Lt. Col. Prithi Pal Singh Bedi

Vs

Union of India and Others

Capt. Dharam Pal Kukrety and Another

Vs

Union of India and Others

and

Capt. Chander Kumar Chopra

Vs

Union of India and Others

Writ Petitions Nos. 4903 of 1981, 1513 of 1979 and 5930 of 1980

(D. A. Desai, A. P. Sen JJ)

25.08.1982

JUDGMENT

DESAI, J. -

1. Validity and legality of an order made against each petitioner convening general court martial to try each petitioner in respect of the charges framed against each of them is questioned on diverse grounds but principally the composition in each of these petitions under Article 32 of the Constitution. In Writ Petition No. 4903 of 1981 the petitioner has also challenged the constitutional validity of Rules 22, 23, 25 and 40 of the Army Rules, 1954 ('Rules' for short) as being violative of the fundamental rights of the petitioner guaranteed under Articles 14 and 21 of the Constitution. As certain contentions were common to all the three petitions they were heard together and are being disposed of by this common judgment. Facts alleged on which legal formulations were founded may be briefly set out in respect of each petitioner.

Re Writ Petition No. 4903 of 1981 :

2. Petitioner Lt.-Col. Prithi Pal Singh Bedi was granted permanent regular commission in the Regiment of Artillery in 1958 and in course of his service he came to be promoted as Captain, then as Major and the relevant time he was holding the rank of Lt.-Colonel and in that capacity he was designed as Commanding Officer, 226, Medium Regiment of 43 Artillery Brigade. As part of his duty he had to write interim confidential reports of five officers of the rank of Major subordinate to him. One Major R.S. Sehgal was one of the subordinate officer whose interim confidential report was written by the petitioner. Under the relevant rules the officer whose confidential report is written by his superior has to be shown the confidential report and in token of his having seen the

same his signature is to be obtained, the purpose underlying this procedure being that the attention of the subordinate officer is drawn to the counselling remark in the confidential report which may encourage him to remedy the defect pointed out and to improve in his efficiency. The confidential reports prepared by the petitioner were to be reviewed by the Brigadier. It is alleged that Brig. N. Sondhi, AVSM who held the office of the Brigadier and under whom the petitioner was working as Lt.-Colonel at the time of writing reports had already been transferred on January 8, 1980, and, therefore, the confidential reports submitted by the petitioner were required to be reviewed by the officer who occupied the office of Brigadier consequent upon the transfer Brig. N. Sondhi. It is admitted that petitioner had also received his order of transfer dated February 6, 1980 but he left the charge on February 26, 1980, after completing the formality of handing over charge and also writing the interim confidential reports which he was bound to complete before proceeding on transfer. It is alleged that Major R.S. Sehgal in respect of whom petitioner wrote the confidential report on February 20, 1980, which contained a counselling remark adverse to the officer was a near relation of Brig. N Sondhi. It is further alleged that even though Brig. Sondhi had already been transferred and had left charge, yet on February 25, 1980, the confidential reports were forwarded by the Headquarters 43 Artillery Brigade to Brig. Sondhi for reviewing the same. While so reviewing the confidential reports, Brig. Sondhi addressed a query with respect to the last sentence in para 27 in the confidential report of Major Sehgal; "that the last sentence appears to have been written possibly at a different time. It is suggested that a confirmation may be asked for from the officer as to whether he was aware of the complete para prior to signing. The ICR may thereafter be returned for onwards despatch". Suspicion underlying this query is that adverse entry reflected in the last sentence of para 27 was interpolated after the confidential report was signed by Major Sehgal. The suspicion arose on the visual impression that : (a) there is change in ink of last line; (b) last line appears to have been written over the signature of the officer reported upon; (c) size of lettering of the last line is smaller than the rest of the para. It may be mentioned that ultimately this alleged interpolation in the interim confidential report after the same having been initialled by the officer reported upon is the gravamen of the charge under Section 45 if the Army Act on which the petitioner is called upon to face a trial by the general court martial convened under the impugned order dated April 11, 1981.

Re Writ Petition No. 1513 of 1979 :

3. The first petitioner Captain Dharmpal Kukrety and petitioner 2 Nail Bhanwar Singh were both attached at the relevant time to 2 Rajput Regiment but since the order to try them before a general court martial both of them are attached to 237 Engineer Regiment of 25 Infantry Division which is a part of the 16th Corps of the Indian Army. Petitioner 1 was promoted as Acting Major but because of the direction to try him before a court martial he has been reverted to substantive rank of Captain. Petitioner 2 holds the substantive rank of Naik. In the year 1978 one Lt.-Col. S.N. Verma was the Commanding Officer of the 2 Rajput Regiment and the 1st petitioner was directly under him being second in command. One Major V.K. Singh belonging to the 2 Rajput Regiment was a Company Commander under Lt.-Col. Verma. He applied for casual leave for seven days and Lt.-Col. Verma granted the same. In the meantime on October 14, 1978, Lt.-Col. Verma proceeded on leave. First petitioner being the second in command was officiating Commanding Officer when Lt.-Col. Verma proceeded on leave. On October 16, 1978, the 1st petitioner informed Major V.K. Singh that he could proceed on leave with effect from October 17, 1978, for a period of seven days. Major V.K. Singh, however, overstayed his leave and returned after 10 days. Petitioner contends that he being a strict disciplinarian, he did not approve of the default of Major Singh and, therefore, he reported the matter to Lt.-Col. Verma on his return from leave who in turn asked the 1st petitioner to make investigation and submit report. On the 1st petitioner making the report, Lt.-Col. S.N. Verma

ordered abstract of evidence to be recorded by framing some charge against Major V.K. Singh. The allegation is that the father-in-law of Major V.K. Singh is Deputy Speaker of Haryana State Legislative Assembly and a man of powerful political influence who appears to have contacted 3rd respondent Lt.-Gen. Gurubachan Singh to assist his son-in-law Major V.K. Singh. It is alleged that when Major V.K. Singh was produced before 7th respondent Brig. P.N. Kacker, the latter appeared reluctant to proceed against Major V.K. Singh. First petitioner sought an interview with 7th respondent and insisted that disciplinary action should be initiated against Major V.K. Singh. First petitioner sought an interview with 5th respondent on December 16, 1978. Major V.K. Singh was awarded 'displeasure' which appears to have infuriated the first petitioner because according to him punishment was disproportionately low compared to default. It is alleged that 5th respondent suggested that 1st petitioner be put on AFMS-10 for psychiatric investigation. First petitioner sought attachment to other unit; certain very untoward incidents followed which are detailed in the report of Court of Enquiry set up for ascertaining the facts which are not necessary to be detailed here. First petitioner has set out in his petition chronology of events leading to his being charge-sheeted. Ultimately, an order was made to try him by a general court martial and a general court martial was convened as per the order dated October 7, 1979. The legality and validity of the order constituting the general court martial is impugned in this petition.

Re Writ Petition No. 5930 of 1980

4. Petitioner Captain Chander Kumar Chopra joined the Army as 2nd Lieutenant on January 12, 1969, and in course of time came to be promoted as Captain and at the relevant time he belonged to 877 AT BN. ASC under 20 Mountain Division which is one of the Divisions in 33 corps. Petitioner was Second-in-Command. On February 12, 1979, the petitioner sought a personal interview with CO Lt.-Col. R.M. Bajaj to report against Major S.K. Malhotra for the irregularities committed in the Company disclosing misappropriation of funds, pilferage of petrol and stores, furnishing of false information and certificates in official documents resulting in loss to the State, misuse of transport and misuse of power and property. As Lt.-Col. Bajaj did not possibly take any action on this report, the petitioner on March 7, 1979, submitted an application to the Chief of Staff, Headquarters, 33 Corps c/o 99 APO to bring to the notice of Chief of Staff the irregularities going on in 'A' Coy, 877 AT BN. ASC and seeking an interview at an early date. The petitioner's request for a personal interview was turned down whereupon the petitioner made an application for casual leave for 13 days w.e.f. February 26, 1979, which appears not to have been granted. On March 16, 1979, the petitioner was summoned by Lt.-Col. Bajaj at his residence and he was assured that justice would be done but the petitioner should cancel the letter dated March 7, 1979, and surrender the demi official letter addressed to Coy. 33 Corps in the interest and name of the unit. Thereafter the petitioner was taken to office by Lt.-Col. Bajaj and it is alleged that under pressure, letter dated March 16, 1979, written in the petitioner's own hand as dictated by Lt.-Col. Bajaj was taken and at the same time a number of certificates were also taken from the petitioner. A Court of Enquiry was set up to enquire into the allegations made against Major Malhotra by the petitioner. The Court of Enquiry commenced investigation on August 27, 1979. The petitioner submitted a request to summon 15 witnesses to substantiate his allegation against Major Malhotra. Probably this request did not find favour and the petitioner entertained a suspicion that the member constituting the Court of Enquiry were highly prejudiced against him. The Court of Enquiry submitted its report. It is not necessary to recapitulate the findings of the Court of Enquiry save and except that not only the Court of Enquiry negatived all the allegations of petitioner against Major Malhotra but on the contrary found that the petitioner had taken some store items unauthorisedly on January 30, 1979, which were returned on January 31, 1979. Pursuant to the findings of the Court of Enquiry a charge-sheet was drawn up against the petitioner for having committed offences under Sections 52(b), (56)(a) and 63 of the

Act. Direction was given for recording summary of evidence. Subsequently the impugned order convening the general court martial was issued. The petitioner thereupon filed the present petition.

5. In each petition legality and validity of the order convening the general court martial more particularly the composition of the court martial in respect of each petitioner is questioned. The challenge up to a point proceeds on grounds common to all the three petitions and they may be dealt with first.

6. The contention is that the constitution of general court martial in each case is illegal and contrary to Rule 40 and, therefore, the order constituting the general court martial in each case must be quashed.

7. The web of argument is woven round the true construction and intendment underlying Rule 40. It was said that the grammatical construction must accord with the underlying intendment of Rule 40 and that the approach must be informed by the expanding jurisprudence and widening horizon of the subject of personal liberty in Article 21 because in the absence of Article 33 the procedure prescribed for trial by the general court martial under the Act would have been violative of Article 21. Approach, it was urged, must be to put such liberal construction on Rule 40 as to subserve the mandate of Article 21. Army, with its total commitment to national independence against foreign invasion must equally be assured the prized liberty of individual member against unjust encroachment. It was said that the court should strike a just balance between military discipline and individual personal liberty. And door must not be bolted against principles of natural justice even in respect of army tribunal. An unnatural distinction or differentiation between a civilian offender and on offender subject to the Act would be destructive of the cherished principle of equality, the dazzling light of the Constitution which illumines all other provisions.

8. The dominant purpose in constructing a statute is to ascertain the intention of the Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the court should adopt literal construction if it does not lead to an absurdity. The first question to be posed is whether there is any ambiguity in the language used in Rule 40. If there is none, it would mean the language used, speaks the mind of Parliament and there is no need to look somewhere else to discover the intention or meaning. If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to subserve and the authority which the rule is framed. This necessitates examination of the broad features of the Act.

9. The Act as its long title would show was enacted to consolidate and amend the law relating to the governance of the regular Army and it came into force on July 22, 1950. Section 2 sets out the persons subject to the Act. Section 3 provides the dictionary clause. Sub-section (2) of Section 3 defines 'civil offence' to mean an offence which is triable by a criminal court. Expression 'corps' is defined in Section 3(vi) to mean any separate body of persons subject to the Act which is prescribed as a corps for the purpose of all or any of the provisions of the Act, 'Department' has been defined in placitium (ix) to include any division or branch of a department. Chapter III deals with the commission, appointment and enrollment of Army personnel. Chapter IV sets out the statutory conditions of service and Chapter V deals with service privileges. Chapter VI sets out various offences made punishable by the Act. Section 69 provides that subject to the provisions of Section 70 any person subject to the Act who at any place in or beyond India commits any civil shall be

deemed to be guilty of an offence against the Act and if charged therewith under the section, shall be liable to be tried by a court martial and, on conviction, be punishable in the manner therein prescribed. This provision would show that if any person subject to the Act commits any offence triable by ordinary criminal court which for the purpose of the Act would be a civil offence, is liable to be tried for the same, though not an offence under the Act, by the court martial and be punishable in the manner prescribed in Section 69. Section 70 carves out an exception in respect of certain civil offences which cannot be tried by a court martial. In view of the provision prescribed in Section 69, a situation is bound to arise where an ordinary criminal court and the court martial both will have jurisdiction to try a person for having committed a certain civil offence. To avoid of jurisdiction, Section 125 is enacted conferring a discretion on 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 proceeding shall be instituted and if that officer decides that it should be instituted before a court martial, to direct that the accused person shall be detained in military custody. Section 126 confers power on the criminal court to require the officer who has decided to use his discretion in favour of court martial under Section 125, to deliver the accused to the nearest magistrate to be proceeded against according to law, or he may direct the officer to postpone proceeding pending a reference to the Central Government. On such a reference being made, the Central Government will have power to determine whether the person should be tried by an ordinary criminal court or by a court martial and the decision of the Central Government in this behalf is rendered final. A successive trial by a court martial and the ordinary criminal court is distinctly possible in view of the provision contained in Section 127. Chapter VII sets out the various punishments which can be imposed under the Act. Chapter VIII deals with penal deductions that can be made from the pay and allowances of an officer. Chapter IX provides for arrest and proceeding before trial. Section 108 in Chapter X provides that there shall be four kinds of courts martial : (a) general court martial; (b) district court martial; (c) summary general court martial; and (d) summary court martial. Sections 109 to 112 confer power on various authorities to convene one or other kind of courts martial. Section 113 provides for composition of general court martial and it may be extracted :

> 113. A general court martial shall consist of not less than five officers, each of whom has held a commission for not less than three whole years and whom not less than four are of a rank not below that of captain.

Section 118 confers power on general or summary general court martial to try any person subject to the Act for any offence punishable therein and to pass any sentence authorised thereunder. Chapter XI prescribes procedure of court martial. Section 129 provides that every court martial shall, and every district or summary general court martial may, be attended by a Judge-Advocate, who shall be either an officer belonging to the department of the Judge-Advocate General, or any of his deputies. Section 130 of the Act is important and it may be extracted :

> 130. (1) At all trials by general, district or summary general court martial, as soon as the court is assembled, the names of the presiding officer and member shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.
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> (2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer decide on the objection.

(3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to, shall retire, and his vacancy may be filled in the prescribed manner by another officer subject to the same right of the accused to object.

(4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial.

Section 133 provides that the Indian Evidence Act, 1872, shall, subject to the provisions of the Act, apply to all proceedings before a court martial. Chapter XII provides for confirmation of the finding and sentence and revision thereof. Chapter XIII deals with the execution of sentence awarded by court martial. Chapter XIV deals with pardons, remissions and suspensions of sentence. Section 191 in chapter XV confers power to make rules for the purpose of carrying into effect the provisions of the Act and without prejudice to the generality of the power so conferred by sub-section (1), the rules made inter alia may provide for convening and constituting of courts martial and the appointment of prosecutors at trials by courts martial, adjournment, dissolution and sitting of courts martial and the procedure to be observed in trials by courts martial and the appearance of legal practitioners threat.

10. Armed with these powers Army Rules, 1954 have been framed. To begin with, the Rules in Chapter V may be noticed. Rule 22 prescribes procedure for hearing of charge at a stage anterior to the convening of court martial. After this preliminary hearing of the charge, if further action is contemplated, Rule 23 prescribes procedure for recording summary of evidence. After recordings summary of evidence Rule 24 enables the Commanding Officer either to remand the accused for trial by a court martial or refer the case to the proper superior military authority or if he thinks it desirable, rehear the case and either dismiss the charge or dispose of it summarily. Rule 25 provides procedure for enquiry of charge against an officer, the salient feature of it is that the procedure prescribed in Rules 22 and 23 is required to be followed in the case of an officer it he so requires.

11. Rule 28 sets out the general format of charge-sheet and Rule 30 prescribes contents of charges. Rule 33 enacts detailed provisions for preparation for defence by the accused which amongst others confer a right on the accused person to interview any witness he wishes to call for his defence and an embargo on censoring his correspondence with his legal advisers as also a prohibition on interviewing the witness whom the accused wishes to call in his defence. Rule 34 provides for assistance to the accused to summon his witness. Rule 37 provides for convening of general and district courts martial. Rule 37(1) and (2) were relied upon in support of a submission by Mr Sanghi, which provides that the convening officer before convening court martial has to satisfy himself that the charges to be tried by the court are for offences within the meaning of the Act and that the evidence justifies a trial of those charges and if not so satisfied, he is entitled to order the release of the accused or refer the case to the superior military authority.

12. Rule 41 provides that on the court assembling, the order convening the court shall be laid before it together with the charge-sheet and the summary of the evidence or a true copy thereof and also names, ranks and corps of the officers appointed to serve on the court. A duty is case on the court to satisfy itself that it is legally constituted and one such duty being that the court, as far as it can ascertain, shall satisfy itself that it has been convened in accordance with the provision of the Act and the Rules and that each of the officer composing the court martial is eligible and not

disqualified for serving on that court martial and further in case of a general court martial, the officers are of the required rank. After the court has satisfied itself about its constitution, it shall cause the accused to be brought before it as provided in Rule 43. Rule 44 enables the accused as required by Section 130 of the Act to state whether he has any objection to be tried by any officer sitting on the court. A detailed procedure is prescribed for disposing of the objection. Elaborate trial procedure is prescribed in the event the accused pleads not guilty and barring minor situational variants the procedure prescribed is analogous to the one prescribed in the Code of Criminal Procedure for trial of an accused by the Court of Sessions. A reference to Rule 95 is advantageous. It enables an accused person to be represented by any person subject to the Act who shall be called the defending officer or assisted by any person whose services he may be able to procure and who shall be called the friend of the accused. Rule 96 confers power subject to the Rules on the Chief of the Army Staff to permit counsel to appear on behalf of the prosecutor and the accused at general and district courts martial if the Chief of the Army Staff or the convening officer declares that it is expedient to allow the appearance of counsel thereat, and such declaration may be made as regards all general and district courts martial held at any particular place, or as regards any particular general or district court martial, and may be made subject to such reservation as to cases on active service, or otherwise, as seems expedient. In case of a general court martial where it is obligatory to associate a Judge-Advocate, Rule 105 provides for powers, duties and obligations of the Judge-Advocate, one such being that both the prosecutor and the accused are entitled to his opinion on any question of law relating to the charge or trial. Rule 177 provides for setting up of a Court of Enquiry, its composition and the subsequent rules provide for the procedure to be followed by a Court of Enquiry. Rule 180 provides that whenever an enquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person being present throughout the enquiry and of making any statement and giving any evidence he may wish to make or give and of cross-examining any witness whose evidence in his opinion affects his character or military reputation and producing any witnesses in defence of his character or military reputation. This rule was relied on by Mr Sanghi to urge that whenever character or military reputation of a person subject to the Act is involved it is obligatory to set up a Court of Enquiry. On a plain reading of Rule 180, the submission is without merits but that would come later. Rule 187 has reference to Section 3(vi). It prescribes that bodies of persons subject to the Act are to be treated as 'Corps' for the purpose of Chapter III and Section 43(a) of the Act and Chapters II and III of the Rules.

13. At this stage it would be profitable to refer to Article 33 of the Constitution which reads as under :

> 33. Power to Parliament to modify the right conferred by this Part in their application to forces. - Parliament may be law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties, and the maintenance of discipline among them.

Chapter IV in the Rules specifies restrictions on the fundamental rights. Rule 19 prescribes restrictions on the fundamental freedom under Article 19(1)(c), to wit, to form associations or unions. Similarly, Rules 20 and 21 prescribe restriction on the freedom of speech and expression guaranteed under Article 19(1)(a). No contention was advanced before us in respect of restrictions prescribed by Rules 19, 20 and 21 on the freedom of speech and expression and the freedom of forming associations and unions. The contention was that a trial by a court martial would result in

deprivation of personal liberty and it can only be done in view of Article 21, by procedure established by law and the law prescribing such procedure must satisfy the test prescribed by Articles 14 and 19. It was contended that in view of the decision in Maneka Gandhi v. Union of India ((1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597) the law to satisfy the test of Article 21 must be just, fair and reasonable and if the procedure prescribed by the Code of Criminal Procedure for trial of offences is just, fair and reasonable, any deviation therefrom in the procedure prescribed for trial by court martial would neither be just, fair nor reasonable and it would be violative of Article 21. The question really is, how far this contention about violation of Article 21 is available in view of the provision contained in Article 33. The contention is that in order to satisfy the requirement of Article 33, Parliament must enact a specific law specifying therein the modification of the rights conferred by Part III and that a restriction or abrogation of fundamental rights cannot be left to be deduced or determined by implication. In other words, the submission is that the law to satisfy the requirement of Article 33 must be a specific law enacted by Parliament in which a specific provision imposing restriction or even abrogation of fundamental rights should be made and when such provisions are debated by the Parliament it would be clear as to how far restriction is imposed by Parliament on the fundamental rights enacted in Part III in their application to the members of the Armed Forces or the forces charged with the maintenance of public order. Submission is that a conscious and deliberate Act of Parliament may permit erosion of fundamental rights in their application to Armed Forces. Such a serious inroad on fundamental rights cannot be left to Central Government to be done by delegated legislation. Article 33 permits Parliament by law to not merely restrict but abrogate the fundamental rights enacted in Part III in their application to the members of Armed Forces. The act was enacted in 1950 and was brought into force on July 22, 1950. Thus the Act was enacted after the Constitution came into force on January 26, 1950. When power to legislate is conferred by Constitution, and Parliament enacts a legislation, normal inference is that the legislation is enacted in exercise of legislative power and legislative craftsmanship does not necessitate specifying the power. Since the Constitution came into force, Parliament presumably was aware that its power to legislate must be referable to Constitution and therefore it would be subject to the limitation prescribed by the Constitution. Whenever a legislation is being debated for being put on the statute-book, Articles 12 and 13 must be staring into the face of that body. Consequently when the Act was enacted not only Articles 12 and 13 were hovering over the provisions but also Article 33 which to some extent carves out an exception to Articles 12 and 13 must be present to the corporate mind of Parliament which would imply that Parliament by law can restrict or abrogate fundamental rights set out in Part III in their application to Armed Forces. But it was said that by contemporanea expositio Section 21 of the Act clearly sets out the limits of such restriction or abrogation and no more. Section 21 confers power on the Central Government to make rules restricting to such extent and in such manner as may be necessary to modify the fundamental freedom conferred by Article 19(1)(a) and (c) in their application to Armed Forces and none other meaning that Armed Forces would enjoy other fundamental freedoms set out in Part III. Armed with this power, Rules 19, 20 and 21 have been framed by the Central Government. Taking cue from Section 21 and Rules 19, 20 and 21, it was submitted that while Article 33 enables the Parliament by law to abrogate or restrict fundamental rights in their application to Armed Fores, Parliament exercised the same power limited to what is prescribed in Section 21 and specified the restrictions in Rules 19, 20 and 21 and, therefore, the remaining fundamental rights in Part III are neither abrogated nor restricted in their application to the Armed Forces. Consequently it was urged that the Act prescribing the procedure of court martial must satisfy the requirement of Article 21.

14. While investigating and precisely ascertaining the limits of inroads or encroachments made by

legislation enacted in exercise of power conferred by Article 33, on the guaranteed fundamental rights to all citizens of this country without distinction, in respect of armed personnel, the court should be vigilant to hold the balance between two conflicting public interests; namely necessity of discipline in armed personnel to preserve national security at any cost, because that itself would ensures enjoyment of fundamental rights by others, and the denial to those responsible for national security of these very fundamental rights which are inseparable adjuncts of civilised life.

15. Article 33 confers power on the Parliament to determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of duties and maintenance of discipline amongst them. Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part III and to specify in the law enacted in exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin. In fact, after the Constitution came into force, the power to legislate in respect of any item must be referable on an entry in the relevant list. Entry 2 in List I : Naval, Military and Air Forces; any other Armed Forces of the Union, would enable Parliament to enact the Army Act and armed with this power the Act was enacted in July 1950. It has to be enacted by the Parliament subject to the requirements of Part III of the Constitution read with Article 33 which itself forms part of Part III. Therefore, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act. This is no more res integra in view of the decision of the Constitution Bench of this Court in Ram Sarup v. Union of India ((1964) 5 SCR 931 : AIR 1965 SC 247 : 1965 (1) Cri LJ 236), in which repelling the contention that the restriction or abrogation of the fundamental rights in exercise of the power conferred by Article 33 is limited to one set out in Section 21 of the Act, this Court observed as under :

> .... The learned Attorney-General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental rights under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental rights....

Section 21 merely confers an additional power to modify rights conferred by Article 19(1)(a) and (c) by Rules and such rules may set out the limits of restriction. But the specific provision does not derogate from the generality of power conferred by Article 33. Therefore, it is not possible to accept the submission that the law prescribing procedure for trial of offences by court martial must satisfy the requirement of Article 21 because to the extent the procedure is prescribed by law and if it stands in derogation of Article 21, to that extent Article 21 in its application to the Armed Forces is modified by enactment of the procedure in the Army Act itself.

16. Incidentally a reference was made to Dalbir Singh v. State of Punjab (1962 Supp

3 SCR 25 : AIR 1962 SC 1106 : 1962 (2) Cri LJ 247), but it hardly illuminates the contours of controversy. The contention raised was that Section 3 of the contours of controversy. The contention raised was that Section 3 of the PEPSU Police (Incitement to Disaffection) Act, 1953, was violative of Article 19(1)(a) and was not saved by Article 19(2). Repelling this contention a Constitution Bench of this Court held that the police service is an arm of the State charged with the duty of ensuring and maintaining public order and since any breach of discipline on the part of its members might result in a threat to public order, Section 3 must be held to be valid as having been enacted in the interest of public order within the meaning of Article 19(2). Attempt was made to urge that as the Act in question was made by the President under Article 356 of the Constitution it would be an Act of Parliament in exercise of the power conferred by Article 33 and as the police force would be one such force as contemplated by Article 33 charged with the maintenance of public order, the provisions of the Act would be beyond the challenge of Part III of the Constitution. This contention was negatived on the ground that Article 33 was not applicable because Parliament had delegated the powers of State legislature to the President and, therefore, any law enacted by the President in exercise of this power would not have the force of Parliamentary legislation contemplated by Article 33. But this is hardly of any assistance. In Lt.-Col. M.L. Kohli v. Union of India (AIR 1975 SC 612 : (1975) 4 SCC 814 : 1975 SCC (Cri) 775 : 1975 Cri LJ 591) the petitioner challenged certain provisions of the Army Act and it was contended that Article 33 does not cover ex-servicemen who are not serving members of the defence forces. In fact, at the hearing of the petition the contention was withdrawn and, therefore, it is not necessary to examine this decision any further.

17. Mr Tarkunde, however, contended that the observations of the Constitution Bench in Ram Sarup case ((1964) 5 SCR 931 : AIR 1965 SC 247 : 1965 (1) Cri LJ 236) in respect of the provisions of the Act having been enacted by the Parliament in exercise of power conferred by Article 33 and that each and every provision of the Act is a law made by Parliament and if any such provision tends to affect the fundamental rights under Part III of the Constitution, that provision does not, on that account become void as it must be taken that Parliament has in exercise of its power under Article 33 of the Constitution made the requisite modification to affect the respective fundamental rights, are obiter. Proceeding along this line it was submitted that the contention before the Constitution Bench was that as Article 22 of the Constitution conferred a fundamental right on a person accused of an offence to be defended by a lawyer of his own choice, the denial of this right to the accused would be violative of Article 22 and the trial would be vitiated. It is true that this contention was repelled on the facts found, namely, that the petitioner made no request for being represented at the court martial by a counsel of his own choice. Rule 96 of the Rules provides that subject to the Rules, counsel shall be allowed to appear on behalf of the prosecutor and accused at general and district court martial if the Chief of the Army Staff or the convening officer declares that it is expedient to allow the appearance of counsel thereat and such declaration may be made as regards any particular general or district court martial held in a particular place etc. The question of validity of this Rule was kept open. Frankly, there is some force in the contention of Mr Tarkunde that once having found that the accused in that case made no request for being defended by a lawyer of his choice he could not be heard to complain of contravention or violation of the right under Article 22 and, therefore, the question whether the whole of the Act was enacted in exercise of the power conferred by Article 33 did not specifically arise. However, a contention was specifically canvassed before the Constitution Bench by the learned Attorney-General that court may proceed on the basis that the

request as claimed on behalf of the accused in that case was made and turned down and yet the accused could not in that case complain of contravention of Article 22 of the Constitution and this contention was in terms answered. If in this context the observation can be said to be obiter, it is nonetheless entitled to respect at our hands.

18. It was, however, contended that the question as to the validity of the Rules enacted in exercise of the power conferred by Section 191 having been kept open, this Court must examine the contention afresh. It was urged that what Article 33 protects is an Act made by the Parliament and not subordinate legislation such as the Rules and the Regulations. Section 191 confers power on the Central Government to make rules for the purposes of carrying into effect the provision of the Act. Section 192 confers power on the Central Government to make regulations for all or any of the purposes of the Act other than those specified in Section 191. Section 193 provides that all rules and regulations made under the Act shall be published in the Official Gazette and on such publication shall have effect as if enacted in the Act. What character the ruled and the regulations acquire when a deeming fiction is enacted that if enacted in accordance with the procedure prescribed they shall have effect as if enacted in the Act meaning thereby that they are to be treated as part and parcel of the enactment itself ? In the Chief Inspector of Mines v. Lala Karam Chand Thapar ((1962) 1 SCR 9, 23 : AIR 1961 SC 838 : 1961 2 Cri LJ 1), a Constitution Bench of this Court examined the position of rules or regulations made under an Act having the effect as if enacted in the Act. After examining various foreign decisions, the Court held as under :

> The true position appears to be that the rules and regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as subordinate rule is not lost....

The same question came up before a constitution Bench in Kali Pada Chowdhury v. Union of India ((1963) 2 SCR 904 : AIR 1963 SC 134 : 1963 (1) Cri LJ 88), and the majority has almost accepted the same view.

19. The effect of the expression 'as if enacted in this Act' has occasionally presented difficulty arising from the context in which the expression is used. If the expression were to mean that the rules or regulations enacted or framed in exercise of the power to enact subordinate legislation having the same force as the provisions of the statute which enables the subordinate legislation to be enacted, a question is bound to arise whether, if the provisions of the statute are not open to question the subordinate legislation would also be immune from the challenge to its validity. In Chartered Institute of Patent Agents v. Lockwood (1894 AC 347), Lord Herschell was of the opinion that the expression 'as if enacted in this Act' would render the subordinate legislation as completely exempt from judicial review as the statute itself. However, in R v. Minister of Health, Ex parte Yaffe (1931 AC 494 : 100 LJ KB 306 : 145 LT 98 (HL)), there was some disinclination to accept Lord Herschell's opinion at least to its fullest extent. While distinguishing Lockwood case (1894 AC 347) a note was taken of the fact that the rules framed in exercise of the power conferred by Section 101(3) of the Patents, Designs and Trade Marks Acts of 1883 and 1888 would be subject to control of Parliament and, therefore, Parliament was in control of the rules for 40 days after they were passed and could have annulled them on a motion to that effect, and that would permit an inference that they had the same strength and validity as the provisions of the statute itself. Distinguishing this position in Yaffe case (1931 AC 494 : 100 LJ KB 306 : 145 LT 98 (HL)) it was noticed that there was no parliamentary manner of dealing with the confirmation of the scheme by the Ministry of

Health and, therefore, it cannot have the same efficacy and validity as the provisions of the statute. Subsequently, in Miler v. Boothman (William) & Sons Ltd. ((1944) KB 337 : (1944) 1 All ER 333 : 170 LT 187), the conflict between the view of Lord Herschell in Lockwood case (1894 AC 347) and the view of Lord Dunedin in Yaffe case (1931 AC 494 : 100 LJ KB 306 : 145 LT 98 (HL)) was noticed but it was held to have no impact in that case because power was reserved with the Secretary of State in the later Factories Act of 1937 to bring the earlier regulation in conformity with the intendment of the Act. It would, however, appear that this ancient formula often resorted to, to clothe subordinate legislation with the force of the provisions of the statute would require further consideration. It is, however, not necessary to conclude this point because the primary contention was about the non-compliance with rules rather than with their validity.

20. Rule 40 provides for composition of court martial. It reads as under :

> 40. Composition of court martial. - (1) A general court martial shall be composed, as far as seems to the convening officer practicable, of officers of different corps or departments, and in no case exclusively of officers of the corps or department to which the accused belongs.
>
> (2) The members of a court martial for the trial of an officer shall be of a rank not lower than that of the officer unless, in the opinion of the convening officer, officers of such rank are not (having due regard to the exigencies of the public service) available. Such opinion shall be recorded in the convening order.
>
> (3) In no case shall an officer below the rank of Captain be a member of a court martial for the trial of a field officer.

The power to convene the general court martial is conferred on the Central Government, the Chief of Army Staff or by any officer empowered in this behalf by warrant of the Chief of Army Staff. The Officer empowered to convene a general court martial is designated in the Rules as 'convening officer'. In the composition of court martial there is both a positive and negative requirement to be fulfilled. The positive requirement is that it shall be composed of officers of different corps or departments and the negative inhibition is that in any case it shall not be composed exclusively of officers of the corps or departments to which the accused belongs. Both these requirements are subject to the overriding consideration that it may be so done as far as it seems to the convening officer practicable to do so. In other words, one or the other requirement may be given a go-by if it is otherwise found not to be practicable. Keeping aside the functional requirement of practicability of complying with Rule 40, the convening officer in ordinary circumstances should arrange the composition of the general court martial as to include officers of different corps or departments and must avoid so composing the court martial as to be exclusively of officers of the corps or department to which the accused belongs. There is a further requirement in sub-section (2) which will be presently examined. What constitutes corps for the purposes of Rule 40 is the bone of contention between the parties. The expression 'department' did not present any difficulty. The definition of the expression 'department' is an inclusive definition. The expression would include any division or branch of a department. Learned Additional Solicitor-General stated that there is only one department in the Army and that is the department of Judge-Advocate. There is not other department. It is not necessary to dilate on this point because it was not contended on behalf of the petitioners that the personnel of the court martial belonged to the same department.

21. The expression 'corps' has been defined to mean any separate body of persons subject to the Act

which is prescribed as corps for the purposes of all or any of the provisions of the Act. And 'prescribed' means prescribed by Rules made under the Act. Rule 187 bears the marginal note : 'Corps prescribed under Section 3(vi)'. Each of the separate bodies of persons subject to the Act set out in sub-rule (1)(a) to (y) is to be a corps for the purposes of Chapter III and Section 43(a) of the Act and Chapters II and III of the Act. Sub-rule (3) provides that for the purposes of every other provision - i.e., other than Chapter III and Section 43(a) of the Act and Chapters II and III of the Rules - each of the body of persons set out in sub-clauses (a) to (f) shall be deemed to be a corps. They are : (a) every battalion; (b) every company which does not form part of battalion : (c) every regiment of cavalry, armoured corps or artillery; (d) every squadron or battery which does not form part of a regiment of cavalry, armoured corps or artillery; (e) every school of instruction, training centre, or regimental centre; and (f) every other separate unit composed wholly or partly of persons subject to the Act. To understand the full import of the expressions 'battalion', 'company', 'regiment' 'squadron' or 'battery', it was imperative to understand the hierarchy and vertical formations in the Army. National security demands that no country would disclose its Army formations. But on the basis of the broad information available, a chart roughly showing vertical hierarchy with horizontal equation was composed to understand the meaning of the aforementioned expressions :

Supreme commander (President of India) | Chief of Army Staff (Chief of Army Staff) | Command (GOC-in-C Commanding Officer)
|_____Army Corps
Army Corps Army Corps Army Corps = Lt.-Gen. |---------- ---------- ---------- ----------
Division Division Division Division = Maj.-Gen |---------- ---------- ---------- ----------
Brigade Brigade Brigade Brigade = Brigadier |---------- ---------- ---------- ----------
Battalion Battalion Battalion Battalion = Lt.-Col.(In Infantry)Regiment inCavalry |---------- --------- ---------- ----------Company Company Company Company = Major(In Infantry)Battery orSquadronin Cavalry##

22. The President of India is the Supreme Commander of Armed Forces (See Article 53(2)). Under him is the Chief of Army Staff. The Indian Army is divided into five Commands being Northern, Central, Western, Eastern and Southern Commands. Each area command has under it static formation areas, sub-area, etc. and fighting formation army corps : for example, the Western Command is said to have three army corps. Corps in this sense means army formation. Speaking generally, each army corps is composed of three or four division with an officer of the rank of Major-General at its head; each division is divided into three or four brigades each brigade being commanded by a Brigadier; each brigade is composed of three or four battalions so designated in the case of Infantry and Regiment in the case of Cavalry or its modern equivalent, each battalion or regiment being commanded by an officer of the rank of Lt.-Col.; each battalion is divided into three or four companies in case of Infantry and three or four Batteries or Squadrons in the case of Cavalry, each such unit being led by an officer of the rank of a Major.

23. To start with, the expression 'army corps' should not be confused with the expression 'corps'. Both connote a distinct and different unit in the army. Section 7 and Rule 189 operate in a different situation. They merely specify who is the commanding officer of a person attached to corps, department or detachment. Corps forms a tiny small part of what is called Army Corps. The expression 'Army Corps' used in Section 8 and Section 125 with its content and juxtaposition leaves no room for doubt that the expression 'Army Corps' and 'corps' have different connotation. Once this is borne in mind the meaning of the expression 'corps' in Rule 40 does not present any difficulty.

24. Reverting to sub-rule (3) of Rule 187 which prescribes corps for the purposes of Section 3(vi),

every battalion is a corps for the purposes of the Act and Rules. Now there may be a company but not forming part of a battalion and may be independent of any battalion and, therefore, sub-clause (b) of sub-rule (3) of Rule 187 treats such unattached company not forming part of a battalion as a corps by itself. That is equally true of regiment of cavalry, armoured corps or artillery. Undoubtedly, every school of instruction, training centre or regimental centre cannot form part of a battalion and must of necessity be a separate corps. If we recall the composition as roughly sketched, every company is part of some battalion because each battalion is sub-divided into companies. And that is possibly the army unit which is being designated as corps. Bearing in mind the designation of battalion in infantry and regiment in cavalry, the unit designated as battalion or regiment will be a corps for the purpose of the Act and the Rules. This conclusion is reinforced by reference to Rule 187(1) in which there are separate bodies of persons each by its very designation, duties and responsibilities and functional requirement would not be part of regular army battalion and, therefore, each has to be designated as a corps for the purposes of the Act and the Rules. If such battalion in the infantry or regiment in cavalry would be a corps for the purposes of Rule 40, the selection of personnel for composing a general court martial would not present difficulty. If on the other hand as contended for the petitioners that the expression 'corps' is an inter-changeable substitute for the expression 'army corps', the difficulty of setting up a general court martial in strict compliance with Rule 40 would be insurmountable. This can be demonstrably established if the composition of the army as hereinabove set out is recalled for the limited purpose of pointing out that command is composed of army corps and each army corps is led by the officer of the rank of Lt.-General. Expression 'command' may be clarified in the sense that this country is divided into various commands such as Western Command, Northern Command, etc. Now, if various army corps form part of the command and if for setting up a general court martial in strict compliance with Rule 40 is to be insisted upon, persons from different army corps have to be selected because as far as practicable officers of different army corps - substituting the expression for corps - for the time being will have to be selected. But the negative inhibition of Rule 40 will present an insurmountable difficulty in that any such general court martial shall not be composed exclusively of officers of the same corps. Translated into functional adaptability officers under the same army corps attached to various divisions, brigades under the various divisions, battalions under the brigades and companies under the battalions will be disqualified from serving on the general court martial because they all belong to the same 'army corps'. That could not be the object underlying Rule 40. Instead of vertical movement, if a downward movement in the army command is taken into account to ascertain the meaning of the expression 'corps', Rule 40 will become workable and would be easy to comply with. What is positively desired is that for the composition of a general court martial, one most strive to secure services of officers of different corps or departments and what must be eschewed is its being composed exclusively of officers of corps of departments to which the delinquent officer belongs. If we give a restricted meaning to the meaning expression 'corps' the rule becomes workable. If wider meaning is given so as to substitute 'army corps' for 'corps' it would be wholly unworkable because officers will have to be summoned from another command together. Thus, if we take 'army corps' to mean the same thing as 'corps' and if the accused belongs to a certain army corps all officers belonging to various divisions under the same army corps, to all brigades under all the divisions of the same army corps, to all battalions under all brigades of the same army corps, and to all companies under all battalions of the same army corps will be disqualified because they do not belong to the different corps and are likely to be stigmatised as officers exclusively belonging to the same corps. A vertical movement starting from the bottom which is indicated by reference to battalion and regiment in sub-rule (3) of Rule 187 clearly indicates that the lowest formation in the battalion or the regiment is corps over and above those specifically designated as corps under Rule 187(1). Therefore, it clearly transpires that the expression 'corps' in Rule 40 must be given the same

meaning as set out in sub-rule (3) of Rule 187 and it would mean that every battalion in the infantry and every regiment in the cavalry would by itself be a corps.

25. This interpretation accords with the intendment underlying Rule 40. Rule 40 takes note of a possible official bias or personal bias on account of close association. If officers belonging to the same corps have to try brother officer, either there might be possible indulgence towards the brother officer or familiarity in working together may have bread such contempt that bias is inevitable. To decry any such possibility and to put personnel of general court martial beyond reproach, to make it unbiased and objective, composition of court martial was to be so devised by statutory rules as to make it an ideal body having all the trappings of a court. Two fundamental principles in this behalf the judge must be unbiased and objective free from personal likes and dislikes or prejudice consequent upon association or close familiarity. People drawn from different corps and avoiding officers of the same corps composing the general court martial would ensure an objective, unbiased body. If this is the underlying intendment, it is achieved by giving the expression 'corps' a restricted meaning and not a wide meaning to make it synonymous with 'Army Corps' at the top, so that it may almost become impossible to search only officers belonging to different army corps and avoid manning the court martial exclusively by officers belonging to same corps because a large body of officers would spill over the line. If on the other hand as is clearly indicated by sub-rule (3) of Rule 187 a battalion or a regiment is treated as a corps then it is easy to provide composition of court martial in strict compliance with Rule 40. Under a brigade there are number of battalions. Each battalion would be a corps. One can easily draw officers from different battalions as they would be belonging to different corps and one can avoid what is negatively inhibited, viz., a general court martial being composed exclusively of officers of the corps to which the accused belongs. If the accused belongs to one battalion, even under the same brigade there are number of battalions, and each battalion being a corps, officers from battalion other than the battalion to which the accused belongs can be conveniently summoned because each battalion is under the same Brigadier. In this manner officer belonging to different corps can be summoned and one can easily avoid a general court martial composed exclusively of officers of the corps to which the accused belongs. It would be unwise to reject this construction on the ground that it does not take note of and try to avoid command influence. Command influence is too vague a concept to call in aid for construction of a rule. Viewed from either angle the expression 'corps' in Rule 40 is not used in the same sense in which the expression 'army corps' is used but it is used in the sense in which it is defined and elaborated in Rule 187.

26. It was contended that the interpretation of Rule 40 must be informed by the underlying intendment that officers composing the court martial must be independent of command influence of superior officer like the convening officer. This is unquestionably correct, save and except saying what meaning one must assign to a loose expression like 'command influence'. If by command one at the highest level such as commander-in-charge of area is the one likely to permeate his influence down to the lowest level it would be impossible to set up a court martial of officer belonging to entirely a different command. The expressions like the 'command influence' and the 'influence of superior officers' have to be understood in the context of the vertical hierarchy in the composition of army. Once it transpires that the expression 'corps' in Rule 40 has the same meaning as has been set out in Rule 187 and, therefore, a battalion would be a corps and an unattached company can be a corps by itself, it becomes easy and practicable to set up a court martial in which officers outside the corps would be available and such officers outside the same corps to which an accused belongs could certainly be said to be free command influence. But to urge that even if the officers of another battalion but forming part of the same brigade are selected the Brigadier being the top officer under whom various battalions must be operating, the command influence will permeate down, the same

difficulty would arise as hereinbefore explicitly set out in setting up a court martial. The intendment underlying Rule 40 is fully subserved by the interpretation, which the language employed indicates, put on the expression 'corps' in Rule 40.

27. Undoubtedly Rule 40 by its very language is not mandatory. Rule on its own force insists on compliance with its requirements as far as may be practicable. Even with this leeway, a strict compliance with the requirements of Rule 40 must be insisted upon and the departure on the ground of practicability will, if challenged, have to be proved within the broad parameters of functional adjustability of the Army requirements. If the interpretation canvassed on behalf of the petitioners is accepted every time the soul of Rule 40 will be sacrificed at the alter of practicability while the interpretation which we put on the expression 'corps' in Rule 40 would help in avoiding shelter under the practicability clause and that in a very large number of cases strict compliance with Rule 40 can be insisted upon. If a court martial is set up not in consonance with Rule 40 and the defence of practicability is advanced the same can be examined with precision. Therefore, the expression 'corps' in Rule 40 is not synonymous with the expression 'army corps' and it must receive a restricted construction with narrow connotation as explained in Rule 187(3).

28. There are two further requirements to be complied with while setting up a general court martial. Section 113 provides that a general court martial shall consist of not less than five officers, each of whom has held a commission for not less than three whole years and of whom years and of whom not less than four are of rank not below that of Captain. Sub-rule (2) of Rule 40 adds one more condition that the members of court martial for trial of an officer shall be of a rank not lower than that of the officer unless in the opinion of the convening officer, officers of such rank are not (having due regard by the exigencies of public service) available. Such opinion to be recorded in the convening order. Sub-rule (3) of Rule 40 merely incorporates the mandate of Section 113.

29. Having formulated the necessary test for examining the validity of the composition of general court martial it is necessary to turn to the facts of each case in this behalf. Lt.-Col. Prithi Pal Singh Bedi (Writ Petition No. 4903 of 1981) was a holding the rank of Lt.-Colonel and belonged to the 226 Regiment of 43 Artillery Brigade of 9th Infantry Division of Indian Army at the relevant time. The general court martial set up to try him was composed of five officers. They are : Brigadier Kalkat, an officer in rank higher than the petitioner, Lt.-Col. Khullar, Lt.-Col. Yadav, Lt.-Col. Nathu Singh and Lt.-Col. Kolhi, all of coordinate, some or of equal rank, and even though they all belong to 9th Infantry Division, they are drawn from different brigades and regiments and that becomes distinctly clear from the attachment of each set out in the order convening the general court martial. To be precise, Lt.-Col. Khullar was officer commanding 168 Field Regiment, Lt.-Col. Yadav, Bhopal Singh, S.M. Dogra were officers commanding 10 Dogra, Lt.-Col. Nathu Singh, Punjab was officer commanding 5th Rajputana Rifles. It would appear at a glance that even though all the five officers belong to the 9th Division, none of them belongs to the same corps which the petitioner belonged and none was lower in rank than the rank held by the petitioner. Therefore, the requirement of Rule 40 is strictly complied with and there is no contravention in letter and spirit thereof.

30. In the case of Capt. Dharam Pal Kukrety (Writ Petition No. 1513 of 1979), the general court martial is composed of seven officers. Petitioner Kukrety was holding the rank of a Captain. Of the seven officer composing the court martial the seniormost is a Brigadier the next in rank is holding the rank of Lt.-Colonel and the remaining five are of the rank of Major. Their designations and attachments show that none of them is even equal in rank with the petitioner; each is holding a rank higher than the petitioner. Petitioner at the relevant time belonged to 25 Infantry Division which is a

division of the 16th Corps of the Indian Army. And all the members composing the court martial belonged to the 25th Infantry Division which itself is a division of the 15th Corps of the Indian Army. But the expression 'corps' qualifying '16th' is army corps and not corps as understood in Rule 40. None of the officers composing the general court martial in the case belongs to the corps to which the petitioner belonged. Therefore, there is no violation of Rule 40.

31. The petitioner Capt. Chander Kumar Chopra (Writ Petition No. 5930 of 1980) has alleged in his petition that he belongs to the 33 Corps and that each such corps is divided into divisions. This will clearly show that by saying that he belongs to 33 Corps he means to suggest that he belongs to 33 Army Corps. At the relevant time the petitioner was holding the rank of a Captain and was attached to 877 AT. BN. ASC c/o 99 APO. There is not one word in the petition that any of the officers composing the general court martial set up to try him, belongs to his corps in the sense in which the word has been interpreted by us. Nor, has he alleged that anyone lower rank than a Captain has been nominated as a member of the general court martial set up to try him. Therefore, even in this case there is nothing to show that Rule 40 has been violated.

32. It would be advantageous at this stage to call attention to the provision contained in Section 130 of the Act and Rules 41 to 44 of the Rules. When either a general, district or summary court martial is assembled and the offender who is to be tried is brought before it, it is obligatory to read out the names of the presiding officer and the members composing the court martial to the accused and he is to be asked whether he objects to his being tried by any of the officers sitting on the court. Sub-section (2) of Section 130 requires that if the accused objects to any such officer, his objection and the reply thereto of the officer objected to shall be heard and recorded and the remaining officer of the court shall in the absence of the challenged officer decide the objection. The provision contained in Section 130 is elaborated in Rules 41 to 44. Rule 41 requires that as soon as the court assembles the order convening the court shall be laid before it together with a charge-sheet and summary of evidence as also the ranks, names and corps of the officers appointed to serve on the court. A duty is cast on the court to first ascertain whether it has been convened according to the provisions of the Act and the Rules. In order to find out whether Rule 40 has been complied with or not, the corps to which each officer composing the court martial is attached is to be set out and which will reveal at a glance whether he is qualified to sit on the court. At this stage the accused does not enter into the picture. The duty is cast on the court itself to ascertain whether its constitution is in accordance with the Act and the Rules. Rule 42 casts a duty on the court to satisfy itself that the person who is to be tried is amenable to the provisions of the Army Act and that each charge framed against him discloses an offence under the Act and is framed in accordance with the rules. Then comes Rule 43. After the court has satisfied itself that Rules 41 and 42 have been complied with the accused is to be brought before the court. Rule 44 provides that on the accused being brought before the court, the order convening the court and the names of presiding officer and the members of the court shall then be read over to the accused and he shall be asked as required by Section 130 whether he has any objection to being tried by any officer serving in the court. Whenever an objection is taken it has to be recorded. In order to ensure that anyone objected to does not participate in disposing of the objection clause (a) of the proviso to Rule 44 directs that the accused shall state the names of all officers constituting the court in respect of whom he has any objection before any objection is disposed of. This is a mandatory requirement because the officer objected to cannot participate in the decision disposing of the objection. It is true that if the court is not constituted in accordance with the Act and the Rules, Rule 44 would hardly assist because as in this case if the contention is that Rule 40 was violated in constituting the court martial and that each officer was disqualified from being a member of the court martial, there is none left to dispose of the contention. In such a situation Rule 44 army not be helpful because once such an objection is taken no one shall be

competent to decide the objection. The provision conferring a right on the accused to object to a member of the court martial sitting as a member and participating in the trial ensures that a charge of bias can be made and investigated against individual members composing the court martial. This is preeminently a rational provision which goes a long way to ensure a fair trial. That stage is still to come and therefore we refrain from pronouncing on any allegation of bias against individual member of the court martial.

33. Similarly a very faint attempt made by Mr Sanghi inviting us to examine the merits of the charge against Lt.-Col. Bedi should not lure us into doing so. That is not our function at any rate at this stage and we steer clear of the same.

34. Having examined the general contention as to the legality and validity of general court martial set up in each of these cases, we may now turn to certain specific contentions raised in each petition.

In re W.P. No. 4903 of 1981 :

35. Mr Sanghi, learned counsel for the petitioner urged that pre-condition to the trial by a general court martial having not been satisfied, the order convening the general court martial to try the petitioner is vitiated. Reliance was placed on Rules 22, 23, 24 and 25. They may be extracted :

> 22. Hearing of charge. - (1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence.
>
> (2) The commanding officer shall dismiss a charge brought before him if, in his opinion, the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion, he is satisfied that the charge ought not to be proceeded with.
>
> (3) At the conclusion of the hearing of a charge, if the commanding officer is of opinion that the charge ought to be proceeded with, he shall without necessary delay -
>
> (a) dispose of the case summarily under Section 80 in accordance with the manner and form in Appendix III; or
>
> (b) refer the case to the proper superior military authority; or
>
> (c) adjourn the case for the purpose of having the evidence reduced to writing; or
>
> (d) if the accused is below the rank of warrant officer, order his trial by a summary court martial :

Provided that the commanding officer shall not order trial by a summary court martial without a reference to the officer empowered to convene a district court martial or on active service a summary general court martial for the trial of the alleged offender unless either -

> (a) the offence is one which he can try by a summary court martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

23. Procedure for taking down the summary of evidence. - (1) Where the case is adjourned for the purpose of having the evidence reduced to writing, at the adjourned hearing the evidence of the witnesses who were present and gave the evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs.

(2) The accused may put in cross-examination such questions as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.

(3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name, shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked : "Do you wish to make any statement ? You are not obliged to say anything unless you wish to do so, but whatever, you say will be taken down in writing and may be given in evidence." Any statement thereupon made by the accused shall be taken down and read over to him, but he will not be cross-examined upon it. The accused may then call his witnesses, including, if he so desires, any witnesses as to character.

(4) The evidence of the witnesses and the statement (if any) of the accused shall be recorded in the English language. If the witness or accused, as the case may be, does not understand the English language, the evidence or statement, as recorded shall be interpreted to him in a language which he understands.

(5) If a person cannot be compelled to attend as a witness, or if owing to the exigencies of service or any other grounds (including the expense and loss of time involved), the attendance of any witness cannot in the opinion of the officer taking the summary (to be certified by him in writing), be readily procured, a written statement of his evidence purporting to be signed by him may be read to the accused and included in the summary or evidence.

(6) Any witness who is not subject to military law may be summoned to attend by order under the hand of commanding officer of the accused. The summons shall be in the form provided in Appendix III.

24. Remand of accused. - (1) The evidence and statement (if any) taken down in writing in pursuance of Rule 23 (hereinafter referred to as the "summary of evidence"), shall be considered by the commanding officer, who thereupon shall either -

(a) remand the accused for trial by a court martial; or

(b) refer the case to the proper superior military authority; or

(c) if he thinks it desirable, rehear the case and either dismiss the charge or dispose of

it summarily.

(2) If the accused is remanded for trial by a court martial, the commanding officer shall without unnecessary delay either assemble a summary court martial (after referring to the office empowered to convene a district court martial or on active service as summary general court martial when such reference is necessary) or apply to the proper military authority to convene a court martial, as the case may require.

25. Procedure on charge against officer. - (1) Where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held and the evidence, if he so requires, be taken in his presence, in writing, in the same manner is nearly as circumstances admit, as is required by Rule 22 and Rule 23 in the case of other persons subject to the Act.

(2) When an officer is remanded for the summary disposal of a charge against him or is ordered to be tried by a court martial without any such recording of evidence in his presence, an abstract of evidence to be adduced shall be delivered to him free of charge as provided in sub-rule (7) of Rule 33.

36. The submission is that before a general court martial is convened as provided in Rule 37 it is obligatory for the commanding officer to heat the charge made against the accused in his presence giving an opportunity to the accused to cross-examine any witness against him and to call any witness and make any statement in his defence and that if the commanding officer is so satisfied he can dismiss the charge as provided in sub-rule (2) of Rule 22. If at the conclusion of the hearing under Rule 22 the commanding officer is of the opinion that the charge ought to be proceeded with, he has four options open to him, one such being to adjourn the case for the purpose of having the evidence reduced to writing, called summary of evidence. Rule 23 prescribes the procedure for taking down the summary of evidence which, inter alia, provides recording of the evidence of each witness, opportunity to the accused to cross-examine each such witness, etc. Rule 24 provides that the summary of evidence so recorded shall be considered by the commanding officer who at that stage has again three courses open to him, to wit, (a) remand the accused for trial by a court martial; (b) refer the case to the proper superior military authority; and (c) if he thinks it desirable, rehear the case and either dismiss the charge or dispose it of summarily. It was urged that in case of the petitioner Lt.-Col. Bedi, the commanding officer did not hear the charge in his presence, that no direction to prepare a summary of evidence in which he could participate was given and that without complying with the mandatory requirements of Rules 22 and 23 a direction has been given to convene the court martial to try the petitioner. Rules 22 to 24 are mandatory in respect of every person subject to the Act other than an officer. Therefore, the requirements of Rules 22 and 24 are not mandatory in case of an officer and this becomes manifestly clear from sub-rule (1) of Rule 25 which provides that where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held, and the evidence, if he so requires, be taken in his presence in writing in the same manner as nearly as circumstances admit, as is required by Rule 22 and Rule 23 in the case of other persons subject to the Act. The opening words of Rule 22 clearly demonstrate the mandatory applicability of the provisions in Rules 22 and 23 in case of persons subject to Act other than officers. Any lurking doubt in that behalf is removed by the language of Rule 25 which provides that if an officer is charged with an offence under the Act, the investigation, if he requires, shall be held and the evidence, if he requires it, shall be taken in his presence. The petitioner is an officer. Therefore, the procedure prescribed in Rules 22 and 23 will not apply proprio vigore to him. If he wants Rules 22 and 23 to be complied with, it is for him to make a request in that behalf. He has to make a two-fold request : (1) that the investigation shall be done in his presence; and (2) the

summary of evidence shall also be drawn in his presence. Petitioner in this case has averred in his petition that the commanding officer did not hear the charge as required by Rule 22 and, therefore, he could not participate in the hearing of the charge nor could he cross-examine the witnesses and make his submissions. He further stated that no charge-sheet was given to him. He has averred that the order dated November 10, 1980, for taking down summary of evidence is void and illegal as it is violative of Rule 23 of the Rules. Mr Sanghi contended that failure to comply with Rules 22, 23 and 24 has denied to the petitioner an opportunity first to convince the commanding officer to dismiss the charge under sub-rule (2) of Rule 22 and even if he could not have persuaded the commanding officer to dismiss the charge after the summary of evidence was recorded, he could have persuaded the commanding officer under Rule 24 either to refer the case to superior military authority or to rehear it and dismiss the charge and this denial of opportunity vitiates the subsequent trial by general court martial. Nowhere in the petition the petitioner has specifically stated that he did make a request that the investigation shall be done in his presence. There is utter sphinx like silence on this point. In para 39 of the counter-affidavit on behalf of the respondents it is specifically stated that Rule 25 requires that if an officer wants Rules 22 and 23 to be complied with, he has to make a request in that behalf and that the petitioner never made such a request at the appropriate time and, therefore, cannot now make a grievance that Rules 22 and 23 have not been complied with. There is no rejoinder to the affidavit. Therefore, it is crystal clear that in the absence of a request from the petitioner as required by Rule 25, failure to comply with Rules 22, 23 and 24 would not vitiate the trial by the general court martial. Rex v. Thomson (1946) 4 Dom LR 579) was relied upon to buttress the submission that there has to be hearing of the charge by the officer commanding in the presence of the offender and the offender should be afforded full opportunity to be heard before a court martial is convened and this is a mandatory requirement and the courts must draw a distinction between what is merely irregular and what is of such a character as to be of substance. It was urged that compliance with this procedure which affords full opportunity of participation cannot be treated as merely directory but must be held to be mandatory to ensure a just and fair trial and its violation must be held to vititate the order convening the court martial and the order would be without jurisdiction. It may be pointed out that the offender in the case before the court in that case was a non-commissioned officer governed by the Army Act, 1881. He was thus a person other than an officer subject to the Army Act and the mandate of Rules 22 and 23 in his case would have applied in all its rigour but as has been pointed out the petitioner in the present case is an officer and unless he requires it, Rules 22 and 23 are not required to be complied with and, therefore, the decision does not advance his case any further. Therefore, there is no merit in this contention.

37. Incidentally it was urged that to the extent Rule 25 erodes mandatory compliance with principles of natural justice as adumbrated in Rules 22, 23 and 24 it would be violative of fundamental rights guaranteed under Article 21 of the Constitution and would be ultra vires the Constitution. Referring to Lee v. Showmen's Guild of Great Britain ((1952) 2 QB 329 : (1952) 1 All ER 1175), it was urged that public policy would invalidate any stipulation excluding the application of the rules of natural justice to a tribunal whose decision was likely to result in deprivation of personal liberty. Continuing along this line it was urged that to the extent the application of minimum principles of natural justice enacted in Rules 22, 23 and 24 depends for its applicability upon the demand by the officer it would be contrary to public policy which mandates that compliance with rules of natural justice should not be made dependent upon a requisition by the person against whom the enquiry is held but it must be deemed to be obligatory and an integral part of any procedure prescribed for a tribunal whose decision is likely to result in deprivation of personal liberty. It has already been pointed out that Parliament has the power to restrict or abrogate any of the rights conferred by Part III of the Constitution in their application of the members of the Armed Forces so as to ensure the

proper discharge of duties and maintenance of discipline amongst them. The Act is one such law and, therefore, any of the provisions of the Act cannot be struck down on the only ground that they restrict or abrogate or tend to restrict or abrogate any of the rights conferred by Part III of the Constitution and this would indisputably include Article 21. But even apart from this, it is not possible to subscribe in the view that even where the prescribed procedure inheres compliance with principles of natural justice but makes the same dependent upon the requisition by the person against whom the enquiry is held, it would be violative of Article 21 which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. If the procedure established by law prescribes compliance with principle of natural justice but makes it dependent upon a requisition by the person against whom an enquiry according to such procedure is to be held, it is difficult to accept the submission that such procedure would be violative of Article 21. And as far as the Rules are concerned, they have made clear distinction between an officer governed by the Act and any other person subject to the Act. Expression 'officer' has been defined to mean a person commissioned, gazetted or in pay as an officer in the regular Army and includes various other categories set out therein. By the very definition an officer would be a person belonging to the upper bracket in the Armed Forces and any person other than an officer subject to the provision of the Act would necessarily imply persons belonging to the lower categories in the army service. Now, in respect of such persons belonging to the lower category it is mandatory that Rules 22, 23 and 24 have to be followed and there is no escape from it except on the pain of invalidation of the enquiry. But when it comes to an officer, a person belonging to the upper bracket in the armed forces, the necessary presumption being that he is highly educated, knowledgeable, intelligent person, compliance with Rules 22, 23 and 24 is not obligatory but would have to be complied with if the officer so requires it. This is quite rational and understandable. One cannot be heard to say that he would not insist upon an enquiry in which he can participate which is his right, and then turn round and contend that failure to hold the enquiry in accordance with the principles of natural justice as enacted in Rules 22, 23 and 24 though he did not insist upon it, would not merely invalidate the enquiry but the rule which requires compliance at the request of the officer is in itself on that account ultra vires. It was, however, urged that in view of the decisions of this Court in Mohinder Singh Gill v. Chief Election Commissioner, New Delhi ((1978) 2 SCR 272 : (1978) 1 SCC 405 : AIR 1978 SC 851), and Maneka Gandhi v. Union of India ((1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597), it is an incontrovertible proposition of law that even while finding a balance between need for expedition and need to give full opportunity to the person against whom the enquiry is held, "a body charged with a duty to act judicially must comply with the minimum requirements of natural justice and that if observance of natural justice in the area administrative decision making so as to avoid devaluation of the principle by administrators already alarmingly insensitive to the rationale of audi alteram partem" that one can ever look upon with equanimity where this principle gives away before a tribunal charged with a duty to act judicially. As has been pithily observed by an author, such an overwears an engaging air of simplicity and reason but having examined the entire procedure one can say confidently that this simplicity is merely skin deep". Rules 22, 23 and 24 prescribe participation at a stage prior to the trial by the court martial. Undoubtedly, fairness in action and natural justice have been developing very much in recent years and if the power of the executive increases the courts have developed the doctrine in an evolving way so a striking out expedition is perilous. (Schmidt v. Secretary of State for Home Affairs, (1969) 2 Ch D 149 : (1969) 1 All ER 904 (CA)) By rejecting the contention a striking expedition of this wholesome principle is not undertaken. It must, however, be pointed out that in a trial which is likely to result in deprivation of liberty the body which has ultimately the power to make an order which would result in deprivation of liberty, must hear the offender offering full participation and that principle cannot be diluted. However, procedure prescribed in Rules 22, 23

and 24 is at a stage anterior to trial by the court martial. It is the decision of the court martial which would result in deprivation of liberty and the order directing that the charge be heard or that summary of evidence be recorded or that a court martial be convened. Even in normal trial under the Criminal Procedure Code it has never been suggested that it is unfair to launch a criminal prosecution without first hearing the accused (see Lord Salmond in Cozens v. North Doven Hospital Management Committee ((1962) 2 QB 330, 343 (sic)) (sic)). Therefore, there is no substance in the contention that Rules 22, 23 and 24 in view of the provision contained in Rule 25 are ultra vires Article 21 of the Constitution.

38. Mr Banarjee, learned Additional Solicitor-General in this context urged that even if it is felt that there is some violation of provisions contained in Rules 22, 23 and 24 in case of an officer, as the officer will have an opportunity to exhaustively participate in the trial by the court martial the irregularity emanating from non-compliance with Rules 22, 23 and 24 would not vitiate the order convening the court martial. Reliance was placed on Major E.G. Barsay v. State of Bombay ((1962) 2 SCR 195 : AIR 1961 SC 1762 : 1961 (2) Cri LJ 828), in which the question arose whether an investigation by an officer of the Delhi Special Police Establishment who undertook investigation of the case and failed to comply with two preconditions incorporated in the proviso to Section 5-A of the Prevention of Corruption Act, 1950, the investigation was vitiated and the trial upon such investigation would be bad. The High Court held that the two conditions had not been complied with by the investigating officer but after considering the entire evidence observed that the alleged irregularity would not justify the conclusion that the non-observance of the conditions prescribed in the proviso to Section 5-A of the Prevention of Corruption Act had resulted in failure of justice. This Court agreed with this conclusion. Drawing sentence from this conclusion it was urged that irregularity in the course of investigation, if any, would not vitiate the trial but in such a situation the court must examine evidence more carefully. As we are of the opinion that the failure to comply with the requirements of Rules 22, 23 and 24 depended upon a requisition by the petitioner, his inaction or omission in that behalf would have no impact on the order convening the court martial.

39. Reference was also made to Flying Officer S. Sundarajan v. Union of India (AIR 1970 Del 29 : 1970 Cri LJ 213 : 1970 Serv LR 459), where a Full Bench of the Delhi High Court held that any error or irregularity in complying with the procedure prescribed by Rule 15 of the Indian Air Force Rules which is in pari materia with Rule 22 of the Rules would not vitiate the trial and ultimate conviction of the accused because of any error or irregularity at a stage before the accused in charged for the purpose of having the evidence reduced to writing and it will not vitiate the subsequent trial as the guilt of the accused has to be established not on the basis of what the commanding officer might have done or might not have done at the initial stage. It was further held that any irregularity in the procedure at that initial stage might have a bearing on the veracity of witness examined at the trial or on the bona fides of the commanding officer or on the defence that may be set up by the accused at the trial but the irregularity can by no means be regarded as affecting the jurisdiction of the court to proceed with the trial. Jurisprudentially speaking the view expressed is that Rule 15 is directory and its contravention has no impact on the subsequent trial. Frankly, we have our reservations about the view taken by the Full Bench of the Delhi High Court but as we have held that Rules 22, 23 and 24 have not been violated on account of the failure of the petitioner to insist upon their compliance which it was obligatory upon him to do, we refrain from expressing any opinion on this point.

40. Mr Sanghi next contended that it is obligatory upon the authorities concerned to appoint a court of enquiry whenever an enquiry affects the character or military reputation of a person subject to the Act and in such an enquiry full opportunity must be afforded to such person of being present

throughout the enquiry and of making any statement or giving any evidence may wish to make or give and of cross-examining any witness whose evidence in his opinion affects the character or military reputation and producing any witness in defence of his character or military reputation. There are some provisions in the Act which (sic) setting up of a Court of Enquiry in the circumstances and for the purpose set out in the provisions. Section 89 permits collective fines to be imposed in the circumstances therein mentioned but the same can be done after obtaining the report of a court of enquiry. In other words, where it is considered necessary and permissible under the Act of to impose a collective fine it can be done after obtaining the report of a court of enquiry which will presage an appointment of such a court of enquiry. Similarly, Section 106 comprehends the appointment of a court of enquiry when any person subject to the Act has been absent from his duty without due authority for a period of 30 days, and such court is required to enquire in respect of the absence of the person and the deficiency if any in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries, and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps of department to which the person belongs shall enter in the court martial book of the corps of department a record of the declaration. A reference to these two section would show that where action can be taken after obtaining report of the court of enquiry it has been so specified. Now, when an offence is committed and a trial by a general court martial is to be held, there is no provision which requires that a court of a enquiry should be set up before the trial is directed. Mr Sanghi, however, urged that on a correct interpretation of Rule 180, it would appear that whenever the character of a person subject to the Act is involved in any enquiry, a court of enquiry must be set up. Rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the court of enquiry. Rule 180 cannot be construed to mean that whenever or wherever in any enquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up of a court of enquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a court of enquiry is set up and in the course of enquiry by the court of enquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceeding of court of enquiry. Court of enquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a court of enquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an enquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific enquiry was directed against the person whose character or military reputation is involved. To ensure that such a person whose character or military reputation is likely to be affected by the proceedings of the court of enquiry should be afforded full opportunity so that nothing is done at his back and without opportunity so that nothing is done at his back and without opportunity of participation, Rule 180 merely makes an enabling provision to ensure such participation. But it cannot be used to say that whenever in any other enquiry or an enquiry before a commanding officer under Rule 22 or a convening officer under Rule 37 of the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior enquiry by the court of enquiry is a sine qua non. Therefore, the contention being without merits must be negatived.

41. It was next contended that the petitioner was not supplied the relevant documents asked for by him and that, therefore, he is not being afforded a full and adequate opportunity to defend himself. Rule 33 ensures preparation for defence by the accused person. He has a right to call witnesses in his defence. The limited grievance is that by his letter dated November 11, 1980, he requested that

documents concerning the case against him may be supplied to him. He also give the name of Sub. Gopal Chand as an essential witness. By his letter dated November 14, 1980, the petitioner requested to supply him the copies of the documents therein listed. As the trial by the court martial has not been commenced, we are sure that the authorities concerned will supply necessary documents to the petitioner in order to avoid even a remote reflection that he was not given adequate opportunity to defend himself.

42. In passing it is necessary to observe that the procedure prescribed for trial of sessions cases in Chapter XVIII of the Code of Criminal Procedure when compared with the procedure prescribed for trial by a general court martial there is very little deviation or departure and more or less the procedure appears to be fair, just and reasonable. Dr. O.P. Sharma, Judge-Advocate General, Indian Army, in his Military Law in India, p. 156, after comparing the two procedures observes that the procedure of trial by court martial is almost analogous to the procedure of trial in the ordinary criminal courts. He points out two demerits, viz., a distinct possibility of a successive trial by a criminal court and a court martial exposing the accused to the hazards of double jeopardy, and the absence of a provision for bail. The horrendous delay of trial in ordinary criminal courts has its counterpart in delay in trial by court martial also. Save and except this deficiency and one or two of minor character both the procedures are almost identical and this aspect has to some extent influenced our decision.

Writ Petitions Nos. 1513 of 1979 and 5930 of 1980 :

43. Save and except the contention as to the validity of the composition of the court martial no other specific contention was raised in these two petitions.

44. Reluctance of the apex court more concerned with civil law to interfere with the internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution that a person by enlisting in or entering Armed Forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. More so when this Court held in Sunil Batra v. Delhi Administration ((1979) 1 SCR 392, 495 : (1978) 4 SCC (Cri) 155 : 1978 Cri LJ 1741), that even prisoners deprived of personal liberty are not wholly denuded of their fundamental rights. In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by the liberty-oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must be preceded by an enquiry ensuring fair, just and reasonable procedure and trial by a judge of unquestioned integrity and wholly unbiased. A marked difference in the procedure for trial of an offence by the criminal court and the court martial is apt to generate dissatisfaction arising out of this differential treatment. Even though it is pointed out that the procedure of trial by court martial is almost analogous to the procedure of trial in the ordinary criminal courts, we must recall what Justice William O'Douglas observed : "(T)hat civil trial is held in an atmosphere conducive to the protection of individual rights while a military trial is marked by the age-old manifest destiny of retributive justice. Very expression 'court martial' generally strikes terror in the heart of the person to be tried by it. And somehow or the other the trial is looked upon with disfavour." ("Tough Test for Military Justice", Time Magazine, pp. 42 & 43) In Reid v. Covert (1 L Ed 2d 1148 : 354 US 1 (1957)), Justice Black observed at page 1174 as under :

Courts martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence". In essence, these tribunals are simply executive tribunals whose personal are in the executive chain of command. Frequently, the members of the court martial must look to the appointing officer for promotions, advantageous assignments and efficiency rating - in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.

Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal of hierarchy of courts. Submission that full review of finding and/or sentence in confirmation proceeding under Section 153 is provided for is poor solace. A hierarchy of courts with appellate powers each having its own power of judicial review has of course been found to be counter-productive but the converse is equally distressing in that there is not even single judicial review. With the expanding horizons of fair play in action even in administrative decision, the universal declaration of human rights and retributive justice being relegated to the uncivilised days, a time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel. Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace-loving citizens enjoy a social order based on rule of law; the same cannot be denied to the protectors of this order. And it must be realised that an appeal from Ceaser to Ceaser's wife - confirmation proceeding under Section 153 - has been condemned as injudicious and merely a lip sympathy to form. The core question is whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with the gravity of the offence charged. Judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be sacrificed at the alter of military discipline. Unjust decision would be subversive of discipline. There must be a judicious admixture of both. And nothing revolutionary is being suggested. Our Army Act was more or less modelled on the U.K. Act. Three decades of its working with winds of change blowing over the world necessitates a second look so as to bring it in conformity with liberty-oriented constitution and rule of law which is the uniting and integrating force in our political society. Even U.K. has taken a step of far-reaching importance for rehabilitating the confidence of the Royal Forces in respect of judicial review of decisions of court martial. U.K. had enacted a Court Martial (Appeals) Act of 1951 and it has been extensively amended in Court Martial (Appeals) Act, 1968. Merely providing an appeal by itself may not be very reassuring but the personnel of the appellate court must inspire confidence. The court martial appellate court consists of the ex officio and ordinary judges of the Court Appeal, such of the judges of the Queen's Bench Division as the Lord Chief Justice may nominate after consultation with the Master of the Rolls, such of the Lords, Commissioners of Justiciary in Scotland as the Lord Chief Justice generally may nominate, such Judges of the Supreme Court of the Northern Ireland as the Lord Chief Justice of Northern Ireland may nominate and such of the person of legal experience as the Lord Chancellor may appoint. The court martial appellate court has power to determine any question necessary to be determined in order to do justice in the case before the court and may authorise a new trial where the conviction is quashed in the light of fresh evidence. The court also been power inter alia, to order production of documents or exhibits connected with the proceedings, order the attendance of witnesses, receive evidence, obtain reports and the like from the members of

the court martial or the person who acted as Judge-Advocate, order a reference of any question to a Special Commissioner for Enquiry and appoint a person with special expert knowledge to act as an assessor (HALSBURY'S LAWS OF ENGLAND, 4th Edn., paras 954-55, pp. 458-59). Frankly the appellate court has power of full judicial review unhampered by any procedural claptrap.

45. Turning towards the U.S.A., a reference to Uniform Code of Military Justice Act, 1950, would be instructive. A provision has been made for setting up of a court of military appeals. The Act contained many procedural reforms and due process safeguards not then guaranteed in civil courts. To cite one example, the right to legally qualified counsel was made mandatory in general court martial cases 13 years before the decision of the Supreme Court in Gideon v. Wainwright (372 US 335 (1963)). Between 1950 and 1968 when the Administration of Justice Act, 1968 was introduced, many advances were made in the administration of justice by civil courts but they were not reflected in military court proceedings. To correct these deficiencies the Congress enacted Military Justice Act, 1968, the salient features of which are : (1) a right to legally qualified counsel guaranteed to an accused before any special court martial; (2) a military judge can in certain circumstances conduct the trial alone and the accused in such a situation is given the option after learning the identity of the military judge of requesting for the trial by the judge alone. A ban has been imposed on command interference with military justice, etc. Ours is still an antiquated system. The wind of change blowing over the country has not permeated the close and sacrosanct precincts of the Army. If in civil courts the universally accepted dictum is that justice must not only be done but it must seen to be done, the same holds good with all the greater vigour in case of court martial where the judge and the accused don the same dress, have the same mental discipline, have a strong hierarchical subjugation and a feeling of bias in such circumstances is irremovable. We, therefore, hope and believe that the changes all over the English-speaking democracies will awaken our Parliament to the changed value system. In this behalf, we would like to draw pointed attention of the Government to the glaring anomaly that court martial do not even write a brief reasoned order in support of their conclusion, even in cases in which they impose the death sentence. This must be remedied in order to ensure that a disciplined and dedicated Indian Army may not nurse a grievance that the substance of justice and fair play is denied to it.

46. With these observations we dismiss all the three petitions and vacate all interim orders. There shall be no order as to costs.

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