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CASE NO.:
Special Leave Petition (civil) 7347 of 1999

PETITIONER:
UNION OF INDIA & ANR.

Vs.

RESPONDENT:
CHARANJIT S. GILL & ORS.

DATE OF JUDGMENT: 24/04/2000

BENCH:
G.B. Pattanaik, R.P. Sethi & Shivaraj V. Patil.

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JUDGMENT:

SETHI, J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J

Finding that the Judge Advocate was lower in rank to the accused facing trial before a General Court Martial (hereinafter referred to as "GCM"), the Division Bench of the High Court set aside the order of the Trial Court and the entire Court Martial proceedings conducted against the respondent No.1. The Bench, however, observed that the quashing of the proceedings of the GCM will not prevent the authorities concerned to initiate fresh court martial proceedings if they are so advised in accordance with law and also in the light of the judgment delivered. Feeling aggrieved by the aforesaid judgment the present appeal has been filed with a prayer for setting aside the impugned judgment and upholding the order of the GCM as well as the learned Single Judge.

The relevant and almost admitted facts for determining the controversy in this appeal are that the first respondent joined the Indian Army as a Commissioned Officer in 1971 and was promoted to the rank of Major in 1984. He was posted at Fort William, Calcutta in April, 1990. While attached with 235 IWT company, Engineers, the respondent No.1 was alleged to have absented himself without leave on four occasions which was an offence under Section 39(1) of the Army Act. He was also charged under Section 63 of the Army Act for violation of good order and military discipline. A GCM was convened by the General Officer Commanding (GOC), Bengal Area by his order dated 23rd December, 1991. The court martial comprised of Col.Rabinder Bahadur Singh as Presiding Officer and Col. Kunjachen Puthenveetil Sebastian, Col. Prakash Nambiar, Col. Mahitosh Deb and Major Kadam Netaji Kesharuo as Members. Capt. Vashishta Arun Kumar, Dy. Assistant Judge Advocate General was appointed as Judge Advocate in the court martial proceedings. The respondent No.1 was found guilty of four out of five charges by the GCM and was sentenced to forfeit six months service for the purposes of promotion. The order of conviction and sentence

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was, however, made subject to the confirmation by the Confirming Authority to whom the proceedings were transmitted by the GCM in terms of Section 153 of the Army Act. The Confirming Authority felt that the sentence awarded to the respondent No.1 by the GCM was grossly inadequate and inappropriate which required review. The order of the Confirming Authority dated 2.5.1992 was conveyed to the GCM which on 19.5.1992 upon, re-consideration revoked the earlier sentence and passed a fresh order of sentence of dismissing the respondent No.1 from service. This order was also made subject to confirmation by the Confirming Authority.

Aggrieved by the order of conviction and sentence passed by the GCM, the respondent No.1 filed writ petition being CO No.7102(W) of 1992 in the High Court at Calcutta praying therein for quashing orders dated 23.12.1991, 10.2.1992, 2.5.1992 and 19.5.1992. At the time of admission of the writ petition a learned Single Judge of the High Court passed an interim order on 29th May, 1992 directing the appellants not to confirm the impugned order of dismissal and not to take any steps against respondent No.1, without the leave of the Court. The interim order was, however, vacated by the learned Single Judge on 16.12.1996 allowing the Confirming Authority to complete the process of confirmation and passing appropriate orders. Consequently, the GCM proceedings were confirmed on 17.12.1996 and the respondent No.1 was dismissed from service on 18.12.1996. The writ petition filed by the first respondent was dismissed by the learned Single Judge on 3rd July, 1997. Feeling aggrieved by the judgment of the learned Single Judge the respondent No.1 preferred appeal being MAT No.2181/97 before the Division Bench which was allowed vide the order impugned in this appeal.

In his writ petition the respondent No.1 is stated to have alleged that in the year 1987-88 when he was posted as@@
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Garrison Engineer in Jammu & Kashmir State under the@@
JJJJJJJJJJJJJJJJJJJJ
Northern Command, he had pointed out to the higher authorities some embezzlement instances involving Rs.22.49 lacs in which Major S.K. Datta and Col. S.C. Gulati were allegedly involved. He alleged that because of his reporting the case of embezzlement he incurred animosity of the persons in the higher echelons of the Army. He submitted that in the year 1990 he had made a direct complaint to the Chief of the Army Staff, Army Headquarters, New Delhi with regard to the aforesaid embezzlement which, according to him, generated further feelings of animosity and ill-will against him. He was attached to 235 IWT Company on 14th September, 1990 and allegedly not given any duty after attachment to the said unit. On 22nd October, 1990, the Commanding Officer of 235 IWT Company called upon the respondent No.1 to produce the evidence by 25th October, 1990 in connection with his allegations of embezzlement. At that time the Company to which he was attached was stationed at Alambazar, near Dakshineswar, just outside Calcutta and his family was residing at Fort Williams, Calcutta. He was served with a chargesheet on 18th November, 1991 signed by the Commanding Officer, 121, Infantry Battalian (TA) which was endorsed by the General Officer Commanding, Bengal Area. Though the respondent No.1 was posted to 235 IWT Company

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vide order dated 12th September, 1990 he was attached on 23rd March, 1991 under the provisions of Army Instructions 30 of 1986 to 121 Infantry Battalion (TA) till finalisation of the disciplinary proceedings which had been initiated against him. The charge-sheet dated 18th November, 1991 disclosed the commission of offences punishable contrary to Sections 39(a) and 63 of the Army Act. The respondent No.1 in his petition had prayed for quashing and setting aside of orders dated 23rd December, 1991 convening the GCM, order dated 10th February, 1992 finding the respondent No.1 guilty and imposition of the sentence by GCM, order dated 2nd May, 1992 exercising the revisional jurisdiction by the GOC, BA and order dated 19th May, 1992 revising the initial sentence and dismissing the respondent No.1 from service. The grounds of challenging the aforesaid orders were as under:

"1. The composition of the GCM, as was determined by the Convening Order dated 23rd December, 1991 was bad in law because Captain Arun Kumar Vashistha was not qualified to be appointed as a Judge Advocate in the said GCM. This ground of challenge is based on two counts, firstly because no officer of a rank inferior to the accused can be appointed as a Judge - Advocate in GCM and secondly the participation of the Judge-Advocate in the proceedings held on 18th and 19th May, 1982 upon revision was bad since he was not entitled to take part in the proceedings after 10th February, 1992 when the GCM proceedings had originally stood concluded.

2. GOC, BA had no jurisdiction to either convene the GCM vide his order dated 23rd December, 1991 or to pass the order dated 2nd May, 1992, as he was neither a properly appointed nor a properly designated Convening Authority for the purposes of convening a GCM nor could he be deemed considered to be a legally and validly appointed conforming authority for the purposes of exercising the power under Section 160 of the Army Act. In either event, his act of convening the GCM was illegal and therefore the proceedings of the GCM on that ground were void ab initio. Similarly since he did not have any power to act a confirming authority, he had no jurisdiction to exercise any power under section 160 of the Army Act and order revision of the sentence. Reliance was placed upon Regulation 472 of the Regulations for the Army in support of this contention.

3. The order dated 2nd May, 1992 was bad in law because while exercising revisional jurisdiction under Section 160 of the Army Act, the GOC, BA not only expressed his views and opinion about the merits of the case but the order amounted to almost a direction upon the GCM, and the GCM comprising, as it were, of the officers subordinate to GOC, BA had no option but to revise the sentence, as was desired by GOC, BA.

4. GOC, BA was also not an appropriate Convening Authority for the purposes of convening a GCM as the petitioner was not serving under him. Since the petitioner was serving in the Head Quarter, Eastern Command, it was only GOC-in-C who could be considered to be the appropriate, convening authority in respect of the petitioner for convening a GCM. Merely because the petitioner was attached to a unit which was under the control of GOC, BA, that by itself did not make GOC, BA the duly appointed convening

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authority for convening a GCM. Reliance was placed upon the contents of warrant A-1 appointing GOC, BA and GOC-in-C as respective convening authorities.

5. The sentence of dismissal for a minor offence like being absent without leave, and for committing an offence under section 63 of the Army Act was highly and grossly disproportionate to the gravity of the offence. Even if the proceedings of the GCM and the finding of "guilty" was to be upheld by this court, the initial sentence of forfeiture of six months of service for the purpose of promotion was a reasonable punishment in the facts and circumstances of this case.

6. Distinction has to be drawn between "absent from a place" and absence from duty" because in the facts and circumstances in which the petitioner was placed, the petitioner was not allocated or entrusted with any duties and therefore if he absented from a place, without there being any duty that he was to perform, Section 39 of the Army Act could not be attracted in his case and therefore he could not be held guilty of the charges levelled against him.

7. The appropriate Confirming Authority have been prescribed in Regulation 472 and even though this Regulation is not statutory in character and has not been issued under Section 192 of the Army Act, yet it amounting to an executive instruction has the force of law and thus supersedes the warrants issued by the Central Government under Section 164 of the Army Act. The contention is that the authorities prescribed in Regulation 472 alone are competent to act as confirming or convening authorities and that the authorities appointed under the warrants by the Central Government in exercise of the powers vesting in its under Section 154 have no jurisdiction to act as such.

8. The order dated 17th December, 1996 is bad because it was passed without affording the petitioner an opportunity of submitting a pre- confirmation representation, as was directed by this court on 16th December, 1996."

None of the grounds found favour with the learned Single Judge who after hearing dismissed the writ petition. The respondent No.1 was, however, given two weeks time to vacate the accommodation occupied by him upon his giving an undertaking. The appeal filed against the judgment of the learned Single Judge was allowed holding: "However, without deciding any other point we are of the view that a Judge-Advocate being lower in rank to an accused officer should not be able to take part in the general court-martial proceedings for the above reason."

Mr.Rawal, the learned Additional Solicitor General appearing for the appellants has vehemently argued that as the Judge Advocate is only a Legal Advisor and not a member of the Court Martial, his rank is not material for being appointed as such to assist the GCM. It is further contended that under the Army Act, Rules and Regulations made thereunder, there was no obligation for the appellants to appoint a Judge-Advocate who should have been senior in rank to the accused on the analogy that the members of the court martial who tried the accused are required to be of

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the same or higher rank to the accused officers. According to him there are separate provisions under the Act, Rules and Regulations for members and Judge-Advocate at GCM laying down their eligibility, disqualifications, duties, etc. Relying upon Note 2 attached to Rule 102, the learned counsel has submitted that the disqualification for being a Judge-Advocate in a court martial is referable to Rule 39(2) alone which cannot be stretched further to Rule 40(2) of the Rules. It is contended that the Division Bench of the High Court has not properly interpreted the provisions of Sections 113 and 129 of the Act and Rules 39, 40 and 102 of the Army Rules. Appearing for the respondent No.1 Mr.Ranjit Kumar, Advocate has submitted that the combined reading of@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Rules 39, 40 and 102 makes it clear that if the@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Judge-Advocate is lower in rank than the accused facing the trial in GCM, the proceedings are liable to be quashed. According to him the provisions of Rule 39 read with Rules 40 and 102 of the Army Rules leave no doubt that the Judge-Advocate appointed for the trial of an officer by the GCM should be a rank not lower than that of the Officer facing the trial. He has submitted that though, technically the Judge-Advocate is an Advisor to the prosecution, yet in practice he wields a great influence upon the verdict of the court in view of the powers conferred upon him under the Act and the Rules. He has specifically referred to the provisions of Rules 60, 61, 62 and 105 of the Rules to emphasise the importance of the role played by the Judge-Advocate during the trial in a court martial. In order to appreciate the rival contentions of the learned counsel for the parties it is necessary to take note of some of the relevant provisions of the Act, the Rules and the Regulations made thereunder. The Act was enacted on 20th May, 1950 and enforced w.e.f. 22nd July, 1950 to consolidate and amend the law relating to the Government of the regular Army keeping in view the report of the Select Committee appointed for the purpose. Prior to the enactment of Army Act, 1950, there existed the Indian Army Act, 1911 made and applied by the British Rulers. Feeling that some of the provisions of the 1911 Act had become out of date and insufficient for modern requirements after independence, a need for revision was felt to have become imperative for obvious reasons. However, the scheme of the Act by and large remained the same as was incorporated in Army Act, 1911. The Act has been found to be suffering from various draw-backs as were pointed out by this Court in Lt.Col. Prithi Pal Singh Bedi vs. Union of India & Ors. [1982 (3) SCC 140]. This Court hoped and stressed that changes all over the English speaking democracies would awaken the Parliament to the changed system as regards the Armed Forces. Merely by joining the Armed Forces a person does not cease to be a citizen so as to be wholly deprived of his rights under the Constitution. While dismissing the writ petitions in that case, this Court noticed with anguish and concern and observed: "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 394] that even

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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 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 that Justice William O'Douglas observed: "[T]that 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." In Reid v. Covert {1 L Ed 2d 1148: 354 US 1 (1957)] Justice Black observed at page 1174 as under:

Court 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 personnel are in the executive chain of command. Frequently, the members of the court marital must look to the appointing officer for promotions, advantageous assignments and efficiency ratings - 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 of otherwise of punishment is a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to hierarchy of courts. Submission that full review of finding and/or sentence in confirmation proceedings 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 a 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

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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 proceedings 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 altar of military discipline. Unjust decision would be subversive of discipline. There must be a judicious admixture of both. An 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 in it 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 (Appeal) 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 of 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 persons 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 has also 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 954-955 pp. 458-59). Frankly the appellate court has power to full judicial review unhampered by any procedural claptrap.

Turning towards the U.S.A., a refernece 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. Waiwright (372 US 335 1963)). Between 1950 and 1968 when the Administration of Justice Act, 1968 was introduced, many

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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 seem 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 of the glaring anomaly that courts 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."

Despite lapse of about two decades neither the Parliament nor the Central Government appears to have realised their constitutional obligations, as were expected by this Court, except amending Rule 62 providing that after recording the finding in each charge the Court shall give brief reasons in support thereof. The Judge-Advocate has been obliged to record or caused to be recorded brief reasons in the proceedings. Even today the law relating to Armed Forces remains static which requires to be changed keeping in view the observations made by this Court in Prithi Pal Singh Bedi's case (supra), the constitutional mandate and the changes effected by other democratic countries. The time has come to allay the apprehension of all concerned that the system of trial by court martial was not the arch type of summary and arbitrary proceedings. In the absence of effective steps taken by the Parliament and the Central Government, it is the constitutional obligation of the courts in the country to protect and safeguard the constitutional rights of all citizens including the persons enrolled in the Armed Forces to the extent permissible under law by not forgetting the paramount need of maintaining the discipline in the Armed Forces of the country. The court martials under the Act are not courts in the strict sense of the term as understood in relation to implementation of the civil laws. The proceedings before court martial are more administrative in nature and of the executive type. Such courts under the Act, deal with two types of offences, namely, (1) such acts and omissions which are peculiar to the Armed Forces regarding which no punishment is provided under the ordinary law of the land and (2) a class of offences punishable under the Indian Penal Code or any other legislation passed by the Parliament. Chapter VI of the Act

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deals with the offences. Sections 34 to 68 relate to the offences of the first description noted hereinabove and Section 69 with civil offences which means the offence triable by an ordinary criminal court. Chapter VII provides for punishments which can be inflicted in respect of offences committed by persons subject to the Act and convicted by court martial, according to the scale provided therein. Chapter X deals with court martials. Section 108 provides that for the purposes of the Act there shall be four kinds of court martials, that is to say,

(a) general court-martial;
(b) district court-martial;
(c) summary general court-martial; and
(d) summary court-martial.

Court martials can be convened by persons and authorities as specified in Sections 109, 110, 112 and 118 of the Act. The procedure of court martials is detailed in Chapter XI of the Act. Section 129 mandates that every general court-martial shall be attended by a judge advocate, who shall be either an officer belonging to the department of Judge Advocate-General or if no such officer is available, an officer approved by the Judge-Advocate General or any of his deputies. The accused has a right to challenge the name of any officer composing the court martial which obviously means that no such objection can be raised regarding the appointment of the Judge-Advocate. No findings or sentence of a general, district or summary general court martial shall be valid except so far as it may be confirmed as provided under the Act. Under Section 158, the confirming authority has the power to mitigate or remit the punishment awarded by the court martial or commute that punishment for any punishment or punishments lower in the scales laid down in Section 71. Under Section 160 the confirming authority has the power to direct a revision of the finding of a court martial and on such revision, the court, if so directed by the confirming authority, may take additional evidence. Any person, subject to the Act, who considers himself aggrieved by any order passed by the court martial can present a petition to the officer or authority empowered to confirm any finding or sentence of such court martial and in that case the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceedings to which the order relates. There is no provision for preferring an appeal against the findings of the court martial.

In exercise of the powers conferred by Section 191 of the Act the Central Government have framed the Rules called the Army Rules, 1954. Chapter V of the Rules deals with the investigation of charges and trial by court-martial. Court-martials are convened in terms of Rule 37. Rule 39 prescribes ineligibility and disqualification of officers for court-martial. It reads:

"Ineligibility and disqualification of officers for court- martial --(1) An officer is not eligible for serving on a court-martial if he is not subject to the Act.

(2) An officer is disqualified for serving on a general or district court-martial if he --

(a) is an officer who convened the court; or

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(b) is the prosecutor or a witness for the prosecution; or

(c) investigated the charges before trial, or took down the summary of evidence, or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the squardon, battery, company, or other commander, who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or

(d) is the commanding officer of the accused, or of the corps to which the accused belongs; or

(e) has a personal interest in the case."

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

Rule 40 provides:

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

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

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

Rule 44 provides that the order convening the court and the names of the Presiding Officer and the members of the court shall 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 sitting on the court. Such objection when raised is required to be disposed of in accordance with the provisions of Section 130. The accused before pleading to a charge, may offer a special plea to the jurisdiction of the court and if he does so, the court shall decide it. If the objection regarding such plea is overruled, the court shall proceed with the trial and if such plea is allowed, the court is required to record its reason and report to the convening authority and adjourn the proceedings (Rule 51). Rules 52, 53, 54, 55 and 56 deal with the recording of the plea of "guilty" or "not guilty". In case the accused pleds not guilty, the trial is to commence and after the close of the case of the prosecution, the Presiding Officer or the Judge-Advocate is required to explain to the accused that he may make an unsworn statement orally or in writing giving his account of the subject of charges against him or if he wishes he may give evidence as witness on oath or affirmation, in disproof of the charges against him or any person to be charged with

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him at the same trial. After the examination of the witnesses, the prosecutor may make a closing address and the accused or his counsel or the defending officer, as the case may be, shall be entitled to reply. The Judge- Advocate is authorised to sum up in open court the evidence and advise the court upon the law relating to the case. Rule 61 provides that the court shall deliberate on its finding in closed court in the presence of the Judge-Advocate and Rule 62 provides the form, record and announcement of finding.

Referring to various provisions of the Act and the Rules as noticed earlier, the learned counsel appearing for respondent No.1 has argued that in effect and practice the Judge-Advocate is the 'court' and the 'court-martial' is the jury for all practical purposes so far as the trial of the accused is concerned. The argument may be exaggerated version of the reality but is not totally without substance inasmuch as the powers exercised by the Judge-Advocate indicate that though not forming part of the court-martial, he is an integral part thereof particularly in court-martials which cannot be conducted in his absence. It cannot be denied that the justice dispensation system in the Army is based upon the system prevalent in the Great Britain. The position of the Judge-Advocate is by no means less than that of a Judge-Advocate associated with a court-martial in that country. The importance of the role of the Judge-Advocate in U.K. was noticed and considered in R v. Linzee [1956 (3) All E.R.].

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

The importance of role played by a Judge-Advocate was noticed by this Court in S.N. Mukherjee vs. Union of India [1990 (4) SCC 594] wherein it was held: "From the provisions referred to above it is evident that the judge-advocate plays an important role during the course of trial at a general court martial and he is enjoined to maintain an impartial position. The court martial records its findings after the judge-advocate has summed up the evidence and has given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It is also required that the sentence should be announced forthwith in open court. Moreover Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement because if such a

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requirement was there it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons for its finding and sentence by the court martial and reasons are required to be recorded only in cases where the court martial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the court martial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy if the court martial makes such a recommendation.

As regards confirmation of the findings and sentence of the court martial it may be mentioned that Section 153 of the Act lays down that no finding or sentence of a general, district or summary general, court martial shall be valid except so far as it may be confirmed as provided by the Act. Section 158 lays down that the confirming authority may while confirming the sentence of a court martial mitigate or remit the punishment thereby awarded, or commute that punishment to any punishment lower in the scale laid down in Section 71. Section 160 empowers the confirming authority to revise the finding or sentence of the court martial and in sub-section (1) of Section 160 it is provided that on such revision, the court, if so directed by the confirming authority, may take additional evidence. The confirmation of the finding and sentence is not required in respect of summary court martial and in Section 162 it is provided that the proceedings of every summary court martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held or to the prescribed officer; and such officer or the Chief of the Army Staff or any officer empowered in this behalf may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed. In Rule 69 it is provided that the proceedings of a general court martial shall be submitted by the judge-advocate at the trial for review to the deputy or assistant judge-advocate general of the command who shall then forward it to the confirming officer and in case of district court martial it is provided that the proceedings should be sent by the presiding officer, who must, in all cases, where the sentence is dismissal or above, seek advice of the deputy or assistant judge-advocate general of the command before confirmation. Rule 70 lays down that upon receiving the proceedings of a general or district court martial, the confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation, or reservation shall be entered in and form part of the proceedings. Rule 71 lays down that the charge, finding and sentence, and any recommendation to mercy shall, together with the confirmation, non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct, and if no direction is given, according to custom of the service and until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated."

In view of what has been noticed hereinabove, it is apparent that if a 'fit person' is not appointed as a judge-advocate, the proceedings of the court martial cannot be held to be valid and its finding legally arrived at.

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Such an invalidity in appointing an 'unfit' person as a judge-advocate is not curable under Rule 103 of the Rules. If a fit person possessing requisite qualifications and otherwise eligible to form part of the general court martial is appointed as a judge-advocate and ultimately some invalidity is found in his appointment, the proceedings of the court martial cannot be declared invalid. A "fit person" mentioned in Rule 103 is referable to Rules 39 and 40. It is contended by Shri Rawal, learned ASG that a person fit to be appointed as judge-advocate is such officer who does not suffer from any ineligibility or disqualification in terms of Rule 39 alone. It is further contended that Rule 40 does not refer to disqualifications. We cannot agree with this general proposition made on behalf of the appellant inasmuch as Sub-rule (2) of Rule 40 specifically provides that members of a court-martial for trial of an officer should be of a rank not lower than that of the officer facing the trial unless such officer is not available regarding which specific opinion is required to be recorded in the convening order. Rule 102 unambiguously provides that "an officer who is disqualified for sitting on a court martial shall be disqualified for acting as a judge-advocate in a court martial". A combined reading of Rules 39, 40 and 102 suggest that an officer who is disqualified to be a part of court martial is also disqualified from acting and sitting as a judge-advocate at the court martial. It follows, therefore, that if an officer lower in rank than the officer facing the trial cannot become a part of the court martial, the officer of such rank would be disqualified for acting as a judge-advocate at the trial before a GCM. Accepting a plea to the contrary, would be invalidating the legal bar imposed upon the composition of the court in sub-rule (2) of Rule 40.

Arguments of the learned ASG, if analysed critically, and accepted would mean that in effect and essence no disqualification or eligibility can be assigned to any officer in becoming a judge-advocate. Stretching it further it can be argued that as Rule 40 does not refer to the ineligibility or disqualification of an officer to be a judge-advocate, even an officer below the rank of a Captain can become a member of the court martial for the trial of a Field Officer as bar of sub-rule (3) of Rule 40 is not applicable. Such an interpretation is uncalled for and apparently contradictory in terms.

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

It has been argued that as officers of the same rank or

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higher in rank than the officers facing the trial in court@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ martials are not available, an interpretation as rendered by@@ JJJJJJJJJJJJJJ the impugned judgment would render the holding of court martials impossible. Such an argument is to be noticed for only being rejected. Sub-rule (2) of Rule 40 itself gives a discretion to the convening officer who is authorised to appoint a member of the court-martial or judge-advocate who is lower in rank than the officers facing the trial, if he is of the opinion that officer of such rank is not (having due regard to the exigencies of the public service) available, subject to a further condition that such opinion is required to be recorded in the convening order. It implied, therefore, that the provisions of sub-rule (2) of Rule 40 are not mandatory because they give a discretion to appoint a member of the court martial or a judge-advocate who is lower in rank than the officer facing the trial under the circumstances specified. Rule 39, admittedly, has no exception and is thus mandatory.

Further relying upon Note 2 mentioned at the foot of Rule 102 providing, "as to disqualification of a judge-advocate CAR 39(2)", the learned ASG submitted that the said Note having the force of law has been followed by the Army authorities from the very beginning and thus disqualifications of a judge-advocate are referable to only Rule 39(2) of the Rules. It is contended as the source of the Rules and the Note thereto is the same, the efficacy of Note 2 cannot be minimised. The Army authorities, according

to the learned ASG have understood Rules 39, 40 and 102 in this context while making appointments of the judge-advocate.

In response to our directions an affidavit has been filed on behalf of the appellants with respect to:

(a) the authority which had prepared the Notes appearing in Army Act, 1950 and Army Rules, 1954

(b) the year in which these Notes were incorporated in the Army Act, 1950 and Army Rules, 1954.

(c) the authority which had approved these Notes to be incorporated in the Army Act and the Rules framed thereunder. stating therein:

"That Army Act, 1950 was enacted on the pattern of the Indian Army Act, 1911 and Army Rules, 1954 are on the pattern of Indian Army Act Rules, Army Rule 89 of Indian Army Act Rules dealt with disqualifications of Judge-advocate. It also had note stating that for disqualification, see the Rule dealing with the Rule pari materia to Rule 39 of the present Rules that is Army Rules, 1959.

That the manual of Indian Military Law, 1937, published by Govt. of India, Ministry of Defence (Corrected upto 1960) Reprint 1967, also contains Indian Army Act, 1911 with Notes as well as the Indian Army Act Rules with Notes. Since this was 1967 reprint, in this manual even Army Act, 1950 and Army Rules, 1954 are also contained.

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That in the year 1978 the JAG's Department compiled the Army Act & Rules in the new Manual with a view to make it more convenient for reference. Prior to it, as stated above, the Military Law of the country was outlined in the Manual of Military Law, 1937. The Manual contained the Indian Army Act, 1911, the Indian Army Act & Rules and explanatory notes under various Sections and Rules. The passage of time necessitated revision of the Manual and incorporation of explanatory notes under the relevant sections and clauses of the Army Act, 1950 and Army Rules, 1954. It also became necessary to include some other enactments essential to the subject, and to exclude from the Manual the repealed Indian Army Act, 1911 and the superseded Indian Army Act Rules. The Manual of Military Law containing explanatory Notes under the current and operative Army Act & Rules were issued in 1983.

That as stated above, the Manual of Military Law issued in 1983 was compiled by the office of Judge Advocate General and approved by the Govt. as evident from the preface of the Manual.

That the Notes to Army Act and Army Rules were appended to Indian Army Act, 1911 and the Indian Army Act Rules and were followed as explanatory Notes and guidance. These suitably modified and amended were formally appended to the relevant provisions of the Army Act, 1950 and Army Rules, 1954 in 1983 after the same were duly approved by the Govt. That no facts which were not pleaded before court below have not been pleaded."

However, no material has been placed on record to show that the Notes appended to the Rules were duly approved by the Government. Per contra the respondent No.1 in his affidavit has submitted that the Notes under Sections and Rules as are found under various provisions of law compiled by the Army authorities in the Manual of Military Law do not form part of the Army Act, 1950 and Army Rules, 1954. The Rules of 1954 are stated to have been borrowed from the Indian Army Act, 1911 and the Rules framed thereunder. It is contended that the Notes are not law passed by Parliament and have not been vetted even by the Ministry of Law & Justice or by the Law Commission. It is not disputed that Section 191 of the Army Act empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the Act and Section 192 to make regulations for all or any of the provisions of the Act other than those specified in Section 191. All Rules and Regulations made under the Act are required to be published in the official gazette and on such publication shall have the effect as if enacted in the Act. No power is conferred upon the Central Government of issuing Notes or issuing orders which could have the effect of the Rules made under the Act. Rules and Regulations or administrative instructions can neither be supplemented nor substituted under any provision of the Act or the Rules and Regulations framed thereunder. The administrative instructions issued or the Notes attached to the Rules which are not referable to any statutory authority cannot be permitted to bring about a result which may take away the rights vested in a person governed by the Act. The Government, however, has the power to fill up the gaps in supplementing the rules by issuing instructions if the Rules are silent on the subject provided the instructions issued are not inconsistent with the Rules already framed.

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Accepting the contention of holding Note 2 as supplementing Rules 39 and 40 would amount to amending and superseding statutory rules by administrative instructions. When Rule 39 read with Rule 40 imposes a restriction upon the Government and a right in favour of the person tried by a court-martial to the effect that a person lower in rank shall not be a member of the court martial or be a judge-advocate, the insertion of Note 2 to Rule 102 cannot be held to have the effect of a Rule or Regulation. It appears that the 'notes' have been issued by the authorities of the Armed Forces for the guidance of the officers connected with the implementation of the provisions of the Act and the Rules and not with the object of supplementing or superseding the statutory Rules by administrative instructions. After examining various provisions of the Act, the Rules and Regulations framed thereunder and perusing the proceedings of the court-martial conducted against the respondent No.1, we are of the opinion that the judge-advocate though not forming a part of the court, yet being an integral part of it is required to possess all such qualifications and be free from the disqualifications which relate to the appointment of an officer to the court-martial. In other words a judge-advocate appointed with the court-martial should not be an officer of a rank lower than that the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public service) available and the opinion regarding non-availability is specifically recorded in the convening order. As in the instant case, judge-advocate was lower in rank to the accused officer and no satisfaction/opinion in terms of sub- rule (2) of Rule 40 was recorded, the Division Bench of the High Court was justified in passing the impugned judgment, giving the authorities liberty to initiate fresh court-martial proceedings, if any, if they are so advised in accordance with law and also in the light of the judgment delivered by the High Court.

Fears have been expressed that in case the proceedings of the court-martial are quashed on the ground of the judge-advocate being lower in rank than the officer facing trial before the court-marital, many judgments delivered, orders passed and actions taken by various court-martials till date would be rendered illegal as according to appellants a number of court-martials have already been held and conducted under the assumption of the disqualification not being referable to Rule 40(2), on the strength of Note 2 attached to Rule 102 of the Rules. In that event, it is apprehended, a flood-gate of new litigation would be opened which ultimately is likely to not only weaken the discipline in the Armed Forces but also result in great hardship to all those whose rights have already been determined. Such an apprehension is misplaced in view of "de facto doctrine" born out of necessity as acknowledged and approved by various pronouncements of the courts. This Court in Gokaraju Rangaraju vs. State of Andhra Pradesh [1981 (3) SCC 132] applying the de facto doctrine in a case where the appointment of a judge was found to be invalid, after reference to various judgments and the observations of the constitutional experts held:

"A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect

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of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de factor doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commended for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

We do not agree with the submission of the learned counsel that the de facto doctrine is subject to the limitation that the defect in the title of the judge to the office should not be one traceable to the violation of a constitutional provision. The contravention of a constitutional provision may invalidate an appointment but we are not concerned with that. We are concerned with the effect of the invalidation upon the acts done by the judge whose appointment has been invalidated. The de facto doctrine saves such acts. The de facto doctrine is not a stranger to the Constitution or to the Parliament and the Legislatures of the States. Article 71(2) of the Constitution provides that acts done by the President or Vice-President of India in the exercise and performance of the powers and duties of his office shall not be invalidated by reason of the election of a person as President or Vice-President being declared void. So also Section 107(2) of the Representation of the People Act, 1951 (43 of 1951) provides that acts and proceedings in which a person has participated as a member of Parliament or a member of the legislature of a State shall not be invalidated by reason of the election of such person being declared to be void. There are innumerable other Parliamentary and State legislative enactments which are replete with such provisions. The twentieth amendment of the Constitution is an instance where the de facto doctrine was applied by the constituent body to remove any suspicion or taint of illegality or invalidity that may be argued to have attached itself to judgments, decrees, sentences or orders passed or made by certain District Judges appointed before 1966, otherwise than in accordance with the provision of Article 233 and Article 235 of the Constitution. The twentieth amendment was the consequence of the decision of the Supreme Court in Chandra Mohan v. State of U.P. [1967 (1) SCR 77], that appointments of District Judges made otherwise than in accordance with the provisions of Article 233 and 235 were invalid. As such appointments had been made in many States, in order to pre-empt mushroom litigation springing up all over the country, it was apparently though desirable that the precise position should be stated by the constituent body by amending the Constitution. Shri Phadke, learned counsel for the appellants, argued that the constituent body

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could not be imputed with the intention of making superfluous amendments to the Constitution. Shri Phadke invited us to say that it was a necessary inference from the twentieth amendment of the Contitution that, but for the amendment, the judgments, decrees, etc. of the District Judges appointed otherwise than in accordance with the provisions of Article 233 would be void. We do not think that the inference suggested by Shri Phadke is a necessary inference. It is true that as a general rule the Parliament may be presumed not to make superfluous legislation. The presumption is not a strong presumption and statutes are full of provisions introduced because abundans cautela non nocet (there is no harm in being cautious). When judicial pronouncements have already declared the law on the subject, the statutory reiteration of the law with reference to particular case does not lead to the necessary inference that the law declared by the judicial pronouncements was not thought to apply to the particular cases but may also lead to the inference that the statute-making body was mindful of the real state of the law but was acting under the influence of excessive caution and so to silence the voices of doubting Thomases by declaring the law declared by judicial pronouncements to be applicable also to the particular cases. In Chandra Mohan case this Court had held that appointments of District Judges made otherwise than in accordance with Article 233 of the Constitution were invalid. Such appointments had been made in Uttar Pradesh and a few other States. Doubts had been cast upon the validity of the judgments, decrees etc. pronounced by those District Judges and large litigation had cropped up. It was to clear those doubts and not to alter the law that the twentieth amendment of the Constitution was made. This is clear from the statements of Objects and Reasons appended to the Bill which was passed as Constitution (20th Amendment) Act, 1966. The statement said:

Amendments of District Judges in Uttar Pradesh and a few other States have been rendered invalid and illegal by a recent judgment of the Supreme Court on the ground that such appointments were not made in accordance with the provisions of Article 233 of the Constitution... As a result of these judgments, a serious situation has arisen because doubt has been thrown on the validity of the judgements, decrees, orders and sentences passed or made by these District Judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the District Courts in Uttar Pradesh has practically come to a standstill. It is, therefore, urgently necessary to validate the judgments, decrees, orders and sentences passed or made heretofore by all such District Judges in those States....".

This position of law was again reiterated in State of U.P. vs. Rafiquddin [1988 (1) SLR 491=1987 Supp. SCC 401] wherein it was held: "We have recorded findings that 21 unplaced candidates of 1970 examination were appointed to the service illegally in breach of the Rules. We would, however, like to add that even though their appointment was not in accordance with the law but the judgment, and orders passed by them are not rendered invalid. The unplaced candidate are not usurpers of office, they were appointed by the competent authority to the posts of munsifs with the concurrence of the High Court, though they had not been found suitable for appointment according to the norms fixed

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by the Public Service Commission. They have been working in the judicial service during all these years and some of them have been promoted also and they have performed their functions and duties as de facto judicial officers. "A person who is ineligible to judgeship, but who has nevertheless been duly appointed and who exercise the powers and duties of the office of a de facto judge, he acts validly until he is properly removed." Judgment and orders of a de factor judge cannot be challenged on the ground of his ineligibility for appointment."

In view of this position of law the judgments rendered by the court martial which have attained finality cannot be permitted to be re- opened on the basis of law laid down in this judgment. The proceedings of any court-martial, if already challenged on this ground and are pending adjudication in any court in the country would, however, be not governed by the principles of 'de facto doctrine'. No pending petition shall, however, be permitted to be amended to incorporate the plea regarding the ineligibility and disqualification of judge-advocate on the ground of appointment being contrary to the mandate of Rule 40(2). This would also not debar the Central Government or the appropriate authority in passing fresh orders regarding appointment of the fit persons as judge-advocate in pending court-martials, if so required.

In the light of what has been stated hereinabove, the appeal is dismissed with the observations and findings noticed in the preceding paragraph and the judgment of the Division Bench of the High Court is upheld. No costs.