
(2016) 12 AHC CK 0197
In the Allahabad High Court
Case No : Special Appeal Defective No. 198 of 2003

Union of India

APPELLANT

Vs

Khem Chand

RESPONDENT

Date of Decision : 15-12-2016

Acts Referred:

Army Act, 1950 — Section 164(2), Section 22, Section 69, Section 70

Citation : (2017) 2 ADJ 221 : (2017) 1 AllWC 756

Hon'ble Judges : Amreshwar Pratap Sahi and Umesh Chandra Srivastava, JJ.

Bench : Division Bench

Advocate : Shishir Kumar and Ashok Singh, Advocates, for the Appellants in Special Appeal Defective No. 198 of 2003; V.S. Singh and Kuldeep Kumar, Advocates, for the Respondent in Special Appeal Defective No. 198 of 2003; Shishir Kumar and Ashok Singh, Advocates, fo

Final Decision : Allowed

Judgement

Umesh Chandra Srivastava, J.—The above mentioned special appeals have been filed against judgment and orders dated 10.2.2003 and 11.10.2002 passed by a learned Single Judge in Civil Misc. Writ Petition No. 3565 of 1981: Khem Chand v. Union of India & others and Civil Misc. Writ Petition No. 8723 of 1980: Satya Deo Giri v. Union of India & others respectively, whereby both writ petitions have been allowed with costs and order/verdict dated 21.1.1975 of the General Court-Martial convicting and sentencing respondents in both special appeals to suffer life imprisonment and dismissal from service and the order of Chief of the Army Staff rejecting petitions under Section 164 (2) of the Army Act, 1950 preferred against the aforesaid order/verdict of the General Court-martial have been set aside and respondents in appeals have been treated to be in continuous service till the date of their superannuation with all consequential benefits.

2. The facts giving rise to appeals in brief are as under :

Respondent in Special Appeal Defective No. 198 of 2003, Khem Chand, who shall

hereinafter be called Respondent 1, was appointed as Sepoy in the Army Ordnance Corps and posted at 74 Armed Workshop, Company 65 EME Battalion C/O APO Jhansi. Similarly, respondent in Special Appeal No. 580 of 2010, who shall hereinafter be called as Respondent 2, was a Store Keeper (Technical) and posted at 74 Armed, Workshop, GS EME Battalion, C/O 56 APO Jhansi at the relevant time. Apart from above, co-accused Ishanand Dubey and deceased Havaldar Ram Phal and Sepoy Jagannath Prasad were also army personnel posted at 74 Armed Workshop, 65 EME Battalion, C/O 56 APO Jhansi at the relevant time.

3. Dead bodies of Havaldar- Ram Phal and Sepoy Jagannath were seen lying on the out skirt of Village-Bhattagaon, P.S. Sadar Bazar, District-Jhansi on 27.01.1974. An FIR in this regard was lodged same day at 2.00 P.M. at P.S. Sadar Bazar, Jhansi by one Manik Ram, Pradhan of Village Singhada. The first information report was investigated by Sub-Inspector S.K. Tiwari, the then Station Officer of P.S. Sadar Bazar, Jhansi. During the course of investigation, it revealed that Respondent-1 & 2, Khem Chand and Satya Deo Giri along with co-accused Ishanand Dubey were involved in the murder of Havaldar-Ram Phal and Sepoy Jagannath. Motive attributed behind the murder was an incident which had taken place on 19.1.1974. It is stated that in the evening of 19.1.1974 deceased Ram Phal and Sepoy Jagannath went to the house of Respondent 2 in his absence and tried to outrage the modesty of his wife Smt. Mira Devi. This incident caused great annoyance to Respondent-2 Satya Deo Giri and Respondent-1 Khem Chand also, as he treated Smt. Mira Devi as his sister. It is after this incident that Respondent 1 & 2 along with co-accused Ishanand Dubey hatched a criminal conspiracy to do away Havaldar-Ram Phal and Sepoy Jagannath. In order to execute the aforesaid plan, Respondent-1 Khem Chand collected a DBBL gun in the morning of 26.1.1974 and thereafter, Respondent 1 & 2 and co-accused Ishanand Dubey along with deceased Havaldar Ram Phal and Sepoy Jagannath Prasad went to jungle same day in the afternoon for playing Shikar where Respondent 1 shot dead Havaldar Ram Phal and Sepoy Jagannath Prasad in the presence of Respondent 2 and co-accused Ishanand Dubey.

4. The Investigating Officer took Respondent Nos. 1 & 2 and co-accused Ishanand Dubey into custody and put them for the identification test. In the said identification test Respondent 1 & 2 and co-accused Ishanand Dubey were correctly identified. On the basis of identification test and other connecting evidences the Investigating Officer filed charge sheet against Respondent 1 & 2 only in the court of A.D.M. (J), Jhansi. No evidence showing involvement of Co-accused Ishanand Dubey was found in the murder of Havaldar Ram Phal and Sepoy Jagannath Prasad and hence a final report was filed against him in the incident in question.

5. Respondent Nos. 1 & 2 and co-accused Ishanand Dubey and deceased persons being army personnel and subject to Army Act, a Court of Inquiry was ordered to be conducted to investigate the incident in question and in the said proceedings

no prima facie case was found to be made out against respondents- Khem Chand, Satya Deo Giri and co-accused Ishanand Dubey, as all witnesses had shown their ignorance to the incident. After filing of charge sheet against respondents- Khem Chand and Satya Deo Giri, an order for collecting additional evidence was passed by convening assembly of another court of inquiry and in the said proceedings some additional evidence was collected against respondents and co-accused Isa Nand Dubey and on that evidence an order for holding trial by General Court-Martial against respondents- Khem Chand, Satya Deo Giri and co-accused Ishanand Dubey was passed. In the proceedings of General Court-Martial, 32 witnesses were examined and the charge of committing murder of Havaladar Ram Phal and Sepoy Jagannath was found proved against respondents and co-accused Ishanand Dubey. Consequently, Respondent-Khem Chand, Respondent 2- Satya Deo Giri and co-accused Ishanand Dubey were convicted and sentenced to suffer life imprisonment besides dismissal from service by order/verdict dated 21.1.1975 of the General Court-Martial. Respondents- Khem Chand, Satya Deo Giri and co-accused Ishanand Dubey had filed representations against the order dated 21.1.1975 of General Court Martial, but their representations were also rejected by the Chief of the Army Staff .

6. Co-accused Ishanand Dubey had filed a petition being Civil Misc. Writ Petition No. 1664 of 1997: Ishanand Dubey v. Union of India & others against the aforesaid orders of General Court-Martial and Chief of the Army Staff praying therein for quashing of the orders of General Court-Martial and Chief of the Army Staff passed against him. This writ petition was allowed on 06.4.1978 by a Division Bench of this Court and the verdict/order dated 21.1.1975 of General Court Martial convicting and sentencing co-accused and dismissing him from service and order of Chief of the Army Staff rejecting his representation have been quashed.

7. Respondent No. 1- Khem Chand had also preferred a petition being Civil Misc. Writ Petition No. 3565 of 1981: Khem Chand v. Union of India & others against the verdict/order dated 21.1.1975 of General Court Martial convicting and sentencing him to life imprisonment and dismissing him from service, and the order of Chief of the Army Staff rejecting representation against the aforesaid order of General Court-Martial. This writ petition was also allowed with costs by a learned Single Judge of this Court by order dated 10.2.2003 and orders of the General Court-Martial dated 21.1.1975 and Chief of the Army Staff were quashed with all consequential benefits treating respondents to be in continuous service till the date of his superannuation.

8. Union of India and two others namely Chief of the Army Staff, New Delhi and Central Officer Commanding had filed special appeal being Special Appeal Defective No. 198 of 2003: Union of India & others v. Khem Chand against the judgment and order of learned Single Judge of this Court which was allowed by a Co-ordinate Bench of this Court holding that learned Single Judge has erred in law by treating the writ petition before him as if it was a first appeal and he has

interfered with findings of facts which is erroneous in law. Consequently, judgment and order passed by the learned Single Judge were set aside.

9. Respondent 2- Satya Deo Giri had also filed a writ petition being Writ Petition No. 8723 of 1980: Satya Deo Giri v. Union of India & others against the judgment and orders of General Court Martial convicting and sentencing him to life imprisonment and dismissing him from service and Chief of the Army Staff rejecting his representation against the order of the General Court-Martial. This writ petition was also heard by the same learned Single Judge and it was allowed on 11.2.2002 with costs and the order dated 21.1.1975 of General Court Martial and the order of the Chief of the Army Staff were set aside. Against the aforesaid order of learned Single Judge, Union of India and three others have preferred Special Appeal No. 580 of 2010: Union of India & others v. Satya Deo Giri with a prayer for quashing the order of the learned Single Judge.

10. Respondent No. 1- Khem Chand had filed Civil Appeal Nos. 6444-6445 of 2005: Khem Chand v. Union of India & others before the Hon"ble Apex Court against the order dated 16.12.2003 of Division Bench of this Court. The Hon"ble Apex Court has allowed these appeals by order dated 22.9.2011 and set aside the order dated 16.12.2003 passed by the Division Bench and has directed the High Court to decide Special Appeal Defective No. 198 of 2003: Union of India & others v. Khem Chand afresh along with Special Appeal No. 580 of 2010: Union of India & others v. Satya Deo Giri in the light of observations made in order.

11. We have heard Sri Ashok Mehta, learned ASGI along with Sri Ashok Singh, Advocate for the appellants and Sri O.P. Singh, learned Senior Counsel assisted by Sri Kuldeep Kumar, Advocate for the respondents.

12. Learned counsel for the appellants has submitted that impugned orders dated 21.01.1975 of the General Court Martial and Chief of the Army Staff convicting and sentencing respondents to suffer life imprisonment and dismissing them from service for committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad had been challenged in the writ petitions on mainly following three grounds:

(I) The first contention of respondents was that they were not subject to Army Act and therefore they could not be tried for the offence of committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad by the General Court-Martial under Section 69/70 of the Army Act. Their contention was that Respondent No. 1 Khem Chand had been discharged from service much before the commission of the alleged offence and he was not on the roll of the Army and provisions of the Army Act were therefore not applicable to him and, in view of this, he could not be tried by the General Court-Martial under Section 69/70 of the Army Act. It was submitted that Respondent 1 had raised this objection by means of an application before the General Court-Martial and had submitted that General Court Martial had no jurisdiction to hold trial under Section 69/70 of the Army Act against him, but his objection was turned down by one line order holding he

could be tried by the General Court- Martial under the Army Act for the offence of committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad who were subject to the Army Act.

Respondent No. 2 had also challenged the jurisdiction of the General Court-Martial on the premise that he was holding the post of Store Keeper and the post of Store Keeper is a civilian post and in view of the fact that he was working on a post which was a civilian post, the provisions of the Army Act were not applicable to him and as such he could also not be tried under Section 69/70 of the Army Act by the General Court-Martial. The challenge of jurisdiction of General Court-Martial was on the ground of place of occurrence also. Their submission was that place of occurrence where Havaladar Ram Phal and Sepoy Jagannath Prasad had been allegedly killed was not a military area but it was a civilian area and first information report of the incident was also lodged with the civil police which had investigated the case and filed charge sheet in the court of A.D.M. (J) Jhansi and A.D.M. (J) Jhansi had taken cognizance on the said charge sheet and in view of these facts, the offence allegedly committed was a civil offence and could be tried by criminal court alone and not by the General Court-Martial under the Army Act by taking aid of Section 125 of the Army Act.

(II) The next point of challenge in the writ petitions was that after the incident of killing of Havaladar Ram Phal and Sepoy Jagannath Prasad and an first information report of the incident being lodged by one Manik Lal, Pradhan of Village-Singhara, Police Station-Sadar Bazar, Jhansi, a court of inquiry was ordered to be conducted by Lt. Col. N.N. Gupta to investigate the circumstances and reasons under which Havaladar Ram Phal and Sepoy Jagannath Prasad were killed and also the persons by whom death of deceased persons was done. Their contention was that in the court of inquiry proceedings many witnesses had been examined but they did not point out any thing, rather all of them shown ignorance to the incident. Lt. Col. N.N. Gupta, who had presided the court of inquiry proceedings had submitted a report to the General Officer Commanding, 31 Armored Division, Jhansi who after taking note of the said report had passed an order stating no further action was needed to be taken into the matter against the respondents. Thereafter, a fresh order for collecting additional evidence was passed by the General Officer Commanding and in pursuance of the said order additional evidence of the same witnesses, who had earlier shown ignorance to the incident in question had been taken and on the strength of the said additional evidence the order to hold trial by General Court-martial for committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad was passed by the General Officer Commanding, Central Command, Lucknow. It is after this order that respondents were tried by the General Court Martial under the Army Act and were held guilty for the offence of committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad and sentenced to suffer life imprisonment and dismissal from the service. Their contention was that once the court of inquiry had been conducted and in the said court of inquiry proceedings all witnesses examined had shown ignorance to the incident and no prima facie

case was found to be made out against the respondents and on the basis of report of the said court of inquiry the General Officer Commanding had passed the order that no further action was needed to be taken into the matter of killing of Havaldar Ram Phal and Sepoy Jagannath Prasad, the case could not be reopened by passing a fresh order for collecting additional evidence in a subsequent court of inquiry proceedings and on the basis of that additional evidence no order for holding trial of respondents under the Army Act by the General Court-Martial could be passed by the General Officer Commanding, Central Command, Lucknow. Thus, their contention was that since no trial of the respondents under the Army Act could be held on the basis of additional evidence collected in the subsequent court of inquiry proceedings under the order of the General Officer Commanding, Central Command, Lucknow, the order of conviction and sentence based on the conclusions arrived at trial by the General Court Martial was bad in the eye of law and therefore not sustainable.

(III) The third point of challenge in the writ petition was that impugned order of General Court Martial dated 21.1.1975 was based on no evidence. The respondents' contention was that there was no direct evidence against respondents that they killed Havaldar Ram Phal and Sepoy Jagannath Prasad by shooting them down as no one had seen them doing so. Their contention was that charge of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad was based on an imaginary story that respondents and co-accused Ishanand Dubey took the deceased persons to jungle on the pretext of playing shikar and killed them there by shooting down and the motive behind killing the deceased persons was an incident dated 19.7.1974 which had happened in the house of Respondent 2 in his absence. According to prosecution story, Havaldar Ram Phal and Sepoy Jagannath Prasad went to the house of Respondent 2 in his absence in the evening of 19.7.1974 and tried to molest and outrage the modesty of his wife Smt. Meera Devi. This incident gave a serious heart burn to Respondent 2, Satya Deo Giri and Respondent 1, Khem Chand also as he treated Smt. Meera Devi as his sister. It is in this back ground that respondents and co-accused Isa Nand Dubey hatched a criminal conspiracy to do away the deceased persons and they executed their plan on 26.1.1974 in the afternoon by taking deceased persons to the area of Pola Patha, a jungle in village Bhattagaon on the pretext of playing shikar where Respondent 1, Khem Chand shot dead the deceased persons in presence of Respondent 2 and co-accused Isha Nand Dubey.

13. The respondents' contention in regard to prosecution story was that deceased persons did not visit the house of respondent no. 2 on 19.7.1974 in his absence and tried to molest and outrage the modesty of his wife Smt. Meera Devi. Their further contention was that P.W. 11, Sepoy E.P. Verghese had not seen the incident dated 19.1.1974 and all evidence in this regard given by Sepoy E.P. Verghese before the General Court-Martial was false and fabricated as all witnesses who had given evidence before the General Court-martial had shown ignorance to the incident before the Lt. Col. N.N. Gupta, who had presided the first court of inquiry proceedings. Their further contention was that had P.W. 11

Sepoy sweeper E.P. Verghese been present at the time of alleged incident dated 19.7.1974 and seen Havaladar Ram Phal and Sepoy Jagannath Prasad trying to molest and outrage the modesty of Smt. Meera Devi then he would have stated this fact to Sub-Inspector S.K. Tiwari who had investigated the case and also to Lt. Col. N.N. Gupta who had presided the court of inquiry proceedings. Their contention was that evidence of P.W. 11 Sepoy sweeper E.P. Verghese with regard to alleged story of molestation given before the General Court-Martial was after thought and therefore the General Court Martial ought to have discarded and disbelieved the same.

14. Respondents' further contention in the writ petitions was that Smt. Meera Devi had been examined as defence witness before the General Court- Martial and she had denied any incident of molestation having taken place with her on 19.1.1974 by Havaladar Ram Phal and Sepoy Jagannath Prasad and P.W. 11 Sepoy sweeper E.P. Verghese had witnessed the said incident. Their submission was that when Smt. Meera Devi had denied the incident dated 19.1.1974 of molestation being taken place with her, the question of respondents being annoyed with the said incident and hatched a plan along with co-accused Isha Nand Dubey for doing away Havaladar Ram Phal and Sepoy Jagannath Prasad and in order to execute their plan taking deceased persons with them to the area of Pola Patha in Village-Bhattagaon in the afternoon of 26.1.1974 for playing shikar and shooting them down there does not arise. Their contention was that there was no cogent reason for the General Court-Martial to disbelieve the evidence of Smt. Meera Devi and believe the false and fabricated evidence of P.W. 11 Sepoy sweeper E.P. Verghese who had given evidence for the first time before General Court Martial after a lapse of long time from the date of incident. Thus, their contention was that General Court Martial was wrong in believing the testimony of P.W. 11 Sepoy sweeper E.P. Verghese for arriving at the conclusions that respondents had a strong motive to commit the murder of Havaladar Ram Phal and Sepoy Jagannath Prasad.

15. The next point which respondents had contended in the writ petition was that all witnesses, who had identified the respondents in district jail Jhansi were not reliable nor their evidence could be read and used against respondents nor it could be held on their testimony that it were respondents who killed the deceased persons. Their contention was that evidence of P.W.12 Damroo Prasad, P.W. 19 Munna Lal and P.W. 21 Sewa Ram who had identified respondent no. 1 Khem Chand and the aforesaid witnesses and P.W. 20 Majju who had identified respondent no. 2 Satya Deo Giri in the identification test while respondents were in jail, was not worth reliance as respondents had already been shown to them before the identification test. Their contention was that Sub-Inspector S.K. Tiwari after taking custody of the respondents from the custody of Army had taken to them to police station Sadar Bazar, Jhansi without covering their faces and they were shown to the witnesses who had correctly identified them in the district jail. Their further contention was that respondents after being taken into the custody of army were kept without parda in a cell abutting to road and witnesses had full

chance to have look of them, and in this situation if the aforesaid witnesses identified respondents in the district jail in identification parade the same should not have been believed.

16. Respondents had also contended that witnesses namely P.W.12 Damroo Prasad, P.W. 19 Munna Lal, P.W. 20 Majju and P.W. 21 Sewa Ram, who had identified respondents in the identification test had admitted before Lt. Col. N.N. Gupta, who had conducted the first court of inquiry proceedings, that they knew nothing about the incident in question and had given a false statement before Sub-Inspector S.K. Tiwari under duress and that they had been tutored what statements had to be given and were also told whom they had to point out.

17. Their further contention was that PW 12, Damroo Prasad is the resident of Village-Bhattagaon and P.W. 19, Munna Lal and P.W. 21, Sewa Ram are the residents of Village-Singhara and both these villages are adjoining to each other and therefore residents of both villages also know each other due to their frequent visits. Respondent 2, Satya Deo Giri was also residing in a rental accommodation in Village-Bhattagaon where the incident had taken place and for this reason, the witnesses who identified him in the identification test know him well from before the incident and in that situation there could be no problem for them in identifying him in the identification test.

18. Respondents had contended before the General Court Martial that evidence of identification test is a very weak evidence and in the absence of other clinching and cogent evidence no conviction can be based on it. In the case in hand the General Court Martial has relied upon the statements of those witnesses who had not seen respondents shooting down the deceased persons rather, according to prosecution story, respondents, co-accused Isha Nand Dubey and deceased persons were seen together on the date of occurrence going towards the place of occurrence before the incident and respondents coming with fast speed one after other from the site of place of occurrence after the incident and that Respondent 1 Khem Chand had a gun in his hand at that time. Their contention was that P.W. 12 Damroo Prasad, who has given statement before the General Court-Martial that he had seen respondents going towards the place of occurrence before the occurrence, being of short stature as his height is only 4 ft. 6 inches, and there being a five feet high wall of hedge between the place he was standing watching flow of water in the field he was irrigating at the time of alleged occurrence and the path respondents passed, it was not possible for him to have view of facial features of the respondents. They had further contended that P.W. 12 Damroo Prasad had seen respondents for fourteen second only and in such a short duration it was not possible for him to have full facial view of respondents when there was a long distance from the place he claims to have seen the respondents and a 5 ft. high wall of hedge between the place he was standing and the way respondents passed.

19. Similarly, there being a distance of 50 yards from the place PW 19 Munna Lal claims to have seen respondents going towards Jhansi with fast speed, it was

also not be possible for him to recognize the respondents. Respondents had contended that this witness was present on the spot at the time of site inspection also and had shown the place from where he claims to have seen the respondents and after realizing that it was not possible to have facial features of anyone from such a long distance he promptly changed his stand and said that he had come 35 steps ahead and seen the facial features of the respondents and then gone back. Similarly, PW 21 Sewa Ram, who also claims to have seen respondents going towards them with fast speed at 5:15 p.m. on the day of occurrence, is a chance witness as he has admitted that he usually did not pass through the path he passed on the day of occurrence, his evidence was not believable. Thus, their contention was that evidence of these witnesses was not liable to be believed and no conviction could be passed on their evidence and General Court Martial was wrong in believing their evidence and recording finding of conviction on the basis of their evidence.

20. Their next contention regarding arriving at conclusion of guilt of respondents by the General Court Martial was the extra judicial confessions of respondents made before P.W.-2 Captain I S Chahal. They had contended that extra judicial confessional statements allegedly made by the respondents before PW 2 Captain I S Chahal are not admissible in evidence as it were made before an officer who was deputed with the work of taking military custody of the respondents and therefore, his position was like a police officer. They had contended that confessional statements made by an accused while in police custody is not admissible in evidence and the position of Captain I S Chahal being like a police officer, the confessional statements made by the respondents while in his custody were also not admissible in evidence. Further, confessional statements of Respondent 2 that Respondent 1 Khem Chand shot dead the deceased persons in his presence are not binding upon Respondent 1. Thus, their contention was that no conviction could be based on the so-called confessional statements and since the conclusion of guilt arrived at by the General Court Martial was based on the confessional statements of the respondents, the same was therefore not liable to stand.

21. Learned counsel for the appellants has submitted that learned single judge did not advert the first two points raised by the respondents in the writ petitions and he entered into merit of the case by reappraising the evidence led before the General Court-Martial as if he was sitting as court of appeal having power to enter into merit of the case and can reappraise the evidence. He has submitted that High Court while exercising jurisdiction under Article 226 of the Constitution of India has no power to reappraise the evidence and substitute its own finding saying conclusions of guilt arrived at by the General Court-Martial being based on weak and insufficient evidence is not liable to stand and respondents are liable to be acquitted of the charge. He has further submitted that ample evidence has been given before the General Court-Martial indicating involvement of respondents in the crime and also that it were respondents who done the death of deceased persons and the findings of conviction arrived at by the General

Court-Martial on the basis of that evidence, which is cogent and reliable, was liable to stand and could not be quashed in the writ petition filed under Article 226 of the Constitution of India in the name of reappraisal of evidence.

22. Learned counsel for the appellants has further submitted that High Court while exercising jurisdiction under Article 226 of the Constitution of India has power to reverse the finding of conviction recorded by the General Court-Martial only when it is established that finding of General Court Martial is based on no evidence or accused were denied opportunity to defend themselves. He has submitted that it was not the case taken in the writ petitions that respondents were denied opportunity to defend themselves, rather it is established on record that both respondents had been provided full opportunity to defend themselves such as they had opportunity to engage lawyer of their choice and they had full opportunity not only to cross examine the witnesses by the prosecution but had opportunity to tender evidence in defence also and they had to tender evidence also in their defence, and in view of these, it was not open for them to challenge the findings of conviction recorded by the General Court-Martial saying evidence on which finding of conviction is based is weak and insufficient and no conviction can be based on that evidence.

23. Learned counsel for the appellants has submitted that ample evidence has been led on record and it is established from that evidence that respondents had a strong motive to commit murder of Havaldar Ram Phal and Sepoy Jagannath Prasad as latter had tried to molest the wife of Respondent 2 whom Respondent 1 treated as sister. It is also established that Respondent No. 1 collected a DBBL gun in the morning of 26.1.1974 and thereafter both respondents, co-accused Ishanand Dubey and deceased persons were seen together going towards the place of occurrence. Not only this, P.W. 12 Damroo Prasad, who is the native of village Bhattagaon and has a field near the place of occurrence which he was irrigating on the day of incident, had heard the sound of two shots besides seeing respondents going towards the place of occurrence before hearing the sound of shots. The learned counsel has submitted that evidence of P.W. 12 Damroo Prasad cannot be ignored saying it is not worth reliance as he being a short statured and there being a 5 feet high wall of hedge between the field he was irrigating and the way both respondents passed and having seen respondents only for fourteen seconds he could not see the respondents facial features and recognize them. The learned counsel has submitted that this witness being a native of village Bhattagoan in which Respondent No. 2 resided at the time of occurrence, he could easily identify him and also Respondent 1, who being a friend of Respondent no. 2 frequently visited his house, he could also identify respondents. Learned counsel has submitted that respondents were not a stranger to P.W. 12 Damroo Prasad and therefore, if he has correctly identified respondents in the identification parade, the same cannot be doubted saying respondents had been shown to the witnesses before the identification parade and had also been told whom they point out.

24. Learned counsel for the appellants has further submitted that similarly, evidence of P.W. 19 Munna Lal, P.W. 20 Majju and P.W. 21 Sewa Ram could also not be disbelieved on the premise that they had been tutored by the civil police what they had to say and respondents had been shown to them before the identification test and they had already been told whom they had to point out. He has submitted that aforesaid witnesses have stated before the General Court Martial why they had shown ignorance to the incident in the court of inquiry proceedings. These witnesses have categorically stated before the General Court Martial that they had deliberately made false statements before the Officer recording summary of evidence with a view to avoid their involvement in the case and loss of their daily wages. They have also deposed that they were afraid of the Army and their explanations were accepted by the members of the General Court Martial and their testimony was relied upon in arriving at conclusion that respondents are guilty of the offence charged for.

25. Learned counsel for the appellants has submitted that P.W. 2 Captain I.S. Chahal has deposed before the General Court Martial that Respondent No. 1 Khem Chand on 9.2.1974 and Respondent No. 2 Satya Deo Giri on 11.2.1974 had made confessions before him that they had done the death of deceased persons. He has submitted that Respondent 1 had stated before him that he had shot dead Havaladar Ram Phal and Sepoy Jagannath Prasad and that time Respondent 2 and co-accused Ishanand Dubey were present. After the above extra judicial confession was made by Respondent 1, Respondent 2 was brought before him and Respondent had repeated the aforesaid confessional statements before him also and Respondent 2 had then said "theek hai". Similarly, Respondent 2 had also made extra judicial confession before Captain I.S. Chahal to the effect that "on 19.1.1974 in the evening Havaladar Ram Phal and Sepoy Jagannath Prasad came to his house in his absence to outrage the modesty of his wife and that he had described this fact to Respondent no. 1 on his return from leave. He also stated that Respondent 1 Khem Chand shot dead Havaladar Ram Phal and Sepoy Jagannath Prasad on 26.1.1974 at 4.30 p.m. by shooting them down with the DBBL gun of Naib Subedar B.N. Pandey and at that time he and co-accused Ishanand Dubey were also present there. He has submitted that learned Single Judge should not have disbelieved the aforesaid extra judicial confessions of the respondents made before Captain I.S. Chahal on the premise that position of Captain I.S. Chahal being like a police officer confessions made before him are not admissible in evidence and they were not reliable for not being supported by any other independent witness. He has submitted that position of Captain I.S. Chahal is not like a police officer as he was not investigating the case nor respondents were in his custody, rather he had simply obtained custody of respondents from ADM (J) Jhansi and lodged them into military custody under the order of General Officer Commanding so that they may be tried for the offence of committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad by convening assembly of General Court-Martial and it was done much before the recording of respondents' confessional statements.

26. Learned counsel for the appellants has further submitted that it is provided under Section 125 of the Army Act, 1950 that "when a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in 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."

27. Learned counsel for the appellants has submitted that both respondents and deceased persons being army personnel were subject to the Army Act, 1950. The General Officer Commanding, 31 Armoured Division, Jhansi was, in view of power conferred upon him under Section 125 of the Army Act, was competent to pass order convening assembly of General Court-Martial to hold trial of the respondents for the offence of murder allegedly committed by them and the jurisdiction of the General Officer Commanding 31, Armoured Division, Jhansi cannot be challenged on the ground that once after passing the order that no further action was needed to be taken into the matter of killing of deceased Havaladar Ram Phal and Sepoy Jagannath Prasad for no prima facie case being found by Lt. Col. N.N. Gupta in the Court of Inquiry proceedings against respondents, no fresh order for collecting additional evidence could be passed nor being based on any such additional summary evidence General Court Martial could be convened for holding trial of the respondents for the charge of committing murder of deceased Havaladar Ram Phal and Sepoy Jagannath Prasad.

28. Learned counsel for the appellants has next submitted that it was wrongly stated in the writ petitions that Lt. Col. N.N. Gupta, who had presided the court of inquiry proceedings, had completed the said proceedings with conclusion that no prima facie case was found against the respondents. His submission is that as a matter of fact, the court of inquiry did not complete the proceedings and its assembly was subsequently cancelled vide convening order no. 3302/346/A-2 dated 9.4.1974, contained in Annexure-C.A.-2 to the counter affidavit filed in Writ Petition No. 3565 of 1981. He has further submitted that it was incorrectly stated in the writ petitions that first court of inquiry proceedings were completed and subsequently canceled because no prima facie case against the respondents was made out. He has also submitted that court of inquiry was assembled with a view to collect evidence to enable the Competent Authority to form its opinion and that as per Army Rule 182, the proceedings of court of inquiry, confessional statement or answer to a question made or given at the time of court of inquiry is not admissible in evidence against a person subject to Act, nor shall any evidence representing proceedings of Court can be given against any such person.

29. Learned counsel for the appellants has further submitted that civil police had investigated the case because incident had taken place in a civilian area and an FIR in this regard was lodged by one Manik Lal, Pradhan of Village-Singhara,

District Jhansi with Police Station Sadar Bazar, Jhansi. The investigation of the case was never handed over to civil police by any military authority, rather after filing of charge sheet against respondents in the court of ADM (J) Jhansi, a decision was taken by the General Officer Commanding, 31 Armoured Division, Jhansi that proceeding in respect of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad, who were subject to Army Act, should be instituted before the General Court-Martial and hence custody of respondents was taken back by the military authorities and respondents were detained in military custody and tried by the General Court-Martial. Learned counsel for the appellants has submitted that General Officer Commanding, 31 Armoured Division, Jhansi was fully competent to pass order for holding trial of respondents before the General Court Martial under Section 125 of Army Act, 1950 and respondents are not allowed to challenge the jurisdiction of General Officer Commanding, 31 Armoured Division, Jhansi on the premise that incident having taken place in civilian area, the criminal court was alone competent to take cognizance of the offence.

30. Learned counsel for the appellants has next submitted that it is incorrect to say that Respondent 1 Khem Chand had been discharged from service much before the commission of the offence. Respondent No. 1 had applied for discharge from Army and the same was approved by E.M.E. (Records) office for sanction by competent authority. The discharge of petitioner, however, was not approved by the competent authority because he did not fulfil the condition which enabled him to proceed on discharge. Thus, he has submitted that Respondent 1 was duly enrolled in army and subject to Act on the date of commission of offence and, therefore, provisions of Army Act, 1950 were applicable to him and the General Court-Martial was fully competent to hold his trial for the offence of committing murder of Havaldar Khem Chand and Sepoy Jagannath Prasad. As regards Respondent No. 2, learned counsel for the appellants has submitted that he had not taken any such plea of jurisdiction before the General Court- Martial. Moreover, he was also duly enrolled in the Army as an enrolled person and, therefore, he was also subject to Army Act and the provisions of Army Act were applicable to him.

31. Learned counsel for the appellants has next submitted that learned Single Judge while deciding the writ petition has acted as if he was sitting as court of appeal. He appraised the evidence led before the General Court-Martial and arrived at finding different than the finding recorded by the General Court-Martial on the premise that evidence led in support of charge framed against respondents was insufficient and weak. Learned counsel for the appellants has submitted that High Court while exercising jurisdiction under Article 226 of the Constitution of India is not competent to reappraise the evidence led before the General Court-Martial nor it can interfere with the findings recorded by the General Court-Martial unless the same are based on no evidence or it is complained and established that respondents were not provided with reasonable opportunity to defend them selves. He has further submitted that learned Single Judge was not supposed to enter into merit of the case and reach to a different

finding saying charge framed against respondents was not proved. He has also submitted that 32 witnesses were testified before the General Court-Martial and from their evidence it is established that it were respondents who committed the murder of Havaldar Ram Phal and Sepoy Jagannath Prasad. The members of General Court-Martial had seen the witnesses testified before them and the manner in which they had given evidence. The members of General Court Martial had judged the evidence of witnesses from their demeanor and had arrived to a conclusion that they were telling truth. Learned counsel for the appellants has submitted that though there could be some discrepancy in their evidence, but minute attention to those immaterial discrepancy should not have been taken into account by the learned Single Judge to arriving at a different finding. He has also submitted that learned Single Judge has erred in arriving at different finding than the finding recorded by the General Court-Martial. Wherefore, his decision is not liable to stand as it leads to failure of justice. He has further submitted that it was not a case that General Court-Martial was not properly constituted nor it was a case of violation of any rule in conducting trial of respondents and, therefore, learned Single Judge should not have interfered with the findings recorded by the General Court-Martial and he should not have reversed the findings and allowed the writ petitions also.

32. Per contra, learned counsel for the respondent has submitted that question of jurisdiction was raised before the General Court-Martial by the Respondent-1 and it was stated that place of occurrence being a civilian area and the first information report of the incident being lodged with civil police station and the matter being also investigated by civil police and charge sheet being filed in the court of A.J.M. (J), Jhansi on which cognizance was taken under Section 145 of old Cr.P.C., the General Court-Martial had no jurisdiction to hold trial of respondents for the offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad. It was also stated before the General Court- Martial that respondent-Khem Chand was not in active service of army as he had been discharged from service much before the commission of the offence. It was stated that since respondent No. 1 was not in active service of the army, he was not subject to the Army Act and, therefore, provisions of Army Act were not applicable to him nor he could be tried for the offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad by the General Court-Martial. It was also stated that plea of jurisdiction raised before the General Court-Martial was not considered in the light of aforesaid facts and law, rather it was rejected by one line order saying General Court Martial has jurisdiction to try the offence.

33. Learned counsel for the respondents has further submitted that respondents had specifically taken a plea in the writ petitions that the General Court-Martial was not competent to try the offence of murder allegedly committed by the respondents as before convening assembly of the General Court-martial the matter was investigated by convening assembly of Court of Inquiry which was presided over by Lt. Col. N.N. Gupta and the said Court of Inquiry had recorded evidence and was of the view that no prima facie case was found to be made out

as all the witnesses had shown their ignorance to the incident. It was also stated that Lt. Col. N.N. Gupta had submitted inquiry report to this effect which was accepted by the General Officer Commanding by concluding that no General Court-martial was required to be convened to try the incident of killing of Havaladar Ram Phal and Sepoy Jagannath Prasad. Learned counsel for the respondents has further submitted that respondents had taken a specific plea in the writ petitions that once the report of Court of Inquiry was accepted by the General Officer Commanding, no fresh order could be passed by the General Officer, Commanding in Chief, Central Command, Lucknow convening assembly of General Court-martial as he was not competent to convene assembly of General Court-martial for trying the offence of murder of Havaladar Ram Phal and Sepoy Jagannath Prasad. He has submitted that these points have not been adverted by the learned Single Judge in his judgment because he was of the view that there was no necessity of it as evidence led in support of charge framed against the respondents was very weak and insufficient and charge to commit murder of Havaladar Ram Phal and Sepoy Jagannath Prasad was not proved on that account and respondents were liable to be acquitted on that reason alone. He has further submitted that although the learned Single Judge has not decided the question of jurisdiction of General Court-martial raised in the writ petitions, but the same can be considered in these appeals as it goes to the root of matter, and if it is found that General Court-martial had no jurisdiction then finding of guilt of respondents for committing murder of Havaladar Ram Phal and Sepoy Jagannath Prasad recorded by the General Court-martial would automatically be rendered void.

34. As regards the third point raised in the writ petitions, learned counsel for the respondents has submitted that it is incorrect to say that this Court while exercising jurisdiction under Article 226 of the Constitution of India cannot re-asses the evidence led before the General Court-martial and reverse the findings which are without any basis and perverse. He has submitted that this Court has ample power to enter into merit of the case if necessary and power of the Court under Article 226 of the Constitution of India cannot be restricted to the extent of examining legality of the order passed by the General Court-martial only without entering into merit of the case. He has also submitted that if the evidence led in support of the charge is weak and insufficient and no conviction can be based on it, as learned Single Judge has held that this Court has every power to reverse the same and for so doing it can re-examine and re-asses the evidence.

35. Learned counsel for the respondents has also submitted that learned Single Judge examined the evidence led before the General Court-martial at length and he was of the view that there was nothing on record to show that in what manner the plan was made by the respondents and co-accused Isha Nand Dubey to do away Havaladar Ram Phal and Sepoy Jagannath Prasad. Learned Single Judge was also of the view that if it is believed that respondents along with co-accused Isha Nand Dubey and deceased persons had gone to jungle for playing

shikar and they remained in jungle for about two hours, then they had enough time to do away the deceased persons inside the jungle as there was a little possibility of them being seen by any one while committing the crime and in that case, in any situation, they could not commit the murder of deceased persons on the out skirt of village Bhattagaon as there was every possibility of them being seen by the public in general.

36. Learned counsel for the respondent has further submitted that entire accusation made against the respondents was based on circumstantial evidence and the evidence which was led in this regard is very weak and insufficient. He has discussed at length the evidence of P.W.12- Damroo Prasad, P.W. 19-Munna Lal, P.W. 20-Majjo and P.W.21- Sewa Ram, who had allegedly seen respondents along with co-accused Isha Nand Dubey and the deceased persons coming towards the area of Polo Patha where offence was committed and both respondents coming from the site of place of occurrence after the occurrence. He has held that all these witnesses had been examined before the Court of Inquiry which was instituted to investigate the reasons and circumstances under which Havaldar Ram Phal and Sepoy Jagannath Prasad were killed and all of them had shown their ignorance to the incident saying they knew nothing about the incident. He has further submitted that since evidence of these witnesses was not worth reliance as they did not support the prosecution version at earliest when they were examined by the Court of Inquiry and they supported the prosecution story before the General Court-martial at belated stage, and no conviction could be based on it, learned Single Judge is fully justified in arriving at a different conclusion that alleged offence was not committed by the respondents.

37. Learned counsel for the respondent further submitted that whether a case of murder is tried by a criminal court or General Court-martial, the principle remains the same that prosecution has to prove the charge beyond all reasonable doubts. It is well settled principle of law that if there is any doubt or possibility that offence is not committed by the person who is charged for, he shall not be convicted, rather in that case acquittal will be recorded giving benefit of doubt to accused. He has also submitted that finding of conviction of General Court-martial was based on the evidence of witnesses who had earlier been examined in the court of inquiry proceedings and they had shown their ignorance to the incident and since they did not support the prosecution story at the earliest, their subsequent testimony given before the General Court-martial that they had seen the deceased persons in the company of respondents and co-accused Isha Nand Dubey coming towards the area where the offence of murder of Havaldar Ram Phal and Sepoy Jagaannath Prasad was committed was not liable to be believed at all.

38. Learned counsel for the respondents has submitted that learned Single Judge has observed that General Court-martial did not act rightly by convicting respondents on the basis of their alleged confessional statements given before

P.W.2- Capt. I.S. Chahel in the presence of Sub-Inspector, S.K. Tiwari. Learned Single Judge has given reasons why finding of conviction recorded by the General Court-martial is not sustainable. The reasons recorded by learned Single Judge are strong and cogent which cannot be interfered in special appeal on the premise that learned Single Judge was not supposed to enter into merit of the case and appraise the evidence for arriving at a finding other than that recorded by the General Court-martial. He has also submitted that learned Single Judge has dealt with the matter at considerable length for arriving at a different conclusion and it needs no interference in appeal merely for the reason that this Court cannot enter into merit of the case under Article 226 of the Constitution. He has also submitted that it should not be forgotten that in a case of circumstantial evidence prosecution case should be based on so strong, cogent and compelling evidence that it should not be possible to form any other opinion than to hold accused guilty for the offence charged. His submission is that since it was missing in the present case as there was no such cogent and reliable evidence, therefore, evidence against respondents that they committed murder of Havaldar Ram Phal and Sepoy Jagannath Prasad being not strong enough to connect respondents with crime, the findings recorded by learned Single Judge holding the charge of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad not proved and they have been wrongly convicted and sentenced by the General Court-martial and wherefore the verdict/order of General Court Martial sentencing respondents to suffer life imprisonment and being dismissed from service and the order of the General Officer Commanding approving the said conviction and sentence and also the order of Chief of the Army Staff rejecting representations of the respondents preferred under sub-section (2) of Section 164 of the Army Act, 1950, are not sustainable in law and respondents are liable to be acquitted of the charge and to be treated to be in continuous service with all consequential benefits up till their superannuation are just, proper and legal and therefore it should not be interfere with and both special appeals should be dismissed with costs.

39. Having heard the respective submissions of learned counsel of both sides, we find that Respondent No. 1-Khem Chand had raised the issue of jurisdiction before the General Court-martial by making an application in writing stating therein that he was not a military personnel as he had applied for discharge from the military service and the discharge order was passed long before the alleged commission of crime relating to this case. He had also stated that since he was not subject to the Army Act, 1950 and the Rules made under, the General Court-martial had no jurisdiction to hold trial of him for the offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad. We have perused the record and find that request of respondent No. 1- Khem Chand was not conceded by the General Court-martial, rather it was refused on the premise that he was subject to Army Act and the General Court-martial was competent to hold trial in respect of him for committing the murder of Havaldar Ram Phal and Sepoy Jagannath Prasad. We also find that both respondents had taken a plea in

the writ petitions filed by them that General Court-martial was not competent to hold trial in respect of alleged offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad, mainly on the ground that they were not subject to Army Act and the offence being committed in civilian area and being investigated upon by civil police after lodging of FIR in this regard at Police Station-Sadar Bazar, District Jhansi and the cognizance being also taken in the matter by A.D.M. Jhansi under Section 145 of the old Cr.P.C., the General Court-martial was not competent to hold trial in respect of the same offence. They had also taken a plea in the writ petitions that once the General Officer Commanding, 31 Armoured Division, Jhansi passed order on the report of Lt. Col. N.N. Gupta, who had presided the Court of Inquiry proceedings, that no Court martial was required as no prima facie case was made out, the General Officer Commanding, Central Command, Lucknow had no jurisdiction to proceed against respondents by passing an order for trying the offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad by the General Court-martial. We also find that despite this plea being taken in both the writ petitions, the learned Single Judge has not decided the issue of jurisdiction, as he was of the view that there was no circumstantial evidence against the respondents and prosecution has completely failed to establish any case so that respondents may be convicted taking aid of Section 34 of IPC. He, therefore, left the issue of jurisdiction to be decided though he was of the view that apparently there was force in the issue. Since the learned Single Judge has left the issue of jurisdiction to be decided with the observation that there was force in the issue, we think it proper and necessary to decide the said issue to set the controversy at rest.

40. We have perused the record of writ petitions and it appears that respondent No. 1-Khem Chand was appointed as Sepoy in Army Ordinance Corps and was posted at 74 Armed Workshop, Company 65 EME Battalion C/O 56 APO, Jhansi during the tenure of his service. It further appears that he was enrolled under Section 2 of the Army Act, as Sepoy in the Army and as an enrolled person, he was subject to Army Act until discharged/dismissed/relieved from the service. It further appears that he had applied for discharge from Army on stream compassionate grounds and the same was approved by E.M.E. (Records) Office for sanction by the Competent Authority, however, discharge was not sanctioned by the Competent Authority because he was not fulfilling the condition necessary for the discharge. Appellants have filed a copy of letter of E.M.E. (Records) Secundrabad No. 50469/118/CAII(MP) dated 16.3.1974 and 65 EME Battalion, Letter No. 216/6878716/EME dated 27.3.1981 contained in Annexures C.A. 5 & 6 to the counter affidavit filed by them which is on record. A reading of letters contained in Annexures-C.A. 5 and 6 shows that though discharge of Sepoy Khem Chand was sanctioned by E.M.E. (Records) and discharge was to be carried out by 8th September, 1973 on liquidation of balance, but it was not sent to E.M.E. Depo Battalion for discharge because the incumbent was under the debit balance. The letters further show that meanwhile respondents allegedly having committed the murder of Havaldar Ram Phal and Sepoy Jagannath Prasad on

26.1.1974, E.M.E. (Records) was, therefore, informed of his involvement in the disciplinary case vide letter dated 12.2.1974. Thus, it shows that respondent no. 1 was not discharged from service on the date of commission of the offence and therefore he was subject to Army Act, and in view of this, it is incorrect to say that he had been discharged from service much before the commission of offence and, therefore, he was beyond the purview of Army Act and he could not be tried for the offence of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad by convening assembly of the General Court-martial.

41. It is relevant to mention here that after the decision of civil misc. writ petition no. 3565 of 1981, Respondent 1-Khem Chand had moved an application before the learned single Judge seeking modification of order on the premise that despite reversal of the order of General Court-martial the General Officer Commanding, 31 Armoured Division, Jhansi did not reinstate him into service. In the modification application Respondent No. -1 had prayed that order be modified directing the General Officer Commanding to re-instate Respondent-1 into service with all consequential benefits by treating him into continuous service. The application of Respondent No. 1 for the modification of order was allowed and it was clarified that if Respondent No. 1 has not reached the age of superannuation, he shall be reinstated forthwith otherwise shall be entitled to all consequential benefits treating him to be in continuous service till the date of his superannuation. After this, it does not lie in the mouth of Respondent-1 to say that he had been discharged from the service much before the commission of offence and was not subject to the Army Act.

42. Section 22 of the Army Act deals with retirement, release or discharge from the service and it reads that any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed.

43. Section 23 of the Army Act says that on dismissal, removal, discharge, retirement or release from the service a certificate shall be furnished by the Commanding Officer in the language which is the mother tongue of every junior commissioned officer, warrant officer, or enrolled person so dismissed, removed, discharged, retired or released and also in the English language setting forth-

- (i) the authority terminating his service;
- (ii) the cause for such termination; and
- (iii) the full period of his service in the regular Army.

44. No such certificate has been issued in the case of Respondents because had it been so then it would certainly be filed. This also shows that Respondent No. 1 was not discharged from the service but he was in service and therefore subject to Army Act.

45. As regards respondent no. 2 Satya Deo Giri, it is not his case that he was also discharged from service. His only case is that since he was appointed on the

post of Store Keeper (Technical) and the said post is not a military post, but a civilian post, therefore he was not subject to Army Act, 1950 and, therefore, he could not be tried for committing the offence of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad under Section 69 and 70 of Army Act by the General Court-martial. The plea of respondent no. 2 that post of Store Keeper (Technical) is a civilian post and, therefore, he was not subject to Army Act, is also incorrect, as undisputedly, he was appointed as Store Keeper (Technical) in Army Ordinance Corps in the year 1971 and was posted at 74 Armed Workshop, Jhansi and continued to work on this post when the offence of murder was allegedly committed. There is no reason to treat the post of Store Keeper (Technical) in the Army Ordinance Corps a civilian post. Since this respondent was appointed in Army on the post of Store Keeper (Technical) and was posted at 74 Armed Workshop and was also enrolled under Section 2 of the Army Act, therefore, his contention that he was not subject to Army Act and could not be tried by the General Court-martial is not sustainable.

46. The next point raising jurisdiction of the General Court-martial is that once the General Officer Commanding, 31 Armoured Division, Jhansi had passed the order that no Court-martial was required as no prima facie case was made out, the General Officer, Commanding-in-chief, Central Command, Lucknow was not competent to proceed against respondents for Court-martial for trying the offence of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad. In this regard, we would like to say that we have perused the record and do not find any such order wherein it would be provided that the General Officer Commanding, 31 Armoured Division, Jhansi has passed any order that no Court-martial was required in the matter of killing of deceased persons as no prima facie case was made out against respondents. What we have noticed on perusal of record is that after the dead bodies of Havaldar Ram Phal and Sepoy Jagannath Prasad were found lying on the outskirts of Village-Bhattagaon, the assembly of Court of Inquiry was convened to investigate the reasons and circumstances under which their death was caused. This Court of Inquiry was presided over by Lt. Col. N.N. Gupta, but before the proceedings of inquiry could be completed another Court of Inquiry was instituted and in the subsequent Court of Inquiry proceedings prima facie evidence against respondents and co-accused Isha Nand Dubey for committing offence of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad was found and, therefore, the General Officer Commanding, 31 Armoured Division, Jhansi, who is competent to convene assembly of Court-martial for trying the offence of murder against respondents, convened assembly of the General-Court Martial for holding trial of respondents in respect of offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad.

47. It is not borne out from the record that order of convening assembly for trying the offence of murder of deceased persons against respondents was passed by the General Officer, Commanding-in-chief, Central Command, Lucknow. It is also not borne out from the record that the General Officer Commanding, 31 Armoured Division, Jhansi had passed any order on the report

of Lt. Col. N.N. Gupta, who was presiding the earlier Court of Inquiry, that no Court-martial was required into the matter of killing of Havaldar Ram Phal and Sepoy Jagannath Prasad, as no prima facie case was made out. Since no such order was passed by the General Officer Commanding, 31 Armoured Division, Jhansi and the order of convening assembly of the General Court-martial for trying the offence of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad against respondents and co-accused Isha Nand Dubey, was passed by the General Officer Commanding, and not by the General Officer, Commanding-in-chief, Central Command, Lucknow, the plea of respondents that order of convening assembly of General Court-martial against respondents for trying offence of murder of deceased army personnels is bad in the eye of law does not have any leg to stand.

48. We have also considered the submission of learned counsel for respondents that first information report of incident being lodged with the civil police and the matter being investigated upon and the charge sheet being filed and the cognizance being taken thereupon by A.D.M., Jhansi under Section 145 of the old Cr.P.C., the case could not be tried by the General Court-martial. We have no hesitation to observe that in view of provisions laid down in Section 125 of the Army Act, 1950, which clearly lays down that 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. In view of this provision, if the General Officer Commanding, 31 Armoured Division, Jhansi decided that respondents and co-accused Isha Nand Dubey should be tried by the Court-martial instead of criminal court, there was nothing wrong in it. It is the discretion of the Officer Commanding the Army to decide that before which court the proceedings shall be instituted and, if he decides that proceedings should be instituted in the court-martial instead of in criminal court, the decision of the Officer Commanding the Army shall prevail.

49. We have examined the record of this case and in view of the aforesaid provision, we find that though in the case in hand the first information report was lodged at P.S. Sadar Bazar, Jhansi and the said report was investigated by Sub-Inspector, S.K. Tiwari, the then Station Officer, Police Station-Sadar Bazar, Jhansi who filed charge sheet against respondents after completing investigation in the court of A.D.M. (J), Jhansi, but since thereafter a decision was taken by the General Officer Commanding, 31 Armoured Division, Jhansi that proceedings in respect of alleged offence should be instituted in the Court-martial and his decision having power to prevail is final, it cannot be called in question saying alleged offence should have been tried by the criminal court in which proceedings were previously instituted.

50. Now the third point which we have to decide in appeals is whether this Court while exercising jurisdiction under Article 226 of the Constitution of India has power to enter into merit of the case and can re-asses the evidence led in support of charge and arrive at a different finding than that recorded by the General Court-martial. Before addressing this issue, we wish to refer some case laws which throw light on the point involved in the issue.

51. The Hon''ble Apex Court in the case of Union of India v. Himmat Singh Chahar reported in 1999 SCC (4) 521, has held that though it is true that notwithstanding the finality attached to the orders of the Competent Authority in the Court-Martial Proceeding the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. Paragraph 5 of the judgment is relevant which is quoted as under:

"5. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the Competent Authority in the court Martial Proceeding. It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial Proceeding the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an Appellant Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior tribunal. This being the parameter for exercise of power of judicial review against the findings of a Competent Authority in a court Martial Proceeding, and applying the same to the impugned judgment of the High court we have no hesitation to come to the conclusion that the High court over-stepped its jurisdiction in trying to re-appreciate the evidence of Mrs. Nirmala Sharma and in coming to the conclusion that her evidence is not credible enough to give a finding of guilt of the respondent of a charge under Section 354. We have also perused the statement of Mrs. Nirmala Sharma and the conclusion becomes inescapable on the basis of

the said statement of Mrs. Nirmala Sharma that the respondent has been rightly found to have committed offence under Section 354 by the Authorities in the Court-Martial Proceedings.

52. The scope of High Court under Articles 226 and 227 of the Constitution of India with regard to Court-martial proceeding was considered by the Hon"ble Apex Court in the case of Union of India and others v. Major A. Hussain (IC-14827), reported in (1998) 1 SCC 537, wherein it was held that though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 and if the court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Paragraphs 22 and 23 of the judgment are relevant in this regard which are quoted as under:

"22. We find the proceedings of the General Court-Martial to be quite immaculate where trial was fair and every possible opportunity was afforded to the respondent to defend his case. Rather it would appear that the respondent made all efforts to delay the proceedings of the court-martial. Thrice he sought the intervention of the High Court. Withdrawal of the defence counsel in the midst of the proceedings was perhaps also a part of his plan to delay the proceedings and to make that a ground if the respondent was ultimately convicted and sentenced. Services of qualified defending officer were made available to the respondent to defend his case, but he had rejected their services without valid reasons. He was repeatedly asked to give the names of the defending officers of his choice but he declined to do so. The court-martial had been conducted in accordance with the Act and Rules and it is difficult to find any fault in the proceedings. The Division Bench said that the learned Single Judge minutely examined the record of the court-martial proceedings and after that came to the conclusion that the respondent was denied reasonable opportunity to defend himself. We think this was a fundamental mistake committed by the High Court. It was not necessary for the High Court to minutely examine the record of the General Court-Martial as if it was sitting in appeal. We find that on merit, the High Court has not said that there was no case against the respondent to hold him guilty of the offence charged.

23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It

has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment."

53. The Hon"ble Apex Court has dealt with the issue again in the case of Bhuvneshwar Singh v. Union of India, reported in 1993 SCC (4) 327 and has held that this Court cannot in an appeal under Article 136 of the Constitution of India, be requested to reappraise the evidence and examine whether the incident took place in the manner suggested by the appellant or the prosecution. Paragraphs 4 and 17 of the judgment which are relevant with regard to case in hand, are quoted as under:

"4. The appellant invited us to go through the evidence recorded by the District court-martial and examine the discrepancies appearing therein. He disputed the correctness of the factual basis on which the proceedings had commenced, for recording of the summary of evidence and the trial by the District court-martial. Undeterred by the findings recorded by the District court-martial, which were confirmed by the confirming authority and against which the departmental appeal had also failed, as well as the judgments of the Single Judge and the division bench of the High court the appellant insisted that we should reappraise the evidence and accept his version regarding the incident and set aside his conviction and sentence. We politely but firmly declined the invitation to reappraise the evidence for testing the validity of the findings, as indeed it is not a case, nor was it the contention of the appellant in the High court or before us, that the findings of the District court-martial were based on no evidence at all. Both the Single Judge and the division bench of the High court found that the proceedings before the District court-martial had been conducted in accordance with law and that there was no defect in the appraisal of evidence by the District

court-martial. We agree. This court cannot in an appeal under Article 136 of the Constitution of India, be requested to reappraise the evidence and examine whether the incident took place in the manner suggested by the appellant or the prosecution.

17. This court as also the High courts under Article 226 have the power of judicial review, in respect of proceedings of court-martial as well as the proceedings subsequent thereto, even though to a limited extent, and can in appropriate cases grant relief, where there has been denial of the fundamental rights of the citizen or if the proceedings before the court-martial suffer from a jurisdictional defect or any other substantive error of law apparent on the face of the record. Having found that the appellant was in illegal detention from 29.6.1988 to 9.7.1989, in our opinion it would be appropriate to award him adequate compensation for violation of his fundamental right of personal liberty as guaranteed by Article 21 of the Constitution and we accordingly direct that the appellant shall be entitled to a sum of Rs. 30,000/- as compensation for his illegal pretrial detention and we make an order accordingly."

54. The scope of Articles 226 and 227 of the Constitution of India with regard to Court-Martial proceedings has been discussed by the Hon'ble Apex Court in the case of Pradeep Singh v. Union of India, reported in 2007 LAWS (SC)-4-63, wherein it has been held that if a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure, 1973 where adjournments have become a matter of routine though that is also against the provisions of law. The Hon'ble Apex Court further held that the High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject matter and has followed the prescribed procedure and it is within its powers to award punishment. Paragraph 7 of the judgment is relevant in this regard which is being reproduced as under:

"7. The next ground of challenge relates to legality of proceedings before the Court-Martial. Though Court-Martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure, 1973 where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court martial remains to be significant degree, a specialised part of overall mechanism by which the military

discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function, and to a great extent, is a court where provisions of the Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pretrial investigation was adequate or not. Requirement of proper and adequate investigation is non-jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject matter and has followed the prescribed procedure and it is within its powers to award punishment."

55. In the case of Mannu Giri v. General/Chief of Army Staff, New Delhi, reported in 2002 LAWS (ALL)-9-204, a Division Bench of this Court has held that summary court-martial having found the appellant guilty of the charge, this Court cannot sit in appeal against the said proceedings. The submission of counsel for the appellant that there was no evidence to support the charge cannot be accepted. The evidence which was relied in summary court-martial proceedings has been referred to and considered by the learned single Judge while dismissing the writ petition. It is further held that the scope of interference by this Court under Article 226 of the Constitution of India in summary court-martial proceedings is very limited. The Chief of Army Staff while considering the petition of the appellant under Section 164 (2) of the Army Act has also considered the evidence relied on by the summary court-martial. The Chief of Army Staff has also found that the findings of the summary court-martial are supported by cogent and reliable evidence which inspire confidence. Paragraphs 9, 10 and 11 of the judgment are relevant, which are quoted as under:

"9. The second submission of the counsel for the appellant that there was no evidence to hold the appellant guilty of the charge needs to be considered. The learned single Judge in his judgment has stated that the complainant Krishna Dolay has narrated the incident in great detail which deposition has been supported by the Capt. Paramjeet (P.W.1), Pramod Kumar Pradhan (P.W.2), Recruit S.K. Ray (P.W.3), Naib Subedar Surjeet Singh (P.W.5) and Subedar Bachan Singh Rathaur (P.W.6). The appellant has annexed along with the appeal the statements of the prosecution witnesses, recruit Krishna Dolay victim in his deposition annexed as Annexure-3 to the affidavit, has narrated the whole incident in detail. The charge of unnatural act by appellant is fully proved by the

deposition of victim and there is no good reason for not believing the statement of victim. Further, other witnesses were all present in the same night and have narrated the events relating to aforesaid unnatural act. The summary court-martial has found the charges proved on the basis of evidence which was brought before the summary court-martial. It is not a case of no evidence. The scope of judicial review with regard to summary court-martial proceedings is very limited. This Court under Article 226 of the Constitution of India will not act as a court of appeal nor will reappraise the evidence brought before the summary court-martial. In the Army Act against the summary court-martial proceedings, a remedy is already provided under Section 164 which remedy has already been availed by the appellant. The Apex Court in the case of Union of India v. Major A. Hussain (supra) has laid down in paragraph 23 which is reproduced below: ????.

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

10. Summary court-martial having found the appellant guilty of the charge, this

Court cannot sit in appeal against the said proceedings. The submission of counsel for the appellant that there was no evidence to support the charge cannot be accepted. The evidence which was relied in summary court-martial proceedings has been referred to and considered by the learned single Judge while dismissing the writ petition.

11. The Apex Court in *Union of India v. Narain Singh*'s case (supra) has again held that where there are relevant material which support the findings that the officer is guilty, it is not the function of the High Court to arrive at independent finding. In view of the foregoing discussions, it is clear that the scope of interference by this Court under Article 226 of the Constitution of India in summary court-martial proceedings is very limited. The Chief of Army Staff while considering the petition of the appellant under Section 164 (2) of the Army Act has also considered the evidence relied on by the summary court-martial. The chief of Army Staff has also found that the findings of the summary court-martial are supported by cogent and reliable evidence which inspire confidence."

56. The scope of Article 226 of the Constitution of India was again considered by a Co-ordinate Bench of this Court in the case of *Union of India v. Ram Adhar Tiwari*, reported in 2002- LAWS (ALL)-8-114, wherein it has been held that power of judicial review under Article 226 is for limited purpose and the said power of judicial review cannot be a power of appellate authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that evidence is sufficient for the conclusion arrived at by the Competent Authorities in the court martial proceedings. In this regard paragraphs 18, 19 and 20 of the judgment are relevant which are quoted as under:

"18. The next submission of counsel for the appellants is that under Article 226 of the Constitution, this Court has limited scope of review. The counsel for the appellants has also relied on various judgments as referred above. In *Bhuvneshwar Singh*'s case (supra), in paragraph 13, the Apex Court held as under:

"13. Keeping in view the limited nature of judicial review in matters arising out of court-martial proceedings, it is not only desirable but necessary that the authorities under the Army Act, strictly follow the requirements of the Act and the Rules?????..

19. It is true that the Apex Court in the aforesaid judgment and other decisions cited by counsel for the appellants has held that power of judicial review under Article 226 is for limited purpose and the said power of judicial review cannot be a power of appellate authority permitting the High Court to re-appreciate the evidence. In *Union of India v. Himmat Singh Chahar*'s case (supra), in paragraph 5, the Apex Court held as under:

"5. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings

arrived at by the Competent Authority in the court-martial proceeding. It is of course true that notwithstanding the finality, attached to the orders of the Competent Authority in the court-martial proceedings the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with the jurisdiction under the Act. The said power of judicial review cannot be a power of an Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is sufficient for the conclusion arrived at by the Competent Authorities in the court-martial proceedings.

20. The other decisions cited by counsel for the appellants lay down the same proposition. There cannot be any dispute with the proposition as laid down by the Apex Court in the aforesaid cases. The scope of judicial review is limited and has to be exercised in well defined parameters of judicial review. In the present case, learned single Judge has not interfered with the court-martial proceedings by way of reappraising the evidence or setting aside the findings. The learned single Judge has granted the relief due to violation of Rule 129 of Army Rules and other reasons mentioned in the judgment. The Division Bench of this Court in *Union of India v. Sepoy/Driver Rameshwar Mehato's case* (supra), which was also a case of violation of Rule 129 has held that respondent was prejudiced in his defence and principles of natural justice were violated. As laid down by Apex Court in *S.N. Mukherjee v. Union of India*, 1990 (4) SCC 594, the principles of natural justice are to prevent miscarriage of justice and secure fair play in action. In paragraph 42 of the judgment, the Apex Court while considering the scope of judicial review under Article 226 with regard to court-martial proceedings held as under:

"42??????? This Court under Article 32 and the High Courts under Article 226 have, however, the power of judicial review in respect of proceedings of courts-martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record."

57. In view of aforesaid pronouncements of the Hon'ble Apex Court and this Court, learned counsel for appellants has submitted that scope of High Court under Articles 226 and 227 of the Constitution of India with regard to Court-martial proceedings is not as wide that this Court can enter into merit of the case and re-appraise the evidence to arrive at a different conclusion than that arrived at by the Competent Authority at the Court-martial proceedings, but it can review the decision taken by the authorities in the light of the facts whether

Court-martial was properly convened and its proceedings were conducted in accordance with rules framed under the Army Rules. He has submitted that if it is found that the Court-martial was properly constituted and convened and its proceedings were conducted in accordance with law as well as Rules framed thereunder and that authorities awarding punishment were competent to award punishment, the decision taken by the authorities cannot be challenged merely on the ground that evidence on which it is based is in-sufficient, weak and unreliable.

58. We have perused the records of the case in hand and find that the General Officer Commanding, 31 Armoured Division, Jhansi who convened assembly of General Court-martial for trying the offence committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad against respondents and co-accused Isha Nand Dubey, was competent to do so. We also find that before convening assembly of General Court-martial, summary of evidence was collected by convening assembly of Court of Inquiry and in that proceeding witnesses were examined. We also find that both respondents and co-accused Isha Nand Dubey, who were tried for the offence of committing murder of Havaldar Ram Phal and Sepoy Jagannath Prasad by the court of General Court-martial being army personnels and enrolled persons under Section 2 of the Army Act, were subject to the Army Act and, therefore, Court-martial was competent to hold trial of them for the offence they were charged for. Thus, so far as composition of the Court-martial and convening its assembly is concerned there was nothing wrong in it so that it could be said that General Court-martial was not competent to try the offence of murder of Havaldar Ram Phal and Sepoy Jagannath Prasad against respondents.

59. We have examined the record and we also find that it is not a case that it could be said that finding of conviction arrived at by the General Court-martial is based on no evidence. To the contrary, it is revealed from the record that deceased persons Havaldar Ram Phal and Sepoy Jagannath Prasad went to the house of Respondent-2 Satya Deo Giri in his absence on 19.1.1974 and tried to outrage the modesty of his wife Smt. Meera Devi who raised an alarm, whereupon P.W. 11 E.P. Verghese, who lives in the same building in which Respondent- 2 lives came out and saw both the persons standing in the Varandah and on the road of the said building. Smt. Meera Devi narrated the incident to him from which it is clear that P.W. 11-E.P. Verghese had seen deceased persons present out side the house of respondent no. 2 on 19.1.1974 and wife of respondent- 2 Smt. Meera Devi had also stated to him that these two persons had tried to outrage her modesty.

60. From perusal of record it also transpires that evidence was given before the General Court-martial to the effect that Respondent-1 Khem Chand came to the house of P. W.11- Verghese on 26.1.1974 at about 7.30 A.M. for the purpose of finding out the house of P.W.9-Nar Bahadur Chhetri, Kote N.C.O. from whom he had been asked by P.W. 21 to take out later's gun. Evidence was also given before the General Court-martial to the effect that both respondents had gone to

the house of P.W.9-Nar Bahadur Chhetri on 26.1.1974 at about 9.00 A.M. and on the same day at about 10.00 gun was issued to Respondent-1. Evidence was also given to the effect that on 26.1.1974 at about 12.30 P.M. P.W.10 had seen respondents and co-accused Isha Nand Dubey sitting and talking in the living room and that time a gun was also lying there. Evidence was also given before the General Court-martial that P.W. 11 E.P. Verghese had seen Respondent-1, co-accused Isha Nand Dubey and deceased persons in the Bazar of Bhattagaon on 26.1.1974 at about 2.30 P.M. Same day at about 4.00 P.M. P.W.20-Majju had seen respondents along with co-accused and deceased persons in the outskirt of Village-Singhara. Same day at about 4.30 P.M. they were seen together going towards the area pola Patha where from the dead bodies of deceased persons were subsequently recovered. Same day at about 4.45 P.M. P.W.-12-Damroo Prasad heard two shots being fired from the side of pola Patha and at about same time P.W. 13-Gopal Kachchi also heard firing of two shots and soon thereafter he saw two persons coming at a fast speed.

61. On 26.1.1974 at about 5.00 P.M. P.W. 21 Sewa Ram had also seen respondents coming at a fast speed from the eastern side of Asghar Ali's Tubewell and on the same day at about 5.15 P.M., P.W.19 Munna Lal had seen them coming at a fast speed from the eastern side near the field of Asghar Ali. On the same day at about 6.30 P.M. when the evening roll call was taken, petitioner and accused no. 1 were found absent.

62. Apart from above, on 9.2.1974 an extra judicial confession is said to have been made before Capt. Iqbal Singh Chahal of 65 EME Battalion in which Respondent-1 is alleged to have confessed that accused no. 1 shot dead Havaladar Ram Phal and Sepoy Jagannath Prasad in presence of Respondent-2 Satya Deo Giri and co-accused Isha Nand Dubey. Respondent-2 Satya Deo Giri had also made confessional statement before Capt. I.S. Chaahal that Khem Chand had shot dead the deceased persons and that time he and co-accused Isa Nand Dubey were present there.

63. Identification parade of both respondents was also held in District Jail and in the said parade P.W. 2, P.W. 19 and P.W. 21 had correctly identified Respondent-1 Khem Chand, whereas aforesaid witnesses and P.W. 20 Majju had correctly identified Respondent-2. On account of evidence stated above, members of General Court-martial were of the view that alleged offence of murder of Havaladar Ram Phal and Sepoy Jagannath Prasad was committed by respondents and co-accused Isha Nand Dubey and that respondents had strong motive of committing the murder as roote cause of murder was Smt. Meera Devi, the wife of Respondent-2 whom Respondent-1 treated like sister.

64. We have considered the submission made by learned counsel for the respondents that settled principle of law is that to hold a person guilty for an offence the guilt is to be proved beyond all reasonable doubts. Reasonable doubt means state of mind where after due deliberation over the facts under consideration before one and when after due thought to the case as a whole, one

is not, honestly and conscientiously able to state how do the matters stand. It does not mean any conceivable doubt which from conflict of evidence or otherwise may arise in the mind of any one nor it is a convenient formula which absolves to reach at a just and reasonable decision. Absolute certainty is rarely obtainable in judicial decisions, nor it is required by law. The degree of certainty upon which you as prudent men of the world act in important affairs of your life is only required to be looked into. Similarly, "Proved does not mean proof of rigid mathematical demonstration because that is impossible to achieve. It means such evidence as would induce a reasonable man to come to a conclusion. So if the evidence led before the General Court-martial is analysed in view of aforesaid definition of "Reasonableness" and "Proved", we would found that no illegality was committed by the General Court-martial by relying upon the evidence led before it and arrived at a conclusion that it were respondents who committed the murder of deceased Havaladar Ram Phal and Sepoy Jagannath Prasad. We are also of the view that there might be some discrepancy in the evidence of witnesses but they are not so material and important that it could be held that there was no prior meeting of mind or the evidence was weak and insufficient to arrive at the conclusion of guilt being proved against respondents that they committed murder of Havaladar Ram Phal and Sepoy Jagannath Prasad.

65. We have perused the impugned judgment and orders and have no hesitation to say that there was no occasion for the learned single Judge going into merit of evidence by reappraising it and arriving at a different conclusion that there was no prior meeting of mind and the evidence which was led before the General Court-martial was weak and insufficient so that no conviction could be based on it and it could be said that offence was not committed by the respondents. We are also of the view that act of learned single Judge going into merit of the case and arriving at a different conclusion being like sitting as court of appeal was not warranted at all as it was not the case of respondents that there was no proper composition of Court-martial and the authority who convened the assembly was not competent for so doing. It was also not the case of respondents that they were denied opportunity of defending themselves. Rather, contrarily the record reveals that the authority who convened assembly of General Court-martial was fully competent for convening assembly of Court-martial and there was nothing wrong in the composition of Court-martial also. Thirty two witnesses were examined before the General Court-martial besides spot inspection and after having considered the facts, circumstances of the case and evidence given in support of the charge, the five members court of Court-martial was of the view that it were respondents who had committed the crime. Since it was not obligatory for learned single Judge to enter into merit of the case by reappraising the evidence and it was also not the case that impugned judgment and orders were based on no evidence, rather contrary to this, evidence led before the General Court-martial was sufficient and cogent to reach the conclusion of guilt against respondents being proved, we do not find it convenient to approve the judgments and orders of learned single Judge reversing the finding of conviction

and sentence passed by the General Court-martial which was later approved by the General Officer Commanding by his order dated 5.2.1975 and the petition preferred against the same under Section 164 (2) of the Army Act, was also dismissed by the Chief of the Army Staff.

66. In view of aforesaid discussions, impugned judgment and orders passed by the learned single Judge being not in accordance with the settled propositions of law and evidence are not liable to sustain, rather they are liable to be set aside.

67. Accordingly, both appeals are allowed with costs. Judgment and orders dated 10.2.2003 and 11.10.2002 passed by the learned Single Judge in Civil Misc. Writ Petition No. 3565 of 1981: Khem Chand v. Union of India & others and Civil Misc. Writ Petition No. 8723 of 1980: Satya Deo Giri v. Union of India & others respectively are hereby quashed and the order/verdict of the General Court-martial convicting and sentencing respondents to suffer life imprisonment and being dismissed from the service, order dated 5.2.1975 of the General Officer Commanding, 31 Armoured Division, Jhansi confirming the order/verdict of General Court-Martial and order of Chief of the Army Staff dismissing respondents' petitions under Section 164 (2) of the Army Act, 1950 are confirmed.