(2001) 07 P&H CK 0148

High Court Of Punjab And Haryana At Chandigarh

Case No: L.P.A. No. 996 of 1991 in Civil Writ petition No. 955-A of 1989

Rabinder Singh		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision: July 2, 2001

Acts Referred:

- Army Act, 1950 - Section 109, 122, 164(2), 3, 52
- Army Rules, 1954 - Rule 105 , 22, 23, 25, 33, 33
- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 1(3), Order 41 Rule 23, 11
- Constitution of India, 1950 - Article 14, 141, 21, 22, 22(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 237, 238, 482
- Penal Code, 1860 (IPC) - Section 120B, 149, 23, 25, 302
- Prevention of Corruption Act, 1988 - Section 5 , 5(2)

Hon'ble Judges: Arun B. Saharya, C.J; V.K. Bali, J

Bench: Division Bench

Advocate: R.S. Randhawa, G.S. Chahl and B.J. Daniel, for the Appellant; Anil Rathee, for the Respondent

Final Decision: Allowed

Judgement

V.K. Bali, J.

Appellant-Rabinder Singh Deol, a selection grade Colonel, unsuccessfully challenged the proceeding, findings and sentence of General Court Martial held against him between June 24, 1987 and October 1, 1987 vide which he was sentenced to undergo rigorous imprisonment for a period of one year coupled with cashiering from service, as the writ petition, filed by him, challenging the proceedings aforesaid, found no favour with the learned Single Judge, before whom the matter came up for ultimate disposal on May 31, 1991. Aggrieved, appellant (here-in-after referred to as ''petitioner'') has challenged order of learned Single Judge in this

appeal filed by him under Clause X of the Letters Patent.

2. Even though facts, leading to trial of petitioner by a General Court Martial and punishment given to him, as mentioned above, grounds on which such proceedings came to be challenged as also the defence projected by respondent-Union of India, have been given in sufficient details by learned Single Judge, yet same, even though in brevity, need a necessary mention.

3. It has been the case of petitioner that he had an excellent unblemished service record spanned over a period of 22 years. He is a recipient of Sewa Medal as also other gallantry awards and had attended various courses of instructions and obtained Master''s degree in Defence Studies from the Madras University in 1978 while at Defence Staff College Course. Having been found fit for promotion to the rank of Lt. Colonel, he was posted to 6 Armoured Regiment, a newly raised unit. During the course of command, his name was put up for selection to the rank of full Colonel and he was duly approved and promoted to the said rank on May 17, 1986. He commanded the Armoured Regiment from February 1, 1984 to October 3, 1986 and thereafter he received his posting as Instructor in College of Combat, Mhow, which in itself was an indication of his excellent performance. By virtue of his posting, as mentioned above, he was required to hand-over the command of the Regiment to the Second-in-Com-mand Lt. Col. Kuldip Singh. It has further been his case that in connivance with certain disgruntled officers, while in the course of handing/taking over, Col. Kuldip Singh reported certain insignificant matters in regard to modification of the vehicles to the Brigade Commander, Brig. J.C. Narang-4th respondent herein. The nature of allegations was that the Unit had wrongly claimed grant for modification of government vehicles for which it was not authorised. The plea of petitioner in opposing the allegation with regard to modification of government vehicles has been that the unit was authorised to receive grant for modification of vehicles for making them fit for operational role as also that various Armoured Regiments had claimed such modification grants which had been the basis of preferring the claim by the Unit commanded by the petitioner which was newly raised one. He had also pointed out to Brig. Narang that each and every paisa of the modification grant had been accounted for and utilised for modification of the vehicles and no allegation of any fraud could either be levelled or made out as the grant was duly claimed, passed by the Controller of Defence Accounts, payment received, utilised on modification of vehicles and accounted for accordingly. Yet, not satisfied, investigation by way of Court Enquiry was ordered, constitution of which, according to petitioner, was in violation of various statutory and mandatory requirements/provisions. It happened mainly on account of mala-fides of the 4th respondent, who himself carried out investigations and ordered further directions against the petitioner, ultimately, leading to recording of summary of evidence, preparation of charge-sheet, finally culminating into convening of the Court Martial and award of sentence, as afore-mentioned, Petitioner preferred pre-confirmation petition on March 5, 1988 which was not

considered at the time of confirmation of the proceedings on June 20, 1988. Post-confirmation petition was thereafter preferred on July 18,1988. When the same was not decided, petitioner approached this Court by way of CWP No. 7783 of 1988 and this Court, vide order dated September 8, 1988 disposed of the same with a direction to the Central Government to decide the post-confirmation petition within three months. The said petition was dismissed on December 7, 1988 and it is then that the writ petition; giving rise to present appeal, came to be filed on various grounds, reference whereof shall be given in the succeeding paragraphs of this judgment. The cause of petitioner was contested, both on facts and law through written statement that came to be filed on behalf of respondents 1 to 6.

4. Learned Single Judge of this Court, after giving facts in detail and reproducing the grounds, on which Court Martial proceedings had since been challenged as also the defence projected in the written statement, observed that the petitioner had raised questions of fact and in order to satisfy that the proceedings before the General Court Martial were in accordance with the Army Act, 1950 and the Rules made thereunder, original record had been summoned, perusal whereof would reveal that the petitioner had substantially reiterated the same points as were raised by him in the post-confirmation petition submitted by him to the Central Government under Sub-section (2) of Section 164 of the Army Act, 1950. The said petition was examined in minutest details by Lt. General Y.S. Tomar. The post confirmation report along with report of Lt. Gen. Y.S. Tomar was submitted to the Chief of Army Staff, who is prescribed authority for disposing of the post-confirmation petition and the Chief of Army Staff approved the note submitted by Lt. General Y.S. Tomar. It was further observed that wild and uncalled for insinuations had been made in the writ petition that the General Court Martial proceedings were irregular but the Court, in its extra-ordinary jurisdiction, was not inclined to examine the disputed questions of fact. The plea of petitioner that the officers conducting the General Court Martial proceedings did not allow opportunity to him to cross-examine the prosecution witnesses, to lead his defence and to permit the defence counsel to make proper submissions, then came to be focussed by the learned Single Judge and it was observed that a senior officer of the Army, who had appeared in the Court at the time of hearing, pointed out that the petitioner was represented by a counsel, including the counsel, who represented him in the writ petition, and in the General Court Martial proceedings, innumerable adjournments were granted to the petitioner despite objections by the prosecution and that the Presiding Officer of the General Court Martial gave ample opportunity to the petitioner to lead his defence and cross-examine the prosecution witnesses. By noting some other facts also, learned Single Judge thought it proper to reproduce the draft note prepared by Lt. General. Y.S. Tomar dated November 18, 1988, which contained background of the case, points raised by the petitioner and the comments on the said points, recommendations of the intermediary Commanders, examination of the whole case and final recommendations and held that in the draft note, the factual allegations

made by the petitioner were found to be baseless. Insofar as legal submissions are concerned, same were held to have been concluded against the petitioner by judgment of Supreme Court in Major G.S. Sodhi Vs. Union of India (UOI), . It was further observed by learned Single Judge that in the present case there were no proceedings or proof of any prejudice that might have been caused to the petitioner on account of infraction of any of the rules by the General Court Martial and that the allegations had been found to be incorrect by the Chief of Army Staff. It was further observed by learned Single Judge that in the light of the comments of Lt. General Y.S. Tomar, he was not inclined to examine the correctness of factual allegations made in the petition regarding Genera! Court Martial proceedings.

5. A perusal of judgment of learned Single Judge, salient features of which have been mentioned above, would manifest that insofar as questions of fact are concerned, same were not permitted to be raised being disputed questions of fact and insofar as plea of petitioner with regard to violation of principles of natural justice, like, not allowing him to cross-examine the prosecution witnesses etc., was determined against him on the basis of draft note prepared by Lt. General Y.S. Tomar dated November 18, 1988. The legal submission were, however, rejected on the basis of Supreme Court judgment in Major G.S. Sodhi''s case (supra). The plea with regard to quantum of sentence was also rejected on the basis of same very judgment of the Supreme Court.

6. Mr. R.S. Randhawa, learned counsel for the petitioner vehemently contends that various aspects of the case, based upon facts and law, have been rejected almost in a summary fashion. Insofar as pleas based upon facts are concerned same have been rejected either being disputed questions of fact or on the basis of draft note of Lt. General Y.S. Tomar dated November, 18, 1988 which contained background of the case, points raised by the petitioner and comments on the said points and which note was confirmed by the Chief of Army Staff and insofar as questions of law formulated in the writ petition are concerned, same have been rejected on the basis of judgment of Supreme Court in G.S. Sodhi''s case (supra), irrespective of the fact that number of such legal points that were raised in the writ petition, were not even subject matter of adjudication in the said case by the Supreme Court. In the draft note prepared by Lt. General Y.S. Tomar and that came to be approved by the Chief of Army Staff, there was summary rejection of the points raised by the petitioner without giving any reason and that being the position, learned Single Judge erred in not examining the said points by a process of reasons. It is virtually a case of substitution of judgment of the Chief of Army Staff in the post-confirmation petition of petitioner, further contends the learned counsel.

7. With a view to appreciate the contentions of the learned counsel, noted above, it would be first necessary to examine the draft note prepared by Lt. General Y.S. Tomar on November 18, 1988 and to peruse the judgment of Supreme Court in G.S. Sodhi''s case (supra). Insofar as draft note dated November 18, 1988 is concerned,

same has been reproduced in verbatim in the judgment of learned Single Judge. After giving reference of the case and the background thereof, points raised by the petitioner and comments thereon have been detailed. Same read thus :-

"Points rained and comments

6. (a) Point : The findings and sentence of the GCM have been confirmed without taking into consideration his pre-confirmation petition. Thus, the confirmation and promulgation are liable to be set aside.

(b) Comment : The pre-confirmation petition was duly considered by the COAS and finding no sub- stance in the petition, it was rejected by him. Thus, the contention of the petitioner lacks substance.

7 (a) Point: The petitioner was reduced to the rank of Major from the rank of Colonel even before his trial commenced. Further, inspite of his unblemished record of service and exemplary character, he was awarded very harsh punishment.

(b) Comment : Pursuant to the attachment of the petitioner under A1 30/86, he had to relinquish his acting ranks of Lt. Col and Col. Thus, no injustice has been done to him. Considering the gravity of the offences committed by him, the punishment awarded to him is just and fair.

Therefore, the petitioner''s contention lacks substance.

8.(a) Point: The innocent acts of counter signing the contingent bills by the petitioner have been made to look soaring by adding words "intent to defraud" and thus brought those innocent acts under the purview of AA Section 52(f). Thus no offence is conveyed by any of the four charges laid down in the charge sheet and are liable to be set aside being bad in law.

(b) Comment: The particulars of the charges averred against the petitioner have no ambiguity and fully support the statement of the offences. Thus, the petitioner''s contention is devoid of merit,

9 (a) Point : The petitioner did not know that the Unit was not entitled to claim modification grant for all the vehicles of the Regiment. Therefore, he is not guilty of the charges.

(b) Comment : There is ample oral/documentary evidence on record to prove that the petitioner knew that his unit was not entitled to claim modification grant for all vehicles of the Regiment. Thus, the contention of the petitioner merits no consideration.

10.(a) Point : The delegation of powers of the Commanding Officer under AO 251/72 by Cdr. 6(1) Armed Bde to Col. N.S. Parihar is illegal.

(b) Comment : The delegation of powers of the Commanding Officer to the Dy. Cdr Col. N.S. Parihar under AO 251/72 is legally in order. Thus, the petitioner''s point

lacks substance.

11 .(a) Point: Brig Narang had carried out the investigations of the case and exercised the powers of the Commanding Officer and also issued orders for his attachment. Therefore, under the provisions of para 449 of the Regulations for the Army 1962, he (Brig Narang) was barred to convene a GCM of the petitioner.

(b) Comment: Brig Narang was the formation Commander or the superior authority and not the Commanding Officer of the petitioner before his attachment to 6(1) Armed Bde. He (Brig Narang) did not carry out any investigation as his (petitioner) CO and thus was not barred to convene a GCM of the petitioner.

12.(a) Point: The Judge Advocate did not act imparlially as required by Army Rule 105. He had addressed questions for the purpose of cross-examining him which is in contravention to the provisions of Army Rule 58(2).

(b) Comment: It is on record in the proceedings that Judge Advocate had explained the provisions of Army Rule 58(2) to the petitioner. The scrutiny of the proceedings does not indicate any prejudice on the part of the court or Judge Advocate. Thus the petitioner''s contention is baseless.

13.(a) Point: He had objected to all the charges and sought the permission of the court to lead evidence in support of his objection. But the court disallowed the objections without assigning any reasons.

(b) Comment: Perusal of the GCM proceedings reveals that the court had duly considered the objections of the petitioner to all the charges along with reply of the prosecutor and advice of the Judge Advocate and decided to disallow the objections. While disallowing an objection, the court is not required to spell out the reasons for doing the same.

14.(a) Point: The charges suffer from the infirmity of multiplicity. A single transaction has been made subject matter of two charges.

(b) Comment: Perusal of charges reveals that all the charges have been framed correctly and do not suffer from any legal infirmity. Thus, the petitioner''s contention Tacks substance."

8. The draft note further refers to the comments of the JAG''s department, recommendations of the intermediary commanders, writ petition that was earlier filed by the petitioner in this Court, examination of the case and recommendations. After hearing Mr. R.S. Randhawa, learned counsel for the petitioner as also examining the records of the case and, in particular, draft note prepared by Lt, General Y.S. Tomar dated November 18, 1988 as also going through judgment of Supreme Court in G.S. Sodhi''s case (supra), we may agree with the learned counsel that this matter could not be decided exclusively on the basis of draft note dated November 18, 1988 and judgment of Supreme Court in G.S. Sodhi''s case (supra).

Insofar as draft note aforesaid is concerned, a reading of that would manifest that while rejecting the various contentions raised by the petitioner, no reasons were given but then there was no requirement for the concerned authorities to give reasons. However, the same could not be true with regard to judgment of learned Single Judge. Indeed, it is a case of summary rejection of all the points based on facts and law by giving no reasons or adopting the draft note, comments and reply on the same. As mentioned above, insofar as law points projected in the petition are concerned, same have been rejected on the basis of judgment of Supreme Court in G.S. Sodhi''s case (supra): We would mention the points raised in the petition that may be covered by the judgment of Supreme Court in the succeeding paragraphs, suffice it to mention here that quite a few points, raised in the petition as also before us in this appeal, are not covered by judgment of the Supreme Court and, therefore, the contention of Mr. Randhawa that the judgment of Supreme Court can not be said to be binding upon the petitioner on all counts, appears to be correct.

9. Having found that the petitioner was unable to get a judgment on all the points raised by him before the learned Single Judge and further that the case could not be determined on the basis of draft note dated November 18, 1988 and judgment of Supreme Court in G.S. Sodhi''s case (supra) alone, question that arises is as to whether judgment of learned Single Judge should be set aside on that ground alone or that petitioner should be permitted to raise all the points and have proper decision thereon by the appellate court. After giving our anxious thoughts, we are of the view that it would be an exercise in futility and would result in further loss of time if the matter is remitted to the learned Single Judge for decision afresh in accordance with law. The better course would be to permit the petitioner to raise all the points mat were left undetermined as also to examine the correctness of the decision on the points that did come up for discussion before the learned Single Judge and were actually decided.

10. First point raised by Mr. Randhawa pertains to denial of right to petitioner to prepare his defence which is guaranteed to him under Rules 33 and 34 of the Army Rules. In support of the above plea, it is urged that the petitioner was required to be given 96 hours for preparation of his defence which is the minimum statutory and mandatory requirement before he was arraigned. By virtue of provisions of Rule 34, petitioner was also required to be given names of officers, who were to constitute the Court to enable him to raise objection. Petitioner was in hospital on 19/20th June, 1987 when he was served a charge-sheet and furnished the names of officers, who were to constitute the Court at 1325 hours on June 20, 1987. Petitioner was got forcibly discharged from the hospital on the evening of June 20, 1987 and moved in an ambulance from Chandigarh to Suratgarh, a journey of about 14 hours performed non-stop by changing the driver en-route. Petitioner was admitted in Military Hospital, Suratgarh at 0700 hours on June 21, 1987 and on June 21/22, 1987, no visitor was permitted and petitioner was put under all restrictions as if under arrest and, thus, given no opportunity to prepare his defence. The Court Martial

assembled at 0800 hours on June 24, 1987. Though, names of seven officers, constituting the Court had been provided on June 20, 1987, petitioner was given yet another list containing names of waiting members on June 23, 1987 at 1410 hours and third list was given to him of seven members and three waiting members at 0815 hours on June 24, 1987. In the manner aforesaid, period of 96 hours was not given to the petitioner and in this background, he could not raise challenge to the members on June 24, 1987. In support of his contention, learned counsel relies upon a judgment of Allahabad High Court in Uma Shankar Pathak v. Union of India and Ors. 1989(3) SLR 405.

11. As before the teamed Single Judge, so also before us, records of Court Martial proceedings are available. Mr. Rathi, learned counsel for the respondent-Union of India, on the basis of records and the averments made in the written statement, states that there is no violation of Rules 33 and 34 of the Army Rules and petitioner was given adequate time as envisaged under the law to prepare his defence. It is in paragraph 7 of the writ petition that averments with regard to not giving 96 hours to the petitioner to prepare his defence have been made. It has been pleaded therein that while preparing for 1985 Car Rally, petitioner had met with an accident and the injuries sustained by him got aggravated which entailed further hospitalisation on June 21, 1987, Petitioner, while in the Intensive Care Unit of the Command Hospital, Chandigarh, was handed-over the charge-sheet dated June 19, 1987 containing the said four charges u/s 52(f) of the Army Act. At 1325 hours on June 21 1987, petitioner was informed that he was to face General Court Martial on June 22, 1987 on the said four charges in the field area over 500 Kms, away from Chandigarh. General Court Martial in respect of the petitioner was accordingly convened by the 4th respondent by a convening order dated June 23, 1987 and the trial commenced on June 24, 1987. In the corresponding para of the written statement, it has been averred that the petitioner has tried to mislead this Court. He knew that disciplinary proceedings would commence against him. With a view of frustrate justice, he asked for ten days causal leave on extreme compassionate grounds to attend his ailing wife. Having proceeded on leave and being aware of the fact that one of the charges would get time barred vide Section 122 of the Army Act on June 25, 1987 if not arraigned by that time, petitioner clandestinely reported to and got admitted in Command Hospital, Chandigarh before the expiry of the said casual leave on a false pretext and manipulated four weeks sick leave with instructions to report back on June 19, 1987 to the same hospital. He went underground and when the Command Hospital authorities came to know his designs, they cancelled his sick leave and informed him on his leave address to rejoin the hospital forthwith. They also informed all the Military Hospitals in the country about it. Petitioner reported to Army Hospital, Delhi Cantt on June 14, 1987 and was transferred to Command Hospital, Chandigarh and later to 184 Military Hospital from where he was discharged in Medical Category shape-1 on June 21, 1987. He was handed-over all the documents as required vide Rule 33 on June 20,

1987 inclusive of names of members who were to constitute the Court. There was no violation of rights of petitioner to prepare his defence. Since petitioner had submitted that one of the members detailed by the convening officer would be a defence witness, name of the said member was detailed as a waiting member and a waiting member was detailed as a member. This was done primarily to accommodate petitioner''s request. The names of members as well as waiting members were communicated to petitioner as required by law on June 20, 1987 itself.

12. Giving details of the events, leading to arraignment of petitioner from records of the case, it is stated that petitioner was appointed Commanding Officer of 6 Armed Regiment of February 1, 1984. On October 2, 1986, while handing-over and taking-over, some discrepancies came to the notice of Brigade Commander, on the basis of which enquiry was ordered into the matter. On October 13, 1986 Court of Inquiry started. Same was presided over by Col. Sawhney and two other Colonels were also members. On December 16, 1986, on the basis of signal received from the Army Headquarters, petitioner was attached with 6th Ind. Armed Brigade HQ for 89 days. On December 26, 1986 attachment of petitioner was extended for another 89 days on the basis of fetter dated December 31, 1986. Petitioner was attached with Brigade Commandeer HQ till finalisation of his disciplinary proceedings. On February 7, 1987 recording of summary of evidence started and Major S.A. Khan was detailed to record the same. On March 30, 1987 summary of evidence was completed. It is on April 4, 1987 that a letter was sent to petitioner asking him to supply the list of witnesses and name of defending officer and further that if petitioner was not to give any name, authorities would appoint defending officer for him. On April 4, 1987 itself petitioner gave reply to the letter aforesaid requesting that Major S.A. Khan be detailed as defending officer for him. However, on April 6, 1987 petitioner was informed that Major S.A. Khan would be appointed Prosecutor as he had recorded summary of evidence and, therefore, he should give another name. Before we may proceed any further on the events leading to arraignment of petitioner, it is relevant to mention here that petitioner had made allegations against Major S.A. Khan in paragraph 25 of the writ petition, wherein it has, inter-ala, been pleaded that the officer, recording summary of evidence, went out of the way to act as self-appointed prosecutor which, indeed, he was detailed ultimately at the court martial and illegally interfered with not only recording of summary of evidence but effectively blocked the petitioner to bring out his defence. Petitioner, earlier in point of time, had filed a writ petition in Delhi High Court before the stage of commencemnt of court martial proceedings wherein too he had made allegations against Major S.A. Khan. Reverting to the events, petitioner insisted upon Major S.A. Khan to be appointed as his defending officer vide letter dated April 6, 1987. Vide communication/letter dated April 8, 1987, services of Major S.A. Khan were refused to petitioner and he was asked to give an other name. On April 5, 1987, petitioner made an application for grant of leave from April 8, 1987 to April 12,

1987 in order to engage and consult a counsel. Meanwhile, on April 7, 1987, he made a request that he be granted leave from April 12, 1987 to May 9, 1987 instead of from April 8, 1987 to April 12, 1987, as prayed earlier. It is well made out from records of the case that on April 8, 1987 a tentative charge-sheet was given to the petitioner. However, on April 12, 1987, petitioner once again sought change of leave from April 19, 1987 to April 26, 1987. This leave was sanctioned. On April 19, 1987 petitioner filed an application asking for giving him some documents. Even though, leave was granted as mentioned above, petitioner did not proceed on leave and on April 20, 1987 made yet another application and changed the ground of leave now to say that he wanted to go on leave as his wife was sick. Petitioner was granted ten days'' leave from April 25, 1987 to May 4, 1987. While on leave, petitioner got admitted in Command Hospital, Chandigarh on May 2, 1987 and remained there upto May 22, 1987. When he did not report at Suratgarh on May 4, 1987, upto which date he was granted leave, the Brigade Headquarters took up the matter with Western Command. On May 6, 1987 a message was sent to 10 Core Western Command that petitioner was over-staying the leave. On May 9, 1987 6th Armed Brigade HQ addressed a letter to the fattier of petitioner at his leave address complaining about his absence. Meanwhile, a message dated May 4, 1987 from the Command Hospital, Chandigarh, was received on May 11, 1987 that petitioner was admitted there. Meanwhile, the matter had also been taken up with 10 Core Bathinda and then hospital authorities were also contacted. On May 22, 1987, a telegram was received from the Command Hospital, Chandigarh, that petitioner was on sick leave for four weeks. Even though on leave, in the manner aforesaid, it would be made out from records as also the writ petition that came to be filed by the petitioner in Delhi High Court that he had proceeded to Bagdogra on June 7, 1987. A message and telegrams were sent to petitioner at all places, inclusive of Bagdogra to report for duty. On June 14, 1987, petitioner got admitted in Military Hospital, Delhi despite the fact that on leave from hospital to visit his house, he had to report at Command Hospital itself. On June 8, 1987 another signal was sent to petitioner by hand and he was advised to report at Command Hospital. The JCO, who had taken the signal aforesaid mentioned that petitioner had already proceeded to Bagdogra. On June 10, 1987, yet another letter and telegram were sent to the petitioner with no response. On June 11, 1987 yet another letter was sent by hand to petitioner to report to Command Hospital on the address given by him while going on leave, i.e., Sector 32-D Chandigarh, house of his father-in-law. Once again, it was reported that he had gone to Bagdogra. On June 11, 1987 matter was taken up with 22nd Sqn. and Headquarter Eastern Army Command, Shillong. On June 12, 1987, a message to all the hospitals and Director, Army Medical was sent to transfer the petitioner at Command Hospital. Petitioner, as mentioned above, however, got admitted in Military Hospital, Delhi on June 14, 1987. Meanwhile, Military Hospital, Delhi informed the authorities at Suratgarh and Command Hospital, Chandigarh, that petitioner was admitted there and it is then that two officers, two Jawans and an ambulance was sent to Chandigarh and on June 19,

1987, petitioner was transferred from Military Hospital, Delhi to Command Hospital, Chandigarh, where he was served the charge-sheet on June 20, 1987 and taken to Suratgarh on June 21, 1987. It may be recalled that the first charge was to become barred by time on June 25, 1987 if the petitioner was not to be arraigned by the said date. Meanwhile, as mentioned above, petitioner had filed Civil Writ Petition in the Delhi High Court, records of which would bear it out that it was prepared on June 19, 1987 and supporting affidavit whereof was prepared on June 22, 1987 and same was filed on June 25, 1987. It was listed for hearing on June 28, 1987 and was ultimately dismissed on June 29, 1987. It is interesting to note that charge-sheet also came to be challenged in the writ petition aforesaid before the Delhi High Court. It would be further interesting to note that on June 20, 1987, retired Brig. K.S. Gill, presently a practising lawyer in this High Court, met petitioner at 3 PM. On June 21, 1987 petitioner gave name of defending officer Lt. Col. M.S. Chahal, who had no legal qualifications and was outside the command. Insofar as fresh list of members is concerned, it had a change of name of one member and that too on the request of petitioner. In place of Mr. Malhotia, Col. Bhandari was named/detailed inasmuch as Mr. Malhotra was to be potential defence witness.

13. The sequence of events given in all their minute details in the preceding paragraph would, thus, manifest that charge-sheet was served upon the petitioner on June 20, 1987 at 1.25 PM and petitioner was actually arraigned on June 24, 1987 at 7.40 PM. Further, the Court Martial was convened as per the order of the convening authority on June 23, 1987 at 8 AM. On the same very day, at 10 AM convening order was read. Names of the Presiding Officer and other officers were read over to him. First question put to the petitioner was "Do you have any objection to be tried by the members and the Presiding Officers". Petitioner replied " I have no objection to raise against the Presiding Officer of this Hon''ble Court. I also do not have any objection to any of the members of this Hon''ble Court". In answer to question No. 4, he, however, stated "having heard the advice of the Judge Advocate I am aware of my right at this stage. I object to all the charges mentioned in the charge- sheet on the grounds that these are not in accordance with the rules and regulations and, thus, bad in law". The Court considered all the objections of the petitioner and decided to disallow the same and petitioner was then arraigned at 1800 hours. After arraignment, petitioner was asked if he wanted to apply for adjournment. Petitioner requested for the same and Court decided to adjourn till 1100 hours on June 29, 1987. Sub-rule (7) of rule 33 and Rule 34 of the Army Rules, 1954, on the basis of which it is alleged the petitioner was not given 96 hours to prepare his defence, read thus :-

"33. Rights of accused to prepare defence. -

(1) xx xx

XX XX

(7) As soon as practicable after an accused has been remanded for trial by a general or district court-martial, and in any case not less than ninety six hours or on active service twenty four hours before his trial, an officer shall give to him free of charge a copy of the summary of evidence, or in the case of an officer where there is no summary of evidence an abstract of the evidence, and explain to him his rights under these rules as to preparing his defence and being assisted or represented as the trial, and shall ask him to state in writing whether or not he wishes to have an officer assigned by the convening officer to represent him at the trial, if a suitable officer should be available. The convening officer shall be informed whether or not the accused so elects.

34. Warning of accused for trial. - (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.

The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty four hours.

(2) The officer at the time of so informing the accused shall give him a copy of the charge sheet and shall, if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.

(3) The officer shall also deliver to the accused a list of the names, rank and corps, if any, of the officers who are to form the court, and where officers in waiting are named, also of those officers in courts martial other than summary courts martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced".

14. Arraignment of petitioner, in the present case, is definitely beyond a period of 96 hours. Mr. Randhawa, learned counsel for the petitioner, however, vehemently contends that the period, in the facts and circumstances of this case, was wholly insufficient. The petitioner was in Command Hospital, Chandigarh, when he was served the charge-sheet. He was brought to Suratgarh in a hurry and was not permitted even a visitor till such time he was actually arraigned. We find absolutely no merit in the contention of learned counsel, as noted above. Not only that we are satisfied that in the facts and circumstances of this case, petitioner had adequate opportunity to prepare his defence, and in fact and reality was arraigned beyond the period of 96 hours from the time he was served charge-sheet, we are further of the view that the defence projected by the respondents that one of the main charges against the petitioner would get extinct by efflux of time and, therefore, petitioner

intentionally and deliberately avoided and evaded service of charge-sheet upon him. appears to be correct. The averments made to that effect in the written statement appear to have a ring of plausibility. It may be recalled that it is on February 7, 1987 that recording of summary of evidence started against the petitioner. Recording of same was complete on March 30, 1987. Petitioner was asked to supply the list of witnesses and name of defending officer on April 4, 1987. His request to depute Major S.A. Khan for him was declined. The petitioner, when all this correspondence was being exchanged between him and the concerned authorities, thought of going on leave. Purpose and effective dates, on which he was to go on leave, kept on changing in between. On account of some injuries that petitioner might have sustained while participating in a car rally in 1985 and which are stated to have got aggravated, petitioner got admitted in the Command Hospital, Chandigarh, even though ground on which he asked for leave ultimately, was to attend to his ailing wife. Petitioner did not report for duty even after the expiry of leave as granted to him and managed to send a message from the said hospital to Suratgarh, even though dated May 4, 1987, which was received only on May 11, 1987. He also managed to go on leave while in the hospital at Chandigarh for a period of four weeks. It was a sick leave and yet the petitioner managed to go to Bagdogra. Even though, on his return from hagdogra, he got admitted in the Military Hospital, Delhi, without any information to any one, he still managed to file a writ petition in the Delhi High Court, challenging, besides others, even the charge-sheet. Petitioner, as mentioned above, also met Brig. K.S. Gill, Advocate, on June 20, 1987 at Command Hospital, Chandigarh, before he was brought to Suratgarh. The manner in which he was ultimately taken to "Suratgarh has since been given in sufficient details. From the facts, as culled out above, this Court is in a position to return a positive finding that petitioner all through knew the charges, on which he was to be tried by a Court Martial. He was given a draft of charges before even the correspondence ensued between the petitioner and authorities at Suratgarh with regard to detailing a defending officer for him. It is not the case of petitioner that the draft charge-sheet supplied to him and the actual charge-sheet is, on any count, at variance with each other. Knowing fully well that the authorities shall not be able to proceed against him on atleast the first charge, being barred by time, it appears, petitioner managed all subsequent affairs, like leave from station, admission in the hospital, going on sick leave while in Command Hospital, Chandigarh, and moving to Bagdogra and then getting admitted in Military Hospital, Delhi, on a pretext. The endeavour of the petitioner, as mentioned above, was to frustrate the proceedings on the plea of limitation. If, in that scenario, respondents, being equally conscious of the same and avoided that very hurdle in their way, brought petitioner from Command Hospital, Chandigarh to Suratgarh, in the way and manner which has been mentioned, but while complying with all the norms and, in particular, to give sufficient time to the petitioner to prepare his defence, their action can not be faulted on any ground whatsoever. The Division Bench judgment of Allahabad High Court in Uma Shankar Pathak''s case (supra) has no parity with the facts and circumstances of this case and

is, thus, distinguishable.

15. The next point that has been urged by Mr. Rand-hawa, in support of this appeal, is that Brig. J,C, Narang-respondent No. 4 could not even convene the Court Martial in respect of the petitioner, who had been attached to HQ 6(1) Armed Brig., of which respondent No. 4 was the Commanding Officer. The General Court Martial convened against the petitioner under the orders of respondent No. 4 is, thus, stated to be illegal, without jurisdiction. Pleadings in support of the aforesaid plea, as given in the writ petition, are to the effect that as per the scheme of Army Act, Rules and Regulations, the power of investigating a charge, against a person and for prosecuting him, if required, rests solely with the Commanding Officer of the accused person. It has been laid down in the Regulations that no Commanding Officer can exercise powers of convening a Court Martial in respect of a person or alter having investigated the same. The definition of Commanding Officer, as given in Section 3(v) of the Army Act reads thus :-

"Commanding Officer", when used in any provision of this Act, with reference to any separate portion of the regular Army or to any department thereof, means the officer whose duly it is under the regulations for the regular Army, or in the absence of any such regulations, by the custom of the service to "discharge with respect to that portion of the regular Army or that department, as the case may be, the functions of a Commanding Officer in regard to matters of the description referred to in the provision".

1.6. It is then pleaded that an officer whose duty it is to discharge the functions of the Commanding Officer as per regulations or in their absence, as per the custom of service, is to be the Commanding Officer. Brigade Commander is the Commanding Officer of the Officer commanding a unit. Thus, respondent No. 4 was the Commanding Officer of the petitioner. The doubt, if any, in this regard is set at rest from the fact that the petitioner was ultimately attached to HQ 6(1) Armoured Brigade commanded by respondent No. 4. The position that Formation Commander is the Commanding Officer of all persons posted to or attached to the HQs has been clarified in various Army orders issued on the subject. Accordingly, respondent No. 4 was the Commanding Officer of the petitioner. The same officer had later convened the Court Martial of the petitioner as is stated to be clear from order convening the Court, Annexure P-2. The officer, who investigated the case and who had been the Commanding Officer of any person at any time between the date on which the cognizance of an offence was taken against the accused and the date on which the case was taken up for disposal, can not exercise power to convene the Court Martial. This position is stated to have been amply clarified in para 449 of the Regulations for the Army, 1962 which reads thus :-"449. Action by Superior Officer :-

a) A superior officer to whom a case is referred may deal with it as follows :-

i) he may refer the case to a superior officer;

ii) he may direct the disposal of the case summarily or by SCM; or ''

iii) if he has power to convene a DCM, he may convene DCM to try it; or

iv) if he has power to convene GCM, he may convene either a GCM or DCM to try it; and

v) in the case of an officer, JCS or WO, he may dispose of the charge summarily under the provisions of Sections 83 and 84 of the Army Act, if competent to do so.

b) When the superior officer has been the Commanding Officer of the accused at any time between the date on which cognizance of an offence was taken against the accused and the date on which the case-is taken up for disposal, or an officer who has investigated the case, he can not exercise the powers detailed in sub para (a) (ii) to (v) inclusive.

c) xx xx"

17. It is further pleaded that respondent No. 4, being Commanding Officer of the petitioner and having investigated into the allegations against him, was incompetent and barred from convening a General Court Martial of the petitioner as given in Section 109 of the Army Act, Rule 37 of the Army Rules and Para 449(b) of the Regulations for the Army 1962 Edition. The trial of the petitioner is, thus, stated to be nullity, being void-ab initio. It has further been averred that even otherwise, respondent No. 4 had carried out the investigations of the case and as such he was only competent to order further necessary action, being Commanding Officer. Summary of evidence in the present case was ordered by Col. N.S. Parihar, who was the Second-in-Command of respondent No. 4, being the Deputy Brigade Commander and, thus, could not be the Commanding Officer of the petitioner, both being of the same rank. Accordingly, ordering of the summary of evidence against the petitioner was done by an authority which was not competent at all to do so and for that reason as well the entire proceedings are vitiated.

18. The pleadings, as reflected above, have been responded to by the respondents by stating that the disciplinary proceedings against an officer commence with the compliance of Army Rule 25 read with Rule 22. In the case of the petitioner, the same were complied with by Col. N.S. Parihar, his Commanding Officer by virtue of his attachment with HQ 6(1) Armed Brig. A Deputy Commander is required to exercise powers of a Commanding Officer in respect of the officers of the Brigade Headquarters. The petitioner''s contention that respondent No. 4 was his Commanding Officer is misconceived and thereby he has tried to mislead the Court. Brig. J.C. Narang, respondent No. 4, being empowered by a warrant of the Chief of Army Staff, was competent in terms of the Army Act, Section 109, to convene the General Court Martial in respect of the petitioner. Since respondent No. 4 was not associated with the investigation, the provisions of para 449 of the Regulations for the Army, 1962 were not attracted in the present case. It has further been pleaded

that petitioner was attached with HQ 6(1) Armed Brig, and Col. N.S. Parihar became his officer Commanding and, was, thus, competent to order summary of evidence vide Army Rule 23 and that the General Court Martial proceedings are in accordance with the provisions of the Army Act, Rules and Regulations.

19. We have examined the pleadings, accompanying documents and records of the Court Martial proceedings, which are available and heard learned counsel for the parties on the issue aforesaid. We are of the firm view that there is no merit in the second contention of Mr. Randhawa. A General Court Martial may be convened by the Central Government or the Chief of the Army Staff or any officer empowered in this behalf by the Warrant of the Chief of the Army Staff, as would be made out from Section 109 of the Army Act. It is specific case of the respondents that Brig. J.C. Narang. respondent No. 4 was empowered to convene the court martial being specifically empowered in this behalf by the warrant of the Chief of the Army Staff. Sub-para 449(c) of the Army Regulations reads thus :-

"Notwithstanding anything stated in the preceding sub-para, when an officer having power to award summary punishment u/s 83 or Section 84 of the Army Act, decides not to deal summarily with a charge against an officer, JCO or WO which has been referred to him for disposal. but to refer it to for trial by court martial, he may convene a court martial for the trial of the accused, whether or not he has investigated the case".

20. Para 20(g) of the Regulations for the Army Volume I, revised upto 1987, would manifest that a Deputy Commander of any Command acts as Commanding Officer for those forming part of the Brigade Headquarter and exercises disciplinary powers over them. From the Army Act, Rules and Regulations, as mentioned above, it is clear that Brig. Narang, respondent No. 4 was competent to convene the Court Martial in respect of the petitioner by the warrant of the Chief of Army Staff which was issued on August 2, 1979 empowering the Commander of 6 Independent Armd. Brigade to convene the General Court Martial and to confirm the proceedings by the Chief of Army Staff. The contention of Mr. Randhawa that respondent No. 4 could not do so as he had investigated the case personally also deserves to be rejected for the reason that insofar as petitioner is concerned, his commanding officer was to be the Deputy Commander by virtue of provisions contained in para 20(g) of the Regulations for the Army. It is interesting to note that even the petitioner addressed Col. N.S. Parihar as OC (Troops) in his earlier C WP No. 1898 of 1987 filed by him before the Delhi High Court. That apart, petitioner raised no grouse with regard to competence of convening officer at the earliest stage. He also raised no objection pertaining to recording of summary of evidence under the orders of respondent No. 4. It is too well settled that all technical defects, a party may feel aggrieved of, have to be raised at the earliest stage and if such an objection is not raised, same can not be pressed into service after the trial is over. Reference in this regard may be made to State of Himachal Pradesh v. Sita Ram, 2010 (4) RCR (Cri) 97. In yet another case,

the Supreme Court held that where a dalinquent did not file any objection before the summary court martial objecting to presiding of court martial proceeding by Commanding Officer of the Corps and such an objection when taken for the first time before the Chief of the Army Officer, even though same might have been taken in the High Court, same could not be allowed being an after-thought. The objection raised by the delinquent in Vidya Parkash v. Union of India, (sic) 1988 SC 70S, referred to above, was that Major P.S. Mahant could not preside over the summary Court martial. On the contention of counsel representing the delinquent to the effect aforesaid, it was held that "it appears that the appellant has not tiled any objection before the summary court martial objecting to the presiding of the court martial proceedings by Major P.S. Mahant nor any such objection had been taken in the writ petition moved before the High Court. It is for the first time in the appeal which the appellant filed before the Chief of the Army Staff (Competent Authority), Army Headquarters, New Delhi, that he raised an objection to the presiding of Major P.S. Mahant as Judge of the court-martial proceedings. It has been rightly held by the High Court that this is an after-thought and as such this submission can not be permitted lo be made by the appellant after the court martial proceedings were completed and the order of dismissal for service was made".

21. The next point that has been urged by learned counsel for the petitioner is that the petitioner was denied fair opportunity to defend himself inasmuch as neither he was provided a defending officer of his choice nor the counsel, thus, resulting into violation of Rules 95 and 96 of the Army Rules. Before we might examine the facts, on the basis of which the plea, based on Rules 95 and 96 has been made, it would be appropriate to find out the exact requirement of law of providing the delinquent defending officer of his choice as also the counsel. Such provisions are contained in Rules 95 and 96. Same read thus :-

"95. Defending officer and friend of accused, - (1) At any general or district court martial, an accused person may be represented by any officer subject to the Act who shall be called "the defending officer" or assisted by any person whose service he may be able to procure and who shall be called "the friend of the accused".

(2) It shall be the duty of the convening officer to ascertain whether an accused person desires to have a defending officer assigned to represent him at his trial and, if he does so desire, the convening officer shall use his best endeavours to ensure that the accused shall be so represented by a suitable officer. If owing to military exigencies, or for any other reason, there shall in the opinion of the convening officer, be no such officer available for the purpose, the convening officer shall give a written notice to the presiding officer of the court-martial and such notice shall be attached to the proceedings.

(3) The defending officer shall have the same rights and duties as appertain to counsel under these rules and shall be under the like obligations.

(4) The friend of the accused may advice the accused on all points and suggest the questions to be put to the witnesses, but he shall not examine or cross-examine the witnesses or address the court.

Note: 1. Under AR 33 the accused, after he has been ordered to be tried by court martial is to be allowed free communication with his "friend", defending officer, or legal adviser.

96. Counsel allowed in certain general and district courts-martial, -(1) Subject to these rules, counsel shall be allowed to appear on behalf of the prosecutor and accused at general and district courts martial if the Chief of the Army Staff or the convening officer declares that it is expedient to allow !he appearance of counsel thereat and such declaration may be made as regards all general and district courts martial held in any particular place, or as regards any particular general or district court martial, and may be made subject to such reservation as to cases on active service, or otherwise, as seems expedient.

(2) Save as provided in rule 95, the rules with respect to counsel shall apply only to the court martial at which counsel are, under this rule, allowed to appear".

A perusal of the rules aforesaid would manifest that the accused may be represented by an officer subject to the Act at any General or District Court Martial, who is called the ''Defending Officer and it is the duty of the con veiling officer to ascertain whether an accused person desires to have a defending officer and if he does so desire, the convening officer is duty bound to ensure that he is represented by a suitable officer. Insofar as providing a lawyer to an accused is concerned, same is subject to the rules as also if the Chief of the Army Staff or the convening officer declares that it is expedient to allow the appearance of a counsel.

22. Having examined the requirements of law on the twin questions of the petitioner to have a defending officer of his choice and a counsel, time is ripe to evaluate the facts, on which the plea of learned counsel is based. Reverting to the pleadings, made in the writ petition, the case of the petitioner is that the petitioner had given the name of Lt. Col. S.A. Khan to be his defending officer. Instead of detailing him to be defending officer of the petitioner, he was detailed to prosecute him. This took the petitioner by total surprise. When the request to have Lt. Col. S.A. Khan was not acceded, he had submitted the name of Lt. Col. M.S. Chahal to be provided to him as his defending officer. Mr. Chahal was not provided with mala-fide intention during the most important and essential stage of the trial. The said officer was available but the trial was started without calling the officer and providing him to the petitioner. Instead, the prosecution arranged and detailed their own man. Major S.C. Dixit to defend the petitioner, who was neither asked for by the petitioner nor was he of his choice. Petitioner, with a view to strengthen the facts, as stated above, refers to records of the Court Martial proceedings at pages 4 and 6 which, according to him, reads thus :-

"The defending officer submits that on 20.6.87, the convening officer appointed him as the defending officer of the accused. Pursuant thereto. I arrived in station on 21.6.87 at about 2100 hrs. I met the accused a number of times but the accused has not given me any brief as I am not of the choice of the accused. The right of audience, therefore, rests with the accused only.

The prosecutor submits that the accused wanted me to he. his defending officer. Since J had recorded Summary of evidence, I was not made available. The accused desired to have Lt. Col. M.S. Chahal. CO 88 Armoured Regiment as his defending officer but he is not available to act as defending officer, presently being outside the Command. However, Army Hqrs. have been approached to make Lt. Col. M.S. Chahal available as the de-fending officer of the accused. The convening officer, therefore, detailed Major S.C. Dixit as a suitable defending officer. In addition, the accused has been provided with a friend of the accused of his choice.

The accused submits that I had given the name of Lt. Col. S.A. Khan, the prosecutor, as my defending officer, which was turned down on the ground that Lt. Col. S.A. Khan had been detailed as defending officer as per Army Rule 39(2) and note (1) to Army Rule 43. Army Rule 39(2) lays down disqualifications for members of the GCM. Note (1) to Army Rule 43 also does not prohibit the detailment of Lt. Col. S.A. Khan as my defending officer, specially so as I had submitted his name about 2 months before the assembly of the Court. Initially, I was not told that Lt. Col. S.A. Khan had been detailed as the prosecutor in the Court. From the correspondence it is clear to me that after I had submitted his name as defending officer, he was detailed as prosecutor".

23. It has been further averred that Major S.C. Dixit was detailed as defending officer by the prosecution who was its man which is stated to be clear from the fact that Major Dixit arranged to stay with one of the prosecution witnesses and despite repeated requests by the petitioner to Major Dixit to shift to some other neutral accommodation, he refused to do so and as such petitioner was unable to repose any confidence in Major Dixit as his defending officer. It is then pleaded that the petitioner, on realising the acute and constant grave damage that was being caused to his defence by the presence of Major Dixit, requested the court to remove Major Dixit from the trial premises. Though the General Court Martial agreed to this request and directed Major Dixt to withdraw, but after a short recess, the said Major Dixit and the prosecutor combined together and by getting an order from respondent No. 4, forced the Court martial to withdraw its earlier order and Major Dixit was allowed to sit on top of the petitioner and thereupon successfully worked for the prosecution to the extreme detriment of the petitioner, thus, causing grave and irreparable damage to his defence at the trial. On June 24, 1987 petitioner made a request to the General Court Martial for a short adjournment to refer the matter of provision of a defending officer of his choice to the convening authority. The said request for a short adjournment of one to two hours, the convening officer being in

the same station, was summarily rejected even though the required defending officer was available. In the manner aforesaid, neither the defending officer of his first choice or of second choice was made available to the petitioner on June 24, 1987 nor was he permitted to approach the convening officer to obtain his orders on the issue. The denial of defending officer of the first or second choice on June 24, 1987 and of the opportunity to approach the convening officer on June 24, 1987 goes to the very root of the matter and vitiates the trial being in violation of the Rules. Since both the defending officers of his choice were available, respondent No. 4 could not give a certificate as provided by Rule 95(2) and as such a unique procedure was adopted to deny the petitioner the defending officer of his choice inasmuch as the defending officer of his first choice was nominated as the prosecutor and Major Dixit was detailed to be the defending officer of the petitioner, while no reply was made on the request for defending officer of the second choice on the opening day of the trial. It is further pleaded that when the defending officer of his choice was not provided and the officer asked for by him was detailed to prosecute him, he requested for an adjournment of ten days on June 24, 1987 so as to enable him to secure the services of a counsel to conduct his defence at the trial at his own cost as per Rule 96 and Article 22(1) of the Constitution of India. The record containing request of the petitioner, as per his case, at page 10 of the proceedings of General Court Martial, reads thus :-

"I am not legally qualified and I am unable to undertake my own defence before the Hon''ble Court. On 21.6.1987 at 1130 hrs, I had given the name of Lt Col M.S. Chahal, CO 88 Armoumed Regiment as my defending officer. He has not been made available so far. I, therefore, request and pray to this Court to grant me an adjournment for ten days to enable me as a last resort, to engage a defence counsel to represent me at the trial. In obsence of a legal officer of my own choice or the counsel, I may prejudice myself if I answer the court questions".

24. Request of the petitioner, as reproduced above, it is further the case of petitioner, was summarily rejected and in the manner aforesaid, petitioner was denied his right to have a counsel of his choice as guaranteed to every citizen under Article 22(1) of the Constitution of India.

25. In the corresponding paras of the written statement, charge of the petitioner of denying him the defending officer of his choice or the counsel at the court martial proceedings has been refuted. It has, inter-alia, been pleaded by the respondents that when the trial papers were forwarded by the petitioner''s Commanding Officer, he was asked if he would like to have a defending officer assigned to represent him at his trial. The petitioner intentionally gave the choice of Lt Col S.A. Khan, who had taken down the summary of evidence in his case. Since the choice was highly unreasonable, he was asked to give another name. The petitioner did not do so inspite of repeated reminders. Ultimately, the convening officer used his best endeavour to ensure that the petitioner should be represented by a suitable officer

and made available the services of Major S.C. Dixit who was doing Doclorate in Law from Bombay University at that time and was legally qualified and also had a tenure with the Judge Advocate General''s department However, the petitioner, to create further problems, on June 21, 1987 gave his choice or Lt Col M.S. Chahal who was serving in a different command and his move had to be ordered by the Army Hqrs. In the interest of justice, however, the Army Hqrs was moved to make available the services of Mr. Chahal to the petitioner. Once the said officer arrived in the station, petitioner allowed him to proceed on leave for as much time as he wished and gave in writing to this effect to the convening officer. He also tried his best not to use the services of Major Dixit at later stages to create a ground to file a petition under Article 226 in this Court. It is further the case of respondents that the convening officer had done his best to ensure that the petitioner was represented by a defending officer at his trial. It is further pleaded that it was for the petitioner to use his services or to engage a counsel, who could defend him or to conduct his own defence. The petitioner, in his wisdom, most of the time defended himself and there was no justification now to blame the convening officer to say he was pro-prosecution. It is also pleaded that the services of Lt. Col. M.S. Chahal were made available to the petitioner, but he, in his own wisdom, dispensed with his services without assigning any justifiable reason. Major S.C. Dixit was asked to be present in the court so that the petitioner could use his services if so desired and should not blame later on that the convening officer failed in his duty to provide him a defence officer and thereby his defence was prejudiced. The petitioner had already dispensed with the services of Lt. Col. S.N. Bakshi, his friend and Lt. Col. M.S. Chahal as his defending officer. In fact, he was creating hurdles in the performance of the duly of imparting justice by the Court Martial. It is further pleaded that insofar as Lt. Col. S.A. Khan is concerned, he had taken down the summary of evidence and as such he could not be detailed for the petitioner. Insofar as second choice is concerned, it was made on June 21, 1987 and inspite of best endeavours, the services of Lt. Col. M.S. Chahal could not be made available forthwith and a suitable officer, Major S.C. Dixit, had to be detailed. When the petitioner made the request before the Court for ten days adjournment, he was advised that an accused is himself required to plead to the charges and once he had pleaded to the charges, the court would consider his request for an adjournment. The contention of petitioner that he was refused adjournment has, thus, been denied.

26. Having heard learned counsel for the parties and examining the records of the court martial proceedings, we do not find any merit in the aforesaid contention of learned counsel either. It is on February 7, 1987 that recording of summary of evidence started against the petitioner and the records shall bear it out and it could not be disputed also, that Lt. Col. S.A. Khan indeed was the officer, who was detailed to record summary of evidence. On March 30, 1987 recording of summary of evidence was completed. On April 4, 1987, a letter was addressed to the petitioner to supply the list of witnesses and name of the defending officer and if he was not to

give the information aforesaid to the authorities, the defending officer would be appointed by the authorities alone. On the same very day, i.e., April 4, 1987, he filed reply requesting that Lt. Col. S.A. Khan be detailed as his defending officer and on April 6, 1987 petitioner was informed that since Lt. Col. S.A. Khan had recorded summary of evidence and he was to be detailed as prosecutor, petitioner could not be provided the services of Lt. Col. Khan as his defending officer. On April 6, 1987 itself petitioner, however, insisted that Lt. Col Khan alone should be provided to him as defending officer. His request was declined on April 8, 1987. It is thereafter that the correspondence ensued between the petitioner and the concerned authorities, petitioner asking for leave and changing his dates on number of occasions as also the cause, details whereof have been given while dealing with the first point raised by Mr. Randhawa, as noted above. It may be recalled that the petitioner was handed over a chargesheet on June 20, 1987 and was taken to Suratgarh on June 21, 1987 and meanwhile the petitioner had already filed a Civil Writ Petition in the Delhi High Court, which, as mentioned above, was dismissed as withdrawn on June 29, 1987 On June 20, 1987 Brig. K.S. Gill, a practising lawyer of this High Court, had met the petitioner at 3 PM. It is on June 21 1987 that the petitioner gave name of the defending officer, namely, Lt. Col. M.S. Chahal, who had no legal qualification and was outside the command. The services of Lt. Col. Chahal, thus, could not be made available to the petitioner and ultimately the petitioner was provided Major S.C. Dixit as defending officer. The sequence of events, as detailed above, would demonstrate that the authorities endeavoured their best to provide the services of one of the best officers, who was even legally qualified and had experience of the court martial proceedings as defending officer. It rather appears to this Court that the plea raised by the respondents that the demand of the petitioner to detail Lt. Col. S.A, Khan as his defending officer was intentional with a view to delay the court martial proceedings, is correct.

27. The record would further bear it out that the plea of the petitioner with regard to not providing him a counsel at the court martial proceedings is equally hollow. The Court martial-proceedings dated July 15, 1987, would reveal that the defending officer submitted that the accused had engaged Col. N.S. Bains, Retired, Advocate, Delhi High Court as his defence counsel, who had instructed the petitioner to seek adjournment until 0800 hours on July 20, 1987 for preparation of defence. On the statement of the defending officer aforesaid, the Court directed the defending officer that the defence counsel may appear and make submissions in person. The defending officer, on the directions aforesaid, asked for time till 0945 hours to enable the defence counsel to come before the Court. The court allowed time as requested by the defending officer. The defence counsel did appear to submit that he arrived yesterday and needed time until 0900 hours on July 20, 1987 to prepare the cause. The prosecutor, on the request of the counsel, submitted that from the beginning, the petitioner had been seeking adjournments from time to time on various counts, (a) during the recording of summary of evidence he sought

adjournment to consult his counsel which was granted to him; (b) after the commencement of the trial he sought adjournments several times to engage a counsel which were granted. From the very beginning, Major S.C. Dixit, a highly qualified and experienced officer was detailed as the defending officer of the accused. In addition, Lt. Col. M.S. Chahal, the defending officer of the choice of petitioner, had also been made available to him. Brig. K.S. Gill, Advocate, Punjab and Haryana High Court, Chandigarh, had visited the petitioner and he had engaged a counsel to file a writ petition before the High Court. He had gone to Sriganganagar for engagement of a counsel and now he had engaged Col. N.S. Bains (Retired), Advocate, Delhi High Court as his defence counsel. During the trial, prosecutor was told that Col. Raj Kumar (Retired) Advocate would arrive and necessary transport and accommodation arrangements were made for him. After making the aforesaid contention, the prosecutor further stated that if the Court feels that the adjournment is required at this juncture, it may grant reasonable time to the defence counsel for preparation of defence and under the circumstances of the case, reasonable time could not be more than 24 hours. The prosecutor further stated that prosecution witnesses 1 to 3 have merely produced documents and PW4 was the first and the only witness as to the facts of the case who was under examination and therefore, adjournment until July 20, 1987 was too much and may not be granted. Furthermore, civilian witnesses were waiting since long and before any long adjournment was given, the court may permit the prosecution to examine these witnesses. It was also stated before the Court that PW4 was under examination and his cross-examination had not begun so far. The prosecution may be allowed to undertake his further examination-in-chief before the cross-examination of the witness commenced.

28. On the aforestated plea of the prosecutor, the defence counsel replied that he was not well that day and needed time as submitted earlier and that in case the court allowed the prosecutor to undertake further examination-in- chief of this witness, he would have no objection. It appears from the court martial proceedings that the court was thereafter closed by observing that the Judge Advocate had been regularly and progressively supplying the prosecutor and the accused/defending officer each with a copy of the proceedings and it decided to adjourn the proceedings till 0900 hours on July 16, 1987 and the prosecutor may continue with the examination-in-chief of PW4. When the court re-assembled on July 16, 1987, it was observed that the defence counsel was not present. Petitoner, however, submitted that based on the short adjournment that the court had granted the previous day, and the ill-heath of the counsel fatigued with long journey, he could discuss his case very briefly with his counsel, who was not well that day and, therefore, had not come before the court. On the aforesaid plea of the petitioner, the Court put the following question to him :-

"Q-19 : Question to the accused : What is your request under the circumstances ?

A-19. Answer by the accused : I have no request to make. I will do as the court directs."

After the aforesaid answer was given by the petitioner, the prosecutor stated the Col. N.S. Bains was quite old and infirm and he would need adjournments occasionally on the ground of his ill health. The petitioner had been provided with two defending officers and under the circumstances, it would be worthwhile that the defending officer represents him in the absence of the defence counsel. PW4 was under examination and it was thought advisable that his deposition was completed. Thereafter if the defence needed more time for preparation of defence, it may seek adjournment for a reasonable time. The prosecutor suggested that after the examination of PW4, the defence may be given as much time as it wants in lump-sum, i.e., to say ten or fifteen days or so to prepare the case thoroughly. On the aforesaid plea of the prosecutor, the petitioner then had nothing further to add. It was decided by the Court to allow one hour to the petitioner to consider what specific request he wishes to make and if he does not wish to make any specific request, what arrangement he wishes to make for his defence in absence of Col. N.S. Bains, Retd, the defence counsel. The Court reopened after an hour and the petitioner then handed-over a written submission which was marked as "LL". The petitioner was then put a question, to which he answered as well. The question and answer are reproduced below :-
"Q-20 : Question to the accused : Vide Exhibit ''LL'' you have neither made any specific request nor indicated any alternative arrangement that you wish to make in absence of Col. N.S. Bains, Retd. the defence counsel. You are once again asked to specify your request or indicate the alternative arrangement that you wish to make in absence of Col. N.S. Bains Retd. the defence counsel ?

Ans-20 : Answer by the accused : Presently, my defence counsel is not well. He is having ailment in his neck, right hand and back. I can not say whether he will be alright in an hour, 2 hours, 6 hours, one day or two days. In case the court decides to proceed with the trial in absence of my defence counsel then Major S.C. Dixit will have right of audience".

29. To the question aforesaid, the prosecutor stated that the petitioner was very intelligent person and he was in the habit of creating scene and dramatising the whole situation. He had intentionally not answered the simple question of the court and it was possible that the petitioner did not have the knowledge of working of Col. N.S. Bains, Retired. Knowing him well, he submitted that the Court may allow him ample time, may be 15 to 30 days, to study the case at one stretch and allow him to appear before the court once he was fully prepared with the case. The petitioner, to the submissions of the prosecutor had nothing more to say. However, the Court granted further time till 1330 hours to the petitioner to consult his counsel and make specific reply to the Court question. The Court reopened at 1330 hours when the petitioner submitted that he had discussed the case with his defence counsel

and he did not wish to apply for any adjournment due to the absence of the defence counsel and that in the absence of defence counsel, Major S.C. Dixit would have the right of audience as also that throughout the proceedings as and when his defence counsel was not present, Major Dixit would represent him. The prosecutor them submitted that the whole day had been wasted for lack of a clear answer from the petitioner and that in future the petitioner should take clear advice from the defence counsel well in advance and avoid giving vague answers to the court questions. It appears from the records, that the prosecutor had received a telegram that his mother had expired. It is the prosecutor now who made a request for adjournment for fifteen days, to which the defence counsel had no objection and on humanitarian grounds, the court decided to adjourn the case to 1400 hours on July 24, 1987. The matter could not be taken upon that day but on the next date of hearing, record further shows that when PW4 was further examined-in-chief on August 1, 1987, he was cross-examined by the defending officer of the petitioner. Mr. Bains, who had sufficient time to have instructions from the petitioner and prepare the defence, it appears from the records, was not present before the Court.

30. From the facts, as have been given in details above, it is clear that the concerned authorites had been more than fair to the petitioner whereas the petitioner had been totally unreasonable in making out demands from time to time, some of which he fully well knew, would not be acceded to, like, detailing Lt. Col. S.A. Khan, defending officer for him. All other demands made by him, in particular, permission to engage a counsel, adjournments so that he can prepare the defence properly were indeed granted. Yes, once again he could not be provided the services of Lt. Col. M.S. Chahal, who was out of command but it may be mentioned at the same time that the best possible officer, whom, it appears, ultimately petitioner preferred over and above the lawyer engaged by him, was provided to him. The very fact that Major S.C. Dixit defended him and cross-examined the material witness, PW4, would go a long way to show that the authorities made available to the petitioner the services of a person, who was legally qualified and had experience of court martial proceedings. It may be repeated here that the petitioner preferred Major S.C. Dixit over and above his counsel, Mr. Bains, engaged by him, who, despite adjournments, spanned over a period of days, did not turn up and instead it is Major Dixit, who had defended the petitioner.

3 I. The facts and circumstances of this case do not reveal any infringement of right of the petitioner as en-visaged under Rules 95 and 96 of the Army Rules and, therefore, there is no need at all to give in detail the judicial precedents relied by Mr. Randhawa in support of his plea, based upon Rules 95 and 96. Suffice it, however, to mention that Mr. Randhawa has relied upon Ranchod Mathur Wasawa Vs. State of Gujarat, , Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar AJR 1979 SC 1369, Khatri and Others Vs. State of Bihar and Others, , Suk Das Vs. Union Territory of Arunachal Pradesh, , Clarender Earl Gideon v. Louie L. Wainwright, Director, Division of Corrections, 372 US 335. Before we might, however, close the

plea aforesaid, we will append a note to the conclusion arrived at by us. These judgments, on facts, are distinguishable and all pertain to matters emanating from criminal trials governed by the Code of Criminal Procedure etc. None of these judgments pertain to Court martial proceedings governed by the Army Act and Rules. By virtue of provisions contained in Article 33 of the Constitution of India, Parliament, by law, can determine to what extent any of the rights conferred by Part III, pertaining to Fundamental Rights, can be restricted or abrogated so as to ensure proper discharge of the duties of the members of armed forces and the maintenance of discipline among them. The contention of Mr. Randhawa based upon Article 21 has, therefore, to be read with Article 33 of the Constitution of India. The Court martial proceedings are governed by Army Act and Rules and it is procedure prescribed under the Army Act and Rules that governs the field and it is infringement of any of the rights that might have been provided to members of armed forces that alone can give a cause of complaint to a citizen. Further, no person is to be deprived of his life and personal liberty except according to the procedure established by law. This liberty is available to a citizen by virtue of Article 21 of the Constitution of India. The right, in terms, is subject to procedure established by law and if the procedure has been established by the Army Act and Rules, it is infringement of that alone which can give a cause of complaint to a citizen. The judgments cited by Mr. Randhawa, which, as mentioned above, deal with the right of defence, emanating from the general law, would not apply to special law, i.e., Army Act and the Rules and for the reason as well, said judgments can not be given any weight in evaluating the contention of learned counsel.

32. Bias and disqualification of June Advocate, resulting into proceedings being vitiated is the next clamour of petitioner. It is urged that not only the Judge Advocate, who has to advice the Court on the pleas raised by the prosecutor and the defence, was biased but he was, by virtue of holding a rank lower than that of the petitioner, disqualified to act as Judge Advocate in General Court Martial proceedings. While attempting to project bias of Judge Advocate, it has been pleaded that the petitioner had objected on a number of occasions verbally and in writing to the exhibited biased, prejudicial and unworthy behaviour of the Judge Advocate and requested that either and Judge . Advocate should be changed or the matter may be referred to the Deputy Judge Advocate General at Hq Western Command, Chandimandir, who was the proper authority to decide the issue as per Rules 102 to 105 and their attendant explanatory notes and with special reference to Rule 104 read in conjunction with Rule 105(B) and Rule 102 read with Rule 39(2) with Note 3 to Rule 103 and Rule 39, the General Court Martial, at the behest of the Judge Advocate, overruled all such objections and in fact permitted and encouraged the Judge Advocate and, though the petitioner had, on number of occasions offered to lead evidence to prove his allegations about the exhibited bias, prejudice and improper behaviour of the Judge Advocate, the General Court Martial, at the behest of the Judge Advocate, refused to give any opportunity to him to substantiate the

allegations in violation of the provisions of Rule 165(7) and (8) read with Note 5 of the same and Rule 77(3) read with its Note 6 and of Note 11 to Rule 58. The denial of such an opportunity at the behest of the interested party, i.e., the Judge Advocate, was to be adversely inferred against the probity and worth of the conduct of the said Judge Advocate and as such the complete proceedings of the General Court Martial stand vitiated by the presence and activities of the Judge Advocate at the trial in violation of Rules.

33. The bias and incompetence of the Judge Advocate, namely, Major Lt. Col. R.K. Avasthi is also stated to be for the reason that the Judge Advocate was holding a rank lower than that of the petitioner. It is urged before us during the course of arguments, though not pleaded, that petitioner was promoted as Lt. Colonel in 1982 by selection. On February I, 1984 be became Commanding Officer, 6th Armed Regiment and was promoted as Full Colonel on May 7, 1986 whereas R.K. Avasthi was holding substantive rank of Major only, even though he might be acting as Lt. Colonel at the relevant time.

34. Insofar as pleadings with regard to bias contained in the writ petition are concerned, it has been pleaded in the corresponding para of the written statement filed on behalf of the respondents that the petitioner has made sweeping allegations against the Judge Advocate without substantiating the same. In fact, he was maintaining an entirely impartial position throughout the trial and the petitioner had raised this issue before the Court Martial too but since his objections were without substance, same were over-ruled. With regard to Mr. Avasthi holding lower rank than that of the petitioner, naturally, there is no reply in the written statement for lack of pleadings in the writ petition to that effect.

35. Having examined the point raised by learned counsel, as noted above, in light of Rules 39, 40(2), 41, 102 and 105 of the Army Rules, which were referred to, during the course of arguments, we find the contention of learned counsel to be devoid of any merit. An officer is disqualified for serving on a general or district court martial, amongst others, on the ground that he has personal interest in the case as would be made out from Clasue (e) of Sub-rule (2) of Rule 39 of the Army Rules. Sub-rule (2) of Rule 40 enjoins that a member 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. By virtue of provisions contained in Sub-rule (2) of Rule 41, the Court, in the case of general or district court martial, to which the Judge Advocate has been appointed, has to ascertain that the Judge Advocate is duly appointed and is not discqualified for sitting on that court martial. An officer, who is diqualified for sitting on a court-martial, shall be disqualified for acting as a Judge Advocate at that court martial, it is further amply made out from the provisions contained in Rule 102 of the Army Rules. No doubt, an officer, who may be interested, in some way or the

other, in success of prosecution version, or may have personal bias against the delinquent, would be disqualified to be a Judge Advocate in a Court martial proceeding but by showing that alone, the case of petitioner gets no thrust, He has further to show the grounds on which a Judge Advocate may be biased and, thus, incompetent. But for general and indeed wild allegations made in the petition, nothing has been stated from which it may even prima facie appear that Mr. Avasthi, Judge. Advocate in this case was biased or had any personal interest. It is for that reason it appears that the objection raised by the petitioner before the Court Martial was rejected. No specific instance of any kind whatsover tending to show bias has been pointed out.

36. Insofar as objection that Major Avasthi was holding lower rank than that of the petitioner is concerned, same appears to be correct in view of the law laid down in recent decision of the Supreme Court in Union of India and Another Vs. Charanjit S. Gill and Others, . Sub-rule (2) of Rule 40, as mentioned above, enjoins that a member 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. We would have gone into this plea in all its minute details if, perhaps, while deciding Cha-ranjit S. Gill''s case (supra), the Supreme Court might have not observed that "in view of this position of law the judgments rendered by the Court-martial which have attained finality can not be permitted to be reopened 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". Not only that such a plea in pending cases can not be raised but even such petitions can not be permitted to be amended. No necessity, thus, arises, as mentioned above, to go into the details of the contention based upon Sub-rule (2) of Rule 40 of the Army Rules. We may, however, hasten to add that Mr. Rathi, learned counsel for Union of India contends that the petitioner, while being sent for Court Martial was reduced to the rank of Major and insofar as Mr. Avasthi is concerned, he held the rank of Lt. Colonel.

37. The next point that has been urged before us pertains to punishment being deterrent and not commensurate with the nature of charges for which the petitioner faced trial. It is stated that the charges do not make it out a case that the petitioner might have appropriated to himself the money he obtained for modification of the army vehicles. Inasmuch as this point has been separately urged by contending that the charges are frivolous, we shall deal with the said point

separately. Suffice it, however, to say that quantum of punishment is by and large in the discretion of the concerned authorities and normally the Court does not interfere in the same. The Supreme Court in Ranjit Thakur Vs. Union of India (UOI) and Others, , while dealing with quantum of punishment in Court Martial proceedings, held that "judicial review, generally speaking, is not directed against a decision, but is directed against the decision making process. The question of choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should be not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review". The facts of the aforesaid case would reveal that the appellant was already serving sentence of 28 days rigorous imprisonment imposed on him for violating the norms for presenting representations to the higher officers. He had sent representation complaining of ill-treatment at the hands of respondent No. 4 directly to the higher officers and he was punished for that by respondent No. 4. He was held in the Quarterguard Cell in handcuffs to serve that sentence of rigorous imprisonment. While so serving the sentence, he was stated to have committed another offence for which the punishment was handed down and was served a charge-sheet for disobeying a lawful command given by his superior officer to the effect that when ordered by Sub Ram Singh to eat food, he did not do so. For this offence committed by him, he was sentenced to undergo rigorous imprisonment for one year and was also dismissed from service. This, indeed, was a punishment which could well he styled to he totally disproportionate to the offence as would shock the conscience and would amount in itself to conclusive evidence of bias. It is in the context of the facts, as staled above, that the Supreme Court observed as quoted above.

38. The controversy veers thick on the next and last contention raised by Mr. Randhawa. He vehemently contends that all the charges framed against the petitioner are frivolous and in fact, from the particulars of same, no intention to defraud is at all made out. Mere non-aulhorisation, at the most, may amount to intent to deceive and nothing more. He further contends that if no harm or injury to any one is averred in the charge and the particulars do not even make it out a case of loss, it would be vague and further that the consequences of deception have to be deciphered from the language of the charge. In order to substantiate his plea that the charges are frivolous or do not amount to any offence it is further urged that every thing has been correctly stated in the bill in dispute which became a subject matter of charge. The bill was neither forged nor false and at the most it could be read to mean wrong assertion on the part of the petitioner which can not

in any case result into intention to defraud, further contends the learned counsel.

39. With a view to appreciate the controversy based upon frivolity of charges, it would be appropriate to reproduce the same. The petitioner was tried by the Court Martial on the following four charges :-

The accused, 1C16714K Major Deol Rabinder Singh, SM, 6 Armoured Regiment, attached Headquarters 6(1) Armoured Brigade, an officer holding a permanent commission in the Regular Army is charged with:-

such an offence as is mentioned in Clause (f) of Section 52 of the Army Act with intent to defraud, in that he, at field on 25 June 84, while commanding 6 Armoured Regiment, when authorised to claim modification grant "in respect of only one truck one tonne 4x4 GS FFR, for Rs. 950A, with intent to defraud, countersigned a contingent bill No. 1096/LP/8/TS dated 25 June 84 for Rs. 31692/-for claiming an advance of 75% entitlement of cost of modification of 43 vehicles, which was passed for Rs. 31650/-, well knowing that the Regiment was not authorised to claim such grant in respect of all types of vehicles. such an offence as is mentioned in Clause (f) of Section 52 of the Army Act with intent to defraud, in that he at field on 5 March, 85, while commanding 6 Armoured Regiment, with intent to defraud, countersigned a contingent bill No. 1965/ULPG/85/T5 dated 5 March 85 for Rs. 20962.50 for claiming an advance of 75% entitled of cost of modification of 22 vehicles, well knowing that the Regiment was not authorised to claim such grant in respect of all types of vehicles.

such an offence as is mentioned in Clause (f) of Section 52 of the Army Act with intent to defraud, in that he, at field on 9 Feb 85, while commanding 6 Armoured Regiment, with intent to defraud, counter-signeda final contingent bill No. 1965/LP/02/TS dated 9 Feb 85 for Rs. 18150/- for claiming the balance of the cost of modification of vehicles, which was passed for Rs. 18149.98 well knowing that the Regiment was not authorised to claim such grant in respect of all types of vehicles.

such as offence as is mentioned is Clause (f) of Section 52 of the Army Act with intent to defraud, in that he, at field on 9 Sep 85, while commanding 6 Armoured Regiment, with intent to defraud, countersigned a final contingent bill No. 1965/LP/04/TS dated 9 Sep 85 for Rs. 6987.50 for claiming the balance of" the cost of modification of vehicles, well knowing that the Regiment was not authorised to claim such grant in respect of all types of vehicles.

40. Learned counsel contends that a perusal of the charges 1 and 2 would demonstrate that petitioner was authorised to claim modification grant in respect of only one truck one Tonne 4 x 4 GS, FFR for Rs. 950/-but, with intent to defraud, he countersigned a contingent bill dated June 25, 1984 for Rs. 31692/- so as to claim advance of 75% entitled of cost of modification of 43 vehicles, knowing well that the regiment was not authorised to claim such grant in respect of all types of vehicles as also that he countersigned a contingent bill dated March 5, 1985 for Rs. 20962.50 for

claiming an advance of 75% entitlement of cost of modification of 22 vehicles, well knowing that regiment was not authorised to claim such grant in respect of any type of vehicles. Insofar as charges 3 and 4 are concerned, they are only continuation of first and second charges as it is with regard to modification of vehicles, mentioned in charges 1 and 2, that remaining 25% was claimed by the petitioner. If first two charges may be held to be frivolous or not amounting to an offence as per provisions contained in Section 52 of the Army Act, charges 3 and 4 would automatically sink, further contends the learned counsel.

41. Mr. Rathi, learned counsel for the Union of India, joins issue with the contention of learned counsel for the petitioner, noted above, and besides contesting the said issue on the basis of facts and law, he also pleads that the petitioner can not be permitted to raise this issue, having earlier filed a writ petition No. 1898 of 1987 in Delhi High Court before commencement of the Court Martial proceedings. Even though, the said petition was dismissed as withdrawn, the petitioner can not raise the issue twice over based upon principles enshrined in Order 23 Rule 1(3) and Section II of the Code of Civil Procedure, further contends the learned counsel.

42. Before we may examine the merits of the contention of Mr. Randhawa, as noted above, it would be appropriate to first deal with the objection of Mr. Rathi with regard to permissibility of plea in view of writ petition that came to be filed before the Delhi High Court based upon Order 23 Rule 1(3) or Section 11 of the Code of Civil Procedure, as has been taken during the course of arguments. This plea has not been raised in the written statement and what all exactly was under challenge before the Delhi High Court is not known. The writ petition filed in the Delhi High Court and the order passed thereon have also not been brought on record. During the course of arguments, however, we are informed that it was prepared and verified by the petitioner himself on June 19, 1987 and seems to have been filed in Delhi High Court on June 25, 1987. The request of the petitioner in CM No. 2640 of 1987 was that respondents be restrained from proceeding with his trial by the General Court Martial in pursuance of convening order dated June 19, 1987 during the pendency of the. writ petition. It is also stated that the petitioner had attached a charge sheet dated June 19, 1987 with the writ petition along with convening order dated June 19, 1987. Even though writ petition was filed before the Delhi High Court on June 25, 1987, it was checked by the Registry on June 26, 1987 and heard on June 29, 1987, on which date it was dismissed as having been withdrawn. The facts, as have been told to us during the course of arguments would, thus, reveal that CWP No. 1898 of 1987 was prepared and verified by the petitioner on June 19, 1987. The same was, however, filed in the Delhi High Court on June 25, 1987. The accompanying documents with the writ petition, were filed by father of the petitioner, Col. Tej Bhan Singh on June 22, 1987; From the facts, as have been given by us in the earlier part of the judgment it may be recalled, the petitioner was brought from Military Hospital, Delhi to Command Hospital, Chandigarh on June 19, 1987 and it is on June 20, 1987 that petitioner was handed-over the charge-sheet

and on the same very day taken to Suratgarh and he was produced before the Court Martial on June 24, 1987. The facts, as given above, would, thus, manifest that Civil Writ Petition No, 1898 of 1987 was drafted before the petitioner was handed- over the charge-sheet. It may be true that earlier in point of time petitioner was given a draft charge-sheet but till such time, the charges, on which the petitioner was to be actually tried were not handed-over to him, in our view, any challenge to the charges on the basis of draft charge-sheet would have been certainly premature as the same were tentative and no cause of action had accrued to the petitioner to challenge the same prior to issuance thereof. Insofar as actual charge-sheet is concerned, same, even as per case of the Union of India, was not attached with the writ petition. As mentioned above, no plea with regard to present petition being barred by the provisions of Order 23 or Section 11 of the CPC has been raised in the written statement. Mr. Rathi, for his contention aforesaid, however, relies upon for judgments of the Supreme Court in Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, , Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen and Another, , B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others, and Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, .

43. The facts of the Workmen of Cochin Port Trust''s case (supra) would reveal that an award of the Tribunal was challenged by way of a SLP filed before the Supreme Court on almost all grounds taken in the writ petition filed before the High Court. When, however, the matter came up before the Supreme Court, after High Court had decided the matter finally, plea of res-judicata based upon dismissal of SLP by the Supreme Court was pressed into service. While dealing with the matter, it was held that "it is well known that the doctrine of res-judicata is codified in Section 11 CPC but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res-judicata has been applied since long in various kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res-judicata is engrafted in explanation IV of Section 11 and in many other situations also principles not only of direct res-judicata but of constructive res-judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res-judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res-judicate also comes into play, when by the judgment and order a decision of a particular issue is implicit in it, i.e., it must be deemed to have been necessarily decided by implication; then also the principle of res-judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided". The Supreme Court further held that "there was no question, therefore, of applying the principles of

constructive res-judicata in this case. What is, however, to be seen in whether from the order dismissing the SLP in limine if can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably, nothing was expressly decided".

44. In Ahmedabad Manufacturing and Calico Printing Company Limited''s case (supra) the High Court had dismissed the writ petition only on the ground that earlier in point of point SLP was filed in the Supreme Court which was withdrawn unconditionally. While examining the correctness of the decision of the High Court based upon dismissal of the SLP by unconditionally withdrawing it, it was held that "the High Court does not exercise a proper and sound discretion in dismissing the writ petition in limine on the sole ground that the application for Special Leave on the same facts and grounds had been withdrawn unconditionally. An order permitting the withdrawal of the leave petition for the same reason can not also operate as res-judicata".

45. The facts of Prabhakar Rao''s case (supra) would reveal that earlier in point of time writ petition similar to the one later filed was dismissed in limine by the Supreme Court. While considering the maintainability of second petition on the same grounds, it was held that "we do not see how the dismissal in limine of such a writ petitioner possibly bar the present writ petitions. Such a dismissal in limine may inhibit our discretion but not our jurisdiction",

46. The facts of Sarguja Transport Service'' case (supra) would reveal that the petitioner in the said case, after withdrawing writ petition without the permission of the Court, instituted a fresh one in respect of same cause of action. The Supreme Court, on the facts, as stated above, held that "in order to prevent a litigant from abusing the process of the Court by instituting suits again and again in the same cause of action without any good reason, the Civil P.C. insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in Order 23 Rule 1(3). The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res-judicata. This principle underlying Rule 1 of Order 23 should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res-judicata, but on the ground of public policy. That would also discourage that litigant from indulging Bench hunting tactics. In any event, there is no justifiable reason in such a case to permit a petition to invoke extra ordinary jurisdiction of the High Court under Article 226 once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies, like a suit or a petition under Article 32 since such withdrawal does not amount to res-judicata, remedy under Article 226 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ". It was further held that "the above rule is not applicable to a writ petition involving the personal liberty of an individual in which the petitioner

prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental rights guaranteed under Article 21 since such a case stands on a different footing altogether".

47. After examining the pleadings to the extent same are available as also even what we have been told in the Court during the course of arguments, we are of the view that neither Section 11 nor Order 23 Rule 1(3)nor even for that matter the principles founded on public policy, as culled out by the Supreme Court in Sarguja Transport Service''s case (supra), would render the pre-rent petition incompetent. As mentioned above, earlier petition came to be filed at a stage when petitioner was not so far facing court martial proceedings. It was drafted at a time when petitioner was not even handed-over the charge-sheet. The moment he was handed-over the charge-sheet, he was taken to Suratgarh. It may be true that while leaving for Suratgarh, petitioner might have handed-over a copy of charge-sheet to his father of any of his well-wishers, who, in turn might have got the same attached with the writ petition, but there is nothing at all available on records that might even remotely show that charge-sheet as such was subject matter of challenge before the Delhi High Court. Prima facie, it appears to us that charge-sheet was not subject mutter of challenge before Delhi High Court as, otherwise counsel for Union of India would have not remained content by simply stating that charge-sheet was attached with the earlier writ petition as in that case he would have certainly stated that charge-sheet was subject matter of challenge. What has been said above, is also supported from the fact that petition was prepared on June 19, 1987, by which date, as mentioned above, petitioner was not even handed-over the charge-sheet. If that be true, cause of action to challenge the charge-sheet had not accrued to petitioner by the time aforesaid petition came to be drafted. Further, it is after culmination of the Court Martial proceedings, resulting into punishment of the petitioner, that present petition has been filed wherein not only the charge-sheet but various other aspects have been highlighted endeavouring to show that the orders passed by the court martial are illegal and, thus, can not sustain. Further, the judgment relied upon by the counsel representing the Union of India, but for the one in Sarguja Transport Service case (supra), are clearly distinguishable on facts. Even the judgment in Sarguja Transport Service case (supra) would not in any way come near in supporting the contention of Mr. Rathi, primarily for the reason that when earlier writ petition filed in the Delhi High Court was withdrawn, no cause of action had arisen to the petitioner to challenge the charge-sheet on the basis of draft charge-sheet and there is nothing available on record to show that the actual charge-sheet handed-over to the petitioner on June 20, 1987 was ever subject matter of challenge.

48. Coming to the core issue with regard to charges being frivolous, it shall be appropriate to examine the pleadings of the parties as contained in the writ petition, reply of the respondents and the charges as such, before the matter is examined on the anvil of law applicable to the facts and circumstances of the case. It has,

inter-cilia, been pleaded in the writ petition that the only allegation levelled against the petitioner was that he had countersigned the contingent bills for claiming the cost of modification of vehicles in the Unit knowing well that the Regiment was not authorised to claim such grant in respect of all types of vehicles. Having regard to the wording of the charges and the allegations contained in the particulars, these did not come within the purview of intent to defraud and the claim of such grant, even if not authorised, would not in itself amount to ''intent to defraud''. Explanatory notes 23 and 24 given u/s 52(f) of the Army Act in support of what has been said above, have been then reproduced and it has further been pleaded that applying the law as contained in Section 52(f) of the, Army Act, it can be safely stated that it is beyond comprehension as to how any offence under the said Section was made out from the particulars. The law requires that it is not sufficient to couple the description of an act which can bear an innocent construction with an averment of intent to defraud and this is what has exactly been done in this case. II has further been pleaded that the decisive test for proving an allegation of ;intent to defraud'' is the presentation and proof of two elements which are essential to the commission of the crime, namely, deceit or an intention to deceive or in some cases mere secrecy; and secondly, either actual or possible injury or risk of possible injury. It has then been pleaded that major portion of the evidence in regard to the mode of utilisation of the grant received after due sanction could not be led being not within the scope of relevancy but the prosecution was allowed to lead evidence in regard to the mode of utilisation of the grant which took the defence by surprise. If the intention was to depend upon the evidence regarding the utilisation of the modification grant, the averment should have been differently made giving defence proper information regarding the nature of the charges and also as to what it was required to defend. The surprise caused to the defence is of such a nature that it caused serious prejudice to the case of the petitioner. It is then pleaded that the petitioner had also raised objection to the charges before the trial under Rule 49 of the Army Rules. It was submitted that besides alleging the nature of act in the particulars it should be clearly mentioned as to how the ''intent to defraud'' was made giving clear and unambiguous information to him to know as to what he is supposed to defend. The particulars which need support from the evidence to reveal the nature of the charges are such which are vague and, thus, hit by the provisions of Rule 49 of the Army Rules. There are other assertions made in the later paragraphs of the writ petition but same by and large, are repetition, with some additions, which need no mention.

49. In reply to the averments made in the writ petition, it has been stated in the corresponding paras of the written statement that petitioner was charged for committing such an offence u/s 52(f) of the Army Act with intent to defraud and the words ''with intent to defraud'' do not require any explanation. The Court may take a judicial notice of the same. A Commanding Officer is individually and personally responsible for accounting public money, even though he may be assisted by his

subordinate staff. It is his signatures which matter with regard to preferring a claim and not of his staff officers. No claim could have been submitted to the Controller of Defence Accounts or passed by them unless the same was countersigned by the petitioner. Since wrong claims were preferred under the petitioner''s signature, he was answerable for the same. Petitioner''s acts fulfilled all the ingredients of an offence chargeable u/s 52(f) of the Army Act and he was, therefore, charged accordingly. Charges so framed in accordance with law did disclose an offence and the same were proved with reliable and cogent evidence beyond reasonable doubt by the prosecution. The charges were worded in simple and clear language so that the petitioner knew as to what he was to answer, The particulars of charges were supporting the statements of offences. Petitioner''s -objections to the charges were considered by the General Court Martial, and found without substance and, therefore, rejected. The Commanding Officer alone was responsible for accounting of public money and hence he could not plead that he merely countersigned in good faith. The unit was only authorised to claim grant for modification of one vehicle whereas the petitioner had claimed for 65 vehicles and thereby the State was put to a loss. Even the grant fraudulently claimed was utilised for purposes other than it was meant. With regard to leading of evidence beyond the scope of charges, it is averred that the record would show that even effort was made that only relevant evidence was taken on record.

50. A perusal of the pleadings, as reflected above, would show that two inter-connected objections have been raised by the petitioner. It is first stated that the charges do not disclose any offence and second, which, as mentioned above, is inter-connected, is that evidence that came to be led by the prosecution, was beyond the scope of charges framed against the petitioner, and was, thus, wholly irrelevant and could not be taken into consideration. A corollary to the second objection, noted above, would be prejudice that might have been caused to the petitioner in case it is first held that the charges were defectively, improperly framed or did not disclose any offence, even though, with regard to missing part in the same, evidence was led by the prosecution. All these questions would require discussion and findings thereon in case the answer to the first question is returned in favour of the petitioner as it is only on determining of first point in favour of petitioner that the discussion on other two points would survive.

51. Before we might examine the charges, it will be useful to notice the provisions of Section 52 of the Army Act, notes appended to the said Section, Rules 30, 32 and 42 of the Army Rules, on the basis of which, it is urged that the charges are totally groundless or, in other words, do not disclose any offence. Section 52 deals with offences in respect of property. Same reads as follows :-

"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 mess band or institution or to any person subject to military, naval or air force law; or

(b) dishonestly misappropriates 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

(t) 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."

52. Clauses (a) to (e) of Section 52 deal with specific offences, like, theft, dishonest misappropriation, criminal breach of trust, dishonestly receiving or retaining any properly and wilfully destroying or injuring any property whereas Sub-section (f) is generally worded to include offences other than mentioned in Clauses (a) to (e) pertaining to property. ''Intent to defraud'' or ''intent to cause wrongful gain to one person and wrongful loss to another amounts to offence by virtue of Clause (f) of Section 52. Relevant parts of Notes 23, 24, 25 and 26 of Section 52 read as follows :-

"23. Clause (f) ''Does any other thing. - An act or omission which would fall under any other clause or any other section of A A should not be made the subject matter of a charge under this clause. But in doubtful cases the charge should be laid under this clause. "

24. (a) With intent to defraud'' - A person is said to do, a thing fraudulently, if he does that thingwith intent to defraud but not otherwise.

(b) The terms ''fraud'' and ''defraud'' are not found defined in the IPC. The word ''defraud'' is of double meaning, in the sense that it either may or may not imply depravation. Whenever the words ''fraud'' or intent to defraud'' or ''fraudulently'' occur in the definition of a crime, two elements atleast are essential to the commission of the crime, namely, first, deceit or an intention to deceit or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of the deceit or secrecy. This intent is very seldom, the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The "injurious deception" is usually intended only as a means to an end, though this does not prevent it from being intentional. A practically conclusive test to the fraudulent character of a deception for criminal purposes is

this : did the author of the deceit derive any advantage from it which he could not have had if the truth had been known ? If so, it-is hardly possible that that advantage should not have had an equivalent in toss, or risk of loss to some one else; and if so, there was fraud.

(c) A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another would be sufficient to support a conviction. In order to prove an intent to defraud, it is not at all necessary that there should have been some person defrauded, or who might possibly have been defrauded. A person may nave an intent to defraud and yet there may not be any person who could be defrauded by his act. It should, however, be noted that an intent only to deceive is not enough.

25. Wrongful loss or wrongful gain :- A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept put of ah property, as well as when such person is wrongfully deprived of property. (Section 23 Part III of IPC).

26. (a) In order to constitute an offence under this clause, it is not sufficient to couple the description of an act which can bear an innocent construction with an averment of intent to defraud. The act alleged to have been committed with intent to defraud must itself appear from the particulars of the charge to be a wrong act, though it may not necessarily amount to an offence under the ordinary criminal law".

(We have reproduced the notes as a mere guide as it is not clear as to whether the same are statutory or otherwise. We have, thus, presumed these notes to be guiding factors)".

53. Rules 30, 32 and 42 dealing with contents of charge and validity of charge-sheet and inquiry by Court as to amenability of accused and validity of charge read as follows :-

"30. Contents of charge - (1) Each charge shall state one offence only, and in no case shall an offence be described in the alternative in the same charge.

(2) Each charge shall be divided into two parts -

(a) statement of the offence; and

(b) statement of the particulars of the act, neglect or omission constituting the offence.

(3) The offence shall be stated, if not a civil offence, as nearly as practicable, in the words of the Act, and if a civil offence, in such words, as sufficiently described in technical words.

(4) The particulars shall state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission is intended to be proved against him as constituting the offence.

(5) The particulars in one charge may be framed wholly or partly by a reference to the particulars in another charge and in that case so much of the latter particulars as are so referred to, shall be deemed to form part of the first mentioned charge as well as of the charge.

(6) Where it is intended to prove any facts in respect of which any deduction from pay and allowances can be awarded as a consequence of the offence charged, the particulars shall state those facts and the sum of the loss or damage it is intended to charge".

32.Validity of charge-sheet. - (1) A charge sheet shall not be invalid merely by reason of the fact that it contains any mistake in the name or description of the person charged, provided that he does not object to the charge-sheet during the trial and that no substantial injustice has been done to the person charged.

(2) In the construction of a charge-sheet or charge, there shall be presumed in favour of supporting the same every proposition which may reasonably be presumed to be impliedly included, though not expressed therein.

42. Inquiry by Court as to amenability of accused and validity of charge. - (1) If the Court is satisfied that the requirements of rule 41 have been complied with, it shall further satisfy itself in respect of each charge about to be brought before it -

(a) that it appears to be laid against a person subject to the Act, and subject to the jurisdiction of the Court, and

(b) that each charge discloses an offence under the Act and is framed in accordance with the rules, and is so explicit as to enable the accused readily to understand what he has to answer.

(2) The Court, if not satisfied on the above matter, shall report its opinion to the convening authority and may adjourn or that purpose".

54. Clause (f) of Section 52 of the Army Act is in two parts, or, in other words, deals with two distinct kind of offences. Whereas, one part deals with doing any other thing with intent to defraud, the other part pertains to wrongful gain to one person or wrongful toss to another. A significant question that arises for determination, prior to points raised by Mr. Randhawa, learned counsel for the petitioner, are discussed, is as to whether "intent to defraud" as mentioned in first part of Clause (f) of Section 52 would include a wrongful gain and wrongful loss and causing wrongful gain to one person or wrongful loss to another, mentioned in second part of Clause (i) of Section 52, would include, such wrongful gain or wrongful loss to be by wrongful means. We would like to mention here that judgment was reserved in this

case but while preparing the same, this distinction came to the notice of the Court. The matter was listed for re-hearing and learned counsel for the parties were apprised of this distinction that might arise. They sought time and then addressed arguments on the point aforesaid.

55. The words/pharases "intent to defraud", "to cause wrongful gain to one person and wrongful loss to another" have not been defined in the Army Act, Rules or Regulations. Section 3 of the Army Act deals with definitions of various words and phrases mentioned therein. By virtue of Clause (xxv), which is last clause in Section 3, all words and expressions used but not defined in the Army Act but defined in the Indian Penal Code, would be deemed to have the meanings assigned to said words and phrases in that Code. Clause (xxv) of Section 3 of the Army Act reads thus :-

"(xxv) all words (except the word India) and expressions used but not defined in this Act and defined in the Indian Penal Code (Act XLV of 1860) shall be deemed to have the meanings assigned to them in that Code".

56. Conedcdly, the words/phrases, "with intent to defraud", "to cause wrongful gain to one person and wrongful loss to another" have not been defined in the Army Act. The words/phras "with intent to defraud" has not been defined even in the Indian Penal Code. However, word "fraudulently" has been defined in Section 25 of the Code. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise, is the definition of "fraudulently" given in Section 25 of the Code. The words "wrongful gain" have been defined in Section 23 of the Code to mean ''wrongful gain'' is gain by unlawful means of property which the person gaining is not legally entitled. "Wrongful loss" has also been defined in Section 23 to mean the loss by unlawful means of property to which the person losing it is legally entitled. During the course of arguments, it could not be disputed that insofar as second part of Clause (f) of Section 52 is concerned, the words "by unlawful means" would be considered inherently embedded in the words "to cause wrongful gain to one person or wrongful loss to another". There is, however, a controversy with gain to one person and loss to another or only a gain or a loss being inherently embedded in the words/phrase "intent to defraud" as mentioned in first part of Clause (f) of Section 52 of the Army Act. Mr. Rathi, learned counsel for Union of India, vehemently contends that since the words/phrase "intent to defraud" have not been defined in the Indian Penal Code, it shall not be permissible to go to the definition of "fraudulently" as contained in Section 25 of the Code. To further elaborate, it is urged by Mr. Rathi that ."fraudulently" has been defined in Section 25 of the Code to do a thing with intent to defraud but not otherwise. It is further urged that it is only because of the words ''but not otherwise'' mentioned is Section 25 of the Code that wrongful gain or wrongful loss or both or either of these, would constitute fraud but, in the first part of Clause (r) of Section 52 of the Army Act, all that has been mentioned is ''with intent to defraud'' and, therefore, the charge need not contain any particulars with regard to wrongful gain or wrongful loss. Mr.

Randhawa, learned counsel for the petitioner, however, joins serious issue with Mr. Rathi on his contention, as noted above and, naturally submits that mere ''intent to defraud'', as mentioned in first part of Clause (f) of Section 52 of the Army Act would not constitute any offence.

57. We have given our anxious thoughts to the contention of learned counsel for the parties, as noted above. We are of the view that the distinction pointed out by Mr. Rathi would not fit in the scheme of the Army Act and, in particular, Clause (f) of Section 52 thereof. As mentioned above, it is not disputed and could not possibly be disputed that words/phrases ''wrongful gain to one person or wrongful loss to another'' would include in it by unlawful means as these words/phrases have since been defined in the Indian Penal Code. It is only because words/phrase ''intent to defraud'' as such having not been defined in the Indian Penal Code that contention is being raised that the words/phrase would not include in it wrongful gain or wrongful loss.

58. Sub-clause (ii) of Section 3 of the Army Act defines ''civil offence'' to mean an offence which is triable by a criminal court. ''Offence'' by virtue of Clause (xvii) of Section 3 of the Army Act means any act or omission punishable under the Army Act and includes a civil offence as defined before. Subject to provisions of Section 70. any person subject to the Army Act, who at any place in or beyond India commits any civil offence, shall be deemed to be guilty of an offence against the Army Act and, if charged therewith u/s 69, shall be liable to be tried by a court-martial, as would be clear from Section 69 of the Army Act. ''Fraud'' is a civil offence triable by a court-martial. There are some specified offences which are not civil offences and are only triable by a court-martial. If the offence, with which the petitioner has been charged, i.e., ''intent to defraud'' be civil offence and also triable by a court-martial and if such an offence has not been defined in the Army Act, there will be no choice but for to apply the definition of such an offence as given in the Indian Penal Code. No doubt, it is true that the words/phrase ''intent to defraud'' have since not been defined in the Indian Penal Code but then one has to look in for such words/phrase that may be as near to the phrase used in the Army Act. ''Fraudulently'' has been defined, as mentioned above, in Section 25 of the Indian Penal Code. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. ''Fraudulently'' has in fact been defined ''as an intent to defraud''. The addition of words ''but not otherwise'' mentioned in the definition of ''fraudulently'' in Section 25 would not make the least difference. Further, it is not only because that the mention of words ''but not otherwise'' that ''intent to defraud'' would not make an offence unless coupled with wrongful gain or wrongful loss. In other words, assuming that words ''but not otherwise'' were not mentioned is Section 25 of the Code, mere intent to defraud without wrongful gain or wrongful loss would otherwise also not constitute any offence. What we have said above would be fortified from the words ''intent to defraud'' mentioned in Section 477-A of the Code. No doubt, that wherever ''fraud'' may be an element of an offence dealing with

various sections of the Indian Penal Code, word/phrase mentioned is ''fraudulently'' but in Section 477-A, the words used are ''with intent to defraud''. Section 477-A of the Code reads thus :-

"477-A :- Falsification of Accounts - Whoever, being a Clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account, which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may be extend to seven years or with tine, or with both.

Explanation :- It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defraud or specifying any particular sum of money intended to be subject of the fraud, or any particular day on which the offence was committed".

59. The words ''intent to defraud'', as mentioned in Section 477-A of the Code, came for discussion by the Apx Court in S. Harnam Singh Vs. The State (Delhi Admn.), . The facts of the said case would reveal that Harnam Singh - appellant, a goods loading Clerk in the Outwards Good Shed, Northern Railway, New Delhi, was tried along with one Naresh Chand, an agent of the Birla Cotton Spg. and Wvg. Mills Delhi by the Special Judge, under Sections 120-B/477-A Penal Code and Section 5(2) of the Prevention of Corruption Act. The trial Court acquitted the appellant of the charge of criminal conspiracy but found him guilty u/s 477-A of the Penal Code and Section 5 of the Corruption Act. Naresh Chand, co-accused of the appellant was, however, acquitted of all the charges. Delhi High Court set aside the conviction of appellant u/s 5(2) of the Corruption Act but maintained his conviction and sentence u/s 477-A of the Penal Code. The charge that came to be framed u/s 477-A was that the appellant, in furtherance of conspiracy, on the same day and place, being a public servant employed in the Railway Department, wilfully and with intent to defraud on 11.1.1967 falsified the entries in the marking-cum-loading register maintained by him as Goods Loading Clerk as GMRI scale Outward Goods Shed, New Delhi by falsely showing therein that 32 bales of cloth belonging to M/s Birla Cotton Spg. and Wvg. Mills Limited, Delhi had reached Outward Goods Shed, New Delhi on 10.1.1967 when in fact these had reached on 11.1.1967 and by making corresponding endorsements on forwarding notes, prepared by Naresh Chand accused, appellant thereby facilitated the issue of invoices and R/Rs and the booking and loading of 32 bales of cloth and the appellant thereby committed an offence punishable u/s 477-A of the Indian Penal Code. Brief facts leading to prosecution of appellant were that booking of goods by rail via Barabanki was closed and restricted by the Divisional

Superintendent, Northern Railway, New Delhi, by his order dated 10.1.1967, The appellant entered into criminal conspiracy with Naresh Chand, agent of M/s Birla Cotton Spg. and Wvg. Mills, New Delhi for booking 32 bales of cotton cloth belonging to the said Mills by circumventing the order of the Divisional Superintendent on 11.1.1967. The plan was that the appellant would falsify the entries in the Marking-cum-Loading register by showing the receipt of the said 32 bales of cloth on 10.1.1967 by antedating that entry, although, in fact, the goods were received in the Goods Shed on 11.1.1967 when the ban against booking imposed by the Divisional Superintendent had become operative. The appellant falsified these accounts by abusing his position as a public servant from corrupt motives. On facts of the case, it was urged by counsel representing the appellant that the entries in question, even if false, were not made by the appellant wilfully and with intent to defraud within the meaning of Section 477-A of the Indian Penal Code. We are not concerned with the facts of the case aforesaid. However, what is relevant is that it was stressed before the Apex Court that the acquittal of appellant, of the charge u/s 5 of the Corruption Act, which includes a finding that he had no dishonest intention or motive to get a pecuniary advantage for himself or for any body else, now precludes the prosecution from contending that nevertheless his intention in making the entries was fraudulent, wrongful gain or injury being an element of ''intent to defraud''. In support of the proposition aforesaid, same very judgment, as relied by us, in Dr. Vimla''s case (supra) was relied upon. It is significant to mention here that the aforesaid judgment of the Apex Court was not u/s 477-A of the Code.

60. While dealing with the contention of learned counsel, in the context of Section 477-A of the Indian Penal Code, inclusive of its explanation, as reproduced above, it was held by the Supreme Court that "an analysis of this Section would show that in order to bring home an offence under this provision, the prosecution has to establish (1) that at the relevant time, the accused was a clerk, officer or servant; and (2) that acting in that capacity he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him for and on behalf of his employer etc. (3) that he did so wilfully and with intent to defraud....."wilfully" as used in Section 477-A means "intentionally" or "deliberately". There can be no difficulty in holding that these entries were made by the appellant ''wilfully''. The appellant must have been aware that the Divisional Superintendent had, by an order, prohibited the booking of this class of goods via Barabanki from and on 11.1.1967. But from the mere fact that these entries were made ''wilfully'', it does not necessarily follow that he did so "with intent to defraud" within the meaning of Section 477-A Penal Code. The Code does not contain any precise and specific definition of words "intent to defraud". However, it has been settled by a catena of authorities that "intent to defraud" contains two elements, viz. deceit and injury. A person is said to deceive another when by practising "suggest to falsi" or

"suppressio veri" or both, he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true, ''injury'' has been defined in Section 44 of the Code as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property". The Supreme Court judgment, in our view, would clinch the issue beyond any doubt, It may be reiterated that the petitioner was tried for a civil offence and not a military offence and, thus, in civil offence the court must take its full import and meaning from the offence defined in the Indian Penal Code. We may also reiterate that extracted portion, on which emphasis has been supplied by us, it appears, came to be laid down as law based upon the contention of counsel for the appellant in the aforesaid case, supported by a judgment of Supreme Court in Dr. Vimla''s case.

61. Time is now ripe to examine the charges as also the contentions of learned counsel for the parties with regard to the validity or otherwise of the same in light of the provisions of the Army Act and Rules, mentioned above and the judicial precedents. A perusal of the aforesaid charges, do reveal that the same were framed u/s 52(f) of the Army Act and on that there is no dispute. The contents of first part of the first charge talk of authorisation to claim modification grant for one truck one Tonne 4x4 GS FFR for Rs. 950/- whereas the contents of second part of the first charge talk of countersigning a contingent bill for Rs. 31,932/- for claiming advance of 75% of entitlement of costs of modification of 43 vehicles with intent to defraud. The remaining parts dealing with passing of the countersigned bill are certainly not a part of the charge, i.e., incriminating particulars. The contents of first part of second charge are, however, countersigning the contingent bill dated March 5, 1983 with intent to defraud for Rs. 20962.50 for claiming an advance of 75% entitlement of cost of modification of 22 vehicles whereas the contents of second part of the second charge are that petitioner very well knew that the regiment was not authorised to claim such grant in respect of all types of vehicles. The only difference between the first and second charge is that whereas one type of vehicles for which alone there was authorisation for modification is mentioned therein, in the second charge, mention is of all types of vehicles. Third and fourth charges, as mentioned above, are continuation of the first and second charges as the same pertain to claiming the balance amount of 25% with regard to countersigned bills of vehicles mentioned in charges I and 2. There is not a word mentioned either in Charge 1 or Charge 2 that the petitioner either actually modified the vehicles, thus, putting the Government at a loss or did not modify the vehicles and appropriated the amount to himself. The pertinent question that, thus, arises for determination is as to whether such an averment or such particulars, which may show wrongful gain or wrongful loss ought to have been mentioned or that the same can be presumed from the charges as they are. Before we may, however, determine the controversy as culled out above, it shall be pertinent to mention that the petitioner raised such an objection during the court martial proceedings, as mentioned above, while giving some details of the pleadings of the parties and this objection, again as mentioned

in the pleadings, i.e.. written statement, was rejected. We may also mention that when the matter was examined by the concerned authorities in the post-confirmation proceedings, wherein objections of the petitioner were dealt separately, as have been reproduced by the learned Single Judge as well in the impugned judgment, while giving the history of the case, points raised by the petitioner and the comments, it was stated in me ''background of the case'' that the regiment was authorised one installation kit amounting to Rs. 950/- for conversion of one GS Vehicle for FFR (Singal Specialist Vehicle) role whereas the petitioner, instead of claiming the cost of one installation kit, preferred claims in respect of all the 65 ''B'' vehicles held by the Regiment. The amount of Rs. 77,750/- was received by the COA Western Command but neither any vehicle was modified nor the stores for the same were received in the unit and on the directions of the petitioner fake documents to meet the audit requirement were prepared by the Technical Adjutant Major BB Singh PW 12. The petitioner had raised the point that no offence was disclosed as per Section 52(f) and the same was dealt with by observing that the particulars of the charges averred against the petitioner have no ambiguity and fully support the statement of offence. As mentioned, above, ail these points and comments have been reproduced by learned Single Judge in the impugned judgment. We may also mention here that the learned counsel for the parties concede that evidence with regard to non-utilisation of sanctioned funds of the vehicles was led before the Court Martial. In fact, during the course of arguments we were handed-over brief comments of the case on behalf of the respondents. A list of vehicles which were modified or not modified has also been attached. There is a mention of modification in first 16 vehicles and 28 to 32 vehicles whereas there is mention of ''not modified''; with regard to other vehicles but in the heading it has been mentioned that such not modified vehicles had not been included in the list of vehicles given by the Presiding Officer.

62. Clauses (a) to (e) of Section 52 deal with specific offences whereas Clause (f) is general in nature. Clause (f) of Section 52 which deals with doing anything with intent to defraud. Merely because all that is mentioned is ''with intent to defraud'' would not require giving particulars that may result into wrongful gain or wrongful loss or only wrongful loss is the question. We have already held that words ''with intent to defraud'' have not been defined in the Army Act and it is permissible by virtue of Clause (xxv) of Section 3 of the Army Act, to look into the provisions of the Indian Penal Code with regard to matters not dealt with by the Army Act and rules. We have also mentioned that by virtue of Section 25 of the Indian Penal Code. " person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise." Under Clause (b)of note 24 to Section 52(f), when the words ''fraud'' or ''intent to defraud'' or ''fraudulently'' occur in the definition of a crime, two elements atleast are essential to the commission of the crime, namely, first deceit or an intention to deceive or in some cases mere secrecy; and secondly either actual injury or possible injury or an intent to expose some person either to actual

injury or to a risk of possible injury by means of that deceit or secrecy. Sub-clause (a) of note 26 says that the act alleged to have been committed with intent to defraud must itself appear from the particulars of the charge to be a wrong act, though it need not necessarily amount to an offence under the ordinary criminal law. As mentioned above, we are not taking the notes framed u/s 52 as statutory but Clause (b) of Note 24 even otherwise seems to reflect correct law.

63. The expression ''defraud'' came to be considered by the Supreme Court for its correct import and meaning in Dr. Vimla Vs. Delhi Administration, . The facts of the case aforesaid would reveal that Dr. Vimla purchased acar from Diwan Ram Sarup in the name of her minor daughter Nalini aged about six months at that time. The price for the car was paid by Dr. Vima and the transfer of car was notified in the name of Nalini to the Motor Registration Authority. The car at that time was isured against a policy issued by the Bharat Fire and General Insurance Company Limited and the policy was due to expire sometime in April, 1953. On request, made by Diwan Ram Sarup the said policy was transferred in the name of Nalini and in that connection Dr. Vimla visited the Insurance Company''s office and signed the proposal form as Nalini. Subsequently, she also filed two claims on the ground that the car met with accident. In connection with these claims, she signed the claim forms as Nalini and also the receipts acknowledging the payments of the compensation money as Nalini. On a complaint made by the Company alleging fraud on the part of Dr. Vimla and her husband, the police made investigation and prosecuted Dr. Vimla and her husband. The Magistrate committed Dr. Vimla and her husband to Sessions to take their trial. The learned Sessions Judge, however, held that no case had been made out against the accused under any one of the offences that they were charged with and, thus, acquitted them. The High Court confirmed acquittal of the husband but with regard to Dr. Vimla, the High Court confirmed her acquittal only u/s 419 IPC but set aside the order of her acquittal under Sections 467 and 468 of the Indian Penal Code and instead convicted her under the said Sections and sentenced her to imprisonment till rising of the Court. Dr. Vimla preferred an appeal before the Hon''ble Supreme Court and raised the contention that a person does not act fraudulently within the meaning of Section 464 unless he is not only guilty of deceit but also he intends to cause injury to the person or persons deceived. The Hon''ble Supreme Court after referring to classic definition of the word ''fraudulently'' as provided in Stephen''s History of the Criminal Law of England, Vol. 2, at page 121, the nature of injury resulting from fraud as provided in Kenny''s Outline of Criminal Law, 15th En. at page 333, observations of Justice LeBane in Haycraft v. Creasy 1801 (2) East 92, the English decisions by the Court of Criminal Appeal in R. v. Welham 1960(1) All ER, 260 at pp 264-266, a Full Bench of Madras High Court in Kotamaraju Venkatarayadu v. Emperor ILR 28 Mad 90, a decision of the Calcutta High Court in Surendra Nath Ghosh v. Emperor ILR 38 Cal 75, Division Bench decision of Bombay High Court in Sanjiv Ratnappa v. Emperor AIR 1932 Bom 545 and a Division Bench judgment of Lahore High Court in Emperor v.

Abdul Hamid AIR 1944 Lah 380, summarised the expression ''defraud'' as follows :-

"the expression ''defraud'' involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss, i.e., depravation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied".

64. What appears from the observations of the Supreme Court, quoted above, is that the deceit has to have two elements, namely, deceit and injury to the person deceived. If there is an element of a benefit or advantage to the one, who has deceived, naturally there is corresponding loss or detriment to the one, who had been deceived. There would be, however, rare cases where the deceiver alone had obtained some benefit or advantage, in such cases too second essential element of expression ''defraud'' is satisfied. In other words and to put it more simply, when there may be an allegation of benefit or advantage to the deceiver by his fraudulent act, a corresponding loss to someone else can be presumed but where such a loss can not be presumed to the one who has been deceived, the element of advantage or gaining something by the de- ceiver has necessarily to be there. In the context of the facts of the case, the Supreme Court further observed that "the charge does not disclose any such advantage or injury nor is there any evidence to prove the same".

65. A Single Bench of Mysore High Court in re B.V. Padmanabha Rao AIR 1970 kant 254, held that "a proper interpretation of the words ''intent to fraud'' occurring in Section 25 is that, such intention is established only when the deception has as its aim some advantage or the likelihood of advantage to the person who causes the deceit or some kind of injury or the possibility of injury to another. It is only in that event that there would be an intent to defraud, otherwise not". Another Single Bench of Mysore High Court In Re: M. Gangadhariah, , while dealing with a case u/s 463 of the Indian Penal Code for foregery, observed that there has to be dishonest and fraudulent preparation of a false document or part thereof and it is necessary for the charge to state that a false document was prepared dishonestly or fraudulently. If it be the case of prosecution that the document was prepared dishonestly, the charge must state whether, the intention with which the document was prepared, was to cause wrongful gain to some one or wrongful loss to another.

66. Mr. Rathi, learned counsel for Union of India, however, contends that the charges were specific and the moment the petitioner counter-signed the contingent bills, dishonest intention, i.e., intent to defraud, was clear and offence was competent and he knowing fully well that his regiment was entitled for modification grant of Rs. 950/- in respect of one truck one tonne 4x4 GS FFR, still he counter-signed the bill for far more vehicles. In the circumstances of the case,

element of gain to the petitioner and loss to the State was presumed and, there was no need to give particulars of gain to the petitioner and loss to the Government while framing the charges.

67. While giving our anxious thought to the issue in controversy, we are of the opinion that the charges, as made, did not disclose any offence and, in particular, the offence under which the petitioner was charged, i.e., Section 52(f) of the Army Act. Be it first or second charge, all that has been disclosed is that the unit headed by the petitioner, was authorised or entitled to ask for modification of one specified kind of a vehicle in the first charge and non-specified vehicles in the second charge and the petitioner, with intent to defraud, counter-signed the bill for far more vehicles in both the charges. There is nothing at all stated in the charges that may even remotely spell out wrongful gain by the petitioner or, for that matter, even singularly wrongful loss to the Government. The language employed in the first two charges concededly does not talk of petitioner having gained any advantage. If perhaps, the particulars of the charges would have also contained that the petitioner appropriated the amount to himself or did not spend the money claimed by him for modification of vehicles, particulars of a valid charge would be available, as in the first case only the petitioner having had the benefit, would be enough and in that case it was not necessary to give any particulars of the loss to the Government. If such an averment or particulars are not to be given, then also the charge would be valid if only loss was to be averred to the Government. A perusal of the first two charges would, however, demonstrate that neither there is an averment with regard to petitioner taking advantage of his intent to defraud or the Government being put to loss by his said act of commission. The judgment of Supreme Court in Dr. Vimla''s case (supra) and two single Bench judgments of Mysore High Court in B.V. Padamnabha and M. Gangadhariah''s cases (supra) fully support the contention of learned counsel for the petitioner. The requirement, as referred to above, would be further spelt out from Rule 30 of the Army Rules. The said rule enjoins that each charge shall state one offence only and that statement of particulars of the act, neglect or omission constituting the offence have to be contained in each charge. Sub-rule (2) of Rule 30 makes it abundantly clear that each charge shall be divided in two parts, (a) statement of the offence; and (b) statement of the particulars of the act, neglect or omission constituting the offence. Sub-rule (4) of Rule 30 further enjoins that the particulars shall state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission is intended to be proved against him as constituting the offence. Note ''7'' to Rule 30 requires the statement of particulars to support the statement of offence, e.g., if the statement of an offence laid under AA Section 52(a) alleges that the accused committed theft in respect of property of the Government, particulars stating that the accused dishonestly deceived or was in unauthorised possession of the property, would not support the statement of the offence and charge would be a bad charge and even the fact that the accused pleaded guilty to it would not affect

the matter. Note ''12'' to Rule 30 further stipulates that the statement of particulars should state shortly in ordinary language what the accused is alleged to have done. All the ingredients necessary to constitute the offence should be specified, e.e., if the charge is under AA Section 41(2) for disobeying a lawful command, the particulars must state the command, rank and name of the superior officer, who gave the command, and the fact that the accused disobeyed it. Where a state of mind, e.g., intention or knowledge is an essential ingredient of an offence, such statement of mind should be averred in the particulars. No doubt, by virtue of provisions contained in Sub-rule (2) of Rule 32 in the construction of a charge-sheet or charge, there shall be presumed in favour of supporting the same every proposition which may reasonably be presumed to be impliedly included, though not expressed therein, but, it can not be lost sight that such presumption pertains to items mentioned in Sub-rule (1) of Rule 32, which pertains to mistake in name or description of the person charged. The presumption to the implied inclusion can not be with regard to essence of a charge-sheet, as in that case, it would be contradictory to Rules 32 and 42 of the Army Rules. In the facts and circum- stances of this case, when the charges 1 and 2, as read, do not at all go beyond over-stepping of the petitioner by, at the most, asking for what he was not authorised, mis-appropriation or wrongful loss to the Government can not be presumed. The Court has necessarily to make an enquiry with regard to validity of charges as would be clear from reading of Rule 42 of the Army Rules. Clause (b) of Sub-rule (1) of Rule 42 once again enjoins the Court to find out if charge framed is in accordance with law and is so explicit so as to enable the accused readily to understand what he has to answer. It appears to us that mandatory requirement of the Rules, referred to above, and, in particular, Sub-rules (2) and (4) of Rule 30 and Clause (b) of Sub-rule (1) Rule 42 were not complied with in this case, even though, it appears, from the records of the Court Martial proceedings, that the Judge Advocate had apprised the members, constituting the Court, requirement of framing the charges under the Army Rules.

68. Framing a proper charge and consequences of not doing so, have been highlighted from lime to time and it would be appropriate to cite some judicial precedents on that score. A Full Bench of Patna High Court in Kesar and Ors. v. Emperor AIR 1919 Pat 27 held that "It is the bounden duty of Sessions Judge in flaming charges to be precise in their scope and particular in their details". A Division Bench of Mysore High Court in Shankar Rao and Others Vs. State, , on the facts where in the charges u/s 302 read with Section 149 Indian Penal Code, the Sessions Judge mentioned common knowledge of the unlawful assembly as the bringing of ''illegal compulsion with criminal intention on the dancing girls'', held that "the manner in which the common object was described was not proper and the charges did not conform to the requirements". A Division Bench of Andhra Pradesh High Court In Re: Bhupalli Malliah and Others, , held that failure to convey to accused and inform him what he is being charged with would result into error in

framing of a charge and same would be vitiated. A Division Bench of Madhya Pradesh High Court in Hira Pearelal Kirar Vs. The State, , held that as a general rule, an accused can not be convicted of an offence with which he is not charged subject to the exceptions contained in Section 237 and 238 Cr. P.C. Merely quoting or translating the wording of a section in the charge "with such intention and such knowledge and in such circumstances" is not enough. The accused should be told the accusation against him precisely and where the committing Magistrate had framed a charge u/s 307 Penal Code against the accused without stating any material facts constituting the offence and on the same charge the trial court convicted the accused u/s 387 Penal Code, it was held that accused was really prejudiced by error in the charge.

69. The contents of a charge being specific and riot vague was subject matter of adjudication by a Division Bench of this Court, in which, one of us, (V.K.. Bali, J.) was a member, in 1993(3) SCT 83 (P&H)(DB) : LPA No. 680 of 1992 (Union of India and Ors. v. Lt. Col. Jagdev Singh) decided on January 27, 1993. Brief facts of the case would reveal that Lt. Col. Jagdev Singh was tried by General Court Martial and dismissed from service as also sentenced to undergo one year''s simple imprisonment. The matter arose from an incident of June 10, 1984 at the Sikh Regimental Centre, Ramgarh in Bihar. It was stated that there was unrest amongst the troops leading to the ransacking by them of the Centre, Kotes and magazines and later when the Commandant, the Deputy Commandant (Brig. S.C. Puri and respondent Lt. Col. Jagdev Singh) and others rushed there, they were fired upon, resulting in death of Brig. Puri and serious injuries to respondent. Three charges were framed against Lt. Col. Jagdev Singh. The second charge, which is relevant, reads as under :-

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Second charge Army Act An omission prejudicial to good order
Section 63 and military discipline.
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in that he, at Ramgarh, in view of Operation ''Blue Star'' in Golden Temple Complex, Amritsar, between 04 June and 10 June, 84, while being the Deputy Commandant and Security Officer of the Sikh Regimental Centre, improperly failed to ensure adequate security measures in the said centre, as a consequence of which on 10th June, 84, the Kotes, magazines and canteen of the Centre were ransacked, prisoners rescued from the quarterguard and the troops moved away from the centre in commandeered vehicles.

70. Lt. Col. Jagdev Singh was convicted only on the second charge and, as mentioned above, was sentenced to one year simple imprisonment and cashiered from service. A writ filed by Lt. Col. Jagdev Singh against the orders aforesaid was allowed, wherein it was held that the charge in respect of Lt. Col. Jagdev Singh was vague and further that there was no evidence to support the same. It was urged before the Division Bench on behalf of Union of India that the second charge, on which Lt. Cot. Jagdev Singh was held guilly, was not vague. This Court, while examining the

contention of the counsel for Union of India, as mentioned above, held that on the face of it, no other conclusion is possible except that second charge, as framed against Lt. Col. Jagdev Singh, was vague and wholly lacking in material particulars.

71. Mr. Rathi, in his endeavour, however, for us to take a view that there were proper particulars from which ''intent to defraud'' was clearly decipherable, cites two judgments of Supreme Court in Ajmer Singh and Others Vs. Union of India (UOI) and Others, and Rupal Deol Bajaj v. Kanwar Pal Singh Gill 1995(3) RCR 700. It was held in Ajmer Singh''s case (supra) that the relevant Chapters of the Army Act, the Navy Act and the Air Force Act embody a completely self-contained comprehensive Code specifying the various offences under those Acts and prescribing the procedure for detention and custody of offenders, investigation and trial of the offenders by Courts- martial, the punishments to be awarded for the various offences, confirmation and revision of sentences im- posed by Courts Martial etc. and that the effect of Section 5 of the Criminal P.C. is clearly to exclude the applicability of the Code in respect of proceedings under any special or local law or any special jurisdiction or form of procedure prescribed by any other law. The statement of law, besides being undisputed, is otherwise binding, being a law declared by the Supreme Court under Article 141 of the Constitution of India. However, in our view, this judgment is not relevant for deciding the controversy in issue. No doubt, matters specifically dealt in the Army Act have to be decided in view of the provisions contained therein and it is only with regard to other matters, i.e., matters not provided under the Army Act, that resort can be had to the provisions of Code of Criminal Procedure etc., but insofar as manner of framing of charges is concerned, same has been specifically dealt with under the Army Act and Rules, mentioned above and the said Rules do contain a mandate to frame charges as mentioned therein.

The facts of Rupan Deol Bajaj''s case (supra) would reveal that a petition u/s 482 of the Code of Criminal Procedure for quashing the proceedings was filed in the High Court which was allowed and it is against the said order that SLP was filed in the Supreme Court. The allegations made by Rupan Deol Bajaj-appellant before the Supreme Court were that the respondent had outraged her modesty. While dealing with the contention based upon ''intent to commit offence'', it was observed that "it is undoubtedly correct that if intention or knowledge is one of the ingredients of any offence, it has to be proved like other ingredients for convicting a person. But, it is also equally true that those ingredients being states of mind, may not be proved by direct evidence and may have to be inferred from the attending circumstances of a given case. Since, however, in the instant case, we are only at the incipient stage, we have to ascertain, only prima facie, whether Mr. Gill by slapping Mrs. Bajaj on her posterior, in the background detailed by her in the FIR, intended to outrage or knew it to be likely that he would thereby outrage her modesty, which is one of the essential ingredients of Section 354 IPC. The sequence of events which we have detailed earlier indicates that the slapping was the finale to the earlier overtures of

Mr. Gill which considered together, persuade us to hold that he had the requisite culpable intention". This judgment would not, in our view, support the contention of Mr. Rathi that essential ingredients of the charges in the present case, can be inferred.

72. The main question pertaining to lack of material particulars in the charges framed against the petitioner or the same being frivolous or disclosing no offence and the requirement of such particulars having been decided in the manner aforesaid, all that now has to be considered is as to whether the petitioner was prejudiced. Before we may express any opinion on this issue, we would like to mention that it is on the first two questions, as detailed above, that learned counsel for the parties advanced arguments in support of their respective contentions. But, insofar as prejudice to petitioner for lack of material particulars in the charges, is concerned, Mr. Rathi could not dispute during the course of arguments that the same would result in prejudicing the petitioner in his defence as, in that case, he would not know as to what case he has to meet. We are also of the opinion that the procedural lapse in this case does vitiate the trial as the petitioner indeed was prejudiced in projecting a proper defence. The particulars of charges, in our view, do not go beyond petitioner over- iepping his limits or authorisation and no more. He has been held guilty of misappropriating the amount inasmuch as he did not spend the amount claimed by him for modification of all the vehicles as would be clear from the history of the case, mentioned by the concerned officer in post-confirmation proceedings. Procedural laws are not an empty formality. The object of the provisions pertaining to framing of proper charges, in our view, is to ensure that the accused gets full and fair trial. The Supreme Court in Willie (William) Slaney Vs. The State of Madhya Pradesh, , while dealing with scope and object of Code of Criminal Procedure and effect of disregard to the provisions contained therein, held that "the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord without notions of natural justice. If he does, if he is tried by a conpetent court, if he is told and clearly understands, the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are recorded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based". It was further held that "under the Code, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity, they can be cured; and in that event the conviction must stand unless

the court is satisfied that there was prejudice". It was further held that "except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code'' will be so obvious that they will speak for themselves as, for example, a refusal to give the accused ahearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth".

73. Framing of proper charge that may apprise an accused of the allegations of prosecution that he has to meet is fundamental and, in our view, is one of the foundations of natural justice. A vague charge which may entail giving no clue to an accused so that he may project a proper defence, strikes at the very root of the case. The Court Martial proceedings, in our view, suffer from a vital defect which can not be cured and, therefore, the said proceedings, culminating into imprisonment for a year and cashiering from service, in our view, needs to be set aside.

74. Inasmuch as we are holding the Court Martial proceedings to be vitiated for want of following the mandatory procedure, resulting into causing a great prejudice to the petitioner, we do not wish to deal with some other matters urged before us, like, that the petitioner was not given full opportunity to defend himself, the Court of enquiry was in violation of Paras 4 and 5 of the Army Rules, that he was not given opportunity to prepare his defence and that the same charge was repeated over and over and that in view of the fact that he was a decorated officer, having led men in battle and had put in 22 years'' service, which was exemplary and that his generations had served in the army and that all others, who had signed the bill and the other units, had also raised similar demands which were met and no action was taken against them and, therefore, a lenient view should have been taken.

In view of the discussion made above, we allow this appeal and reverse the impugned judgment dated May 31, 1991. Consequently, the proceedings, findings and sentence of Court Martial held during June 24, 1987 and October 1, 1987 are quashed. Parties are left to bear their own costs.

75. Appeal allowed