarification has ever been made. The learned counsel would urge that unless an Order u/s 125 of the Act is passed, the Court Martial could not take cognizance of the offence. In any event, the learned counsel would contend that the discretion exercised in terms of Section 125 of the Act being a judicial jurisdiction, reasons were required to be recorded in support thereof. According to the learned counsel, ordinarily such trial should have been held by a criminal court. It was further submitted that normally a trained Judge should have been held to be competent to try the offences. The learned counsel would argue that the statutory conditions laid down in the law must be strictly complied with. Reliance in this connection has been placed on R.S. Bhagat Vs. Union of India, , Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Usha Ranjan Roy Choudhury and Another, ; Ranjit Thakur Vs. Union of India (UOI) and Others, ; and State of Madhya Pradesh Vs. Sunder Lal, .

9. Mr. George, the learned counsel appearing on behalf of the respondents would, on the other hand, contend that qualification of a Judge Advocate need only be considered having regard to the compliance with the principles of natural justice as contained in the provisions of Rule 39 of this Rules and no other. Ineligibility and disqualification, contends the learned counsel, stand on a different footings and thus only because a Judge Advocate was ineligible to participate in the Court Martial proceedings in terms of Section 139 of the Act, the same would per se not lead to the conclusion that he was disqualified to act as Judge Advocate, particularly having regard to the fact that only legally trained persons are appointed in the said posts.

The learned counsel would urge that criminal proceedings are required to be held expeditiously and non-appointment of a competent lawyer for the petitioner cannot per se be a ground for non-commissioning the Court Martial.

10. As regard the third contention raised by the learned counsel appearing on behalf of the petitioner, it was submitted that the provisions of the Act have been held to be intra vires, Ram Sarup Vs. The Union of India (UOI) and Another, . The learned counsel would contend that in a case of this nature, the question of passing an order contrary thereto has been passed by the Chief Judicial Magistrate. Drawing our attention to the statements made in the counter affidavit, the learned counsel would contend that in this case when the accused was produced before the Chief Judicial Magistrate, it was directed by the Criminal Court that he be tried in a Court Martial proceedings.

Re. CONTENTION NO. 1:-

11. Chapter X of the Act provides for holding Court Martial proceedings. A General Court Martial in terms of Section 109 of the Act may be convened by the Central Government, the Chief of the Army Staff, or by any Officer empowered in this behalf by warrant of the Chief of the Army Staff. The composition of a General Court Martial is contained in Section 113 of the Act, which is in the following terms:-

" 113. Composition of General Court Martial . --A General Court Martial shall consist of not less than five officers, each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of captain."

12. It is not in dispute that Judge Advocate, who represented the Army Authorities, in the instant case, did not complete three whole years of commission service. It is also not in dispute that judging from that angle, the Judge Advocate was not eligible for taking part in General Court Martial.

13. The power to make Rules is contained in Section 191 of the Act. Pursuant to or in furtherance of the said power, the Central Government has framed Rules, known as Army Rules, 1954. Rules 39, 40, 41 as also Rule 102 of the Rules, which are relevant for our purpose, read as under:-

"39. Ineligibility and disqualification of officers for court-martial. -

(1) An officer is not eligible for serving on a court-martial if he is not subject to the Act.

(2) An officer is disqualified for serving on a general or district court-martial if he (a) is an officer who convened the court; or (b) is the prosecutor or a witness for the prosecution; or (c) investigated the charges before trial, or took down the summary of evidence or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the squadron, battery, company, or other commander, who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or (d) is the commanding officer of the accused, or of the corps to which the accused belongs; or (e) has a personal interest in the case.

(3) The provost-marshal or assistant provost-marshal is disqualified from serving on a general court martial or district court-martial."

"40. Composition of general Court-martial . --

(1) A general court-martial shall be composed, as far as seems to the convening officer practicable, of officers of different corps or departments, and in no case exclusive of officers of the corps or department to which the accused belongs.

(2) The members of a court-martial for the trial of an officer shall be of a rank not lower than that of the officer unless, in the opinion of the convening officer, officers of such rank are not (having due regard to the exigencies of the public

service) available. Such opinions shall be recorded in the convening order.

(3) In no case shall an officer below the rank of captain be a member of court-martial for the trial of a field officer."

41. Inquiry by court as to legal constitution. --(1) On the court-assembling, the order convening the court shall be laid before it together with the charge-sheet and the summary of evidence or a true copy thereof, and also the ranks, names and corps of the officers appointed to serve on the court; and the court satisfy itself that it is legally constituted; that is to say--

(a) that, so far as the court can ascertain the court has been convened in accordance with the provisions of the Act and these rules;

(b) that the court consists of a number of officers, not less than the minimum required by law and, save as mentioned in Rule 38, not less than the number detailed;

(c) that each of the officers so assembled is eligible and not disqualified for serving on that court-martial; and

(d) that in the case of general court-martial, the officers are of the required rank.

(2) The court shall, further, if it is a general or district court-martial to which a judge-advocate has been appointed, ascertain that the judge-advocate is duly appointed and is not disqualified for sitting on that court-martial.

(3) The court, if not satisfied with regard to the compliance with the aforesaid provisions, shall report its opinion to the convening authority, and may adjourn for that purpose."

102. Disqualification of judge-advocate. -- An officer who is disqualified for sitting on a court-martial, shall be disqualified for acting as a judge-advocate at that court-martial."

14. It is true that whereas Rule 39 speaks of ineligibility and disqualification of officers to act in Court Martial proceedings. The question, which, however, arises for consideration in this writ petition, is as to whether the ineligibility criteria contained in Section 139 of the Act is applicable in the instant case.

15. Rule 40 of the Rules relates to composition of General Court Martial whereas Rule 41 refers to an enquiry by court as to the legal constitution.

16. The Apex Court in no uncertain terms has clearly in Charanjit S. Gill's case (Supra) laid down the importance of a Judge Advocate holding a particular rank. The Apex Court referred to its earlier decision in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, and lamented that despite the said decision, the Central Government had failed to realize their constitutional obligations inasmuch as except amending Rule 62, no other provision had been amended. Tracing the history of the Act, it was held that "Court Martials" are not the courts in the terms as understood in the implementation of the civil laws. The

Apex Court considered the provisions of Rules 39, 40 and 44 and upon noticing its earlier decision in S.N. Mukherjee Vs. Union of India, , observed:-

"14. It is true that Judge-Advocate theoretically performs no function as a judge but it is equally true that he is an effective officer of the court conducting the case against the accused under the Act. It is his duty to inform the court of any defect or irregularity in the charge and, in the constitution of the court or in the proceedings. The quality of the advice tendered by the Judge-Advocate is very crucial in a trial conducted under the Act. With the role assigned to him a Judge-Advocate is in a position to sway the minds of the members of the court-martial as his advice or verdict cannot be taken lightly by the person composing the court who are admittedly not law knowing persons. It is to be remembered that the court-martials are not part of the judicial system in the country and are not permanent courts."

17. Rejecting a similar contention that disqualification of the Judge Advocate is confined only to Rule 39(2) of the Rules, it was held:-

"16. ...We cannot agree with this general proposition made on behalf of the appellant inasmuch as Sub-rule (2) of Rule 40 specifically provides that members of a court-martial for trial of an officer should be of a rank not lower than that of the officer facing the trial unless such officer is not available regarding which specific opinion is required to be recorded in the convening order. Rule 102 unambiguously provides that "an officer who is disqualified or sitting on a court-martial shall be disqualified for acting as a Judge-Advocate in a court-martial". A combined reading of Rules 39, 40 and 102 suggest that an officer who is disqualified to be a part of court-martial is also disqualified acting and sitting as a Judge-Advocate at the court-martial. It follows, Therefore, that if an officer lower in rank than the officer facing the trial cannot become a part of the court-martial, the officer of such rank would be disqualified for acting as a Judge-Advocate at the trial before a GCM. Accepting a plea to the contrary, would be invalidating the legal bar imposed upon the composition of the court Sub-rule (2) of Rule 40."

It was observed:-

"18. The purpose and object of prescribing the conditions of eligibility and qualification along with desirability of having members of the court-martial of the rank not lower than the officer facing the trial obvious. The law makers and the rule framers appear to have in mind the respect and dignity of the officer facing the trial till guilt is proved against him by not exposing him to humiliation of being subjected to trial by offices of lower in rank. The importance of the Judge-Advocate as noticed earlier being of a paramount nature requires that he should be such person who inspires confidence and does not subject the officer facing the trial to humiliation because the accused is also entitled to the opinion and services to the Judge-Advocate. Availing of the services or seeking advise from a person junior in rank may apparently be not possible ultimately resulting in failure of justice."

18. The Apex Court, however, applied the de facto doctrine and gave prospective operation to the judgment.

19. For construction of such a provision, the doctrine of purposive construction must be taken recourse to.

20. Yet recently in *A. Chandra Sekhar Reddy and etc. v. Union of India and Ors.* AIR 2002 (A.P.) 148, it was noticed:-

"21. In *Ananta Kumar Bej Vs. State of West Bengal and Others*, a Division Bench of the Calcutta High Court has noticed the authorities as regards purposive construction in the following terms (para 22 of Lab IC):

"It is well settled principles of law that despite absence of a rule, the Selection Committee is entitled to short list the candidates. Rule 9(c)(ii) of the Rules only gives a statutory recognition to the aforementioned service jurisprudence. In a case of this nature, Therefore, the doctrine of purposive interpretation should be invoked, and in such a situation the word "written test" must be held to be incorporated within the word "interview." The answer to the question posed in this appeal, thus in the opinion of this Court, should be rendered in affirmative as otherwise the word "written examination" would become totally otiose. Such a construction is permissible by taking recourse to the doctrine of strained construction, as has been elaborately dealt in by Francis Bennion in his *Statutory Interpretation*."

"22. In Francis Bennion *Statutory Interpretation*, Second edition, as regards the rule of "purposive construction," it has been stated at Section 304 as under:

A purposive construction of an enactment is one which gives effect to the legislative purpose by--

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in the Code called a purposive-and-literal construction),

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction)."

"23. In *DPP v. Schildkamp*, 1971 AC 1, it was held that the rule that severance may be effected even where the "blue pencil" technique, is impracticable."

"24. In *Jones v. Wrotham Park Settled Estates* (1980) AC 74 the law is stated in the following term:--

"...I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a Court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. Kammins

Ballrooms Co. Ltd. v. Zenith Investments (torquay) Ltd. 1971 AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a Court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed."

21. In the instant writ petition which was filed in the year 1995, a question had been raised as regards eligibility of the Judge Advocate in the following terms:-

"F. That the next infirmity that stares at the trial rendering it without jurisdiction is the ineligibility of the Judge Advocate to sit at the trial. It is clearly provided in Rule 41(2) that the court, where the Judge Advocate has been appointed, shall ascertain that he is duly appointed and not disqualified for sitting on that court martial. Further elaboration in this regard is contained in Rule 102 to the effect that an officer who is disqualified for sitting on a Court Martial shall be disqualified for sitting as a Judge Advocate at that trial. One of the essential requirement for a member to be eligible and competent to sit on a court martial is commissioned service rendered by him. As given in Section 113 of the Army Act, a person eligible for being detailed as a member of the GCM must have held a commission for not less than 3 years. If the qualification and competency of an officer to be a member and a Judge Advocate are same, then this condition must attract the detainment of the Judge Advocate as well. Rather, this must visit the detainment of the Judge Advocate with ferocity because he has much more onerous responsibility and duties to perform under the scheme of the Army Act and which are almost akin and equivalent to the presiding officer of the court. The record reveals that the Judge Advocate detailed held the rank of Lieutenant, which clearly means that he was having a service less than 3 years. The Judge Advocate as such was not competent to sit as Judge Advocate in the trial. It is on the basis of his advice that the court has come to a decision and conclusion. The entire conclusion and decision as such are vitiated on account of the advice of a person who was neither eligible for nor qualified to sit as Judge Advocate, rendering the entire trial without jurisdiction."

It is, thus, a case where such a question had been raised and, thus, the decision of the Apex Court in Charanjit Singh Gill (Supra) is applicable.

22. We are, Therefore, of the opinion that the Judge Advocate being ineligible, the Court Martial proceedings stood vitiated. The first contention must,

Therefore, be answered in favor of the writ petitioner and against the respondents.

RE. : CONTENTION NO. 2.:-

23. In terms of the letter of the respondents dated 30.01.1993, an intimation regarding commencement of the General Court Martial proceedings was sent to the father of the petitioner. The petitioner, who does not know English, probably took the help of a co-employee and by his letter dated 08.02.1993 stated:-

"1. Your letter No. 2002/A/2478597A- Sep Ranjit Singh dated 30.1.93

2. I need the services of an Army Officer.

3. My family members may kindly be awaited. On their reaching only, I would come to know about the lawyer. It is possible that they might have arranged some one, in case they could not do so, I may be provided Govt. pleader.

4. I have no witness."

24. On 27.01.1993, despite earlier communication, the petitioner was informed that a lawyer shall be provided to him at the Government expenses. The petitioner in his writ petitioner contended :-

"E. That the most serious prejudice which the petitioner had suffered was the detainment of the counsel to defend him at the trial. It is provided under the Act that an accused person facing trial for an offence, which is punishable with death, can be provided a counsel at the State expense. The upper limit of expenses is regulated in this regard and cannot exceed Rs. 240 per day. Once the decision had been taken to try the petitioner by court-martial, he was asked through letter dated 30-1-93 to intimate if he wanted to engage a counsel. Copy of letter is at Annexure "F". Though it was mentioned in the letter that a counsel can be provided at the State expense, yet he was informed that in case he decided to engage the services of a defense counsel, then the Govt. was under no liability to defray such expenses. This clearly gave out to the petitioner that if he wanted some help from the State, he had to agree to a counsel selected by the Unit authority who was responsible for prosecuting the petitioner. The petitioner in response to this letter had written that he required the services of an officer to defend him. In regard to the counsel, he had apprised the Unit that his relatives may bring some advocate and they may have made arrangement in this regard and hence their arrival be awaited. Copy of letter is at Annexure "G". In case they did not arrive, then the Govt. counsel may be provided to him. On 27-1-1993, a letter had also been written to the father of the petitioner in this regard and the father of the petitioner had specifically requested the unit that he wanted to bring the counsel for his son from his part of the country. Copy of letter is at Annexure "H". An adjournment was also prayed but without heeding to the request, one Shri Ajit Kumar Dowerah was detailed to defend the petitioner at the Govt. expenses. Under the circumstances, he was neither of the choice of the petitioner nor the petitioner had consented for his presence to

defend him. Rather, he was forced and thrust upon him. The prejudice that accrued to the petitioner on this count is manifold as enumerated in the foregoing paragraphs. This counsel could not converse with the petitioner as he did not know Punjabi. the petitioner did not know any other language. This counsel also could not understand. This counsel also could not understand the deposition of various witnesses who spoke in Punjabi. The handicap and prejudice suffered by the petitioner on this count can well be imagined. In fact, it in itself is a serious infirmity going to the root of the matter vitiating the entire trial. It is not out of place to mention here that a right to be defended by counsel of one's choice is now recognised as a fundamental right as part and parcel of the right to life and liberty and the procedure established by law as contained in the Articles 20 and 21 of the Constitution of India, the counsel which was thrust upon the petitioner neither could defend him properly nor was he interested in doing so he being selectee of the prosecution agency.

25. The question raised in this writ petition must be judged having regard to the constitutional protection given to an accused in terms of Article 21 of the Constitution. An accused has a right to be defended by a counsel of his own choice in terms of Section 304 of the Criminal Procedure Code (in short, "the Cr. P.C."). The State is bound to, in the event the accused is unable to engage one, appoint a defense counsel and provide for a counsel, who would have not only be in the penal of defense counsel, but also must have minimum experience of 7 years.

26. u/s 12 of the State Legal Services Authorities Act, 1983 a prisoner is entitled to engage a legal aid counsel at the expenses of the Legal Service Authority. The petitioner was not apprised of his right under Article 21 of the Constitution as also the SLSA Act. Such a violation of constitutional and statutory right of an accused and particularly when he was being proceeded with on a grave charge must be viewed with all seriousness.

27. It may be true, as argued by Mr. George, that the Court Martial proceedings were required to be initiated expeditiously, but the same would not mean that the Court Martial proceedings should and/or could be initiated at the cost of a valuable right of the accused person. Once a prisoner is deprived of a valuable right of getting himself defended in a criminal proceedings, in absence of assistance of a counsel who could represent him in true sense, in our opinion, it must be held that the petitioner's fundamental right as also statutory right has been violated.

28. In Ranchod Mathur's case (Supra) , Krishna Iyer, J. emphasized the need of appointment of a defense counsel stating:-

"... Indigence should never a ground for denying fair trail or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronizing gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available, so

that the advocate chosen may serve the cause of justice with all the ability at his command."

29. Yet again in Hussainara Khatoon's case (Supra) , the Apex Court noticed Article 39A of the Constitution of India (in short, "the Constitution") and clearly held that making legal services available to the accused persons is mandatory as he cannot be deprived of his life or liberty, inasmuch as such the entire procedure must be reasonable, fair and just.

30. Provisions of providing legal services would inter alias mean the engagement of a lawyer who is in a position to communicate with his client and take instructions from him. He must for all intent and purport be a competent counsel.

We may also notice that the Constitution was amended by inserting Article 39A, which is in the following terms:-

"Article 39A Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

In terms of the aforementioned provisions coupled with the provisions of the Legal Services Authority Act, 1987, and by reason of the provisions of Article 21 of the Constitution, an accused must be held to have a constitutional and statutory right in respect thereof.

31. Yet again in Suk Das and Anr.'s case (Supra) , referring to its earlier decision in Khatri and Others Vs. State of Bihar and Others, , the Apex Court reiterated that on account of poverty or illiteracy, an accused prisoner cannot be denied his right to obtain free legal services at the cost of the State. It was held that irrespective of the fact that as to whether an accused files an application or not in this behalf, a lawyer has to be provided at the expense of the State. As noticed hereinbefore, in the instant case, it has not been contended that the lawyer appointed by the respondents was not a competent lawyer but was not in a position communicate with the petitioner. Providing such legal assistance would for all intents and purposes mean to rendition of no legal assistance at all. The second contention of the petitioner, Therefore, also succeeds.

RE : CONTENTION No. 3 :-

32. Sections 69 and 70 of the Act read thus:

"69. Civil offences. -- Subject to the provisions of Section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,--

(a) if the offence is one which would be punishable under any law in force in

India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned;

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this At mentioned.

70. Civil offences not triable by court-martial . -- A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences--

(a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the Central Government by notification in this behalf."

33. It may be true that the petitioner could have been tried in a General Court Martial having regard to the provisions of Sections 69 and 70 of the Act, but the question, however, is as to whether in the instant case, the procedure laid down Therefore has been followed.

34. Section 125 of the Act reads thus:-

"125. Choice between criminal court and court-martial. --When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody."

An order indisputably, Therefore, has to be passed in terms of the aforementioned provisions.

35. Section 125 of the Act speaks of a decision. Such a decision to the effect that the proceedings should be instituted before a Court Martial must be in writing. Only by reason of an order in writing, a direction can be issued by the competent authority that the accused person shall be detained in military custody. An ordinary court has the jurisdiction to initiate the trial of a criminal case. Sections 69 and 70 of the Act curb out an exception thereto. The jurisdiction of the criminal court and the Court Martial being coordinate it was obligatory on the part of the respondents is strictly comply with the provisions of Section 125 of the Act. Exercise of discretion in terms of Section 125 of the Act would require application of mind on the part of the Competent Authority and while applying mind in that behalf, the said authority must take into consideration all aspects of

the matter including respective advantages and disadvantages of getting the accused tried by a criminal court vis-a-vis in a Court Martial. A discretion conferred upon the appropriate authority cannot be exercised arbitrarily or whimsically. The Apex Court while upholding the constitutionality of Section 125 of the Act in Ram Sarup's case (Supra) held:-

"22. In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court-Martial or by an ordinary Criminal Court, and Therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.

23. Lastly, it may be mentioned that the decision of the relevant military officer does not decide the matter finally. Section 126 empowers a criminal court having jurisdiction to try an offender to require the relevant military officer to deliver the offender to the Magistrate to be proceeded against according to law or to postpone proceedings pending reference to the Central Government, if that Criminal Court be of opinion that proceedings be instituted before itself in respect of that offence. When such a request is made, the military officer has either to comply with it or to make a reference to the Central Government whose orders would be final with respect to the venue of the trial. The discretion exercised by the military officer is Therefore subject to the control of the Central Government."

It was held that Section 125 does not contain any guideline. The Apex Court, however, held that the nature of offence, the person accused, by whom the offence is committed, discipline in the Army and exigency of service are the relevant criteria.

36. Even an accused who is illiterate is entitled to be informed about his rights under the provisions of the Act as in case of conflict, the decision of the Central Government would be final.

37. In Usha Ranjan Roy Choudhury's case (Supra) , the Apex Court has held where the procedures have not been followed, the trial is vitiated.

38. In Ranjit Thakur's case (Supra) , it was held that the statutory conditions must strictly be complied with.

39. In Union of India (UOI) Vs. Major S.K. Sharma, , the Apex Court held:-

"The policy of our constitutional polity is that no person should be regarded as being above the law. Military, naval or air force personnel are as much subject to the law as members of the civil population. It is significant that Rule 8 empowers the Magistrate, on coming to know that a person subject to the military, naval or air force law or any other law relating to the Armed Forces has committed an offence and proceedings in respect of which ought to be instituted before him

and that the presence of such person cannot be procured except through military, naval or air force authorities, to require the Commanding Officer of such person either to deliver such person to a Magistrate for being proceeded against according to law or to stay the proceedings against such person before the court martial if since instituted, and to make a reference to the Central Government for determination as to the court before which the proceedings should be instituted. Reference may also be made to Section 127 of the Army Act. It is an important provision. It provides that a person convicted or acquitted by a court martial, may, with the previous sanction of the Central Government, be tried again by a criminal court for the same offence or on the same facts. This provision is an exception to Article 20 of the Constitution, which provides that no person shall be prosecuted and punished for the same offence more than once. The provision has been made possible by reason of Article 33 of the Constitution, which confers power on Parliament to modify and Fundamental Right in its application to the members of the Armed Forces. It is to enable the operation and application of Section 127 of the Act that Rule 7(1) of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 requires the Commanding Officers or the competent military, naval and air force authority to inform the Magistrate whether the accused has been tried by a court martial or other effectual proceedings have been taken against him."

40. In this case, there is a dispute to the effect as to whether the Chief Judicial Magistrate has passed any such order. The contention of Mr. George to the effect that such an order was passed by the Chief Judicial Magistrate cannot be accepted. The said purported contention has been raised in the counter affidavit in the following terms:-

"A person who is subject to this act, commits any civil offence, he shall be deemed to be guilty of an offence against this act and shall be liable to be tried by a Court Martial. Besides this Section 70 clearly says that any offence committed by an Army personnel against a person who is not subject to Military force he shall not be guilty under this section. Whereas, in this present case accused belongs to military force and offence, which he has committed is also against a person who is subject to military Act, further this offence was committed on active service. Therefore, Army Court has got a jurisdiction over this matter and not the Criminal Court.

Second contention raised by the petitioner in this para relates to jurisdiction of Court Martial to deal with this matter, is wrong and denied. Section 125 empowers the Commanding Officers to use his discretion while allotting any case to Criminal Court or to Court Martial. Although the language of Section 125 does not specify the manner in which the specified Commander will exercise his discretion, but it is neither arbitrary nor uncontrolled. While taking a decision u/s 125 of the Army Act the Commander is guided by the exigencies of the military service, requirements of discipline and various other factors relevant to the case.

Further this case satisfy all the requirements which must be present before a

Court Martial proceedings are satisfied i.e.

(i) Offence is committed during the course of duty. (ii) Most witnesses of the case are military persons. (iii) Necessity of discipline demands that soldier be tried by Court Martial; (iv) When offence is committed against a serviceman."

The aforesaid contention has been denied by the petitioner stating:-

"(B) The contents of this ground in the petition are reiterated and those of the reply denied being misconceived. There is nothing on record to show that the case was ever claimed for trial from the Magistrate or that he had transferred the case file. No record in this regard has been exhibited before this Hon"ble Court with the present petition."

41. The Court Martial proceedings admittedly had not been held in the presence of the deponent of the counter-affidavit, he thus cannot be said to be personally conversant with the fact of the case. The affidavit has been verified in the following term:-

"2. That I have read and understood the contents of the accompanying counter and state that the contents of the same are true and correct to my knowledge, as derived from the official record, maintained in my office."

Such an affirmation does not satisfy the requirement of law and thus the same must be ignored. Furthermore, the records, which have been produced before us, do not prove such a contention. Thus, even the deponent could not have made the aforementioned statements on the basis of the materials on record. We do not appreciate the Army Authorities to make such statements before this Court. We hope and trust that the concerned officers and the counsel representing the Army Authorities should bestow their services consideration.

42. It is trite that the provisions of a statute in case of any doubt or dispute must be construed having regard to the rule to purposive interpretation. For the said purpose not only the statute has to be read as a whole, but also the same has to read chapter-by-chapter and then section-by-section. It may not be presumed that by reason of the provisions of the Act, despite entry 33 in the List I of the Seventh Schedule of the Constitution, the procedure envisaged under the Constitution are not required to be complied with. Life of a person irrespective of the fact he is a military personnel or a civilian, the fundamental right under Article 21 would be equally applicable so the procedural safeguards are liable to be complied with. The constitutional safeguards thus are required to be read into the provisions of the Act and the Rules framed there under by taking recourse to the rule of purposive construction.

43. We may notice that the Apex Court recently in Criminal Appeal No. 1368 of 1999 in Union of India and Ors. v. L.D. Balam Singh disposed of on 24.04.2002 in no unmistakable terms laid down the law that for procedures, safeguards in a special statute are required to be provided to the accused, even if he is proceeded against in a Court Martial proceedings and it was held thus:-

"Turning attention on to the procedural aspect, be it noticed that Section 18 is an offence which cannot but be ascribed to be civil in nature in terms of the provisions of Army Act - if Section 18 is to be taken recourse to then and in that event the provisions of the statute come into play in its entirety rather than piecemeal. The charge leveled against the respondent is not one of misdeeds or wrongful conduct in terms of the provisions of the Army Act but under the NDPS Act - In the event, we clarify, a particular statute is taken recourse to, question of trial under another statute without taking recourse to the statutory safeguards would be void and the entire trial would stand vitiated unless, of course, there are existing specific provisions Therefore in the particular statute. Needless to record that there were two other civilian accused, who were tried by the Court at Patiala, but were acquitted of the offence for non-compliance of the mandatory requirements of the NDPS Act. Once the petitioner was put on trial for an offence under the NDPS Act, the General Court Martial and the Army authorities cannot reasonably be heard to state that though the petitioner would be tried for an offence u/s 18 of the NDPS Act, yet the procedural safeguards as contained in the statutory provision would not be applicable to him being a member of the Armed Forces. The Act applies in its entirety irrespective of the jurisdiction of the General Court Martial or other Courts and since the Army authorities did not take into consideration the procedural safeguards as is embodied under the Statute, the question of offering any credence to the submissions of Union of India in support of the appeal does not and cannot arise. There is no material on record to show that the authorities who conducted the search and seizure at the house of the respondent herein has in fact done so in due compliance with Section 42 of the statute which admittedly stand fatal for the prosecution as noticed above -- as a matter of fact, two of the civilians stand acquitted therefore."

44. For the reasons aforementioned, the impugned order cannot be sustained and the same is accordingly set aside. The respondents shall, however, be entitled to take appropriate action in accordance with law.

45. This writ petition is allowed with the observations and directions made hereinabove. The petitioner is entitled to costs. Advocate fee Rs. 10,000/-.