(1971) 03 MP CK 0004

Madhya Pradesh High Court

Case No: M.P. No. 6 of 1969

Subhash Chandra Sarkar		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: March 4, 1971

Acts Referred:

- Army Act, 1950 - Section 125, 126, 164, 165, 27
- Constitution of India, 1950 - Article 126, 226, 227, 227(4), 32
- Penal Code, 1860 (IPC) - Section 149, 304

Citation: (1973) JLJ 940

Hon'ble Judges: P.K. Tare, J; H.R. Krishnan, J

Bench: Division Bench

Advocate: G.M. Chaphekar, for the Appellant; Vijayavargiya, Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Tare, J.
In this Writ Petition, which is described as a petition under Articles 226 and 227 of the Constitution of India, two questions are mainly involved. So far as Articles 227 of the Constitution of India is concerned it will be out of the picture. Sub clause (4) of Article 227 of the Constitution specifically excludes Court martial from the operation of the Article. It is as follows:--

Article 227 (4)--Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces.

Therefore, Court-martial can in no sense be considered to be a Tribunal subordinate to the High Court. But the said bar does not find place in Article 226 of the

Constitution of India. Therefore, although Courts martially may not be considered to be Tribunals subordinate to the High Court or for the purposes of Article 126 of the Constitution of India subordinate to the Supreme Court, they will be amenable to the prerogative jurisdiction of the High Court under Article 226 of the Constitution of India and to the jurisdiction of the Supreme Court under Article 32 of the Constitution of India in the matter of exercise of fundamental rights.

2. The instant questions came up for consideration before Sankaran, J. in Vishnukrishnan Namboodiri v. Brigadier K.N. Kripal AIR 1952 TC 7, wherein the learned Judge held that ordinarily the Civil Court would have no power to interfere with the administration of military law by the properly constituted Tribunals acting within their jurisdiction. Therefore, the matters which are placed within the jurisdiction of Military Tribunals or authorities constituted under the Military law must be determined by such authorities themselves and their decisions cannot be reviewed or set aside by Civil Courts. This principle of the common law has been embodied in Clause (4) of Article 227 of the Constitution of India which deals with the High Court''s power of superintendence over all Courts and Tribunals within its jurisdiction. However, the general power conferred on the High Court under Article 226 of the Constitution has to be construed subject to the limitation imposed by Clause (4) of Article 227. It cannot, however, be said that the High Court has no jurisdiction to relieve against unauthorised or illegal acts of military authorities affecting the fundamental rights of persons in military service. The learned Judge relied on the English cases of R. v. Army Council Ex. P. Ravensdroft (1917) 2 K.B. 504, and Heddon v. Evans (1919) 35 TLP 642 . In this connection 1 might observe that the limitation for the High Court to exercise prerogative powers under Article 226 of the Constitution would be as laid down by Lord Esher, M.R. and as approved by their Lordships of the Supreme Court in Ebrahim Aboobakar and Another Vs. Custodian General of Evacuee Property, , to the following effect:--

When an inferior Court or Tribunal or body which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that Tribunal or body It may in effect say that, if a certain state of facts exists and is shown to such Tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. ''But there is another state of things which may exist. The legislature may entrust the Tribunal or body with a jurisdiction which includes the jurisdiction, to determine whether the preliminary state of facts exists, as well as the jurisdiction'', on finding that it does exist, to proceed further or do something more. When the legislatures are establishing such a Tribunal or body with limited jurisdiction, they also have to consider whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. ''In the second of the two cases

I have mentioned it is erroneous application of the formula to say that the Tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends ; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.

3. A Division Bench of the Orissa High Court, presided over by Barman, C.J. and A. Mishra, J. in Soubhagya Chandra Patnaik Vs. Union of India (UOI), thought it unnecessary to decide the question of jurisdiction of the High Court under Article 226 of the Constitution of India so as to interfere with the decision of a Summary Court Martial on the ground that the Summary Court-Martial had complied with the principles of natural justice and that the petitioner had no case on merits whatsoever. For the reason, the question of jurisdiction of the High Court for exercising prerogative powers was not at all decided,

4. In Som Datt Datta Vs. Union of India (UOI) and Others, , their Lordships of the Supreme Court had to consider a petition under Article 32 of the Constitution of India, wherein the grievance of the petitioner was that as the police officer had started investigation, the petitioner could be tried under the Code of Criminal Procedure and as such he could not have been tried by the General Court-Martial. On that contention the petitioner''s conviction u/s 304 read with section 149 Indian Penal Code and the sentence of six years'' rigorous imprisonment was sought to be quashed by the petitioner. The question was not at all raised on behalf of the Union of India that the petition under Article 32 of the Constitution of India was not tenable. It was more or less conceded that a petition of such a nature would be tenable in the Supreme Court for exercise of fundamental rights. But, however, their Lordships while construing sections 125 and 126 of the Army Act held that the General Court-Martial could exercise jurisdiction in the matter of trying the accused. In that view of the matter, the petition under Article 32 of the Constitution was dismissed.

5. In this connection I may observe that as a necessary corollary I would agree with the view expressed by Sankaran, J. in Vishnukrishanan Namboodiri v. Brigadier K.N. Kripal (supra), that the High Court in exercise of powers under Article 226 of the Constitution would be able to interfere with the decision of a Court constituted under the Army Act, 1950, subject to the limitations pertaining to interference with decisions of Special Tribunals. Of course as provided by sub-clause (4) of Article 227 of the Constitution, such a Tribunal constituted under the Army Act in no sense can be considered to be subordinate to the High Court. But although subordination of a Tribunal may be necessary for the purposes of Article 227 of the Constitution, such subordination is not necessary for the purpose of Articles 226 of the. Constitution of India, which empowers the High Court to issue Writs in the nature of Mandamus, Certiorari etc., including any orders or direction to any person or authority,

including the Government. Therefore, a Courts Martial constituted under the Army Act can certainly be said to be an authority contemplated under Article 226 of the Constitution of India This would dispose of the preliminary objection raised on behalf of the respondents regarding jurisdiction of this Court.

6. As regards Special Tribunals, the limitations for interference with them will be to the extent as indicated by their Lordships of the Supreme Court in Ebrahim Aboobakar v. Custodian Geheral of Evacuee Property (Supra). Therefore, the High Court would be able to interfere if it finds that the Special Tribunal has acted without jurisdiction or in excess of jurisdiction or has flouted the principles of natural justice which would revolt against judicial conscience. But for these three eventualities this Court would not be able to interfere with the decision of a Special Tribunal constituted under special enactment.

7. Then, we come to the petitioner''s case on merits. At the relevant time, the petitioner was a Senior Major of the Army Medical Corps and was posted at the Military Hospital, Mhow. On the night intervening the 21st and 22nd of September, 1967, an Army officer belonging to another Unit namely, Capt. Cyrus Dalai and his wife went to the hospital at about 12 in the night. Capt. Dalai wanted Mrs. Dalai to be treated for some emergency matter. It was alleged that the petitioner found that there was no emergency case and the petitioner also found that Capt. Dalai was not in his usual gait and that he was heavily drunk and was not in his normal senses. Therefore, he examined Capt. Dalai for an alcoholic test. Capt. Dalai made a grievance, of that fact to his superior officers alleging that he had been forced to go through an alcoholic test and this action of the petitioner was high-handed.

8. On the representation of Capt. Cyrus Dalai, the following charge was framed against the petitioner on 2-3-1968 (Vide Petitioner''s Annexure-16):--

At Mhow, on night of 21/22 September 67, while performing the duties of Orderly Medical Officer in MH Mhow improperly subjected IC 11818 Captain Dalal, Cyrus of Signals Mote to various clinical and pathological tests for the purpose of ascertaining whether Capt. C. Dalai was intoxicated or not against his will in contravention of Para 393 (b) of Regulations for the Army and para 93 of the Regulations for the Medical Services, Armed Forces.

This action of the petitioner was said to constitute an act prejudicial to good order and Military discipline amounting to an offence u/s 63 of the Army Act. The petitioner during the General Court-Martial was acquitted of this charge. Therefore, we are not at all concerned with the said charge, nor with the details relating to the said incident. The petitioner also has no grievance in respect of his trial before the General Court-Martial. But, as already indicated earlier, this petition involves two questions of law. One regarding the jurisdiction of this Court to exercise prerogative powers under Article 226 of the Constitution has already been dealt with earlier. The other question is whether the petitioner''s action in not attending the investigation

inspire of an order given by the Station Commandant amounted to an offence u/s 42 of the Army Act.

9. The necessary facts for the decision of the said question of law are as follows. In order to try this charge according to the procedure prescribed by the Army Act and the Rules and the Regulations, a Court of inquiry to be presided over by LT. Col. J.S. Bhullar was constituted by the Station Commandant. It appears that the petitioner had no good relations with Lt. Col. J.S. Bhullar and he made all attempts to persuade the Station Commandant to change the personnel of the Court of inquiry, but he did not meet with success. It is not necessary to consider the earlier correspondence. The petitioner had also filed a statutory complaint u/s 27 of the Army Act (Vide petitioner''s Annexure-4), dated 292-1968 It appears that this statutory complaint was withheld by the Head of the Central Command at Lueknow and it was never forwarded to the Central Government or to the Chief of the Army Staff. It is not necessary for us to examine whether this withholding was legal or otherwise. But, ultimately the Station Commandant, Mhow, namely Brigadier Rao O'' Connor, rejecting all representations of the petitioner as also his request for interview passed an order to the effect that a disciplinary action would be taken against the petitioner if he did not attend the Court of inquiry presided over by Lt. Col. Bhullar.

10. In this connection the petitioner''s grievance against Lt. Col. J.S. Bhullar was that he took personal interest and visited the petitioner and threatened him. The petitioner alleged that for that reason, he did not want Lt. Col. J.S. Bhullar to preside over the Court of inquiry. It appears that ultimately the Station Commandant, for some reason or the other, changed Lt. Col. J.S. Bhullar and nominated Lt. Col. P.M. Namjunda as the person to preside over the Court of inquiry.

11. Therefore, at a later stage, the following charge was framed against the petitioner, namely:--

At Mhow, when ordered by Lt. Col. P.N. Behl, OC MH Mhow (MP) his superior officer to appear before IC 2537 Lt. Col. J.S. Bhullar Punjab Regiment for recording the summary of evidence of 4 March 68 at 10.00 hrs. at the Medical board room of MH, did not do so.

This action of the petitioner was said to amount to disobeying a lawful command of his superior officer so as to constitute an offence u/s 41 (2) of the Army Act. Therefore the question arises whether the Station Commandant can issue the said order and whether it would amount to a lawful command, as contemplated by section 41 of the Army Act. It may be relevant to reproduce section 41 (2) of the Army Act, 1950, which is as follows:--

Section 41 (1).....

(2)--Any person subject to this Act who disobeys any lawful command given by his superior officer shall, on conviction by Court Martial.

If he commits such offence when on active service, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned ; and

if he commits such offence when not on active service, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.

12. Therefore, the requirement of the said section is that there must be a lawful command issued by a superior officer and the subordinate concerned should be guilty of disobeying that lawful command. I shall presently discuss as to what would be a lawful command.

13. When the petitioner attempted to have Lt. Col J.S. Bhullar changed, he as a last resort made a representation to the Officer Commanding Military Hospital (Petitioner''s Annexure-17) on 2-3-1968, wherein he alleged that Lt. Col. J.S. Bhullar was interfering with the witnesses. The petitioner, therein stated that if the grievance was not redressed then there would be no alternative than to approach the higher authorities. Thereupon the Commanding Officer, Lt. Col P.N Behl required the petitioner to attend the Court as already told verbally at the scheduled time, i.e. 4-3 1963 at 9.30 a.m. Thereupon the petitioner wrote an endorsement to the following effect:--

Pending disposal of my applications and complaints and request for interview I request that proceedings of the Court may please be deferred. In case you decline actions on the above, may I take your permission to approach HQ M.P. Area direct.

Thereupon Lt. Col. P.N. Behl served the following order on the petitioner on 4-3-1968 (Vide Petitioner''s Annexure-19):--

Subject:--Attending of Court.

Reference your remarks on my letter No. 862/SC/36-A dated 4 March 68.

The matter is being referred to Station Head quarters. Pending decision, the Court cannot be deferred, and question of approaching HQ M.P. Area direct does not arise at all.

You are hereby ordered to attend the proceedings of the Court (summary of evidence) at 10 00 hrs. on 4 March 68 in the Medical Board Room, adjacent to my office. You will report to Lt. Col. J.S Bhullar, officer recording summary of evidence. Any disobedience of this order will render you liable for disciplinary action.

Sd/Lt. Col. AMC
Commanding (P.N. Behl)
09.35 Hrs.

Regarding this second charge the General Court-Martial held the petitioner guilty of an offence u/s 41 (2) of the Army Act and for that reason, imposed the punishment, namely (a) forfeiture of eighteen months service for purposes of promotion, (b) severely reprimanded. The findings and the sentence awarded by the General Court-Martial had been confirmed by the General Officer Commanding-in-Chief, Central Command, Lucknow.

14. In this connection it is relevant to take note of rules 22, 23 and 25 of the Indian Army Rules, which pertain to the right of an accused to prepare his defence in relation to officers. Rule 22 is as follows:--

Rule 22,--Hearing of Charge. --(1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence.

(2) The Commanding officer shall dismiss a charge brought before him if, in his opinion, the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion, he is satisfied that the charge ought not to be proceeded with.

(3) At the conclusion of the hearing of a charge, if the commanding officer is of opinion that the charge ought to be proceeded with, he shall without unnecessary delay,

(a) dispose of the case summarily u/s 80 in accordance with the manner and form in Appendix III ; or

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

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary Court-Martial:

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

(a) the offence is one which he can try by a summary Court-Martial without any reference to that officer ; or

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

Rule 23 of the rules is as follows:--

Rule 23-Procedure for taking down the summary of evidence:

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

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

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

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

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

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

It is to be noted that under the said rules it is the right of the accused to have an opportunity for preparing his defence and his presence at the preliminary enquiry or at the final trial would be necessary. But so far as the officers are concerned, rule 25 of the Army Rules provides as under:--

Rule 25.--Procedure on charge against officer--

(1) Where an officer is charged with an offence under the Act, the investigation shall, it he requires it, be held, and the evidence, if he so requires, be taken in his presence

in writing, in the same manner as nearly as circumstances admit, as is required by rule 22 and rule 23 in the case of other persons subject to the Act.

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

15. Therefore, it is left to the choice of the officer concerned to insist on the investigation being conducted in his presence. If he does not make any such request, the investigation or the preliminary inquiry or as we may call in the terms of criminal jurisprudence, the committal proceedings, may be carried on against an officer in absentia. Rule 25 also envisages that the investigation has to be carried on in the same manner as nearly as circumstances admit as would be required by rules 22 and 23. Therefore, the question arises whether the petitioner could be ordered by his superior officer to be present at the investigation to be conducted by Lt. Col. J.S. Bhullar and whether disobedience of that order would constitute an offence u/s 41(2) of the Army Act, 1950.

16. In this connection I might observe that rules 22 and 23 and 25 are rules relating to the investigation of charges against the ranks and officers and the said rules confer a right or a privilege on the accused to demand investigation of an offence in his presence. What is a right or a privilege cannot be converted into a duty or a liability merely by couching an order on the lines of petitioner''s Annexure 19, which has been reproduced earlier. It is to be noted that the petitioner was actually arrested and later on released and he did appear before the General Court-Martial to face the two charges. As regards the incident relating to Capt. Cyrus Dalai, the petitioner was acquitted ; while he was found guilty of this second charge. I can quite envisage a situation where the presence of an accused will be necessary. So far as the Municipal Criminal Courts are concerned, the presence of the accused is mandatory and the Court has always the discretion to dispense with the presence of an accused for some good reasons such as an accused being a woman or an old or infirm person or being unable to attend for some valid reason. The accused has no choice in the matter but to remain present in Court on every hearing unless he is exempted by the Court specially in that behalf. But as regards the General Court-Martial and a Court of inquiry conducting preliminary investigation, the difference is that before the General Court-Martial an accused as in any other Municipal Criminal Court would be expected to remain present and for his absence, he can certainly be arrested. But as regards a Court of inquiry is concerned, the ranks would be expected to attend. But the officers are given an option either to insist on their presence during investigation or they can choose to remain absent at their own sweet will. As such, there can be no doubt that rule 25 of the Army Rules confers a right or a privilege on the officer concerned. Therefore, the question arises whether that right or privilege can be made the subject-matter of a command to be

issued by any superior officer. At this stage I would draw a distinction between a right or a privilege on the one hand and a duty or a liability or an obligation on the other hand In my opinion, a command can certainly be issued in respect of a duty, a liability or an obligation, But by no stretch of imagination, can command, in my opinion, be issued in respect of a right or privilege of an accused exercisable at his own sweet will or option. It is not necessary for me to refer to the dictionary meaning of the words ''command'', ''privilege'', ''right'' or ''duty'', ''obligation'' and ''liability''. But there can be no doubt about the proposition that a command cannot be issued by any other person in respect of a right or a privilege, which the individual concerned alone can exercise at his own option or sweet will. From this point of view I have no doubt that the question whether the petitioner should remain present during the investigation before the Court of inquiry could never form the subject-matter of a command, much less a lawful command, as envisaged by section 41 (2) of the Army Act, 1950. Therefore, with due respect to the learned Members constituting the General Court-Martial, I would stress that as the petitioner''s presence or otherwise before the Court of inquiry could not be the subject-matter of a command to be issued by the petitioner''s superior officer, the question of disobedience of such a command could not at all arise and consequently no offence u/s 41 (2) of the Army Act can be said to have been committed. I may observe that the verdict of the General Court-Martial was absolutely under a misapprehension of the law and especially by ignoring rule 25 of the Army Rules.

17. As the said order (Petitioner''s Annexure 19) could not at all have been issued, nor could it amount to a command, much less a lawful command, the sentence imposed by the General Court-Martial is absolutely illegal and it cannot be sustained in law. Of course, as is well known our Army has been Known for two of its good qualities, namely, discipline and bravery. From the point of view of strict discipline, such state of affairs is not at all desirable. I should not be understood to say that the petitioner''s conduct in refusing to obey the order of his superior officer was very commendable. But here we are not concerned with the desirability or otherwise of the petitioner''s action either from the Military or the moral point of view. But we are only concerned with the question as to the legality or otherwise of the petitioner''s action and Whether it would constitute an offence u/s 41 (2) of the Army Act and I have no doubt that by no stretch of imagination can his action be said to constitute such an offence. The verdict was given by the General Court-Martial under a misapprehension of the law and the punishment awarded, therefore, cannot be sustained in law. The entire thing was misconceived and for this reason, such a punishment cannot be allowed to remain on record and it has necessarily to be quashed.

18. It could well be appreciated if Lt. Col J.S Bhullar as the presiding officer over the Court of inquiry required the petitioner''s presence and directed him to remain present. That discretion of the Court of inquiry would always be there. But one is at a loss to understand as to how the petitioner''s superior officer, Lt. Col. P.N. Behl

could issue any order to him about attendance before the Court of inquiry. That was the exclusive choice of the petitioner and he could waive his right. I may observe that the right of the petitioner to demand the investigation by the Court of inquiry being held in his presence would necessarily imply a right to remain absent at the sweet will or the officer concerned and that right could not be taken away by issuing a so-called command by the petitioner''s superior officer. During arguments it was pointed out by the Learned Counsel for the petitioner that in his deposition before the General Court-Martial, Lt. Col. P.N. Behl had as much stated that he had issued the said order under a mistaken notion in ignorance of rule 25 of the Army Rules. However, the record of the proceedings relating to the General Court-Martial not being before us, we are unable to say anything in the matter one way or the other. But, even if it were to be assumed that Lt. Col. P.N. Behl made no such admission, it is clear that he had no jurisdiction to issues any such order. Even if he might have issued such an order probably under some misapprehension, the same could not have constituted a lawful command within the meaning of sub-section (2) of section 41 of the Army Act, 1950. In this view of the matter, the petitioner certainly cannot be accused of having committed any offence, whatsoever under the said section.

19. However, incidentally another question arises whether this Court should exercise prerogative powers under Article 226 of the Constitution as the petitioner having a right of representation as per sections 164 and 165 of the Army Act, did not avail of the same by approaching the Chief of the General Staff or the Union Government.

20. It is true that the petitioner could have invoked the supervisory powers of the higher authorities as conferred by sections 164 and 165 of the Army Act, 1950. He not having availed of that remedy, the question arises whether this Court should exercise its prerogative powers in the matter of quashing an order imposing punishment which on the face of it is illegal and without jurisdiction. In this connection their Lordships of the Supreme Court in a series of cases have laid down the principles to the following effect: In State of U.P v. Mohammad Nook AIR 1958 SC 86, their Lordships of the Supreme Court made the following observations adverting to the observations of Harris C.J. in Assistant Collector of Customs for appraisement and Another Vs. Soorajmull Nagarmull and Another, . Their Lordships approved of the following observations of the learned Chief Justice:

There can, I think, be no doubt that Court can refuse to issue a certiorari if the petitioner has other remedies equally convenient and effective But it appears to me that there can be cases where the Court can and should issue a certiorari even where such alternative remedies are available. Where a Court or Tribunal, which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justices and arrives at a decision contrary to all accepted principles of justice then it appears to me that the Court can and must interfere.

Their Lordships further observed:

It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no faults of his own may in a proper case obtain a review by certiorari. (See Corpus Juries Seconded, Vol. 14, Art. 40 p. 189). If, therefore, the existence of other adequate legal remedies is not per se a bar to the issue of a certiorari and if in a proper case it may be the duty of the superior Court to issue a writ of certiorari to correct the errors of an inferior Court or Tribunal called upon to exercise judicial or quasi judicial functions and not to relegate the petitioner to other legal remedies available to him and if the superior Court can in a proper case exercise its jurisdiction in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal, e.g., by furnishing security required by the statute, should it then be laid down as an inflexible rule of law that the superior Court must deny the right when an inferior Court or Tribunal by discarding all principles of natural justice and all accepted rules of procedure arrived at a conclusion which shocks the sense of justice and fair play merely because such decision has been upheld by another inferior Court or Tribunal on appeal or revision.

21. In Carl Still G.M.B.H. and Another Vs. The State of Bihar and Others, their Lordships of the Supreme Court made the following observations:--

It is next contended for the respondents that, whatever the merits of the contentions based on the construction of the contract, the proper forum to agitate them would be the authorities constituted under the Act to hear and decide disputes relating to assessment of tax, that it was open to the appellants to satisfy those authorities that there have been no sales such as are liable to be taxed, that indeed they were bound to pursue the remedies under the Act before they could invoke the jurisdiction of the Court under Article 226 and that the learned Judges of the High Court were, therefore, right in declining to entertain the present petitions. It is true that if a statute sets up a Tribunal and confides to it jurisdiction over certain matters and if a proceeding is properly taken before it in respect of such matters, the High Court will not in the exercise of its extraordinary jurisdiction under Article 226, issue a prerogative writ so as to remove the proceedings out of the hands of the Tribunal or interfere with their course before it. But it is equally well settled that, when proceedings are taken before a Tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. That has been held by this Court in State of Bombay v. The United Motors (India) Ltd. 1953 CSR 1069 at p. 1077, Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, and The Bengal Immunity Company Limited Vs. The State of Bihar and Others, . The position that emerges is that, if the proceedings before the Sales Tax Officer are founded on the provisions of the Act, which authorises the levy of the tax on the supply of materials in construction contracts then they must in view of the decision in The State of Madras Vs. Gannon Dunkerley

and Co., (Madras) Ltd., : be held to be incompetent and quashed. But if the proceedings relate to any extent to sales otherwise than under the contract, then the enquiry with respect to them must proceed before the authorities under the Act and the application under Article 226 must fail.

22. Their Lordships of the Supreme Court reiterated the same view in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, , where their Lordships made the following observations:

It is a well established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed Vs. The Municipal Board, Kairana, , "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a Writ of Certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In State of Uttar Pradesh v. Mohammad Nooh 1958 SCR 596,605. S.R. Das, C.J., speaking for the Court, observed : ''In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus that it will lie only where there is no other equally effective remedy. It is well established that provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute (Halsbury''s Laws of England, 3rd Ed. Vol. II, P. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the Superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a Writ of Certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the Superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies In the King v. Post Master-General Ex Parte Carmichael 1928 (1) KB 291, a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of Summary jurisdiction. The case of REx. v. Wandsworth Justice Ex-parte Read (1942) (1), KB 281 is an authority in point. In that case a man had been convicted in a Court of summary jurisdiction

without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction.

There are at least two well-established exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged obliged to wait until those proceedings run their full course--(See the decisions of this Court in Carl still G.M.B.H. v. State of Bihar and Bengal Immunity Company Ltd. v. State of Bihar. In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice, (See State of Uttar Pradesh v. Mohammad Nooh.)

23. It is, therefore, clear that the existence of an alternative remedy and its non-exercise by a petitioner cannot be a bar to the granting of a writ of certiorari for quashing the decision of the Special Tribunal in exercise of prerogative powers under Article 226 of the Constitution, although as per Article 227 (4) of the Constitution, that Tribunal may not be considered to be subordinate to the High Court. In the present case the circumstances are such that I am of opinion that this Court ought to exercise its prerogative powers in order to quash an order which is clearly based on a misapprehension of the scope of section 42 of the Army Act, 1950, on the part of the Military Authorities. If interference were not to be made in the present petition, that miss apprehension might continue and such orders might come to be passed which would be illegal and without jurisdiction or, at any rile, in excess of jurisdiction. Therefore, it is necessary to put a stop to that misapprehension on the part of the Military Authorities and from this point of view. I have no doubt that this is eminently a case where despite the petitioner having failed to exercise his right of representation, this Court should grant a writ of certiorari in order to quash an obviously illegal order passed in excess of jurisdiction.

24. To sum up, ray conclusions are as follows:--

(1) that Lt. Col. P.N. Behl, as superior officer of the petitioner, has no jurisdiction to pass an order requiring the petiole&#xfffd;s attendance before the Court of Inquiry. Such an order could only be passed by the Members of the Court of Inquiry or the members of the General Court-Martial;

(2) that the subject-matter of the petiole&#xfffd;s attendance before the Court of Inquiry as also any alleged disobedience of the same to be taken note of by the superior officer of the petitioner could not be the subject-matter of a lawful command to be issued by the superior officer ;

(3) that on the face of the record as there could be no "lawful Command in respect of the petitioner''s attendance before the Court of Inquiry as the person issuing such a command had no jurisdiction to issue any such command, on the face of the record no offence u/s 41 (2) of the Army Act could be said to have been committed The General Court-Martial acted in excess of jurisdiction in holding an offence committed upon the established facts on record.

25. Thus, the prerogative jurisdiction of this Court in the matter of issuing a writ of certiorari can be invoked by the petitioner in order to get quashed an obviously illegal order holding the petitioner guilty of contravention of section 41 (2) of the Army Act. The view of the General Court-Martial in this behalf cannot be treated to be final. After all the Constitution has entrusted the task of interpretation to law Courts.

26. As a result of the discussion aforesaid, I would allow the present petition with costs and would quash the impugned order imposing punishment on the petitioner for violation of section 41 (2) of the Army Act, 1950. As the petitioner did not commit any offence whatsoever, there would be no question of any retrial. Therefore, after quashing the said order by a writ of certiorari, I would further issue a writ of mandamus directing the respondents not to carry into effect the said punishment and to treat the petitioner as if he never committed any offence under the said section. The petitioner shall be entitled to his cost of this Writ Petition. Counsel''s fee in this Court shall be Rs. 200 if certified.

Oza, J.

27. I have had the advantage of going through the order of my learned brother Tare. J.I regret that I fail to agree with him.

28. This is a petition filed by the petitioner against an order passed by the General Court Martial, and confirmed by the General Officer Command-in-Chief, Central Command, Lucknow, punishing the petitioner for an offence u/s 41 (2) of the Army Act, 1950 (hereinafter called the Act).

29. The facts in detail have been stated in the order of my learned brother, and it would not be worthwhile to repeat them. The first question that dissevers to be considered is as to the jurisdiction of this Court under Article 226 of the Constitution to issue writs in the nature of certiorari against a decision of the General Court-Martial, especially in view of clause (4) of Article 227 of the Constitution excluding Court-Martial from the operation of the supervisory powers of this Court under Article 226. As regards this question, I agree with the conclusions arrived at by my learned brother that this Court under Article 226 of the Constitution can issue a writ of certiorari against an order passed by the Court-Martial. But it can only be issued on the principles well settled now by a series of decisions of the Supreme Court It is well settled that where a tribunal acts (a) without or in excess of its jurisdiction or (b) acts in contravention of the rule of natural justice or (c) commits an

error apparent on the face of the record, this Court under Article 226 of the Constitution can always issue writs in the nature of certiorari. Apparently, there is no grievance made against this proceedings of the Court-Martial either to indicate that it has exceeded its jurisdiction or has acted without jurisdiction. It is also not the grievance of the petiole that the Court Martial has acted in contravention of the rules of natural justice. Therefore, the only grievance that is made is about the interpretation of rule 25 of the Army Rules, 1954, (hereinafter called the rules) to find out whether an offence u/s 41 (2) of the Act is made out or not. Therefore, the only head under which a certiorari can be sought is on the basis of an error apparent on the face of the record.

30. It is well settled that when a tribunal has jurisdiction to decide a question, it may decide it rightly or wrongly, and a mere error of law or an erroneous view of law will not justify the issuance of a writ in the nature of certiorari. In Bharat Barrel and Drum Mfg. Co. Vs. L.K. Bose and Others, , it was observed that-

The next contention of Mr. Bishan Narain was that on the question of refund of the excess charges the impugned order suffered from an error of law apparent on the record. The question is what is an error of law apparent on the record. In Champsey Bhara and Company v. Jivaraj Ballo Spinning and Weaving Company 1923 AC 480. Lord Dunedin observed that an error on the face of an award means that the Court must first find whether there is any legal proposition which is the basis of such an award. He also said that where an award is challenged up on such a ground it is not permissible to read words into it or to draw inferences and the award or the order must be taken as it stands. Tucker, J. said the same thing in James Clarke (Brush Materials) Ltd. v. Cartess (Merchants) Ltd. 1944 1 KB 566. Reading the impugned order it is difficult to say what legal proportion it contains it respect of which it can be said that there is an error of law apparent on the record. The issue before the Controller was whether in refusing to give the refund of the said excess of the 6th respondent was guilty of obstructing the implementation of the order, dated May 1/2 1962 or of preventing the appellant company from taking delivery of the said goods. It is true that the Controller had on more than one occasion directed the 6th respondent to deduct the said excess from its pro forma invoice and the 6th respondent had in fact expressed its willingness to deduct it. The dispute between the parties was within a circumscribed compass, viz, whether the appellant company would not withdraw the suit. The appellant company would not withdraw the suit and hence the controversy. But then it is not pos sable to say that there was no difficulty in the way of the 6th respondent in deducting straight way the said excess from its invoice, for, as already, stated, the appellant company had stated different sums of such excess at different times. The Controller had not fixed the exact amount of the said excess and had not directed as to when and on what condition the appellant company''s suit should be withdrawn. If in these circumstances the Controller finds that the appellant company should not have insisted on the deduction before withdrawing its suit, even if a Court were to coma to a different

conclusion, it certainly is not a case of an error apparent on the face of the record.

While dealing with a similar question about examining an error of law, in the context of an error apparent on the face of the record, their Lordships of the Supreme Court, in Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, observed that--

Is the conclusion wrong and if so, is such error apparent on the face of the record ? If it is clear that the error if any is not apparent on the face of the record, it is not necessary for us to decide whether the conclusion of the Bombay High Court on the question of notice is correct or not. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self-evidence and if it can be established, it has to be established by lengthy and complicated arguments. We do not think such an error can be cruel by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ. In our opinion the High Court was wrong in thinking that the alleged error in the judgment of the Bombay Revenue Tribunal, viz, that an order for possession should not be made unless a previous notice had been given was an error apparent on the face of the record so a to be capable of being corrected by a writ of certiorari.
It is in this context that the question in the present case deserves to be considered.

31. Under the Army Act, rules have been framed and Chapter V of those rules deals with investigation of charges and trial by Court Martial. The relevant rules are rules 22, 23 and 25. The scheme of these rules indicates that at the first stage, when there is a charge against a person, it is heard by a competent officer, and if he thinks that there is no charge, he may dismiss it. But if the officer thinks that the charge is such which can be proceeded with, then the next step in the proceeding is when the evidence is reduced to writing. Rules 22 and 23 prescribe the procedure at the two stages viz., hearing of the charge and taking down the summary of the evidence where the person against whom the charge is being heard is a person other than an officer. Rule 25 provides the procedure for officers. It is as under--

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

(2) When an officer is remanded for the summary disposal of charge against him or is ordered to be tried by a Court Martial, without any such recording of evidence in his presence an abstract of evidence to be adduced shall be delivered to him free of charge as provided in sub-rule 97 of rule 33.

The interpretation of this rule is the subject matter of controversy.

32. A reading of this rule indicates that for officers the procedure to be followed is more or less the same as required by rules 22 and 23, except that if the officer against whom the charge is being heard or the summary of evidence is being recorded wants it to be done in his presence then it has to be done in his presence. The rule, as it stands, does not state that ordinarily the hearing of charge or recording of a summary of the evidence would be in the absence of the officer concerned, But it only lays down that it will have to be in his Presence if the officer so desires, and in the later part of rule 25 rules 22 and 23 have been introduced for the rest of the procedure. A reading of this rule, in my opinion, can only lead to the conclusion that in cases of officers the pro cadre in rules 22 and 23 will have to be followed but for the exception that the hearing of the charge and summary of the evidence may even be in the absence of the officer concerned but that if he wants that to be done in his pre since, it will have to be so done. Two questions, therefore, arise out of this rule firstly, that if the officer hearing the charge or recording the summary of the evidence decides to proceed in the absence of the officer concerned, then he can and this cannot be disputed, and, secondly, if he chooses to proceed in the absence of the officer against whom the charge is levelled and such officer insists that it should be in his presence then rule 25 clearly indicates that it should be done in his presence. There can be no doubt about this as well. But if the officer hearing the charge or recording a summary of evidence wants the officer charged to remain present, can it be said that it is the free choice of the officer so charged that he may choose not to remain present ? It is significant that rule 25 does not indicate that the officer against whom a charge is levelled has been allowed the option of getting the hearing of the charge and recording of the summary of evidence done in his absence. He has only been conferred the right to insist that it should be done in his presence. Therefore, if the officer hearing the charge or recording the summary of evidence does take the proceedings in the presence of the officer charged, can it be said that those proceedings would be bad ? A reading of rule 25, in my opinion, would clearly indicate that under such circumstances it cannot be said that the proceedings are bad because the officer charged was directed to remain present. The proceedings can only be said to be bad in law if in spite of the desire of the officer charged that it should be in his presence the officer hearing the charge proceeds to hear in his absence. Except in that situation, it cannot be said that the proceedings are bad in law. In this context, rule 25 clearly indicates that in case of an officer the procedure as contemplated in rules 22 and 23 will have to be followed except that in the discretion of the officer hearing the charge or recording the summary of evidence it can be even in the absence of the officer charged. But this discretion is further curtailed by the right conferred on the officer so charged to insist that it should be done in his presence. It is here that I do not agree with the interpretation put by my learned brother on rule 25.

33. The petitioner was informed on 4th March 1968 that he had to attend the Court of Inquiry at 09.30 hours on 4th March 1968. The petitioner, at the foot of this intimation, wrote that--

Pending disposal of any applications and complaints and request for interview I request that proceedings of the Court may please be deferred. In case you decline actions on the above, may I take your permission to approach HQ MP Area direct.

This clearly indicates that the petitioner wanted the proceedings for recording of evidence to be deferred till his complaints and applications were disposed of. He has also sought an interview. What has been written by the petitioner, as quoted above, clearly indicates that he did not want that the recording of the summary of evidence may be proceeded with in his absence On the contrary his insistence on deferring the proceedings indicates that he very much intended to remain present but he only wanted that his applications and complaint should be first disposed of. Thereafter on the same day an order was passed, which is filed by the petitioner as Annexure XIX, indicating that so far as his complaints and applications were concerned, they were being referred to the Station Head-quarters, and the proceedings of the Court could not be deferred. The order directed the petitioner to attend the proceedings for recording of summary of evidence on the same day as already intimated and it was further ordered that "Any disobedience of this order will render you liable for disciplinary action" On this order itself, the petitioner again wrote as under--

May any action deemed suitable by you please be taken for my inability to attend Court.

This also does not indicate that the petitioner did not want to insist on his presence during the recording of summary of evidence. He does not say that this may be done in his absence. He only invites action for his disobedience of the order.

34. In this context, what is contended by the petitioner is that this order directing him to remain present is not a lawful order which could be passed in view of rule 25. As already discussed above, rule 25 nowhere prohibits the recording of the summary of evidence in the presence of the officer against whom a charge is levelled All the more, the previous order of intimation and the note put by the petitioner, as quoted above, do not indicate that the petitioner did not want to insist on the hearing of the proceedings pertaining to the recording of the summary of evidence in his presence. In these circumstances, it cannot be held that the order directing the petitioner to remain present can be said to be an order absolutely illegal. On the contrary, in my opinion, it is a perfectly valid order and disobedience of that order would no doubt incur an offence u/s 41 (1) of the Act. It is also significant that section 41 (1) talks of disobedience in a particular manner and makes it punishable only under the circumstances mentioned in that provision. Section 41 of the Act is as under--

41 (1) Any person subject to this Act who disobeys in such manner as to show a wilful defiance of authority any lawful command given personally by his superior officer in the execution of his office whether the same is given orally or in writing or by signal or otherwise shall on conviction by Court-Martial be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned.

(2) Any person subject to this Act who disobeys any lawful command given by his superior officer shall, on conviction by Court-Martial,

If he commits such offence when on active service, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and

If he commits offence when not on active service, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.

It is significant that disobedience showing a wilful defiance of authority alone has been made punishable, and it sounds consistent with the requirement of discipline in the Armed Forces. If, therefore, an officer not only disobeys an order but disobeys it showing a wilful defiance of authority, there can hardly be any doubt that he commits an offence as contemplated in section 41 of the Act. In this context, it would be significant to note that when the petitioner was informed of the date and hour at which the proceedings would start, he requested for an adjournment, and when the request for adjournment was rejected and he was directed to remain present and it was indicated to him that disobedience of the order would render him liable for disciplinary action, still the petitioner not only did not obey the order but wrote on the order suggesting that any action, deemed suitable may be taken. Such an attitude clearly falls within the ambit of the phrase "wilful defiance of authority" and there can, therefore, hardly be any doubt that the petitioner committed an offence u/s 41 of the Act.

35. Apart from this, it is clear that interpreting rule 25, coupled with rules 22 and 23, even to hold that the order passed against the petitioner was not a lawful order, it requires a lengthy process of reasoning. Therefore, even if for argument''s sake it is conceded that in one view of the matter the order may not be justified under rule 25, still it cannot be said that it is an error apparent on the face of the record, because while examining this question we are not sitting in appeal over the proceedings of the Court-Martial. We are only hearing a petition under Article 226 of the Constitution. In this view of the matter, therefore, the petition has no substance and deserves a straight dismissal.

36. There is yet another obstacle in the way of the petitioner, and in that also I do not find myself in agreement with the view of my learned brother. The Act provides remedies for an officer against whom the Court Martial inflicts punishment. u/s 164

of the Act, any person aggrieved by a finding or sentence of any Court-Martial can present a petition to a superior officer including the Central Government. In the present case, the petitioner had that remedy open to him. His attitude, as indicated by the allegations made by him in the petition, appears to be that he expected no redress and it was this that was put forth by the petitioner''s counsel as a ground for not pursuing the remedies available under the statute. It is no doubt true that an alternative remedy is not a bar to the issue of writ of certiorari in every case. Their Lordships of the Supreme Court have repeatedly held this, specifying the cases where the alternative remedy would not be a bar. (sic) Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, their Lordships of the Supreme Court held two well-established exceptions where alternative remedy will not be a bar to the issue of a writ of certiorari. An extract from this judgment has already been quoted by my learned brother and I need not repeat from the same. But it is clear from the observations of their Lordships that the present case is not one which can fall within any of the two exceptions stated by their Lordships in that case. But apart from this, where a statute specifically provides a remedy and there is nothing to prevent the petitioner from pursuing it a petition for certiorari cannot be entertained merely because the petitioner apprehends that he may not get redress by following that remedy. There is nothing else to indicate that the petitioner could, not have the relief he seeks before the authorities where a remedy was available to him. It is also significant that section 165 of the Act provides that the jurisdiction of the authorities hearing a representation u/s 164 is wide enough to consider the findings of the Court-Martial in all its aspects even if they are unjust. In these circumstances, therefore, in my opinion the petition deserves to be dismissed on this ground also.

37. Consequently, in the light of the discussion above, the petition deserves to be thrown out.

[On account of the difference between Tare and Oza JJ, the matter was placed before Krishnan, J.]

Krishnan, J.

38. This arises out of a petition under Articles 226 and 227 of the Constitution by Maj. S.C. Sarkar of the Army Medical Corps. He urged that the judgment of the Court-Martial convicting him u/s 41 of the Army Act, and punishment by a reprimand and forfeiture of 18 months of his service for the purpose of promotion, should be declared null and void and a direction issued to the authorities in the defence services not to implement the said judgment. Hearing this petition the Bench consisting of my learned brothers Tare, J. and Oza J. agreed that in principle the High Court had jurisdiction to entertain petitions of this nature ; but they differed on merits about the issue of a direction in this case. As a preliminary point Oza J held that there was an alternative remedy in section 164 of the Army Act (46 of 1950) and that not being availed of it would not be proper or necessary for this

Court to entertain this petition. On merits too Oza, J. felt that the order given by the petitioner''s superior Commanding Officer of the AMC at Mhow directing the petitioner to attend the Court of Inquiry was a lawful one, and the petitioner''s conduct was one of defiance and disobedience ; accordingly there was no occasion for this Court to interfere. As against it Tare, J. has held that the alternative remedy was not adequate and this Court could examine the merits of the petition On merits he was inclined to feel that the recording of the summary of evidence by Lt. Col. Bhul an was against rule 25 of the Army Rules 1954, and accordingly the order of the Commanding Officer directing the petitioner to attend the recording of evidence was illegal and the petitioner was not therefore bound to obey it. Tare J. in these circumstances felt that the petition should be allowed.

39. The reference to this Court does not involve the consideration of the question whether in view of Article 227 (4)of the Constitution (which is really a proviso this Court has jurisdiction at all to entertain petitions against the decisions of a Court-Martial. Both the learned Judges have held that it has and it is unnecessary to go into this matter any further. But the two other topics, namely, the existence of adequate alternative remedy available to the petitioner and the consequence of his failure to seek it and secondly, the alleged illegality of the order of the Commanding Officer directing the petitioner to go and attend the recording of evidence by Lt. Col. Bhullar, are for our consideration in this order.

40. It is sufficient to record a short summary of the happenings leading to this case. At Mhow there is an Army Medical Corps, in which at the relevant time, namely, March 1968 this petitioner was a Major. His immediate superior officer was Lt, Col, Behl, Commanding Officer. There are other service units there including the Punjab Regiment in which one of the higher officers was Lt, Col, Bhullar. Between the petitioner on the one hand and one Capt C. Dalai of the signal corps on the other, there had been an incident at about that time. Naturally each of them had his own version put through his superior officers at the station. It may be noted even here that the Court-Martial was constituted at the first instance for trying the allegations against the petitioner in connection with the incident. The Court has acquitted him of this charge. However, in the interval the petitioner had committed an act of disobedience of the order of his own superior officer Lt, Col. Behl who incidentally had been all the time giving full support to the petitioner in the main controversy. The Court-Martial had no choice except to add an additional count in the charge u/s 41 Army Act; it is on this count that the petitioner has been awarded the sentence already mentioned.

41. Apropos of the allegation of Capt. Dalai, a Court of Inquiry had been constituted. Lt. Col. Bhullar of the Punjab Regiment was that Court, and was to record a summary of evidence Already the petitioner had made allegations questioning the impartiality of Lt. Col. Bhullar, and whatever the merits of these allegations, they were before his superiors. No action had yet been taken when Lt. Col. Bhullar fixed a

date for recording the summary of evidence and that was passed on to the petitioner''s Commanding Officer Lt. Col. Behl. He in is his turn ordered the petitioner to go and be present during the recording of the evidence. The petitioner wrote on that order--

Pending disposal of my application and complaints and requests for interview I request that proceedings of the Court may please be deferred. In case you decline action on the above, may I take your permission to approach H.Q.M.P. Area direct...

Thereupon the Commanding Officer sent another message to the petitioner--

The matter is being referred to Station H.Q. Pending decision the Court cannot be deferred and question of approaching H.Q.M.P. Area direct does not arise at all. You are hereby ordered to attend proceeding of the Court (summary of evidence at 10.00 hours on 4 March in the Medical Board room adjacent to my office. You will report to Lt. Col. J, S. Bhullar Officer recording summary of evidence. Any disobedience of this order will render you liable for disciplinary action,

In spite of this caution and persuasion and the meeting half way on the part of the Commanding Officer the petitioner flagrantly disobeyed and wrote the endorsement--

Any action deemed suitable by you may please be taken for my inability to attend the Court.

Soon after he was arrested and proceedings started against him.

42. The charge before the Court-Martial was--

At Mhow when ordered by Ltd. Col. P.N. Behl, Officer Commanding, M.H. Mhow, his superior to appear before Lt. Col. J.S. Bhullar, Punjab Regiment for the recording of the summary of evidence on 4 March 1968 at 10.00 hours at the Medical Board room of M.H. did not do so and accordingly committed an offence u/s 41 (2) of the Army Act.

As already stated, this was only a second count, the first and the main count relating to the incident between the petitioner and a captain on which the Court-Martial recorded an acquittal.

43. The punishment awarded was in due course confirmed by the Regional Command H.Q. Lucknow. The petitioner did not either move the confirming authority before confirmation or after the confirmation petition the Central Government Chief Army Staff) or the prescribed officer against the sentence. However, he has come to this Court with the present petition.

44. The first point of difference between the two learned Judges of the Divisional Bench is, whether this was a case in which we could interfere notwithstanding the petitioner''s failure to avail himself of the remedy already provided in statute. Tare, J.

held that there are two well established exceptions to this doctrine of exhaustion of statutory remedies ; first, the proceedings are taken before the Tribunal under a provision of law which is ultra vires ; and the second, where the impugned order had been made in violation of the principles of natural justice. He felt that the instant case attracted both the exceptions and accordingly this Court was competent to entertain the petition and give the relief sought. Oza, J., on the contrary, felt that there was no justification for the relaxation of the preliminary condition of the exhaustion of statutory remedies. In fact this links up with the findings on the main allegation on the one hand that the order was illegal and on the other that it was not so.

45. Examining the position regarding statutory remedy it is clear that section 164 of the Army Act provides relief at two stages. The Court-Martial having completed its work and pronounced judgment the aggrieved party may approach the confirming authority to whom the case may in any event be submitted. In fact the confirming authority is charged with duty of satisfying itself of the legality and propriety of the judgment of the Court-Martial. If at that stage the aggrieved party sends its petition pin-pointing its grounds why the punishment should not be confirmed, it will receive due notice by the confirming authority. Nobody can say that such an approach will always be successful for the petitioner; but there is a chance that a reasonable grievance is noticed and redressed. Again even after confirmation the aggrieved party can petition the Government which in dealing with such petition acts through the Chief Army Staff, or one of the officer associated with it. Those officers are at the highest level and have necessarily to be of a rank higher than the confirming authority. It is urged on behalf of the petitioner before me that the remedy provided is not adequate because it is nothing more than mere memorializing. The section does not speak either of appeal or revision which would entitle the party to a hearing as the case may be in person, or wherever permitted, by lawyer. Section 164 enables it merely to send a petition or memorial which may or may not receive full attention.

46. Generally speaking, such remedies as the law provides to persons aggrieved because of some punishment or disciplinary action are of three kinds ; first, appeal; second, revision ; and third, a statutory right to send a petition. Of course there is a fourth possibility that the aggrieved party sends a petition even though there is no express provision in statute. We do not treat any such petitioning as a remedy provided by statute. But it is another matter when statute itself enables the aggrieved party to send a petition ; the difference is, when a petition is sent under a provision of statute it is expected to receive attention while a petition sent without any statutory sanction may on may not be looked into. It may also be true that broadly speaking an appeal or even a revision properly so called, enables the appellant or applicant to seek and most often receive a "personal" hearing. On the other hand, a petitioner even if permitted by statute to send petition is not as of right entitled to a personal hearing though in practice wherever such a statutory

petition seeks an opportunity of personal appearance it is granted. The question is not whether the opportunity afforded by law to approach higher authorities in the administration right upto the top with a grievance against the Court Martial decision is an appeal or a revision or just a right of presenting a memorial. The point is that there is an opportunity and the party who goes to the High Court without availing of it has to show that his case is such that we should hear him and give him the relief which he has not sought even though permitted by statute. Nor I am prepared to find that this comes under either of the two exceptions to the rule of "exhaustion of remedies" as laid down in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, As will be patent in time this is not a case where the tribunal, namely, the Court Martial has acted under a provision of law that is ultra vires. After all that tribunal had power to frame charge u/s 41 of the Army Act, to take evidence and give its decision. Nor is it a case that judgment of the tribunal, namely, the Court Martial is one calculated to shock conscience, or the aggrieved party trying to seek statutory relief is driven to a forum which has already committed itself on the subject. Thus, left to myself agreeing with Oza, J. I would have refused to go into the merits of the petition on the simple ground that statute has provided some means of relief to the petitioner and he had failed to avail of it. In fact as one looks back on the course of events, it would have been better for the petitioner if he had sought the remedies provided in section 164. We can never be sure what the confirming authority or the Chief Army Staff would have done if and when approached. But certainly the chances were brighter for their softening the punishment awarded to the petitioner. On the one hand, we as a High Court cannot interfere unless the petitioner succeeds in establishing the patent illegality in the order which he took upon himself to disobey ; on the other hand, those authorities could have taken a humane view of the matter, and noticed that the petitioner had already worked himself up into a sort of psychosis against Lt. Col. Bhullar and was obviously in an abnormal state of mind when he chose to disobey his superior officer.

47. Be that as it may, the petition has been admitted and judgments recorded on merits, as they turn out, varying judgments. It, therefore, becomes necessary to consider the main question whether the order of the Commanding Officer Lt. Col. Behl directing the petitioner to go and attend the proceedings before the Court of Inquiry held by Lt. Col. Bhullar was unlawful.

48. It may be briefly recapitulated that the Station Commandant had constituted a Court of Inquiry presided over by Lt. Col. J.S. Bhullar to look into the incident between the present petitioner and Dalai. This certainly cannot be called unlawful. To be sure, immediately after that incident the petitioner had been sending representations giving his version of the happening and in addition making certain allegations in proof of his want of confidence in the Court of Inquiry presided over by Lt. Col, Bhullar. It is unnecessary or in this case to say anything about the reasonableness or otherwise of the grievances made by the petitioner. Suffice it to

note that whatever might be Lt. Col. Bhullar''s attitude, ultimately the matter was to go to a Court Martial; and Lt. Col. Bhullar was, as it were, nothing more than an authority holding a preliminary inquiry. Such preliminary inquiries are usually held and normally the officer or officers concerned are directed to be present. There again, Lt. Col. Bhullar''s holding the inquiry was not unlawful. To be sure, rule 25 of the Army Act has been read by both my learned brothers to different effects, Tare, J. holding that it prohibits and renders illegal any inquiry and any recording of summary evidence unless the officer concerned wants it, and Oza J. holding to the contrary. I shall come to it presently. But the real question is not the lawfulness or otherwise of Lt. Col. Bhullar''s enquiring and recording of evidence but the legality of the order of the petitioner''s commanding officer Lt. Col. Behl, directing him to attend the Court of Inquiry. Actually that direction originated from the Station Commandant Brigadier O''Connor. But as usual it had been routed through the Commanding Officer of the petitioner who as already indicated had been throughout a friend of and sympathizer with the petitioner. Anyway, to have the simple picture of the commanding Officer and of a Major in our forces ordering the latter to go and attend a Court of Inquiry in which evidence was going to be recorded regarding his own, that is, the Major''s alleged conduct, and the Major in his turn defiantly refusing to go and challenging the Commanding Officer to visit him with the consequences. Whenever the immediate superior of an officer in the services is informed that another officer was going to hold an inquiry he has to inform the subordinate and give him such direction as would be proper on the occasion. There may theoretically be a situation in which the Commanding Officer in consultation with the officer concerned decides to advise him not to attend. But the more usual practice is that the Commanding Officer directs the subordinate to attend. Such a direction by the Commanding Officer to his subordinate to attend an inquiry in which the conduct of the latter is going to be the subject-matter of the evidence recorded is quite reasonable ; whatever the merits of the inquiry it is quite lawful. We can conceive of a situation where the inquiry is patently illegal and the Commanding Officer being apprised of it still insists upon the subordinate going there. That certainly is not the situation here. The Station Commandant had constituted a Court of Inquiry and that Court in its turn is preparing to record summary of evidence for the use by the Court Martial that will ultimately try the case and pronounce judgment. Examining each of the stages involved, I fail to see where illegality comes in.

49. Rule 25 has been quoted and discussed by both my learned brothers. This rule consists of two sub-rules, the first one concerning the recording of the evidence which is usually a summary record by the Court of Inquiry.

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

Sub-rule (2) provides a situation in which there is no evidence recorded. In that event the officer is entitled to an abstract of evidence which presumably means a brief setting out the names of witnesses that are to be called and the nature of evidence expected out of each of them. We are concerned with sub-rule (1) in this case. This rule is not a self contained provision but is a sort of exception to the general rules 22 and 23, governing the manner of recording evidence in respect of charges and trial by Court Martial. Rule 22 provides for the hearing of charge and 23 is about procedure. Rule 24 provides for the remand of the accused for trial by Court Martial when the Commanding Officer or the Court of Inquiry finds What might be called a prima facie case. So far these provisions apply to every member of the services against whom a charge is made. Now comes rule 25 (1) which in certain circumstances enables an officer to be absent if he chooses while the Court of Inquiry records the evidence as usual in a summary manner. This recording of evidence by the Court of Inquiry is not a trial but a preliminary step after which the person charged may be placed before a Court Martial for trial. Left to himself, an officer who is being charged can tell the Court of Inquiry that he need not be present. This is something which a member of the forces other than an officer cannot do. There are, however, two circumstances of which we should not lose sight. An officer''s choice to be absent has at all events to be conveyed by him to the Court of Inquiry in an appropriate manner and time, which is of course, before the beginning of the recording of evidence. Secondly, though the officer may, left to himself, choose not to be present during the investigation by the Court of Inquiry, his superior may for some reason or other direct him not to waive the right of presence but to go and attend. The most usual reason would be that the inquiry concerns other members of the services and the presence of the officer charged would be necessary to enable the Court to get a full picture. The position of a private citizen charged with a criminal offence and an officer of the services so charged are basically different. A private citizen may choose any step he likes and the only person injured by any false step is himself. In the case of the services it is not only the officer concerned but the entire service in the matter of discipline, morale and example. So, in these circumstances a superior officer can in exercise of his powers insist upon the officer charged going before the Court of Inquiry and taking part in it. It is difficult to see how such a direction or order can be described as illegal. Even taking an extreme view, which is not supported by the facts of this case, that Lt. Col. Bhullar had no authority to hold an inquiry, even on that view a direction by the Commanding Officer of the petitioner that he should go and attend will still be legal. It would be open to the officer to go before the Court of Inquiry and point out that it is illegal or if it is legal, ask the Court of Inquiry to exempt him from personal attendance. This last request would be subject to the discretion exercised by the officer''s own Commanding Officer who may in appropriate cases consider that this officer''s presence is essential.

50. With all respect I find it difficult to agree with my learned brother Tare J. who seems to make a fine distinction between an order originating from the Court of Inquiry, in the instant case Lt. Col. Bhullar, and one from the Commanding Officer of the petitioner. He seems to feel that a direction or order from the Court of Inquiry or for that matter from the General Court Martial calling upon the petitioner to be present would be a lawful one while precisely the same order passed by his Commanding Officer would not be lawful. Actually, even the Court of Inquiry would route its request through the Commanding Officer and in the instant case the common superior of the two Commanding Officer had himself desired that the petitioner should be present before the Court of Inquiry. The point to note is that normally all such orders would be routed through the Commanding Officer to whom the officer concerned is immediately subordinate. Thus I would hold that the order directing the petitioner to attend before the Court of Inquiry presided over by Lt. Col. Bhullar was quite a lawful one and disobedience was an offence u/s 41 of the Army Act.

51. The Commanding Officer took the trouble of explaining to the petitioner that whatever he might have done by way of petitions and representations against Lt. Col. Bhullar had no bearing on his attendance before the Court of Inquiry and he should attend at the risk of disciplinary action. Strangely enough the petiole disobeyed this order with an air of defiance. Section 41 (1) refers to "Wilful defiance of authority" which is exactly the position here. The irony of the situation is that on the main charge u/s 42 the petitioner has been acquitted by the Court Martial while it finds that he has committed the offence set out u/s 41 (1). Thus, even if we go into the merits of the petition, it deserves so be dismissed.

52. In the result, agreeing with my learned Brother Oza., J., on both the grounds of the petitioner''s non-availing of the statutory remedy and the fact of the order being legal and disagreeing on the same grounds with my learned Brother Tare, J., I would dismiss this petition. In the special circumstances of this case, I would not pass any order for costs.

ORDER

Tare & Oza, JJ.

53. On a difference of opinion between us, the case was referred to a Third Judge. In accordance with the majority opinion, the petition fails and is accordingly dismissed. However, in the circumstances of the case and in accordance with the opinion of the Third Judge, we direct that there shall be no order as to costs. The security amount deposited by the petitioner be refunded to him after deduction of any dues if against him.