CALCUTTA HIGH COURT

Amal Sankar Bhaduri

Vs

Union of India

(Umesh Chandra Banerjee C,J.)

24.12.1985

JUDGMENT

Umesh Chandra Banerjee, J.

1. An interesting question as regards the jurisdiction of the writ Court in matters of Court Martial in General, falls for determination in this writ petition.

2. While it is true that Army personnel ought to be subjected to strictest form of discipline and Article 33 of the Constitution has conferred powers on to the Parliament to abridge the rights conferred under Part III of the Constitution in respect of the members of the Armed Forces, but does that mean and imply that the Army Personnel would be denuded of the Constitutional privileges as guaranteed under the Constitution. Can it be said that the Army Personnel form a class of citizens not entitled to the Constitution's benefits and are outside the purview of the Constitution. To answer above in the affirmative in my view, would be a violent departure to the wishes of the framers of our Constitution. An Army Personnel is as much citizen as any other individual citizen of this country. At this juncture it would be worthwhile to refer to Article 33 of the Constitution. Article 33 has been engrafted in the Constitution to enable the Parliament by law to restrict the rights as contained in Part III of the Constitution. The extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula. The Constitution makers were obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the Armed Force Personnel and therefore Article 33 empowered the Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution in so far as the Armed Force Personnel are

concerned. (In this context reference may be made to the decision of the Supreme Court in the case of B. Viswar and Ors. v. Union of India and Ors.,).

3. The Supreme Court in the case of Prithi Pal Singh v. The Union of India observed :

> "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 Patra v. Delhi Administration that even prisoners deprived of personnel 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 abridge such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizen not entitled to the benefits of liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land havings feeling of belonging to the civilized community governed by the liberty oriented -- Constitution."

4. At this stage it is convenient to deal with the other aspect of the matter as regards the maintainability of the petition under Article 226 of the Constitution as contended 'by the respondent, viz.; that the ban imposed by Article 227(4) also applies to Article 226.

5. At the outset it is to be noted that unlike Article 227, there is no express limitation in Article 226 itself excluding the power of Superintendence over Military Tribunal from the scope of that Article. It is now well settled that the Law Courts would not be justified in incorporating an expression or a word in a particular provision of the statute as it would be presumed that such omission has been effected by the Law makers knowingly. To add to or to supplement the words of a statute would be contrary to all recognized principles of construction. Our Constitution makers have deliberately thought it fit not to impose the same restriction in Article 226 as it is in Article 227(4). The framers of the Constitution obviously, therefore, did not intend that there should be a similar embargo in respect of Military Tribunals under Article 226 of the Constitution. Whereas in Article 227 the power of interference is restrictive in nature the powers conferred under Article 226 is of very wide amplitude. The power of interference extends even to the extent of quashing an impugned order on the ground of error of law. The respondents contended that as the Court has the power of Superintendence both under Article 226 as also under Article 227, both the Articles should be read together in a harmonious manner and as such the restriction in Article 227(4) should also be read as existing in Article 226 of the Constitution. In my view however the same cannot be accepted. Jurisdiction of the High Court under Article 226 is of very wide amplitude. On a plain reading of Article 226 and Article 227 of the Constitution, in my view, it can not be said that the two Articles are in pari material. The extent of Courts Jurisdiction under the two Articles is not the same and no logical reason exists for

engrafting in Article 226, the limitation imposed by Article 227(4) of the Constitution. The language of Article 227(4) clearly manifests that the same was not intended to have a broader application. The user of "This Article" in Article 227(4) clearly depicts the intention of the Constitution makers. Whenever the makers of our Constitution thought it fit to restrict the powers of the Law Courts, the same has been expressed in explicit language. Article 392(B) or Article 363 may be, considered in this context. It, therefore, appears that there is no overlapping of jurisdiction neither the scope of Articles 226 and 227 are the same.

6. The next contention is in regard to the Constitution of Court Martial. Before dealing with the rival contentions in that regard it would be worthwhile at this juncture to refer to the relevant provisions of the Army Act and the Rules.

7. Section 109 of the Army Act provides that a General Court Martial may be convened by the Central Government or the Chief of Army Staff or by any Officer empowered in this behalf by warrant of the Chief of Army Staff.

8. 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 not less than four are of a rank not below that a Captain.

9. As regards the composition of General Court Martial, Rule 40 of the Army Rules 1954 also lends assistance to Section 113 of the Army Act. Rule 40 provides as follows :--

(i) A General Court Martial shall be composed as far as seems to the convening Officer practicable, of Officers of different corps or departments and in no case exclusive of Officers of the corps or department to which the accused belongs;

(ii) 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 a convening order.

(iii) 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.

Mr. Ghosh appearing for the writ petitioners contended that the Court Martial has been illegally constituted in violation of Rules 40(2) of the Army Rules of 1954 and as such the Court Martial has no jurisdiction to try the petitioner. Admittedly, the petitioner is a Lt. Col. in the Army but the respondents Nos. 9, 10 and 11 hold substantive rank of Maj. though at present in the acting rank of Lt. Col. Relying on these state of facts, Mr. Ghosh strongly contended that three out of its

five members of the Court Martial are of a lower substantive rank than that of a petitioner and the Constitution of the Court Martial is thus in contravention of Rules (4002) of the Army Rules and hence illegal.

10. In support of his contentions Mr. Ghosh also placed reliance on Rule 2(d)(ii) of the Army Rules. Rule 2(d)(ii) defines 'rank' to mean 'substantive rank'.

11. Mr. R.N. Das, however, tried to repel the submissions of Mr. Ghosh on two counts. Firstly that the petitioner did not object to be tried by the members constituting the Court Martial when it first assembled on 15th March 1985 and secondly the definition in Rule 2(d) (ii) of the Army Rules will not apply to Rules 40(2) of the Army Rules. Mr. Das contended that the rank is not defined in the Army Act. Therefore, Section 113 of the Army Act rank includes both acting and substantive ranks and the definition of 'rank' in Rule 2(d) (ii) if read with Rules 40(2) of the Army Rules would lead to a conflict as regards the meaning of rank in Section 113 of the Army Act. Mr. Das contended that Rules 40(2) is practically identical with Section 113 of the Army Act and the Law Courts ought not to put an interpretation which may lead to a conflict between the provisions of the Army Act and the Rules framed thereunder.

12. At this juncture, however, it would be useful to refer to the relevant set of facts vis-a-vis the contention of the parties in that regard.

13. In December 1984 the petitioner was asked to name his defending Officer, whereupon the petitioner named two Officers in order to preference, the second being Major Chawda. But by reason of non-availability of the two Officers named, and on being further asked to suggest his defending Officer, the petitioner named further four Officers. The petitioner, however, having had no conformation as regards his defending Officer, engaged a civilian lawyer from Gauhati. The civilian lawyer was not, however, available prior to 16th April 1985, intimation whereof was sent to the Authorities. On 13th March 1985, that is, two days prior to the Assembly of the Court Martial Major Chawda was assigned to the petitioner as his defending Officer. The petitioner, however, expressed his unwillingness to be defended by Major Chawda and the latter in fact reported the same to the Authorities. On 15th March 1985 the petitioner submitted a Memorandum to the Court stating that he did not wish to be defended by Major Chawda. Nevertheless, Major Chawda, however, appeared as Defending Officer. In the writ petition, the petitioner has stated that he wanted Major Chawda to object to the Constitution of the Court, but he did not do so, saying that "he did not wish to annoy the Court". However, the petitioner insisted that the Court be adjourned till 16th April, 1985 so that Civilian Counsel of his choice could be available for defending him. This request was granted by the Court.

14. On this state of facts it is to be considered as to whether the conduct of the petitioner can be

said to be barred by the doctrine of estoppel, waiver or acquiescence.

15. In Spencer Bower and Turner "The Law Relating to Estoppel by Representation" it has been stated : "Not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same results cannot be achieved by conduct or acquiescence by the parties. Any such attempt to create or enlarge jurisdiction is in fact the appointment of a Judicial Officer by a subject, and as such constitutes a manifest usurpation of the Royal Prerogative. On the other hand where nothing more is involved than a mere irregularity of procedure or (e.g.) non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive the defect, or to be estopped by conduct from setting it up, now new jurisdiction is thereby impliedly created and no existing jurisdiction impliedly extended beyond its existing boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail.

16. Accordingly, in all cases of the first class, that is, where it is sought by estoppel to enlarge the jurisdiction of any tribunal of limited jurisdiction, or to confer jurisdiction on any tribunal or person to whom it is not given by law, it has been held that it is impossible by contract to achieve these ends contrary to the provisions of a statute ; and similarly no estoppel can be invoked to produce a similar result. In the second class, in which the representation is set up merely as a remedy for an irregularity in procedure it has been held that this end may be achieved by estoppel or waiver.

17. In some branches of the law the terms of the relevant statute preclude the parties from contracting out of the jurisdiction of the prescribed tribunal; and, in such cases, just as no agreement between the parties can oust the jurisdiction of the tribunal, neither can it be ousted by the invocation of an estoppel.

18. In the case of R.W. McClaughry v. Peter C. Deming reported in Law Ed. U.S. 183 1049 Peckham J. observed that consent can confer no jurisdiction on a Court Martial but composed entirely of Officers of the regular army of the United States in direct violation of the 77th Article of war which declares that such Officers shall not be competent to sit on Court Martial to try the Officers or soldiers of other forces. Similar view has also been expressed in the case of Simpson and Anr. v. Crowle and Ors. reported in 1921(3) K.B. 243 in which it has been held that as the claim was solely for an injunction and not for an injunction as ancillary to a cause of action within Section 56 of the County Courts Act, 1888, the County Court Judge had no jurisdiction and that the mere fact that the parties proceeded with the trial without the point as to the jurisdiction having been raised did not confer jurisdiction upon the County Court Judge.

19. In the case of Ram Lal Roshonlal & Co. v. B. C. Paul & Sons (P) Ltd. this Court held that defect in or lack of or basis incompetence in jurisdiction can never be waived.

20. In the case of K.R. Shenoy v. Chief Officers, Town Municipal Council, Udipi and Ors. the Supreme Court observed that an excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel.

21. The issue was further examined by the Supreme Court in the case of Superintendent of Taxes, Dhubri and Ors. v. Onkarmal Nathmal Trust, in which the Supreme Court observed :

"Furthermore, the waiver, even where both sides have agreed to waive the operation of a statutory provision, cannot extend to a case in which the effect may be either to oust the jurisdiction conferred by statute or to confer a jurisdiction which, according to the statute, is not there."

In that view of the matter, I am unable to accept the contention of Mr. Das that simply because of the fact that the petitioner did not object to be tried by the members constituting the Court Martial when it first assembled on 15th March 1985 it would be deemed to be a complete waiver of the right as regards the challenge on the ground of jurisdiction. To hold it otherwise would be a complete departure from the well established principles of law. Consent in any event, cannot confer jurisdiction if there is none, I, however, find some jurisdictions in Mr. Ghosh's submission on the factual aspect that there was in fact no consent or waiver as regards the Constitution of the Court Martial.

22. Further it is also to be noted that there ought to be an express pleading in regard to the point of estoppel, waiver or acquiescence which is, however, lacking in the case under consideration.

23. The respondents next contended that Rules 40(2) of the Army Rules is practically identical with Section 113 and the definition of 'rank' in Rule 2(d)(ii) ought not to be read in Rules 40(2) of the Army Rules. It was further contended that if the definition of 'rank' is read in Rules 40(2) it would lead to conflict which the Law Courts ought always try to avoid. Law Courts ought to interpret the statute to make it viable and operative and ought not to put an interpretation which may lead to its invalidity or the provisions being rendered nugateryandoties.

24. The Army Act read as a whole, does not lend any support to the respondent's contention neither the expression nor the concept of 'acting rank' occurs anywhere in the statute. There is thus no warrant for saying that the word 'rank' used in the Act includes an 'acting rank'. It does follow, therefore, far less, logically, that such a wide meaning must be given to the word 'rank' in Section 113. The expression 'acting rank' occurs only in Special Army instructions relating to pay, pension, promotion, leave, etc., (but not regarding composition of a Court Martial). These

Instructions have no statutory force and are subordinate to the Act, and cannot, therefore, be used for interpreting the Act.

25. A perusal of Section 113 of the Act shows that the word 'rank' occurs in the) Section only in the last part, i. e., as regards the requirement that at least four of the five Officers must be of a rank not below that of a Captain.

26. It is apparent, from Section 113, that this Section is only dealing with the minimum requirements for the composition of a Court Martial. One of those requirements is that at least four members of the Court Martial must be above the rank of Captain, i.e., they must be Majors or above. This is the context in which the word 'rank' occurs. In this context reliance was placed on the decision of the Madras High Court in the case of in Re : Kandassery reported AIR 1919 Mad.24. In that decision the statute required that sanction for prosecution must be given by a District Magistrate and the Court held that a person who was an acting District Magistrate and discharging the same function as the District Magistrate was competent to grant the sanction. In my view, however, the decision noted above has no manner of application and it is clearly distinguishable on facts. In Section 113 of the Army Act there is, no reference to any functionary by any official title.

27. In the course of argument, some emphasis was placed on the fact that the definition contained in Rule 2(d) (ii) of the Army Rules was brought in by amendment in 1979. This does not mean that before 1979 the meaning of 'rank' in the Army Rule was different that before 1979 'rank)' included 'acting rank'. It is well known that definitions are not infrequently brought in by subsequent amendment to declearer what was always the true meaning of particular expression, so as to avoid possible confusion or difficulties which may have arisen because of the absence of a definition earlier. It can not be presumed that the Rule making authority would introduce a definition of a 'word' in the Rules which would run counter to the meaning of that 'word' in the Act. On the contrary, it is to be presumed that it is in conformity with the meaning of that 'word' in the Act. Simply because there is no definition of 'rank' in the Army Act, it is not a correct method of interpretation to say that word should be given as wide a meaning as possible and that it, therefore, includes 'acting rank'.

28. The word 'rank' in Section 113 of the Act, in my view means what the word normally conveys--i.e., substantive rank, and not 'acting rank', which is a special extended meaning and not a normal meaning. There is nothing in the Act to indicate that this special or extended meaning is intended to be included in Section 113. In the case of Commissioner of Wealth Tax, Andhra Pradesh v. Officer-in-Charge (Court of Wards). Paigah , the Supreme Court observed :--

"We think that it is not correct to give as wide a meaning as possible to terms used in a statute

simply because the statute does not define an expression. The correct rule is that we have to endeavour to find out the exact sence in which the words have been used in a particular context. We are entitled to look at the statute as a whole and give an interpretation in consonance with the purposes of the statute and what logically follows from the terms used. We are to avoid absurd results."

29. It was further contended by the respondent Authority that Section 17 of the General Clauses Act ought to be allowed a full play in the matter of interpreting Section 113 of the Army Act as well as the Rules 40(2) particularly as the Central Government (the Rule-making Authority) must have been aware that the Army Rules of 1954 are, by virtue of Section 193, to have effect "as if enacted in the Act", i.e., on a par with the provisions of the Act. In my view Section 17 of the General Clauses Act, however, does not in any way advance the matter further. It is to be noted that both Section 113 and Rules 40(2) of the Rules for General Court Martial, however, have separate and different objects and purposes and the two provisions operate in different fields.

30. Section 113 prescribes firstly the minimum number required for a valid Court Martial and secondly prescribes the minimum experience that each should, possess, i.e., each must have held a commission for a period not less than 3 years, and thirdly the minimum qualifications that the members should possess, i.e., that at least four should hold a rank not below that of Captain. Rules 40(2), however, deals with a different aspect. It lays down that the members of the Court Martial must not be of lower in rank than that of the Officer who is being tried by them. This is an additional requirement. Section 113 stops after laying down the minimum rank of Officers constituting a Court Martial and it does not deal with any other aspect of the Constitution of a Court Martial, e.g., the further question of the ranks of the members of the Court Martial vis-a-vis that of the Officer being tried by them. This aspect is left to the Rules. Section 191(2)(e), of the Act expressly confers power to frame rules providing for the convening and Constitution of Court Martials. If the Legislature was of the view that Section 113 (which deals with the composition of Court Martial) was exhaustive, there would not have been any point in expressly conferring power to make rules for the Constitution of Court Martials. Rules 40(2) has been framed in pursuance of Section 191(2)(e) of the Act.

31. Thus in my view, Rules 40(2) does not conflict in any way with Section 113 of the Act. It only imposes an additional requirement, viz., that the members of the Court Martial should not be of lower in rank than that of the Officer being tried. There is no difficulty at all in reading Rules 40(2) harmoniously with Section 113 neither there is any repugnancy. This is also the understanding of the Army Authorities, as will appear from Vol. I of the Manual of Military Law, (para. 17, page 25).

32. There is no conflict between Rules 40(2) and Section 113 and such an interpretation is fully

consistent with the principle running throughout Military Law that a man should be tried by his peers. A substative Lt. Col. can be tried by members of a Court Martial who are of the substantive rank of Lt. Col. or of a higher rank. He cannot be tried by a Major. This very same principle is embodied in para. 518 of the Defence Service Regulations dealing with composition of a Court of Enquiry, viz., "when the character of military reputation of an Officer is likely to be a material issue, then Presiding Officer of the Court of Enquiry whenever possible will be senior in rank and other members at least equivalent in rank to that Officer.

33. In this context the observations of the Supreme Court in the case of Commissioner of Sales Tax, Gujrat v. Union Mining Agency and Ors. is very opposite.

34. The Supreme Court observed that the High Court was obviously wrong in not interpreting the expression 'registered dealer' in the context of Clause (ii) of Section 8 but with reference to the other provisions of the Act, particularly in the light of Section 44 of the Act, to give effect to the so-called legislative intent for the levy of a single point tax. It was in error in making an exposition ex visceribus actus and in relying upon the leading cases of Bywater v. Brandling, (1928) 7 B & C 643. Rein v. Lane, (1867) LR 2 QB 144. Jobbms v. Middlesex Country Council, (1949) 1 KB 142, Crates on Statute Law, 6th ed., 99 and Maxwell on interpretation of Statutes, 8th ed. 30.

35. The Supreme Court further observed that there is no dispute with the proposition that the meaning of a word or expression defined may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in definition Section, namely, 'unless the context otherwise requires'. In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words in a particular Section. But where there is no obscurity in the language of the Section, there is no scope for the application of the rule ex visceribus actus. This Rule is never allowed to alter the meaning of what is of itself clear and explicit. The authorities redied upon by the High Court are, therefore, not applicable.

36. The next contention urged on behalf of the petitioner is in regard to the non-compliance of the conditions precedent to the exercise of power convening a Court Martial. Before dealing with this aspect of the matter it is worth considering the relevant statutory provisions in particular Rule 37 of the Army Rules of 1954 framed under the Act of 1950. Rule 37 reads as follows :-

"37. Convening of General and District Court-Martial.--

(1) An Officer before convening a Central or District Court-Martial shall first 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 on those charges, and if not so satisfied, shall order the release of the accused, or refer the case to superior Authority.

(2) He shall also satisfy himself that the case is a proper one to be tried by the kind of Court-Martial which he proposes to convene.

(3) The Officer convening a Court-Martial shall appoint or detail the officers to form the Court and may also appoint or detail, such waiting Officers as he thinks expedient. He may also, where he considers the services of an interpreter to be necessary, appoint or detail an interpreter to the Court.

(4) The officer convening a Court-Martial shall furnish to the senior member of the Court with the original charge sheet on which the accused to be tried and, where no judge-advocate has been appointed, also with a copy of the summary or abstract of evidence and the order for the assembly of the Court-Martial. He shall also send to all the other members, copies of the charge-sheet and to the judge-advocate when one has been appointed, a copy of the charge-sheet and a copy of the summary or abstract of evidence."

Rule 37(1) and (2) of the Rules, in my view, makes it obligatory on the part of the convening Officer to the effect that the Officer must himself look into the evidence and there is an element of personal satisfaction, There ought also to be a consideration of the evidence and upon such consideration the convening Officer must be satisfied that such evidence justifies the trial of the Officer on the proposed charges that is to say that there ought to be a proper and independent formation of opinion based on records.

37. Incidentally, though a definite case has been made out by the petitioner that there was no proper application of mind by the convening Officer and as such the requirement of Rule 37(2) was not complied with. The respondents, however, have chosen not to deal with the, said allegations in the counter affidavit. The convening Officer though made a party in the writ petition has not come out with any affidavit which is, in my view, cannot be overlooked by the Court. Statute enjoins certain functionaries to perform, certain duties and that particular functionary when made a party ought to have come out with a case in regard to the compliance of statutory requirement. A third person by virtue of a simple authority to sign and affirm, in my

view, is not a proper person to comply with strict rigours of law. In any event, in the counter affidavit filed by the respondent authorities it has been stated as follows :--

"I say that the General Officer (Commanding), Bengal Area, the convening Authority had fully satisfied himself in terms of Army Rule 37(1) in respect of charge and evidence. He had gone through the legal opinion of the Assistant Judge Advocate General 4 Corps on the evidence and charges and had satisfied himself in all respects before convening the General Court-Martial".

38. In the present case the respondent No. 2 was the convening Officer whether the respondent No. 2 himself looked into the evidence and was satisfied with the findings justifying a trial of the petitioner on the proposed charges ought to be a matter within the personal knowledge of the convening Officer being the respondent No. 2 in the present proceedings. The affidavit as it appears, have been affirmed by an Officer who is not even a party to the proceeding and therefore, no credence to the statement can or ought to be placed thereon and the criticism of Mr. Ghosh, in my view, is amply justified in the facts of the case.

39. In any event, the statement in the counter affidavit goes to show that the respondent No. 2 had gone through the legal opinion of the Assistant Judge Advocate General on the evidence and charges and had satisfied himself from that opinion and the evidence and charges before convening the General Court-Martial. This by itself shows that the respondent No. 2 arrived at his satisfaction upon consideration of the opinion of the Assistant Judge Advocate General which, in my view, is not permissible since Rule 37(1) requires that the convening Officer must apply his mind and look into the evidence himself. On a plain reading of the Rule what is required is the independent application of mind and not on the basis of some one else's opinion.

40. Mr. Das, however, appearing for the respondent authority referred to Rule 458 of the Defence Services Rules. Rule 458 reads as follows :--

"Reference to the Judge Advocate General's Department before trial--In all cases for trial by a General Court Martial, and all cases under the Army Act, all indecency, fraud, theft except ordinary theft, civil offences except simple assaults, the charge-sheet and ..... of evidence, and all the exhibits will be referred to by the convening Officer to the Deputy JAG of the Command before trial is ordered. The convening Officer who also referred for advice any other cases of doubt or difficulty. In all cases the doubts or difficulties and the matters of which advice is required will be specifically stated in the applications."

41. On a plain reading of Rule 458 of the Defence Services Rules it is clear and apparent that though the Regulation contemplates reference to Judge Advocate General before trial commences but the Regulation does not provide that the convening Officer to act on the opinion

or advice of the Judge Advocate General. Reference to the Judge Advocate General for advice of the Convening Officer can only be effected in case of doubt or difficulty but not otherwise. In this context reference to Rule 458 of the Defence Services Rules and in particular Rule 452D ought to be noted. Under Rule 452D it has been clearly laid down that the Commander under whose authority the convening order has been issued must personally satisfy himself as required in Army Rule 37 and a certificate to that effect must also in every such case] be attached to the convening order. It appears further from the records that an endorsement has been made at the foot of the opinion of the Assistant Judge Advocate General by another Officer to the effect that the petitioner should be tried by a Court-Martial. Immediately below there is another endorsement by the respondent No. 2, dated 14th January 1984 to read : "I agree, Convene GCM". In my view agreeing with an opinion formed by some one else that the petitioner should be tried by a Court-Martial is not sufficient compliance with Rule 37(1) of the Army Rules.

42. Assuming, however, that the Convening Officer has formed an opinion and that formation of opinion is a precondition of the convening of a General Court-Martial, but the Writ Courts, in my view, would be within its jurisdiction on the given set of facts to enquire whether the formation of opinion has been justified or not. It ought riot to be best sight of that the matter before this Court is not one which concerns the findings of fact arrived at by a disciplinary authority or a case where the Labour Court has come to certain findings of fact which are being challenged in a writ proceeding. The Supreme Court in the case of State of Uttar Pradesh and Ors. v. Sardar D.K. Yadav and Ors. reported in AIR 1968 SC 1186 observed that it is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled in a proceeding for a writ to be determined upon its own independent judgment whether or not that finding is correct.

43. Further in the case of Rohtas Industries v. S.D. Agarwal , the Supreme Court observed that whenever a provision of law confers certain power on an authority on its forming certain opinion on the basis of certain facts the Courts cannot and ought not to be precluded from examining whether the relevant facts on the basis of which the opinion is said to have been formed were in fact existed.

44. The same issue was further examined by the Supreme Court in the case of M.A. Rashid v. State of Kerala . The Supreme Court observed :

"Where powers are conferred on public authorities to exercise the same when "they are" satisfied" or when "it appears to them", or when "in their opinion" a certain state of affairs exists ; or when powers enable public authorities to take "such action as they think fit" in relation to a subject matter, the Courts will not readily defer to the conclusive-ness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of

the power is predicated."

45. The Supreme Court further observed :

"Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The Courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform any range from the Courts' own opinion of what is reasonable body might have decided. The Courts will find out whether conditions precedent to the formation of the opinion have a factual basis."

46. The decision of the Supreme Court in the case of Mrs. Labbkuwar Bhagawan Shaha v. Janardan Mahadev Kala reported in AIR 1963 SC 535, in my view, is strictly not relevant in the present context. It was strongly urged that there exists some evidence which requires investigation. But in my view, the evidence must be such so as to at least prima facie establish though not conclusively that the petitioner had committed the offence charged. If it falls short of this or if the evidance is untrustworthy then same would not be sufficient evidence in the eve of law. In fine, the Convening Officer ought to be satisfied that the evidence which is already on record justifies a trial of the petitioner on the proposed charge.

47. On the state of law as discussed above, it is, therefore, to be seen as to whether there was any factual basis for such formation of opinion against the petitioner. For convenience take such an analysis ought to be effected in relation to the charges levelled against the petitioner.

48. The 1st charge reads as follows :

"The accused No. MH-0166A Lt. Col. (Substantive) Amal Shankar Bhaduri of Military Hospital, Panagarh attached to base hospital Barrackpore an Officer holding of permanent commission in the regular army is charged with :-

Without sufficient cause overstaying leave granted to him.

In that he, at Panagarh having been granted leave of absence from 09 May 1983 to 11th May 1983, with permission to prefix 06 May 1983 being Sunday, to proceed to his home, failed without sufficient cause, to rejoin duty a Military Hospital at Panagarh on 12th May 1983."

49. As against the aforesaid charge the Parada Register being exhibit 'P' before the authority shows that the petitioner was present on 12th May 1983 and was on the ration strength of the Unit. The attendance register being Ext. 'Q' also categorically suggests that the petitioner was

present on 12th May 1983. The oral evidence of P.M. 7 Acharya as also the D.M. Maj. Mahlewat go to show that the petitioner was present on 12th May 1983. It is, however, on record as against this evidence that the petitioner was not seen by Maj. Pandarinath and Nayak Subedar Dogra at the Unit on 12th May 1983. It is to be noted in this context that Maj. Praharaj has countersigned the parade state register on 12th May 1983 certifying the correctness of the entries. Maj. Praharaj however was not called as a witness. P.W. 19 Gorai has stated that he saw the petitioner at Delhi on the morning of 12th May 1983 and P.W. 10 Inder Singh and P.W. 2 Dogra stated that they received the petitioner at Panagarh Station on 13th May 1983. P.W. 1 has stated that this was about 6 or 6-30 A.M. at Panagarh on 13th May 1983. The petitioner produced a certificate issued by the Railway Authorities being Ext. 'T' stating therein that the Kalka Mail passed through Panagarh at 8-44 A.M. on 13th May 1983. Another significant fact to be noted is that Kalka Mail stops at Durgapur and not at Panaragh. Therefore, the petitioner could not have possibly availed of Kalka Mail on 12th May reaching Panagarh on 13th May between 6 and 6-30 A.M. in the morning. The parade state register being Ext. 'P' further shows that Gorai himself was present at Panagarh on 12th May 1983. In that view of the matter, question of Gorai seeing of the petitioner at Delhi on 12th May 1983 is beyond any strength of imagination.

50. The petitioner has stated in his written statement that he had gone to Delhi, on 7th May 1983 as the whereabouts of his son were not known and he returned to Panagarh on 11th May 1983. Thereafter, on the morning of 12th May 1983 he left Panagarh for Durgapur at about 7-30 A.M. for his friend's house and from whose house he could avail of the STD telephone facility as he was still trying to find out the whereabouts of his son, who was still missing. The petitioner further stated that he came back to Panagarh at about 1-40 P.M. and afterwards met Maj. Mahlwat and his son. Later in the day as per the written statement of the petitioner he again went to Durgapur but as he could not come back that night, so he took the first train to Panagarh on the morning of 13th, May 1983 when he was received at the Station.

51. The documentary evidence, in my view, does not militate against the statement of the petitioner. On the contrary it corroborates the petitioner's version.

52. Having regard to the contemporary documentary evidence evidencing that" the petitioner was present on 12th May 1983 and having regard to the testimony of two Pws as also certain correspondence signed by the petitioner on 12th May 1983 as appears from. Ext. 'H' in my view, no prima facie case said to have been established against the petitioner in respect of the charge. Such formation of opinion in the matter initiating a general Court Martial does not stand to reason and can be said to be utterly perverse, entitling the Writ Court to quash the same. This is apart from the factum that the charge is of very trivial nature and the state of evidence does not justify the formation of opinion or the satisfaction of the convening officer in regard to the

initiation of a Court Martial proceedings as against the petitioner.

53. The second charge reads as follows :

"An act prejudicial to good order and military discipline, in that he at Panagarh while officer commanding military hospital, Panagarh in properly and without authority permit No. 13920Ck2 L/NE M. C. Gorai a sahayak, to be absent from duty from 12th May to 31st May 1983."

54. Section 63 of the Army Act provides that any person who is guilty of any act or omission which, though not specified in this Act is prejudicial to good order and military discipline usually on conviction by Court Martial be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned. Admittedly, the second charge has been levelled under Section 63 of the Army Act.

55. The charge itself manifests that another Officer absented him self from duty without leave for which responsibility is said to have been foisted on the petitioner though the concerned Officer was not proceeded with. In my view, at best the offence would be of aiding and abetting rather than an offence under Section 63 being an act prejudicial to good order and military discipline. Absence from duty without leave amounts to an offence under Section 39(b) of the Army Act with which L/NK Gorai could have been charged but not the petitioner under Section 63 of the Army Act. Aiding and abetting itself is an offence under Section 66 of the Army Act. As such the charge in any event, is wholly misconceived and in the view I have taken no trial could take place under Section 63 of the Army Act.

56. Apart from what is noted above, the principle question that arises for consideration in this regard is whether there existed any obligation or a duty under the Act or the Rules upon the petitioner to ensure presence of the petitioner's subordiate staff or an officer for duty. Unfortunately both the Act and the Rules are silent on that score. In my view, the answer is and ought to be in the negative. As noted above, there is no obligation on the part of the petitioner to ensure presence of his subordinate Officers and as such breach of good order and military discipline cannot be attributed to the petitioner. In this context, Note 3(a) of Section 63 of the Army Act is of some significance and as such the same is set out hereunder :

"3.(a) "An omission" to be punishable under this Section must amount to neglect which is wilful or culpable. If wilful, i.e., deliberate it is clearly blameworthy. If it is not wilful, it may or may

not be blameworthy, and the Court must consider the whole circumstances of the case, and in particular the responsibility of the accused. A high degree of care can rightly be demanded of a person who is in charge of a motor vehicle or public money or property, or who is handling fire-arms or explosives, where a slight degree of negligence may involve loss or danger to life; in such circumstances a small degree of negligence may be blameworthy. On the other hand, neglect which results from more forgetfulness, error of judgment or inadvertence, in relation to a matter which does not rightly demand a very high degree of care, would not be judged blameworthy so as to justify conviction and punishment. The essential thing for the Court to consider is whether in the whole circumstances of the case as they existed, at the time of the offence the degree of neglect proved is such as, having regard to their military knowledge of the amount of care which ought to have been exercised, renders the neglect substantially blameworthy and deserving of punishment."

Further the language of Section 63 is "prejudicial to good order and military discipline". The word "ought" used in this Section shows that both conditions must be satisfied. I am, however, Unable to accept the contention of Mr. Das that the action of the petitioner as regards the absence of L/NK Gorai amounts to an act prejudicial to good order or prejudicial to military discipline. Furthermore, the daily attendance register as well as the parade state register show the presence of L/NK Gorai from 12-5-83 to 31-5-83. Contemporary documents maintained by the military administration cannot be ignored. It is the interesting feature of this matter is that the Maj. Praharaj, the administrative Officer has signed the parade state register but was not called to testify the circumstances under which the name of L/NK Gorai finds place in the register maintained by the authority. Another redeeming feature as regards this charge is the lack of evidence as regards the acts or omissions or involvement of the petitioner in the matter. None of the witnesses have mentioned in their respective depositions any act or omission on the part of the petitioner in regard to the factum of permission to L/NK Gorai to be absent from duty without leave.

57. On the materials on record, therefore, I am of the view that the charge under Section 63 of the Act in no way can be substantiated as against the petitioner.

58. The third charge with which the petitioner was charged reads as follows :

"Such an offence as is mentioned is Clause (f) of Section 52 of the Army Act with intent to defraud, in that he at Panagarh on 25th June 1983 with intent to defraud caused a railway concession voucher (IAFT--1720A) bearing No. L/30, 754311 dated 28th June issued in the name of brother of No. 139 2012 L/Nk M. C. Gorai of military hospital, Panagarh for Journey from Panagarh to New Delhi and back vide (IAFT--1720A) bearing No. L/30, 764312 dated 28 June '78 to be used by Shri Ashok, his personal servant."

59. The charge has been framed under Section 52(f) of the Army Act. In order to appreciate the submissions made in this regard, it is necessary to refer to Section 52 of the Army Act. Section 52 reads as follows :

"52. Offences in respect of property--Any person subject to this Act who commits any of the following offences, that is to say (a) commits theft of any property belonging to the government, or to any military, naval or air force mass, band or institution, or to any person subject to military, naval or air force law; or

(b) dishonestly misappropriate or converts to his own use any such property ; or

(c) commits criminal breach of trust in respect of any such property ; or

(d) dishonestly receives or retains any such property in respect of which any of the offences under Clauses (a), (b) and (c) has been committed, knowing or having reason to believe the commission of such offence ; or

(e) wilfully destroys or injures any property of the Government entrusted to him ; or

(f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person;

shall, on conviction by Court Martial, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned."

60. Section 52 of the Army Act deals with offeffnces in respect of property. Section 52(a) to (e) show that each of the sub-sections is dealing with a specific act in regard to the property belonging to the Government or to the Army forces. In my view, Section 52(f) ought to be construed ejusdem generis. This view finds support from the decision of the Bombay High Court in the case of Maj. S.G. Barsay and Ors. v. The State reported in AIR 1958 Bom. 354. The Bombay High Court observed :

"In our opinion this contention is not well founded. Accused No. 1 is charged in this case is having entered into a criminal conspiracy with five others. Two of whom are public servants and three, are not public servants. It is no doubt true that the offences falling under Section 5(i)(c) and (d) of the Prevention of Corruption Act might fall under Section 52(b) of the Army Act cannot be accepted. Section 52 of the Army Act deals with offences in respect of government property or property belonging to any military, naval or air force mess, bank or institution or to any person subject to military, naval or air force law. Several clauses in that section deal with different kinds of offences which are liable to be committed in respect of such property. In our opinion the

language of Section 52 Clause (f) must be construed ejusdem generis and would not include the offence of criminal conspiracy, much less criminal conspiracy entered into by persons not governed by the provisions of the Act."

61. The petitioner has been charged as having caused Ashok to wrongfully use a particular railway concession voucher, in my view, considering the true purport of the language used in Section 52 the same would not come under Section 52(f) of Army Act. I am in respectful agreement with the view expressed by the Bombay High Court and am of the view that even if the petitioner had entered into an agreement with Ashok who wrongfully used the concession voucher, but such an agreement does not fall within the ambit of Sub-section (f) or amounts to an offence under Section 52(f) and as such the convening Officer could not have possibly been satisfied or formed an opinion on a charge under Section 52(f). The writ Court as such for the reasons abovenoted would be within its jurisdiction to declare such satisfaction as perverse.

62. Further, on a persual of the evidence on record as regards the charge concerned, it appears that there is no lots of evidence that the ticket on which Ashok travelled was obtained in exchange of the concession voucher issued in the name of Gorai's brother, neither there is my evidence about the involvement of the petitioner in regard to the user of a concession voucher by Ashok. Ashok was examined and there is no evidence to the effect that the petitioner gave him any concession voucher or ticket neither Ashok has said that the petitioner instructed him to use the concession voucher. There is thus absolutely no evidence at all that the petitioner caused Ashok to use that particular voucher. Streneous submissions have been made by Mr. Das as regards a chit fund on the desk of the petitioner. Admittedly, the concession vouchers are issued by the administrative Officer and the chit however does not bear the signature of the petitioner. If the chit had been given by way of instruction, it would have in the normal course of events been signed by the petitioner. The other significant feature would be that if the chit was supposed to be instruction it would have found its place in the administrative office rather than at the desk of the commanding Officer, a fortnight after the concession had been issued. From the records it appears that one Maj. Tewari was the Administrative Officer at the material time issued the voucher. Maj. Tewari would have been the best person to depose as to the circumstances under which the concession voucher was issued. So also one Baldeb Singh being the writer of the voucher. None of these two persons have been called to depose. The absence of which in my view, cannot be ignored. Another aspect of the matter, viz., the evidence of Thindal being P.W. 20, the officiating Head Clerk, in the Office of the Administrative Officer, keeps absolute silence as regards the chit affair. He does not say that any instructions were given by the petitioner for issue of the concession voucher or that he was asked to issue the voucher by the petitioner. The only evidence which is on record on which emphasis to was laid by Mr. Das is the evidence of Maj. Pandari Nath. The gist of his evidence as appears from record is that the chit being Ext. 'A'

was the instruction on the basis of which the concession voucher was issued in the name of Gorai's brother. In my view, by reason of the preponderance of evidence to the contrary and on consideration of the document itself the same can never be termed to be a basic document culminating in the issuance of a concession voucher. The petitioner in this regard, says that Gorai telephoned him from his house requesting that he should be issued a concession voucher for himself and his brother. The petitioner scribbled the requirement of Gorai but did not pass any instruction to his sub-ordinate staff for any such issue neither he has signed the chit for the purpose of giving effect to the said requirement. It was kept on his desk and no further step was taken in that regard.

63. Further on a proper construction of Section 52(f), it is clear and manifest that there must be an intent to defraud in regard to which, in my view, there is no evidence from which inference could reasonably be made that the petitioner by his acts intended to defraud.

64. That being the position, the charges, in my view, are perverse in nature capable of being quashed by the Court in exercise of its writ jurisdiction.

65. Last contention of Mr. Das appearing for the authority is that the Court cannot and ought not to go into the question of perversity since there is no specific prayer for quashing of a charge-sheet being Annexure 'H' to the writ petition. Admittedly, the petitioner prayed for the issuance of a high prerogative writ of mandamus commanding the respondent to act in accordance with law and to recall, rescind and withdraw the impugned convening order No. 00/084/262/A3 dated 9th March 1985 convening the General Court Martial to proceed against the petitioner being Annexure 'I' to the petition and to desist from proceeding further with the said Court Martial against the petitioner or any further acting upon the impugned order dated 9th March 1985. A writ of certiorari was also prayed for quashing or setting aside the order dated 9th March 1985 as also a writ of prohibition restraining the respondent from proceeding with a General Court Martial by reason of the convening order dated 9th March 1985. The order dated 9th March 1985 directs the petitioner to be tried by a Court Martial and the trial is in respect of the charges mentioned in Annexure 'H'. While it is true that there ought to be a prayer for quashing the charge sheet but absence of which would not justify to refuse the writ when the exigencies of the particular case demand it so. This view finds support from the decision of the Supreme Court in the case of Chiranjit Lal v. Union of Indian . In that decision the Supreme Court observed :--

"Article 32 of the Constitution of India gives such very wide discretion in the matter of framing our writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or trial has not been prayed for."

66. In my view, technical rules of pleading ought not to stand in the way in the matter of grant of

appropriate relief when the facts warrant such a decision and the Court ought not to exercise jurisdiction simply on the ground that there is no proper prayer for the same. The reliefs ought to be militated as per the situation and circumstances so as to afford complete reliefs to the person seeking the aid of Law Courts. If on the existing material there is no ground for the formation of an opinion in the matter of initiation of a General Court Martial then in my view, there can hardly be any point in continuing with the General Court Martial and going through the formality of a trial and such a course would merely result in unnecessary harassment without serving the cause of justice.

67. In that view of the matter, this writ petition succeeds. The charge sheet being Annexure 'H' to the petition as well as the order convening the General Court Martial being Order No. 001084/262/A3 dated 9th March 1985 are quashed and set aside. There shall, however, be no order as to costs.

68. [Stay of] Operation of the Order as prayed for is granted for a period of three weeks after the X'mas Vacation.