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**(2011) 04 AHC CK 0433**

**In the Allahabad High Court**

**Case No :** Criminal Miscellaneous Case No. 1342 of 2011

Union of India (UOI)

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

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**Date of Decision :** 01-04-2011

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 22, 475, 5, 5(1)

**Citation :** (2011) 4 ADJ 433

**Hon'ble Judges :** Narayan Shukla, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

Shri Narayan Shukla, J.—Heard Mr. Raj Kumar Singh, learned Counsel for the Petitioner as well as Sri Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State.

2. The Petitioners have challenged the order impugned dated 23.2.2011, passed by the Additional Chief Judicial Magistrate-Vth, Court No. 29, Lucknow, whereby the Petitioners' application for transfer of case for trial to the Armed Forces Tribunal has been rejected on the ground that in the matter the charge-sheet has already been filed and the Court has taken cognizance of the offences, therefore, now it cannot be transferred to the Tribunal.

3. Learned Counsel for the Petitioners invites the attention of the Court towards the provisions of Section 475 of the Code of Criminal Procedure, which speaks for delivery of the case to commanding officers of persons liable to be tried by Court-martial. Section 475 of the Code of Criminal Procedure is extracted here below:

475. Delivery to commanding officers of persons liable to be tried by Court-martial.--(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons

subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court- martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court- martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court- martial.

Explanation.--In this section--

(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(b) "Court- martial" includes any tribunal with the powers similar to those of a Court- martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court- martial for trial or to be examined touching any matter pending before the Court- martial.

4. Learned Counsel for the Petitioners further submits that there is Army Act, 1950 as well as Rules framed there under which empowers the Tribunal for trial of such cases, therefore, the transfer of the case cannot be denied. In the case of Lt. Col. S.K. Kashyap and Another Vs. The State of Rajasthan, the Hon"ble Supreme Court has discussed the controversy involved in the matter and held that for transferring the case for trial under the Army Act, it is not necessary for the learned Magistrate to frame charges and then transfer the matter. Section 5 of the Code of Criminal Procedure (old) has been dealt with and has expressed the opinion that the words "charged with and tried for an offence" mean that there are accusations and allegations against the person. It does not mean that the charges have been framed. The relevant paragraph of 26 of the judgment is reproduced here below:

26. The next question is as to what meaning should be given to the words "charged with and tried for an offence under the principal Act", occurring in Section 5(1)(A). Counsel for the Appellants contended that the words "charged with and tried for an offence" would mean that charges had been actually framed and trial commenced. There is a distinction between Clauses (a) and (b) of Sub-section (1) of Section 5 of Act 22 of 1966. Clause (a) deals with persons who are subject to the military, naval or air force law being charged with and tried for an

offence together with a person or persons not so subject whereas Clause (b) deals only with persons who are subject to military, naval or air-force law. In the present case, the Appellants are persons who were subject to military law and they were charged alongwith civilians. Therefore, Clause (a) is attracted. It is in connection with a case which concerns only persons subject to military, naval or air-force law that u/s 5(1)(b) it is enacted that a case is not only to be pending before 30 June, 1966 before a Special Judge but that charges should also have been framed against such persons. The absence of framing of charges in Clauses (a) and requirement of framing charges in Clause (b) repels the construction suggested by counsel for the Appellants that charges should have been framed in the present case in order to make it a case pending within the meaning of Section 5(1)(a) of the 1966 Act. The words "charged with and tried for an offence" mean that there are accusations and allegations against the person. The words "charged with" are used in Section 5 (1)(a) in contradistinction to the words "charges have already been framed" in Section 5(1)(b) of the Act. Therefore, the use of separate words in the two separate Clauses (a) and (b) is significant to indicate that the statute speaks of the words "charged with" in Clause (a) not in the sense of "charges have been framed" in Clause (b). The legislative intent is abundantly clear from the use of separate words.

The learned Magistrate does not dispute the authority of the Court under the Army Act to try with the case.

5. The provisions of Section 475 of the Code of Criminal Procedure are itself clear that when the person who is subject to military, naval or air force law and is liable to be tried by the Court-martial, is brought before the Magistrate and charged with an offence, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together for the offence in which he is accused to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.

6. Thus for sending a person for trial under the Court-martial, the framing of charge by the Magistrate is not necessary. The only statement of the offence committed by him is to be recorded by the learned Magistrate. Therefore, I am of the view that the learned Magistrate has failed to appreciate the law on the subject correctly. Under the circumstances, I hereby quash the order impugned dated 23.2.2011, passed by the Additional Chief Judicial Magistrate-Vth, Court No. 29, Lucknow and the direction is issued to the learned Magistrate to transfer the case to the concerned officer who is competent for trial of the case forthwith.

7. In the aforesaid terms, the petition is allowed.